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የኢትዮጵያ ሕግ መጽሔት
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25ኛ ቮልዩም ቁ 2	በዓመት ሁለት ጊዜ የሚታተም	Vol. XXV No. 2
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በ1956 ዓ.ም የተቋቋመው የአዲስ አበባ ዩኒቨርሲቲ የሕግ ፋኩልቲ የኤል.ኤል.ኤም እና የኤል.ኤል.ቢ ዲግሪዎችን ይሰጣል፡፡ ለማንኛውም ጉዳይ መረዳት ቢያስፈልግዎ ለሕግ ት/ቤት አዲስ አበባ ዩኒቨርሲቲ የመልዕክት ሣጥን ቁጥር 1176 ብለው ይጻፉ፡፡

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Tadesse Lencho (LL.B, LL.M)

የኢትዮጵያ ሕግ መጽሔት

ከኢትዮጵያ ሕግና ተዛማጅነት ካላቸው ዓለም አቀፍ ሕጎች ጋር ተያይዘው የሚነሱ የሕግ ነክ፣ ፖለቲካዊና ማሕበራዊ ጉዳዮችን የሚመለከቱ የምርምር ሥራዎች የሚታተሙባት መጽሔት ነች።

ሕግ ነክ የምርምር ጽሁፎችን፣ የመጽሐፍ ትችቶችን፣ እንዲሁም በፍርዶችና በሕጎች ላይ የተደረጉ ትችቶችን ብትልኩልን በደስታ እንቀበላለን። በተጨማሪም በኢትዮጵያ ሕግ መጽሔት ባለፈው ዓመት ታትመው የወጡ የምርምር ጽሁፎችን፣ የመጽሐፍ፣ የፍርድ ወይም የሕግ ትችቶችን በሚመለከት አስተያየትን ትጋብዛለች። በዚሁ መሠረት የሚቀርብ አስተያየት በግምት ከ5 ገጽ መብለጥ የለበትም። የተመረጡ አስተያየቶች በአስተያየቱ አዘጋጅ ትብብር አርትኦት ከተደረገባቸው በኋላ በመጽሔቱ ላይ ይታተማሉ።

አድራሻችን፣ ለዋና አዘጋጅ
የኢትዮጵያ ሕግ መጽሔት
የመሣቁ 1176
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የስልክ ቁጥር 0111-243684 ነው።

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አዲስ አበባ፣ ኢትዮጵያ

<u>የኃላፊነት አለመኖር</u>

የኢትዮጵያ ሕግ መጽሔት በተለያዩ ጸሀፍት የተደረሱ ወይም የቀረቡ ጽሁፎችንና ሰነዶችን የሚያሳትም ሲሆን የጽሁፎቹን ወይም በጽሁፎቹ ዉስጥ ያለዉን መረጃ ትክክለኛነት ማረጋገጥ ግን የጽሁፎቹ አቅራቢዎች ኃላፊነት ነዉ። በመሆኑም በደራሲያኑ ተደርሰዉም ይሁን ተተረጉመዉ አልያም በማንኛዉም መልክ የሚቀርቡ ጽሁፎች ዉስጥ ባሉ መረጃዎች ትክክል ያለመሆን ወይም በመረጃዎቹ በመጠቀም ለሚደርስ ማንኛዉም ኃላፊነት የሕግ ትምህርት ቤት ወይም ሰራተኞቹ ተጠያቂ አይሆኑም።

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ፍርድ: ክፍል አንድ[1]

በዚህ መዝገብ ይግባኝ ባይ የሆኑት አቶ አየለ ደበላ የወንጀሉን ክሶችና ክርክሮች በወ/መ/ቁ. 82604 በመጀመሪያ ደረጃ ያየው የፌዴራል ከፍተኛ ፍ/ቤት ግንቦት 3 ቀን 2002 ዓ.ም መርምሮ የሰጠውን የጥፋተኝነት ፍርድ ቀጥሎም ሐምሌ 13 ቀን 2002 ዓ.ም መርምሮ የሰጠውን የቅጣት ውሣኔ ሙሉ በሙሉ በመቃወም ይግባኛቸውን አቅርበዋል፡፡[2]

ከሣሽ የሆነው የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን ዐቃቤ ሕግ ተከሣሽ በሆኑት በአቶ አየለ ደበላ ላይ በፌዴራል ከፍተኛ ፍ/ቤት አሥር የተለያዩ የወንጀል ክሶችን አቅርቦባቸዋል:: የመጀመሪያዎቹ ሁለት ክሶች በቀድሞው የገንዘብና የባንክ አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሰ/ እና 2 ላይ የተመለከተውን ቀጥሎም ከዚህ አዋጅ በኋላ ለብቻው የባንክ ሥራ በሚል በወጣው አዋጅ ቁጥር 592/2000 አንቀጽ 58/1 ላይ የተመለከተውን በመተላለፍ ከብሔራዊ ባንክ የተሰጠ ፈቃድ ሣይኖራቸው ለተለያዩ ግለሰቦችና ድርጅቶች በርካታ የገንዘብ ብድሮችን በመስጠትና ለብድሮቹም ቼኮችን በመያዣነት በመቀበል ለባንኮችና ለመሰል የፋይናንስ አክሲዮን ማህበራት ብቻ የተፈቀደውን የብድር ሥራ በህገወጥ መንገድ እንደንግድ ሥራ በተደጋጋሚ የመሥራት ወንጀል ፈጽመዋል በሚል የቀረቡ ናቸው፡፡ በ1ኛው ክስ አቶ አየለ ደበላ ከ80

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[1] ይህ ፍርድ 21 ገጽ ያለዉ ሲሆን በመጽሔቱ ላይ በተለመደዉ የፍርድ ጉዳዮች ሪፖርት ከሚገባዉ በላይ ስለሚረዝም በሁለት ክፍሎች እንዲቀርብ ተደርጓል፡፡ ስለዚህ የመጀመሪያዉ ክፍል በዚህኛዉ እትም ይቀርባል፡፡ ክፍል ሁለት በሚቀጥለዉ ዕትም ይቀርባል፡፡

[2] ይግባኝ ባይ በአስር ጥፋቶች የተከሰሱ ሲሆን የመጀመሪያዉ ምንም እንኳን የወንጀል ሕጉም ይሁን አግባብነት ያላቸዉ ሌሎች አዋጆች የተለየ ስያሜ ባይሰጡም "ያለአግባብ የባንክ ስራ መስራት" የሚል ነበር፡፡ ከ2ኛዉ እስከ 10ኛዉ ያሉት ክሶች አራጣ ማበደር፣ ግብር መሸሸ፣ እና በሕገ-ወጥ መንገድ የተገኘን ገንዘብ ሕጋዊ የማስመሰል ተግባርን የሚመለከቱ ነበሩ፡፡ በመጀመሪያዉ ክስ ላይ የጠሰጠዉ ዉሳኔ በዚህኛዉ ክፍል ቀርቧል፤ ከሁለት እስከ አስር ያሉት ክሶች ላይ የተሰጠዉ ዉሳኔ በመጽሔቱ የሚቀጥለዉ ዕትም ላይ ይቀርባል፡፡

በላይ ለሆኑ ተበዳሪዎች በተለዩ ጊዜያቶች ብር 102,405,244.99 ያበደሩ መሆኑ ተገልጸአል፡፡ በ2ኛውም ክስ ለአንድ ድርጅት በ5 ውሎች በተለያዩ ጊዜያቶች ብር 2,100,000.00 ያበደሩ መሆኑ ተገልጸ ቀርቧል፡፡

ቀጥሎ ያሉት አራት ክሶች ደግሞ አቶ አየለ ደበላ የአራጣ ወንጀሎች ስለመፈፀማቸው የሚዘረዝሩ ናቸው፡፡ ከእነዚህ ክሶች መካከል በ3ኛው እና 5ኛው ክሶች በ1949 ዓ.ም የወጣው የቀድሞው የወንጀለኛ መቅጫ ሕግ ቁጥር 670/ሐ/ እና 667/1/ የተጠቀሱ ሲሆን በ4ኛው እና በ6ኛው ክስ ደግሞ በ1997 ዓ.ም የወጣው አዲሱ የወንጀል ሕግ አንቀጽ 715 /ሐ/ እና 712/1/ሀ/ ተጠቅሰዋል፡፡ በእነዚህ የአራጣ ወንጀል በሚመለከቱት ክሶች አቶ አየለ ደበላ ለስድስት የተለያዩ ግለሰቦች እና ሁለት ድርጅቶች በተለያዩ ጊዜያቶች በወር ከ7 በመቶ እስከ 20 በመቶ በሚደርስ ወለድ በመቶ ሺህዎችና በሚሊዩን የሚቆጠር ገንዘብ ያበደሩ ስለመሆናቸውና በአንዳንዶቹ ተበዳሪዎች ላይ የሀብት ማራቆት እንደደረሰባቸው ተዘርዝሮ ቀርቧል፡፡ ቀሪዎቹ ሶስት ክሶች የገቢ ግብር እና የተጨማሪ እሴት ታክስ አሣውቆ አለመክፈል እና ወደግብር ሰብሳቢው መ/ቤት አሳሳች መረጃ ስለመስጠት ወንጀሎች የሚመለከቱ ናቸው፡፡ በእነዚህ ክሶች ላይ አቶ አየለ ደበላ ተላልፈዋል ተብለው የተጠቀሰባቸው የገቢ ግብር አዋጅ ቁጥር 286/94 አንቀጽ 96ና 97/3/ እና የተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/94 አንቀጽ 49 ሲሆኑ አቶ አየለ ደበላ አሣውቀው አልከፈሉም የተባለው የግብር እና ተጨማሪ እሴት ታክስ መጠንም በየክሶቹ ላይ ተገልጸ ቀርቧል፡፡

የመጨረሻ የሆነው 10ኛው ክስ አቶ አየለ ደበላ በወንጀል ሕግ አንቀጽ 684/1/ እና/2/ላይ የተመለከተውን በመተላለፍ በወንጀል ድርጊት የተገኘን ገንዘብ ሕጋዊ አስመስሎ የማቅረብ ወንጀል ፈጽመዋል በሚል የቀረበ ነው፡፡ በዚህ ክስ በወንጀል ድርጊት የተገኘን ገንዘብ ሕጋዊ አስመስለው አቅርበዋል የተባለው በ4ኛውና በ6ኛው ክስ ላይ በተገለጹት ሁለት የአራጣ ወንጀሎች እና በ7ኛው እና በ9ኛው ክሶች በተገለጹት የገቢ ግብር እና የተጨማሪ እሴት ታክስ አሣውቆ አለመክፈል ወንጀሎች አማካኝነት በጠቅላላው ብር 89,783,020.63 አግኝተዋል የሚለውን
ነው፡፡

አቶ አየለ ደበላ ሁሉንም ክሶች በመካድ ተከራክረዋል፡፡ የፌዴራል ከፍተኛ ፍ/ቤት በዐቃቤ ሕግ በኩል የተቆጠሩትን በርካታ ማስረጃዎች ከሰማ በኋላ ተመስክሮባቸዋል ብሎ አቶ አየለ ደበላ ሁሉንም ክሶች በሚመለከት እንዲከላከሉ አዟል፡፡ በዚህም መሠረት አቶ አየለ ደበላ በበኩላቸው በርካታ የሰውና የሰነድ መከላከያ ማስረጃዎች በመቁጠር አቅርበው አሰምተዋል፡፡ የፌዴራል ከፍተኛ ፍ/ቤት የግራቀኙን ክርክሮችና ማስረጃዎች በመስማት የክርክሩ ሂደት እንዲጠናቀቅ ካደረገ በኋላ በመጨረሻ መርምሮ በሰጠው ፍርድ አቶ አየለ ደበላ የተከሰሱባቸውን አሥሩንም ወንጀሎች መፈፀማቸው ተረጋግጧል በማለት በየክሶቹ ላይ በተጠቀሱባቸው የሕግ አንቀጾች መሠረት ጥፋተኛ አድርጓቸዋል፡፡ ቅጣቱን በተመለከተም የ22 አመት ጽኑ እሥራት እና የገንዘብ መቀጮ ብር 308000 የወሰነባቸው ከመሆኑም በተጨማሪ በባንክ ተቀምጦ ተገኝቷል የተባለ ብር

12,000,000 /አሥራ ሁለት ሚሊዩን ብር/ አንድ ቤት እና ሁለት መኪናዎች እንዲወረሱ ወስኗል፡፡

የአቶ አየለ ደበላ ጠበቆች ሐምሌ 15 ቀን 2002 ዓ.ም በተፃፈ የይግባኝ ማመልከቻ የፌዴራል ከፍተኛ ፍ/ቤት የሰጠውን የጥፋተኛነትም ሆነ የቅጣት ውሣኔ የሚቃወሙባቸውንና ሊሻር ይገባል የሚሉባቸውን በርካታ ምክንያቶች ዘርዝረው አቅርበዋል፡፡በሌላም በኩል በዚህ መዝገብ መልስ ሰጭ የሆነው ዐቃቤ ሕግ በበኩሉ የፌዴራል ከፍተኛ ፍ/ቤት በአቶ አየለ ደበላ ላይ በሰጠው የቅጣት ውሣኔ በከፊል ቅሬታ በማሣደር ከዚህ መዝገብ ጋር እንዲጣመር በተደረገው የወ/ይ/መ/ቁ. 60793 ይግባኙን አቅርቧል፡፡ ዐቃቤ ሕግ ነሐሴ 14 ቀን 2002 ዓ.ም ተጽፎ እንዲቀርብ ባደረገው የይግባኝ ማመልከቻ በቅጣት ውሣኔው ላይ ያሉት የቅሬታ ነጥቦች ስድስት መሆናቸውን ዘርዝሮ አቅርቧል፡፡ የቅሬታ ነጥቦቹ በዋናነት የእሥራት ቅጣትና የገንዘብ መቀጮው ስለማነስና በወንጀሎቹ የተገኙ ናቸው የተባሉ ሌሎች በርካታ ንብረቶች እና ገንዘብ እንዲወረሱ ስላለመደረጉ የሚገልጹ ናቸው፡፡

በሁለቱም የይግባኝ መዝገቦች ግራቀኙ እንዲቀርቡ ተደርጎ በወ/መ/ሕ/ሥ/ሥ/ቁ. 192 መሠረት ክርክሮቹ ተሰምተዋል፡፡ ክርክሮቹ በየመዝገቦቹ ለየብቻ የተሰሙ ናቸው፡፡ በመጀመሪያ የአቶ አየለ ደበላ የይግባኝ መዝገብ ይግባኙ ሲሰማ ጠበቃቸው ሰፊ የፍሬ ነገር የማስረጃ እና የሕግ ክርክሮች በማንሣት የይግባኝ ቅሬታቸውን በዝርዝር አስረድተዋል፡፡ በዐቃቤ ሕግ የይግባኝ መዝገብም በተመሳሳይ መንገድ በሁለቱ ተከራካሪ ወገኖች መካከል ሰፊ ክርክሮች ተደርገዋል፡፡

በሁለቱም የይግባኝ መዝገቦች በርካታ ክርክሮች እና የተለያዩ ጥያቄዎች ስለተነሱ ቀጥሎ ከየጉዳዩቹ ጋር በተያያዘ በዝርዝር የሚታዩና የሚመረመሩ ናቸው፡፡

በቅድሚያ እልባት ሊሰጠው የሚገባው በዚህ መዝገብ በአቶ አየለ ደበላ በኩል የቀረበው ይግባኝ ነው፡፡ አቶ አየለ ደበላ በአሥሩ ክሶች ጥፋተኛ መባላቸው በአግባቡ ነው ወይንስ አይደለም የሚለው ዋናው ጉዳይ ከተነሱት የማስረጃና የሕግ ክርክሮች አኳያ ታይቶ ሣይወሰን ወደ ቅጣት ጥያቄዎች መሸጋገር ስለማይቻል ቅደም ተከተላቸው ተጠብቆ መታየት አለበት፡፡

በዚህም መሠረት በመጀመሪያ የአቶ አየለ ደበላ ጠበቃ ከ1ኛ እና 2ኛ ክሶች ጋር በተያያዘ በ1ኛው አዋጅ ቁጥር 83/86 አንቀጽ 59 እንዲሁም በሁለተኛው ክስ በአዋጅ ቁጥር 592/2000 አንቀጽ 58 ተጠቅሰባቸው የባንክ ሥራ ሰርተዋል በሚል ክስ የቀረበባቸው ያለአግባብ ነው፤ ክሱ ስለወንጀል የሚደነግግ የትኛውን አንቀጽ እንደተላለፈ በግልጽ አያመለክትም፤ ማበደርን ወንጀል አድርጎ የባንክ ሥራ ብቻ ያደረገ ሕግ የለም፤ ወንጀል በማስመሰል ተሰርቷል ሊባል አይችልም፤ ክሶቹ የሕግ መሠረት የላቸውም በእነዚህ ክሶች ጥፋተኛ ሊባሉ አይገባም በሚል ያቀረቡት ክርክር ከሕጉ አንፃር ተቀባይነት የሚሰጠው ነው ወይንስ አይደለም? በግለሰብ ደረጃ የባንክ ፈቃድ ሣይኖር ለድርጅቶችም ሆነ

ለሌሎች ግለሰቦች ደጋግሞ ብድር መስጠትን ወንጀል አድርጎ የሚቀጣ የሕግ ድንጋጌ አለ ወይንስ የለም? በክሱ ላይ የተጠቀሰው የገንዘብና የባንክ አዋጅ ብድር መስጠት ለባንኮችና መሰል የፋይናንስ አክስዮን ማህበራት ብቻ የተፈቀደ የባንክ ሥራ ነው የሚል ድንጋጌ አለው ወይንስ የለውም? የሚሉት ጥያቄዎች ሲመረመሩ፡-

አቶ አየለ ደበላ በ1ኛው ክስ በተለያዩ ጊዜያቶችና ለተለያዩ ተበዳሪዎች በጠቅላላው ብር 102,405,224.94 ያበደሩ መሆናቸው መያዣ የብር 25,665,116 ዋጋ ያላቸው 82 ቼኮች መቀበላቸው በ2ተኛውም ክስ በ5 ውሎች በተለያዩ ጊዜያቶች «ኢዶኤች ኢንተርናሽናል ለተባለ ድርጅት ብር 2,100,000 ማበደራቸው ተገልጾአል። በአንደኛው ክስ ላይ የተዘረዘሩትን ብድሮች ተሰጡ የተባለው ከጥቅምት 24 ቀን 1991 ዓ.ም ጀምሮ እስከ ነሐሴ 30 ቀን 2000 ዓ.ም ድረስ ባለው የአስር ዓመት ጊዜ ውስጥ ሲሆን በሁለተኛው ክስ ላይ የተገለጹትን አምስት ብድሮች ደግሞ የሰጡት ከመስከረም 14 ቀን 2001 ዓ.ም ጀምሮ እስከ ታህሳስ 16 ቀን 2001 ዓ.ም ድረስ ነው። በሁለቱም ክሶች ላይ ብድሮች የተሰጡት በወለድ ወይም ያለወለድ ስለመሆኑ የተገለጸ ነገር የለም። ብድሮቹ በአብዛኛው ለኢ.ዲ.ኤች ኢንተርናሽናል ኃላፊነቱ የተወሰነ የግል ማህበር የተሰጡ መሆኑን የክሶቹ ዝርዝር መግለጫ ያሳያል:: አቶ አየለ ደበላ ኢ.ዲ.ኤች ኢንተርናሽናል ራሳቸው ያሉበት የቤተሰብ ድርጅት እንደሆነ ይናገራሉ።

ከእነዚህ የብድር ጉዳዩች ጋር ተያይዞ ወደተነሳው ዋናው የሕግ ክርክር ስንመለስ በ1986 ዓ.ም የገንዘብና የባንክ አዋጅ በሚል ወጥቶ የነበረው አዋጅ ቁጥር 83/86 ከነሐሴ 5 ቀን 2000 ዓ.ም ጀምሮ ተሽሮ በአዋጅ ቁጥር 591/2000 ተተክቷል። ይህ አዋጅ የኢትዮጵያ ብሔራዊ ባንክ ማቋቋሚያ አዋጅን ለማሻሻል የወጣ ነው። ቀጥሎም የባንክ ስራን ለብቻው የሚመለከት አዋጅ ቁጥር 592/2000 በአንቀጽ 26 ንዑስ ቁጥር 1 በተራ ፊደል ‹መ› የተሻረው አዋጅ አንቀጽ 59 ንዑስ አንቀጽ 1 በተራ ፊደል ሸ ላይ የተመለከተውን ዓይነት ወንጀል ድንጋጌ ይዟል። ንዑስ አንቀጽ 2 የሚለውም ድንጋጌው ተመሳሳይ ይዘት ያለው።

በአንደኛው ክስ ላይ የተጠቀሰው የቀድሞው የገንዘብና የባንክ አዋጅ ቁጥር 83/86 የወጣው ብሄራዊ ባንክን እንደገና ለማቋቋም የዚህኑ ባንክ ሥልጣንና ተግባር ለመወሰን ብሄራዊ ባንክ ከሌሎች ባንኮች ከመድን ዋስትና ሰጪ ድርጅቶች እና ከመሰል የገንዘብ ተቋማት ጋር ስላለው ግንኙነት ለመደንገግ እንዲሁም ስለኢትዮጵያ ሕጋዊ ገንዘብ እና የውጪ ሀገር ገንዘብ አስተዳደር ለመወሰን እንጂ ስለገንዘብ ብድር አሰጣጥ ወይም ስለብድር ጉዳይ ለመወሰንና ለመደንገግ አይደለም።

በዚህ አዋጅ ስለባንክ ሥራ የሚዘረዘረው አንቀጽ 2 ንዑስ አንቀጽ 12 በአዋጁ ውስጥ ስላሉት ስለአንዳንድ ዋና ዋና ቃሎች እና ሀረጎች እንዲሁም መሠረተ ሀሳቦች ትርጉም የሚያብራራው የአዋጁ የመጀመሪያ ጠቅላላ ክፍል ሥር የሚገኝ ነው። ይህ አንቀጽ የባንክ ሥራ ማለት ምንድን ነው የሚለውን የሚያብራራና የሚዘረዝር ነው።

ይኸውም የባንክ ሥራ ማለት፡-

- የተስፋ ሰነዶችን
- የገንዘብ መክፈያ ሰነዶችን፣
- የሀዋላ ወረቀቶችንና ሌሎችን የእዳ መክፈያዎች በመመንዘር በመቀበልና በማስተላለፍ፣
- በአደራ የሚቀመጥ ገንዘብና የንግድ ወረቀት በመቀበል ገንዘብ ማበደር፤

ከዚህ የህጉ የባንክ ሥራ ትርጉም የባንክ ሥራ የሚባለው በርካታ ሥራዎችን የሚያካትት መሆኑን መረዳት ይቻላል፡፡

ይህንኑ የገንዘብና የባንክ አዋጅ ቁጥር 83/86 ን የሻረው አዋጅ ቁጥር 591/2000 የባንክ ሥራ የሚለውን የሚያብራራ ሲሆን ቀጥሎ የባንክ ሥራ የሚለውን ብቻ በሚመለከት የወጣው አዋጅ ቁጥር 592/2000 በተመሳሳይ መንገድ የባንክ ሥራ ማለት ምን እንደሆነ ይዘረዝራል፡፡ በነዚህ አዋጆች የባንክ ሥራ በሚል የተዘረዘሩት ነገሮች በአብዛኛው ተመሳሳይ ናቸው፡፡ በእነዚህ አዋጆች እንደመጀመሪያው የገንዘብና የባንክ አዋጅ ሁሉ የገንዘብ ብድር መስጠት ከባንክ ሥራዎች መካከል አንዱ እንደሆነ ከመገለጹ በቀር ስለገንዘብ ብድር አሰጣጥ ወይም ስለብድር ጉዳይ የተሰጠ የተለየ ትኩረት የለም፡፡ ሕጉ ብድር መስጠት ከባንክ ሥራዎች መካከል አንዱ እንደሆነ የሚጠቁም እንጂ ብድር መስጠት ለባንኮች እና ለመሰል የፋይናንስ ተቋማት ብቻ የተፈቀደ ነው፣ ግለሰቦች የባንክ ፈቃድ ሳይኖራቸው ብድር መስጠት አይችሉም የሚል ድንጋጌ የለውም፡፡ የመጀመሪያው የገንዘብና የባንክ አዋጅ ቁጥር 83/86 ም ሆነ በኋላ የባንክ ሥራ በሚል የወጣው አዋጅ ቁጥር 592/2000 ብሄራዊ ባንክ ለባንኮች ለመድን ድርጅቶች እና ለሌሎች የገንዘብ ድርጅቶች በሕጉ መሠረት ፈቃድ እንደሚሰጥና እንደሚቆጣጠር ከሚገልፀው በቀር በግለሰብ ደረጃ ብድር ለመስጠት ከብሄራዊ ባንክ ፈቃድ ያስፈልጋል ወይም ግለሰቦች በውል የገንዘብ ብድር መስጠት አይችሉም አይሉም፡፡ በሁለቱም ክሶች ላይ የተጠቀሱት አዋጆች ብድር በመስጠት ረገድ በግለሰቦች ላይ የሚደረጉት ክልከላ አለመኖሩ ብቻ ሣይሆን በግለሰቦች ደረጃ ብድር ለመስጠት የሚያስቀምጧቸው ቅድመ ሁኔታዎች ወይም ገደቦች የሉም፡፡

የመጀመሪያውም ሆነ በኋላ የወጣው አዋጅ ስለብድር ጉዳይ በሚመለከት በፍትሐብሔር ሕጉ ከቁጥር 2471-2489 ድረስ የተጻፉትን ድንጋጌዎች አልሻሯቸውም፡፡ እነዚህ የፍትሐብሔር ሕጉ ድንጋጌዎች ደግሞ ሲታዩ ብድር የተፈቀደና በውል ላይ የተመሠረት ሕጋዊ ተግባር እንደሆነና ግለሰቦችም በውል ላይ ገንዘብ ማበደር እንደሚችሉ የሚያሳዩ ናቸው፡፡

በኢትዮጵያ ሕግ የገንዘብ ብድር የባንክ ሥራ ይሠራሉ ተብለው በሕግ እና በሌሎች የመመሥረቻ ሥርዓቶች በተቋቋሙ ባንኮችና በሌሎች መሰል የፋይናንስ ተቋማት ብቻ ሳይሆን ከነዚህ ውጪ ባሉ ግለሰቦች ጭምር ሊሰጥ የሚችል ነው፡፡

ብድር በመስጠት ረገድ በሕጉ ሕጋዊ ወለድ መጠንም ከመወሰኑ በቀር በብድር የሚሰጠው ገንዘብ መጠንና ደጋግሞ በማበደር በኩል የተደረገ ገደብ የለም፡፡

ብድር ወንጀል የሚሆነው በወንጀል ሕግ አንቀጽ 712 ላይ እንደተደነገገው በአራጣ ላይ የተመሰረተ ሆኖ ሲገኝ ብቻ ነው፡፡

በዚህ ጉዳይ የአሁኑ ይግባኝ ባይ አቶ አየለ ደበላ በአንደኛው ክስ ተላልፈዋል ተብሎ የተጠቀሰባቸው አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሸ እና ንዑስ አንቀጽ 2 ወንጀል ብሎ የሚደነግገው ነገር ምንድነው? በዚህ አንቀጽ ላይ የተገለጸው የወንጀል ሁኔታ የባንክ ፈቃድ ሳይኖር በተደጋጋሚ ብድር የመስጠት ድርጊት ተፈጽሟል ከተባለው ጋር የሚዛመድ ነገር አለው ወይንስ ግንኙነት የለውም?ድንጋጌው እንዲህ ዓይነቱን ብድር የመስጠት ጉዳይ ወንጀል በማድረግ የሚቀጣ ነው የሚል ትርጉም የሚሰጠው ነው አይደለም?የሚሉትን ጥያቄዎች በማንሳት ስንመለከት፡-

አንቀጽ 59 በአዋጁ ክፍል አራት ሥር የሚገኝ ሆኖ ርዕሱ ስለቅጣት በሚል የሚጀምር ነው፡፡ አንቀጹ በአዋጅ ውስጥ ከተካተቱት ጉዳዩች አፈፃፀም ጋር በተያያዘ እንደወንጀል የተቆጠሩትን ድርጊቶች የሚዘረዝር ነው፡፡ በንዑስ አንቀጽ 1 ከፊደል ተራ ሀ እስከ ፊደል ተራ ሰ ድረስ የወንጀል ድርጊቶች ተብለው የተዘረዘሩት በአዋጁ ውስጥ ከተካተቱት ጉዳዮች መካከል በየተኞቹ አንቀጾች ላይ ከተገለጹት ጋር በቀጥታ ተያያዥነት እንዳላቸው ተለይተው ተቀምጠዋል፡፡ በሁለተኛው ክስ ላይ በተጠቀሰው አዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ ሥር ወንጀል ተብለው የተዘረዘሩትም ተመሳሳይ ሁኔታዎች የሚታዩባቸው ናቸው፡፡

በመጀመሪያ ከተዘረዘሩት ሁሉ በተለየ ጥቅል የሆነ የወንጀል አገላለጽ የሚታይበት በፊደል ተራ ሸ ላይ የተመለከተው ሲሆን ይህም በማናቸውም ሌላ አኳኋን የዚህን አዋጅ ወይም በዚህ አዋጅ መሠረት የሚወጡ ደንቦችንና መመሪያዎች የተላለፈ ወይም አፈፃፀማቸውን ያሰናከለ እንደሆነ ወንጀል የተሰራበት ሀብት መወረሱ እንደተጠበቀ ሆኖ በወንጀለኛ መቅጫ ሕግ መሠረት ይቀጣል በማለት ቅጣቱን በተመለከተ በወቅቱ ሥራ ላይ የነበረው በ1949 ዓ.ም ወደወጣው የወንጀለኛ መቅጫ ሕግ የሚመራ ነው፡፡ የወንጀለኛ መቅጫ ሕጉም ሲታይ በአዋጅ አንቀጽ 59/1ሸ ላይ ከተገለፀው የወንጀል ሁኔታ ጋር የሚመሳሰል ወይም የሚዛመድ ድንጋጌ ያለው ሆኖ አልተገኘም፡፡ በሁለተኛው ክስ ላይ የተጠቀሰው የባንክ ሥራ አዋጅ ቁጥር 592/2000 አንቀጽ 58 በወንጀል ሕግ መሠረት ይቀጣል የሚለውን በማስቀረት ቅጣቱን ጭምር አስቀምጧል፡፡

በ1ኛው ክስ ላይ የተጠቀሰው የአዋጅ አንቀጽ 59/2/ በተመለከተም ወንጀሉ የተፈፀመው ሥልጣንን መከታ በማድረግ ወይም በመንግሥት ሥራ አጋጣሚ ወይም ተገቢ ባልሆነ መንገድ ሀብትን ለማካበት ወይም በተደጋጋሚ ሲሆን በሚል የተዘረዘሩት የቅጣት ማክበጃ ምክንያቶች እንጂ በንዑስ አንቀጽ 1 ሥር የተገለጹትን የወንጀል ድርጊቶች የሚያቋቁሙ ወይም ራሣቸውን ችለው የሚቆሙ የወንጀል ፍርጊቶች አይደሉም፡፡

ዐቃቤ ሕግ በ1ኛው ክስ ይግባኝ ባይ በአንቀጽ 59/1/ሸ ላይ የተመለከተውን በመተላለፍ ወንጀል እንደፈፀሙ አድርጎ ክሱን ያቀረበ ሆኖ ቢገኝም በዚህ አንቀጽ ላይ የዚህን አዋጅ ወይም በዚህ አዋጅ መሠረት የሚወጡ ደንቦችንና መመሪያዎችን የተላለፈ ወይም አፈፃፀማቸውን ያሰናከለ እንደሆነ በሚል በተገለፀው የወንጀሉ ፍሬ ነገሮች መሠረት ይግባኝ ባይ የአዋጁን አፈፃፀም አሰናክለዋል ወይም በአዋጁ መሠረት የወጣ ደንብና መመሪያ ተላልፈዋል ተብሎ በክሱ ላይ የተነገረባቸው ነገር የለም፡፡ በአዋጁ መሠረት የወጣ ደንብና መመሪያም አለ ተብሎ መቅረብ ቀርቶ በክሱም ሆነ በክርክሩ ላይ የተጠቀሰ ሆኖ አልተገኘም፡፡ይግባኝ ባይ የአዋጁንም አፈፃፀም አሰናክለዋል ለማለት የሚያስችል ምክንያት የለም፡፡ በአዋጁ ያልተከለከለና ወንጀል ነው ያልተባለን ብድር የመስጠት ጉዳይ ፈጽመው መገኘታቸው ደግሞ የአዋጁን አፈፃፀም እንዳሰናከሉና ወንጀል እንደፈፀሙ ተደርጎ የሚታይ አይደለም፡፡

በሁለተኛው ክስ የተጠቀሰው አዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ “በዚህ አዋጅ አንቀጽ 3/1/ ላይ የተደነገገውን የተላለፈ ማናቸውም ሰው የጥፋት ድርጊቱ ለቀጠለበት---“ በማለት ስለቅጣቱ የሚገልጽ ሲሆን በዚህ አንቀጽ ላይ እንደወንጀል ድርጊት የተቆጠረው በአንቀጽ 3/1/ ላይ በብሔራዊ ባንክ የተሰጠ የባንክ ሥራ ፈቃድ ካልተያዘ በቀር በኢትዮጵያ ውስጥ የባንክ ሥራ መስራት ክልክል ነው በሚል የገለፀው ነው፡፡ ነገር ግን ይህ አንቀጽ በግለሰብ ደረጃ ብድር ለመስጠት የባንክ ፈቃድ ያስፈልጋል አይልም፡፡ ከላይ ተደጋግሞ እንደተገለፀው በሕጉ በግለሰብ ደረጃ ብድር መስጠት አልተከለከለም፡፡ ብድር መስጠት ከባንክ ሥራ መካከል አንዱ እንጂ ለባንክ ብቻ የተሰጠ ሥራ አይደለም፡፡ ክሱም የቀረበው የባንክ ሥራ ለሚለው የተሳሳተ ትርጉም በመስጠትና በሕጉ በግልጽ ወንጀል ነው ያልተባለን ነገር ወንጀል በማስመሰል ነው፡፡ አንድ ግለሰብ ብድር መስጠትን እንደ ንግድ ሥራ አድርጎ መጠቀም ህገወጥ ድርጊት ነው የሚል የሕግ ድንጋጌም የለም፡፡

ፈቃድ ተሰጥቷቸው የባንክ ሥራ ከሚሰሩት ባንኮችና ሌሎች የገንዘብ ድርጅቶች ውጭ ያሉት ግለሰቦች በግል ደረጃ የገንዘብ ብድር መስጠትን እንደመደበኛ የንግድ ሥራ አድርገው ሊጠቀሙበት አይገባም፡፡ በግለሰብ ደረጃ የሚሰጥ ብድር ገደብ ሊደረግበት ይገባል፤ ግለሰቦች ያለ ገደብ ብድር እየሰጡና እንደመደበኛ የንግድ ሥራ አድርገው በብድር ሥራ ላይ በመሰማራት የባንኮችን ብድር የመስጠት አገልግሎት እየታሸሙ ሥራቸው እንዲጣበብ አድርገዋል፤ እንዲህ ዓይነቱ የባንክ ፈቃድ ሳይኖር ግለሰቦች የሚሰጡት ልቅ ብድር በኢኮኖሚው እና በገንዘብ ዝውውር ሥርዓት ጉዳትና ችግር እያስከተለ ነው ከተባለ ይህንን ለመቆጣጠርና ለመግታት የሚያስችልና ወንጀል አድርጎ የሚቀጣ ግልጽ ሕግ መውጣት ይኖርበታል፡፡

በግለሰብ ደረጃ ገንዘብ ደጋግሞ ማበደርንና ብድር መስጠትን አዘውትሮ መስራት በግልጽ ወንጀል በማድረግ የሚቀጣ ሕግ ሳይኖርና ከባንኮችና ከሌሎች የገንዘብ ድርጅቶች ውጭ ያሉ ግለሰቦች በግለሰብ ደረጃ ብድር ለመስጠት የብሔራዊ ባንክ ፈቃድ ያስፈልጋቸዋል የሚል ግልጽ ድንጋጌ በሌለበት በቀድሞው የገንዘብና የባንክ አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሸ/ እና የባንክ

ሥራ የሚል በወጣው አዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ ላይ ከተገለፀው የወንጀል ሁኔታ ጋር በማመሳሰል ፍ/ቤት ወንጀል ነው ብሎ ቅጣት ሊወሰን አይችልም፡፡

የወንጀል ሕግ አንቀጽ 2 ንዑስ አንቀጽ 2 ፍ/ቤት ህገወጥነቱ በሕግ በግልጽ ያልተደነገገን ድርጊት ወይም ግድፈት እንደወንጀል ሊቆጥረውና ቅጣት ሊወስን እንደማይችል እንደዚሁም የዚህ አንቀጽ ንዑስ አንቀጽ 3 በሕግ ላይ ከተደነገጉት ወንጀሎች ጋር ይመሳሰላል በማለት ወንጀልነቱ በግልጽ ያልተደነገገን ድርጊት ወይም ግድፈት ፍ/ቤት እንደወንጀል ሊቆጥረው እንደማይችል ይደነግጋል፡፡ እነዚህ የሕጉ ቁልፍ መርሆች ናቸው፡፡ በእርግጥ እነዚህ ድንጋጌዎች ፍ/ቤት ሕጉን እንዳይተረጉም የሚያግዱት አይደሉም፡፡

በተያዘው ጉዳይ የአሁኑ ይግባኝ ባይ አቶ አየለ ደበላ በ1ኛውና በ2ኛው ክሶች በወንጀል የተከሰሱባቸው የገንዘብ ብድር መስጠት ጉዳዮች በሁለቱ አዋጆች የተጠቀሱት አንቀጾች ወንጀል ብለው ከሚዘረዝሯቸው ነገሮች ጋር ተያይዘው ሲታዩ በወንጀል የሚያስቀጡ ድርጊቶች የሚል ትርጉም የሚሰጣቸው ሆነው ባለመገኘታቸውና ይግባኝ ባይ በእነዚህ ጉዳዮች መወንጀል ተጠያቂ ሊሆኑ ይገባል ለማለት የሚያስችል በቂ የሕግ ምክንያት ባለመኖሩና ክሶቹም የሕግ መሠረት የሌላቸው በመሆኑ የፌዴራል ከፍተኛ ፍ/ቤት በወ/መ/ቁ 82604 ግንቦት 3 ቀን 2001 ዓ.ም የአሁኑን ይግባኝ ባይ በ1ኛ እና በ2ኛ ክሶች ጥፋተኛ ናቸው በሚል የሰጠው ፍርድ በወ/መ/ሕ/ሥ/ሥ/ቁ. 195/2/ለ/1/ መሠረት ተለውጦ ከ1ኛ ና 2ኛ ክሶች በነፃ እንዲሰናበቱ ተወስኗል፡፡

<u>የሀሳብ ልዩነት</u>

እኔ ስሜ በሶስተኛ ተራ የተመዘገበው ዳኛ ከሶስተኛ ተራ እስከ አስረኛ ተራ ቁጥር ባሉት ክሶች ላይ የአብላጫው ድምፅ በሰጠው ውሣኔ የምስማማ ስሆን በአንደኛ እና ሁለተኛ ክስ ላይ የአብላጫው ድምፅ የከፍተኛ ፍ/ቤቱ የሰጠውን የጥፋተኝነት እና የቅጣት ውሳኔ መሻሩ አግባብ አይደለም ስል በሀሳብ ተለይቻለሁ፡፡ 1ኛ ክስ በ1986 ዓ.ም የወጣውን የገንዘብና የባንክ አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሸ/ እና 2/ሀ/ ላይ የተመለከተውን በመተላለፍ የንግድ ጥቅም ለማግኘት የብድር አገልግሎት ስራ ለመስራት የሚያስችል ከብሄራዊ ባንክ ፈቃድ ሳይኖራቸው በአጠቃላይ ከሰማንያ በላይ ለሆኑ ተበዳሪዎች በሰማንያ አራት የውል ሰነዶች ብር 102,405,244.94 (አንድ መቶ ሁለት ሚሊዮን አራት መቶ አምስት ሺ ሁለት መቶ አርባ አራት ብር ከዘጠና አራት ሳንቲም) የሆነ የገንዘብ ብድር ለመስጠት ለብድር መክፈያም 25,665,166 (ሃያ አምስት ሚሊዮን ስድስት መቶ ስልሣ አምስት ሺ አንድ መቶ ስልሳ ስድስት) የገንዘብ መጠን የያዙ ቼኮች በመቀበል ለባንኮችና መሰል የፋይናንስ አክስዮን ማህበራት የተፈቀደውን የብድር ስራ በሕገወጥ መንገድ እንደንግድ ስራ በተደጋጋሚ ሲሰሩ በመገኘታቸው ተከሰዋል የሚል ነው፡፡

2ኛው ክስ ይግባኝ ባይ አዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ ላይ የተመለከተውን በመተላለፍ የንግድ ጥቅም ለማግኘት የብድር አገልግሎ ስራ

ለመስራት የሚያስችል ከብሄራዊ ባንክ ፈቃድ ሳይኖራቸው በአጠቃላይ በአምስት የብድር ሰነዶች ብር 2100000 (ሁለት ሚሊዮን አንድ መቶ ሺ) ገንዘብ በብድር በመስጠት ለባንኮችና መሰል የፋይናንስ አክስዮን ማህበራት ብቻ የተፈቀደውን የብድር ስራ በህገወጥ መንገድ እንደንግድ ስራ በተደጋጋሚ ሲሰሩ በመገኘታቸው ተከሰዋል የሚል ነው፡፡

ከላይ በጠቀስኳቸው ሁለት አዋጆች የቀረቡት ክሶች ተግባሩ የተፈፀመበት ጊዜ ከመለያየቱ አንፃር ሁለቱንም አዋጆች ተላልፈዋል ተብሎ ከመቅረቡ ውጪ ሁለቱም የባንክና መሰል አክስዮን ማህበራት ሊሰሩት የሚገባን የብድር ስራ እንደንግድ ስራ በሕገወጥ መንገድ መስራት ነው፡፡ የፌዴራል ከፍተኛ ፍ/ቤት ከላይ በጠቀስኳቸው ሁለቱም ወንጀሎች ይግባኝ ባይን ጥፋተኛ በማድረግ ቅጣት ሰንዝሮ የነበረ ሲሆን ይግባኝ ባዮች ባቀረቡት ቅሬታ የተከሰሱት በመቅጫ አንቀጽ ነው፣ የትኛውን ሕግ እንደተላለፍኩ አልተገለፀም፣ ውሎቹም ሰማንያ አራት አይሆኑም፣ ብድር መስጠት በፍትሀብሄር ሕግ የተፈቀደ ነው የሚል ክርክር አቅርበው ክርክራቸው በአብላጫው ድምፅ ተቀባይነት አግኝቶ ከሁለቱም ክሶች በነፃ መሰናበታቸውን ከላይ በአብላጫው ድምፅ ከተሰጠው ውሳኔ መረዳት ይቻላል፡፡

በእርግጥ በ1952 ዓ.ም የወጣው የኢትዮጵያ የፍትሀብሄር ሕግ ቁጥር 2451 እና ተከታዮቹ ግለሰብ ለግለሰብ ብድር ሊሰጥ የሚችለበት ሁኔታ እንዳለ እና የብድር ውልም እንዴት እንደሚመራ በግልጽ ያስቀምጣል፡፡ ሕዝቡ በዕለት ከዕለት ኑሮ ሲያደርገው የኖረና ወደፊትም የሚያደርገው ስለሆነ ይህን ለማወቅ ትልቅ ሕግ አዋቂ መሆን አይጠይቅም፡፡ ወደያዝነው ጉዳይ ስንመጣ ግን ግለሰብ ለግለሰብ ከሚያደርገው ተራ ብድር ከፍ ባለ መልኩ እና የፍትሐብሔር ሕጉም ሲወጣ ሕግ አውጪው የብድር አሰጣጥ ሁኔታ ከፍ እና ወጣ ባለመልኩ የተፈፀመ እና በዚህ ሁኔታ ስለሚሰጥ ብድር በ1ኛ እና በ2ኛ ክስ የተጠቀሰው አዋጅ ምን ይላል የሚለውን ከዚህ እንደሚከተለው ለማስቀመጥ እሞክራለሁ፡፡ ብድር የተሰጠባቸው ግንኙነቶች ከሰማንያ በላይ ስለመሆናቸው በክሱ በዝርዝር ቀርቧል፡፡

የገንዘብና የባንክ አዋጅ ቁጥር 83/86 በመግቢያው ላይ የኢትዮጵያ ልማት እና እድገት ሊፋጠን የሚችለው የፋይናንስ እና የገንዘብ ሀብቶችን በስርዓት በማንቀሳቀስ እና ስራ ላይ በማዋል በመሆኑ፣ የኢትዮጵያን ኢኮኖሚ ያለማቋረጥ ለማሳደግ የሚረዳ መሠረት ያለው የባንክ ስርዓት ማስፈን አስፈላጊ መሆኑን ይገልጻል፡፡ በሁለተኛሰው ክስ በተጠቀሰው አዋጅም መጠነኛ የቃንቃ ልዩነት ቢኖረውም ይኸው ሀሳብ ይገኛል፡፡ የባንክ ስራ ማለት የተስፋ ሰነዶችን፣ የገንዘብ መክፈያ ሰነዶችን፣ የሀወላ ወረቀቶችን እና ሌሎችንም የእዳ መክፈያዎች በመመንዘር በመቀበል እና በማስተላለፍ፣ በአደራ የሚቀመጥ ገንዘብ እና የንግድ ወረቀት በመቀበል፣ ገንዘብ በማበደር እንዲሁም በገንዘብ መልክ ያልተቀረፀ ወርቅና ብር እና የውጭ ሀገር ገንዘብ ምንዛሪ በመግዛት እና በመሸጥ የሚከናወን ማናቸውም ስራ ነው ይላል፡፡

ሌሎች የገንዘብ ድርጅቶች ወይም ባንኮችን መሰል የፋይናንስ አክስዮን ማህበራት የሚባሉት፣ የቁጠባ ድርጅቶች፣ የብድር የሕብረት ስራ ማህበሮች እና በማናቸውም የባንክ ስራ የተሰማሩ ሌሎች መሰል ድርጅቶች መሆናቸውን በአዋጅ ቁጥር 83/1986 ክፍል አንድ ቁጥር 4 ላይ በግልፅ ተመልክቷል። የባንክን ስራ እንዲሰራ የሚሰሩ የብድር የሕብረት ስራ ማህበሮችም ሆኑ ሌሎች የገንዘብ ድርጅቶች ከብሄራዊ ባንክ ፈቃድ ተሰጥቶአቸው እና በብሄራዊ ባንክ ቁጥጥር እየተደረገባቸው መስራት እንዳለባቸው የአዋጁ አንቀጽ 41 በግልፅ ያስቀምጣል።

ይግባኝ ባይ ይሰጡት የነበረው የብድር መጠን፣ የብድሩ ተደጋጋሚነት እና ከፍ ባለ መጠን የገንዘብ መክፈያ ሰነዶች በመለዋወጥ ያደረጉት መሆኑ ሲታይ ይህን የብድር ስራ እንደሰራ አድርገው ይልቁንም ከሌሎች የንግድ ስራዎቻቸውም በላይ ጊዜ ሰጥተው ከመቶ ሚሊዮን ብር በላይ በሆነ ገንዘብ በማንቀሳቀስ ይተገብሩት የነበረ መሆኑ ሲታይ የፍትሐብሔር ሕጉ በሚለው እና ሕጉን ያወጣው አካል በገመተው አይነት ሁኔታ ሳይሆን ከላይ በክሱ ላይ በተገለፁት አዋጆች መሠረት ተገቢው ቁጥጥር እና ክትትል እየተደረገበት ሊንቀሳቀስ የሚገባውን ገንዘብ ያለአግባብ እና ያለፈቃድ እንደሰራ አድርገው ተንቀሳቅሰዋል የሚል እምነት አለኝ። የፍትሐብሔር ሕጉ ስለብድር ወይም ስለገንዘብ ብድር ብቻ ሳይሆን ስለተለያዩ የውል ግንኙነቶች ይናገራል። ለምሳሌ ስለሽያጭ፣ ስለኪራይ እና ስለመሳሰሉት፣ ሆኖም አንድ ሰው አንድን ነገር ስለሸጠ ወይም አልፎ አልፎ የሚሸጣቸው የራሱ የሆኑ ነገሮች ስለአሉት በመሸጥ እና በመግዛት ስራ ላይ የተሰማራህ ነጋዴ ነህ ስለዚህም የንግድ ፈቃድና እንደነጋዴም ማሟላት ያለብህ መስራት ያስፈልጋል ላይባል ይችላል። ይህ ሰው ስራውን መሸጥ መለወጥ እና መግዛት አድርጎ እንደሰራ ከያዘው ግን በመሸጥ በመለወጥ ለሚነግደው ነገር ተገቢውን ፈቃድ አውጥቶ እነ ቁጥጥር እየተደረገበት ነው መንቀሳቀስ የሚገባው።

ልክ እንደሸያጩ ሁሉ አንድ ሰው ሊኖርበት የሰራውን ቤት ወይም ለእንግዳ መቀበያ ብሎ ጊቢው ውስጥ የሰራውን ሰርቪስ ስለቸገረው ቢያከራየው ማከራየትን እንደሰራ ይዘህል ላይባል ይችላል። ሆኖም በመቶዎችና በሺ የሚቆጠሩ ቤቶች የሚከራይ ከሆነ ግን ቤት እየሰሩ ማከራየትና እንደሰራ አድርጎ ይዞአልና ይህን ስራ እንደሰራ አድርገው የሚሰሩ ሰዎች በሕግ ማሟላት የሚገባቸውን መስፈርት ሳያሟላ እንደተራ አከራይ ታይቶ ሊታለፍ የሚችል አይደለም። ወደያዝነውም ጉዳይ ስንመጣ ገንዘብ መበደርም ሆነ ማበደር በፍትሐብሔር ሕጉ የተፈቀደ መሆኑ ግልጽ ነው። ሆኖም የብድር ስራን እንደሰራ አድርጎ ከፍ ባለ ገንዘብ፣ እጅግ በተደጋገመ ግንኙነት እና የገንዘብ መክፈያ ሰነዶችን በመለዋወጥ የሚደረግ ከሆነ አበዳሪው ማበደርን ዋና ስራው አድርጎታልና ይህን ስራ ለመስራት የወጡትን ልዩ ሕጎች የሚጠይቁትን መስፈርት ማሟላት አለበት እላለሁ።

የሀገራችንን እድገት ለማፋጠን የገንዘብ ሀብቶች በስርአት መንቀሳቀስ ይኖርባቸዋል። የሀገሪቱ የፋይናንስና የገንዘብ ሀብቶች በስርዓት እንዲንቀሳቀሱ ደግሞ ይህን ስራ የሚሰራው አካል ከብሄራዊ ባንክ ፈቃድ ማግኘት እና ተገቢው

ክትትል እና ቁጥጥር ይደረግበት ዘንድ ይገባል፡፡ በመሰረቱ ስራውም መሰራት ያለበት በባንኮችና መሰል የፋይናንሰ ተቋማት ነው፡፡ ከዚህ ውጪ የተደረገው እንቅስቃሴ የሀገሪቱን የፋይናንስ እና የገንዘብ እንቅስቃሴ የሚያዛባ እና ኢኮኖሚውንም የሚጎዳ ከመሆኑም በላይ በሕጋዊ መንገድ የሚሰሩት ባንኮችና መሰል የፋይናንስ አክሲዮን ማሕበራት በአግባቡ ስራቸውን እንዳይሰሩ የሚያደርግ ነው፡፡

ይግባኝ ባይ በክፍተኛው ፍ/ቤት የተከሰሱበትና ጥፋተኛ የተሰኙበት የነበረው በሁለቱም አዋጆች የተጠቀሰው የሕግ ድንጋጌ በወንጀል ሊያስከስስ እና ጥፋተኛ ሊያሰኝ የሚችል ነው ወይስ አይደለም የሚለውን አስመልክቶ አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሸ/ እና 2 (ሀ) ላይ የተደነገገውን በዝርዝር ስናየው፣ በአንቀጽ 59/1/ ከሀ-ሰ በተጠቀሰው ዝርዝር ውስጥ በአብዛኛው የተገለፀው ከውጭ ሀገር ገንዘብ ምንዛሪ ጋር በተያያዘ ስለሚፈፀሙ ሕገወጥ ድርጊቶች ነው፡፡በሌላ በኩል ክስ የቀረበበት አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሸ/ ‘በማናቸውም ሌላ አኳኋን የዚህን አዋጅ ወይም በዚህ አዋጅ መሠረት የወጡ ደንቦችን እና መመሪያዎችን የተላለፈ ወይም አፈፃፀማቸውን ያሰናከለ እንደሆነ ወንጀል የሰራበት ሀብት መወረሱ እንደተጠበቀ ሆኖ በወንጀለኛ መቅጫ ሕግ መሠረት ይቀጣል ይላል፡፡

ይግባኝ ባይ ከላይ በዝርዝር ለመግለጽ እንደሞከርኩት በዚህ አዋጅ መሠረት የወጡ ደንቦችን እና መመሪያዎችን ሳይሆን የዚህን አዋጅ አንቀጽ 59/1/ሸ/ ተላልፈዋል እንዲሁም የአዋጁን አፈፃፀም አሰናክለዋል የሚል እምነት አለኝ፡፡ እንዴት ተላለፉ ወይም አሰናከሉ ቢባል፣ አንደኛ ለባንኮችና ሌሎች የብድር ተቋማት የተሰጠውን የብድር (የባንክ) ሥራ ያለፈቃድና ቁጥጥር እንደሰራ በመስራት፣ ሁለተኛ የፋይናንስና የገንዘብ ሀብቶች ከስርአት ውጪ እንዲንቀሳቀሱ በማድረግ፣ ሶስተኛ በሕግ መሠረት ፈቃድ አውጥተው እና በብሄራዊ ባንክ ቁጥጥር እየተደረገባቸው ስራውን እንደሰራ የሚሰሩትን ባንኮችና ሌሎች የብድር ተቋማት በእቅዳቸው መሠረት እንዳይንቀሳቀሱ በአቋራጭ ተበዳሪን በደላላ በመውሰድ በሚሰሩ ሕገወጥ ተግባር የተጠቀሰውን አዋጅ ተላልፈዋል እላለሁ፡፡

ቀጥሎ የሚመጣው ክርክር አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሸ/ በወንጀለኛ መቅጫ ሕግ መሠረት ይቀጣል ስለሚል ከወንጀለኛ መቅጫ ሕግ የሚጠቀስ የሕግ አንቀጽ እስከሌለ ድረስ በዚህ አዋጅ ላይ ተመስርቶ ጥፋተኛ ማለት ይቻላል ወይ? ማለት ነው፡፡ በመሠረቱ ይህን ወንጀል የፈፀመ ሰው ምን ያህል ይቀጣ የሚል በአዋጁ ውስጥ ባይኖርም በድፍኑ በወንጀለኛ መቅጫ ሕግ ይቀጣል የሚል ብቻ ቢሆን የወንጀለኛ መቅጫ ሕግን መጥቀስ ያስፈልጋል በሚለው እስማማለሁ፡፡ ሆኖም ይግባኝ ባይ የተከሰሱት በአዋጁ አንቀጽ 59/1/ሸ/ ብቻ ሳይሆን ንኡስ ቁጥር /2/ሀ/ ታክሎበት ነው፡፡

አዋጅ ቁጥር 83/86 አንቀጽ 59/2/ሀ/ ላይ በዚህ አንቀጽ ንዑስ አንቀጽ 1 የተመለከተው ቢኖርም ወንጀሉ የተፈፀመው ስልጣንን መከታ በማድረግ ወይም በመንግሥት ሥራ አጋጣሚ፣ ወይም ተገቢ ባልሆነ መንገድ ሀብትን ለማካበት፣

ወይም በተደጋጋሚ ሲሆን ወንጀል የተሰራበት ሀብት መወረሱን እንደተጠበቀ ሆኖ ቅጣቱ ከአስራ አምስት ዓመት የማይበልጥ ፅኑ እስራትና ከብር 20000 (ሃያ ሺ) የማይበልጥ የገንዘብ መቀጮ ይሆናል ይላል፡፡ እዚህ ላይ ንዑስ ቁጥር /1/ሸ/ የአዋጁን አፋፃፀም ያሰናከለ ሰው እንደሚቀጣ የሚቀጣውም በወንጀለኛ መቅጫ ሕግ እንደሆነ በግልጽ ያስቀምጣል፤ እዚሁ ላይ ቆሞ ቢሆን ኖሮ ስንት እንቅጣው የተባለው የወንጀለኛ መቅጫ ሕግስ የትኛው ነው የሚለው የግድ ከወንጀለኛ መቅጫ ሕግ ሌላ አንቀጽ ያስፈልጋል እንድል ሊያደርገኝ ይችል ነበር፡፡ ሆኖም ይግባኝ ባይ ወንጀሉን የፈጸሙት ተገቢ ባልሆነ መንገድ ሀብትን ለማካበት በመሆኑ በተጠቀሰው አዋጅ አንቀጽ 59/2/ሀ/ መሠረት ጥፋተኛ ስለሚያደርጋቸው ምን ያህል ይቀጡ የሚለውን በአዋጁ ላይ በግልጽ ስለተቀመጠ፤ ምን ስለአረጉ ነው የሚቀጡት የሚለውን በተመለከተ የአዋጁን አፈፃፀም ተገቢ ባልሆነ መንገድ ሀብትን ለማካበት በማሰናከላቸው መሆኑ በግልጽ ስለተቀመጠ፤ አንድ ሰው በወንጀል የሚቀጣው በወንጀለኛ መቅጫ ሕግ ከተደነገገ ብቻ ሳይሆን በሌሎች አዋጆችም የወንጀል ድንጋጌዎች ስለሚኖሩ ይግባኝ ባይ በመቅጫ ሕግ ብቻ ተከስሼ ተቀጣሁ የሚሉት ቅሬታ ተቀባይነት ሊኖረው የሚገባ አይደለም እላለሁ፡፡

በአንደኛው ክስ ላይ የተጠቀሰው አዋጅ እና በ2ኛው ክስ ላይ የተጠቀሰው አዋጅ ይግባኝ ባይ ያለፈቃድ ለባንኮችና መሰል የብድር ተቋማት የተሰጠን ሥራ በመሥራታቸው የተጠቀሱ ሲሆን፤ በአንደኛው ክስ የተጠቀሰው አዋጅ በአሁኑ ጊዜ በሁለተኛው ክስ በተጠቀሰው አዋጅ እና የብሔራዊ ባንክን ለማቋቋም በወጣው አዋጅ ቢተካም ይግባኝ ባይ በሁለቱም አዋጆች በሁለት ክስ ሊከሰሱ የቻሉት በመጀመሪያው ክስ ላይ የተጠቀሰውን ለባንኮችና መሰል የብድር ሕብረት ሥራ ማሕበራት የተሰጠን ሥራ የሰሩት አዋጅ ቁጥር 83/86 ሥራ ላይ በነበረበት ጊዜ ሆኖ ሁለተኛው ክስ ላይ የተጠቀሰውን በሕገወጥ መንገድ ብድርን ያለፈቃድ እንደሰራ መሥራት ወንጀል የሰሩት አዋጅ ቁጥር 259/2000 ሥራ ላይ ከዋለ በኋላ በመሆኑ ነው፡፡ ስለዚህም ወንጀሉ መፈጸሙ እስከ ተረጋገጠ ድረስ ሁለቱም አዋጅ ሥራ ላይ ለነበሩበት ጊዜ ተጠቅሰው ክስ መቅረቡ አግባብ ነው፡፡

በአዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ ላይስ ይግባኝ ባይን ጥፋተኛ የሚያደርግ እና የሚቀጣ አለ ወይ ወደሚለው ስንመለስ፤ የባንክ ሥራ እንደሰራ አድርጎ መሰራት በዚህኛውም አዋጅ ቢሆን ለባንኮችና መሰል የብድር ተቋማት የተሰጠ ነው፡፡ የባንክ ሥራ ምንድነው ለሚለውም የግድ የባንክ ሥራ የተባውን ሁሉ አጠቃሎ የመስራት ሥራ ጉዳይ ሳይሆን ከባንክ ሥራዎች አንዱ የሆነውን የብድር ሥራ በተደጋጋሚና ከፍ ባለ ገንዘብ እየተንቀሳቀሱ መሥራትን የሚያጠቃልል ነው፡፡ ምክንያቱም አነስተኛ የብድር ተቋማት የሚባሉትን ጨምሮ በዋነኛነት ስራቸውን ብድር አድርገው የሚሰሩት የብድር ተቋማት የሚሰሩት ስራም እንደስራ አድርገው እስከሰሩት ድረስ ስራቸው የባንክ ስራ ነውና፡፡ ይግባኝ ባይ በሁለተኛው ክስ ላይ የሰሩትስ የባንክ ስራ ነው ወይ ወይም ብድርን እንደአደራ አድርገው ሰርተዋል ወይ?ወደሚለው ስንመጣ መልሱ አዎ ነው፡፡ ምክንያቱም ይግባኝ ባይ በሁለተኛው ክስ ላይ የፈጸሙት ተግባር በአንደኛው ክስ ላይ የተገለጸውን የማስቀጠል ጉዳይ ነውና፡፡

ይግባኝ ባይ በአንደኛው ክስ ላይ በመቶ ሚሊዮን የሚቀጠር ገንዘብ በማንቀሳቀስ ያበደሩ ነበር፤ በሁለተኛው ክስ ላይ ደግሞ እንዲሁ በሚሊዮኖች የሚቆጠር ገንዘብ በተደጋጋሚ እንደሰራ ማበደራቸው የተረጋገጠ ነው፡፡ አዋጅ ቁጥር 592/2000 በመግቢያው ላይ የባንክ ሥራ በተገቢው ሥርዓት ያለመመራት በፋይናንስ ስርዓቱና በአጠቃላይ ኢኮኖሚው ላይ ጎጂ የሆነ ያለመረጋጋት የሚያስከትል ባህሪ እንዳለውና፤ በፋይናንስ ስርዓቱ እና በአጠቃላይ ኢኮኖሚው ላይ የሚደርሰው ያለመረጋጋት በሕዝብና በመንግሥት ላይ የሚያስከትለው ጉዳት በቀላሉ የሚገመት እንዳልሆነ በግልጽ ያስቀምጣል፡፡ በዚሁ አዋጅ አንቀጽ 2/2/ለ/ ላይ ተቀማጭ ገንዘቦችን በብድሮች ላይ ከባንክ ስራዎች አንዱ እንደሆነ በግልጽ ያስቀምጣል፡፡ ተቀማጭ ገንዘቦችን በብድሮች ላይ ማዋል ስንል ደግሞ ከላይ ለመግለጽ እንደሞከርኩት የብድር ሥራን እንደስራ መስራትን ማለቴ ነው፡፡ ይግባኝ ባይ ደግሞ ይህን ሲያደርጉት ነው የኖሩት፤ በሁለተኛው ክስ የሰሩትን ሥራ ይህንኑ በግልጽ የሚያሳይ ነው፡፡

ይግባኝ ባይ በሁለተኛው ክስ የተከሰሱበት አዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ ላይ በዚህ አዋጅ አንቀጽ 3/1/ ላይ የተደነገገውን የተላለፈ ማንኛውም ሰው የጥፋት ድርጊቱ ለቀጠለበት ለእያንዳንዱ ቀን በብር 20000 (ሃያ ሺ) የገንዘብ መቀጫ እና ከአሥር እስከ አሥራ አምስት አመት የሚደርስ ጽኑ እሥራት ይቀጣል ይላል፡፡ የአዋጁ አንቀጽ 3/1/ ደግሞ በብሔራዊ ባንክ የተሰጠ የባንክ ሥራ ፈቃድ ካልተያዘ በስተቀር በኢትዮጵያ ውስጥ የባንክ ሥራ ማካሄድ ክልክል ነው የሚለው፡፡ ስለዚህ ከብሔራዊ ባንክ ፈቃድም ሆነ ቁጥጥር ሳይደረግባቸው ይግባኝ ባይ ለሰሩት ለባንክና መሰል የፋይናንስ የአክሲዮን ማህበራት የተሰጠ የብድር ሥራ እንደስራ የመስራት ወንጀሎች ይግባኝ ባዩ አቶ አየለ ደበላ በአንደኛውም ሆነ በሁለተኛው ክሶች ጥፋተኛ ናቸው ስል የፈ/ከፍ/ፍ/ቤት በአንደኛው እና በሁለተኛው ክሶች ይግባኝ ባዩን ጥፋተኛ ማድረጉ የሚነቀፍ አይደለም በማለት ከአብላጫው በድምጽ /በሃሳብ/ ተለይቻለሁ፡፡

የማይነበብ የአንድ ዳኛ ፊርማ አለበት፡፡

Criminal Appeal File No.60324
Miazia 3, 2004 E.C.
Federal Supreme Court

Judges:

Dagne Melaku
Belachew Anshiso
Shimekit Assefa

Appellant - Ato Ayele Debella - Appeared with his Defense Attorney Ato Tamrou W/Agegnehu
Respondent --Ethiopian Revenue and Customs Authority, Prosecutor Ato Tesfa Mariam G/Tensa'e.

C/A/F/No.60793 that was lodged by the Respondent and heard independently is merged with this file and the court gave the following judgement.

Judgement - Part I[1]

The Appellant appealed against the decisions of the Federal High Court rendered on Ginbot 3, 2002 E.C. and Hamle 3, 2002, E.C., in which he was convicted and sentenced respectively, for committing the following crimes[2]:

- Counts No. 1&2 - Unlawful Engagement in banking business without having a license issued by the National Bank. It is alleged that he has contravened Arts. 59(1)(h) &(2) and 58(1) of Proclamations No. 83/1994 and 592/2008, respectively.[3]

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[1] Full volume of the judgement is 21 pages in Amharic. Given such a length, it is presented in two parts just for the sake of maintaining the average space in case reporting in the journal. Part One is presented here below and Part Two will appear in the next issue of this journal.

[2] The Appellant was charged under ten counts. Count One pertains to 'unlawful engagement in banking business', albeit, the alleged crime does not have a specific labelling either under the Penal or Criminal Codes or the relevant proclamations. Counts Two - Ten pertain to Usury, Tax Evasion and Money laundering. The judgement of the court on the former counts is reported under Part One and the remainder will be reported under Part Two.

[3] Monetary and Banking Proclamation N o.83/1994. Art.59(1)(h) reads as follows:
Whosoever, in any other manner violates or obstructs the implementation of this Proclamation or regulations and directives issued under this proclamation shall, without prejudice to the confiscation of the property with which the offence is committed be punishable in accordance with the Penal Code.
(2) - Notwithstanding the provisions of sub-article 1 if this Article,

- The Appellant is alleged to have lent over 104 Million Birr to over 80 borrowers.

The High Court convicted and sentenced him to 22 years of rigorous imprisonment, a fine of 308,000 Birr and the confiscation of 12, 000,000 Birr deposited in his bank account, one house and two cars, all belonging to him.[4]

Both parties have appealed from this judgement to this court. The present Respondant's points of appeal concern in the main, the leniency of the sentences and the failure to confiscate other properties belonging to the Appellant. The Appellant on his part has raised many points that challenge the High Court's ruling on conviction as well as sentencing.

This court, after having heard the parities' argument, has framed the following issues and decided as follows:

-Whether or not the Appellant has been rightly convicted for those crimes listed under count No.1&2.

The Appellant is arguing that: there is no law that criminalizes lending money to others or that confers the right to engage in banking business to banks alone , the charge does not mention the article of the law that is contravened, that no one can be convicted by analogy and that he is convicted wrongly.

This court has examined whether the act of repeated lending of money without having a license issued by [the National] Bank is a criminal act

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a) the punishment shall, without prejudice to the confiscation of the property with which the offence is committed , be imprisonment not exceeding fifteen years and fine not exceeding Birr 20,000 where the accused misused his power or his official position or where he committed the offence with intent to improperly amass wealth, or where the offence is committed repeatedly.

Banking Business Proclamation No.592/2008 – Art. 58 – Penalties

(1) Any person who contravenes the provision of Art.3(1) of this Proclamation shall be punished with a fine of Birr 20,000 in respect of each day on which the contravention continues and with a rigorous imprisonment from 10 to 15 years.

Art.3 – Requirement of Obtaining Licenses – (1) – it is prohibited to transact banking business in Ethiopia without obtaining a banking business license from the National Bank.

[4] These are the punishments that the lower court passed on all ten charges in aggregate.

under the law and whether there is any law that gives the prerogative to lend money to banks and other financial share companies alone.

It is stated that the money was lent [at different times] and the major borrower is EDH International PLC, - a business organization owned by family members - in which the Appellant is a shareholder. It is not mentioned whether the money was lent with or without interest.

Turning back to the major legal issue regarding the contracts of loan, Proclamation 83/1994 that was enacted to regulate banking and financial matters is repealed and replaced by Proclamation No. 591/2008 that was enacted to amend the legislation that established the National Bank. Then after, Proclamation No.592/2008 was enacted to regulate the banking sector alone. Art.26 (1) (d) of Proclamation No.591/2008 that repealed Proclamation No. 83/1994, contains penalties' provisions which are similar to Art.59(1)(h) of the latter and sub – article two has similar contents.

Proclamation No. 83/1994 that is cited in Count No. One was enacted to re-establish the National Bank and regulate its powers and duties, its relationship with insurance companies and similar financial institutions and the administration of Ethiopian national currency and foreign currencies, but not to regulate contracts of loan of money or loan [in general].

Art.2 (12) of this proclamation defines major terms that are contained in it. This article defines 'banking business' as follows: "Any operation involving the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidence of debt; receiving deposits of money and commercial paper; lending money ,and buying and selling of gold and silver bullion and foreign exchange."

It can be noted from the above that the term 'banking business' incorporates a variety of activities. Moreover, the definitions given to the term under Proclamations No.591&592/2008 are similar to those given under Proclamation No.83/1994. In all these legislation, there is no provision that regulates money lending or loan except for the fact that all provide that money lending is one of the objectives of banks. The law also does not give the sole prerogative to lend money to banks and other financial institutions alone, neither does it prohibit individuals to engage in such an activity without having licenses issued by [the National] Bank. [All the above cited proclamations] provide that the National Bank has the authority to issue licenses to banks and insurance companies and supervise their activities, but

they do not contain any provision that prohibit individuals from engaging in money lending without having such licenses or deny them the right to lend money contractually. Neither do the proclamations put, any prerequisite or limits on individuals who want to enter into such contracts.

The proclamations did not repeal Arts.2471-2489 of the Civil Code that regulate contracts of loan. [It can thus, be concluded that] loan contracts are lawful activities and individuals can lawfully engage in this activity. Under Ethiopian law, the prerogative to lend money is not solely given to banks and other financial institutions established through their respective articles of association. Thus, individuals can engage in this sector. [Furthermore,] apart from fixing the interest rate, the law does not put any limit on the amount of money to be loaned nor on the number to times that such contracts shall be repeated. Loan will be a crime only when it meets the elements of Art.712 of the Criminal Code that defines the crime of 'Usury'.

In the case at bar, under Count One, the Appellant was charged for contravening Art.59 (1) (h) & (2) of Proclamation No.83/1994. This court has examined the types of crimes enumerated in the proclamation, whether repeated lending of money without having license is a crime or not, and whether the proclamation's provisions can be interpreted in such a way that money lending can be taken to be a criminal act. Art.59 is found under Part Four of the proclamation that is entitled as 'Penalties'. The article enumerates criminal acts that can be committed within the scope of the proclamation. Those crimes listed under sub-article 1(a-g) and that can be committed within such a scope are provided in relation with specific activities covered in the proclamation. Count Two is based on Art.58 (1) of Proclamation No.592/2008 which provides for similar matters. Of all the provisions, it is sub art. 'h', that provides for general matters. [See, Foot Note 3]. [Nonetheless,] the Penal Code does not contain any provision that relates to what is provided under sub (h). As regards Count Two, Art.58 of Proclamation No.592/2008 provides for a specific penalty, by omitting the cross reference to the Criminal Code.

Art.59 (2) of Proclamation No.[83/1994] cited in Count Two, does not provide for an independent crime, but aggravating circumstances. [See, Foot Note 3].

Though the Prosecutor has charged the Appellant under Art.59(1)(h), it has failed to prove that he has in fact contravened or obstructed the provisions of the proclamation or regulations or directives issued to implement the same. [Moreover] let alone submitting those regulations or directives, it did not even cite these legal instruments in its charge. Thus, it cannot be concluded that the Appellant has obstructed the provisions of the proclamation. The fact

that he has lent money which is an act not criminalized under the proclamation cannot lead one to conclude that he has obstructed the provisions of the proclamation.

Article 58(1) of Proclamation No. 592/2008 under which the Appellant was charged provides for a crime to be committed in violation of Art.3 (1) which provides for the prohibition of engaging in banking business without having a license. The latter provision does not, however, require that individuals should have licenses to enter into contracts of money lending. As repeatedly stated above, the law nowhere prohibits the act of lending money on individual basis. It does not provide that lending money is the sole prerogative of banks, but just one of their activities. Thus the charge is pressed due to misinterpretation of the term 'banking business' and criminalizing an act which is not provided under the law, for there is no provision under the law that criminalizes the act of money lending on individual basis.

[It may be argued] that if individuals engage in such businesses on a regular basis, they may impinge on the performance of the banks by engaging in unfair competition, with further consequences on the economy and the financial flow. Nonetheless, there needs to be a law that makes such acts crimes. Thus, in the absence of a law that criminalizes the act of repeated money lending and in the absence of an express provision that requires individuals to have licenses issued by the National Bank in order to engage in such acts, the court cannot conclude that such acts are criminal by analogizing those grounds provided [under the provisions of the proclamations cited above.] The Criminal Code prohibits criminalizing acts that are not expressly provided under the law as well as creation of crimes by analogy.[5] Though these provisions do not prohibit interpretation, these are, however, basic principles.

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[5] Art.2 – Principle of Legality

(1) Criminal law specifies the various crimes and the penalties and measures applicable to criminals.

(2) The Court may not treat as a crime and punish any act or omission which is not prohibited by law.

The Court may not impose penalties or measures other than those prescribed by law.

(3) The court may not create crimes by analogy.

In the case at bar, a look at those acts proved to have been committed by the Appellant in relation with those acts criminalized under the proclamations evinces that they are not crimes. Thus, the Appellant is acquitted from those charges listed under Counts One and Two. The decision of the Federal High Court rendered on Ginbot 3, 2001 (E.C.) in Criminal File No. 82604 that convicted the Appellant on Counts One and Two is hereby reversed per Art.195 (2) (b) (1).

Dissenting Opinion

I, Judge Shimekit Assefa, - the third judge, - have dissented from the majority decision and here follows my dissenting opinions:

Under Count One, The Appellant was charged under Art.59 (1)(g) and (2) of Proclamation No.83/1994 for repeatedly engaging in unlawful money lending without having a license issued by the National Bank. It is shown that he has lent 102,405,244.94 Birr to over 80 borrowers and collected checks as collaterals for 25,665,166.00 Birr. According to the charge, this business is allowed for banks and similar financial institutions alone.

Appellant was also charged under Art.58 (1) of Proclamation No.592/2008 for repeatedly engaging in unlawful activities similar to those stated under Count One. He has lent Birr 2,100,000.00 through five written loan contracts.

It is true that the 1960 Civil Code of Ethiopia clearly provides for contracts of money lending between individuals as well as how such contracts should be regulated. Since people had been transacting in such activities for a long time and they are still practicing it, it does not demand to be a top notch lawyer to know this. When we come to the case at bar, however, we shall see below the position of the law regarding voluminous lending which are different from those normally transacted between ordinary individuals and exceptional when seen in light of the volume of money being transacted in such a manner in 1960 when the Civil Code was enacted. What do the two pieces of legislation cited above to charge the Appellant say about such voluminous lending that were not foreseen by the legislature back in 1960? It should be noted that the money was lent through over 80 contracts.

The preamble to Proclamation No.83/1994, states that:

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(4) The above provisions shall not prevent the Court from interpreting the law…..

"The accelerated growth and development of Ethiopia requires systematic mobilization and use of financial and monetary resources, and that it is necessary to lay the basis for a sound banking system which will foster the continued expansion of the economy of Ethiopia." Despite minor differences in wordings, the same principles are reflected in the proclamation cited to charge the Appellant in Count Two. It also defines the term 'banking businesses as "a business that consists of the discounting and negotiation of promissory notes , drafts, bills of exchange and other evidence of debt as well as the buying and selling of gold and silver bullion and foreign exchange. "

It is clearly provided under Art.2(4) of the proclamation that "other financial institutions" means institutions of savings, postal savings, credit cooperatives and other similar institutions engaged in any type of banking business. Art.41 also provides that the [National] Bank shall license and supervise banks, insurers and other financial institutions in accordance with the law.

When one notes the amount money transacted by the Appellant, its repetitiveness and the volume of money exchanged through bills of exchange, it will be tempting to conclude that he was engaged in this business as his basic occupation for which he allots much of his time. Moreover, the fact that he has transacted in hundreds of millions of Birr also shows that he was doing this business not in light of the provisions of the Civil Code and in accordance with the situations foreseen by the legislature of the code, but contrary to the legislation under which he was charged which demand that such voluminous transactions should be carried out under proper supervision and follow up. Nonetheless, I am of the opinion that he did all these improperly and without having license. The Civil Code provides for not only contract of loan or loan of money alone, but also for different types of contracts, such as contracts of sales or hire/rent, etc. It may be argued that just because an individual has sold an item or his own properties occasionally that he is not engaged in the business of selling and buying and that he is not required to have a license and meet all the criteria demanded of businessmen. Nonetheless, if such a person engages in this business as his basic occupation, he is required to have a license and put his business under proper supervision.

Just like in the case of contract of sales, if a person rents his house that he built to live in, or the rooms he constructs as a guest house for occasional visitors, because of financial problems, it may not be concluded that he is engaged in renting business as his basic occupation. Nonetheless, if he is renting hundreds or thousands of houses, it may be concluded that he has taken up this job as his basic occupation and that he should be required to

meet all the criteria required of others engaged in similar trades and this is a point that cannot be overseen. When we come to the case at bar, it is clear that lending or borrowing money are lawful contracts recognized under the Civil Code. Nonetheless, I am of the opinion that, when one lends money as his basic occupation, and in such high volumes, repetitively and through exchange of bills of exchange, he should meet the requirements laid down in relevant laws, for he is engaged in the business as his main occupation.

Financial resources should be mobilized in order to accelerate our country's economic development. In orders to mobilize financial and monetary resources, those that are engaged in this sector should have license issued by the National Bank and be supervised by the same. In principle, such a business should be transacted by banks and similar financial institutions. Any activity done outside of such a framework distorts the mobilization of the country's financial and monetary resources and hurts the economy and discourages those banks and other financial institutions from doing their business in the legal way.

The relevant articles of Proclamation No. 83/86 under which the Appellant was charged and convicted by the High Court mainly relate to crimes to be committed in relation with exchange of foreign currency. Art.59 (1)(h) provides that violation and obstruction of regulations and directives is a punishable act. I am of the opinion that the Appellant has contravened this provision. This is so, because, he has been engaged in banking business that is given to banks and other financial institutions, without having license and proper supervision as his basic occupation; causing the mobilization of financial and monetary resources outside of the legal framework; impinging on the activities of those banks and other financial institutions that are duly licensed and supervised by the National Bank, by soliciting/cajoling borrowers through middlemen and, therefore, doing unlawful acts.

I concur with the majority decision that for the purpose of punishment, Art.59 (1) (h) refers to the Penal Code. Nonetheless, the Appellant was also charged under sub-article 2(a). This sub-article provides for specific penalties. Had he been charged under the other articles alone, but not sub-art.2 (a), I would have been compelled to look for a relevant article from the Penal Code. Nonetheless, given the fact that the Appellant committed the crime with the intention to unlawfully amass profit, he has to be convicted for violating Art.59 (2) (a) and as this provision has provided for specific penalties he should have been punished by these penalties. This is so, because he has obstructed the implementation of the proclamation by improperly amassing wealth and this element is expressly provided under

the provision. Thus, a convict is punished not only when his acts are made punishable under the Penal Code, but also when such acts are criminalized under other laws/proclamations. [For all these reasons], the Appellant's contention that he was convicted for committing an act not criminalized under the Penal Code is not tenable.

The appellant was charged under two counts and two different proclamations for crimes committed at different times during their respective effective periods of implementation. Thus, there is no problem in this regard. When we come to the issue whether Proclamation No.592/2008 contains a provision that can help convict the Appellant, the answer is yes, for engaging in banking business as one's basic occupation is a prerogative given to/conferred upon banks and other financial institutions under this proclamation too, and the proclamation provides that banking business is not limited to doing all banking transactions, but extends to engaging in money lending repeatedly and in high volumes which is one of the varieties of banking business. This is so because, those institutions including credit associations, engaged in money lending do so as their basic field of occupation, and they are engaged in banking business. Regarding the acts done by the Appellant mentioned under Count Two, these were done as a continuation of those acts done under Count One. Thus, what he did, fall under the legal definition of banking business and he was engaged in these acts as his basic occupation.

It is proved that the Appellant has lent hundreds of millions of Birr in those acts mentioned under Count One and millions of Birr under Count Two repeatedly and taking this as his basic occupation. Proclamation No. 592/2008 expressly provides that "the business of banking has a number of attributes which, if not managed properly, has the potential to generate financial system and macroeconomic instability and the cost of financial system and macroeconomic instability to the general public and the Government is significant." Art.2 (2) of the same proclamation also provides that using funds for the purpose of lending money is one of the activities that falls under banking business. It is clear that the Appellant had been engaged in this as proved under both counts.

Art.58 (1) of Proclamation No. 592/2008 provides for punishments and per Art.3 (1) of the Proclamation, "It is prohibited to transact banking business in Ethiopia without obtaining a banking business license from the National Bank." Accordingly, the Appellant, who had been engaged in such a business which is conferred on banks and similar other financial institutions, without having a license issued by the National Bank and supervision by the

latter, should have been convicted on these counts. Thus, the decision of the Federal High Court should have been confirmed. For all these reasons, I have dissented from the majority decision.

Ineligible signature of a judge.

Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective

Hiruy Wubie*

1. Introduction

Terrorist attacks can affect almost all sets of rights in different contexts.[1] Not to mention terrorism's devastating impacts on various sets of human rights, the fact that it destroys 'freedom from fear' makes it clear that any terrorist act is inherently irreconcilable with human rights concerns.[2] The destruction of the freedom from fear of the targeted population is a common denominator for the multifaceted negative implications that terrorism has on a variety of human rights.[3] The international duty of states to protect human rights violations obliges them to take the necessary steps to prevent terrorism and punish its perpetrators. It is based on this broad premise that the legitimacy of effective counterterrorism measures rests. Legislative response is one of the modalities to prevent human rights violations arising from terrorism.

Based on the conviction to protect the right of the people to live in peace, freedom and security from the threat of terrorism,[4] the Ethiopian parliament adopted the Anti-Terrorism Proclamation. The legislative organ was also concerned to avoid or minimize the damaging consequences of counter-

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[1] Progress Report submitted by the Special Rapporteur on Terrorism and Human Rights, UN DOC E/CN.N/Sub.2/2001/31 par. 102

[2] Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, p. 7.

[3] This is discernable from the wordings of the two leading human rights Covenants, i.e. the ICCPR and ICESCR, while mentioning the 'freedom from fear' in their preambles. For example, paragraph 4 of the ICCPR reads as "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and **freedom from fear** (emphasis added) can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." We can plausibly infer from these wordings that 'freedom from fear' is not even just a mere right but the ideal goal that could be reached upon respecting each set of rights. By affecting this ideal goal, terrorism endangers the whole body of human rights recognized in the two covenants.

[4] Anti-Terrorism Proclamation, Proc. No. 652/2009, Federal Negarit Gazeta, 15th Year No. 57, (hereinafter cited as the Anti-Terrorism Proclamation), Preamble, para. 1.

terrorism measures meant to be addressed by the Proclamation. That is why the aspiration to balance individual liberty and public security is stated as one of the objectives of Ethiopia's anti-terrorism law.[5]

The major objective of this research is to explain the positive and negative implications of the law from a human rights point of view and assess its compatibility with the Ethiopian constitution. In view of this objective, it makes a positivist legal analysis regarding the human rights friendliness or otherwise of the anti-terrorism law. Moreover, it makes use of interviews with pertinent professionals so as to show the various arguments stated in this paper.

The human rights friendliness or otherwise of any law could not be determined by a mere exploration of the law. It also depends on the way the law is applied in practice. This is more pertinent in case of laws which, in many jurisdictions, are prone to abuse due to political reasons of which anti-terror laws are worth mentioning. The case of Ethiopia's anti-terrorism law is no exception in this regard. There are contending arguments expressed in various state owned[6] and private media[7] about the human rights friendliness

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[5] A document that explains Ethiopia's draft anti-terrorism proclamation, an unpublished document in the Library of the Ethiopian Parliament (Original document in Amharic, Translation mine), p.13.

[6] See for example, Zemen Megazine (State Owned), Ethiopian Press Organization, July 2011 issue, See also, Ethiopian State Television Special Program about Anti-Terrorism in Ethiopia named 'Akeldama' broadcasted on the 27th of November 2011, See also, Ethiopian Television News, September 17,2011. A number of terrorist suspects, of which there are political activists and journalists, are detained as per the anti-terrorism law. The major theme of most of these and other media releases by state owned medias is an explanation that the anti terrorism law is being implemented in a human rights friendly manner without bypassing fundamental rights and freedoms of terrorist suspects and preventing human rights violations which could have been materialized had the allegedly planned terrorist acts been committed.

[7] See for example, Fethe Amharic News Paper, Issues 163-186, September 2011- May, 2012, See also, Anita Powell, *Ethiopia Reporter Flees, Other Opposition Arrested*, Associated Press, as accessed on September 15, 2011, See also, Haile Mulu and Yemane Negash, The Counter-terrorism Campaign Terrifying the Opposition, The Reporter, Amharic News paper (translation mine), Wednesday 7th September 2011. Most articles in the private press media tend to have a position that the anti-terrorism law is being unduly utilized by the government to silence political opposition and there are also allegations of violations of the rights of terrorist suspects.

or otherwise of the practice in proscribing and prosecuting suspects of terrorism charges. This research does not dare to explore the practical aspects of the anti-terrorism law from a human rights perspective. It is believed that a combined study of the law and the practice is a broad area worth being explored in a wider separate research for which this study, along with others, could serve as a basis.

This article begins with elucidating justified limitations and suspensions on human rights while countering terrorism contending that should a state need to counter terrorism for the sake of human rights, it shall do so within the bounds of the limitation and derogations recognized by the Ethiopian constitution and human rights instruments to which Ethiopia is a party. Then it goes on elucidating the positive and negative impacts of Ethiopia's anti-terrorism law from a human rights perspective and wraps up with recommendations for the adoption of necessary amendments.

2. Justified Limits on Human Rights While Countering Terrorism

There seems to exist a widespread attitude that terrorism justifies partial neglect to human rights concerns in order to curb the danger that it poses to the society at large.[8] National security concerns have long been challenges on human rights protection. Not few states often view human rights as a competing interest with or an interest that compromises national security.[9] This kind of understanding is so devastating and groundless that it contradicts the very evolution of the notion of human rights. By now, it has just become a common knowledge that international human rights standards came after the untold miseries of World War II to serve as guarantees for the continuation of the human race from the then and forthcoming insecurities. Hence, nothing can justify the position that the exercise of human rights

[8] See for example, John Ip., *Comparative Perspectives on the Detention of Terrorist Suspects*, Transnational Law and Contemporary Problems, Vol.16, 2006-2007. See also, M. Shamsul Haque, *Government Responses to Terrorism: Critical Views of their Impacts on People and Public Administration*, Public Administration Review, Vol.62, Special Issue: Democratic Governance in the Aftermath of Sep. 11,2001, 2002.

[9] See for example, William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 Harvard Human Rights Journal, 2004, p. 251. It is further stated that "promoting human rights has long been viewed as a luxury, to be perused when the government has spare diplomatic capacity and national security is not being jeopardized." See also, Jacob R. Lily, *National Security at What Price?: A Look into Civil Liberty Concerns in the Information Age under the USA Patriot Act of 2001 and a Proposed Constitutional Test for Future Legislation*, Cornell Journal of Law and Public Policy, Vol. 12, 2002-2003,pp. 448-471. Jacob's article gives a detailed analysis based on historical evidences showing how national security claims erode civil liberties especially in times of crisis and instability.

might affect national security. In fact, it furthers national security interests.[10] In this section, we will see the justified limits on human rights while combating terrorism.

To begin with, it is not acceptable to consider human rights protection as something that is incompatible with the process of countering terrorism. In fact, it has been rightly contended that *'effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of states' duty to protect individuals within their jurisdiction.'*[11] Counterterrorism has to reconcile the necessity of combating terrorism with the constitutional, legal and ethical demands of a democratic state.[12]

Counterterrorism is a manifestation of state's duty to protect human rights. But, it is often used as a pretext for human rights violations.[13] It is not an easy task to identify when it has ceased to be a protection scheme and began to unduly sabotage human rights. This section aims at avoiding the dilemma [14] in this regard. While commenting on justified incursions on human rights in countering terrorism, Emanuel Gross contends that *'we must refrain from clinging to the false illusion that in situations of serious and imminent terrorism threats it is possible to protect the individual's privacy as if that individual were living in a utopian state of peace and tranquility.'*[15] It is not wise to think that things should remain the same even with serious and imminent problems posed by terrorism. Something has to be done to address terrorist threats

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[10] This does not mean that the interests of national security and human rights protection do always coincide. In such cases, international human rights has its own way to deal with the scenario. We have the notions of restrictions and derogations. When one speaks of human rights standards, it is always understood that we have this schemes in place. A national security claim to intrude human rights protection is at all times baseless if it tries to use means other than the ones already built within the international human rights architecture.

[11] U.N. Fact sheet No 32, Supra note 3 at 23.

[12] Gregory M. Scott et al, *21 Debated Issues in World Politics*, Pearson Education Inc., 2004, p.152

[13] See infra, forthcoming discussions for the details.

[14] See, Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh University Press, 2005, p. 2. Michael Ignatieff shows this dilemma saying that *"when democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, deception, secrecy and violation of rights."*

[15] Emanuel Gross, *The Struggle of A Democracy Against Terrorism – Protection of Human Rights : The Right to Privacy Versus the National Interest – the Proper Balance*, Cornell International Law Journal, Vol.37,2004, p.88.

without transgressing international human rights standards.

International human rights law has its own schemes that could be used in times when it is not possible to protect human rights in a manner similar with ordinary times. Hence, there are flexibilities built into the international human rights legal framework.[16] These are restrictions on certain rights and in a very limited set of exceptional circumstances and derogations from certain human rights provisions.[17] Both have to be managed in a way that goes along with international human rights standards. They are not allowed to be put-in-place at all times and in all places in a similar magnitude. Restrictions are often justified by the protection of others whereas derogations are just *'lesser evils'* that a democracy may commit when it genuinely believes that it faces the greater evil of its own destruction.[18] Whether the limits of counterterrorism measures on human rights are justified or not has to be seen from this perspective.

One major feature that distinguishes restriction and derogation is the former may be perpetually applied provided that legal requirements are met, whereas derogations are seasonal suspension of the exercise of some rights which will be withdrawn once the exigencies requiring the same are dealt with. The other basic difference is that derogations are put in place only in emergency situations while restrictions are applied both in normal and emergency situations.[19] These fundamental differences are also discernable from the Ethiopian constitution which incorporates perpetual restrictions on almost all rights whereas it ordains that derogations shall only temporarily suspend or limit[20] some rights in situations of public emergency proclaimed by law.

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[16] U.N. Fact sheet No 32, Supra note 3 at 23.

[17] Ibid

[18] Michael Ignatieff , Supra note 15 at 2.

[19] See, Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, Mizan Law Review, Volume 3, Number 2, page 314. Tsegaye explained the major difference between restrictions, suspensions and derogations in the following manner. "Restrictions circumscribe the manner, or place, and the extent to which rights can be enjoyed or exercised in a particular set of circumstances, often in normal times. Suspension leads to temporary non-application of one or more rights because of an unusual difficulty in which a state finds itself. Derogation refers to the possibility of acting in a manner deviating from the accepted standards of behavior vis-à-vis rights. It entails acting like there are no human rights at all. The latter two come into play in extra-normal situations."

[20] Derogations may require suspension of some rights during the emergency period or the limitation of the rights in a manner much wider and different from ordinary limitations put in place by way of restrictions for normal times.

Restrictions on rights are built into human rights instruments. In fact, the restrictions of one's right might be the rights of the other. Hence, a number of rights, as recognized in the various international human rights instruments, are not free from restrictions. There are, however, other rights that can in no way be restricted. Though it is not the object of this paper to make thorough discussions on this issue, it seems imperative to mention some rights just as examples. From among the rights that might be restricted for a genuine reason is the right to liberty and security of the person. The International Covenant on Civil and Political Rights (ICCPR) ordains that there are legitimate instances of restrictions that may be imposed on the right to liberty and security of the person.[21] On the contrary, there are rights that cannot be restricted. A prominent right of such nature is the right not to be subjected to torture.[22] States may not restrict the exercise of rights whose restriction is not permissible whereas they may put restrictions on the rights falling in the list of rights upon which restrictions are permissible.

While imposing restrictions on the limitable rights, states have to make sure that their measures go-in-line with the requirements of international human rights law standards. Limitations, if they are to come, must be prescribed by law, in the pursuance of a legitimate purpose, and must be necessary and proportional.[23] Not to go to the details, a limitation or restriction on human rights for counterterrorism purposes is legitimate only if it fulfils the requirements. As Richard A. Posner explains it well, the scope of a right must be calibrated by reference to the interests that support and oppose it.[24] A limitation's legitimacy in specific cases can better be judged on a case by case basis. However, it shall always be borne in mind that a democracy shall

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[21] See generally, The International Covenant on Civil and Political Rights, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A(XXI) of December 1966, entry into force 23 March 1976, art. 9(1)-(5).

[22] See, Id. art. 7. It reads as *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."* The consent requirement does not relate to torture in general but only to the specific case of medical or scientific experimentation.

[23] See, Human Rights Committee, General Comment No. 31 Para. 6 and, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa principles on the Limitation and Derogation of provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

[24] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Oxford University Press, 2006, P. 31. Richard A. Posner further contends that the scope of a constitutional right has to keep changing as the relative weights of liberty and safety change. Id. P.40.

always have a perpetual optimal balance between security and liberty with a view to ensure that anti-terror laws do not unduly bypass the domain of rights under the guise of legitimate restrictions.

Derogations from certain set of rights are permissible so long as the requirements of human rights law are fulfilled. In periods of extreme exigencies, states may derogate from their duties in international human rights law so as to respond to the needs of the circumstances.[25] This is dictated by necessity. The fact that democracy is not only concerned with the rights of the individual but also equally committed to the security of the majority[26] justifies derogations in such situations. Nevertheless, derogations themselves are limited by law and have to fulfill stringent requirements stated in international human rights instruments to which Ethiopia is a party.[27] The discussion about derogations should not be understood to mean that terrorism is like temporary exigencies often dealt with through derogations. Terrorism is no more temporary. But still temporary situations caused by terrorism may require temporary measures. In short, nothing other than perpetual balancing between rights and security through restrictions and/or temporary derogations for exceptional exigencies can be justified in human rights standards.

True, counter-terrorism measures have to be taken by states so as to prevent

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[25] See, Supra note 18 art. 4. The ICCPR ordains that

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

[26] Michael Ignatieff , Supra note 15 at 8.

[27] See, Supra note 18, Art. 4(2) of the ICCPR provides a list of non derogable rights and other stringent requirements that have to be fulfilled so that a state can justifiably apply derogations. .

and prosecute human rights violations caused by terrorist acts.[28] However, as a manifestation of state duty for human rights protection, counterterrorism measures shall always be loyal to human rights. Failure in this regard is nothing but self-refuting with the promised goal of such measures. Hence, a counterterrorism measure that suspends or restricts the application of human rights and fundamental freedoms has to be exercised within the bounds of the international human rights standards.[29] Whether a counterterrorism campaign's negative impacts on human rights are irreconcilable with international human rights or not depends on an evaluation of whether they fall within the restriction/derogation formula of the human rights instruments. Any negative impact of a counterterrorism measure that falls out of the ambit of the aforementioned lesser evil exceptions is, irrespective of any diplomatic words that anyone might use to justify it, is a clear violation of human rights that should not be tolerated. The various negative human rights implications of the Ethiopian anti-terrorism law have to be seen in this context.

3. The Impacts of the Anti-Terrorism Proclamation on Human Rights Protection

In the essence of effective counterterrorism laws lies the need to strike a balance between securing protection of human rights from abusive terrorist attacks and ensuring that the responses thereto do not bypass recognized human rights standards. The aspiration to balance individual liberty and public security is stated as one of the objectives of Ethiopia's anti-terrorism law.[30] Despite this pronounced ambition of the lawmaker, the law has both positive and negative impacts on human rights protection. The overall

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[28] Jonathan Cooper, *Countering Terrorism, Protecting Human Rights: A Manual*, Office for Democratic Institutions and Human Rights, OSCE/ODIHR, 2007, P.15. The duty of states is stated in the following manner *'international and regional human rights law makes clear that states have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of states to protect individuals under their jurisdiction against interference in the enjoyment of human rights. More specifically, this duty is recognized as part of states' obligations to ensure respect for the right to life and the right to security.'*

[29] See for example, David Dyzenhaus, *Schmitt V. Dicey: Are States of Emergency Inside or Outside the Legal Order?* , Cardozo Law Review, Vol. 27, No. 5, March 2006, pp. 2005-2039. To stress on the indispensability of using state of emergency with due care, it has been noted that a state of emergency is brought into being by law and has to be exercised only within the limits of the law.

[30] Explanation on Ethiopia's draft anti-terrorism proclamation, (unpublished document in the Library of the Ethiopian Parliament. Original document in Amharic, Translation mine), p.13.

impact of the Proclamation on human rights protection is, therefore, a cumulative effect of the opportunities it provides and the challenges it poses.

3.1 The Strongholds of the Proclamation for Human Rights Protection

The anti-terrorism Proclamation has positive roles to play for the betterment of human rights protection. This article identified three positive sides in this regard. Of these three, the first one refers to the overall impact of a separate anti-terrorism legislation for a better efficacy of counterterrorism measures while the latter two are its specific features that could be seen as positive measures from the perspective of Ethiopian ordinary criminal law and procedure.

3.1.1 It is a Manifestation of State Duty to Protect the Rights of Citizens

Terrorism has far-reaching direct and indirect harmful consequences on human rights protection. In response to this challenge, states have a right and a duty to prevent and control terrorism. This is not a novel duty but a manifestation of the duty imposed on states in the various international human rights covenants. As an acceding state to major human rights treaties such as the ICCPR and ICESCR, Ethiopia has the duty to prevent the violations of human rights irrespective of their sources. The Vice Chairperson of the Legal and Administrative Affairs Standing Committee of the Ethiopian Parliament, Ato Hailu Mehari, affirms that the determination to protect human rights from violations emanating from terrorism was the prominent reason why the law was enacted.[31] It seems obvious to say that terrorism poses a serious challenge to human rights protection that a state party to human rights covenants has to respond to.

Ethiopia has real threats of terrorism.[32] With this background, it would be a mistake if the government fails to take positive measures that can minimize the risk of human rights violations emanating from terrorist acts or threats thereto. In line with this, the anti-terrorism Proclamation is meant to provide the government with the necessary legislative and administrative framework

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[31] Interview with, Ato Hailu Mehari, Vice Chairperson of the Legal and Administrative Affairs Standing Committee of the House of Peoples' Representatives, on 7 December 2009.

[32] Mehari Taddele Maru, *The Threat of Terrorism and its Regional Manifestations*, A Paper Presented for the Counter-Terrorism International Conference, Riyadh, February 5-8, 2005, p. 16. See also, Charles Goredema and Anneli Botha, *African Commitments to Combating Organized Crime and Terrorism: A Review of Eight NEPAD Countries*, African Human Security Initiative, 2004, pp. 64-69.

geared towards preventing and controlling terrorism.[33] Needless to explain, this is a step ahead to prevent violations of human rights.

A research conducted before the Proclamation's enactment identified that the Ethiopian judiciary, public prosecutor and police did not have the requisite human and material competence to investigate and prosecute terrorism cases.[34] Given the complexity of terrorism cases and their organized character, it is imperative that the justice system has to build its capacity to effectively deal with such cases. An incompetent justice system cannot be expected to effectively prosecute terrorism cases; nor can it be expected to avoid human rights violations in the course of investigation and prosecution. If, for example, the police are not equipped with modern methods of investigation, it is more likely that they may resort to inhuman and degrading treatments of suspects of terrorism or even witnesses thereof. The enactment of the Proclamation might be a deriving force for the government to enhance the capacity of the various actors in cases of terrorism.[35] Though some of the provisions have negative implications on human rights protection in themselves[36], the Proclamation creates state capacity to deal with terrorism cases with increased efficiency.

The following are the noteworthy areas that depict the Proclamation's role in increasing state capacity to effectively deal with terrorism related cases. It prohibits incitement to terrorism[37] wider than what is provided in ordinary

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[33] See, Supra note 5, The Anti-Terrorism Proclamation, Preamble, para. 3.

[34] Hashim Tewfik (Ph.D), *Judicial Capacity to Counter Terrorism in Ethiopia*, May 14, 2007, Addis Ababa, Ethiopia, Unpublished paper at 42-52.

[35] Cf. Interview with Ato Mulugeta Ayalew, the Federal Ministry of Justice, Deputy Assistant General Attorney. Former Head Justice Bureau Head of Amhara Regional State, on 18 December 2009. Ato Mulugeta said that since the anti-terrorism law provides guidelines on the competence of prosecutors who can handle terrorism cases, capacity problems might be resolved accordingly. See also, Interview with Commander Muluwork Gebre, Federal Police Commission, Anti-Terrorism and Organized Crimes Directorate Director, on 31 December 2009, Commander Muluwork Gebre contends that the proclamation assists the Federal Police Commission in furthering its mandate to prevent and punish terrorism. See also, Interview with Ato Demoze Mammie, Ethiopian Human Rights Commission, [the then] Deputy Chief Commissioner, on 21 December 2009. Ato Demoze said that though the Commission has done nothing so far, they have plans to create public awareness on the law. This might play a part in solving capacity and attitudinal problems.

[36] See infra, discussions in the next section of this paper on the challenges of the proclamation on human rights protection.

[37] Supra note 5, The Anti-Terrorism Proclamation, Art. 6.

criminal cases. It has to be borne in mind that incitement to terrorism mainly through the media may lead to world's most heinous atrocities, as it did in many parts of the world in different periods of history. With this background in view, leaving aside the debates on the permissibility or otherwise of the Proclamation's extent of prohibiting encouragement of terrorism for further discussions, the prohibition of incitement to terrorism plays a vital role in minimizing the possible occurrence of terrorism cases.

The preventive and investigative measures provided in the Proclamation[38] such as protection of individuals exposed to terrorist attacks and other preventive measures provided for in the law have a positive role to play in enhancing the capacity of the government to prevent terrorist acts ahead of their commission. In relation to this, the coordinated institutional operations of the concerned stake holders that the Proclamation envisages[39] is also very important in increasing the efficacy of the country's counter-terrorism measures and thereby contribute positively for human rights protection that would have been resulted from preventable terrorist acts. The provision of the Proclamation on protection of witnesses[40] also assists in the process of prosecuting perpetrators, which is one among the remedies that a state can afford to victims of human rights violations in terrorism cases. In most cases, terrorist crimes are perpetrated in group. Hence, in the absence of protection schemes for witnesses, it may be a pious wish to find someone ready to testify against a suspected terrorist.

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[38] Id. Arts. 13-22.

[39] Id. Arts. 28-30.

[40] Id. Art. 32 Protection of Witnesses

1. Where the court, on its own motion or on an application made by the public prosecutor or by the witness, is satisfied that the life of such witness is in danger, it may take the necessary measure to enable the withholding of the name and identity of the witness. The measures it takes may in particular, include:
    a. holding of the proceedings at a place to be decided by the court;
    b. avoiding of the mention of the names and addresses of the witnesses in its orders, judgments and in the records of the case;
    c. issuing of any directions for securing that the identities and addresses of the witnesses are not disclosed; and
    d. ordering that all or any of the proceedings pending before the court shall not be published or disseminated in any manner.
2. Any person who contravenes any decision or order issued under sub-article (1) of this Article shall be punishable with rigorous imprisonment from five to ten years and with fine from Birr 10,000 to Birr 30,000.

The terrorist groups' proscription process envisaged in the Proclamation is not free from critics. However, setting this aside for a latter discussion, the fact that the law aspires to control and outlaw terrorist organizations is a prominent means to combat terrorism and hence prevent human rights violations which they could have caused. Jonathan Cooper contends that "*one way of combating terrorism is to outlaw organizations that promote or foster it. By controlling these organizations, whether by confiscating their finances and other resources, or curbing their publicity, it may be possible to minimize and control the threat of terrorism.*"[41] As could be seen from the readings of the pertinent provisions of the anti-terrorism Proclamation regarding proscription,[42] the Proclamation plays a vital role to prevent terrorism by outlawing terrorist organizations and freezing their property.

Starting from its preamble, the anti-terror proclamation pronounces the aspiration of the Ethiopian government to prevent and control terrorism. The fact that terrorism is prevented and controlled is of a decided role in preventing human rights violations, which are the natural consequences of the occurrence of terrorism. This, however, should in no way be abused so as to justify or excuse impermissible limits on human rights under the guise of protecting human rights from terrorism.

3.1.2 It Provides a Scheme of Compensation for Victims of Terrorism

It has been established that terrorism is a serious violation of various human rights, such as the right to life, bodily integrity, freedom of movement, etc. and the state has a duty to protect the victims from the long lasting effects of the violations of rights. The ICCPR ordains that states have an international obligation to ensure that any person whose rights or freedoms as recognized in the covenant are violated shall have an effective remedy.[43] The mere fact that the perpetrators of the violation of the rights are prosecuted for the offence committed can in no way qualify to be referred to as an effective remedy which the ICCPR envisages. Payment of compensation for victims of human rights violations is a notion that is gaining prominence especially in contemporary human rights activism.[44] Hence, compensation in kind or monetary terms has to be implemented to pursue for an effective remedy.

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[41] Jonathan Cooper, Supra note 29, at 216.

[42] See infra, discussions in 3.2.2 on issues related to proscription. The pertinent provisions of the proclamation are reproduced therein.

[43] The International Covenant on Civil and Political Rights, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A(XXI) of December 1966, entry into force 23 March 1976, Art. 2(3) (a).

[44] See generally, Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System,*

The Ethiopian Anti-terrorism law has a praiseworthy stand on the issue of compensation for victims of human rights violations arising from terrorism. The Proclamation ordains that proceeds of terrorism[45] or property[46] of a terrorist organization or a terrorist shall be forfeited by the government and shall eventually be transferred to the terrorism victims fund to be established in accordance with it.[47] This is a positive measure to remedy human rights violations and consequently for human rights protection in general.

It could be argued that the compensation of victims of crimes are not unique characters of the Anti-Terrorism Proclamation within the Ethiopian criminal justice system. True it is; the Criminal Code of Ethiopia envisages a possibility whereby victims of crimes may be entitled to compensation for damages.[48] Although the Code visualizes an alternative to make the compensation payable from the proceeds of the crime and other sources,[49] the payment of compensation in the Criminal Code principally depends on the capacity of perpetrator to make the damage good. The anti-terrorism law, on the other hand, comes up with a scheme whereby all proceeds of terrorism or property of a terrorist organization or a terrorist shall be consolidated into the Terrorism Victims' Fund. This is a prudent solution to guard the interests

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Vanderbilt Law Review, Vol. 57, 2004, pp. 2211-2238. See also, Elke Schwager, *The Right to Compensation for Victims of an Armed Conflict*, Chinese Journal of International Law, Vol. 4, No. 2, 2005, pp. 417-439, See also, Catherine E. Sweetser, *Providing Effective Remedies to Victims of Abuse by Peace Keeping Personnel*, New York University Law Review, Vol. 83, 2008, pp. 1643-1677.

[45] Supra note 5, The Anti-Terrorism Proclamation, Art. 2(2) "Proceeds of Terrorism" means any property, including cash, derived or obtained from property traceable to a terrorist act, irrespective of a person in whose name such proceeds are standing or in whose possession or control they are found.

[46] Id. Art. 2(1) "Property" means any asset whether corporeal or incorporeal or movable or immovable, and includes deeds and instruments evidencing title to or interest in such asset such as bank accounts.

[47] Id. Art. Art. 27(1) and (4).

[48] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Art. 101. It is provided that where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation.

[49] Id. Art. 102(1). It is provided that where it appears that compensation will not be paid by the criminal or those liable on his behalf on account of the circumstances of the case or their situation, the court may order that the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or a part of the fine or of the yield of the conversion into work, or confiscated property be paid to the injured party.

of victims whose perpetrators have no sufficient fund to make good the damage suffered. This makes the law of vital importance in ensuring the remedies for the victims of violations of human rights arising from terrorism cases.

The Proclamation, however, has postponed the establishment of the Terrorism Victims Fund until the Council of Ministers, which is empowered to issue regulations necessary for the implementation of the Proclamation,[50] issues a regulation on the matter.[51] So far, the Council of Ministers has not issued the anticipated regulation. It has to be reckoned that the Council shall take the matter seriously and issue the regulation as soon as possible. Failure in this respect might be a challenge on the state's duty to ensure an effective remedy to victims of terrorism and curtail the positive role of the Proclamation for human rights protection.

3.1.3 It Fixes the Maximum Period to Remand Suspects for Investigation

Undeniable as it is, the Proclamation's stipulation[52] that a terrorist suspect might be detained for four months without a criminal charge for the purpose of investigation is not perfectly compatible with international human rights standards. The ICCPR unequivocally provides that *"any one who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."*[53] As a state party to the ICCPR, Ethiopia has the duty to enforce this provision. One may say, it does not seem reasonable to argue that a four months period after detention, which actually is the maximum period possible for detention without charge, is as prompt as what the ICCPR demands.

However, when seen from Ethiopia's perspective, the fact that the Proclamation fixes the maximum period to remand a suspect of a terrorist crime for further investigation is a praiseworthy feature of the law[54] for the

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[50] Supra note 5, The Anti-Terrorism Proclamation, Art. 37.

[51] Id. Art. 34.

[52] See infra, the provision of the proclamation in later discussions of 3.2.6.

[53] Supra note 22, ICCPR, Art. 9(2). See also, Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Federal Negarit Gazeta, Year 1, No. 1 (hereinafter referred to as the FDRE Constitution), Art. 19(1).

[54] See also, The Minutes of Public Discussions made by the Legal and Administrative, Foreign, Defense and Security Affairs Standing Committees of the Ethiopian Federal Parliament with Concerned Stake Holders, 24 June 2009, p. 7. Unpublished Document located in the Documentation Center of the Ethiopian Federal Parliament, original document in Amharic, Translation mine.

betterment of human rights protection. The four months maximum period of remand might, albeit arguably[55], be considered to be inconsistent with the required promptness to inform the arrested person of the charges.

I argue that the Proclamation's positive aspect in cases of remand has to be subjectively considered within the domain of the Ethiopian criminal justice system. The hitherto applicable provision of the Criminal Procedure Code of Ethiopia in remand cases has been subject to criticism as it failed to fix the maximum period within which the police have to finalize investigation. It simply demands that *"No remand shall be granted for more than fourteen days on each occasion"*[56] without saying anything about the maximum period as of which the court shall deny remand of the case for investigation. Hence, in cases covered by the ordinary criminal procedure, detention without a charge has no legally recognized limits and there have been cases whereon suspects were detained even for years without a charge.[57]

The Proclamation made a commendable change[58] in cases of remand that has positive roles for the betterment of the human rights protection of terrorist

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[55] The reason for disagreements in this respect could be the fact that the ICCPR only says the arrested person charge has to be 'promptly' informed of the charge without determining the time frame thereto. The fact that the Human Rights Committee of the ICCPR said *"delays must not exceed a few days"* as mentioned in paragraph two of *General Comment No. 08: Right to liberty and security of persons (Art. 9) : . 06/30/1982.* can only serve to strengthen the allegation that the proclamation allows four months pretrial detention is against the guarantee of promptness required by the ICCPR. It can not be a legal basis to say that the four months period necessarily bypasses the guarantee provided by the international covenant since this interpretation is not a binding one and the ICCPR does not clearly spell the time frame that makes a pre-trial detention a violation.

[56] The Criminal Procedure Code Proclamation 1961, Imperial Ethiopian Government Proclamation No. 185 of 1961, Negarit Gazeta, Art. 59(3).

[57] See for example, Interview with Ato Aderajew Teklu, a former public prosecutor in North Gondar Zone of the Amhara Regional State, on 14 and 16 December 2009. See also, Interview with Ato Yirdaw Abebe, formerly a Public Prosecutor in North Gondar Zone of the Amhara Regional State and currently a Public Prosecutor of the Region's Anti-Corruption Commission, December 3 2009. Both of them experienced many cases of detention without charge, even for more than a year.

[58] As it has been stated above, it has to be reckoned that this positive contribution made by the Proclamation is labeled as such but by taking a subjective consideration up on comparing it with the ordinary criminal procedure that applies in other cases in Ethiopia. This author believes that, in objective standards, the four months remand period is 'unacceptably' longer and might be considered to have bypassed Article 9(2) of the ICCPR. However, in a legal system where there is no legally stipulated clear limitation of the period of pre-trial detention and where practices show unduly

suspects. It provides that the Court, before which a suspected terrorist is presented, may remand the suspect for investigation for a minimum of twenty eight days in each occasion; provided, however, that the total time shall not exceed a period of four months.[59] This legal stipulation minimizes the possibility whereby terrorist suspects might be subjected to an indefinite pre-trial detention[60] that inevitably affects the rights of the suspect.

3.2 The Downsides of the Proclamation from the Perspective of Human Rights Protection

The Anti-Terrorism Proclamation of Ethiopia has been a subject of controversy from its draft stage to its entry into force. International human rights organizations, such as Amnesty International and Human Rights Watch, opposition political party leaders and the private media have been, and still are, expressing their worries about the Proclamation. The opposing voices differ from case to case.[61] It is not the objective of this section of the article to ponder on all concerns of the opposing voices. It is rather limited to exploring the challenges the law, as is, poses to human rights protection. With this objective in view, we will evaluate the provisions of the Proclamation that, in one way or another, have harmful effects on human rights protection.

While exploring the Proclamation's negative impacts on the various rights recognized in international human rights covenants, mainly the ICCPR, and the Ethiopian Constitution, this article does not favor to treat each and every right in its own. It is believed that this is not appropriate to assess the Proclamation's compatibility with holistic human rights standards. Hence, it is opted that the article explores the negative impacts of the provisions of the Proclamation by taking the most important ones that have cross-cutting

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excessive pre-trial detentions, the fixed four month period for terrorism cases is better than 'other' cases if not perfectly in line with international human rights standards. I believe that, in choice of evils situation, the lesser evil is always the better.

[59] Supra note 5, The Anti-Terrorism Proclamation, Art. 20(1) and (3).

[60] We have indefinite pre-trial detention in other cases covered by the ordinary criminal procedure laws of Ethiopia since there is no a time-bound limitation for maximum periods of remand.

[61] See for example, a news paper article by Harego Bensa, *Government has Grand Duty of Protecting its Peoples from Terrorism*, The Reporter, Published Weekly by Media and Communications Center, Saturday 11 July, 2009. During discussions on the law in its draft stage, one opposition political party leader has been quoted referring "the draft bill as terrifying as terrorism itself".

implications in human rights protection at large. However, specific reference would be made in case of rights more directly affected by the proclamation.

3.2.1 Unwarrantedly Broad and Vague Definition of Terrorism

Defining terrorism is a controversial subject matter both at local and international levels.[62] It has been estimated that there are well over 100 different definitions of terrorism in the scholarly literature.[63] This mainly stems from political and ideological differences.[64] While commenting on the use of the terms 'terrorists' and 'terrorist acts', Ben Saul argued that they are open to widely differing interpretations and may facilitate rights violations.[65] This skeptical attitude is in no way groundless. In fact, analysis of more than 500 State reports to the Counter Terrorism Committee, established by Security Council Resolution 1373 revealed that there were states with very broad or vague definitions.[66] The vagueness and broadness of the definitions cast doubt on the compatibility of the respective anti-terrorism laws with human rights standards.

The problem of a vague and very broad definition of terrorism is not just something whose effects can end up curtailing a single human right. It rather has cross-cutting human rights implications by making the law susceptible to abuse. It is a basic tenet of the principle of legality that a criminal legislation should not be vague and should define the ambit of a prohibited conduct with reasonable precision.[67] Failure in this respect makes laws volatile and prone to be tuned for abuses of human rights. In the Ethiopian context, given the politically sensitive aspect of terrorism, much care should have been taken in defining its prohibited acts so as to prevent potential abuses of an

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[62] See for example, David E. Long, *Coming to Grips with Terrorism After 11 September*, Brown Journal of World Affairs, Vol.8, 2001-2002, p. 38. David E. Long contends that "the question what is terrorism is an easy question that is not easy to answer."

[63] C. A. J. Caody, *Terrorism and Innocence*, The Journal of Ethics, Vol. 8, No. 1,2004, p.38.

[64] Dr. Keith Suter, *September 11 and Terrorism: International Law Implications,* Australian Journal of International Law, 2001, p.27. See also, Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, Cardozo Law Review, Vol. 27, No. 5, March 2006, pp. 1987-2004.

[65] Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985 – 2004,* Chinese Journal of International Law (2005), Vol. 4, No. 1, p. 20.

[66] Ibid.

[67] E. Steyn, *The Draft Anti-Terrorism Bill of 2000: the Lobster Pot of the South African Criminal Justice System?*, South African Journal on Criminal Justice, Vol. 14, 2001, p. 184.

antiterrorism law and not to betray the lawmaker's declared commitment[68] to appropriately balance individual liberty and public security.

Before commenting on the broad and vague characters of the definition of 'terrorist acts' in the Ethiopian Anti-Terrorism Proclamation, let us just have a look at the provisions of the law verbatim. Article 3 of the Proclamation[69] defines[70] 'terrorist acts' in the following manner:

> *Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:*
>
> 1. *causes a person's death or serious bodily injury;*
> 2. *creates serious risk to the safety or health of the public or section of the public;*
> 3. *commits kidnapping or hostage taking;*
> 4. *causes serious damage to property;*
> 5. *causes damage to natural resource, environment, historical or cultural heritages;*
> 6. *endangers, seizes or puts under control, causes serious interference or disruption of any public service; or*
> 7. *threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article:*
>
> *is punishable with rigorous imprisonment from 15 years to life or with death.*

The above stated definition is blamed by various commentators as having features of being unwarrantedly broad and indefensibly vague.[71] It has been

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[68] See, A document that explains Ethiopia's draft anti-terrorism proclamation, an unpublished document in the Library of the Ethiopian Parliament (Original document in Amharic, Translation mine), p.13.

[69] Supra note 5, The Anti-Terrorism Proclamation, Art. 3.

[70] It is customary to provide definitions in the second article of proclamations in the drafting traditions of Ethiopian proclamations. As a departure from this tradition, the anti terrorism proclamation provides the definition in Article 3. In fact, even this article does not directly state that it is providing a working definition to 'acts of terror'. However, it is understood that the definition provided therein is the working definition in applying the proclamation.

[71] See for example, Human Rights Watch, Analysis of Ethiopia's Draft Anti-Terrorism Proclamation, March 9, 2009, p. 3.

commented that "*the draft proclamation*[72] *provides an extremely broad and ambiguous definition of terrorism that could be used to criminalize non-violent political dissent and various other activities that should not be deemed as terrorism*".[73] Broadness and vagueness in definition could expectedly serve as a spring board wherefrom abuses of human rights and fundamental freedoms emanate. An opposition party leader vehemently argued that the prominent origin of the human-rights-unfriendly aspects of the Proclamation is the blatantly broad and vague definition of terrorism.[74]

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[72] Though this comment refers to the draft and not the final legislation, there have been not many substantial changes that the Proclamation made from the draft's definition of terrorist acts. The only commendable change made from the draft is the requirement of seriousness in relation to 'bodily injury', 'risk to the safety or health of the public or a part thereof', 'damage to property', 'interference or disruption of public services'. The requirement of seriousness is, however, regrettably not mentioned in relation to 'damage to natural resource, environment, historical or cultural heritages'.

For a purpose of comparison, let us see the provision of the draft in this regard.

Art. 3. Terrorist Acts

1. Whosoever, for the purpose of advancing political, religious or ideological cause; and with the intention of:
    a. coercing or intimidating the government'
    b. intimidating the public or section of the public or
    c. destabilizing or destroying the fundamental political, constitutional, economic or social institutions of the country;
    i. causes a person's death or bodily injury
    ii. creates risk to the safety or health of the public or section of the public;
    iii. commits kidnapping or hostage taking;
    iv. causes damage to property;
    v. causes damage to natural resource, environment, historical or cultural heritages;
    vi. endangers, seizes or puts under control, causes interference or disruption of any public service;

    is punishable with 15 years of imprisonment to death
2. Whosoever threatens to commit any of the acts stipulated under Sub Article 1 of this Article,

    Is punishable in accordance with Sub Article 1 of this Article.

[73] Human Rights Watch, Supra note 72.

[74] Interview with, Ato Lidetu Ayalew, [the then] President of the Ethiopians' Democratic Party, Conducted on the 18th of November 2009. But see, Supra note 37. The [then] Deputy Chief Commissioner of the Ethiopian Human Rights Commission Ato Demozie Mammie contends that the problem of definition should not be given much weight if the government is democratic in character.

A. Analysis of the Unwarrantedly Broad Aspects of the Definition

The broader a definition of terrorism is the more likely that counterterrorism measures might be susceptible to abuse and the consequent human rights violations. That is why the United Nations' Special Rapporteur on Human Rights and Counterterrorism holds that the concept of terrorism should be limited to acts committed with the intention of causing death or serious bodily injury, or kidnapping and the taking of hostages, and not property crimes.[75] Based on this frame of reference, one can easily point out the unwarrantedly broad and vague elements of the definition of terrorist acts that the Anti-Terrorism Proclamation adopts.

Let us first consider one manifestation of the broadness of the element of the definition that makes it a terrorist act if one 'causes damage to natural resource, environment, historical or cultural heritages'. As has been stated above[76], this is the only definitional element that the Proclamation failed to make an amendment from its draft in requiring the damage caused to be a serious one. This makes the provision overtly simplistic in that even cutting or threatening to cut a single tree, which is unarguably damage to natural resource, might, literally speaking, be considered an act of terrorism, provided that other elements are fulfilled. This is decidedly pointless. What kind of damage to natural resource, environment, historical or cultural heritages justifies the labeling of the act that causes the damage a terrorist act even when it is done with intent to advance political, religious or ideological motives? The law is silent in this regard.[77] It should have been qualified in a manner that restricts the domain of acts that potentially fall within the ambit of the definition. I believe that the failure in this respect makes the domain of the offence much broader than any reasonable person can expect a terrorism offence to include.

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[75] See, Ethiopia: Amend Draft Terror Law; Proposed Counterterrorism Legislation Violates Human Rights, http://www.hrw.org as accessed on 30 June 2009.

[76] See Supra note 73.

[77] But See, Mattew Taylor, *Effective Counter-Terrorism: A Critical Assessment of European Union Responses,* Quaker Council for European Affairs, 2007, pp.6-7 and Common Wealth Secretariat, Draft Model Legislation on Measures to Combat Terrorism, 2002. The European Union and the Common Wealth's definitions of terrorism qualify the type of damage on natural resources that could be considered as a terrorist act in their respective manners. While the former requires that 'the release of dangerous substances, or causing fires, floods or explosions should have an effect of endangering human life' whereas the latter limits the means of damage requiring that the damage has to expose the public or a part thereof to dangerous, hazardous, radio active or harmful substance, a toxic chemical, a microbial or other biological agent or toxin.

We can also consider a second element of the terrorism definition that depicts the unwarrantedly broad aspect. It makes it a terrorist act, punishable with rigorous imprisonment from 15 years to life or with death, if one endangers, seizes or puts under control, causes serious interference or disruption of any public services provided that it fulfils other requirements stated in the definition. The Proclamation defines "public services" as electronic, information communication, transport, finance, public utility, infrastructure or other similar institutions or systems established to give public service.[78] The element of the terrorist acts' definition in issue has been commented to be too broad to constitute a terrorist act and it might be utilized to punish political dissent.[79]

Criminalizing an act that is not inherently violent or which is unlikely to cause serious damage to the life, bodily integrity or property of a person does not seem to be a defensible one in cases of anti-terrorism legislations.[80] It is this conviction that made some other jurisdictions to reconsider their earlier drafts and provide an exemption for advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm to a person or a serious risk to the health and safety of the public or a section of the public.[81]

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[78] Supra note 5, The Anti-Terrorism Prclamation, Art. 2(7).

[79] Human Rights Watch, Supra note 72 at 4. True it is this comment refers to the draft and not the final Proclamation. Nonetheless, the only amendment that the final Proclamation made is requiring seriousness of the interference or disruption of public services. But see, supra note 32, Ato Hailu Mehari contends that this will not affect peaceful protests as what is envisaged is acts done in pursuance of the goals of a terrorist organization. However, I would argue against Ato Hailu's assertion as the proclamation envisages every one and not necessarily a member of an organization that is proscribed as a terrorist organization.

[80] See generally, Human Rights Council, 10th session, Agenda item 3, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Mission to Spain, 16 December.2008. The standards of the United Nations Special Rapporteur on Terrorism and human rights support this argument and denounce contrary stipulations.

[81] See for example, Jude McCulloch, *'Counter-terrorism', Human Security and Globalization-from Welfare to Warfare State?*, Current Issues in Criminal Justice, Vol. 14, 2002-2003, p.285. Jude McCulloch mentioned that due to public pressure, the Australian government amended its original anti-terrorism legislation that unduly curtails the right to political protest by the use of non-violent means of oppositions such as civil disobedience. In the final legislation, political protest that is not intended to cause serious physical harm to a person or a serious risk to the health and safety of the public or a section of the public are exempted from being considered as terrorist acts. This could serve as a model for other jurisdictions,

This approach by the Australian[82] law[83] could be taken into account so as to amend the anti-terrorism law to make it more friendly to human rights. For instance, the Commonwealth Draft Model Legislation expressly provides that disruption of any services which is committed in pursuance of a protest, demonstration, or stoppage of work, shall be deemed not to be a terrorist act unless the act is intended to result in endangering a person's life, causing serious bodily harm, serious damage to property or serious risk to the health or safety of the public or a part thereof.[84] The European Union common definition of terrorism also follows a similar trend.[85] Resolution 1556 of the Security Council of the UN also indirectly defines terrorism in a similar manner.[86]

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including the Ethiopian case, if there is a real commitment not to unduly curtail the right political protest under the guise of preventing terrorism.

[82] I am taking Australia as an example since Ethiopian State Television Special Program about Anti-Terrorism in Ethiopia named 'Akeldama' broadcasted on the 27th of November 2011 mentioned that Australia is one among the four democratic countries from where the Ethiopian anti-terrorism law is allegedly taken 'verbatim'.

[83] Section 100.1 of the Australian Criminal Code defines a terrorist act as

"an action or threat of action' which is done or made with the intention of

- ✓ advancing a political, religious or ideological cause; and
- ✓ coercing or influencing by intimidation, the government of the Common wealth, State or Territory or the government of a foreign country or intimidating the public or a section of the public.

Action will only be defined as a terrorist act if it:

- ✓ causes serious physical harm or death;
- ✓ seriously damages property;
- ✓ endangers a person's life;
- ✓ creates a serious risk to public heath or safety; or
- ✓ seriously interferes with, seriously disrupts, or destroys, an electronic system.

Action will not be a terrorist act if it is advocacy, protest, dissent or industrial action and is not intended to cause serious physical harm or death, endanger the lives of others or create a serious risk to the public heath or safety.

[84] Common Wealth Secretariat, Supra note 78 Art. 3.

[85] Mattew Taylor, Supra note 78 Sub-article D. It limits the criminalization of disrupting public services. It provides that "causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss."

[86] Resolution 1566(2004), Adopted by the Security Council at its 5053rd meeting, on 8 October 2004. It states that for a criminal act to be labeled as terrorist it has to be "committed with the intent to cause death or serious bodily injury, or taking of hostages…"

The Ethiopian Anti-Terrorism Proclamation, on the contrary, fails to qualify serious interference or disruption of public services and other acts that might be labeled as terrorist acts, which inevitably makes the domain of its application extremely broad. An opposition political party leader expressed his fear that there is no guarantee to preclude the use of this provision to punish an inherently peaceful political demonstration which might cause the interruption or disruption of public services sought by the law.[87] I believe it is convincing that the mere fact of causing serious interruption or disruption of public services or other acts which are not directed against life or serious destruction of property shall not constitute terrorism. It should have been qualified with its consequences. It is the failure in this respect that makes the prohibition so broad that it might end up criminalizing inherently non-violent forms of political or other demonstrations. This might make the public frightened not to take part in public, most notably political, demonstrations and consequently hold back exercise of the right to participate in public affairs.

B. Analysis of the Vague Aspects of the Definition

Let us consider the ambiguous aspects of the definition. We will explore the vagueness of the definition by taking two elements that prominently display its vagueness. These are 'coercing the government' and 'destabilizing or destroying the fundamental…social institutions of the country'. These two are taken as examples since I believe that they can better display the definition's vagueness.

'Coercing the government' up on committing or threatening to commit any of the six offences stated in Article 3 is an element of the definition of a terrorist act. The phrase 'coercing the government' is not easily determinable.[88] It may not be possible to determine whether a certain act fulfils this requirement or not. The indeterminate aspects of the phrase mentioned can better be seen by the use of hypothetical cases.

Assume the government failed to pay salaries or make an increase thereof to employees of the Ethiopian Telecommunication Corporation[89] and the aggrieved employees warned government officials to disrupt

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[87] Interview with Lidetu Ayalew, Supra note 75.

[88] Parliamentary Minute, Supra note 55 at 5. In the minutes of this discussion, it has been commented that the phrase 'coercing the government' is not clear and demands further explanation.

[89] The Corporation is owned and run by the government and it is the only telecom service provider in the country.

telecommunication services[90] unless their demands are fulfilled and the services of the Corporation are made open to the private sector[91] believing that this would ultimately solve the problem. I do not want to dwell on the issue as to the legality of the action taken in the hypothetical case. Let us simply think whether the action constitutes a threat to 'coerce the government' assuming that the disruption they sought fulfils the seriousness requirement that the Proclamation demands. I believe that such kinds of actions are minor expressions of dissatisfaction and shall in no way be considered acts of terrorism. It seems indefensible to consider a workers' strike as a terrorist act. However, there is no guarantee that a strict application of the Proclamation might not lead one to another conclusion. This shows the magnitude of the inherent vagueness of the definition provided.

In relation to the above stated element, we can also raise issues as to the magnitude of acts that have the potential to 'coerce the government'. Does every act that aspires to 'coerce the government' fulfill the requirements of the law or do we need to adopt standards? This dichotomy can be made clear by the use of a hypothetical example. Suppose an individual is aggrieved by the way a local government administration[92] functions and commits serious bodily injury against a local official believing[93] that his action would change the administration for better. Does the action of this person have the required magnitude so as to be considered as an act that coerces the government? I believe that this kind of action, though unarguably criminal, cannot have the capacity to 'coerce the government' in the strict sense[94]. No doubt, it is an attempt to coerce a government body but I believe that the act has no capacity to do so and the government will not normally be factually coerced in this case.[95] However, it is not unrealistic to predict that a judge might

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[90] According to the definition provided for in the Proclamation this constitutes a 'public service' and hence falls within the ambit of the Proclamation's application.

[91] This might be considered as an ideological motive sought in the proclamation. It has to be reckoned that the degree of government involvement in the economy is one of the divisive ideological subjects for political actors in Ethiopia and beyond.

[92] This is refereed to as *'Kebele'* Administration in the Amharic Language.

[93] No doubt about it, this is an unacceptable belief and the act is indefensibly criminal. However, it is not possible to make everyone believe in a conventional manner.

[94] The Anti-Terrorism Proclamation Art. 2 (9). It defines "government" means the federal or a state government or a government body or a foreign government or an international organization.

[95] If one tends to argue that the mere intention suffices, it would be pointless as such kind of interpretation punishes ideas rather than acts. At this point, it would be wise to refer to the general principle of causation as enshrined in the Ethiopian Criminal

consider the same act as an act of terrorism since the law is silent on the magnitude of an act that can coerce the government. This shows the vagueness of the definition provided in the Proclamation.

Similarly, the other element of the definition that reads as 'destabilizing or destroying the fundamental…social institutions of the country' has inherent vagueness making application of the definition of terrorism an indeterminable one. I believe that the fundamentality of the social institution that is destabilized or destroyed is not easy to identify. It might seem silly to argue committing any of the offences enumerated in the Proclamation intending to advance political, religious or ideological cause by destroying a family, which is conventionally regarded as a fundamental social institution of a country, is a terrorist crime. Nevertheless, a literal reading of the text of the Proclamation's definition of terrorist acts might lead one to such an awkward conclusion, which cannot convince any one with reasonable understanding of terrorism. What constitutes the fundamental economic or social institutions of the country? It is not something that can certainly be known and there has to be a clear definition to avoid this problem.

The broadness and vagueness of a definition of terrorism makes an anti-terrorism law inclined to inconsistent applications and potential abuses which inevitably affect human rights protection. An over-broad definition of terrorism is a harsh security strategy that infringes rights without adding a value for their protection.[96] It has been appropriately commented that "a narrower definition of terrorism would not only minimize threats to civil liberties, but would also help focus limited resources on the most serious

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Code, which specialized criminal legislations, including the Anti-terrorism proclamation shall comply with, unless there is a special amendment made for the purpose of the proclamation. The Anti-terrorism proclamation is silent in this regard. Article 24(1) of the Criminal Code provides the following:

> Article 24 – Relationship of Cause and Effect
>
> 1. In all cases where the commission of a crime requires the achievement of a given result, the crime shall not be deemed to have been committed unless the result achieved is the consequence of the act or omission with which the accused person is charged.
>
> This relationship of cause and effect shall be presumed to exist when the act within the provisions of the law would, **in the normal course of things (emphasis added)**, produce the result charged.

[96] Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh; or Proportionate Security Strategies in Canada and Britain*, Cardozo Law Review, Vol. 27,No. 5, March 2006, p.2219.

threats."[97] Even setting aside the human rights impacts of a broad and vague definition, given the resource constraints the country has and the expected expenditure that counterterrorism requires, it would have been better had the law been focused on cases of terrorism that speak for themselves.

The indeterminacy of the definition makes the law highly inclined to misuse. This more likely affects the free exercise of fundamental rights and freedoms[98]such as freedom of expression, demonstration and assembly since it is not as such easy to identify which act constitutes terrorism and which one does not. In fact, this is a common denominator of many of the downsides of the Proclamation from the perspective of human rights protection. Generally, the more indeterminate a definition of terrorism is the more likely for it to be used so as to curtail the free exercise of legitimate rights, especially those with political features, for fear of terrorism charges.

3.2.2 Absence of Judicial Involvement in the Proscription[99] Processes and its Effect on Individual Liability

Customarily, the executive is often times not friendly with or at least not a renowned defender of human rights. It is not unusual for human rights activists to blame the executive as the author of human rights violations in many occasions. In such cases, democracy provides us the other two organs of government to have a close look at and, if necessary, condemn the decisions of the executive and thereby preventing it from violating human rights using the state machinery it has. Hence, adherence to separation of powers and appropriate check and balance could be seen as an indication of a government's adherence to human rights norms.[100]

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[97] Ibid.

[98] See, Interview with Lidetu Ayalew, Supra note 75. Ato Lidetu Ayalew contends that the indeterminacy of the definition gives unwarrantedly broad discretion of interpretation and thereby making the law prone to abuse.

[99] See Zemen Megazine, Supra note 7, The Ethiopian parliament has already proscribed five groups as terrorists in Ethiopia. These include three local political groups namely Ginbot 7, Ogaden Peoples Liberation Front (ONLF) and Oromo Liberation Front (OLF) and two foreign Islamic groups namely Al-Qaeda and the Somalia based Al-shabab. There are debates about the appropriateness or otherwise of this proscription and the fairness of the procedure followed by the parliament. The effect of the proscription on individuals who are members of such groups before and after proscription remains to be a bone of contention. In a related fashion, the effect of proscription on other individuals who have relations other than membership to such groups is still not settled. However, it is not the object of this article to dwell into practical issues which deserve a separate study.

[100] Rosemary Foot, *Human Rights and Counterterrorism in Global Governance: Reputation and Resistance, Global Governance,* Vol.11, 2005, p.292.

Judicial and legislative control over the executive is required for sound government functioning. This skeptical attitude towards the executive is not groundless. Since terrorism is a volatile concept, there has to be a system so as to minimize the risk of abuse and strike a balance between countering terrorism and protecting the rights of all including terrorist suspects. The fact that Ethiopia's Anti-Terrorism law has made proscription and its effects on individual members totally out of the reach of the judiciary[101], I believe, has negative impacts on human rights protection.[102]

The Proclamation provides the following in relation to the procedure to be followed in proscribing terrorist organizations[103] within its part five that provides measures to control terrorist organizations and property:

> *Article 25. Procedure of Proscribing Terrorist Organization*
>
> 1. *The House of Peoples' Representatives shall have the power, upon submission by the government, to proscribe and de-proscribe an organization as terrorist organization.*
> 2. *Any organization shall be proscribed as terrorist organization if it directly or indirectly:*
>   a. *commits acts of terrorism;*
>   b. *prepares to commit acts of terrorism;*
>   c. *supports or encourages terrorism;*
>   d. *is otherwise involved in terrorism.*

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[101] Cf. Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, Oxford University Press, 2002, P. 50. Clive Walker stated that there is a similar trend in England's Anti-Terrorism legislation. It was commented that the Terrorism Act 2000 remains steadfastly executive in terms of the activation of proscription. The Secretary of State may by order add or remove an organization from a list of terrorist organizations.

[102] But see, Interview with Hailu Mehari, Supra note 32. Ato Hailu Mehari contends that as the House of Peoples' Representatives represents the Nations, Nationalities and Peoples of Ethiopia; there is no wrong in mandating it to the proscription. He goes on arguing that since the House is a democratic entity, it is not wise to be skeptical that it might unduly use its power. See also, Interview with Demoze Mamie, Supra note 37. Ato Demoze praises this proscription process. Nevertheless, I argue against them as the issue at hand is whether the House can exercise powers on justicable matters but not whether it is democratic or not.

[103] See, Supra note 5, The Anti-Terrorism Proclamation, Art. 2(4). It provides that "terrorist organization" means:

> a. a group, association or organization which is composed of not less than two members with the objective of committing acts of terrorism or plans, prepares, executes or cause the execution of acts of terrorism or assists or incites others in a way to commit acts of terrorism; or
> b. an organization so proscribed as terrorist in accordance with this Proclamation.

3. *Where any organization is proscribed as terrorist in accordance with sub-article (1) and (2) of this Article, its legal personality shall cease.*
4. *The body that administers the terrorism victims fund to be established in accordance with this Proclamation shall assign a liquidator to the organization the legal personality of which has ceased pursuant to sub-article (3) of this Article, and enforce the process of the liquidation.* [104]

The absence of judicial involvement in the process of proscription or de-proscription and the effects thereof on individual members of the concerned organization certainly violates the citizens' right of access to justice. The FDRE Constitution ordains that *"everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."*[105] No one could reasonably argue that the House of Peoples' Representatives has judicial powers whatsoever.[106] Neither can it be denied that the proscription process has justiciable elements in it. It suffices to mention the effects of proscription.

Besides the consequent freezing and forfeiture of the property of the proscribed terrorist organization[107], the fact that any form of participation by individuals in a proscribed terrorist organization is an independently punishable crime makes the justiciable feature of the proscription process an incontestable one. Hence, it could be said that the Proclamation violates the right of access to justice by precluding judicial involvement in determining the effects of the proscription process.

Freedom of association is constitutionally recognized as it is stated that *"every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited."*[108] It is obvious that establishing an association with terrorist missions or a promotion thereof is illegal making its prohibition lawful and justified. However, it is equally sound and acceptable that the legality or not of an association shall be ascertained by an independent judiciary; not by the law making organ, which obviously favors the majority. The Anti-Terrorism law,

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[104] Id. Art. 25.
[105] Supra note 53, The FDRE Constitution, Art. 37(1).
[106] See, Id. Art. 79(1). It is provided that "judicial powers, both at Federal and State levels, are vested in the courts."
[107] It has to be reckoned that a grouping of even two persons might be deemed as such.
[108] Supra note 53, The FDRE Constitution, Art. 31.

however, provides a scheme whereby the legality or otherwise of an association could be determined without judicial involvement, at any stage. This denies the association and its members the right to access court-administered-justice and thereby affects their freedom. Members might be frightened in joining associations as a subsequent proscription by the majority in the parliament might make their mere membership a crime.[109]

The negative human rights implications of the absence of judicial involvement in the proscription are not just limited to the organizations *per se*. It also affects members of the proscribed organization on an individual basis. The fact that the organization in which someone is a member is proscribed makes the member thereof punishable for a crime of participation in a terrorist organization[110] and be subjected to rigorous imprisonment from 5 to 10 years. I believe that especially the phrases that criminalize membership and participation in any capacity for the purpose of a terrorist organization are susceptible to abuse and the judiciary should have had a say at least in determining the criminal intent of those charged for being a member of a proscribed organization. This seems absent as the law currently stands.

It is an established fact that everyone has the right to be a member of any association unless the association is clearly against the law. Suppose someone joins a certain organization firmly convinced that the activities the organization undertakes are lawful and participates in purely peaceful aspects of the organization. However, if the organization, to which our 'innocent' example is a member, is proscribed as a terrorist organization, the 'innocent' person is liable to a minimum of 5 years rigorous imprisonment as the requirement of the law i.e. membership or participation, in any capacity, to a proscribed organization is met. This looks absurd.

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[109] But see, Interview with Hailu Mehari, Supra note 32. Ato Hailu argues that the law will not affect freedom of association as every one has to be confident in joining a peaceful organization. If the organization is really a peaceful one, there is no possibility of being punished.

[110] Supra note 5, The Anti-Terrorism Proclamation, Art. 7. Participation in a Terrorist Organization

1. Whosoever recruits another person or takes training or becomes a member or participates in any capacity for the purpose of a terrorist organization or committing a terrorist act, on the basis of his level of participation, is punishable with rigorous imprisonment from 5 to 10 years.
2. Whosoever serves as a leader or decision maker in a terrorist organization is punishable with rigorous imprisonment from 20 years to life.

If it is not a slip of the pen, in a parliamentary document that explains the Draft Anti-Terrorism Proclamation, there was a requirement of intention for one to be punished for participation in a terrorist organization.[111] This requirement of intention is, however, absent in both the draft and the final Proclamation. There is nothing that prevents one, who, even with innocent belief, becomes a member and/or participates, in any capacity, in pursuance of the objectives of an organization that is proscribed as a terrorist one, from being persecuted for terrorism. It would have been sensible had membership alone been made punishable only in so far as the accused has become a member once the organization is proscribed as a terrorist one. Therefore, the absence of judicial involvement in the process of proscription is of paramount implications from the perspective of such 'innocent' individuals.

The envisaged proscription makes the power of courts a symbolic one. They have no role whatsoever in challenging the decision to proscribe or de-proscribe an organization as a terrorist one. It has to be borne in mind that the FDRE Constitution gave the power of constitutional interpretation to the House of the Federation but not to courts of law.[112] Hence, courts cannot declare unconstitutional whatever is decided by any organ of government including the parliament.[113] Therefore, it may not be constitutionally permissible to directly empower courts to check the excess of powers by the executive or the legislative organs. However, nothing should have prevented courts of law from considering individual cases of members of proscribed organizations to determine whether they are criminally responsible for their involvement in the proscribed organization. Otherwise, it would mean that the parliament is deciding on individual criminal responsibility.

From the individual's perspective, it seems that courts cannot go to the merit of considering the unlawfulness of the acts that someone commits if it is proved that he is a member or participated, in any capacity, for the purpose of the proscribed organization.[114] By proscribing a given organization as a

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[111] A Short Explanation to the Draft Anti-Terrorism Proclamation, an unpublished document located in the Documentation Center of the Ethiopian Parliament, Original Document in Amharic, Translation Mine p. 15.

[112] Supra note 53, The FDRE Constitution, Art. 83.

[113] See generally, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities, Proclamation No. 251/2001.

[114] But see, Interview with, Ato Amare Amogne, Judge, Federal Supreme Court, 9 December 2009. Ato Amare contends that it does not mean that a member will be punished for his membership alone unless it is proved that in becoming a member of the organization he has intended to cause the wrongs done. It is only a member who has actually done the specified acts of terrorism who is liable to punishment.

terrorist one, the Parliament is making members punishable for their mere membership as membership alone in any capacity is an independently punishable crime. Generally, there is no clear demarcation between the powers of the lawmaker and that of courts, if at all any, in the process of prosecuting alleged terrorists.[115] With all the above stated reasons, I argue that the absence of judicial participation in the proscription and especially the effects thereof, has negative consequences from a human rights perspective since courts of law are expected to be defenders of human rights.

3.2.3 It Might be Used to Punish Political Dissent[116]

Among criticisms against anti-terrorism laws, all over the world, the allegation that they might be inappropriately used to punish political dissent is the most prominent one.[117] In fact some commentators even questioned the appropriateness of the focus given to anti-terrorism measures alleging that they are being misused to pursue political missions by red-herring the public with the mostly echoed effects of terrorism.[118]

However, I [this author] would argue that as the law appears now, there is no further requirement if it is proved that some one is a member of an organization that is proscribed as terrorist.

[115] See, Ibid. Ato Amare said that regulations are needed to bring clarity on the procedure to be followed in bringing court cases before and/or after the proscription. See also, Supra note 37. While commenting on whether investigation begins before proscription, Ato Mulugeta contends that some form of pre-formal investigation is indispensable as there is a need to establish a case to the satisfaction of the Parliament to decide on the issue. I argue that this has to be resolved by a regulation that clearly demarcates the mandates of courts before and/or after proscription by the Parliament.

[116] See, Supra notes 7 and 8 for the debate on whether or not the government is actually using the anti-terrorism to silence political opposition. In consequence of the terrorism charges against a number of journalists and members of the opposition, some people argue that the law is being used to silence political opposition. On the contrary, the government denies such allegations and contends that it has never used the law to silence political opposition whereas membership to political parties could not be a defense to evade criminal prosecution. This paper does not dare to examine practical issues which, as already indicated above, is an area which deserves a separate study.

[117] See for example, Ben Saul, *Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law*, Australian Year Book of International Law, Vol. 25, 2006, p.20. See also, Noah Bialostozsky, *The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses*, Northwestern Journal of International Human Rights, Vol. 6, 2007-2008, p.83.

[118] See for example, Carol K. Winkler, *In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era*, State University of New York Press, 2006, p.2.

The Anti-Terrorism Proclamation has been criticized by international human rights activists and the domestic opposition and private media for its susceptibility to be used for the purpose of punishing political dissent.[119] The government, on its part, denies the plausibility of this accusation. During public discussions of the Proclamation in its draft stage, officials of the government maintained that the law has no negative impact in the peaceful functioning of political parties.[120]

In a press briefing on this issue, Ato Meles Zenawi, the late Ethiopian Prime Minister, reiterated the position of his government. He said that political difference ought to be resolved by political means; that is perfectly correct; which means, if that is the position the opposition accepts, political differences will not take the form of terror and therefore the Proclamation will not affect those with a different political opinion.[121] True, gone are the days when it was thought that was appropriate to use any means to get to state power. However, it has to be stressed that not all inappropriate methods of acquiring state power are cases of terrorism.

Despite the government's optimistic statements on the issue at hand, I would argue that there are genuine concerns to argue that there is no guarantee that can prevent the government in power from using the Proclamation to attack its political opponents. It is an age-old purpose of laws to limit arbitrary power of government. This does not necessarily mean that governments are irresponsible actors. However, neither is it plausible to expect the government to put a limit on its power based on its volition. This is why we need laws to check undue practices by the government, and obviously other actors. Irrespective of the degree of political commitment not to use the Proclamation for punishing political dissent, the system can in no way be immune from such criticism unless it has legal schemes meant to pursue this commitment.

Carol K. Winkler contends that in the case of the United States of America on an empirical level more Americans have died from crossing the street than from being victims of terrorist attacks, that only six Americans have died as a result of chemical or biological terrorism since 1900, and that no American has ever died from an act of nuclear terrorism.

[119] See for example, Human Rights Watch, Supra note 72.

[120] Parliament Document, Supra note 69 at 10. It was stated that "the Proclamation is not meant to deal with the relations between the opposition and the government; it is rather meant to stand for peace."

[121] Melaku Demissie, Arguments on Anti-Terrorism Law, the Reporter (English), Published Weekly by Media and Communications Center, Saturday 04 July 2009.

The Proclamation has two inherent weaknesses that make it vulnerable to be abused so as to silence political opposition. These two weaknesses have been the focus of analysis in the preceding two downsides of the Proclamation. Though the above stated weaknesses have cross-cutting effects on various categories of human rights, their negative impacts on manifestations of the right to protest is a noteworthy one which demands separate treatment due to the fact that terrorism is not a purely legal concept but rather with political hybrids.

It has been noted earlier that some of the elements of the offence of 'terrorist acts' in the Proclamation are unduly broad. Notable in this regard could be the fact that it criminalizes 'serious interference or disruption of public services' as a terrorist act irrespective of whether human life has been lost, bodily integrity seriously endangered or grave loss or destruction has resulted from such interference. Since demonstrations are the prominent ways of pursuing political protest, mainly in critical times, the broader aspect of the definition, in one way or another, is more likely to curtail peaceful political demonstrations.

Incontrovertibly, interruption or destruction of public services is a criminal activity and its perpetrators deserve the appropriate punishment. However, there is no justified reason for it to constitute a crime of terrorism on its own. In our case, if an organization is proscribed, it will immediately lose its legal personality and cannot lawfully operate. This has deterrence effects on peaceful political protests as there is a possibility for protests to result in the public service interruption or disruption sought by the law[122] and the whole activity be regarded as a 'terrorist act' making the organizing party susceptible to proscription. Any undue limitation on the right to protest, the functional part of the right to political participation, is of far-reaching harmful consequences on human rights protection.

The weakness of the Proclamation manifested in denying judicial involvement in the process of proscription of terrorist organizations also best depicts the problem of the absence of judicial control not to let the law be used to silence political opposition. It has been mentioned earlier that an organization will be proscribed as a terrorist one based on the proposal by

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[122] See, Interview with Lidetu Ayalew, Supra note 75. Ato Lidetu Ayalew further contends that these and other features of the Proclamation suggest that the law was made not just for protection of innocent victims of terrorism, which he argues shall be the only focal point of the law as they have no way to protect themselves, but to protect the government which has well-entrenched capacity to protect itself from any attack.

the government and an endorsement thereof by the House of Peoples' Representatives. In current Ethiopian reality, the party which leads the executive, and the one which is supposed to propose proscription, has 99.6% of the seats in the House. It will have no problem in getting an approval of the proposed proscription from the House.[123] Hence, in the absence of any form of judicial involvement, there is nothing that can prevent the government from proscribing any organization as a terrorist one.[124] The unchallenged dominance that the leading political party has in the House places the conviction not to use the Proclamation for political purposes in the mercy of the leading political party, not in a legally regulated scheme that prevents abuse.

The only option that an aggrieved political party has in such cases would be questioning the constitutionality of the decision of the House. However, even the House of the Federation, which is mandated to constitutional interpretation, is a political entity and hence may not be immune from the critics that one may have over the Parliament.[125] Therefore, I argue that the absence of judicial involvement, in all the stages of the proscription process might potentially be used to silence political opposition.

3.2.4 Evidentiary Rules Bypassing Constitutional Guarantees of Human Rights

The need to incorporate new legal mechanisms and procedures to gather and compile sufficient information and evidences in order to bring perpetrators of terrorist acts to justice[126] is one among the statements of reason of the proclamation. A parliamentary document that gives brief explanation of the provisions of the Proclamation stated that the existing legal regime in Ethiopia regarding evidentiary matters are not sufficient to control terrorism

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[123] In my personal observations so far, I never heard of a bill proposed by the executive that failed to get the approval of the Ethiopian parliament.

[124] See, Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, Suffolk Transnational Law Review, Vol. 20, 1996-1997, p. 51. Professor Minasse Haile criticizes the Ethiopian Constitution for not being friendly with the principle of separation of power.

[125] Supra note 53, The FDRE Constitution, Art. 61(3). The Constitution ordains that "Members of the House of the Federation shall be elected by the State Councils." In current Ethiopian realities, in all the State Councils, the leading political party is either the one which controls the Council or has partnership with the ethnically organized political parties controlling the regions' State Councils. It is this political feature of the House of the Federation that affects its pragmatic potential in dealing with the claims of aggrieved political parties with the degree of neutrality that is demanded in such cases.

[126] Supra note 5, The Anti-Terrorism Proclamation, Preamble, par. 4.

and bring perpetrators to justice demanding the law maker to provide new rules of evidence.[127]

Article 23 of the Anti-Terrorism Proclamation provides that:

> *Without prejudice to the admissibility of evidences to be presented in accordance with the Criminal Procedure Code and other relevant legislations, the following shall be admissible in court for terrorism cases:*
>
> 1. *intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered;*
> 2. *hearsay or indirect evidences;*
> 3. *digital or electronic evidences;*
> 4. *evidences gathered through interception or surveillance or information obtained through interception conducted by foreign law enforcement bodies; and*
> 5. *confession of a suspect of terrorism in writing, voice recording, video cassette or recorded in any mechanical or electronic device.*[128]

Among admissible evidences listed in the Proclamation, the one which makes an intelligence report on terrorism admissible without a need to disclose the source or the method it was gathered seems, at least apparently, contrary to the constitutional rule that excludes evidences obtained under coercion. The Constitution commands that *"persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible."*[129] The fact that the law admits intelligence reports without a need to disclose the method of collection thereof might enable the intelligence officials to bypass the constitutional guarantee not to use torture to obtain evidences. It has to be borne in mind that this kind of technique is becoming rampant in many countries in relation to terrorism cases.[130] Coupled with the capacity problems of the police to investigate terrorism cases[131], it is not unwise to be skeptical of the way that this provision is going to be implemented.

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[127] A Short Explanation to the Draft Anti-Terrorism Proclamation, an unpublished document located in the Documentation Center of the Ethiopian Parliament, Original Document in Amharic, Translation Mine p. 10 and 11.

[128] Supra note 5, The Anti-Terrorism Proclamation, Art. 23.

[129] Supra note 54, The FDRE Constitution, Art. 19(5).

[130] See, Human Rights Council of the UN, 10th session, Agenda item 3, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 February 2009, p. 7.

[131] Hashim Tewfik, Supra note 36 at 42-44.

It might be argued that the Proclamation does not specifically make evidences obtained by coercion admissible. On the contrary, since revising evidentiary rules is among the statement of reasons of the Proclamation stated in the preamble, something significantly different from the existing legal regime might have been sought. Irrespective of what has been sought by the law, it is a clear case that contradicts with the Constitution if intelligence report that fails to disclose its method of collection is made admissible, especially in cases when the suspect claims to have been tortured.[132] I recommend the constitutionality of this provision of the Proclamation has to be challenged.

The FDRE Constitution unequivocally establishes the right of accused persons to have full access to any evidence presented and examine witnesses testifying against them.[133] The fact that the anti-terrorism law provides that hearsay or indirect evidences are admissible might collide with the principles of fair trail recognized by the Ethiopian Constitution. The admissibility of hearsay and indirect evidences as well as intelligence reports failing to disclose the source or method of gathering seriously offends the defendants' right to confrontation of the prosecution case. This may undermine the reliability of the court's verdict and likely give rise to miscarriage of justice.

3.2.5 5Undue Restriction on Freedom of Expression

The Proclamation's subjective criminalization of encouragement of terrorism[134] makes the domain of the prohibited act indeterminate and might unduly restrain the lawful exercise of freedom of expression especially through the media. Undeniable as it is, unregulated use of the media might make it susceptible to abuse by persons of terrorist agenda to nurture a

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[132] I am aware of the argument that it may not be unconstitutional if the law just turns the burden of proving the existence of torture or other forms of coercion from the government to the suspected individual.[see for example, supra note 32, Ato Hailu Mehari had this opinion] But I would argue that this kind of scheme is in no way acceptable as the right at stake is freedom from torture, which is an absolute right and it is not practically an easy affair for an individual suspect prove the fact of his being coerced to the satisfaction of the court.

[133] Supra note 54, The FDRE Constitution Art, 20(4).

[134] Supra note 5, The Anti-Terrorism Proclamation, Art. 6. Encouragement of Terrorism

Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.

culture of violence and spread terror.[135] Exceeding its limits, freedom of expression might be abused and add fuel to the fire. This has to be legally regulated.[136] However, care should be taken not to violate the essence of the freedom under the guise of fighting terrorism.

The Proclamation criminalizes not only clear cases of direct or indirect encouragement of terrorism through the media[137] but also any thing that is likely to be understood as such by the public or a part thereof for whose consumption the publication was made. Coupled with the above commented vagueness and broadness of the definition, the subjective consideration in deciding whether an expression is an encouragement of terrorism might result in an unprincipled limitation on the freedom. As the law appears on its face, in so far as there is a possibility for the expression to be understood by members of the public as a direct or indirect encouragement of terrorism, it is legally possible to punish the expression without enquiry into the objective plausibility that the expression is a clear case of encouragement of terrorism. This subjectivity makes the domain of the offence indeterminate. The more indeterminate a criminal offence is the more likely for it to be abused.

The FDRE Constitution stipulates that freedom of expression can be limited only through laws which are guided by the principle that the freedom cannot be limited on account of the content or effect of the point of view expressed.[138] In apparent contradiction with this principle, the Proclamation employed a purely subjective criterion that is meant to control the effect of the point of view expressed by the media. This subjective consideration is likely to erode the constitutional commitment to provide legal protection to the press, as an institution, so as to ensure operational independence and its capacity to entertain diverse opinions.[139] In the public debate about the law, it

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[135] See for example, Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response*, Frank Cass Publishers, 2005, p.174-183.

[136] See, Supra note 22, ICCPR, Art. 19 (3).

[137] But see, Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Art. 19, Global Campaign for Free Expression, International Standards Series, November 1996. Principle 6 provides that expression may be punished as a threat to national security only if a government can demonstrate that: the expression is intended to incite imminent violence, it is likely to incite such violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

[138] The FDRE Constitution, Art. 29(6).

[139] Id. Art. 29 (4).

was noted that the way the provision of the law is framed might embarrass citizens not to exercise their freedom of expression.[140]

3.2.6 Other Human Rights Concerns

In this section, we will focus on exploring other human rights concerns that could be raised in relation to the Proclamation. Three concerns of human rights are explored. An argument against the generic denial of bail in terrorism cases is the first one to be explored. The not-unlikely unprincipled use of the surveillance and interception mandates by the security personnel is also commented as there has to be a scheme not to let the mandate used in cases when it is not indispensable. Finally, this article reflects on the fate of suspects of terrorism against whom a charge has not been instituted at the expiry of the four month maximum period of remand.

The denial of bail right[141] for suspects of terrorism cases is one of the critiques that one might mention against the Proclamation. It is provided that *"if a terrorism charge is filed in accordance with this proclamation, the court shall order the suspect to be remanded for trial until the court hears and gives decision on the case."*[142] There are arguments that this kind of generic denial of bail has unconstitutional elements. The theme of the argument is that the Constitution provides that a court may deny bail only in exceptional circumstances prescribed by law[143] but not a total legislative denial of bail in specified offences. In fact, a case[144] with similar contents regarding the anti-corruption special procedure and rules of evidence (Amendment) proclamation has been submitted to the Council of Constitutional Inquiry and it was maintained that the stipulation is constitutional. It declared that there is no need for constitutional interpretation and rejected the case.[145] It is only a final decision

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[140] See, Parliamentary Document, supra note 55 at 6.

[141] But see, Wondwossen Demissie (ed.), *Human Rights in Criminal Proceedings: Normative and Practical Aspects*, Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-terrorism Law, Ethiopian Human Rights Law Series Vol. III, Addis Ababa University, Faculty of Law, 2010, pp. 51-54. Wondwossen argues that the issue of bail has not specifically been addressed in the anti-terrorism proclamation. There is an obscurity regarding the fate of the arrested terrorist suspect until a terrorist charge is instituted against him/her. However, the proclamation specifically denies conditional release once a terrorist charge has been established.

[142] Supra note 5, The Anti-Terrorism Proclamation, Art. 20 (5).

[143] Supra note 54, The FDRE Constitution, Art. 19(6).

[144] Council of Constitutional Inquiry, Recommendation on the constitutionality of the proclamation that prohibits bail in crimes of corruption, unpublished document located in the House of the Federation.

[145] See generally, Council of Constitutional Inquiry Proclamation, Proc. No. 250/2001, Federal Negarit Gazeta, Year 7, No. 40.This comprises professional experts that have the mandate to recommend on constitutional interpretation issues submitted to the

by the House of the Federation that serves as a precedent for other similar constitutional matters.[146] Therefore, it is not impossible for one to expect another decision by making an application for the case of the anti-terrorism law.

Without prejudice to the issue of constitutionality, I would argue that it would have been better had not all cases of terrorism been non-bailable offences. Not all offences stipulated in the Proclamation are serious so as to justify denial of bail. False threat of terrorism[147], failure to disclose terrorist acts[148] and failure to provide information about a lessee[149] that are punishable with rigorous imprisonment from three to ten years on account of breach of duty to cooperate[150] may be prominent examples in this regard. It does not seem justified to treat all the offences specified in the Proclamation alike. It would have been better had grave offences of terrorism that are deemed non-bailable been specified. In fact, we have a similar legislative trend in

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House of the Federation and submit the recommendation for the House of the Federation for a final decision. Article 17 (3) of the proclamation provides that "if the Council, after investigating the case submitted to it, finds that there is no need for constitutional interpretation, it may reject the case and inform of its decision thereof to the concerned party."

[146] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities, Proclamation, Proc. No. 251/2001, Federal Negarit Gazeta, Year 7, No. 41, Art. 11(1).

[147] Supra note 5, The Anti-Terrorism Proclamation, Art. 11 False Threat of Terrorist Act

Whosoever while knowing or believing that the information is false, intentionally communicates or makes available by any means that a terrorist act has been or is being or will be committed, is punishable with rigorous imprisonment from 3 to 10 years.

[148] Id. Art. 12. Failure to Disclose Terrorist Acts

Whosoever, having information or evidence that may assist to prevent terrorist act before its commission, or having information or evidence capable to arrest or prosecute or punish a suspect who has committed or prepared to commit an act of terrorism, fails to immediately inform or give information or evidence to the police without reasonable causes, or gives false information, is punishable with rigorous imprisonment from 3 to 10 years.

[149] Id. Art. 15. Information about a Lessee

1. Whosoever leases a house, place, room, vehicle or any similar facility shall have the duty to register in detail the identity of the lessee and notify the same to the nearest police station within 24 hours.
2. Any person, who lets a foreigner live in his house, shall have a duty to notify the nearest police station within 24 hours, about the identity of the foreigner and submit a copy of his passport.

[150] Id. Art. 35.

Ethiopia[151] and it would have been better to follow a similar trend for cases of terrorism. I believe that it is still possible to make amendments to effect changes in this regard.

Given the danger terrorism poses on the well being of the public at large, it is legally acceptable to put in place legitimate and permissible restrictions on personal rights in appropriate circumstances. With this understanding, I would argue that the fact that the Proclamation mandates the security personnel to intercept or conduct surveillance on various modalities of communication up on getting court warrant[152] is legitimate. In fact, it might make the security personnel able to prevent crimes of terrorism ahead of their commission and thereby preventing the would-be negative implications on human rights protection.

I believe the surveillance and interception sought by the Proclamation does not bypass constitutionally provided restrictions on the enjoyment of the right to privacy which permit legitimate restrictions in compelling circumstances meant to protect national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedom of others.[153] It is meant to protect an overarching interest that deserves protection. However, care should be taken not to let this mandate be abused by using it in cases whose gravity does not justify the interception and surveillance sought by the law. In fact, this would be a matter of judicial activism in that the judiciary has to question the merits of each case. But still, it would have been better had the law provided guiding considerations[154] to

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[151] The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proc. No. 434/2005, Federal Negarit Gazeta, Year 11, No. 19, Art. 4(1) limits non-balilable corruption cases based on the gravity of the offence stating that it is only persons charged with a corruption offence punishable for more than 10 years imprisonment who can not be released on bail. This provision repeals the provision of the Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation that ordains that any person who is arrested on suspicion of having committed a corruption offence [irrespective of its gravity] shall not be released on bail.

[152] Supra note 5, The Anti-Terrorism Proclamation, Art. 14(1).

[153] Supra note 54, The FDRE Constitution, Art. 26(3).

[154] Supra note 5, The Anti-Terrorism Proclamation, Art. 18. The Proclamation provides such kind of guidelines in case of warrant given to conduct covert search. It is provided that: The court on the basis of the information presented to it by the applicant (the police), may give covert search warrant by having into consideration:

a. the nature or gravity of the terrorist act or the suspected terrorist act; and
b. the extent to which the measures to be taken in accordance with the warrant would assist to prevent the act of terrorism or arrest the suspect.

grant court warrant or refuse to do so considering whether the compelling circumstances sought by the Constitution are fulfilled. In the absence of clearly stated guidelines, there is a probability whereby the legitimate mandate might be used for illegitimate cases and thereby unduly restricting the privacy rights of citizens beyond the permissible limits of the law. Yet, it is praiseworthy that the Proclamation provides that information obtained through interception shall be kept in secret.[155]

This article mentioned earlier the four month period of remand to detain a suspect of terrorism for investigation purposes before charge as a positive contribution of the Proclamation when seen from subjective Ethiopian legal reality. However, there are genuine human rights concerns that have to be seen with due attention. Nothing has been said regarding the fate of the suspect when investigation is not over after the lapse of the four month period of remand. The police might potentially indefinitely detain suspects of terrorism even after the expiry of the four month limitation. It is not very uncommon for the police in Ethiopia to detain a suspect even defying a court order for the release of the same.[156] Hence, something concrete should be there to prevent the police from detaining the suspect indefinitely.

The Proclamation simply ordains that no remand shall be given after the lapse of the four month period. The fate of the suspects up on expiry of such period is not clearly stated. Some argue that the suspect shall not be released free and has to be conditionally released on bail[157]; others argue that the court should only close the file of remand and it is up to the detained person to challenge the legality of his detention by invoking *habeas corpus*[158]; still others contend that the case has to be closed for-good and the suspect has to be released forthwith[159] as no case has been established against him. This

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[155] Id. Art. 14(2).

[156] See, Interviews with Aderajew Teklu and Yirdaw Abebe, Supra note 58. Ato Aderajew and Ato Yirdaw confirmed this mentioning real cases. See also, Siye Abrha, *Freedom and Justice in Ethiopia*, Signature Book Printing, 2009, P. 92. (Original book in Amharic entitled 'Netsanetna Dagninet Be'Ethiopia', translation mine). This is a famous case of corruption allegation against a former MP and Minister of Defense of Ethiopia. The book evidenced detention after a court decided release on bail of the suspect.

[157] Interview with Ato Berihu Tewoldebirhan, Federal Public Prosecutor, on 14 November, 2009.

[158] Interview with Amare Amogne, Supra note 114.

[159] Interview with Mulugeta Ayalew, Supra note 37. Ato Mulugeta Ayalew has this stand.

uncertainty might be a cause for human rights abuses as the police might indefinitely detain suspects.

I believe that the law has to be given effect. If the suspect remains in custody or is only conditionally released, the Proclamation's limitation of the period of investigation to four month time becomes meaningless. Nor is it acceptable to resort to *habeas corpus* which, I believe, works for a person whose detention has not come to the attention of a court of law.[160] Therefore, if the four month period expires without a criminal charge, the case shall be closed and the suspect has to be released, at least conditionally, forthwith. Otherwise, the police would be indifferent towards diligence in investigating cases of terrorism. Judicial activism geared towards protecting the rights of suspects up on adopting human-rights-friendly interpretation of the pertinent legal instruments is priceless to solve the problem.

The negative features of the Proclamation have either real or potential negative impacts on human rights protection. The ones with real negative impacts are those which directly place undue restrictions on human rights. The case of freedom of expression might be an example in this regard. Those which I referred as having potentially negative impacts on human rights are the ones which are susceptible to be used to curtail the whole process of human rights protection. The indeterminacy of the definition and minimized role of the judiciary might fall in this category. Though terrorism has to be prevented and punished, this should not be done at the expense of human rights that the prevention of terrorism is meant to protect. This is clearly against the premise of fighting terrorism. To use the words of Michael Ignatieff, freedom itself must set a limit to the measures we employ to maintain it.

4. Conclusion and Recommendations

The anti-terrorism law shall not be a source of violations of human rights, for whose protection it was necessitated. The anti-terrorism law has praiseworthy positive roles for the furtherance of human rights protection. Its most important positive feature is enabling the country to effectively prevent

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[160] Cf. Civil Procedure Code of the Empire of Ethiopia of 1965, Decree No. 52 of 1952, Art. 179(2) provide that an illegally detained person shall be released by virtue of habeas corpus where the court is satisfied that the restraint is unlawful. This shows that what the law envisages are cases which the court was not aware of. In our case, however, the court is fully aware of the unlawful detention since it is the one that closed the file of the remand and the detention would henceforth be unlawful. It does not seem justified to expect the suspect reappear by virtue of a habeas corpus application as it is possible to decide on the issue right there.

and punish terrorism. Secondly, the fact that the law envisages the establishment of a Terrorism Victims' Fund is praiseworthy in that it introduced the concept of compensation to victims of human rights violations, which has hitherto been not well-organized, or even totally absent, in Ethiopia. I recommend a prompt establishment of the fund by a regulation. Thirdly, the law fixed the maximum period of remand to prevent unlimited pre-trial detention.

Coming to its downsides, this article identified a number of real and potential threats to human rights protection emanating from the Proclamation. The first one is a common denominator for all the threats. The law provides an unwarrantedly broad and vague definition of terrorist acts. This makes the domain of the offence an indeterminate one and highly susceptible to abuse by state actors. I recommend the definition of 'terrorist acts' in the Proclamation has to be amended so as to avoid its unwarrantedly broad and indefensibly vague elements. It is possible to take lessons from the recommendations of United Nation organs, and that of other jurisdictions.

The second major problem is mandating the Parliament the power to proscribe and de-proscribe terrorist organizations and deny judicial role in at least examining particular cases. Proscription in the Proclamation is not just a symbolic declaration. It has irreversible implications on the fate of the organization and its members. The absence of judicial involvement violates citizens' right to access court-administered-justice recognized in the Constitution. I recommend the constitutionality of the proscription process envisaged by the proclamation be considered. Moreover, an amendment has to be made not to punish individuals for their mere membership to proscribed organizations in the name of punishing participation in a terrorist group. It is possible to differentiate mere membership before and after proscription. It is only when one becomes a member cognizant of an organization's terrorist missions that membership alone can defensibly be a terrorist act. Coupled with the definitional indeterminacy, this could make the law susceptible to abuses that could punish non-terrorist political dissent. A regulation has to be issued to make clear the mandates of the parliament and that of courts of law in the process of prosecuting terrorist organizations and members thereto. The effect of proscription in the conduct of court cases shall especially be addressed.

The fact that the Proclamation makes admissible terrorism-related intelligence report (that does not disclose its source or the method used) and hearsay and indirect evidences might be a source of abuse. This is contrary to the constitutional principle that excludes evidences obtained by torture and

might tempt the police to resort to torture. It may also limit the right of defendants to confront evidences and witnesses against them and thereby causing miscarriage of justice. The law also restricts the exercise of freedom of expression not by using objectively verifiable standards but by subjective considerations. It prohibits freedom of expression if it is likely to be understood by the addressees of the expression as a direct or indirect encouragement of terrorism. Given the definitional problems mentioned earlier, this predominantly subjective thought might give rise to an unprincipled restriction on freedom of expression. This unprincipled restriction should be rendered unconstitutional.

The capacity of the police, public prosecutors, the judiciary, the national intelligence and security service and other stake holders has to be strengthened for the better. This assists much for the efficacy of the country's counterterrorism measures without unduly violating human rights. It is only when we have well-organized police and judicial system that human rights would better be protected. A police force without the required competence to investigate terrorism cases is more likely to resort to inhuman treatments against suspects or witnesses in terrorism cases. Above all, there has to be a higher degree of judicial activism to prevent abuse of human rights in terrorism-related cases. Judges should always act as human rights defenders by adopting human-rights-friendly interpretation of the provisions of the Proclamation and other criminal legislations including provisions of the Criminal Code and procedure. It is only when the judiciary is active in defending human rights that we can be assured that the potential abuses of the Proclamation by government forces is not something worrisome.

Legal Research Tools and Methods in Ethiopia

Wondemagegn Tadesse*

1. Introduction

Like in any other discipline (science or profession), clarity on research methods is crucial for the study of law and its institutions. From terminology to its very existence, the subject of legal research methodology, which is mostly unheeded until recently, is debated. Close to home, legal research methodology, despite its potential in shaping the quality of legal scholarship, has not yet obtained sufficient clarity in the study of law. From confusion of 'legal research' with the study of legal citations to lack of academics interested in the area, legal research languishes in the shadows of substantive study of law. Unlike in other disciplines where research methods are taken seriously – in some cases being the very definition of the profession – law students, academicians, and practitioners have largely ignored issues of research methods in Ethiopia.

Generally two problems of legal research could be identified in Ethiopia. The first relates to the dearth of finding tools or law finders that are crucial in standard legal researches as carried out for instance in writing legal memorandum or pleadings. It is common knowledge among Ethiopian legal scholars that their doctrinal researches at present are not assisted by systematic tools of locating the law. Although there were beginnings to systematize the publication and the finding of Ethiopian laws such as the consolidation efforts of the 1970's, none of them resulted in permanent tools of legal research. Moreover, there is little consensus among legal scholars on the importance of law finding tools in Ethiopia. The second problem relates to the meaning and type of empirical legal research methods that should be applied in empirical legal scholarship. The introduction of a course on legal research methods, with recent reforms of law school curricula, might be evidence of the growing recognition of empirical legal research methods in

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Email: twondemagegn@yahoo.com. I am grateful to the two anonymous reviewers, who identified, among others, major structural flaws of the initial draft and helped in the enhancement of coverage and organization of the article. I am also indebted to students Rediate Mulugeta and Sousena Kebede of the School of Law, who have assisted me in carrying out a general empirical survey used for this article.

the study and practice of law. But telling from the content and organization of the textbook[1], (empirical) legal research methods are more obscured than elaborated. While criticizing the text is not the point of this article and as a matter of fact the text's efforts have to be acknowledged as pioneering empirical methods to Ethiopian law students, the textbook provides little assistance for actual undertaking of empirical legal research owing to its lack of clarity exemplified by ambiguities in terminologies and concepts of research methods.

Such problems surrounding significance and meaning of legal research in Ethiopia naturally call for exploration of the various issues of research methods, issues which will hopefully be taken up for further research and action by students, practitioners, and institutes of law. Hence exploration, it should be stated, is the objective of this article. As in the nature of exploratory research, instead of providing concrete solutions, the article aims at identifying issues concerning legal research in Ethiopia. In doing so, categories and definitions of legal research are borrowed from literature. For the purpose of comparison with other research methods, brief examination of doctrinal study and its methods is made. Since finding tools in doctrinal research require special attention, separate discussion of the topic is provided. Issues revolving around empirical legal research are also discussed at length for they stir debates in legal scholarship. The article also offers some clarification of terms "primary" and "secondary", which might mean different things based on the context in which they are used. After an outline of questions of concern in legal research methods in Ethiopia, the article will remark on law schools and legal methods including the issue of plagiarism, frequently encountered in term papers and theses. After some observations on rules of citation, the article will end with conclusions and recommendations to stakeholders in enriching legal research and in effect legal scholarship in Ethiopia.

The initial story should be told. Sometime ago, the writer was looking for an article he was told published in the Journal of Ethiopian Law (hereinafter JEL). The story did not include the year and volume of JEL - the source was a faint memory of the article. Naturally, the writer went to the Law Library (Addis Ababa University, hereinafter AAU), wondering how to retrieve the article. He was all but unsure if there were indices of JEL. The Library informed the writer that there was no index to JEL. What was then the natural course for the writer, or anyone for that matter? Naturally colleagues

[1] Justice and Legal System Research Institute, Legal Research Methods: Teaching Material, (2009)

teaching the subject area should be of assistance but could not identify the article. The situation was unfortunate not least the writer could not find the article - may be the article never existed. But because there was and is no easy way of finding it: probably one had to start from the first Volume, first Number of JEL, which would be how many decades back? Or would it be a consolation if one knew that there are barely 25 volumes of JEL ever issued? But what struck the writer most was the wider picture: there was and still is no easy way of finding Ethiopian law- laws, legal articles, and any legal research output. And then the big question: should legal research tools such as finding tools, techniques, and methods not help legal scholars with these and similar issues? Ideas with empirical legal research forming part of this article came later.

Afterwards the writer consulted legal research materials and browsed books and periodicals online. For lack of local materials, the writer has to substantially depend on foreign materials accessible. The literature on legal research is rich, though as will be clear later, with varying meanings of the concept. But what is inspiring is if one so desired one can bite as much as one likes for legal research and scholarship in Ethiopia. Compared to complex and functional legal tools and methods developed elsewhere, the understanding and employment of legal research methods in Ethiopia are at their earliest. It is not to say that by now the Ethiopian lawyer should have had Ethiopian versions of Westlaw and LexisNexis. It is neither to suggest that the Ethiopian law student should have had half of her studies in empirical legal research methods.

Regarding the situation of legal research methods in Ethiopia, the article relies on personal observation of the writer and information gathered through conversations with colleagues and students. Moreover, to corroborate these sources of information, a general survey for the purpose of this article was carried out. The survey, the questions of which are annexed in the end, focused on types of legal research common among scholars and students of law, the use of law finders in doctrinal research, and methods applied to empirical legal research. In the survey, which is carried out at the School of Law, AAU, thirty-six research reports are investigated in terms of research tools and methods. Sixteen are articles published in JEL and twenty are theses and senior papers of graduate and undergraduate students of the School of Law. The findings are indicated in sections where the Ethiopian situation is explored. As it should be clear, the sample taken is not representative of legal research outputs in law schools let alone in Ethiopia. However, given the communality of legal research tools and methods in many jurisdictions, the writer believes that similar findings are expected in

legal studies in Ethiopia, in academics and in practice alike. Moreover, as is in the nature of exploratory research, which this article is, it should be the issues raised and not the findings that concern readers most.

2. Note on Terminology

At the outset, it is important to clarify the meaning of terms in this article. This is partly because one of the article's aims is to explain terms in methodology. A person interested in legal research might come across words like legal research methods, legal methodology, doctrinal research, non-doctrinal research, empirical legal research, research in law and how to find the law, just to name a few. These terms, as will be explained in subsequent paragraphs and sections, might have differing meanings, some of them identifying the conventional legal research, others meaning in the broadest sense, still others referring to different categories of legal research, and so on. For example, in Black's Law Dictionary, one finds *legal research* as "the finding and assembling of authorities that bear on a question of law,"[2] which mirrors the traditional legal research but oblivious to the nascent empirical legal research concerned more in what is happening in society than what books of law such as proclamations say or do not say.

To provide framework for later discussions, this article borrows an illuminating classification of legal research by Paul Chynoweth, who himself depended on the work of a Canadian report on legal education. According to him, legal research is classified into two: doctrinal legal research (which is also research in law) and interdisciplinary (sometimes called non-doctrinal or research about law). Based on their application, these two in turn are classified into two: applied and pure research. Joining them together, the classification will have four strands: in doctrinal research, which is about "formulation of legal 'doctrines' through the analysis of legal rules," there are two, one being *expository research* (an applied one and exemplified by black-letter law research used to write legal textbooks, treatises, articles or legal memorandums) and two being *legal theory research* (which is 'pure' and could be exemplified by researches in legal philosophy); and in interdisciplinary research there are *fundamental research* (pure research, example being theoretical researches in law and economics) and *empirical research* (applied one, example being an empirical research carried out with the aim of law reform).[3]

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[2] Bryan A. Garner (ed.), Black's Law Dictionary (7th ed., 1999)

[3] Paul Chynoweth, "Legal research", in Andrew Knight and Les Ruddock, Advanced Research Methods in the Built Environment (2008), p. 29

Any Ethiopian legislative measure could be taken to elucidate the classification. Consider the Disclosure and Registration of Assets Proclamation No.668 /2010, which roughly requires (Article 4), "any appointee, elected person or public servant shall have the obligation to disclose and register the assets under the ownership or possession of himself and his family; and sources of his income and those of his family." One question for a legal scholar might be if the Proclamation violated any constitutional right of an appointee such as the right to privacy of Article 26 of the Constitution of Federal Democratic Republic Ethiopia (FDRE) in asking the appointee to register her property, which might normally be considered as private. Despite the merit of the issue, a legal memorandum could be written on constitutionality of the parliamentary act, which will be a doctrinal research exposing constitutionality of one of the provisions of the Proclamation. It might also be that the prosecutor is indicting an appointee for failure to register, which is punishable under the Criminal Code. This again is an issue of doctrinal research, expository one. On the other hand, a legal philosopher might have interest in the parliamentary act and wonder if the government is morally justified in imposing a penalty of fee in preference to firing the appointee for example, which might be called legal theory research. Again it is possible that a legal scholar or a student of "law and economics" might raise a theoretical question if the legislation contributes to economic efficiency by deterring corruption, which will be a kind of research one might consider fundamental and interdisciplinary legal research. Again a legal researcher might inquire effects, if any, on the conduct of public officials of the passing of this particular legislation, e.g. whether corruption has dropped down since the adoption of the legislation, carrying out an applied interdisciplinary research.

The article shares this classification, which is prevalent in legal research discourse. But in line with its objective of clarification of methodology specifically on similarities and differences in legal methods, the article takes two general categories of legal research: one is doctrinal research, the conventional legal research which coincides with the first general class in the previous classification and two is empirical legal research, the kind of research common in the social sciences.

This categorization might leave out one particular class that is usually called fundamental research about law such as 'law and economics', for instance asking if the Ethiopian law on trade practice is informed by rational choice theory. The intention is not to discard this sub-division as irrelevant to the study of legal research. After all "understanding" and "critique" of the law based on perspectives from economics, history, and so forth have always

figured in legal scholarship.[4] Rather its methodological issues could be generally merged with the doctrinal legal research. Intuitively, one can say, a legal researcher interested in such kinds of research could familiarize himself with theories and models of the discipline and deploy logic, critical analysis, deductive and inductive reasoning, which are available from traditional legal research, and carry out the study. On the other hand, since empirical legal research – the fourth kind – raises peculiar methodological challenges to students of law, it merited separate discussion.

It should be noted that the categories in this article as elsewhere owe their existence to their strength in elucidating methods in legal research. Other classifications and terminologies could be easily entertained and justified for various purposes. For example, in an informative collection of Research Methods for Law, editors identify for examination three major types of legal research, namely empirical legal research, international and comparative legal research, and doctrinal research.[5] While the classification in this article does not profess universality, for the purpose of this article the latter two could be combined under the doctrinal research category while the former retains its separate category. Again as will be commented upon later, there are writers who consider *law finders* as legal research methods. But they are mere tools helpful in a standard legal research to locate law and legal authorities and are not methods as such.

On use of terminology of 'method,' a point has to be made. Some legal scholars take *legal method* for *applied* theory or science of law. One might encounter a book on *legal methods* which elaborates schools of legal thought or theories of law such as legal positivism and critical legal studies. Of course, these theories have significantly influenced tools, techniques, sources, or generally methods of legal research. But their identification as methods or models should not be understood as methods in the social sciences or methods as used in this article. Here falls the adoption of the term 'methods' in a Symposium on Method in International Law resulting in an excellent guide in the study and practice of international law. As elaborated in the Symposium, the "link between a *legal theory* and a *legal method* is … one between the *abstract* and the *applied*."[6](Emphases added!) Hence legal

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[4] Philip C. Kissam, "The Evaluation of Legal Scholarship," 63 Wash. L. Rev. 221 1988, p. 236

[5] Mike McConville and Wing Hong Chui, "Introduction and Overview", in Mike McConville and Wing Hong Chui (eds.), Research Methods for Law, (2007), p. 3

[6] Steven R. Ratner and Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers, Symposium on Method in International Law", 93 Am. J. Int'l L. 291 1999, pp. 292 & 293. Organizers of the symposium

methods are equated with schools of legal thought or theories of law, except the practice orientation of methods. And that is also why the Symposium used terms like "positivist method".[7] Although such usage of the term 'legal methods' is common among legal scholars and has to be elaborated in Ethiopian context, this article does not employ 'method' in that sense.

3. Doctrinal Research and Methods

> *The task of the legal scholar was seen as being to extract a doctrine from a line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for "sensible" results in light of legal principles and common sense. Logic, analogy, judicial decisions, a handful of principles such as stare decisis, and common sense were the tools of analysis. The humanities and the social sciences were rarely mentioned.*
>
> *Judge Richard A. Posner*
> *Legal Scholarship Today, 115 Harvard Law Review 1316 (2002)*

A note is in order before discussion of doctrinal research methods. Traditionally legal practice, study, and writing have been shy of using the term research methods in doctrinal scholarship. Contributing factors are many. One is that traditional approaches in law were different from methods in the social and natural sciences and hence the term method was considered unsuitable for legal studies.[8] This could be illustrated by the perception people had towards traditional legal research. Take for example crucial legal works such as treatises, legal encyclopedias, and restatements. For some, the undertakings to produce those legal writings were not legal researches simply because legal research is "the scientific study of law," which involves

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identify seven *methods* for appraisal: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. Many of these methods, which correspond with theories in international law, are adapted from general theories in law and are regarded as representing the "major methods of international legal scholarship."

[7] Ibid.

[8] See, for example, James Huffman, "Is the Law Graduate Prepared to do Research?", 26 J. Legal Educ. 520 1973-1974, p. 520, which says, "what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists. ... Legal research, as taught in the law school course of that or similar appellation, is the technique of using legal source materials - cases, statutes, regulations, etc.- to determine what the law is."

the "formulation of ... propositions ... and ... verification by observation."[9] Hence according to such perception unless there are propositions and empirical investigations, a legal study cannot be considered as method. But this is not something all scholars have agreed with. The undertakings of doctrinal research which mainly comprise illumination of the law, holding positions, and giving reasons for legal inconsistencies have been considered "tremendously important research undertaking."[10]

The other contributing factor for reluctance in use of *research methods* in doctrinal studies has been lack of separate study in legal methodology with exceptions of studies in bibliography and finding tools, which instead of *methods* should be conveniently called tools assisting the carrying out of legal research.[11] As a matter of fact, methods in the study of law were dispersed in substantive courses. Methods of legal analysis, for example, are not considered separate studies of law instead being considered as skills students of law develop with the study of substantive laws. Methods or skills in legal scholarship are said to be learned at an "instinctive level through exposure to the process."[12] Another factor is lack of understanding among legal scholars on what amounted to methods. As Professor Ulen indicated, there is little consensus on what amounts to methods in legal inquiries.[13]

Coming to the topic of this section, doctrinal legal research – sometimes called research in law – is the traditional and standard form of legal research. Its main component of research is black-letter law, which is about "what the prevailing state of legal doctrine is."[14] Unlike empirical research, doctrinal

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[9] Hessel E. Yntema, "'Looking out of the Cave'—Some Remarks on Comparative Legal Research", in Alfred F. Conard (ed.), Conference on Aims and Methods of Legal Research (1957), p. 58-59

[10] Albert J. Harno, "Comments", in Alfred F. Conard (ed.), Conference on Aims and Methods of Legal Research (1957), p. 143

[11] On the teaching of legal bibliography as a subject in American legal education, see Frederick C. Hicks, "The Teaching of Legal Bibliography", 11 Law Libr. J. 1 1918. An Ethiopian law student may be amused of the idea of learning of bibliography as a course; but when he understands the existence of millions of legal materials to look for in carrying out a research, the student will be less so.

[12] Chynoweth, cited above at note 3, p. 35

[13] Thomas S. Ulen, "A Nobel Prize in Legal Science: Theory, Empirical Work, and The Scientific Method in the Study of Law", 2002 U. Ill. L. Rev. 875 2002, p. 881

[14] Karl N. Llewellyn, "Social Significance in Legal Problems" in Alfred F. Conard (ed.), Conference on Aims and Methods of Legal Research (1957), p. 27. The same definition applies to Chynoweth, cited above at note 3, p. 30, who identifies the concern of doctrinal research as "the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions" that "take

research relies on "reason and analysis" rather than data from outside sources and on theories that "presume to describe the world" rather than "hypothesis that have been subjected to empirical testing."[15]

According to Judge Edwards, the defining features of traditional legal research (the term he applies is "*Practical" legal scholarship*) are two: one, being *prescriptive* in analyzing the law to instruct attorneys in consideration of legal problems, to guide judges and decision-makers in their resolution of legal disputes, and to advise policymakers on law reform; and two, being *doctrinal* in attending to the various sources of law such as precedents and statutes that constrain or guide the practitioner and policymaker.[16] While the first point identifies the normative nature of standard legal research, the second explains the justification for the primary focus of doctrinal legal research on legal texts – both texts *of* the law, e.g. proclamations and texts *about* the law, e.g. journal articles.[17]

A cursory glance at doctrinal legal scholarship indicates the existence of crucial techniques and skills that could be explained under doctrinal research methods. Major methods include legal analysis, legal synthesis, methods of interpretation, and methods of legal reasoning. The aim of legal analysis, which is the principal tool in doctrinal legal research, is to "reduce, separate, and break down cases, statutes, and other legal materials into separate elements" and offer "explanations, interpretations, and criticisms of the elements of the case or statute analyzed."[18] Legal synthesis, on the other hand, aims at combining the "disparate elements of cases and statutes together into coherent or useful legal standards or general rules."[19] Another important category of skills or methods in doctrinal legal studies is the ability to exploit various methods of legal reasoning, which are mostly identified as deductive, inductive and abductive reasoning.[20] Methods of interpretation are also important tools in the undertaking of legal research. The familiar cannons of interpretation that have profound importance in doctrinal

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the form of asking 'what is the law?', which is different from "questions asked by empirical investigators."

[15] Shari Siedman Diamond, "Empirical Marine Life in Legal Waters: Clams, Dolphins, and Plankton", 2002 U. Ill. L. Rev. 803 2002, p. 805

[16] Harry T. Edwards, "The Growing Disjunction between Legal Education and the Legal Profession", 91 Mich. L. Rev. 34 1992-1993, p. 42

[17] Sharon Hanson, Legal Method & Reasoning (2nd ed., 2003), p. 1

[18] Kissam, cited above at note 4, pp 231 & 232

[19] Ibid.

[20] For explanation of these methods of reasoning, see Terence Anderson, David Schum, and William Twining, Analysis of Evidence (2nd ed., 2005), p. 56.

research include language use, especially in understanding the language of law that demands precision, formality, and generalization, textual interpretation, legislator's intent, historical consideration, comparative analysis, textual interpretation, and teleological construction.[21]

In deployment of these traditional legal research methods, stages of legal research undertakings are generally clear. In a standard doctrinal research, there is a legal situation, a legal researcher analyzes the problem by identifying the facts of the case and legal issues, locates relevant legal texts from primary and secondary sources (which could be a legislation, a case, a journal article, or a database), evaluates and updates, and finally applies the rules to the facts of the case.[22] All of these legal research activities are assisted by finding tools such as codes or consolidations of laws, chronological publications of laws, digests, authority finders, and indices.[23]

Finally it should be noted that like disciplines in humanities, doctrinal legal research is not preoccupied with empiricism and as such might largely ignore methods in empirical investigation.[24] Unlike researches in social and natural sciences, doctrinal research does not have lists of questions, questionnaire, observation, and experimentation in order to gather empirical data from outside. Hence its methods might differ and tempt some into denying the concept of methodology to doctrinal research. Again some might conveniently consider its methodologies as "techniques of qualitative analysis."[25] But whether called by the name methodology or not, they are complex and powerful techniques of traditional legal research that could match the esteem (if one cares!) of the often praised "scientific" methods in empirical scholarship.

4. Legal Research and How to Find the Law

With quick review of library catalogues with the title "legal research" in the School of Law (AAU), one uncovers materials on how to find the law, by varied names such as *how to find the law, practical guide to legal research,* and

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[21] For more on cannons of interpretation, see Matthias Klatt, Making the Law Explicit: The Normativity of Legal Argumentation (2008), p. 17.

[22] This exercise is mostly practiced in courses such as legal skills or legal writing. See Hanson, cited above at note 17, for more on legal argument construction, p. 207.

[23] Morris L. Cohen and Robert C Berring, How to Find the Law (8th ed., 1983), p. 377. See section 4 of this article for finding tools.

[24] Chynoweth, cited above at note 3, p. 37

[25] Ibid.

legal research handbook, all of them referring to finding tools.[26] In these legal research materials, legal research is portrayed as synonymous to finding the law, in effect identifying finding tools with legal research methods. First, it should be clear that finding tools are not legal research methods, and hence they should not be mistaken for the "qualitative skills" of the traditional legal research identified in the previous section. Rather, they are tools utilized to locate the provisions of the law. Second and the point of this section, it is hard to overemphasize the importance of finding tools in carrying out doctrinal research. Simply stated, finding tools simplify access to laws, without which doctrinal analysis is not possible. Quick and efficient finding of the law is hard to imagine without finding tools. One could suppose a situation where thousands of statutory rules and judicial precedents exist in a given legal system.[27] How could a lawyer find the law – statutory rule or a precedent – pertinent to the issue at hand from this bulk of legal materials? Whether one likes it or not, everyday activities of the legal researcher – in academics or practice – relate to finding the law and finding tools are crucial.

Major factors that determine the type and complexity of finding tools of traditional legal research include the characteristics of the law that basically mean the interaction between certainty and stability of the law, the legal system such as the existence or lack of *stare decisis* in the system, multiplicity of primary sources of law that might probably be the number of statutes, judicial opinions and other primary sources of law, forms and volumes of publication of laws such as the existence of official and unofficial practice of law reporting, principles of interpretation adopted in the system, court structures, prevailing classifications of laws, governance structure , e.g. unitary vs. federal structure, hierarchy of laws, existence of statutory compilation or codes, and the variety of secondary sources.[28] Below is a brief outline of finding tools, which are likely to be found in any given legal system.

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[26] The situation is not peculiar to an Ethiopian law school. For example, those who searched for "legal research books" in an Australian university found out that "legal research means finding the law." See Desmond Manderson and Richard Mohr, "From Oxymoron to Intersection: an Epidemiology of Legal Research", 6 Law Text Culture 159 2002, p. 160.

[27] In American legal system, they have millions of reported cases and statutes; hence it is difficult to imagine tasks of legal research without finding tools. See Cohen and Berring, cited above at note 23, for more on the enormity and complexity of American legal materials and finding tools.

[28] See Cohen and Berring, cited above at note 23, especially pp 2-5.

Finding Tools

As already explained in the previous paragraphs, for quick and efficient undertaking of legal research, doctrinal research has to employ *finding tools* – a term which includes consolidations, 'codes', digests, encyclopedias, catalogs, indices, tables, and computers that facilitate the access of law and legal materials to the legal researcher.[29] Although sources of laws might vary as variations in legal systems, the law is usually sought in statutes, precedents, and secondary sources of law. To find the law in such legal materials, the following tools are commonly applied.

Case Finders

In common law tradition where judicial precedents are sources of primary authority, case-finding – a process for locating judicial decisions[30]– is a crucial skill that determines the success of legal research. Owing to its importance, in the USA for example, legal research materials have given considerable attention to cases, forms of publication, and their finding tools.[31] Such might not be the case for Ethiopia where the principle of judicial precedent has limited application. In any case, however, in many common law countries, there are different approaches to case finders such as traditional case digest systems, table of cases, word indices, legal encyclopedias, restatements, computer based search systems, and various secondary materials such as casebooks. These tools are publications, either official or commercial, put to use by legal researchers to locate cases or precedents.[32]

Statute Finders

Most relevant finding tools to legal systems such as Ethiopia's whose primary source of law is statute or legislation are statute finders. These could be chronological publications, indices of laws, legal consolidations or 'codes' in common law countries, encyclopedias, indices of legal periodicals, textbooks, and treatises.[33]

Authority finders

Before the search for the law is complete, one need ensure the current status of the statutory rule or the precedent. Since a statute or a case might be

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[29] Ibid.

[30] Id, p. 99

[31] Id, p. 17

[32] Details on these and lessons from American finding tools and for comprehensive treatment of specific tools such as the West's American Digest System, Shepard's Citations, computer search services, etc are found in Cohen and Berring, cited above at note 23. Recent editions of this material might be more useful.

[33] Cohen and Berring, cited above at note 23, p. 13. A 'code' in common law tradition refers to a subject compilation of current statutes of a given jurisdiction.

repealed, reversed, modified or amended, this function of authority finders is valuable lest one argues based on repealed or reversed provision of the law, a disastrous scenario lawyers are always anxious to avoid. While legal systems have their own tools to find authorities, the America's *Shepard's Citations* are well known.[34] Shepard's Citations "trace the judicial history of every published decision, and the later legislative *and* judicial treatment of every enacted statute."[35]

5. Empirical Legal Research and Methods

> *For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.*
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> *Justice Oliver Wendell Holmes, The Path of the Law, 10 Harvard Law Review 457 (1897)*

Three advance notices: one, as should be understood from notes on classification, empirical legal research and research about law are not one and the same. For this article at least, the latter is broader and includes theoretical studies such as theoretical parts of the "law and society". This section of the article outlines the former. The latter part, i.e. the "law and" study, as remarked in the second section, does not raise radical methodological difficulty apart from traditional legal scholarship and hence its association with methods in doctrinal research. Therefore, apart from its contribution for the emergence of empirical research indicated later, it should be left out of this section.

Two, by empirical, reference is made to both quantitative and qualitative analysis. There is nothing new with this passing note. Black's Law Dictionary defines empirical as "of, or relating to, or based on experience, experiment or observation," irrespective of numerical or non-numerical nature of the function. Three, as Professor Diamond says, it is "misleading to view the categories of empirical and non-empirical as mutually exclusive."[36] Traditional doctrinal study usually requires empirical investigation. For

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[34] Ibid. *Shepard's Citations* is "a set of volumes, which for statutes, indicates every modifications effected by the legislature and cites every judicial opinion which has construed, applied, or even mentioned it. It also performs a similar function for judicial opinions, citing every case which has in any way commented upon a prior case, and indicating the effect of each such subsequent opinion upon the precedential authority of the cited case."

[35] Id, p. 250

[36] Diamond, cited above at note 15, p. 805

example, it is through empirical investigation that the existence of a law could be ascertained. As Professors Epstein and King identify in their excellent work on empirical legal research, a "large fraction of legal scholarship [in the US] makes at least some claims about the world based on observation or experience."[37] In a similar tone, Professor George, who has carried out an empirical research of empirical legal scholarship, states "nearly all law review scholarship [which is the mouth piece of the traditional legal research] offers some statement about the real world, and thus has an empirical component."[38]

Legal realism[39] is believed to have initiated empiricism in law, with legal realists' expectations that empirical research revealed the "true nature of law."[40] But these did not mean that legal scholars immediately scrambled to undertake empirical legal research. Instead legal realists looked in other disciplines for empirical findings.[41] The subsequent development of the "Law and" movement such as "law and economics" might have also increased the chances of empirical legal scholarship.[42] Although scholars carrying on "law and society" research varied in methods, they were all committed to methods outside the law and to understanding of the law in terms of its social context.[43]

Unlike non-empirical legal scholarship which is usually concerned with how legal institutions "ought to behave," the concern in empirical legal studies is usually about the actual behavior of the law and its institutions.[44] In a typical empirical legal study, the empirical legal scholar offers a *hypothesis* of a law or

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[37] Lee Epstein and Gary King, "The Rules of Inference", 2002 The University of Chicago Law Review, Vol. 69 No. 1, p. 3. In the article, the authors adapt "the rules of inference used in the social and natural sciences to the special needs, theories, and data in legal scholarship."

[38] Tracey George, "An Empirical Study of Empirical Legal Scholarship: The Top Law Schools", 2005 Indiana Law Journal 81(1), p. 146. This article interestingly assesses "law schools based on their place in the ELS [empirical legal scholarship] movement and offers an essential ranking framework that can be adopted for other movements as well."

[39] Legal Realism is a theory that says "law is based, not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy." Garner, cited above at note 2

[40] George, cited above at note 38, p. 144

[41] Id., p. 146

[42] Ibid.

[43] Lawrence M. Friedman, "The Law and Society Movement," 38 Stan. L. Rev. 763 1985-1986, p. 763

[44] Diamond, cited above at note 15, p. 806

legal institution and then tests that hypothesis using quantitative and qualitative techniques developed in the social and sometimes natural sciences. The evidence may be amassed by laboratory experiment such as simulated judges or collected systematically from real world observation such as the actual observation of treatment of children in schools to identify elements of discrimination, field researches such as on implementation of a certain legislative act, case studies, e.g. studying court cases of an issue with documents and interviews with plaintiffs and defendants, and archival analysis, e.g. review of all cases of the Cassation Division of the Federal Supreme Court with a sentence of life imprisonment.[45]

5.1 Methods for Empirical Legal Scholarship

There are various methods developed by social and natural sciences. A look at the outline of a textbook on social science research displays helpful insights on methods of empirical research. In a standard social science research, the following terms and concepts frequently appear: research topic, research question, hypothesis, quantitative/qualitative research, research proposals, research objectives, research design, experimental research, descriptive/correlational research, literature review, population, random/non-random sampling, data gathering, interview/questionnaire, FGD (focus group discussion), experiment, survey, observation, data analysis, statistics, SPSS (Statistical Package for the Social Sciences), internal/external validity, triangulation, ethnography, variables, replication, research ethics, and research report. [46] Many of these terms expectedly are new to the traditional legal scholar. But these are some of the concepts one has to use when setting out to perform empirical investigation. The question is: should the legal scholar take these concepts in methods and their interrelationship in the social sciences and apply them to empirical legal research?

One thing is clear. The traditional legal scholarship does not have a complete list of methods to carry out empirical legal research. Hence, it is argued, "legal scholarship needs to rely on other methodologies" to obtain empirical data vital to understand "the forces that act upon the legal system and of the

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[45] See Diamond, cited above at note 15 for explanation of some of the forms of empirical legal research.

[46] This is to incidentally mention terms/concepts one encounters and there is no intention here whatsoever to discuss methods in social sciences as applied to legal research. They are left for future research tasks. For those interested in social science methods, there are easily accessible books online and just googling will result in valuable research books.

impact of legal decisions."[47] What remain is which methods to select for adaptation to empirical legal scholarship. "The most useful fields," Professor Rubin points out, are those "whose subject matter overlaps with that of law and legal scholarship," providing economics, political science, and sociology as illustrations.[48] Different legal writers have also introduced various methods from other disciplines.[49] For example, Professor Harcourt introduced to legal studies correspondence analysis, a method that "integrates in-depth qualitative interviews with an experimental free associational component, map analysis of the interviews."[50]

5.2 Why Empirical Research Methods to the Lawyer

A question might be asked as to why law students who are likely to engage in traditional legal research as judges, for example, should be concerned with methods of empirical legal research. Two general categories of answers are identified: the lawyer as the 'consumer' and the lawyer as the 'producer' of empirical research.[51]

As the consumer of empirical scholarship, courts have always resorted to empirical evidence from other disciplines such as the social sciences. It is possible to mention frequently cited US Supreme Court case of Brown v. Board of Education, in which the Court utilized researches from the social sciences and determined "separate educational facilities are inherently unequal."[52] Although no empirical data is available to the writer to tell the situation of use of scientific findings in Ethiopian courts, a point could be made using the concept of expert testimony in the Criminal Code. Article 51

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[47] Edward L. Rubin, "Law and the Methodology of Law", 1997 Wis. L. Rev. 521 1997, p. 521

[48] Id., p. 565

[49] For a comprehensive adaptation of research methods to empirical legal scholarship, especially aimed for use by legal scholars and explained with the help of actual empirical legal researches in connection with amassing data, summarizing data, making descriptive or causal inferences, replication, and research design (research questions, hypothesis, measurement, estimation, recording the process, identification of population, sampling) see Epstein and King, cited above at note 37.

[50] Bernard E. Harcourt, "Measured Interpretation: Introducing the Methods of Correspondence Analysis to Legal Studies", 2002 U. Ill. L. Rev. 979 2002

[51] For brief explanation on being a consumer and producer of research, see Scott W. Vanderstoep and Deirdre D. Johnston, Research Methods for Everyday Life: Blending Qualitative and Quantitative Approaches (2009).

[52] Cohen and Berring, cited above at note 23, p. 556

provides for expert testimony.[53] Specifically sub-article three says "on the basis of the expert evidence the Court shall make such decision ... In reaching its decision it shall be bound solely by *definite scientific findings* and not by the appreciation of the expert as to the legal inferences..." (Emphasis added!)

An issue might arise as to the sub-article's implied assumption that scientific findings are always definite. As a matter of fact the main criticism for use of empirical data for legal decision making is that empirical evidence presented to courts is usually "flawed and unhelpful."[54] Again, the sub-article does not state the criteria for the Court to determine whether the finding is scientific or not.[55] This point is more relevant to the discussion here. What if there are competing scientific findings in the area under consideration? Reasonably, the Court has to apply the criteria of methods to appreciate competing findings. As Professor Meares indicated, "courts, with absence of training in empiricism, are not capable of dealing with complicated and sometimes conflicting social science data."[56] This argument applies to all participants in law and legal institutions: practitioners, academicians, policy makers, and legal researchers.

Moreover the complete understanding of law and the legal system is difficult without the help of empiricism. The traditional legal scholarship usually considered law as "self- contained system that... works like a syllogism" with abstract principles and legal rules "combined with ... facts ... leading deductively to legal outcomes."[57] However, in reality as explained by law and society movement, law is "far from a closed system of logic" and "is tightly interconnected with society."[58]

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[53] The Criminal Code of the Federal Republic of Ethiopia, 2004, Art. 51, Proc. No. 414/2004

[54] Tracy L. Meares, "Three objections to the Use of Empiricism in Criminal Law and Procedure – and Three Answers," 2002 U. Ill. L. Rev. 851 2002, p. 854

[55] For example the US Supreme Court has identified four criteria for expert testimony to be considered as scientific which are associated with possibility of falsifiability of the theories, publication of the methods in peer-reviewed journals, existence of known rate of error, and methods generally accepted in the scientific community concerned. Ulen, cited above at note 13

[56] Meares, cited above at note 54

[57] Kitty Calavita, Invitation to Law & Society: An Introduction to the Study of Real Law, (2010), p. 4

[58] Id, p. 5

Overall as often asserted, most of a lawyer's work involves factual issues "rather than great abstract issues of law," requiring the ability to find and use facts.[59] This in effect requires mastery of methods of empirical research which would permit the assessment of accuracy and validity of data.

Equally important, as producer, a lawyer needs methods to produce empirical legal scholarship. As already outlined in previous sections, legal scholars have been carrying out empirical research. What was missing in those research works has been the observance of methods of empirical study. Even in Ethiopian research practices at law schools, it is common to encounter researches on "the law and the practice" – for example, consider a research topic which reads "Freedom of Information in Ethiopia: the Law and the Practice."[60] Although it seems on the face doctrinal research, such researches have elements in empirical investigation. How does the researcher know the practice? Obviously, through empirical investigation of the behavior of institutions and individuals involved. Without the knowledge and proper utilization of methods in empirical investigation, the researcher is unlikely to accurately describe the practice. Hence systematic usage of methods is required to accept findings that claim to represent reality.

Another practical reason might be, unlike in the past, many students and practitioners of law are being called up on, out of necessity in most cases, to carry out empirical investigation. For example, many investigative researches on the implementation of human rights laws in Ethiopia are being carried out by lawyers. Moreover, a few graduates of law are also shunning the traditional practice of law preferring to engage in other undertakings requiring skills in empirical research. In all these activities, methods in empirical research are very important.

It should be noted here that empirical legal scholarship could be carried out by students from social sciences with their tools and techniques in empirical research, depriving any urgency to the engagement of law students. It is also quite possible that empirical legal scholarship is "open to participants from the social sciences," the principal reason being law schools' traditional reluctance to train empirical scholars.[61] However, "non-lawyers have the distinct disadvantage of often not understanding legal doctrine or the state of

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[59] Cohen and Berring, cited above at note 23, p. 517

[60] Freedom of the Mass Media and Access to Information Proclamation,2008, Proc. No 590, Neg. Gaz. Year 14, No. 64

[61] Mark Suchman, "Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?" Amici 2006 13(2), pp 1-4

the law" to carry out empirical legal scholarship.[62] By studying methods in empirical research, the lawyer will exploit the advantage of understanding the contours of law and its institutions.

5.3 Areas for Empirical Legal Scholarship

Theoretically speaking, almost all areas of law are candidates to empirical investigation. Although evidence of increased empirical legal research is found across numerous areas of legal scholarship, its development within particular areas is said to be uneven.[63] Regarding legal institutions, for example, studies about court attitudes are common in empirical studies in the USA, resulting in interesting insights in judicial behavior. For example, a systematic analysis of appellate court behavior indicated that defendants have substantial advantage over plaintiffs on appeal.[64] Regarding doctrines, examples are abundant. Professor Korobkin in the USA, for example, carried out review of empirical researches in contract law, which dealt with various issues including contracting practices of parties, experimental studies of contracting behavior (using hypothetical parties), and opinions of contracting parties about contract law.[65]

5.4 Shortage of Empirical Legal Research

While there are a number of legal issues that could be subjected to it, empirical legal scholarship has not matched the volume of traditional legal scholarship. Some writers speculated on reasons for the shortage of empirical legal research. One is the traditional perception that law by itself is the "servant of the legal profession," interested in "expository, doctrinal or black-letter tradition" instead of empirical investigation.[66] Others include lack of theoretical work that could stimulate a demand for empirical work and lack of training necessary to carry out empirical investigation.[67] A hard work required for empirical legal scholarship, a fear of embarrassment of

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[62] Theodore Eisenberg, "Why Do Empirical Legal Scholarship?", 41 San Diego L. Rev. 1741 2004, p. 1741

[63] Michael Heise, "The Past, Present, and Future of Empirical Leal Scholarship: Judicial Decision Making and the New Empiricism", 2002 U. Ill. L. Rev. 819, p. 825

[64] Kevin M. Clermont and Theodore Eisenberg, "Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments", 2002 U. Ill. L. Rev. 947

[65] Russsell Korobkin, "Empirical Scholarship in Contract Law: Possibilities and Pitfalls", 2002 U. Ill. L. Rev. 1033

[66] Paul Chynoweth, "Editorial", International Journal of Law in the Built Environment, 2009 Vol. 1 No. 1 pp 5-8

[67] Ulen, cited above at note 13, p. 914. The article suggests ways and methods for the scientific study of law.

falsification by replication (a possibility in empirical scholarship), lack of prestige for empirical legal research, and lack of institutional incentive are all identified as contributing to the shortage of empirical studies in law.[68] Other reasons provided for neglect of empirical legal scholarship include the inconvenience of going out of the library, inability to control data from the field, uncertainty of findings, and constraints in resources and time.[69] "Lack of an adequate market for those who become trained personnel" has also been long identified.[70]

6. 'Primary' and 'Secondary' Sources

Another point of ambiguity in the study of legal research methods has been the meanings of these terms as used in law and elsewhere. Before a brief outline, one initial distinction has to be made. Primary *source* is no primary *legislation*. The terms *primary* and *secondary* used together with the term *legislation* simply identify the hierarchy of institutions issuing the laws. In English legal system, for example, primary legislation or simply statute is a legislation issued by the Parliament while secondary legislation (delegated legislation or subordinate legislation) is issued by authorized lower organs.[71] In the federal context of Ethiopia, proclamations would be primary legislations while regulations and directives fall under the category of secondary legislations.

6.1 'Primary' and 'Secondary' Sources in Doctrinal Legal Research

In doctrinal legal research, the terms primary and secondary refer normally to sources of *law*. Hence they are about the binding nature of the 'authority' under consideration. Primary sources of law, which have binding nature, might be statutes and judicial opinions, assuming the latter are also binding in the given legal system. In Ethiopian context, primary sources include proclamations, regulations, and directives. On the other hand, secondary sources of law, which mostly cite or analyze primary sources, do not have the binding force as statutes. However, depending on their quality, they may have persuasive power in supporting legal arguments presented based upon primary sources of law.[72] In the category of secondary sources of law fall legal encyclopedias, treatises, civil law commentaries, textbooks,

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[68] Michael Heise, "The Importance of Being Empirical" 26 Pepp. L. Rev. 807 1998-1999, pp. 816-824

[69] Peter H. Schuck, "Why Don't Law Professors Do More Empirical Research?", 39 J. Legal Educ. 323 1989, pp. 333 & 334

[70] Llewellyn, cited above at note 14, p.14

[71] Hanson, cited above at note 17, p. 40

[72] Cohen and Berring, cited above at note 23, p. 14

restatements, legal dictionaries, or periodical articles, which are helpful for their explanation of concepts, terminology, rules, and summaries of primary sources of law.[73] In continental legal tradition such as in Ethiopia where there is limited application of the principle of judicial precedent, court decisions are also good secondary sources of law.

6.2 'Primary' and 'Secondary' in Empirical Legal Research

Taking the example of empirical scholarship in other disciplines, this classification has to depend on how the data is obtained. First-hand data collected by the researcher is considered primary data, while information obtained from reports made available by other researchers or interested people would be secondary data. Hence from this, data obtained by observation, experiment, archival analysis, etc by the legal researcher herself will be primary data and the source primary source of data. Other data obtained by reviewing research reports, books, encyclopedias, dictionaries, directories, abstracts, etc would be secondary data and the source secondary source of data.

7. Legal Research in Ethiopia

As indicated in the introductory section, issues and assertions on the state of Ethiopian legal research methods are based on personal observations[74], exchanges of ideas with colleagues teaching law, legal practitioners and students, and an empirical survey. Having noted this, in this paragraph, issues helping the reader appreciate the gravity of concerns in legal research tools and methods in Ethiopia are raised. General questions first: where is the Ethiopian jurisprudence found – the state of the law, the books, the journals, the cases, and the authorities? Or in terms of the scholar, do academicians and practitioners of law in Ethiopia quickly and efficiently navigate their way out of all constitutions, proclamations, regulations, directives, and policies of the State every time they encounter a legal issue? Less general: does the Ethiopian legal researcher have bibliographies or indices identifying materials to understand national jurisprudence? A specific one: how many law review journals are published in Ethiopia and is there a device or tool – such as a periodical index – to systematically retrieve and consume any of the articles in those journals? A question on use of resources: is there any way of

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[73] Id, p. 433

[74] Among others, two years back, the writer taught legal research methods to students of the School of Law (AAU). Students' home assignments and class discussions focused mostly on types of research of selected undergraduate papers, what factors made them so, whether the papers combined features of other research types, what law finding tools were available to the student, etc.

finding out whether any Ethiopian law article or a book has ever assisted in court litigations or policy making? A question on practice: what is the situation and utility of empirical legal scholarship in Ethiopia? Having raised general questions, additional questions, many of them rhetorical, are raised where necessary under categories of doctrinal and empirical research.

7.1 Doctrinal Research

What finding tools do Ethiopian legal scholars have for primary sources of law? From the writer's observation, there are not many finding tools in Ethiopia that could be used in doctrinal legal research. This question has also been part of the survey conducted at the School of Law. To begin with, one could say that the question may not necessarily be answered by looking at mere research reports since there is no obligation under rules of citation to specify how one finds the law except that the law is cited. Although that is mostly true, clues could be found in the introductory and bibliographic parts of research reports. For lack of Ethiopian finding tools, however, no Ethiopian consolidations, law finders, and encyclopaedias were identified in the research reports investigated. Still Ethiopian journals, books, *Negarit Gazeta*s, and cases cited in the investigated articles and papers could be taken as finding tools although their principal aim in the reports is serving as sources of laws, ideas, arguments and authorities.

Owing to nature and lack of systematic organization of these sources, however, their services as finding tools are very much limited. Regarding Ethiopian journals and books, they are not systematically indexed and hence there is little guarantee that they are either comprehensive or up to date. Rightly, it has become natural for law schools, associations and institutions to have their own periodicals. Again, to the delight of legal scholars, many books on topics such as contract law, criminal law, labour law, and company law are being published. But there are not similar efforts to index those articles and books or to prepare bibliography based on systematic identification of topics and sub-topics. Moreover, chronological publications of laws – mainly *Negarit Gazeta* that is invariably used in all legal researches – do not promise ease of subject access to legal rules.

In this regard, the good beginnings of indexing that was carried out by the School of Law at the early days of JEL's publication deserve mention here. During those good times for legal scholarship, the Journal's editors had indices for JEL's articles both by authors and subject, indices of cases cited,

and table of laws cited.[75] It was unfortunate those good starts were just that. From recent efforts, *ad hoc* bibliographies such as the Bibliography on Ethiopian law by Peter H. Sand and Muradu Abdo are quiet encouraging.[76] Still with unmatched importance as a finding tool so far, the electronic copy of federal laws compiled by Digital Ethiopia PLC is worth noting.[77]

Coming to other findings, issues could arise as to the existence of tools that assist legal researchers in ascertaining the state of the law in Ethiopia. It is common knowledge among academics and practitioners that there is no as such a systematic tool to identify the present state of the law. There is also little in the survey findings that indicate the availability of such a tool to the legal researcher. In the absence of such systematic tool, it is common among legal scholars to depend on their personal skills to discover the state of the law by searching through volumes of *Negarit Gazet*. It is also natural for Ethiopian legal scholars to depend on common knowledge to determine the state of the law. For example, researchers on constitutional law might benefit from the public knowledge that the FDRE Constitution has never been amended and hence the text is the state of the law. How far personal skills and common knowledge of the state of the law would be useful for the present day sophisticated Ethiopian lawyer facing an increasing number of constitutions, proclamations, regulations, directives, authoritative judicial and quasi-judicial decisions, and legal publications?

Keeping with constant changes in laws is crucial. The legal scholar has to be able to easily identify if a legal rule for a case is operational, repealed or modified. Presently, *ad hoc* and private compilations, e.g. 'as amended', at law schools are common. But one could also imagine of something similar to Shepardizing[78] to Ethiopia. In tracing the state of the law, it should be noted, the Consolidation works of the 1970's by the School of Law were admirable.[79]

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[75] Reference is made here to Journal of Ethiopian Law, Vol. IV No. 2 (1967) and Vol. VI No. 2 (1969).

[76] Peter H. Sand and Muradu Abdo, "A Bibliography on Ethiopian Law", Journal of Ethiopian Law, Vol. XXIII No. 2, (2009), pp. 204-244

[77] Digital Ethiopia PLC (Federal Negarit Gazeta from 1995 to 2006, CD-ROM, 2007)

[78] *Sheprdizing* is a way to determine the subsequent history of a case by using Shepard's Citators or similar means. Garner, cited above at note 2. It is a hypothetical equivalent to Ethiopia of a publication that sytematically reports the subsequent history of each provision of every Ethiopian legislation, which might be a legislative repeal, amendment, judicial development or interpretation.

[79] Faculty of Law of Haile Sellassie I University, Consolidated Laws of Ethiopia: An Unofficial Compilation of National Laws in Effect as of September 10, 1969, Volumes I & II (1972)

However, their relevance today is little more than historical for the legal researcher engaged in everyday doctrinal research.

More questions could be posed not only about tools but the content of the law itself. How can a legal scholar or a lawyer with an actual case, for example, locate federal administrative directives in Ethiopia, which are mostly left unreported, especially considering the total absence of consolidations of directives with annotations and subject indices? In this connection, websites of government organs such as the National Electoral Board of Ethiopia and the Ethiopian Revenues and Customs Authority, if sustained, are good beginnings in ensuring ease of access of laws, directives and forms in their areas of responsibility. By providing their sectoral policies, proclamations, regulations, directives, programs, and strategies, websites of many other sectoral offices have already become very useful in undertaking legal research.

Issues also routinely arise regarding laws of regional states. How does one discover laws of national regional states, for example laws of Oromia National Regional State, especially where comparative legal analysis is carried out? This is not a mere theoretical question. For example, law students frequently encounter difficulties of finding family codes of national regional states for their assignments in family law. The same applies to their studies in land law. More important is the necessity of accommodating the country's federal system of governance in legal research and scholarship. It may not be the time or will never be to contemplate the issuance of uniform laws for adoption by regional states, owing to limited legislative mandates of national regional states; but there are still areas on family law, land administration, constitutions, and even practices on which comparative works could flourish. Legal studies as a result will have a few more reasons to attempt consolidations of laws of regional states thereby ensuring ease of access of regional laws at national level.

Out of curiosity, do legal researchers profit out of tools, if any, that systematically organize and report legislative history of say parliamentary acts, which are usually necessary in works of interpretation? It is stating the obvious to say that doctrinal legal researches in Ethiopia usually rely to varied degree on preparatory materials. In the surveyed research reports, appeal to preparatory works is common. However, accessibility of these works poses a challenge. For the study of constitutional law, for example, accessibility of minutes of the Constitutional Assembly – especially physical and language accessibility – is in doubt. The same applies to the jurisprudence on constitutional law in Ethiopia as determined and elaborated

by constitutional review organs, the principal being the House of Federation (HoF) of FDRE. At present, studies on constitutional law in Ethiopia substantially depend on comparative analysis of foreign and international materials. But such studies have to progress towards domestic interpretation and application of the Constitution mainly by the HoF.[80] In this regard, the Journal of Constitutional Decisions, which publishes decisions of the HoF regarding constitutional 'interpretation' and 'questions' is praiseworthy.[81]

With the interpretation power of the Cassation Division of the Federal Supreme Court, it is now high time to think of devising systematic ways of case reporting for the Court's interpretative decisions.[82] The legal researcher might think of 'restatement' of interpretations by extracting interpretative rules found in the Court's judgments. Considering the bilingual nature of federal laws, there should also be an attempt to have official or unofficial translation of the Court's interpretative decisions. In this regard, the publications of the Federal Supreme Court containing judgments of the Cassation Division classified under major topics such as civil procedure, jurisdiction, contract, and commercial law and its website containing cases and federal proclamations are impressive.[83]

To end this section with an emerging contribution of private individuals for the doctrinal study of law through the use of information technology is appropriate. At present, few private Ethiopian websites and blogs have

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[80] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Articles 62, 83, & 84, Proc. No 1, Neg. Gaz. Year 1 No. 1. The House of Federation is empowered to interpret the Constitution with the assistance of its advisory organ, the Council of Constitutional Inquiry.

[81] Office of the House of Federation, Journal of Constitutional Decisions, Vol. 1, No. 1, Hamle 2000 (E.C.)

[82] In publications of cases, in addition to Ethiopia's experience, one could take lessons from case reporting in common law traditions. For example, in case reporting in the USA, components of a case include a caption (with names of parties, docket number, attorneys), and syllabus and head-notes (a summary or digest of a point of law decided by the court, opinion, and holding and dicta). See Cohen and Berring, cited above at note 23, pp 26-34.

[83] Other headings used in case publications of the Court include family, execution, criminal law, property, extra-contractual liability, labour, bank and insurance, customs and taxes, agency, intellectual property and miscellaneous others. The website of the Supreme Court (http://www.fsc.gov.et/) is the most elaborate from those of other government offices in providing federal laws and the Courts' judgments and useful for legal research as long as it is accessible all the time and sustainable.

popped up. Some of them are owned and administered by practicing lawyers, others by academicians and some by postgraduate students. Their typical features include commentaries on recent legislations, opinion on controversial legal issues, some allowing participation of guests, and some with legal news. Interestingly, some of them supply federal laws and directives. Four of them selected with the help of Google Search deserve mention here[84]: http://chilot.me/, a legal blog which supplies proclamations, regulations, directives, teaching materials, some journal articles and student papers; http://ethiopianlaw.com/blog, which provides brief articles on variety of legal issues both in Amharic and English and a newsletter to subscribers; http://www.ethiopian-law.com/, which, though in its early stage, is a promising one in terms of breadth of coverage and organization of topics; and http://www.abyssinialaw.com/index.php/home, which provides legal news and allows other bloggers to lead discussions on topics of their choice.

These and other similar websites, as long as they comply with ethical standards of the profession, have to be congratulated. One major disadvantage of these websites and blogs has to be acknowledged, however. As is the case with other blogs, writings and commentaries appearing in those websites are not peer-reviewed and hence difficulties arise in assessing the quality of opinion and positions expressed in those electronic sources.

7.2 Empirical Research

The situation of empirical legal scholarship in Ethiopia is one area that methods of legal research have to focus. From the survey, it is easy to see that empirical legal researches are carried out routinely. While the number of empirical legal researches in journal articles is small (the ratio is 1 to 15), the number of empirical researches by students especially at graduate level is impressive. Seven out of ten legal researches in the masters program are empirical while at undergraduate level it is 4 out of 10. Three hypotheses might be made to explain the disparity: one is availability of a research fund, which empirical researches need, to postgraduate students while the fund is very small to undergraduate students, and almost null for publications in JEL. Two, postgraduate students have in their curriculum empirical research methods while there is little guidance on similar methods to contributions for

[84] In the selection of these four blogs and websites, the writer used two queries 'Ethiopian legal blog' and 'Ethiopian legal website', one after the other, in Google Search. The first three search results were identified for both queries, resulting in four of the websites identified here. The websites were checked for content and ownership as they stood on the 25th of July 2012.

JEL. The third explanation is availability of time allocated outside the library. While students are given time with mandatory requirements, for example a full semester for graduate students, writers for JEL might have little time to spare for many of contributors are engaged in teaching or practice that involves full-time.

In addition to these three, inaccessibility of legal materials could arguably be another factor that poses a challenge to empirical legal research in Ethiopia. Ease of access, for example in terms of language and physical accessibility, to decided cases by Ethiopian courts is crucial in empirical investigation of judicial practices. From this it is logical to suspect that difficulty of access is one reason why empirical researches of court practices usually study a couple of cases and profess empiricism. In one of the research reports investigated, for example, only three cases were studied to show the practice. As already indicated, the publication of cases by the Federal Supreme Court is one step forward towards organized system of case reporting, providing an opportunity to researchers to study the practice of the Supreme Court.

Another point worth noting of empirical research in Ethiopia is about methods that suit empirical legal scholarship. Here it should be noted that considering the curricula of legal research methods both at graduate and undergraduate levels, the tendency is to adapt social science research methods to empirical legal studies. That should raise little objection. However, the full integration of those methods as suiting legal issues and topics has yet to come. The finding, as outlined in the next section, from the research reports studied is that there is little to indicate the existence of strict observance of empirical methods in empirical legal studies.

Regarding topics for research, there seems to be no limit on doctrines and institutions that could be subjected to empirical scholarship. Commercial law, the judiciary, intergovernmental issues in the context of Ethiopian federal system, land, institutional frameworks, international law, human rights law, finance, customary law, family law, and administrative tribunals were all subjected to empirical investigation in the research reports examined. What probably are missing topics from the small number of researchers examined are reform-oriented researches that are based on empirical studies and interdisciplinary researches like law and sociology. While there are reform oriented researches, they are based on comparative studies of international and foreign experiences and hence mostly doctrinal studies. In interdisciplinary studies likewise, there is little evidence showing the interest of legal scholars in carrying out researches on law and economics or law and sociology in Ethiopian context.

8. Law Schools and Research Methods

As already indicated, the introduction of empirical research methods to Ethiopian law schools at undergraduate level is a welcome phenomenon.[85] Postgraduate students of law are also taking research methods as a mandatory preparatory module at AAU. That seems to be the reason why, as commented earlier, empirical studies are greater in number than doctrinal studies at postgraduate level. But in light of rules of empirical research methods, students' works are far from valid. Although small deployment of empirical methods might lure many of traditional legal academics not trained in empirical research, students' empirical works are mostly fraught with methodological errors such as using unrepresentative samples, failure to identify population of the study, and use of improper tools and techniques. These errors are happening on the face of students' admission that their works are empirically carried out with empirical methods.

In the surveyed research reports which are considered empirical, students have failed to identify the population of their study, the methods of their sampling, and other necessary elements in methods. Even in those cases where interviewees are identified, little information is given for the reader to assess the authoritative nature of statements by interviewees. In a couple of cases, blanket identification of interviewees as 'authorities concerned' is made. But such wholesale assertions mean little to the reader in examination of the persuasive nature of statements made. Moreover, there is little indication in the empirical studies as to reasons, if any, in limiting any given sample size. For example, in one empirical study to which a point is made above, three cases were the only cases for the study, which offers no explanation as to why the research is limited to these three. This is not to say that three cases are not in any way enough for empirical studies. It could be that three cases are the only cases in the country or in some way they are representative of the whole set of relevant cases, in either case three would be the right size for the study. But in the instant research report, the reader is not told if any justifiable reasons existed to take the three as a representative sample. This brings up the next issue of disclosure.

One crucial point that should be underlined regarding students' empirical legal research is the importance of disclosure. Often students performing empirical legal research, like their counterparts in doctrinal research, are

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[85] In the US they have already started ranking law schools based on empirical research. Whatever rationale and merits it has, such ranking implies the significance of empirical legal scholarship in the status of law schools. On such ranking, see George, cited above at note 38, p. 150.

reluctant to disclose every step and details of the process of their legal research. None of the empirical researches investigated for this study have full disclosure of methodology. Some of them do not have any part in methodology, except postgraduate students, who have allotted a section on methodology. From those having a section on methodology, many do not provide information on their sampling techniques, how representative the size of the sample is, features of the sample selected, or list of questions for data gathering. This absence or lack of disclosure is not a good sign for empirical studies. Unlike in doctrinal research, "publicity and transparency in empirical inquiry play a crucial role" to verify the reliability of the findings.[86] Disclosure for empirical research is like presenting documentary evidence and witnesses to a court of law. Without observance of the norms of disclosure, empirical findings are usually rejected in similar ways a court rejects claims without evidence. What is important here is "methods and results underlying empirical claims must be made public in detailed, [and in] reproducible terms."[87] Hence students undertaking empirical legal scholarship are duty bound to disclose the details of the process of their research; hence supervision of such works has to enforce this duty.

As far as empirical research works of students are concerned, there are two choices: either law schools should let students do empirical research in which case the schools have to strictly enforce the rules on methods in empirical research lest their researches are superficial and findings flawed; or deny students where they are not willing or able to observe rules of empirical

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[86] Gregory Mitchell, "Empirical Legal Scholarship as Scientific Dialogue", 83 N.C. L. Rev. 167 2004-2005, p. 180

[87] For common rules of disclosure, the content, and format, see Id., pp. 202 and 203. For example, disclosures of primary purpose of the investigation, statement of the problem, the phenomena to be described, and/or specific hypotheses or theoretical propositions to be tested, the larger body of empirical inquiry (comparable to literature review), disclosure of sufficient information to allow another investigator to evaluate methods and verify results, including disclosure of research design employed and a description of all variables studied, description of the sample of observations, the procedure for collecting data, including sampling techniques and the identity of any archives used in the research, relevant distinguishing characteristics of different data sources, time period during which observations were obtained from survey, experimental, and/or field research, data sources that did not provide complete data or that had to be eliminated after initiation of the study, explanation as to why complete data could not be obtained, description of any apparatuses, instruments, or other tangible materials employed in the study, step-by-step description of the procedure employed in execution of the research, the data collected and the results of statistical analyses conducted on the data are identified as subjects of disclosure.

research in which case they should limit themselves to the traditional legal research and analysis.

Issues of plagiarism at law schools also deserve some attention here. In today's scholarship, owing to ease of access of materials, concerns of plagiarism have been voiced among academicians. Those concerns have already permeated law papers - law theses and assignments. Plagiarism means roughly "presenting the ideas or data of others as his or her own."[88] This trend has to be countered and remedial measures have to be put in place. Since ignorance of what amounted to 'plagiarism' is said to be the principal factor for the commission of the offence, clear instructions have to be given on plagiarism in courses such as legal research methods. Moreover, while it will not be a magic wand, systematic organization and retrieval of Ethiopian legal materials with the help of finding tools might deter plagiarism. For example, if all law schools share topics and themes of legal research outputs including students' theses and legal periodicals, detecting plagiarism in legal writings would be much easier.

9. Rules of Citation

Another important point in any research undertaking is the use of rules of citation. To create uniformity among legal scholars, close to study of law, different rules of citation were issued typical of them being the Blue Book in the USA. One undesirable attitude in Ethiopian legal research in this regard is the mistaking of rules of citation for legal research methods. Although the rules are part of rules of methods that should be followed in research reporting, they are small, still necessary, part of research writing. Again another undesirable attitude is the lack of attention accorded to rules of citation in Ethiopian legal studies.

Two points could be raised here. One is whether the Ethiopian legal scholarship has rules of citation, including for use in court pleadings. The other issue is whether those rules are mandatory. For the first, there seems to be no consensus on rules of citation applicable to all law schools, let alone legal scholarship. Even it is not clear which rules of citation each school or department of law recommends for use by its students. The example of the School of Law (AAU) is instructive. It is not unusual to find law students of the School submitting the final draft of their thesis confessing, when asked, their ignorance of the Rules of Citation of the Faculty of Law.[89] That might

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[88] Vanderstoep and Johnston, cited above at note 51, pp 19&20

[89] Faculty of Law, Book of Citation of the Faculty of Law (1965, unpublished). To the writer's knowledge, there has not been any attempt to update and popularize this

arguably be attributed to students' lack of diligence. But are these Rules, which have not been updated, mandatory for papers submitted to the School and if yes on what basis? This brings one to the second issue. Are there compulsory rules of citation in legal scholarship in Ethiopia, referring to the Blue Book or any other standard citation guide? While court-sanctioned rules of citation are not unusual in some jurisdictions for memorials or pleadings presented to courts, the Ethiopian lawyer need not ironically identify the legal rule in pleadings before courts, let alone sources and proper citations.[90] Should this trend continue or should at least law schools be encouraged to provide express guidance on rules of citation for legal research, with continuous updating of these rules? The citation guide of JEL in this regard should be commended.

10. Conclusions and Recommendations

The question in doctrinal legal research is not whether the traditional lawyer has methodology or not. Although legal scholars do not usually call them methodology, there are powerful instruments of logic, rules of interpretation, legal analysis and synthesis, and deductive and inductive reasoning for research works in doctrinal legal scholarship. These are the instruments and skills that legal scholars mostly need in their everyday activities as practitioners and academics of law. However, a noticeable challenge in

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valuable Book of Citation. Nevertheless, this Book has been a useful guide in terms of content and form of citation for students of law. It has also significantly contributed to the 'rules of citation' section of the present undergraduate teaching material on legal research methods (cited above at note 1). The Book of Citation provides comprehensive guidance on forms of citation for materials such as books, journal articles, newspapers and magazines, judicial decisions, codes, legislations, and consolidations. If the Book is updated to take account of, among others, the present state of legal publications in Ethiopia, the existence of federal and regional laws and courts, and electronic sources, it could be very useful in setting standards of citation for legal scholarship in Ethiopia.

[90] For example, consider the Civil Procedure Code that allows the submission of pleadings without the necessity of citation of law let alone 'rules of citation.' In the Civil Procedure Code, Articles 80 and the following, which require pleadings to be as near as may be to the appropriate Form, no legal arguments are mandated let alone references and citations. Mention to the Federal Court Advocates' Code of Conduct Council of Ministers Regulations No. 57/1999 (Article 7.1) may also be made: An Advocate shall have the obligation, after evaluating the facts and evidences of the case, to assist his client reach on the proper decision by giving him explanation based on the law as to the possible result or alternative results of the matter, and the type and scope of representation that must be assumed to obtain the desired result. Although legal explanation has to be given, there is no reference to citation or the exact source of law to be identified to the client.

doctrinal legal scholarship in Ethiopia exists and it is the absence of finding tools, either to find the law or literature on Ethiopian laws and institutions.

It should be admitted that it is neither necessary nor desirable to have complex finding tools like in the American system. The volumes and kinds of laws and the Ethiopian legal system do not yet justify such a complex scheme in the study and practice of law. But still, one should agree, statutory materials and their updates are not easy to locate. There are no consolidations, little subject access to legislations especially secondary legislations, no systematic way of tracing later history of statutory provisions, and so on. Statutes are not all. There are interpretations and practices produced by institutions and scholars that should be investigated and studied. One has to be able to easily trace these sources through finding tools such as indices of legal periodicals and digests of court cases. The task of devising such tools awaits Ethiopian legal scholars.

Since "contemporary legal scholarship has become pluralistic in its values, purposes, methods, and perspectives," [91] legal studies have already embraced empirical research methods. The natural path is adaptation of research methods in the social sciences and humanities. But the adaptation should be systematic and well informed. Simple copying of methods without testing their relevance and application to legal doctrines and institutions has to be discouraged. An 'empirical' legal scholarship of interviews with a couple of judges or authorities with no due regard, for instance, to 'population' of the study and 'representative sampling' is 'mediocrity' in empiricism and hence efforts have to be exerted to incorporate valid empirical methods in legal studies.

It is here natural to raise the question of responsibility of tackling urgent issues of Ethiopian legal scholarship identified in this article. Is it the responsibility of law schools, legal academics, practitioners, or the government to tackle any of the issues and concerns expressed in this article? Law schools – especially research and publication units – might have interest in taking the initiative to devise networks among all stakeholders in ensuring systematic publications of all primary and secondary legislations including directives, notices, and standard forms, systematic reporting of current developments in the law, and systematic organization of indices of Ethiopian legal periodicals, and indices of law student research papers. Law schools could also encourage publication of books like traditional commentaries, which should integrate the practice to develop national jurisprudence on

[91] Kissam, cited above at note 4, p. 252

various subjects of law. Since law schools have little resources to carry out either of these activities, they should be encouraged to seek financial assistance from outside. These same activities could be carried out by bar or lawyers' associations, which might at the same time extend technical and financial assistance to law schools.

The Government's role in these undertakings should not be underestimated. For example, without government's involvement, timely publication and retrieval of administrative directives, rules, policies and notices is difficult. The role of the House of Peoples' Representatives in official consolidations of federal proclamations is unavoidable. Again technical support from government organs such as the Justice and Legal System Research Institute (JLSRI) should be counted on.[92] Among government organs, the legal mandate of the Ministry of Justice in consolidation of federal and regional laws is also crucial. The Ministry of Justice, which also controls the JLSRI, has the powers and duties, among others, to "undertake legal reform studies and carry out the codification and consolidation of federal laws; collect Regional State laws and consolidate same as necessary."[93]

In the end two general concerted efforts are called for: one relates to finding tools namely to assess the situation of finding tools in Ethiopia, carry out their comparative analysis in varied jurisdictions, determine the necessity or desirability of those tools to Ethiopia, and offer concrete suggestions for action; and two relates to empirical legal research namely to assess the state of empirical legal scholarship in Ethiopia, carry out comparative analysis of empirical methods among jurisdictions and disciplines, determine the promise of empirical methods to the development of legal scholarship, and offer concrete suggestions for action.

Note, Instructions and Questions for the Survey

Note

The survey, carried out with the help of two students at the School of Law, is made to assess principal features of legal research at the School of Law of

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[92] Justice and Legal System Research Institute Establishment Council of Ministers Regulations, 1997, Reg. No. 22, Neg. Gaz. Year 4 No. 8. Given its legislative powers and duties such as undertaking legal studies with a view to consolidating, updating and making laws accessible, publishing and distributing legal information, and undertaking studies necessary for the promotion of legal education (Article 5), the Institute, in cooperation with law schools, would be the ideal place to tackle many of Ethiopian legal research issues raised in this article.

[93] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Article 16 (2)

Addis Ababa University. Three categories of research were identified: researches published in the Journal of Ethiopian Law, researches by postgraduate students (as a requirement for LLM), and researches by undergraduate students (as a requirement for LLB).

Note for the Student
Dear Student:
These questions are prepared to survey legal research tools and methods used at the School of Law, Addis Ababa University. Two important concepts (doctrinal and empirical or non-doctrinal legal research), which are useful in making the survey, are indicated. Once you take note of the concepts, you may proceed with the survey.

1. **Doctrinal Research** is the conventional legal research, which might try to formulate legal doctrines through analysis of legal rules; which might try to clarify the law; and which focuses on black-letter law concerned with the prevailing state of the law, etc.

2. **Empirical Legal Research** is a kind of research common in the social sciences. Unlike doctrinal legal research, the concern in empirical legal studies is usually about the actual behavior of law and its institutions. In a typical empirical legal study, the empirical legal scholar offers a *hypothesis* of a law or legal institution and then tests that hypothesis using quantitative and qualitative techniques developed in the social sciences. The evidence may be gathered by laboratory experiment or collected systematically from real world observation (such as the actual observation of treatment of children in school to identify elements of discrimination), field researches (such as on implementation of a certain legislative act), case studies (e.g. studying court cases of an issue with documents and interviews with plaintiffs and defendants), etc.

Instructions
1. Randomly select 5 theses (or senior papers) for each year from those submitted in the last 3 years. Overall you will select 15 senior papers. You could simply pick the first 5 in a given list or you could take every 10 until you have 5 for each year or whatever is convenient for you. What is important is you have to do it ***randomly***. Do not under any circumstances intentionally select or discard any thesis of the year under consideration. [Similar instructions were given to all the three categories of research reports. The instructions for graduate and undergraduate researches are almost identical. For publications in the Journal of Ethiopian Law, this instruction reads: Randomly select 5 issues of JEL or you could simply take the last 5 issues of JEL. The study should be limited to articles (and

not book/case reviews or opinion). Each issue is likely to have 4 or 5 articles and answers to questions below should be limited to each one of them]

2. Afterwards, identify/write down:

    a. Topic of the thesis; and

    b. Whether it is doctrinal or empirical [you might need to go through the thesis quickly to identify this point or you may as well need to first answer questions 3 or 4 before you come to the conclusion that the thesis is doctrinal or empirical];

    c. If you find the paper to be doctrinal, you would answer questions under number three (3) and if you find the paper to be empirical, you would answer questions under number four (4) below.

3. If the thesis is doctrinal:

    a. Does the author use ***Ethiopian (Ethiopian only!)*** *legal research tools* such as consolidations, encyclopaedias, CDs, case finders or digests, etc? If yes, identify the kind of tool or tools the thesis is using. [You could look for legal research tools in the bibliography and footnotes];

    b. Does the thesis mention how the author became aware of the law or judicial decision? For example, does the paper cite a newspaper or magazine to locate a certain legislation or court decision?

    c. Does the author mention how s/he came to the conclusion that the law s/he analyzes is the authority or *the state of the law* at a given time? That is, how does the author know if the law is not repealed or amended?

    d. Does the author use ***foreign*** legal research tools such as consolidations, encyclopaedias, CDs, case finders or digests, etc? If yes, identify any one or two of such foreign legal research tools!

4. If the thesis is empirical, identify the following:

    a. Does it have a part in the first chapter or in the introduction discussing methodology or methods? [Clues could be found in use of terms like primary and secondary sources, interview and

questionnaire, taking samples, random/non-random sampling, etc.]

b. Does the author detail the kind of interview, questionnaire, focus group discussion or any other kind of empirical investigation s/he has carried out?

c. Does the author provide a list of questions s/he used to gather data? [This is usually found at the end of the thesis as annex.]

d. Does the author detail how many respondents/interviewees s/he selected for the research?

e. Related to'd', what are the justifications for the selection in terms of size and qualities of respondents/interviewees? [For example, does the author provide explanation as to how and why s/he selected the number of people for interview or response? Another example, does the author use any kind of statistical formula in the selection of the respondents?]

f. Does the author detail the sampling technique such as random and/or non-random sampling and why?

g. Does the author provide background of the study population or the sample or the people s/he studied? [The subjects of the study could be courts, judges, public prosecutors, etc.]

Dear Student:
You could provide any information or opinion you think is relevant to the study.
I thank you for taking your time in carrying out the survey.

Towards Legislative History of Modern Taxes in Ethiopia (1941 2008)

Taddese Lencho*

The spirit of the people, its cultural level, its social measure, the deeds its policy may prepare…is written in its fiscal history. He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else.

Joseph Schumpeter

The past is never dead. It is not even past.

William Faulkner

1. Introduction

Taxation has a long history in Ethiopia, but the modern system of taxation began in full earnest after the departure of the Italians in 1941. Immediately after his restoration to the throne, Emperor Haile Sellassie I began introducing a spate of modern tax laws which were to change the face of Ethiopian taxation for ever. What constitutes 'modern' in the context of taxation is liable to be contested and I am certain historians may take an earlier date as a starting point for modern Ethiopian taxation. The period before 1941 was dominated by the traditional system of taxation, although a few modern taxes had already begun to be introduced before the Italian period.[1] The introduction of "excise and consumption" taxes in 1931, the "entertainment tax" in 1932 and the income tax in 1934 suggested that the modernization of the Ethiopian tax system would probably have begun earlier had it not been interrupted by the Italian invasion in 1936.[2]

The modern system of taxation represents quite a departure from the traditional system of taxation in Ethiopia. First, of course, is that taxes began to be published in the official gazette of legal publications- the Negarit

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* Addis Ababa University, School of Law; LL.B (AAU), LL.M (University of Michigan Law School, Ann Arbor), PhD candidate, University of Alabama Law School, Tuscaloosa; I am grateful to the two anonymous assessors for their comments on the earlier drafts of this article and particularly to Ato Gebrelibanos Welde-Aregay for providing me with information about the development of some taxes in Ethiopia. I am also grateful to DLA Piper Foundation for providing me with research funds for the writing of this article.

[1] For an extensive treatment of taxation prior to the Italian period, see Richard Pankhurst, **Economic History of Ethiopia: 1800-1935** (1968), Haile Selassie University Press, Addis Ababa, Ethiopia, pp. 504-544

[2] See Bahru Zewde, "Economic Origins of the Absolutist State in Ethiopia (1916-1935)" in Bahru Zewde, **Society, State and History, Selected Essays**, (2008), Addis Ababa University Press, pp. 114-115

Gazeta.[3] While this development was not for taxes *per se*, it represented an important development in taxation at least in ensuring that taxation would be based on written laws rather than the whim of officials or an appeal to some vague tradition. Second, the modern period saw the transformation of the Ethiopian tax system from one that was based predominantly upon in-kind payments to a cash-based one, taxation thus representing a monetary obligation regardless of the type of tax levied and the occasion for taxation.[4]

The traditional system of taxation in Ethiopia was excoriated by a number of writers largely on account of its in-kind payments system resulting in abuses of one kind or another.[5] The traditional system of taxation exposed "taxpayers" to various forms of abuses and occasioned arbitrary exercises of power as the government permitted its "officers" various rights and powers of appropriation as a form of remuneration for their services and loyalties to the government. [6] This system of relations was very burdensome particularly to the peasants, who bore the brunt of the burden. It also left the central treasury with little revenue of its own.

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[3] The *Negarit Gazeta* was promulgated as an official gazette for publication of laws in 1941; see Negarit Gazeta Establishment Proclamation, 1942, Proc. No. 1, *Negarit Gazeta,* Year 1, No. 1

[4] See Richard Pankhurst, **State and Land in Ethiopian History** (1966), the Institute of Ethiopian Studies and the Faculty of Law, HSIU, pp. 176-179

[5] Several writers lamented the deplorable situation of tenants under the traditional taxation system of Ethiopia. Gebre Hiwot Baykedagn, an early Ethiopian intellectual, for example, wrote the following poignant passage bemoaning the suffering of tenants under the traditional tax system of Ethiopia: "Great is the hardship of the farmer in our country. Before he starts to hold the plough to farm, an officer comes to charge him land tax. When he goes home after a hard work on the field, he finds his wife being kicked and slapped by the soldiers that she should prepare them food. Whenever he is ordered by his rulers, he goes and works for them like a slave leaving his work aside." Gebre Hiwot Baykedagn proposed a solution to end these abuses, one of which was to fix the tax according to the produce of peasants and pay tax in terms of dollars and not in terms of cereals, honey and cattle'; see Gebre Hiwot Baykedagn, **Berhan Yehun**, (Asmara) passim, quoted in Richard Pankhurst, *supra note* 4, p. 177; another Ethiopian intellectual of the same period, Afework Gebreyesus, relates a story of a farmer who had to endure the ignominy of denying that a woman living with him was his wife and passing her off as his sister in order to stave off an abuse by a quartering government soldier who was obviously intent on making advances on his wife; see Afework GebreYesus, **"Dagmawi Atse Minilek"** Reissued 2001 E.C.,(in Amharic, originally published in 1901 E.C.), p. 3

[6] John Markakis, **Ethiopia: Anatomy of A Traditional Polity**, (2006), Shama Books, p.148; see also Richard Pankhurst, *supra note* 4, pp. 176-179

The modernization of the Ethiopian tax system after 1941 was in part therefore motivated by the desire of the central government to assert full powers of appropriation and assume full responsibilities for paying its officers and public servants remuneration for their services in stead of the latter exacting their own price from the population. Hence, one of the first regulations to be issued after the departure of the Italians in 1941 was an administrative regulation in which the government proclaimed that the government would pay all its employees monthly salaries. [7] Taxes represented one of the principal sources of revenue for a government intent on paying its servants directly.

Although hundreds of tax laws have been issued since 1941, no systematic work has been done to document how these tax laws developed and evolved into the taxes we have in the books now. It has been remarked elsewhere that the Ethiopian tax system is "chaotic, disorganized, uncoordinated and worse," [8] and this is in part due to the absence of a research that documents the development of Ethiopian taxation over the modern period. It is easy to dismiss an exercise like this as an arcane fascination of an 'academic squirrel",[9] but the importance of modern tax history for the understanding of the Ethiopian tax system cannot be emphasized enough.

Those who follow the contemporary rumbles of taxation in Ethiopia are liable to forget that the issues they grapple with today were also contemplated in the past. One can cite a number of instances but it is enough for now to mention one contemporary debate of Ethiopian taxation. At the time of writing, a debate is raging over the design of presumptive taxation for small businesses.[10] This is not a problem that suddenly cropped up in Ethiopian tax system. Small businesses have always been the Achilles heel of the Ethiopian

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[7] John Markakis, *supra note* 6, p. 148, quoting Imperial Ethiopian Government, Ministry of Interior, Administrative Regulations, Addis Ababa, 1941 in foot note 152

[8] See Taddese Lencho, "The Ethiopian Tax System: Cutting Through the Labyrinth and Padding the Gaps," **Journal of Ethiopian Law**, vol. 25, No. 1 (September 2011), p. 86

[9] The expression 'academic squirrel' is a variation on Gore Vidal's expression 'scholar squirrels'. Gore Vidal describes 'scholar squirrels' as those in the academia who suffer from "the delusion that there is a final Truth revealed only to the tenured few in their footnote maze" and who "must itemize everything in the shop"; see Gore Vidal, "Lincoln and the Priests of Academe", in **United States, Essays 1952-1992**, (1993) Random House, pp. 675, 678

[10] See, Eden Sahle, "Small Businesses Threaten Shutdown,(sic) Over New Tax Pressures," **Fortune**, Vol. 12, No.587, July 31, 2011; "ድሀ እሚበላው እንጂ እሚከፍለው አያጣም"፣ መሰናዘርያ፤ ማክሰኞ፤ ነሐሴ 10 2003 ዓ.ም ገፅ 1፣6-7 እና 12 ይመልከቱ see also Kirubel Tadesse, "Pay Tax – it is only fair!!" **Capital**, August 01, 2011

tax system. But because the institutional memory of Ethiopian tax history is so limited, those tasked with the problem are more likely to search for solutions across the Atlantic or the Mediterranean than revisit how things were organized during the early period. One of the surprises of this study is that the early modern tax laws of Ethiopia contain some nuggets of prudent tax policy for contemporary debates about Ethiopian taxation.

Organizing and documenting a tax history – even of a brief period – in Ethiopia is an incredibly difficult and precarious task.[11] Since tax laws are some of the most frequently revised pieces of legislation in Ethiopia, one has to literally review hundreds, perhaps thousands of individual pieces of tax legislation to piece together and understand the development of modern taxation in Ethiopia. The task is undertaken with the lingering suspicion that something might have slipped through one's hands, so disorganized the tax laws have been. This article is no guarantee that those lingering doubts are completely removed and laid to rest, but every effort has been made to provide as accurate a picture of modern Ethiopian taxation as it is possible to glean from individual pieces of tax legislation.

Several types of taxes emerged during the modern period. Some are no longer in the books; many have survived with some changes and a few completely new forms of taxes have been added to the lexicon of the Ethiopian tax system. Many of the taxes that have formed part of modern Ethiopian fiscal history were introduced in the 1940s and 1950s (the formative period of Ethiopian modern tax history). Some structural principles laid down during this formative period continue to inform and shape the structure of the modern Ethiopian tax system to this day – another reason why documenting the history of modern taxation is necessary.

As the title suggests, the article attempts to trace the modern history of taxation from a decidedly narrow perspective of the legislative development of various taxes in Ethiopia. Unlike similar exercises on related subjects,[12] the

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[11] Eshetu Chole made a valiant effort to document the history of taxation of the early modern period (1941-1974), but even his meticulous documentation could not spare him from making occasional errors, as when he wrongly assumed that the first stamp duties were introduced in 1957 when in fact they were introduced in 1943; See Eshetu Chole, "Towards a History of the Fiscal Policy of the Pre-Revolutionary Ethiopian State: 1941-1974", in Eshetu Chole, **Underdevelopment in Ethiopia**, (2004), Organization for Social Science Research in Eastern and Southern Africa, p. 73

[12] See, for example, Eshetu Chole, *supra note* 11, pp. 63-73; Eshetu Chole, "Income Taxation in Pre- and Post-Revolution Ethiopia: A Comparative Review," **Ethiopian Journal of Development Research**, (April 1987), vol. 9, No. 1, pp. 50–77; Lesane-work Deme, "The Agricultural Tax in Socialist Ethiopia," **Ethiopian Journal of**

treatment of the history of the various taxes of Ethiopia does not attach any special importance to any one of the taxes covered in the article. None of the taxes covered in this article receive any special emphasis either because of their contribution to the public economy or their role in the political trajectory of the country, although some passing references are made to vital incidents of fiscal history associated with some of the taxes.[13] In short, this is a history of how different taxes emerged, evolved and developed into what they are now.

The article is structured around the individual taxes that were introduced since 1941. Starting with land and agricultural income taxes, the article will trace the emergence and development of taxes like income taxes, excise and sales taxes, customs and export duties, stamp duties, municipal taxes, and tax incentives. Most tax incentives in Ethiopia are issued in general investment incentive laws and are usually viewed as part of investment laws of the country. Nonetheless, tax incentives cannot be separated from the rest of the Ethiopian tax system for the simple reason that these incentives use taxes as instruments of a specific public policy, in the case of incentives, that of encouraging capital investment.

2. Land and Agricultural Income Taxes

The first taxes of the post-Italian occupation period targeted land – not at all surprising in an agrarian country like Ethiopia.[14] Land tax law was promulgated in 1942, applying a crude form of graduated taxation by dividing land into 'fertile', semi-fertile' and 'poor' lands. Landowners holding fertile land were to pay more per *gasha* [15] than landowners holding semi-fertile lands, and semi-fertile land owners were to pay more than those holding poor lands. Not all lands were measured in *gasha* and the 1942 land tax law had provisions for those areas where land was not measured. The land owners in these areas were to pay tax in accordance with a law passed back in 1935.[16]

Development Research, (Oct. 1979) vol. 3, No. 2; Peter Schwab, "The Tax System of Ethiopia," **American Journal of Economics and Sociology**, (Jan. 1970), vol. 29, No. 1.

[13] Comparable attempts on the subject in the past have tended to focus on revenue contributions of different taxes and have therefore suffered from giving 'undue attention' to the few taxes that mattered; see Eshetu Chole, *supra note* 11, and Peter Schwab, *supra note* 12.

[14] A Proclamation to Provide for a Tax on Land, 1942, Proc. No. 8, *Negarit Gazeta*, Year 1, No. 1

[15] 'Gasha' is a unit of land measurement at the time equaling about 40 hectares; see Teshale Tibebu, **The Making of Modern Ethiopia: 1896-1974** (1995), The Red Sea Press, Inc., p. 87

[16] A Proclamation to Provide for a Tax on Land, 1942, cited above, Article 3 (ii)

The 1942 land tax law was repealed and replaced two years later by a law which revised the modality of land taxation at the time and above all introduced the first modern agricultural income taxation in Ethiopia.[17] The 1944 land tax law took some of the modalities of land taxation of the 1942 law by dividing some lands into 'fertile', 'semi-fertile' and 'poor' lands but went further and divided the country into clusters of provinces – no doubt reflecting the political and traditional configuration of the time.

The first group consisted of the then provinces of *Wellega*, *Sidamo*, *Illubabor*, *Gemu Gofa* and *Kafa*. Landowners holding 'fertile' lands in these regions were to pay 15 Birr per *gasha*, those holding 'semi-fertile' lands 10 Birr per *gasha*, and those holding 'poor' lands 5 Birr per *gasha*. The second group consisted of the then provinces of *Shoa*, *Harar*, *Arussi* and *Wollo*, whose landowners were to pay 15 Birr per *gasha*, 10 Birr per *gasha* and 5 Birr per *gasha* for 'fertile', 'semi-fertile' and 'poor' lands respectively. The third group consisted of the then provinces of *Gojjam*, *Tigre* and *Beghemder* whose land owners were to pay land tax at the rate which was fixed in 1927.[18] There was perhaps fear that the people in these areas would be slow to tax reform because of their sentimental attachment to traditional system of land tenure and taxation.[19]

As alluded to before, the 1944 tax law was more than a land tax for it added an agricultural income tax, thus replacing the long standing traditional tax known as the 'tithe' or *asrat* in Amharic(to signify that 1/10th was contributed as a tax).[20] The 1944 tax marked an additional evidence of an advance towards full monetization of the Ethiopian tax system. The agricultural income tax of 1944 applied the same crude form of graduation for taxation and followed the same classification as the land tax. The

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[17] Land Tax, 1944, Proc. No. 70, *Negarit Gazeta*, 4th year, No. 2

[18] Id, Article 4; there was a fourth category – not based on region but on the status of the land as an 'unmeasured' land. All the previous categories depended on measurement of land for taxation. Unmeasured lands were classified into five categories whose owners were to pay a fixed amount of 20 Birr, 17 Birr, 15 Birr, 10 Birr and 5 Birr respectively.

[19] See Eshetu Chole, *supra note* 11, p. 67.

[20] Land tax is a property tax based on the wealth of the taxpayer (such as land) chargeable regardless of whether the owner obtains gain from the produce of the land or not. An income tax (e.g. agricultural income tax) is based on the gain produced from the use of the land and is not necessarily attachable to the owner of the land. These technical distinctions may seem trivial to a non-specialist but they are significant in tax literature. Land tax cannot survive without private ownership of land while income tax will always be chargeable as long as the land is productively used. That is why agricultural income taxation persisted after the nationalization of land following the 1974 Ethiopian revolution while land taxation was abolished.

agricultural income tax also followed the same principles for all the other categories. The burden of agricultural income taxes was greater for the southern provinces than the northern provinces, and those whose lands were unmeasured were to pay higher taxes in total than those whose lands were measured, presumably to encourage the former to have their lands measured.[21]

The land taxes of the 1940s left out a vast expanse of the Ethiopian lowlands where another form of ownership was in place. The land and agricultural income taxes of 1942 and 1944 were designed to reach landowners and farmers who derived income from farming. It took more than a decade before the government remembered or became interested in the pastoral areas as potential sources of government revenue. In 1954, the Ethiopian government introduced a 'cattle tax' to ensure, in the words of the preamble of the law, 'equality between those who obtain their livelihood from agricultural pursuits and [those who obtain their livelihood from] pastoral activities.'[22] The tax rates of the 1954 cattle tax were again crude for a modern taxation. The cattle tax rates were pegged against the type of domestic animal owned by pastoralists. Pastoralists were to pay 0.50 Birr per head of camel, 0.25 Birr per head of horned cattle, 0.25 Birr per head of horse, 0.25 Birr per head of mule, 0.10 Birr per head of donkey, 0.05 Birr per head of sheep or goat and 1.00 Birr per head of pig. Since this tax was an 'equalizing' tax, taxpayers who were subject to the agricultural income tax under the 1944 agricultural income tax law were exempted from the payment of cattle tax. The cattle tax law had a special procedure for assessment of taxes in the pastoralist areas. According to a regulation issued in the same year (1954) to provide for the implementation of the cattle tax, the Governor of the *Awradja* was to invite not less than five chieftains and elders from each '*Mikitel Woreda*' (sub-district) for counting cattle, or the pastoralist himself could choose to have his cattle counted for purposes of assessment of the cattle tax.[23]

The land and agricultural taxes faced the stiffest of challenges in their implementation. Although agriculture represented the mainstay of the Ethiopian economy, the government was not able to raise revenues commensurate with the share of agriculture in the economy. The low revenue yield of agricultural taxation at the time was attributed to four principal

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[21] See Land Tax Proclamation No. 70/1944, cited above, Article 4

[22] See a Proclamation to Provide for Cattle Tax, 1954, Proc. No. 142, *Negarit Gazeta*, 14th year, No. 1

[23] See Rules Issued Pursuant to the Cattle Tax Proclamation, 1954, Article 2, Proc. No. 187, *Negarit Gazeta*, 14th year, No. 1

factors: [24] i) the Ethiopian Orthodox Church, which owned about a third of the land at the time, was exempted from the tax; ii) many landowners were able to use their powers and connections to evade the tax; iii) proper land measurements were not undertaken; and iv) the existing tax rates were not progressive.

The government was thus keen to reform the agricultural income taxes and improve their performance. It finally managed to pass a uniform agricultural income tax in 1967, with progressive tax rates upon the entire population, with the exception of pastoralists who would continue to pay head tax on their cattle.[25] However, the agricultural income tax of 1967 was destined for doom as it was issued in the midst of political upheaval, which eventually brought down the Monarchy in 1974. Before the *coup de grace* was delivered by the 1974 Ethiopian Revolution, the agricultural income tax of 1967 faced stiff resistance in the period leading up to its passing and after its introduction. It was subjected to 'considerable maneuvering and delaying tactics' when attempts were made to pass the bill.[26] Upon introduction, it led to immediate protests in some places, largely due to the perception that the tax 'would lead to measurement of land' –something of an anathema in some regions of Ethiopia where this was seen as an end to the traditional land holding system.[27] As a result of this resistance, the Emperor at the time was forced to make painful tax concessions to taxpayers in the epicenter of the revolt against the tax – Gojjam.[28] Resistance to agricultural taxes was not confined to Gojjam, of course. There were reports of resistance to taxation in the lowland areas, like the Somali region of Ethiopia.[29]

When the 1974 Ethiopian Revolution broke out, it was evident that the first tax to become the casualty of the Revolution was the land tenure and taxation system that prevailed during the imperial times. A number of laws were issued after the 1974 Ethiopian Revolution radically altering the landscape of land tenure and tax system of the country. One of these laws was the 1975 law that abolished private ownership of land and made it public property.[30]

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[24] Eshetu Chole, *supra note* 11, p. 67; see also Eshetu Chole, **Taxation in Ethiopia**, 1967, Faculty of Law, Addis Ababa University, Archives (unpublished), p. 2

[25] Peter Schwab, *supra note* 12, p. 77

[26] Schwab, 1972, ch. 5, quoted in Eshetu Chole, *supra note* 11, p. 68

[27] Eshetu Chole, *supra note* 11, p. 68

[28] Schwab, 1972, 166, quoted in Eshetu Chole, *supra note* 11, p. 69; see also John Markakis, *supra note* 6, pp. 450–462

[29] See John Markakis, *supra note* 6, p. 441

[30] Public Ownership of Rural Lands, 1975, see Article 3, Proc. No. 31, *Negarit Gazeta* 34th year No. 26

The 1975 Proclamation effectively repealed the land taxation by abolishing private ownership of land upon which land taxation was predicated. In any case, an agricultural and land use fee was promulgated in 1976 consistent with the new political economy – socialism.[31]

The land use fee set a lower fee for members of agricultural cooperatives in a bid no doubt to encourage farmers to join the cooperatives. The agricultural income tax was flat up to a certain threshold of income (up to 1200 Birr) but farmers whose income exceeded 1200 Birr were a subject of a progressive income tax rate up wards from 15% to 70%, while State farms were subject to a flat tax rate of 50% on their taxable income. [32] Taxpayers were allowed to deduct all 'necessary expenses' including an allowance for depreciation of capital assets used in agricultural activities.[33] The agricultural income tax system put in place since 1976 remained in force well into the 1990s.

Although the Derg[34] regime was removed from power in 1991, there wasn't any fundamental change in the policy towards land and agricultural taxation except perhaps in the significant reduction in the rates of taxation. Land continued under public ownership and for a while the agriculture land use fees and income taxes that were introduced by Derg remained in force long after Derg was ousted. The only notable transformation in this area in the post 1991 period is the decentralization of land and agricultural taxes to regional governments.[35]

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[31] It was significant that the new law used the word 'fee' in stead of 'tax'. The name was to signify that the government was now the owner and the holders, mere users of land; see Rural Land Use Fee and Agricultural Activities Income Tax, 1976, Proclamation No. 77, *Negarit Gazeta,* 35th year, No. 19

[32] See Proclamation No. 77/1976, cited above, Articles 17 and 25; the land use fees and agricultural income tax rates were raised two years later by an amendment to the 1976 Land Use Fee and Agricultural Income Tax Law. And characteristic of the tax rates in other areas, the agricultural income tax rates were raised, the top income earners being subject to a marginal tax rate of 89%; see Rural Land Use Fee and Agricultural Activities Income Tax Amendment, 1978, Proc. 152, *Negarit Gazeta*, 39th year, No. 2

[33] See Proclamation No. 77/1976, cited above, Article 24

[34] Derg is the name of the communist regime that took over power after the 1974 Ethiopian Revolution

[35] The decentralization was at first recognized in a law passed during the transitional period and later entrenched in the Constitution of 1995; see A Proclamation to Define the Sharing of Revenue between the Central Government and the National/Regional Self-Governments, *Negarit Gazeta*, 52nd year, No. 7; the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, Articles 94–99

The Regional States took quite sometime before they were able to write their own agricultural income tax laws although agricultural income taxes were thoroughly decentralized both during the Transition period and after the passing of the Constitution.[36] Once starting to issue their own agricultural income tax laws, however, the Regional States have instituted various methods of agricultural taxation – perhaps to be expected in a decentralized agricultural income tax system.[37] The variations are seen not only across regions but also over the course of time in the same region. While many of the regions initially followed the progressive agricultural income tax system inherited from the agricultural income tax system in place since 1976, some of them have since then reverted to a cruder form of agricultural income taxation based on the size of land holding. For example, the Oromia Regional State initially adopted a progressive agricultural income tax system, but replaced this practice with an agricultural income tax system based on the size of landholding, rather than the amount of agricultural produce.[38] The tax base of agricultural income taxation in Benishangul-Gumuz and Gambella is the annual agricultural produce (and therefore predictably varies from year to year), while in regions like Tigray and Harari, the tax is fixed on the basis of the size of land holding.[39] In some regions, the tax burden varies with the specialty produce of the area, its location or the kind of production.[40] For example, in Southern Nations, Nationalities and Peoples Region (SNNPR), higher rates of agricultural income tax are imposed on holders of land used for *chat* or coffee production,[41] taking obviously into consideration the higher market value of these commercial crops. It will be interesting to explore the impact of these wide ranging divergences in agricultural income taxation upon the state of the agrarian economy.

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[36] **See Deso Chemeda,** Taxation of Agricultural Income and Rural Land Use Payment : the Law and the Practice in Oromia, **(2008, Unpublished, AAU Law Library Archives); see also The Southern Nation (sic), Nationalities and Peoples' Regional Government Rural Land Use Rent and Agricultural Activities Income Tax, 1996, Proclamation No. 4, *Debub Negarit Gazeta*, 1st year, No. 5; A Proclamations (sic) to Provide for the Rural Land Use Rent and Agricultural Activities Income Tax in Benishangul Guzuz Regional State, 1997, Proc. No. 7, in Compiled Laws of the Benishangul-Gumuz Regional State.**

[37] See The Federal Democratic Republic of Ethiopia, **The New Federal Budget Grant Distribution Formula**, May 2007, Addis Ababa, pp. 20-22.

[38] See Deso Chemeda, cited above, note 34, pp. 37-48; see Oromia National Regional Government Rural Land Use Payment and Agricultural Income Tax Amendment, 2005, Proc. No. 99, *Megeleta Oromia*, 13th year, No. 13/2005

[39] See The Federal Democratic Republic of Ethiopia, cited above, note 35, pp. 20-21

[40] Id, p. 21

[41] Ibid

2.1 Benefit Taxes Tied to Land and Agricultural Income Taxes: The Education and Health Taxes

Traditionally, land attracted various forms of taxes and levies even before 1941 period and that tradition continued after 1941 with the levying of various taxes associated with or pegged upon land in the rural and urban areas. Thus, in 1947, the Ethiopian government issued an 'Education Tax' upon landholders with a stated purpose of raising revenues for provision of education as a public good.[42] The education tax was an 'earmarked' tax in the sense that the proceeds of the tax were destined for expenditure on education. This was quite unlike many other taxes whose proceeds are deposited in general government accounts for appropriation in general government budgetary purposes. The 1947 Educational Expenditure law (passed immediately after the Education Tax) specifically directed the Ministry of Finance to set aside the proceeds from this tax for education.[43] Since, the education tax was tied to land, the tax followed the same principles and modalities of the land tax of 1944, except that the amounts charged were different.[44]

The principle of 'earmarked' taxation extended to health services in 1959 with the coming into force of the Health Tax, which, like the education tax, was tied to land holding.[45] The preamble of the 'Health Tax' law states the reason for the introduction of the new tax as 'the need for additional finance for health services' and like the education tax, the Ministry of Finance was to set aside the proceeds from the tax for the specific purposes of providing public health.[46] Again the "Health Tax" followed the same modalities of land taxation issued back in 1944, with the only difference seen in the amounts of

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[42] The preamble of this law states: 'Education for all is an asset and benefit to the nation"; see Education Tax Proclamation, 1947, Article 3, Proc. No. 94, *Negarit Gazeta*, 7th year, No. 3, Article 3.

[43] See Educational Expenditure Proclamation, 1947, Proc. No. 95, *Negarit Gazeta*, 7th year, No. 3

[44] The landowners living in Wellega, Sidamo, Illubabor, Gemu Gofa and Kafa were to pay 13.50 Birr, 12 Birr and 4.50 Birr for 'fertile', 'semi-fertile' and 'poor' lands and 6 Birr if their land was unmeasured; See Education Tax Proclamation No. 94/1947, *Negarit Gazeta*, 7th year, No. 3, Article 3; it is to be noted that the education tax, which was originally tied to rural lands, was extended to urban lands and personal income taxes by 1970; see Eshetu Chole, *supra note* 11, p. 70;

[45] See The Health Tax, 1959, Decree No. 37, *Negarit Gazeta*, 18th year, No. 14

[46] An order was issued in 1960 instructing the Ministry of Finance to collect the health tax and appropriate the proceeds to the Ministry of Health, which shall then use the fund for the purpose of expanding and improving public health facilities; see Health Tax Administration, 1960, Order No. 22, *Negarit Gazeta*, 19th year, No. 11

tax chargeable.[47] The Health Tax law, like the Education Tax law, had a provision instructing the Ministry of Finance to keep the revenues separately from the general accounts of the government, and to disburse the proceeds for the provision of health services only.[48] Although these taxes were repealed in 1978,[49] they provide an interesting alternative for the financing of education and health in Ethiopia. Since the proceeds are earmarked, they have an undeniable advantage in creating some level of accountability in how tax proceeds are spent and in raising the awareness of the taxpaying community. Taxpayers are generally more demanding and exacting when they pay taxes that are earmarked and that may improve the quality of health and educational services by the government.

3. The Main Income Taxes[50]

The first modern income tax law (outside the agricultural system) was issued in 1944 and was named a "Proclamation to Provide for the Payment of a Tax by All Individuals and Businesses".[51] The Proclamation defined income as 'every income earned or unearned, accruing from or received' in the Empire except salaries received by members of the regular armed forces and income earned from agriculture.[52] The 1944 income tax law established the schedular approach to income taxation in Ethiopia, which has remained as the basic structure of income taxation to this day.

The 1944 income tax law created three schedules for income taxation. Schedule A of that income tax law did not specify the types of income subject

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[47] One other notable difference was that the health tax attached to city lands as well – 30% of the municipal tax on land. It is to be incidentally noted that the education tax did not attach to city land until 1970 when a Proclamation was issued to extend the payment of education tax to urban land, payable at the rate of 30% of the municipal land tax and on personal emoluments, payable monthly at the rate of 0.50 Birr for those whose monthly emoluments were between 50 Birr and 100 Birr and 2 Birr for those whose monthly emoluments exceeded 100 Birr.

[48] See Health Tax, 1959, Article 7, Decree No. 37, *Negarit Gazeta*, 18th year, No. 14; Health Tax Administration Order, 1960, Article 2, Order No. 22, *Negarit Gazeta*, 19th year, No. 11

[49] See A Proclamation to Amend the Income Tax, 1978, Proc. No. 155, *Negarit Gazeta*, 38th year, No. 3

[50] "Income taxes" refers to the taxes on employment, rental, business and professional as well as miscellaneous incomes. The use of 'income taxes' in the plural is deliberate. It is to convey that there are multiple income taxes in Ethiopia although most of these taxes are stipulated in a single principal legislation.

[51] See Personal and Business Income Tax Proclamation, 1944, Proc. No. 60, *Negarit Gazeta*, 3rd year, No. 9

[52] See id, Article 2(2)

to tax, but it probably covered personal income. The amount of taxes was fixed in pounds (reflecting perhaps the British influence at the time) and the tax rates covered income grounds as low as 30 pounds and as high as 9000 pounds. The income brackets were much longer than the ones we have in the law now. And more significantly, the accounting period for personal income tax was a year, and the tax year at the time was the Ethiopian calendar, which ran between 1st of *Meskerem* and the end of *Pagume*, but tax was payable on the 1st of *Yakatit*, six months after the tax was due.[53]

Schedule B of the income tax law of 1944 covered the income ground covered by Schedule C today – income from business. The last income tax Schedule –Schedule C – was a sur-tax on special classes of Schedule B taxpayers, applying graduated tax rates to those businesses earning income above a baseline.[54] Schedule B of the 1944 income tax law grouped businesses into categories of traders, retailers, premises and sundry establishments, which were further classified into three classes (as Class A, B and C) with higher taxes levied on Class A than B and B than C (the modern equivalent of Category A, B and C taxpayers). Traders included brokers, commission agents, contractors, general importers and exporters, sub-contractors and wholesale dealers. Retailers included bakers, barbers, booksellers, boot and shoe sellers, butchers, chemists and druggists. In the premises category, we meet with businesses like bars, biscuit factories, breweries, cinemas, cotton mills, distilleries and flour mills. No explanation was provided in the law as to why such classifications were adopted. Judging by the tax rate differentials in that law, it must have been assumed that these different categories of businesses represented different taxpaying abilities.

The 1944 income tax was replaced fives years later in 1949 by Proclamation No. 107/1949, bearing the same name. The 1949 income tax law defined income more broadly than the 1944 law as 'every sort of income earned or unearned, whether in the form of gains, profits or rents, salaries, wages or compensation for personal services of whatever kind'.[55] Income earned by members of the armed forces, which was exempted under previous income tax law, was now made taxable. The only source of income that was excluded from this law (because it was covered by another tax regime) was income from agriculture.

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[53] See id, Article 3(ii)

[54] See id, Schedule C

[55] See a Proclamation to Provide for the Payment of Tax by All Individuals and Businesses, 1949, Article 2(2), Proc. No. 107, *Negarit Gazeta*, 8th year, No. 12

The 1949 income tax law made a few changes in the structure laid down by the 1944 law. The currency of tax payment was now Ethiopian Birr, instead of a pound. The Scope of Schedule A was clearer than the 1944 income tax law. Schedule A applied to salaries, wages, emoluments or personal compensation, and rents on property in a non-commercial setting (a composite of today's Schedule A and B income tax). It might be said that the 1949 income tax law was the first to explicitly refer to 'rental income' as a taxable source of income. Schedule B of the 1949 income tax law covered the same ground as that of the 1944 income tax law, except that the types of businesses subject to tax were now almost exhaustively listed (more than 70 overall). Each business category was further divided into seven classes (instead of the three classes under 1944 income tax law) for purposes of the application of a crude form of graduation. The income tax was presumptive over all, and not really based on income but on the type of business and the class into which the business falls. For example, a baker classified as 1st class was to pay 300 Birr annually while a baker classified as 7th class was to pay 25 Birr only. This, it will be noted, is a modern equivalent of standard income taxation for category C taxpayers. A classification of businesses into seven classes was to be made by a Commission set up in that same year.[56]

Schedule C of the 1949 income tax law was a sur-tax like that of the 1944 law except that under the 1949 law importers and exporters were to be subject to withholding on the point of imports and exports at the rate to be fixed by the Ministry of Finance, which fixed the rates in regulations afterwards at 4% and 1% of the customs valuation for imports and exports respectively (the first such attempt at withholding at source).[57] The sur-tax for special class of Schedule B taxpayers was an additional tax rate of 10% upon income exceeding 100, 000 Ethiopian Birr. An income tax amendment issued in 1954 eliminated the sur-tax of 1949 (eliminated Schedule C, at least temporarily) and reclassified importers and exporters under Schedule B[58], reducing the income tax system to two schedules.

The 1949 income tax law was of historical significance because it was the first piece of legislation to grant income tax exemptions to encourage investment. The 5-year income tax holiday, which became a standard tax incentive since

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[56] See the Personal and Business Tax, 1949, Legal Notice No. 138, *Negarit Gazeta,* 9th year, No. 4

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

[58] See a Proclamation to Amend the Personal and Business Tax, 1954, Proclamation No. 144, *Negarit Gazeta*, 14th year, No. 2

then, was for the first time recognized in the 1949 income tax law(**for tax incentives, see below**).[59]

It was as if the income tax system of Ethiopia needed change every five years. The 1949 income tax law was replaced by an Income Tax Decree in 1956.[60] The 1956 income tax law reorganized the schedules of the income tax as they were then known. Schedule A was narrowed down to income from employment, covering salaries, wages, pensions and other personal emoluments. Schedule B became income from rent of lands and buildings used other than for agricultural and cattle-breeding purposes. Schedule C was created to cover income from businesses, from professional and vocational occupations, from exploitation of wood and from all other sources not previously mentioned (in effect, Schedule C was a catch-all basket). Schedule C also subsumed a sur-tax, which was previously handled under a separate Schedule.[61]

For the first time, the 1956 income tax law introduced a monthly accounting system for schedule A tax (income from employment) and income brackets were created up wards from 30 Birr to the top of 1500 monthly income for purposes of computing the tax under this schedule. The accounting period for Schedule B and C income tax remained a year, up wards from 360 Birr to top of 18, 000 Birr. The 1956 income tax decree ended the classification of businesses into categories, except for small businesses that do not keep proper books of accounts. The taxable income of small businesses was to be estimated by the Ministry of Finance.[62] All other businesses were to be subject to a single income tax rate table based on their taxable income.
Of all the early income tax laws, the 1956 income tax law strikes us as the most familiar, because it was really in that law that some of the most enduring substantive principles of Ethiopian income tax system were laid down. The content of the three Schedules (A, B and C) of the Ethiopian income tax have changed very little since the 1956 income tax law. The 1956 income tax law contained a long list of exemptions some of which are still with us today. For example, the exemptions for unskilled workers and members of the diplomatic community are traceable at least in part to the 1956 income tax law.[63]

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[59] See Proclamation No. 107/1949, cited above, Article 3(iii)
[60] Income Tax, 1956, Decree No. 19, *Negarit Gazeta*, 16th year, No. 1
[61] See Proclamation No. 107/1949, cited above, Article 14
[62] See Decree No. 19/1956, cited above, Article 43
[63] The current exemptions for unskilled workers and members of diplomatic community are traceable to the 1956 income tax law.

The 1956 income tax decree was replaced in 1961 by Proclamation No. 173/1961. The 1961 income tax law was a better known income tax law in modern income tax history because it remained in force for a long time – for more than 40 years until 2002, but the 1961 income tax law introduced very little to what the 1956 income decree did- in fact, close examination of the two laws reveals striking similarities between the two. Even in an area where one would expect some changes (e.g., tax rates), there was little difference between the contents of the 1956 income tax law and 1961 income tax law. It might be even stated that the 1961 income tax law was the 1956 income tax decree in the guise of a Proclamation. [64]

The 1961 income tax law turned out in the end to be one of the longest running tax laws in the book. In a manner of saying, the 1961 income tax law survived the vicissitudes of three Ethiopian regimes before it was finally repealed in 2002. Ironically, it wasn't a change of regimes but a tax reform undertaken independently of a change of government that finally became its undoing. It was the 2002 tax reforms that finally repealed the 1961 income tax law.[65]

While the 1961 income tax law was clearly a survivor of many regimes, it survived only because it underwent too many amendments to count here. One of the notable amendments of the 1961 income tax law was the addition (incorporation) in 1967 of agricultural income taxation in the body of the main income tax system of Ethiopia. The agricultural income tax law of 1967 was added to the main body of the income tax system (for the first and last time, it turns out) when Emperor Haile Sellassie I issued an agricultural income tax law to repeal and replace the 1944 tax in lieu of tithe. The 1967 income tax law added income from agricultural activities as Schedule D of the 1961 income tax law, but, as pointed out above, this incorporation of agricultural income taxation was short-lived.

The aftermath of the 1974 Ethiopian Revolution had a major impact upon the structure and content of Ethiopian income tax system. The Revolution was directly responsible for tax reforms which removed two of the Schedules (B and D) of the 1961 income tax as well as for the major overhauls of the two remaining schedules at the time (A and C).

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[64] The Emperor presented the 1956 income tax decree for approval because He was required by the Constitution of the time. It was the 1956 income tax decree which became the 1961 income tax proclamation when it was finally approved by the then parliament.

[65] See Income Tax, 2002, Proc. No. 286, *Federal Negarit Gazeta*, 8th year, No. 34

The first schedule to be affected was Schedule D – the tax on income from agricultural activities. Only recently added to the main body of the Ethiopian income tax system, the agricultural income tax system of the *ancien regime* was destined to become history as a consequence of the 1974 Ethiopian Revolution. The official repeal of Schedule D came in 1976 when Derg issued its own agricultural income tax law consistent with the new ideology.[66] This ended the brief incorporation of agricultural income taxes in the main body of the Ethiopian income tax system. The agricultural income tax system of Ethiopia has operated as autonomous tax regime since 1976, as it did prior to 1967.

Another casualty of the 1974 Revolution was Schedule B – which was a tax on income from rental of lands and buildings at the time. The 1975 Proclamation which abolished private ownership of urban lands and expropriated extra houses had the effect of abolishing Schedule B from the income tax system altogether. The 1975 law nationalized urban lands, which meant that there would no longer be any income from rental of lands. The 1975 law also outlawed rental of houses by any person, family or organization, except by the government itself.[67] The law specifically abolished lessor-lessee relationships[68]– one of the sources chargeable with income tax under Schedule B at the time. Although the 1975 law made no specific reference to the income tax law at the time, it was evident that there would be no rental income to be taxed after that.

The other schedules – A and C – were also affected by the changes spawned by the Ethiopian Revolution of 1974, but they did not suffer the kinds of fatal blows Schedules B and D suffered. The whole reform of the tax system at the time reflected the paradoxical approach of radically changing some parts of the income tax system while keeping the main framework of the system in place. In spite of the transformative changes to the income tax system, the framework of the income tax system of the Imperial period was maintained. In 1978, for example, the income tax law of 1961 underwent significant revisions both in its content (substance) and form.[69] The 1978 income tax law added schedule D– which remained vacant after agricultural income tax was removed from main income tax system – now with entirely new sources of income. The 1978 income tax law added hitherto unknown sources of income

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[66] See Rural Land Use Fee and Agricultural Activities Income Tax, 1976, Proc. No. 77, *Negarit Gazeta*, 35th year, No. 19

[67] See Proclamation No. 47/1975, cited above, Article 20

[68] Ibid

[69] See a Proclamation to Amend the Income Tax, 1978, Proc. No. 155, *Negarit Gazeta*, 38th year, No. 3

and sources which were previously exempted under earlier income tax laws.[70] Unlike the other schedules of the income tax system, the new schedule contains an assortment of sources of income which are unified neither by their sources nor by the tax rates. For lack of a unifying name, the 1978 income tax law referred to these sources as 'miscellaneous' income. The new sources of income that became chargeable with tax were: income from games of chance (mostly lottery winnings), royalties from patents and copyrights, income from technical services rendered abroad, income from casual rental of property and dividends.[71] The new sources of income, the circumstances leading to taxation and the tax rates are different for each new source of income chargeable under Schedule D. The only thing common among them (apart from the fact that they all fall under Schedule D) is that almost all the new sources were to be collected through withholding by intermediaries.[72]

In addition to bequeathing new sources of income to the Ethiopian income tax system (and in the process broadening the base of the tax system), the 1978 income tax law gained some notoriety for raising tax rates (and burdens) to heights never reached before and after in the history of the Ethiopian income tax system.[73] The 1978 income tax law came at the height of socialism, when it was fashionable to view high income groups with suspicion, if not outright hostility. The 1978 income tax law raised the top marginal tax rates for individuals to as high as 89% (for businesses) and 85% (for employees). The tax law raised the tax rates for companies to a high of 50%, which was over and above the tax levied on dividends, which was 25% at the time. The tax rates on newly added 'miscellaneous' sources of income were not as high as the other sources but they were quite high: royalties (40%), income from technical services (10%), dividends (25%) and income from games of chance (10%).[74] The tax rates were quite high and the effective tax rates were considerably higher than the legal rates when we consider the fact that these tax rates were levied upon gross receipts.

The 1990s continued the piecemeal revision of the 1961 income tax law in spite of the changes of government and shifts of economic policy. The most notable developments of the 1990s in the area of income taxation were the re-

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[70] The 1961 income tax law exempted 'income from dividends'; see Article 18 (f) of Income Tax Proclamation No. 173/1961 (now repealed).

[71] See Income Tax Amendment Proclamation No. 155/1978, cited above, Article 2(7)

[72] Ibid

[73] See, generally, Bekele Haile Selassie, "Salient Features of the Major Ethiopian Income Tax Laws," **Journal of Ethiopian Law**, vol. 15, 1992, p. 59

[74] The government was probably comparatively lenient on income from gambling because it had a monopoly over the administration of lottery.

introduction of 'income taxes on rental of buildings'[75] and the reduction of tax rates both for individuals and companies. The tax on 'income from rental of buildings' was introduced after a hiatus of 18 years. The reduction in tax rates was initiated by the Derg which during its waning days adopted some liberal policies towards private enterprises and investment.[76] Hence, in 1990, Derg reduced the marginal tax rates for individuals from the high of 89% to 59% and dividend tax rates from the high of 25% to 10%. After the change of government in 1991, the tax rates continued falling until they reached the current rates – 30% tax rates for companies and 35% top marginal rates for individuals.[77] The tax rates for miscellaneous sources of income also fell considerably: royalties (from the high of 40% to 5%), income from technical services (which remained the same: 10%), dividends (from the high of 25% to 10%). The only sources of income whose burdens appear to increase in the post 1990 period were income from games of chance (from 10% to 15%), interest from bank deposits (from 0 to 5%) and capital gains (from 0% to 15% and 30%). Income from interest on bank deposits was not mentioned as a source chargeable with tax until 2001 and capital gains were for the first time mentioned as sources chargeable with tax in 1994.[78] (**For more, see appendix 1 below**)

As alluded to before, the approach to income taxation may be described as one of incremental reform or revision in which an old tax law was maintained as the framework legislation and whatever changes needed were introduced as an amendment to the old piece of legislation. This approach is particularly dominant in the field of income taxation. Many seemingly radical transformations of the income tax system were paradoxically accommodated within the framework of the existing income tax system.

Whatever merits this approach might have, its downsides were palpable. The piecemeal revisions of existing income tax law/s became a major source of concern as uncertainties grew over which rules were in force and which rules were abrogated. Several pieces of legislation were in force at one time,

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[75] See Income Tax (Amendment), 1993, Proc. No. 62, *Negarit Gazeta*, 52nd year, No. 54

[76] See Council of State Special Decree to Amend the Income Tax, 1990, Proc. No. 18, *Negarit Gazeta*, 49th year, No. 15, which reduced the tax rates for businesses from the high of 89% to 59%; see Income Tax Amendment, 1994, Proc. No. 107, *Negarit Gazeta*, 54th year, No. 3, which brought the tax rates down to 40% for Schedule A and C income tax groups

[77] See Income Tax Proclamation No. 286/2002, op cit, Articles 10, 15, and 19

[78] See Income Tax (Amendment), 2001, Proc. No. 227, *Federal Negarit Gazeta*, 7th year, No. 9; Payment of Tax on Gains from Capital, 1994, Proc. No. 108, *Negarit Gazeta*, 54th year, No. 4, Article 4

making the task of understanding the tax system extremely arduous for average taxpayers. There were times when it was necessary to read more than a dozen pieces of major legislations on income taxation alone to get a clear idea about the Ethiopian income tax system – and this without counting other subsidiary pieces of legislation like directives and internal manuals and memos.

When laws are revised haphazardly, it is inevitable that discrepancies arise among the different pieces of legislation, as reformers are more concerned about their revisions than the impact of their reform upon taxpayers in general. A byproduct of the piecemeal revision of taxes was the visible discriminatory treatment of various categories of taxpayers. This actually happened in the 1990s. The top marginal tax rate for taxpayers engaged in rental of buildings was 45% while the top marginal tax rate for taxpayers falling under Schedule A and C was 40%.[79] The income brackets among different schedules were not uniform either. The taxable income bracket (above the exemption floor) for Schedule A taxpayers started at 1400 ETB while for that of Schedule B and C taxpayers, it started at 1800 ETB.[80] The tax rate differentials as well as the disparate income brackets were largely the product of the piecemeal revision of income tax laws and were probably unintentional.[81]

These problems of income tax reform in Ethiopia became one of the major reasons why the Ethiopian Government undertook what might justifiably be called 'comprehensive' income tax reforms culminating with the passing of income tax laws in 2002. The 2002 income tax laws put an end to the incremental approach to revision of income tax laws and repealed all previous income tax laws in force up to that time, except the autonomous income tax regimes in agriculture and mining sector.[82]

The 2002 income tax laws introduced many changes to the Ethiopian income tax system, one of which was the implementation of uniform tax rates and income brackets for different categories of taxpayers subject to income tax under the main income tax system.[83] Nonetheless, the 2002 tax laws retained

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[79] See Proclamation No. 62/1993, cited above, Article 2(3), and Proclamation No. 107/1994, cited above, Articles 2(2) and 2(3)

[80] See Proclamation No. 62/1993, cited above and Proclamation No. 107/1994, cited above

[81] See Taddese Lencho, **Income Tax Reforms of 2002: An Appraisal of some Substantive Principles**, a manuscript in author's possession

[82] See Income Tax Proclamation No. 286/2002, op cit, Article 119

[83] For more on this and critique of the reforms, see Taddese Lencho, *supra note* 81.

the schedular structure of Ethiopian income tax system and introduced very little to the content of the existing schedules.

In terms of modernization of the income tax system, the 2002 income tax laws must stand head and shoulders above all of the previous income tax reform attempts in Ethiopia. The 2002 income tax laws succeeded in bringing together scattered pieces of income tax legislation in a single body of principal income tax laws (a proclamation and regulations) –although the situation has since then unfortunately gone back to the bad habits of the old times.[84] The 2002 income tax reforms have also introduced some modern principles of income taxation, such as the extension of Ethiopian income tax jurisdiction over the worldwide income of residents, the insertion of provisions to combat avoidance of income taxation and, and special sections and rules on income tax accounting.[85] Most of these reforms are of symbolic significance only as the Ethiopian Tax Administration has yet to create the capacity to implement some of the modern-sounding principles of income taxation on the ground.

4. Special Income Tax Regimes: Petroleum and Mining Income Taxes

For much of the modern history of income taxation, only the agricultural sector charted its own autonomous course of history of income taxation in Ethiopia (the exception, as previously noted, was the period between 1967 and 1975, when agricultural income taxes were incorporated into the main body of Ethiopian income tax system). Many economic sectors were the subject of special government regulations in Ethiopia, but these special treatments never spilled over into taxation. For example, the exploration and extraction of minerals attracted special government regulation and attention since 1971 but the main income tax system continued to apply to this sector with minor adjustments.[86]

In 1986, the immense wealth to be had from petroleum extraction prompted the Ethiopian Government to fashion special incentive schemes for those involved in the exploration and extraction of petroleum in Ethiopia.[87] In that

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[84] See Income Tax (Amendment), 2008, Proc. No. 608, *Federal Negarit Gazeta*, 15th year, No. 15

[85] See Income Tax Proclamation 286/2002, cited above, Articles 2(4) (5), 3-5, 22, 23, 29, 59-63

[86] The tax rate applicable to the mining income was 51%, a much higher rate than the regular income tax rate at the time; see Article 4(1) of Proclamation No. 282/1971.

[87] Wondemagegnehu G. Selassie, "Mining and Development: an Overview of the Ethiopian Experience Within the Context of Mining Laws," **Ethiopian Bar Review**, Vol. 2, No. 2, March 2008

year, the Ethiopian Government issued a proclamation to impose tax on petroleum operations along with a law that purported to regulate the operation of petroleum explorations in the country.[88] The main objective of this law was not to raise revenues but to respond to the special characteristics of petroleum explorations, thus encouraging investment in the area. The 1986 petroleum operations law states that the issuance of a special law regulating petroleum exploration would foster petroleum infrastructure and develop domestic expertise in the area of petroleum explorations.[89] The preamble of the 1986 petroleum income tax law strengthens this by stating that the 'nature of petroleum operations calls for special law to regulate income tax thereon'. And the special rules to regulate become immediately clear when we read the provisions of this income tax law. The accounting /tax year is different from the tax year under the main income tax laws – Gregorian calendar – perhaps recognition of the fact that the exploring companies would be foreign owned concerns. There was a long list of special definitions as it is to be expected befitting such special law. There are special rules on the meaning of taxable income, deductions, capital expenditure and valuation, among others. The applicable tax rate at first was 50% at the organization level, but the distribution of dividends was exempted from income tax.[90] A definition of taxable income in this special income tax law is different from what we are used to in other income tax laws. The 1986 petroleum income tax law defines 'taxable income' as the value of all petroleum produced and saved in accordance with special agreement between contractor and the government'.

In general, the petroleum income tax law was not intended to generate revenues from existing activities but to encourage investment in the field of petroleum exploration by providing for special benefits and incentives through the tax system. It was perhaps in response to the specific request of petroleum exploration companies that demanded some guarantees through special tax regimes for their activities.

Another special income tax regime joined the Ethiopian income tax system in 1993, when a special mining law and an income tax law were issued.[91] The

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[88] See Petroleum Operations Income Tax, 1986, Proc. No. 296, *Negarit Gazeta*, 45th year, No. 7; and Petroleum Operations, 1986, Proc. No. 295, *Negarit Gazeta*, 45th Year, No. 6

[89] See the preamble of Petroleum Operations Proclamation No. 295/1986, cited above

[90] The tax rate has since fallen to the current rate of 30%; see A Proclamation to Amend the Petroleum Operations Income Tax, 2000, Proc. No. 226, *Federal Negarit Gazeta*, 7th year, No. 8

[91] See Mining Proclamation, 1993, Proc. No. 52, *Negarit Gazeta*, 52nd year, No. 42 and Mining Income Tax, 1993, Proc. No. 53, *Negarit Gazeta*, 52nd year, No. 43

1993 mining income tax law has *sui generis* rules for businesses engaged in exploration and extraction of minerals. The tax rate at the time of its introduction was 35% for small-scale mining activities and 45% for large-scale mining activities.[92] The mining income tax law has, like the petroleum income tax law, special definitions for taxable income, gross income, revenue expenditure, depreciation, reinvestment deduction and permitted losses.[93] All these rules are different from comparable situations under the main income tax law. To mention some of the special rules that apply to mining activities, the mining income tax law permits depreciation allowance at a straight-line deduction over the useful life of all capital expenditures and pre-production costs for four consecutive years.[94] The mining income tax law also allows deduction of 'reinvestment' income (5% of the gross income of the mining company) if the company wishes to reinvest its profits, and more importantly, there are rules for deduction of financial losses and physical losses, in the former case allowing the mining company a carry-forward of its losses for ten consecutive accounting years.[95] While the petroleum income tax law exempted dividends,[96] the 1993 mining income tax law imposes 10% tax on dividends.[97] Since the 1986 petroleum income tax has not been repealed, companies engaged in petroleum operations may take advantage of the exemption provisions therein. All indications are that the mining income tax law, like its predecessor, the petroleum income tax, was intended primarily to encourage investment in the mineral extraction sector rather than to generate revenues for the government.

The differences between the petroleum and mining income tax laws seem trivial and accidental on closer examination. The two tax regimes reveal substantial similarities, and if anyone is paying attention, it may be appropriate to merge the two tax regimes and issue a new tax law for mining sector, including petroleum extractions (**for timeline of special income taxes, see appendix 2 below**).

5. Provisional Income Taxes

Governments are never as inventive in their fiscal policies and instruments as in times when they are strapped for money, such as in times of war and economic crisis. The history of taxation throughout the world is a testament

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[92] See Mining Income Tax Proclamation No. 53/1993, cited above, Article 4

[93] See id, Articles 4, 7, 8, 9 and 10

[94] See id, Article 8

[95] See id, Article 10 and compare that with Article 28 of the Income Tax Proclamation No. 286/2002, cited above

[96] See Proclamation No. 296/1986, cited above, Article 12

[97] See Proclamation No. 53/1993, cited above, Article 12(2)

to the tremendous creative energy governments unleash in their search for new sources of revenue during times of crisis. Some of the taxes that we take for granted today were introduced in times of crisis. Income taxes are today recognized throughout the world as popular sources of revenue for governments but it is often forgotten that these taxes were first introduced by England in order to ease its financial burden as a result of the ongoing war with Napoleon at the time.[98] The United States first experimented with the income tax during the American Civil War and later returned to this tax as one of its major sources of revenue today.[99]

In the Ethiopian tax history, temporary taxes are not unheard of – although we may disagree upon what names we should give these taxes. One such tax is the so-called 'contributions' law of 1988. This law was issued at a time when the Government was hard-pressed for money by war particularly in the northern parts of the country. It had a long title – 'Contributions for the unity and territorial integrity of the Motherland Council of State Special Decree'.[100] The contributions law of 1988 covered virtually everybody – employees, pensioners, peasants, companies, professionals, Ethiopian nationals living abroad, producers' cooperatives, lottery winners, urban dwellers, agricultural service cooperatives, thrift and credit associations, public enterprises, and the National Bank of Ethiopia. Although it was called a 'contribution,' there was little doubt that this was an additional tax. The use of the word 'contribution' was a pure rhetorical device to stir some patriotic feelings in time of war. The contribution law imposed tax primarily on the basis of income. Employees, pensioners, and peasants were to pay an amount equal to one month of their income payable in 12 equal installments. The tax rates were not proportional at all. Some classes of taxpayers were subject to heavier tax rates than others. For example, persons engaged in petroleum trade and commission agency were to pay 15% of their total assessment annual income, thrift and credit associations to 25% of their total assessment annual income and public enterprises to 10% of the amount transferred to their general reserves. The 1988 'contribution' law may be cited as a legislative example of temporary taxes but it is a matter of public knowledge that these kinds of contributions in Ethiopia are intermittent sources of public revenues in times of great crises like famine and the initiation of public projects, the latest prominent example of which is the 'the Renaissance Dam' on the Abay River.

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[98] See Edwin R. A. Seligman, **The Income Tax, A Study of the History , theory and practice of income taxation at home and abroad,** The Macmillan company, 1911

[99] Ibid,

[100] See Contribution for the Unity and Territorial Integrity of the Motherland Council of State Special Decree, 1988, Decree No. 2, *Negarit Gazeta*, 47th year, No. 21

6. Excise and Sales Taxes

a. Excise Taxes

> *Excise – A hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid.*
>
> Samuel Johnson[101]

Excise taxes are indirect taxes 'imposed upon the production or sale of particular commodities or related groups of commodities'.[102] Excise taxes are nothing but sales taxes imposed on a limited category of goods.[103] Excise taxes were one of the first modern taxes to be spotted by the Ethiopian Government as potential sources of revenue. Some excise taxes had already been introduced before the Italian occupation targeting goods that were considered luxuries or primary exports at the time. [104] Before the Italian occupation, selective excise taxation was introduced in 1931 targeting products like alcoholic drinks, cigarettes, incense, carpets and wear.[105] This tax was introduced for the specific purpose of financing the purchase of Bank of Abyssinia, which was under the British concern at the time.[106]

In the post-Italian period, excise taxes became one of the first taxes to be introduced – they at least preceded general sales taxes by more than a decade. This is hardly surprising. Excise taxes, as selective taxes or production taxes, are much easier to administer than sales taxes with application on broad range of goods. The nascent Ethiopian tax administration at the time pursued a prudent policy of first introducing taxes on selective goods and then later extending the net to cover larger number of goods.

The first target of excise taxation was tobacco – in 1942. In that year, the Government asserted a state monopoly over the 'manufacture, purchase,

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[101] Quoted in Ben J. M. Tarra, 'Excises', in Victor Thuronyi, **Tax Law Design and Drafting**, International Monetary Fund, vol. 1, 1996, p. 146

[102] Babak A. Rastogoufard, "Too Much Smoke and Not Enough Mirrors: the Case Against Excise Taxes and for Gasoline Taxes," **Urban Lawyer**, vol. 36, 411, Summer 2004

[103] Excise taxes are typically imposed at the producers' or manufacturers' level, but some countries also impose excise taxes at the retail level (e.g., the US imposes gasoline taxes at the retail level); see Victor Thuronyi, **Comparative Tax Law**, (2003), Kluwer Law International, p. 58

[104] See Bahru Zewde, *supra note* 2, pp. 114-115

[105] Bahru Zewde, "Relations between Ethiopia and the Sudan on the Western Ethiopia Frontier," 1976, 301, quoted in Eshetu Chole, *supra note* 11, p. 72

[106] Bahru Zewde, 1976, 301, quoted in Eshetu Chole, *supra note* 9, p. 72; Bahru Zewde, *supra note* 2, p. 115

preparation, sale, import and export of tobacco.'[107] The 1942 law also established a Tobacco Monopoly Board, which was empowered to license tobacco production and, more importantly, to collect taxes, a proportion of which was to go to the Ministry of Finance as general revenue.

The second targets of excise taxation were alcohol and alcoholic products – in 1943. [108] The excise duty of 1943 levied *ad-rem* duties upon the production of alcohol, and befitting the nature of the tax, the amount of duty depended upon the alcoholic content and concentration of an alcoholic product.[109] The excise tax regime on alcoholic products went beyond taxation of alcohol and alcoholic products. A series of regulations were successively issued in the 1940s, some with a view to regulating the production of alcohol in the country, and others with a view to regulating the licensing and warehousing of alcoholic production. [110] At first, alcohol excise duties were limited to foreign produced alcoholic products but these duties were later extended in the mid 1950s to locally produced wine and bar beverages. [111] But these alcohol excise duties prudently relieved the production of *tej* and *tella* (traditional alcoholic beverages) from the payment of excise duties.[112] It would have been administratively impractical to levy excise duties on these products as they are produced in innumerable households with no attachment to modern commercial establishments. Although not mentioned in name, the omission of '*chat*' (a mildly addictive chewable plant) from the list of products subject to excise duties must have been motivated by the traditional nature of '*chat*' production in Ethiopia. As part of the excise tax regime, the taxation of alcohol and tobacco production is usually accompanied by warehousing obligations.[113] It is administratively easy (or at

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[107] A Proclamation to Establish A State Monopoly in Respect of Tobacco, Matches, and Pocket Lighters, 1942, see Article 3, Proc. No. 30, *Negarit Gazeta*, 2nd year, No. 2

[108] Alcohol Excise Duty, 1943, Proc. No. 40, *Negarit Gazeta*, 2nd year, No. 10

[109] See the Alcohol Excise Duty rules, 1943, Legal Notice No. 23, Negarit Gazeta, 2nd year, No. 10

[110] See Alcohol Excise Duty, 1944, Proc. No. 51, *Negarit Gazeta*, 3rd year, No. 6; Legal Notice No. 44/1944, *Negarit Gazeta*, 3rd year, No. 6; Legal Notice No. 108/1947, *Negarit Gazeta*, 7th year, No. 3; Proclamation No. 108/1949; Legal Notice No. 129/1949, *Negarit Gazeta*, 8th year, No. 12; Legal Notice No. 130/1949, *Negarit Gazeta*, 8th year, No. 12

[111] See A Decree to Provide for the Payment of Federal Alcohol Consumption Tax, 1956, Proc. No. 18, *Negarit Gazeta*, 18th year, No. 13; Legal Notice No. 203/1956, *Negarit Gazeta*, 18th year, No. 13

[112] See a Decree to Provide for the Payment of Federal Alcohol Consumption Tax, 1959, Article 17, Proc. No. 33, *Negarit Gazeta*, 18th year, No. 17

[113] Alcohol producers are required to obtain special license for alcoholic production and to construct bonded warehouses approved by the Tax Authorities.

least manageable) to enforce warehousing obligations upon alcohol and tobacco producers – since the producers employ modern technology of organized production. It is extremely difficult to enforce warehousing regulations on the production of traditional products like *tej*, *tella* and *chat*.[114]

In 1948, another species of excise taxation was added to the excise tax regime of Ethiopia – Highway Renovation Tax.[115] The Highway Renovation tax targeted one type of product – petrol – as a way of raising revenues for and recovering expenses of highway maintenance and construction. Petrol was selected as a target because of its close functional affinity with roads. Those who used highways used petrol to drive around. It is only appropriate that they were made to foot the burden of highway maintenance and construction. To convey the message that the tax was levied for purposes of raising revenues for highway maintenance and construction, the 1948 law prescribed the setting up of a special account called 'Highway Renovation Account' to which the proceeds from the tax were to go. The law instructed the Ministry of Finance to disburse from the account amounts for contracts signed by the Ministry of Public Works and Communications (at the time the public body in charge of highways).[116] It was clear that the construction of roads and highways was one of the major public work priorities of the Government at the time as the Ethiopian Government introduced a road tax in the same year, which was enforceable as a road toll on major highways. The road tax law of 1948 empowered the Ministry of Communications to specify highways upon which the road toll was to be imposed, and the rate of taxation was to be determined for every 100 kilometers of road used.[117]

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[114] See the Customs Revised Import and Export Regulations, 1951, Legal Notice No. 153, *Negarit Gazeta*, 10th year, No. 8; incidentally, chat was the subject of other types of taxes from a fairly early period in the modern tax history of Ethiopia. It was a subject of export taxes since 1951(see below), and income taxes since 1987. The 1987 income tax law required payment of tax by any person 'possessing, carrying, or otherwise handling chat for sale or destined for sale'. The chat tax is today enforced by both the Federal Government and the Regional Governments, collected usually at certain points of entry of chat into the market (called *kella* or toll booths).

[115] A Proclamation to Provide for the Renovation of Highways, 1948, Proc. No. 103, *Negarit Gazeta*, 8th year, No. 4

[116] Id, Article 6

[117] Although, it was not clearly indicated in the law as to how the tax was to be collected, it would certainly have required installment of toll-booths on highways selected for collection of road tolls. Motor cars were to pay 0.25 Birr while other vehicles were to pay varying rates depending on their loading capacity. Those who used vehicles which do not normally use roads (e.g. tractors) needed to pay specified fees and special permit from the Ministry of Communications to be able to use roads. The road tax of 1948 exempted all vehicles of Ministry of Public Works from the road

The highway renovation tax, as well as the road tax, of 1948 was seen as one source of revenue for construction and maintenance of highways. It was evident that the proceeds from these taxes were never going to be sufficient to cover the enormous costs of road construction and maintenance in a country with an extremely low density of highways. This was in any case made very clear in the laws when it was stated that the tax would not alter the normal budgetary allocation for construction of highways.[118]

The 1948 Highway Renovation Tax established some important principles of taxation, which were sadly discarded in later developments of taxation in Ethiopia. The first principle is the principle of transparency of aims and objectives of taxation. The 1948 tax law was transparent not only in the use of the expressive name – 'highway renovation tax',[119] but also in the specification of the objectives for which the tax was imposed – which was to cover the costs of highway maintenance and construction.

In the 1940s and early 1950s, excise taxes were faithful to the traditional tax policy objectives of excise taxes.[120] We observe this admirably reflected in the alcohol and tobacco excise taxes of 1940s and 1950s and the highway renovation tax of the 1948. However frequently the government revised the tax laws, we can see that the excise tax regimes were broadly faithful to the textbook version of excise taxation. Excise taxes as instruments for discouraging consumption of harmful products were admirably reflected in alcohol and tobacco excise taxes. Excise taxes as benefit taxes were also reflected in highway renovation taxes. With respect to benefit excises, the policy considerations were faithfully adhered to until the late 1960s when the laws in this regard took care to exempt petroleum not destined for highways. The 1967 petroleum excise tax, for example (the successor to the highway

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tax. The 1948 road tax was the only known toll law in Ethiopian tax history; See Road Tax Proclamation, 1948, Proc. No. 98, *Negarit Gazeta*, 7th year, No. 8

[118] A Proclamation to Provide for the Renovation of Highways No 103/1948, cited above, Article 7

[119] In this regard, the 'Highway Renovation' Tax of 1948 shares the plaudits with some other taxes that came out during the same period, namely the Education Tax of 1947 and the Health Expenditure Tax of 1959 (*see above*)

[120] According to Cnossen, excise taxes are distinguished by their selectivity in coverage, discrimination in intent and some form of quantitative measurement in determining tax liability; see Sijbren Cnossen, Excise Systems (1977), quoted by Ben J. M. Terra, Excises, in Victor Thuronyi (ed.), **Tax Law Design and Drafting**, International Monetary Fund, vol. 1, 1996, p. 248; see also John F. Due and Ann F. Friedlaender, **Government Finance, Economics of the Public Sector**, 2002, pp. 390-402; Ward M. Hussey and Donald C. Lubick (eds.), **Basic World Tax Code and Commentary**, Harvard University International Tax Program, 1992

renovation tax), exempted petroleum destined for use by the navy, railways, and industries.[121]

As an earmarked tax, the 'highway renovation' tax of 1948 could have served as a model for some other taxes, which should be earmarked given the aims for which these taxes are introduced in the first place. In other tax systems, the idea of earmarking a tax is not confined to benefit excises as such. We see some countries earmarking excise taxes on alcohol, tobacco, and other harmful products like asbestos. In the US, for example, excise tax proceeds imposed on coal mining are set aside for the benefit of miners who suffer from black lung cancer – an ailment associated with coal mining.[122] The proceeds from the excise duties on coal mining go to a special account called "Black Lung Disability Trust" from which disbursements are made to take care of those afflicted by black lung cancer.[123] Similarly, the proceeds from excise taxes on cigarettes are placed in a special account to benefit those who suffer from cigarettes smoking.[124] In Ethiopian tax history, the Highway Renovation, education and health taxes were the only taxes that were earmarked for the purposes for which the taxes were introduced in the first place. The wisdom of earmarking could have been extended to excise taxes on cigarettes, alcohol and some other harmful products. The idea of earmarking seems to have been completely abandoned as the requirements for earmarking faded from the later amendments of petrol taxes and as the education and health taxes were repealed. The production and import of products like alcohol, cigarettes and some other products out there has become just an excuse for raising additional revenues from these products.

From the middle of the 1950s and increasingly after that, Ethiopian Governments began to see excise taxes not merely as instruments of specific public policy but also as sources of easy revenues. Hence, we had an excise tax regime targeting salt in 1955.[125] The aim of this tax –which incidentally continues to this day – is revenue generation, although some people might argue that the aim is to discourage consumption of salt (a harmful product?).[126] Although some variety of salt can be harmful to health (and

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[121] See a Proclamation to Provide for Payment of Excise Tax on Petroleum Products and Lubricants, 1967, Proc. No. 249, *Negarit Gazeta*, 26th year, No. 14

[122] Federal Tax Course, CCH 1999 CCH Incorporated p. 124

[123] Ibid

[124] Ibid

[125] See a Proclamation to Amend the Federal Tax Proclamation, 1955, Proc. No. 146, *Negarit Gazeta*, 14th year, No. 19

[126] Initially, those people who argue that the taxation of salt has something to do with it being 'harmful' product may have a point. The first salt tax law of 1955 imposed

therefore an occasion for excise taxation), the taxation of salt in Ethiopian context remains to be predominantly motivated by the desire to generate additional revenues from an easy target – i.e., the collection of salt tax in places where salt is mined (mainly in the Afar Region- *Afdera*).

In 1956, the excise tax regime was unabashedly deployed to target unconventional but easy targets of excise taxation. The 1956 excise tax law extended the reach of excise taxes to widely consumable goods like sugar, yarn of cotton and textile fabrics.[127] And a year later, the net of excise taxes was widened to target locally produced goods like eucalyptus trees, stones, chalk, sand, jewelry and coal – clearly indicating the aim of the government to use excise taxes as means of generating additional revenues.[128] Another excise tax, introduced in 1960, further broadened the regime of excises, with taxes then levied on building materials like planks and rafters produced at sawmills, tiles and bricks.[129] This period represented a moment of unprecedented expansion for excise tax regimes in Ethiopia.

Luckily, some of these extensions of the excise tax regime beyond the traditionally 'excisable' products did not meet with approval with the then parliament. The excise taxes on local products like eucalyptus trees and stones and the excise taxes on building materials were rejected by the then parliament when the government presented them for approval in 1963.[130] The excise taxes on goods like eucalyptus trees, stones and sand and the excise taxes on building materials have never been revived again after the disapproval of the then parliament. However, these setbacks never seemed to dampen the appetite of Ethiopian governments over the use of excise taxes as sources of additional revenues from selected products out there. In the same year when 'building materials' excise taxes were turned down by the then Parliament, the Government succeeded in getting approval for an excise tax regime that targeted widely consumable goods like sugar, cotton and textile

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differential rates of tax based on the 'foreign elements' of salt and exempted from salt tax salt used for dressing hides and skins and salt used for the preparation of canned meat. These provisions seem to suggest that the aim was at least in part to discourage the consumption of salt. As in other areas of excise taxation, these aims were lost in later revisions of these taxes. ; see Salt Tax Regulations, 1962, Regs. No. 254, *Negarit Gazeta*, 21st year, No. 9

[127] See Federal Excise Tax Decree, 1956, Decree No. 16, *Negarit Gazeta*, 15th year, No. 11; and Federal Excise Tax Regulations, 1956, Regs. No. 205, *Negarit Gazeta*, 16th year, No. 1

[128] See Local Products Excise Tax, 1957, Decree No. 1, *Negarit Gazeta*, 17th year, No. 1

[129] See Building Materials Excise Tax, 1960, Decree No. 41, *Negarit Gazeta*, 19th year, No. 11

[130] See Notice of Disapproval No. 1/1963

fabrics –which were already in force since 1956 in the form of decrees.[131] Unlike the excise taxes on building materials, the excise taxes on sugar and textile products have been so well-established in the Ethiopian excise tax regime as to become part of the 'tax canon' of Ethiopian excise taxation. The policy justification for levying excise duties upon these products may be tenuous, but this has not prevented Ethiopian governments from continuing to view these as legitimate targets of excise taxation.

Excise taxes are some of the most frequently revised tax laws in the books, most for purposes of revising the tax rates. By 1960s, the products upon which Ethiopian excise taxes were levied seemed to be clearly established and the tax regime has stabilized by and large since then. We could clearly discern at least four categories of excise taxes since 1960s.[132] There are excise taxes on products selected for sumptuary purposes (e.g., sumptuary excises on alcohol, tobacco, and asbestos). There are also the so-called 'benefit' excises imposed upon petroleum and kindred products to recoup the costs of road construction and maintenance. And thirdly, we have so-called luxury excises imposed on luxury items like watches, jewelry and vehicles. And fourthly, we have 'revenue' excises levied upon widely consumable goods like sugar and textile products.[133]

These four categories were clearly distinguishable particularly until the end of the 1980s as excise tax laws were issued separately for all the four categories. We had therefore excise taxes separately for tobacco, alcohol, for petroleum products and lubricants, for widely consumable goods like sugar and textiles and for luxuries. Some of these tax laws were identified by the products upon which the excise taxes were to be imposed – e.g., as alcohol excise taxes, petroleum and lubricants excise taxes, while others were simply known by the generic name 'excise taxes'.[134]

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[131] See a Proclamation to Provide for Payment of Excise Tax, 1963, Proc. No. 204, *Negarit Gazeta*, 22nd year, No. 17

[132] For classification of excise taxes, please see Due and Friedlaender, *supra note* 120, pp. 390-402

[133] Like all classifications, these classifications are not watertight. Due and Friedlaender identify four different excise tax categories: excises designed to improve efficiency in the use of resources (sumptuary excises), excises in lieu of charges (benefit excises), excises for general revenue, and miscellaneous excises; see Due and Friedlaender, *supra note* 120, pp. 391-402

[134] See, for example, a Proclamation to Provide for the Payment of an Excise Tax on Alcohol, 1965, Proc. No. 217, Negarit Gazeta, 24th year, No. 10, which applied obviously to alcohol and alcoholic products; a Proclamation to Provide for the Payment of Excise Tax on Petroleum Products and Lubricants, 1967, Proc. No. 249, Negarit Gazeta, 26th year, No. 14; and compare them with a Proclamation to Provide

Separate legislation of excise taxes (as if to stress their specific and select character) came to an end with the issuance of a consolidated excise (and sales) tax law in 1990.[135] The consolidation of 1990 clearly made excise tax laws accessible. Almost by single stroke, the 1990 tax law brought together the previously separate pieces of legislation on excise taxes, alcohol excise taxes, petroleum products and lubricants excise taxes, salt tax, and transaction taxes.[136]

However, the consolidation of excise tax regimes (while commendable on accessibility grounds) may have relegated the policy considerations which made excise taxes relevant in the first place. Excise taxes are nowadays virtually indistinguishable from other forms of taxes except for the fact that all the products that are subject to excise taxes are listed in a schedule.

Later developments of the excise tax regimes of Ethiopia abandoned the policy considerations altogether. Petroleum continues to be the subject of excise taxation but the proceeds are no longer placed in a special account as in the early modern period, which means that the proceeds might be used for general government services.[137] Various types of alcoholic products also continue to be the subject of excise taxation even when these products are destined for desirable objectives, like the use for treatment in hospitals. [138]

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for the Payment of Excise Tax, which with that generic name applied to widely consumable goods like sugar, yarn of natural cotton and textile fabrics; see a Proclamation to Provide for the Payment of Excise Tax, 1963, Proc. No. 204, Negarit Gazeta, 22nd year, No. 17.

[135] See Sales Tax Council of State Special Decree, 1990, Decree No. 16, *Negarit Gazeta*, 49th year, No. 11

[136] The 1990 law repealed the Excise Tax Proclamation No. 204/1963; the Alcohol Excise Tax Proclamation No. 217/1965; the Petroleum Products and Lubricants Excise Tax Proclamation No. 249/1967, the Federal Salt Tax Proclamation No. 144/1955 and the Transaction Tax Proclamation No. 205/1963; see Article 3 of Decree No. 16/1990, cited above.

[137] There is, incidentally, an intention to revive the practice of earmarking some taxes for the construction and maintenance of roads, as can be gathered from the reading of the Road Fund Proclamation of 1997. This Proclamation lists the sources of this Fund, one of which is the so-called 'Road Maintenance Fuel Levy". The Proclamation authorizes the Council of Ministers to issue regulations for this levy, but no such regulations have been issued so far; see Road Fund Establishment Proclamation, 1997, Articles 5 and 5, Proc. No. 66, Federal Negarit Gazeta, 3rd year, No. 24

[138] The 1990 Excise Tax Law, for example, charges alcohol destined for 'medical, industrial, scientific or technical purposes' with an excise tax rate of 239%, a little less than alcohol destined for beverages, which is chargeable with 267%; see Schedule A of Decree No. 16/1990; Compare the Schedules of Ethiopian Excise Tax Proclamation with the list of items subject to excise taxation in the Basic World Tax Code; more

The reason for all of these developments is that the recent excise tax laws of Ethiopia no longer contain provisions that enjoin the government to earmark the proceeds or exempt the products when they are used for desirable goals. In sum, excise taxes have become taxes by a different name.

The other controversial development of excise taxes is the use of excises as revenue generation schemes. The imposition of excise taxes on sugar, salt and textile products has no other explanation (in Ethiopian context) than the generation of easy revenues from easily accessible products out there. The burden on these products has not been relieved even in times when there is scarcity of these products in the market. We can also take issue with the list of so-called luxury items in the Ethiopian excise tax regime. The import and production of vehicles attracts excise taxation regardless of the make of the vehicle.[139] Contrary to the nature of conventional excise taxes (which are normally used as fiscal tools for discouraging harmful products in the market), the excise tax regime on vehicles has the unintended consequence of recycling old vehicles in the market, with deleterious consequences upon the environment. The heavy excise duties upon imported vehicles force consumers to opt for the less environmentally friendly used cars. Sometimes, the excise tax rates defy reason. There was a time when the import of four-wheel drive vehicles carried 20% excise tax rate when other types of cars attracted as much as 100%.[140]

In general, excise tax regimes have become the first taxes to turn to whenever governments feel under pressure to raise extra revenues from selected products. The 1990 excise tax law is a case in point in this regard. This tax law- which incidentally came out when the government was waging civil wars in the north- came close to being a general sales tax law, with excises levied on not just the conventional excise target goods like tobacco and alcohol, but also on products like sandals, boots, vermin traps, advertising models, goods imported by hotels, chemicals and reagents, and flour and agricultural products (**see appendix 3 below**).

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than half of the items subject to excise taxation in Ethiopia are not mentioned in the Basic World Tax Code; the Code mentions alcoholic products, tobacco products and motor vehicles as subject to excise taxation; see Ward M. Hussey and Donald C. Lubick (eds.), **Basic World Tax Code and Commentary**, Harvard University International Tax Program, 1992, pp. 119-127.

[139] See Schedule D of Sales and Excise Tax Proclamation, 1993, Proc. No. 68, *Negarit Gazeta*, 52nd year, No. 61

[140] See the Schedule attached to Proclamation No. 68/1993 (now repealed), cited above

Since the consolidation of disparate excise taxes in the 1990s, the Ethiopian excise tax regime maintained a unified body. With the exception of revisions involving tax rates, the substance of excise tax regime has remained largely unchanged in the 1990s and 2000s. Excise taxes formed part of the comprehensive tax reform package of 2002, but though the law changed, the tax reforms actually changed very little about the existing excise tax regime at the time.[141]

b. Transactions Taxes/Sales Taxes

General sales taxes were comparatively late comers onto the scene of Ethiopian tax system. General sales taxes apply to a wide range of supplies of goods and services compared to excise taxes, which are limited in application. As a result, general sales taxes are comparatively more difficult to administer. That explains why the Ethiopian Government waited until 1954 to introduce a general sales tax law and even then a sales tax law with limited application. In that year, the Government introduced what it called 'Federal Tax' to be levied on imports and exports of goods in general.[142] At first reading, the 1954 Federal Tax law may be difficult to pin down for taxonomists. The law uses a generic name 'federal tax' which says little about the nature of the tax. Even more puzzling is that the 1954 Federal Tax Law applied on imports and exports. We may be inclined to call it a tax on imports and exports as result, but since Ethiopia had already had customs duties by that time, it is fair to conclude that the 1954 law was the first general sales tax law in Ethiopia.[143] In any case, since the 1954 law replaced

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[141] See the Turnover Tax, 2002, Proc. No. 308, *Federal Negarit Gazeta*, 9th year, No. 21, and compare it with Sales and Excise Tax, 1993, Proc. No. 68, *Negarit Gazeta*, 52nd year, No. 61, which it replaced

[142] See Federal Tax Proclamation, 1954, Proc. No. 143, *Negarit Gazeta*, 14th year, No. 2; by the way, the prefix 'federal' is a reference to the Federation of Ethiopia with Eritrea at the time; it is sometimes difficult to label some taxes in the early period as 'this' or 'that' type of tax. This is to be expected – governments, under pressure to raise revenues, are more interested in how revenues are raised than what experts would call their taxes.

[143] At the time of the introduction of federal tax in 1954, Ethiopia had already had an import and export duties law preceding the 1954 law by more than a decade. The 1954 Federal Tax was not intended as replacement of the customs duties of Ethiopia at the time, but as an additional and different tax on imports and exports. It appears that the points of imports and exports were selected solely for their administrative ease – entirely understandable given the limited administrative resources of Ethiopian tax system at the time; see Customs and Exports Duties Proclamation, 1943, Proc. No. 39, *Negarit Gazeta*, 2nd Year, No. 10 (now repealed); see below for more on customs duties

by a transaction tax law in 1956, this should dispel any doubts about the nature of the 1954 tax law.

The 1956 Transaction Tax law extended the scope of the sales tax regime from imports and exports to goods manufactured locally – the first sales tax on manufacturers.[144] Although the scope of application of transaction taxes was wider than excise taxes, we could see that the scope was still limited to one level of distribution and even then to limited number of goods. The imports, exports and the collection of tax from manufacturers were carefully selected for their ease of tax administration. Imports and exports are the easiest points of reach and manufacturers are more easily accessible than other actors in the supply chain (wholesalers and retailers) as the number of manufacturers is generally fewer than wholesalers and retailers.

The 1956 Transaction Tax law was further limited in scope by the wide range of exemptions granted to supplies of certain goods. Imports of agricultural and industrial machinery, implements and spare parts, supplies used as inputs or raw materials, goods manufactured by small businesses, goods produced by flour mills, bakeries and dairies were among the long list of goods exempted from the payment of transaction tax at the time.[145] Some of these exemptions were justified by the need to maintain that the sales tax regime remain a consumption tax and not a production tax (e.g., the exemption for agricultural and industrial machinery was intended to prevent the tax from becoming a production tax). Other exemptions were motivated at least in part by the realization that the resources of the tax administration were limited (e.g., exemptions for small business manufacturers).

Subsequent amendments of Ethiopian sales tax laws predictably widened the coverage of sales taxes as the tax administration became more confident in its enforcement capacities. Thus, in 1963, a transaction law that replaced the 1956 transaction tax decree extended the sales tax regime to wholesalers and retailers by introducing a turnover tax upon all sales at all levels.[146] The 1963 transaction tax law also extended the sales tax regime to services for the first time – although only one type of service (i.e., construction work) was

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[144] See Decree to Provide for the Payment of a Federal Transaction Tax, 1956, Articles 4 and 7, Decree No. 17, *Negarit Gazeta*, 15th year, No. 11

[145] See id, Article 5 and 7

[146] See a Proclamation to Provide for Payment of Transaction Taxes, 1963, Proc. No. 205, *Negarit Gazeta*, 22nd year, No. 18

chargeable with sales taxes at that time.[147] The turnover tax became a popular form of sales tax for the government in the 1970s, 80s and early 90s.

The landscape of sales taxation largely remained unaffected by the developments of the Ethiopian Revolution and its aftermath. Although sales taxes were a subject of numerous revisions (almost all of them in respect of rates), at the end of the day, the sales tax regime laid down during the Imperial period was maintained for much of the 1970s and 1980s. In 1990, the sales taxes and excise taxes were issued in a consolidated piece of legislation, but apart from the consolidation, there was little change in the substance of the taxes themselves.

After the change of the regime in 1991, sales taxes became a subject of a major revision in 1993. The sales and excise tax law of 1993 slightly contracted the scope of application of the sales tax regime. Turnover taxes were eliminated from the sales tax and the sales tax regime became a thoroughly single-stage sales tax regime with application upon imports, goods manufactured locally and a limited number of services.[148]

After a hiatus of about a decade, the turnover taxes returned after the comprehensive tax reforms of 2002, this time as supplementary taxes to the value added tax (VAT).[149] The introduction of the value added tax in 2002 (effective 2003) clearly marked the biggest transformation of the sales tax regime of Ethiopia of recent times.[150] The value added tax, along with the supplementary turnover tax of 2002, broadened the reach of the sales tax regime in Ethiopia, with sales taxes potentially reaching small retail products, not just production as was previously the case. The turnover taxes are provisional taxes, readmitted into the Ethiopian tax system as necessary evil.[151] We have every reason to believe that the turnover taxes will eventually peter out as more and more transactions are brought under the regime of VAT or for that matter another type of general sales tax.

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[147] The 1963 transaction tax law referred to one type of service only as subject to transaction taxes – namely, construction work. All other types of services were exempted by omission.

[148] See Sales and Excise Tax, 1993, Proc. No. 68, *Negarit Gazeta*, 52nd year, No. 61

[149] See the Turnover Tax, 2002, Proc. No. 307, *Federal Negarit Gazeta*, 9th year, No. 21

[150] See the Value Added Tax, 2002, Proc. No. 285, *Federal Negarit Gazeta*, 8th year, No. 33, Value Added Tax Regulations, 2002, Regs. No. 79, *Federal Negarit Gazeta*, 9th year, No. 19

[151] For the distortionary effects of turnover taxes, see Due and Friedlaender, *supra note* 120, pp. 415-416

7. Customs Duties – Import and Export Duties

a. Import Duties

The first customs duties of the modern era were issued in 1943.[152] The customs duties of 1943 covered both import duties and export duties. For duties on imports, a tariff schedule was attached (as it has always ever since been) to the customs law of 1943 – a long list of goods classified into categories, with rates attached thereto. The rates ranged from 'free' to duties as high as 70% at the time. The rates were both *ad rem* (based on the unit of the good charged) and *ad valoreum* (based on the value of the good charged). The *ad rem* rates were used on class II goods of the customs tariffs, which included alcoholic products and cigarettes – no doubt to discourage their import through the import duties.

Customs duties are some of the most frequently revised tax laws, and indeed of any laws in the land. Most of these amendments are in the area of the customs tariffs, which require revising from time to time whenever a need arises for changing the tax rates, sometimes for reclassifying the goods and at times for completing the customs tariff laws, which, at the time of issuance, did not cover some subjects like regulation of customs warehousing and customs invoicing. When taxes are the subject of frequent revision, there is always a problem of keeping track of which tax laws are in force and which have been repealed. This problem is very acute in the area of customs tariffs. The Government was able to relieve some of the difficulties in this regard by undertaking a consolidation of the various customs' tariff laws at various times in modern history. The first consolidation was done in 1955[153] and since then consolidated customs laws were issued at various times.[154]The most unstable part of the customs laws, the tariffs schedules, kept pouring out every now and then.

Customs duties have never been disinterested sources of revenue – not anywhere, not in Ethiopia.[155] Customs duties are often used by governments

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[152] See Customs and Exports Duties Proclamation, 1943, Proc. No. 39, *Negarit Gazeta*, 2nd Year, No. 10; for the history of customs duties before the Italian invasion, see Mahteme Sillassie Wolde Meskel, **Zikra Nagar**, 2nd Issue (in Amharic), 1962 E.C., pp. 172ff; see also Bahru Zewde, *supra note* 2

[153] See a Proclamation to Consolidate and Amend the Law Relating to the Customs, 1955, Proc. No. 145, *Negarit Gazeta*, 14th year, No. 7

[154] The latest is in 2009; see Customs Proclamation, 2009, Proc. No. 622, *Federal Negarit Gazeta*, 15th year, No. 27

[155] See generally, John F. Due, "Customs, Excise, Export duties," in Milton C. Taylor (ed.), **Taxation for African Economic Development**, Hutchinson Educational Ltd., 1970, pp. 392-413

to promote specific public policies other than generation of revenues. Their differential rates or tariffs are ideal for enforcing these policies. The history of customs duties in Ethiopia is no different. The government sought to discourage the consumption of certain imports (e.g., alcohol and tobacco) by imposing heavier burdens of customs duties upon these imports and encourage the consumption or use of other imports (e.g., agricultural machinery and books) by relieving these imports from customs duties.[156]

Apart from the customs tariffs, imports are a convenient route for imposing various forms of taxes. As goods enter through designated customs routes, governments have used these places as proxies for levying many of the other taxes in customs offices. Most of the indirect taxes (e.g., sales and excise taxes) have always used imports as a point for tax collection. Imports have also been used as convenient collection points for even income taxes (withholding taxes) and sometimes sur-taxes. At the time of writing, for example, imports are used for levying withholding income taxes (3%) and sur-taxes, which are imposed on most goods imported into Ethiopia.[157]

b. Export Duties

The export duties – which were introduced along with import duties in 1943 – were not as extensive as the import duties. Few products were at first listed as subject to export duties: hides and skins, civet, bees wax and coffee.[158] Then in 1951, the range of commodities subject to the export duties was broadened to include oil seeds, *chat*, sheep and lamb skins, goat and kid skins, leopard skins, ivory, saffron, butter, bazaar and ghee.[159] The limitation of export taxes to specified products should not be surprising. The exports of Ethiopia were limited to begin with (compared to the imports). It would have been pointless to issue an export tariff as extensive as that of the import tariffs. Secondly, even if there were other goods exported from Ethiopia, they weren't in any significant quantity – hence the concentration on high value exports like coffee and hides and skins. The export duties used both *ad rem* and *ad valorem* rates. *Ad valorem* rates were used for hides and skins, bees wax and coffee while an *ad rem* rate was used for civet.

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[156] See the Customs Revised Import and Export Regulations, 1951, Legal Notice No. 153, *Negarit Gazeta*, 10th year, No. 8

[157] See Income Tax Proclamation No. 286/2002, cited above, Article 52; Import Sur-Tax Council of Ministers Regulations, 2007, Regs. No. 133, *Federal Negarit Gazeta*, 13th year, No. 23

[158] See Customs and Export Duties Proclamation No. 39/1943, op cit; see also Eshetu Chole, *supra note* 11, p. 70

[159] See The Customs Revised Imports and Export Regulations, 1951, Legal Notice No. 153, *Negarit Gazeta*, 10th year, No. 8

Coffee – being the premium export product of Ethiopia for a long time – was frequently a subject of various forms of export duties. In addition to the regular duties imposed as part of the regular customs duties, coffee was subject to various additional duties at various times. For example, a regulation issued in 1954 increased coffee export duty and imposed a surtax of Birr 40 per 100 kg of coffee based on the price quotations on the New York Coffee Exchange.[160] And in 1957, the Ministry of Commerce and Industry was authorized by law to impose a cess[161] on all coffee products produced in and exported from Ethiopia.[162] A year later a National Coffee Board Cess Regulations[163] was issued, imposing 1 Birr per quintal of coffee exported. Although the cess was to be collected by the Customs Department (for obvious reasons), the law instructed the Department to appropriate the proceeds to the National Coffee Board for its administration. It was clearly an indirect tax to defray the costs of administration by the Board.

The outlook on exports has changed significantly in the 1990s and 2000s, with the government keen to promote the export sector by removing all kinds of barriers to exports, including taxes and duties. Instead of imposing export duties, the government introduced a number of laws aimed at removing all taxes and duties on exports, allowing exporters to import inputs duty-free and drawing back any taxes and duties paid upon goods exported from Ethiopia.[164] Exporters have also enjoyed zero-rated privileges under the VAT regime, which allows them to compete in international trade without the deadweight of Ethiopian taxes and duties.[165] However, the government has been slow to give up revenues from the premium product of Ethiopia –

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[160] See the Customs Import and Export Duties Regulations, 1954, Article 5, Legal Notice No. 185, *Negarit Gazeta*, 13th year, No. 9

[161] The term 'cess' (a shortened form of "assess"; the spelling is due to a mistaken connection with *census*) generally means a tax; http://en.wikipedia.org/wiki/Cess, visited on July 10, 2011; it stands in general for a levy, an assessment or tax, and in some countries used in connection only with local taxes (Britain), land taxes (Scotland) and taxes on commodities (India); see **Merriam Webster's Dictionary**, Third International Edition; Black's Law Dictionary defines a 'cesse' as an 'assessment or tax'; see **Black's Law Dictionary**, With Pronunciations, 6th edition. .

[162] See A Decree to Make Provision for the Establishment of a National Coffee Board, 1957, Decree No. 28, *Negarit Gazeta*, 17th year, No. 4

[163] See the National Coffee Board Cess Regulations, 1958, Legal Notice No. 217, Negarit Gazeta, 17th year, No. 10

[164] See a Proclamation to Establish Export Trade Duty Incentive Scheme, 1993, Proc. No. 69, *Negarit Gazeta*, 52nd year, No. 62

[165] See Value Added Tax Proclamation No. 285/2002, cited above, Article 7(2) (a) and (b)

coffee. It has waited until 2002 to remove export duties upon coffee, but even then, the government has kept a window open to reintroduce export duties on coffee if the 'international price of coffee improves'.[166]

Like import duties, export duties are seldom about revenues *per se*. Export duties have been used by various governments as instruments of various public policies. For instance, export duties are sometimes used by governments to discourage certain exports.[167] In Ethiopia, while the curtain on revenue export duties seemed to have been brought down, the other kind of export duties has emerged as a driver of certain public policies – export duties as instruments for discouraging the export of raw/unprocessed products from Ethiopia. The Raw and Semi-Processed Hides and Skins Export Tax Law of 2008 is a very good example of this type of export duties.[168] The preamble of this law makes the aim of the duty abundantly clear when it reads in part "*... the tax system will serve as an instrument to encourage industries engaged in the production of hides and skins (sic) shift to exporting processed hides and skins than exporting raw and semi-processed hides skins.*" The 2008 export duty law imposes differential tax rates upon the value of exports ranging from 5% (on wet blue goat skins) to 150% (on raw hides and skins).[169]

8. Stamp Duties

1943 was probably the busiest year on Ethiopian tax calendar. The first stamp duties were issued, like customs duties and many other taxes already considered, in 1943.[170] Stamp duties are transfer taxes distinguished from many other taxes due to their close association with documents that contain certain legal rights or involve the transfer of certain legal rights over property.[171] Stamp duties are invariably imposed on documents, although their impact ultimately falls on whoever benefits from the authentication and enforcement of those documents by the government. The first stamp duty law of Ethiopia listed the documents which are chargeable with stamp duties:

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[166] See Tax on Coffee Exported from Ethiopia (Amendment) Proclamation, 2002, Article 2(2), Proc. No. 287, *Federal Negarit Gazeta*, 8th year, No. 35

[167] See generally, John F. Due, "Customs, Excise, Export duties," in Milton C. Taylor (ed.), **Taxation for African Economic Development**, Hutchinson Educational Ltd., 1970, pp. 392-413

[168] See Raw and Semi-Processed Hides and Skins Export Tax, 2008, Proc. No. 567, *Federal Negarit Gazeta*, 14th year, No. 18

[169] Id, Article 4

[170] See a Proclamation to Provide for Stamp Duties, 1943, Proc. No. 41, *Negarit Gazeta*, 2nd year, No. 11

[171] Stamp duties derive their name from the conventional method of enforcement of stamp duties, which is by affixing stamps.

affidavits, articles of association, awards, bills of exchange, bonds, cheques, conveyances, customs bonds, leases, mortgages, notarial acts, powers of attorneys, petitions, receipts, share warrants and tickets of admission to places of public entertainment.[172] These lists have been repeated in successive stamp duty laws.

Apart from their association with documents, stamp duties are also distinguished by their method of enforcement. There are two aspects to the enforcement of stamp duties that distinguishes them from other types of taxes. The first is that stamp duties are paid by affixing adhesive stamps, which are available in various denominations for purchase by those obligated to affix documents with the stamps.[173] The second trademark enforcement of stamp duties is a provision of the law that denies any legal notice to documents that are not affixed with stamp duties. Except in criminal proceedings, documents which do not bear evidence of payment of stamp duties are not entitled to notice by public authorities and therefore remain unenforceable until stamp duties are paid.[174] The withdrawal of public notice from documents is perhaps unique to stamp duties. In addition to this peculiar method of enforcement, stamp duties laws also contain provisions that impose penalties upon parties obligated to affix stamp duties on documents.

Since 1943, the stamp duties regime in Ethiopia has been revised in a major way at least four times, in 1957, 1987, and 1998.[175] However, the substance of stamp duties laws has changed very little since 1943. Most of the revisions are in the redefinition of the documents[176] and of course the tax rates or the amounts of tax chargeable to each document. With few exceptions, most of

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[172] See Proclamation to Provide for Stamp Duties No. 41/1943, cited above

[173] This form of payment is effected as long as the amount of duty is not in excess of a threshold amount (e.g., $50 ETB). An amount in excess of the threshold is usually paid directly to the tax authorities; see Stamp Duty Proclamation, 1998, Article 7(2), Proc. No. 110, *Federal Negarit Gazeta*, 4th year, No. 36

[174] See Stamp Duties Proclamation, 1998, Article 10, Proc. No. 110, *Federal Negarit Gazeta*, 4th year, No. 36

[175] See Stamp Duty Decree, 1957, Decree No. 26, *Negarit Gazeta*, 17th year, No. 4; Stamp Duty Proclamation, 1987, Proc. No. 334, 46th year, No. 23; Stamp Duty Proclamation, 1998, Proc. No. 110, *Federal Negarit Gazeta*, 4th year, No. 36; Stamp Duty (Amendment) Proclamation, 2008, Proc. No. 612, *Federal Negarit Gazeta*, 15th year, No. 9

[176] For example, the document regarding transfer of immovable property later became documents of title to property; contracts in the early laws branched out into contracts in general, contracts of employment and collective agreements in more recent stamp duties laws

the documents that were listed as chargeable with stamp duties in 1943 have been retained over the years. With the decentralization of government in the post 1991 period, many Regional Governments have issued their own stamp duty laws although in this, as in many other cases, they have simply copied Federal Stamp Duty law of 1998.[177]

9. Urban Taxes – Municipality Taxes – Property Taxes

Municipality taxes were anticipated as sources of revenue immediately after the end of the Italian occupation.[178]And in 1945, a law was issued authorizing municipalities and townships to impose and collect various rates, taxes and fees on the inhabitants of municipalities.[179] Municipalities and townships were authorized to raise and finance their expenditures by levying what were known as 'municipality taxes' – really an assortment of 'rates', 'taxes', and 'fees' on town dwellers.[180] Not all of them were taxes. What really qualified as a property tax in the strict sense of the word was the tax or rate on immovable property. Others were really 'fees' – a distinction which is significant in tax literature.[181] In any event, municipalities and townships were authorized to raise revenues from license fees, market fees (stall fees), and municipality service fees (e.g. fees for fire brigades and fees for considering and approving building plans).[182] The municipality rates were to be developed by the 'municipality councils' and needed the approval by the

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[177] see, for example, The Southern Nations Nationalities and Peoples' Regional State Stamp Duty Proclamation No. 25/1999, Debub Negarit Gazeta, 4th year, No. 5; Benishangul Gumuz Regional State Proclamation to Provide for the Payment of Stamp Duty No. 61/2006

[178] See *Teklay Ghizat* Administration, 1942, Decree No. 1, Year 1, No. 6, Parts 74, 75 and 76.

[179] See Article 11 of a Proclamation to Provide for the Control of Municipalities and Townships, 1945, Proc. 74, *Negarit Gazeta*, 4th year, No. 7; the 1945 law classified Ethiopian towns and cities into two categories calling them 'municipalities' and 'townships'. *Addis Ababa, Gondar, Harar, Jimma, Dessie,* and *Dire Dawa* were 'municipalities'. All others were 'townships'. The townships were further classified into three classes as 'first class', 'second class' and 'third class' townships; See the Schedule attached to Control of Municipalities and Townships Proclamation No. 74/1945, cited above

[180] See Proclamation No. 74/1945, cited above, Article 11 (i) – (iv)

[181] For a distinction, see Laurie Reynolds, "Taxes, Fees, Assessments, Dues, and the "Get What you Pay for" Model of Local Government," **Florida Law Review**, April, 2004; see also Victor Thuronyi, **Comparative Tax Law**, Kluwer Law International, 2003, p. 58

[182] See Proclamation No. 74/1945, cited above, Article 11(i) – (iv)

Minister of Interior at the time to become law. These municipality rates were effective only after publication in the *Negarit Gazeta*.[183]
The first municipality rates were issued for the city of Addis Ababa in 1947 (no surprise there).[184] The first Addis Ababa City regulations covered a tax on immovable property, which was based on area (in square metres) and the location of the immovable property. The city was classified as 'first class' and 'second class' and three categories were created for each 'class' to apply differential property tax rates. First category of first class, for instance, paid $3 per 50 square metres, while third category of first class paid $4 per 500 square metres.[185]

Some municipalities followed Addis Ababa in issuing their municipality rates and taxes. For example, the city of Nazareth (now *Adama*) issued its own rates and taxes in 1968, which in form as well as content were similar to the rates and taxes issued by the municipality of Addis Ababa.[186] Municipality rates and taxes for specific cities were the exception rather than the rule. For most other towns, the municipality rates and taxes were fixed for whole provinces, instead of specific towns or municipalities, with wider application in all towns that fell under those provinces. Municipality rates and taxes were, for example, issued for provinces like *Arussi* (*Arsi* now),[187] *Wellega*,[188] *Sidamo*,[189] *Shoa*,[190]and *Illubabor*[191] (now *Illu-Abba-Bora*). Issued by the then Ministry of the Interior, these municipality rates and taxes often

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[183] Id, Article 11(v)
[184] See the Municipalities Proclamation 1945 Order, 1947, Legal Notice Nos. 111and 112
[185] See also Addis Ababa Land Tax (classification) Regulations, 1968, Legal Notice No. 341, *Negarit Gazeta*, 27th year, No. 21
[186] Nazareth Municipality Rates, 1968, Legal Notice No. 339, issued pursuant to Municipalities Proclamation No. 74/1945
[187] See Arussi Teklay Gizat Municipalities Rates and Fees Regulations, 1969, Legal Notice No. 369, *Negarit Gazeta*, 28th year, No. 20
[188] Rates, Dues and Fees Regulations for the Municipalities of *Welega Tekaly Gizat*, 1969, Legal Notice No. 372, *Negarit Gazeta*, 28th year, No. 27
[189] See the Sidamo Teklay Gizat Municipalities Rates and Fees Regulations, 1969, Legal Notice No. 378, *Negarit Gazeta*, 29th year, No. 5
[190] See Rates, Dues and Fees Regulations for the Municipalities of Shoa Teklay Gizat, 1970, Legal Notice No. 385, Negarit Gazeta, 29th year, No. 21
[191] See Rates, Dues and Fees Regulations for the Municipalities of Illubabor Teklay Gizat, 1970, Legal Notice No. 386, Negarit Gazeta, 29th year, No. 24

contained multiple tables of rates and taxes corresponding to major towns falling under those provinces.[192]

Like in the rural land and agricultural taxes, the Ethiopian Revolution of 1974 affected the state of land taxes in urban areas quite significantly. The abolition in 1975 of private ownership of land in both rural and urban areas and the expropriation of extra urban houses[193] all but abolished the taxes that were associated with urban lands and urban houses. In any case, an Urban Land Rent and Urban Houses Tax law was promulgated in 1976 abolishing all the urban land and house taxes that prevailed during the Imperial period.[194] The urban land taxes were abolished and replaced by urban land rent, which was to be based on the grade of the land. One type of tax nonetheless survived – urban house tax (for those who survived the expropriation and those who built houses after the Revolution), which was based on the estimated rental value of a house.[195] The Urban Rent and Urban Houses Tax law of 1976 contained a uniform schedule of rates (Schedule 1, 2, 3) for rent and tax, but town administrations could issue their own rates in consultation with the then Ministry of Public Works and Housing.[196] The City of Addis Ababa, always at the forefront in this regard, issued a regulation in the same year,[197] which divided the city into three grades and applied differential rates based on these grades.

And in 1979, provincial urban land rent and urban house tax regulations were issued for the urban centers in the provinces.[198] These Regulations classified all the urban centers outside Addis Ababa into four categories, for

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[192] The municipality rates and taxes for Wellega, for example, came out with multiple rates and tables for the towns of *Lekemte (now Nekemte)*, *Gimbi*, *Arjo*, *Shambu*, *Sirey*, *Nejo*, *Mendi*, *Asosa*, and *Dembi Dollo*; see Legal Notice No. 372/1969, op cit

[193] Shortly after the promulgation of the public ownership of rural lands, the Provisional Military Administrative Council issued the Urban Land and Extra Houses Proclamation in July 1975. This Proclamation did to the urban lands what the Rural Land Proclamation did to the rural lands (i.e. nationalize all urban lands for public ownership and expropriate extra houses). As in the case of rural lands, no person could from then onwards buy, sell or transfer urban land.

[194] See Urban Land and Urban Houses Tax, 1976, Proc. No. 80, *Negarit Gazeta*, 35th year, No. 25

[195] See id, Article 6(1)

[196] Id, Article 19

[197] See Addis Ababa Land Use Rent and House Tax, 1976, Legal Notice No. 36, *Negarit Gazeta*, 35th year, No. 25

[198] See Provincial Urban Land Rent and Urban House Tax Regulations, 1979, Legal Notice No. 64, *Negarit Gazeta*, 38th year, No. 9

which schedules were developed for land rent and house tax payments.[199] The urban centers were categorized in orders of their size, with the city of Asmara (then part of Ethiopia, now capital of independent Eritrea) having its own schedule, while other urban centers were categorized in groups in orders of their size.[200]

In spite of the adoption by the country of a federal system of government after 1991, the urban rent and urban houses tax law of 1976 as well as the regulations issued by the City of Addis Ababa in the same year have remained in force long after Derg was toppled.[201] Indeed, some of the taxes and rates that are still applicable in Addis Ababa are traceable to the Imperial times.[202] A case in point is the 'Amusement Tax' law – a tax on tickets of admission to places of amusement (theatres, cinemas, stadiums, etc), issued back in 1964 – is still applicable today, as were the license rates and fees issued back in 1947 and 1952.[203]

While Addis Ababa continues to rely upon municipality tax laws issued as far back as the Imperial times, some of the Regional States have issued their own legislation on fees and taxes following the decentralization of power in the post 1991 period. The practice in some of the Regional States is that the minimum and maximum tariff rates as well as the division and rank of cities within a regional state are determined by the Regional Council while the cities and towns determine the actual tariff amounts based on the 'objective situation of the locality'. The Regional Tariff Rates for municipalities and towns contain 'benefit taxes' and fee rates for various services provided at the municipality and township level. The taxes are levied on taxpayers without the municipalities and towns showing evidence of specific service while the fees or charges are imposed directly upon the beneficiaries of specific public services. The Amhara Regional State Tariff Rates for Cities in the State, for

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[199] See id, Article 4

[200] The second Schedule was for medium-sized cities like *Assela*, *Bahr Dar* and *Gonder*, while the third Schedule was devoted to smaller cities like *Dilla* and *Gimbi*, and the last Schedule was devoted to small towns like *Dodola* and *Dukem*; See the schedules attached to the 1979 Regulations.

[201] The rates for some of municipal services have been revised but the laws of 1976 have remained intact; interview with Ato Gebrelibanos Welde-Aregay, ERCA, Yeka-Sub-City Revenues Bureau, on December 28, 2010

[202] See, however, Regulations No. 6/1998 Issued to Collect Service Charge on Outdoor Advertisement, *Addis Negarit Gazeta*, 1st year, No. 6

[203] See Municipality of Addis Ababa Amusement Tax Regulations, 1964, Legal Notice No. 291, *Negarit Gazeta*, 23rd year, No. 20; Legal Notice No. 167/1952, and Legal Notice No. 112/1947

example, authorizes cities and towns to levy what it calls 'Trade and Professional Service Tax" which is to be assessed based on five factors: size of land holding, annual gross sales, environmental impacts of the activity, the location of business, and the amount of capital invested.[204] Similarly, Tigray Regional State has a law authorizing cities and towns in Tigray to levy 'Trade and Professional Service Tax'' the amount of which varies according to factors like the rank of the city or town in which a trader or a professional service provider operates.[205]

Finally, it is important to note that some Cities in Ethiopia have a special constitutional status that gives them the power to act not just as municipalities but also as virtual regional states. The City of Addis Ababa has a special constitutional status as the seat of the Federal Government.[206] The City of Addis Ababa is also recognized as a separate city administration and collects tax revenues not just from what are traditionally known as 'municipal taxes and rates' but also taxes assigned by the Ethiopian Constitution to the Regional Governments.[207] The City of Dire Dawa, which obtained special status due to 'competing claims' from the Oromia and Somali Regions, also operates pretty much like a region, with all the fiscal powers of a regional government.[208]

10. Tax Incentives

Most tax incentives in Ethiopia came out in separate tax legislations, justifying their separate treatment here.[209] They were usually issued in the body of investment incentive laws in general. The first mention of tax incentives as deliberate policies to encourage investment was in the 1949 income tax law. The 1949 income tax law granted an income tax exemption – what is today called a tax holiday – to 'long term investments in industrial,

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[204] The Amhara National Regional State Revised Cities Revenue Title and Tariff Determination, 2009, Council of the Regional Government Regulation No. 69, *Zikra Hig*, 14th year, No. 11.

[205] **የትግራይ ብሔራዊ ክልላዊ መንግስት ምክር ቤት፤ የመዘጋጃ ቤቶች፤ የሞያ ስራዎችና የአገልግሎት ክፍያዎች የግብር እና የቀረጥ ታሪፍ ደንብ ቁጥር 6/1990፤ ነጋሪት ጋዜጣ ትግራይ፤ ፩ኛ ዓመት ቁጥር 6**

[206] See The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 49, Proc. No. 1, *Federal Negarit Gazeta*, 1st year, No. 1

[207] See id, Article 97; see also Addis Ababa City Government Revised Charter Proclamation, 2003, Article 52, Proc. No. 361, *Federal Negarit Gazeta*, 9th year, No. 86

[208] See the Dire Dawa Administration Charter Proclamation, 2004, Article 43, Proc. No. 416, *Federal Negarit Gazeta*, 10th year, No. 60, Article 43

[209] For the early development of tax incentives in Ethiopia, see Timothy P. Bodman, "Income Tax Exemption as an Incentive to Investment in Ethiopia," **Journal of Ethiopian Law**, vol. 6, No. 1, 1969, pp. 215-225

transport, or mining enterprises, and the exemption period was five years.[210] A legal notice was issued shortly afterwards with a title 'Statement of Policy' providing a tax incentive to foreign capital investment – tax holiday extending to five years to newly established foreign investments.[211] These were the earliest instances of Ethiopian government using the tax system to stimulate investment in Ethiopia. And in 1954, a separate law was issued to 'encourage agricultural and industrial expansion' in Ethiopia.[212] This law exempted agricultural or industrial machines and parts from all kinds of taxes that were in existence at the time – customs duties and taxes, health and education taxes, personal or business taxes, and municipal taxes.[213]

The desire to use taxes as instruments for attracting investment continued in the 1960s – with the issuance of a proclamation to encourage capital investment in Ethiopia in 1966.[214] This law really became a model for subsequent investment incentive laws. In terms of scope, the 1966 investment incentive law contained tax and non-tax incentives. In its tax incentive sections, it provided for tax incentives in the form of income tax reliefs (income tax holidays), import duty reliefs and export duty reliefs.[215] In its non-tax incentives sections, the 1966 law included such schemes like repatriation guarantees and access to immovables by foreign investors,[216]

Newly established enterprises with a capital of not less than ETB $200, 000 enjoyed a five year income tax holiday and enterprises which had expanded their existing businesses enjoyed an income tax holiday for three years. All types of enterprises were beneficiaries of this income tax holiday, except industries engaged in manufacture of alcoholic beverages and liquors.[217]

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[210] See Proclamation No. 107/1949, op cit, Article 3(iii)

[211] See Statement of Policy for the Encouragement of Foreign Capital Investment, 1950, Legal Notice No. 10, *Negarit Gazeta*, 9th year, No. 6

[212] See A Proclamation to Encourage Agricultural and Industrial Expansion, 1954, Proc. No. 145, *Negarit Gazeta*, 14th year, No. 3

[213] Although the list of taxes, from which agricultural or industrial machines were exempted, was very expansive, the 1954 was actually limited to exemption from import duties – the other taxes were not imposed on these machines in any case; see a Proclamation to Encourage Agricultural and Industrial Expansion, 1954, Article 2, Proc. No. 145, *Negarit Gazeta*, 14th year, No. 3.

[214] See a Proclamation to Provide for the Encouragement of Capital Investment in Ethiopia, 1966, Proc. No. 242, *Negarit Gazeta,* 26th year, No. 2.

[215] See id, Articles 5, 6 and 7

[216] See id, Articles 8 and 10

[217] See id, Article 5(3)

The customs duties relief was limited to agricultural and industrial enterprises and available only if the imports were not produced within Ethiopia.[218] The beneficiaries of this relief were exempted from not just import tariffs, but also transaction taxes on imports, municipal and all other taxes due on imports.[219] The export duty incentive was available on discretionary basis to manufactured finished goods destined for export. The incentive period was not specified (the law simply says 'reasonable period'). It depended on the determination of the 'Investment Committee' which would extend the relief if it was convinced that the relief would assure the competitive position of the goods on export markets.[220]

The early decade of the 1974 Revolution was marked by overt hostility towards private investment and private capital formation in general. Instead of encouraging investment (domestic or foreign), the Government actually took action to impose heavy burdens of taxation – with the obvious intent to stamp out private investment and arrest the development of capitalism. The 1978 income tax law with its extraordinarily steep marginal tax rates (up to 89%) was an example of hostile government policy towards private investment and capital formation (**see above**). The steep tax rates of the 1978 income tax law followed on the footsteps of legislations which nationalized land in both rural and urban areas, extra houses in urban areas and expropriated major economic sectors and brought them under the ownership of the government.

There was a relaxation of this antipathy towards private investment (partially at least) in the early and late 1980s. First, the Military Government issued a Joint Venture Proclamation in 1983 to encourage the participation of domestic and foreign investors to participate in joint venture investments.[221] The joint venture law of 1983 contained a number of tax incentives for investors that signed the joint venture agreement with the government at the time. The tax incentives contained the usual stock – exemption from customs duties on import of investment goods and spare parts, income tax holidays for five years in case of new projects, for three years in case of extension of existing projects, possible exemptions from customs duties for imports of raw materials, and from customs and transactions taxes for goods exported.[222]

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[218] See id, Article 6(1)
[219] Ibid
[220] See id, Article 7
[221] Joint Venture Proclamation, 1983, Proc. No. 235, *Negarit Gazeta,* 42nd year, No. 6
[222] See id, Article 27

Another law which contained tax incentives at the height of socialism in Ethiopia was the Petroleum Operations law of 1986, which was followed immediately by the issuance of Petroleum operations income tax.[223] The 1986 petroleum operations law provided for tax incentives – exemption from import duties for import of machinery, equipments, vehicles, fuels, and chemicals necessary for the operations of petroleum explorations and extractions.[224] In addition, the expatriates to be hired by petroleum companies were exempted from import duties for import of goods and personal effects and from personal income taxes.[225]

As the Military Regime relaxed its tight grip upon the economy and embraced a mixed economic policy, it adopted a more aggressive investment and/or tax policy to encourage investment from the private sector. The regime issued an investment incentive law in 1990 in a bid to stimulate private capital investment in general.[226] The 1990 investment incentive law effectively ended the hostility of the regime to private investment and extended wide open arms to those who wished to invest in agriculture, industry, construction and hotel services.

The outlook for domestic and foreign investment changed for the better after change of government in 1991. A proclamation was issued in 1992 to 'encourage, expand and coordinate investment.'[227] The 1992 law contained a long list of tax exemptions for domestic and foreign investment: exemption from import duties for import up to the 15% of the capital invested of capital goods and spare parts; income tax holidays for three years for commencement and 2 years for expansion; exemption from export duties; tax deductions for research and development expenses, loss carry-forward beyond the tax holiday period and income tax holiday for three years for reinvestment.[228] The export sector received a huge boost with the issuance in

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[223] See a Proclamation to Regulate Petroleum Operations, 1986, Proc. No. 295, *Negarit Gazeta,* 45th year, No. 6, and Petroleum Operations Income Tax Proclamation, 1986, Proc. No. 296, *Negarit Gazeta,* 45th year, No. 7

[224] See Petroleum Operations Proclamation No. 295/1986, cited above, Article 21

[225] Ibid

[226] See Council of State Special Decree, 1990, Decree No. 17, *Negarit Gazeta*, 49th year, No. 12

[227] See Proclamation to provide for the Encouragement, Expansion and Coordination of Investment, 1992, Proc. No. 15, *Negarit Gazeta*, 51st year, No. 11

[228] See id, Article 13

1993 of a law that abolished all taxes and duties on export goods, with the exception of coffee.[229]

Many tax incentives issued during this period were of general application to both domestic and foreign investment. But there were incentives that targeted specific economic sectors. One such tax incentive was, for example, offered in 1992 to importers of passenger and freight commercial vehicles.[230] The 1992 Regulations for the transport sector offered duty free privileges to imports of vehicles of a certain carrying capacity.[231] The 1993 mining law was another example.[232] The 1992 mining law was of course a general law regulating the operations of the mining sector (with tax incentives as minor footnotes) but its overall objective was to acknowledge the role of private investment in capital formation, technology transfer and marketing of minerals.[233] The 1993 mining law devoted a few provisions to tax incentives. It exempted expatriates working for mining companies from the payment of income tax.[234] It relieved the import of all equipment, machinery, vehicles, spare parts for mining operations from the payment of customs duties and taxes, and it relieved the export of all minerals from Ethiopia from export duties.[235]

Tax incentives are controversial instruments of public policy. Many writers believe that tax incentives are ineffective instruments for attracting investment and argue that tax incentives result only in revenue losses for governments.[236] Tax incentive regimes of Ethiopia have attracted their fair share of criticism from various quarters. The jury is still out on whether the tax incentive regimes of Ethiopia have actually attracted investment into the country. Due to legislative and administrative gaps, tax incentive regimes have also gained some notoriety in Ethiopia for providing some unscrupulous beneficiaries with opportunities for tax evasion and avoidance.

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[229] See a Proclamation to Cancel Taxes and Duties Levied on Export Goods, 1993, Proc. No. 38, *Negarit Gazeta,* 52nd year, No. 23

[230] See Council of Ministers Regulations, 1992, Regs. No. 3, *Negarit Gazeta,* 51st year, No. 12

[231] A carrying capacity of 44 passengers or 100 quintals; see id, Article 3(1)

[232] See Mining Proclamation, 1993, Proc. No. 52, *Negarit Gazeta,* 52nd year, No. 42

[233] See id, the preamble

[234] Id, Article 38(2)

[235] See id, Articles 34(2) and 41(4)

[236] See David Holland and Richard Vann, "Incentives for Investment", in Victor Thuronyi (ed.), **Tax Law Design and Drafting**, International Monetary Fund, 1998, vol. 2; United Nations Conference on Trade and Development, **Tax Incentives and Foreign Direct Investment**, A Global Survey, ASIT Advisory Studies, Geneva, 2000

The reported cases of tax incentive abuses and overall doubts about the effectiveness of tax incentives have yet to dampen the appetite of the Ethiopian Government in this regard, as successive amendments to investment incentives have only maintained most of the benefits.[237] Sometimes, however, the Ethiopian Government has reacted to the news of abuses by taking away some tax incentives and privileges, although it has yet to jettison the whole tax incentive regime.

11. Conclusion

We have outlined the beginnings, developments and transformations of the modern Ethiopian tax system over the last seven decades. Leaving the details to the main body of this article, we note the following developments:

- Of all the modern taxes of Ethiopia, the agricultural taxes (land and income taxes) have gone through extreme vicissitudes largely spawned by the ideological shifts Ethiopia went through during the modern period. The agricultural taxes also appear to be the most susceptible to popular sentiments with regard to these taxes (no doubt, in large part due to the sentimental attachment of the people towards land and agriculture). They are not an important source of government revenue but they are an important source of political capital or political anguish depending on how they are viewed by the public.

- While the structural frameworks of the income taxes have remained largely unchanged (e.g., the schedular orientation of Ethiopian income tax system), the income taxes have developed from purely presumptive income taxes of the early days to modern income taxes which are based on declaration of actual income for fairly large taxpayers (category A and B taxpayers). The income tax bases have also progressively broadened over the years.

- Indirect taxes like the sales and excise taxes have also broadened their bases over the years. Although excise taxes are normally limited to a few 'excisable' goods, the Ethiopian excise tax regime has increasingly become just another tax to generate revenues (easy revenues as that) for Ethiopian governments. The remarkable policy orientations of the early excise tax regimes have also been overlooked in the recent tax

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[237] See Investment (Amendment) Proclamation, 2003, Proc. No. 373, Federal Negarit Gazeta, 10th year, No. 8; Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Incentives, 2003, Regs. No. 84, Federal Negarit Gazeta, 9th year, No. 34; see Eden Sahle, "Hotels Pay up for Duty-free Abuse," **Fortune**, vol. 11, No. 550, Nov. 14, 2010

reforms of the Ethiopian excise tax regime – once again turning excise taxes to just taxes with a different name to generate revenues for the governments. The modern excise tax regimes have a lot to learn from the early excise taxes in this regard.

- The most important feature of the development of modern taxation – one habit that dies hard – is the haphazard way tax reforms and legislations have been introduced in each successive period. With few exceptions, the piecemeal revision of each tax, almost unconnected with other taxes, has continued to this day. The consolidation attempts in the 1990 sales and excise tax system and the income taxes in 2002 should have spilled over to all the other taxes of Ethiopia, but these 'ideals' were soon forgotten even for those taxes which were consolidated through those efforts. Subsequent amendments of these taxes have overturned the 'ideals' of consolidation, returning the tax system to its haphazard ways. These developments have been serious challenges in understanding the Ethiopian tax system as a whole, and even more of a challenge to average taxpayers who have to pay taxes whether they understood these taxes properly or not. Luckily, much of the tax system relies upon intermediaries, who are significantly fewer than the much larger number of taxpayers. Whatever it is, it is a development which needs to be brought to an end in future tax reforms of the Ethiopian tax system.

- Although the progress of Ethiopian tax system has been uneven, there is a lot of progress in many respects. But, as often happens in history, the early income tax laws have a lesson or two for modern tax laws of Ethiopia. It is sometimes necessary to go back and revisit how some taxes were designed in the early period and take lessons from these designs because the early modern taxes of Ethiopia were surprisingly very modern even for today's needs. If only for this, the study of the history of modern taxation of Ethiopia is worth paying attention to. After all it is not without reason that William Faulkner famously said 'the past is not dead, it is not even past', if we care to look back.

Appendix 1: Time line of the Key Developments in the history of Main Income Tax System of Ethiopia

Years	Schedule A	Schedule B	Schedule C	Schedule D
1944	Personal income	Business income	Sur-tax on Schedule B taxpayers (excess profits	N/A

			tax)	
1949	Salaries, wages, personal compensation, rents on property in a non-commercial setting	Business income	Sur-tax on Schedule B taxpayers	N/A
1954			Sur-tax repealed	N/A
1956	Wages, salaries, pensions and other personal emoluments	Rent of lands and buildings used other than for agricultural produce, cattle breeding purposes	Income from business, professional and vocational occupation, exploitation of wood and other sources not mentioned elsewhere	N/A
1961	Same	Same	Same	N/A
1967				Income from agricultural activities incorporated in the main income tax system
1975	Same	Repealed	Same	Same
1976	Same	Repealed	Same	repealed
1978	Same		Same	Income from miscellaneous sources included for the first time: royalties, income from technical services, income from games of chance, and dividends.
1993	Same	Reintroduced as a tax on rental of buildings	Same	Same

1994				Capital gains taxation introduced for the first time
2002	Revised	Revised	Revised	Revised

Appendix 2: Time line of Autonomous Income Tax Regimes

Years	Type of Income Tax
1944	Tax in lieu of tithe
1967	Incorporation of agricultural income tax into the main body of income tax system
1976	Promulgation of autonomous agricultural income tax
1978	Revision of agricultural income tax
1986	Introduction of petroleum income tax
1992	Decentralization of agricultural income taxation to the Regions
1993	Introduction of mining income tax
1995	Constitutional Recognition of decentralization of agricultural income taxation to the Regional States

Appendix 3: Time Line of Key Events in the Ethiopian Excise Tax System

Year	Type of excise tax	Chargeable Goods/products
1942	Tobacco Excise Tax	Tobacco and cigarettes
1943	Alcohol Excise Tax	Alcohol and Alcoholic Products
1948	Highway Renovation Tax; Road Toll Tax	Petrol, vehicles
1950s, 1960s,1970s	Alcohol Excise Tax; Petroleum and lubricants Excise Tax; Excise Tax	Alcohol, alcoholic liquors, wine, beer and stout, perfumes, tej and tella, manufactured in factories; Petroleum, benzene, naphta, Kerosene, Grease and oils, sugar, yarn of natural cotton, textile fabrics, soft drinks, iron and steel rods, footwear, plastic rubber

1990	Sales and Excise Tax Consolidated	Sugar, drinks (soft drinks, beer, wine), alcohol and alcoholic products, tobacco and tobacco products, salt, textile fabrics, sandals, boots, vermin traps, advertising models, goods imported by hotels, chemicals and reagents, and flour and agricultural products
1993	Sales and Excise Tax Revised	Sugar, drinks (soft drinks, mineral water), alcohol and alcoholic drinks, tobacco and tobacco products, salt, fuel, perfumes, leather, textile, personal adornments, dish washing machines, video decks, TV, video cameras, receivers, passenger vehicles, and 4-wheel drives
2002	Separate Excise Tax	Sugar, drinks (soft drinks, bottled water, alcoholic drinks (beer, wine, whisky, and others), pure alcohol, tobacco and tobacco products, salt, fuel, perfumes and toilet waters, textile and textile products, personal adornment, dish washing machines, washing machines, video decks, TV, video cameras, vehicles, carpets, asbestos and asbestos products, clocks and watches, dolls and toys

Scrutiny of the Ethiopian system of Copyright Limitations in the Light of International Legal Hybrid resulting from (the Impending) WTO Membership: Three-Step Test in Focus

Biruk Haile*

1. Introduction

There are least developed countries (LDCs) including Ethiopia on WTO accession negotiation. This requires them, among others, to bring their copyright rules compatible to the norms of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) that prescribes minimum standards national legislations should meet. On the other hand, there is strong desire in these countries to promote education and knowledge through dissemination of copyright materials by crafting copyright limitations in a manner that reflects their domestic socio-cultural and economic realities. Especially the need for bulk access to copyright works in their languages is tremendous. This requires a harmonious understanding and application of standards of copyright limitations incorporated in the TRIPS Agreement which has incorporated the Berne Convention for Protection of Literary and Artistic Works (1971) (Berne Convention). Such undertaking also requires utilization of the TRIPS flexibilities in proper manner.

This article seeks to evaluate the system of copyright limitation in Ethiopia which is currently tabled for WTO accession negotiation in the light of the TRIPS Agreement. In doing so, the article argues the Ethiopian copyright law in many instances failed to craft appropriate system of copyright limitation in tune with its domestic realities within the framework of TRIPS flexibilities. It also argues the system of limitation in the TRIPS system fails to adequately systematize copyright limitations and guarantee availability of copyright works at affordable prices in local languages.

Copyright limitation may be seen from various perspectives including the subject matter covered, requirements for protection, duration of protection, etc. But this article examines only limitations to the exclusive rights. Similarly, this article will not deal with other international instruments like WIPO Copyright Treaty 1996 (WCT) and bilateral treaties that provide standards on copyright (limitations) which are not directly intertwined with the TRIPS system.

Section II examines the place of copyright limitations in the copyright system. Section III explores issues relating to incorporation of the Berne Convention in

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to TRIPS Agreement. Section IV examines the triple test and, finally, section V examines limitations under the Ethiopian law in the light of TRIPS standards.

2. Limitations as Integral Part of Copyright System

Various terminologies are used in different jurisdictions and international instruments to refer to dealings permitted with respect to copyrighted works. These include limitations, exceptions, exemptions, users' rights, rights of the public, permitted acts, defenses etc.[1] Setting aside doctrinal differences, all of these refer to acts the law allows users of copyrighted works to undertake which otherwise would amount to copyright infringement. In the context of the North-South dialogue there is a growing enthusiasm especially on the part of developing countries to use copyright limitations as balancing instruments to the ever strengthening system of copyright protection. We should note at this stage that currently the main argument surrounding copyright limitations is not whether or not to have them as part of copyright system, but the debate is on the nature and scope of limitations.

Writers like Hugenholts identify three justifications that explain copyright limitations.[2] First, there are limitations intended to mitigate the adverse effect of copyright protection on such fundamental rights and freedoms as freedom of expression, freedom of press, right to information, and right to privacy. Secondly, there are limitations explained on account of protection of public interests which can be met by use of copyright works by institutions engaged in dissemination of knowledge such as libraries, archives, museums, and educational establishments. Thirdly, there are limitations motivated by market dysfunction in those areas where the copyright owners cannot effectively exercise their rights and levy price. We can also include limitations meant to foster dissemination of knowledge and expansion of education like limitations for research and education and compulsory license embraced with enthusiasm in developing countries.

On the part especially of copyright systems founded on 'author's right' doctrine there is inbuilt assumption that copyright limitations are in principle

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[1] Legal literature also distinguishes between exceptions and limitations based on whether the permitted dealing eliminates or limits a given exclusive right. However, such distinction is said to be immaterial for TRIPS purposes because as will be seen later, the same requirement is applicable whether the dealing comes in the form of exception or limitation. Articles 9-19 of the Ethiopian Copyright Proclamation No. 410/2004 do not engage in to choice of any of such terminologies.

[2] B. Hugenholtz, The Future of Copyright in a digital Environment, (1996), pp. 94 et seq., in Anne Lopage, "Overview of Exceptions and Limitations to Copyright in the Digital environment," UNESCO e-Copyright Bulletin, 2003, p.4.

opposed to ideals of copyright protection and weaken copyright system.[3] This bias can also be discerned from the various revisions of the Berne Convention that emboldened the rights accorded and broadened the subject matters protected and enhanced author's grasp on new media of expression and dissemination.[4] Moreover, limitations are not firmly established in the preamble of the Convention though they appear in substantive provisions of the Convention.

Similarly, in the TRIPS Agreement while the rights are specifically provided and mandatory,[5] limitations are not systematized and are optional.[6] This means the TRIPS system does not guarantee minimum limitations and members are allowed to craft their copyright systems without limitations. Furthermore, there is no clear regulation of contractual arrangements (supported by technological methods of restricting access (digital lock-ups)) that may outlaw the exceptions as between the parties. The fact that national systems are left with 'free hand' with regard to copyright limitations under major international instruments including the TRIPS Agreement has raised two major concerns from the point of view of especially LDCs.[7] Firstly, generally these countries lack the technical human resource and institutional competence to systematically provide coherent and acceptable system of limitations in their domestic laws and whatever room for flexibility is left for domestic legislation usually remains highly unexploited.[8] Even the specific limitations provided in the Berne Convention are flexibly worded and need national adaptation in line with local realities. That is, developing countries lack capacity to implement the full range of limitations available to them under international law; ten of eleven countries in Asia Pacific had not

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[3] Lucie M.C.R. Guibault, Copyright Limitations and Contracts: An Analysis of Contractual Overridability of Limitations on Copyright, (2002).

[4] It is important to stress that the 1908 Berlin Act prohibits formalities as a condition of enjoyment and enforcement of rights. It broadened subject matters to include photographic works; recognized the exclusive right of adaptation in relation to musical works, and guaranteed minimum duration of protection. The 1928 Rome Act also recognized exclusive right of broadcasting and moral rights. Similarly, the 1967 Stockholm Act expressly recognized the exclusive right of reproduction.

[5] See Articles 9-11, TRIPS Agreement

[6] See Article 13, TRIPS Agreement

[7] This is said to have resulted in bewildering differences even in European national copyright Acts in areas of limitations. See Robert Burrel and Allison Coleman, Copyright Exceptions; the Digital impact (Cambridge Studies in Intellectual Property Rights), (2005), p.2.

[8] Ruth L. Okediji, International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries, (UNCTAD-International Center for Trade and Development, Issue Paper No. 15), (2006), p. 6.

incorporated teaching exceptions to extent allowed and none of the eleven countries had taken advantage of all the limitations available to them under international copyright instruments.[9] Secondly, bilateral agreements being concluded with developed countries tend to emphasize on enhancing rights and enforcement than systematizing limitations.[10] We should also note the current wave of influence from copyright industry and some national copyright systems for protection of technological measures of protection used by right holders that will have the obvious effect of undermining permitted uses.[11]

National copyright systems, too, do not embrace limitations in the same footing as the rights. In the Ethiopian context, like in the case of other countries, the Constitution protects proprietary rights both for tangible and intangible property in depth but copyright limitations (or limitations to intellectual property in general for that matter) are not well grounded except that reference is made to 'public interest'.[12] Similarly, the preamble of the Ethiopian copyright proclamation stresses the importance of protecting copyright and neighboring rights but express reference is not made about the importance of dissemination and exploitation of the protected works through limitations.[13]

Such limited space accorded to copyright limitations in international instruments and national legislations raises the question whether the prevailing copyright systems reflect a proper balance between the need to protect authors and the need to ensure access or exploitation of the works. It is advocated that there is a dire need on the part of developing countries to correct such imbalance.[14]

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[9]Consumer International, Copyright and Access to Knowledge; Policy Recommendations on Flexibilities in Copyright Law, (Kuala Lampur, 2006) in Gaele Krikorian and Amy Kapczynski (eds.,), Access to Knowledge in the Age of Intellectual Property, (Zone Books, New York), (2010), p. 518

[10] Okediji, supra note 8, p. 4.

[11] For example see the US Digital Millennium Copyright Act 1998, sec. 1201, Article 18 of WPPT, and Article 11 of WCT.

[12] Federal Democratic Republic of Ethiopia (FDRE) Constitution (1995), Article 40 (1)

[13] Copyright and Neighboring Rights Protection Proclamation, 2004, preamble para. 1 & para. 2, Proc. No. 410/2004, Federal Negarit Gazetta, 10th year, No. 55.

[14] 'Balance' is susceptible to different meanings in different jurisdictions as a reflection of the state of economy, culture and technology. We are simply referring to the appropriate scale of weight each legal system has to attribute to both interests.

Some times it is viewed that the two policies, i.e., the policy of protecting individual authors and public access to such creative works are distinctly antagonistic. However, this is not shared by the author because protection accorded to authors is in the interest of public to the extent it can be explained as providing incentive for creation of works which are ultimately consumed by the public. Similarly guaranteeing access to protected works is in the interest of authors to the extent that creation is an incremental process where any new creation is derived in one way or the other from existing creations, i.e., creation is partly derivative process.[15] Thus, it seems plausible to conceive that both copyright protection and limitations do serve to promote and protect both interests.

The notion of copyright limitation is known to both the civil law and common law countries. However, the conception and approach varies in the two systems. While the common law system maintains a closed system of rights and open system of limitations, the civil law tradition maintains a reverse system where rights are defined broadly and limitations are strictly defined and closed.[16] The former approach provides broadly worded limitation that leaves courts the space and task of establishing whether a specific circumstance falls within the wording, but the latter provides specific and carefully defined exceptions. This is mainly because the European continental system (especially that of France) is founded on natural right theory where right of the author is understood as absolute and unrestricted individual right whereas the American system is crafted on utilitarian considerations mainly to promote social good.[17]

It should also be stressed that there is diversity within each system including the 'fair use' doctrine in the U.S and semi-closed 'fair dealing' system in UK. Within the continental European legal tradition some countries like Germany and Holland, although they primarily subscribe to ideals of natural right theory, concede wider latitude for public interest motivated limitations. There is also diverging attitude towards copyright limitations between the

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[15] Judith Sullivan, Study on Copyright Limitations and Exceptions for the Visually Impaired, Standing committee On Copyright and Related rights, (WIPO, SCCR/15/7, 2007) p. 12.

[16] Guibault,cited above at note 3, p. 17.

[17] This means in systems predicated on utilitarian considerations rights will be restricted in any case where it does not help attain a given social goal or negatively affects it; but in system of 'author's right' exceptions will highly be restricted. On the other hand, there is recently a growing question as to whether the two systems today markedly vary in substance or methodology towards exceptions.

developed and developing countries in the history of international copyright instruments including the TRIPS Agreement.

3. The Incorporation of the Berne System of Limitations in to the TRIPS

One of the most challenging tasks for domestic lawmakers and courts is to craft and apply domestic copyright limitations compatible with the intricate system of limitations within the TRIPS system. The difficulty mainly stems from the fact that the TRIPS Agreement does not have a self-contained system of copyright limitation. It rather develops on the system of limitation already existing under the Berne convention. Therefore, it is imperative to explore the relevance of the Berne system of limitations in the TRIPS context.

Article 13 of the TRIPS Agreement provides that members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Thus, limitations to the exclusive rights should pass the so called three-step test. Firstly, limitations should be confined to certain special cases; secondly, they should not conflict with the normal exploitation of the work, and thirdly, they should not unreasonably prejudice the legitimate interests of the right holder. The wording of Article 13 of the TRIPS Agreement takes inspiration from and resembles Article 9 (2) of the Berne Convention.[18] The three-step test standard expanded, though with some variations, to other areas of intellectual property and international instruments as a model.[19]

Article 9.1 (first sentence) of the TRIPS Agreement requires members to comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.[20] The Berne Convention, in those substantive provisions

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[18] However, the two provisions are different because while Article 9 (2) of Berne Convention provides yardsticks for limitations to the exclusive right of reproduction, Article 13 Article 13 of TRIPS Agreement seems meant to affect limitations to all exclusive rights. Moreover, while the former provision does not exclude other limitations, the latter is restrictive in its formulation and does not leave any space for other specific limitations that may not pass the three-step test. Furthermore, while Article 9 (2) makes reference to 'legitimate interest of the author', under Article 13 TRIPS Agreement reference is made to 'legitimate interests of right holders'.

[19] We can see Article 30 of TRIPS (patents), Article 26 (2) TRIPS (industrial designs), Article 10 (WIPO Copyright Treaty (WCT)),and Article 16 (WIPO Performances and Phonograms Treaty (WPPT)

[20] Incidentally, it should be reckoned that for countries like Ethiopia on WTO accession process accession to the Berne Convention is not required for TRIPS compliance.

incorporated in the TRIPS Agreement, provides, apart from the three-step test limitation to the reproduction right under Article 9 (2), specific limitations to exclusive rights.[21]

When we see article 2 (2) of the TRIPS Agreement, it provides that nothing in Parts I to IV of this Agreement shall derogate from existing obligations that members may have to each other under the Berne Convention. This seems to suggest that members of the TRIPS Agreement did not intend to undermine the protection in the Berne Convention by providing diminished protection. This is compatible with Article 20 of the Berne Convention (that is already incorporated in the TRIPS agreement) which provides the Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. It can be argued that the TRIPS Agreement, by incorporating Article 20 of the Berne Convention, does not allow its members to provide exceptions in excess of those provided in the Berne convention. Thus in principle the application of the three-step test in the TRIPS Agreement can be understood as not entailing broader exceptions. This particularly is the case if we subscribe to the argument that the role of the TRIPS triple test with respect to rights recognized in the Berne Convention is to discipline the so called *minor exceptions*.

There was argument that the TRIPS three-step test applies only with respect to new rights recognized in the TRIPS Agreement, i.e., the exclusive right of commercial lending under Article 11 and not with respect to rights that existed under the Berne convention. However, the WTO Panel in the United States-Section 110 (5) case has clarified that TRIPS three-step test is applicable also with respect to rights that existed even in the Berne convention. It provides:

> *In our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of*

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[21] These are 1) reproduction by the press or broadcasters of lectures, addresses and other works, of same nature (2bis (2)), 2) quotation from work that has already been made available to the public as long as it is compatible to fair practice and its extent justified by purpose (Art. 10 (1)), 3) use of literary or artistic works for teaching provided that the use is compatible with fair practice (art. 10 (2)), 4) reproduction by the press , the broadcasting or communication to the public of articles published in newspapers or periodicals on current economic, political, or religious topic (art. 10bis (1)), and 5) reproduction of works for purpose of reporting current events to extent justified by informatory purpose (art. 10bis (2)).

application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS agreement.[22]

In fact, as noted by many commentators, Article 13 of TRIPS refers to limitations or exceptions to 'exclusive rights', not just only to the new rights brought about by the TRIPS Agreement.

Another issue relates to whether the TRIPS three-step test further applies in relation to the specific limitations provided in the Berne Convention. One may argue that the Berne specific limitations cannot prevail in the TRIPS context unless they further pass the TRIPS three step test. However, several authors including Professor Carlos Correa have argued that Article 9 (1) of the TRIPS Agreement incorporates into the TRIPS system not only rights but also limitations in the Berne Convention, i.e., Articles 1 through 21.[23] This means there is no need to test those specific Berne limitations against the TRIPS three step test. This also means that with respect to the exclusive right of reproduction it is the three-step test in Article 9 (2) of the Berne Convention than article 13 of the TRIPS that applies.

The next logical question will be whether the creation of further TRIPS three-step-test- compliant limitation in relation to the rights provided in the Berne Convention will be justified under the latter instrument. In this connection most writers observe that the system of limitation in the Berne Convention is not limited to those specifically provided exceptions but also the instrument tolerates the so called minor exceptions (*de minimis* doctrine).[24] In the US-Section 110 (5) case the Panel observed the following:

We note that, in addition to the explicit provisions on permissible limitations and exceptions to the exclusive rights embodied in the text of the Berne convention (1971), the reports of successive revision conferences of that convention refer to "implied exceptions" allowing member countries to provide limitations and exceptions to certain rights. (i.e., the so called "minor reservations" or "minor exceptions" doctrine).[25]

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[22] United States-Section 110 (5) of the US copyright Act, Report of the Panel, (World Trade Organization, 2000, WT/DS160/R, Para 6.80).

[23] Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement, (2007).

[24] Peter Tobias Stoll, Max Plank Commentaries on World Trade Law (WTO): Trade Related Aspects of intellectual Property Rights, (2008), P. 279.

[25] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Paras. 6.48-6.49. And Article 9 (1) of TRIPS Agreement incorporates the Berne exclusive rights together with the possibility of drawing minor exceptions on them (i.e., Berne *aqcuis-Berne interpretation and doctrine)*) (as no reference is made otherwise).

This means it is allowed for members of the TRIPS Agreement to provide any limitation to the rights provided in the Berne Convention (in addition to those limitations specifically provided) as long as such limitations are compatible with the requirements of the three-step test. This may evoke an argument that such approach opens up the door for WTO members to expand the scope of limitations beyond what Berne Convention provides. However, in the above WTO case the argument of the US against the European Union is that the three-step test will not yield limitations in excess of the Berne compliant regime of minor exceptions.[26]

4. Analysis of the three-step test under the TRIPS Agreement

The three-step test is extensively analyzed by WTO Panel in relation to the Section 110 (5) of the US Copyright Act 1976 (as amended by the Fairness in Music Licensing Act of 1998, which entered into force in 1996) challenged by European Union as not complying with the test. Section 110 (5) puts certain limitations on the exclusive rights provided in Section 106 of the Act in respect of certain performances and displays. The "home-style exemption" under sub paragraph (A) of Section 110 (5) relates to the communication of transmission embodying performance or display of a dramatic musical work by public reception on a single receiving apparatus of the kind commonly used in private homes. The "business exemption" in Section 110 (5) (B) relates to communication by an establishment of a transmission or retransmission embodying a performance or display of non-dramatic musical work intended to be received by the general public, originated by a radio or television broadcast station or by a cable system or satellite carrier. The Panel, after making factual analysis, found out the former to be in compliance with Article 13 of TRIPS and the later to be in violation of the triple test.

The Panel provides that the three requirements under Article 13 of the TRIPS Agreement are independent and cumulative requirements that member countries have to satisfy.[27] This means even though a limitation/exception/ is confined to certain special case, it may conflict with normal exploitation of works or unreasonably prejudice the legitimate interests of the right holder. Conversely, an exception /limitation/ that does not conflict with normal exploitation of the work and that does not prejudice the legitimate interest of the right owner may not be limited to certain special cases. This approach

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[26] We can even otherwise argue that such conclusion results from the clear language of the TRIPS Agreement and that the freedom of members should not be curtailed simply on account of implied argument.

[27] United States-Section 110 (5) of the US copyright Act , cited above at note 21, Para. 6.79.

seems to be in tune with the wording of Article 13 even though some writers would like to argue otherwise as will be seen hereunder. As long as it meets these requirements, the TRIPS Agreement leaves national legislators (judiciary) to set limitation to any exclusive right as reflection of their peculiar social, economic and cultural realities. One may be tempted to argue that TRIPS Agreement leaves members free to define these requirements as they like. However, the very requirement set out in the agreement means that members cannot design a limitation that does not pass these criteria assessed objectively (taking into account national realities).

The first task in this analysis is to establish what is meant by 'certain special cases'. In this regard it is important to examine the interpretation provided by the WTO Panel in *United States- Section 110 (5) of the US Copyright Act* that embarked on establishing the ordinary meanings of individual words 'certain', 'special', and 'cases'.[28] In this regard it seems to be agreed between both the US and EU (and affirmed by the Panel) that the fact that the word 'special' is not defined in the agreement means that it is up to national legislature/judiciary to determine whether particular case represents an appropriate base for the exception as long as it falls within the definition of the first test. Accordingly, the Panel provided that the ordinary meaning of the word 'certain' is "known and particularized, but not explicitly identified", "determined, fixed, not variable; definitive, precise, exact".[29] The Panel (in the same paragraph) further explained that this element of the first requirement means that as long as the limitation is clearly defined and the scope of the exception is known and particularized there is no need to identify explicitly each and every possible situation the exception could apply.

It can be noted that the system of copyright limitation in countries following the continental European tradition where the legislature provides limited list of exceptions this first requirement in the first condition of the three-step test will easily be met. However, in the common law tradition with an open ended 'fair use' or 'fair dealing' doctrine serious questions can be raised as to their compatibility with the TRIPS-three- step test even though, so far, no such a

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[28] Even though the Panel's decisions do not have the effect of precedent (as it can be reversed by AB under article 17 of DSU), its analysis has significant persuasive value. In its attempt to find out the ordinary meanings of these words as per Article 31 of the Vienna Convention on Law of Treaties (VCLT), the Panel relied on dictionary meaning (Oxford English Dictionary)

[29] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.108.

challenge has been launched before the WTO Dispute Settlement Body (DSB).[30]

The Panel also tried to define the ordinary meaning of the second word in the first test. It stated:

> *the term 'special' connotes "having an individual or limited application or purpose", "containing details; precise, specific', "exceptional in quality or degree; unusual; out of the ordinary", or "distinctive in some way". This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words an exception or limitation should be narrow in quantitative as well as qualitative sense.*[31]

This part of the Panel's reasoning is obliterated by some commentators as the most incoherent. Professor Daniel Gervais, for example, argues the phrases 'limited in its field of application' and 'exceptional in its scope' are not equivalent (as connected by disjunction 'or') for the reason that while the former is not very restrictive, the latter is.[32] He further argues that the fact that a limitation is 'limited in its field of application' does not necessarily lead us to a conclusion that it must therefore be 'narrow in quantitative as well as qualitative sense'. This concern will be much reinvigorated when we consider the Panel's final remark that this requirement of the first condition, in the context of the second condition, means the limitation should be the opposite of non-special, i.e., normal.[33] This is unhelpful approach in that it accommodates a very wide range of limitations and refutes earlier suggestion that the limitation should be limited in its field of application or exceptional in its scope. The opposite of non-special (normal) may not necessarily be exceptional in its scope. That is why Professor Gervais argued that the definition of the word 'special' given by the Panel will ultimately render the requirement useless because any exception short of complete repeal of Copyright Act would arguably be 'limited in its field of application.'[34] He

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[30] Christophe Geiger, "The Role of Three Step test in the Adaptation of Copyright law to the Information Society," UNESCO, e-Copyright Bulletin, (2007), p. 5

[31] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.109.

[32] Daniel J. Gervais, Toward and new Core International copyright Norm: The Reverse Three-Step Test, (2004), p.17

[33] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.109.

[34] Gervais, cited above at note 32, p.17.

further argued that because of the above deficiency in definition the three-step test is in reality a two-step test (and the requirement that limitation should be confined to certain 'special' case shall be ignored). For him the two tests that can be operationalized are interference with commercial exploitation and unreasonable prejudice to the legitimate interests of the author. However, this approach raises serious questions regarding the long embraced tradition of construction of the Panel not to resort to technique of interpretation that yields redundancy or inutility.[35]

One important inference that can be drawn at this stage is that the absence of binding or acceptable definition of the requirement that limitations shall be limited to certain 'special' cases creates room for uncertainty and compounds the difficulty of countries like Ethiopia with limited expertise. The problem partly emanates from different formulation of Article 13 compared to Article 30 which refers to 'limited exceptions'. However, it is still possible to understand the first requirement as referring to diminution of the right itself than the economic effect of exception (i.e., non-economic test), which has to be weighed against the second and third tests.

Some commentators argued that national public policy (special purpose) justification behind copyright limitations will be relevant in determining whether limitations meet the first requirement of the three-step test.[36] However, the WTO Panel in the *United States-Section 110 (5) of the US Copyright Act* has justifiably distanced itself from such approach relying on the wording of Article 13 of TRIPS which refers to 'certain special case' not 'special purpose'.[37]

The Panel, in the same paragraph, very well affirmed its position based on earlier Appellate Body (AB) decisions that prohibit interpretative tests which were based on the subjective aims or objectives pursued by national legislation; otherwise the Panel or AB would have been given unacceptable role of overseeing national policies. However, the Panel noted public policy purposes stated by law makers when enacting a limitation or exception may be useful from factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition.[38]

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[35] United States-Standards for Reformulated and Conventional Gasoline, (Appellate Body Report, 1996, WT/DS2/AB/R), p. 23.

[36] See S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Work: 1886-1986, (1987), p.482.

[37] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.111

[38] Id., Para. 6.112

When we see the second requirement of the three-step test, limitations should not conflict with the normal exploitation of the work. The Panel in the United States-*Section 110 (5) of the US Copyright Act* went on expounding the ordinary meanings of the words 'exploitation (exploit)', 'normal', 'work', and 'conflict'. Accordingly, the Panel enunciated the dictionary meaning of the term 'exploit' to connote'making use of' or 'utilizing for one's own ends.'[39] In the context of the case at its disposal the Panel further explained that 'exploitation of musical works refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic values from their rights to those works.'

The Panel also pronounced the ordinary (dictionary) meaning of the word 'normal' as 'constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional---.'[40] The Panel, in the same paragraph, elaborated the definitions reflect both empirical (i.e., what is regular, usual, typical, ordinary, conventional---) in the factual sense and normative (dynamic) (i.e., conforming to a type or standard) connotations. The question to ask under the empirical approach is said to be whether the exempted use would otherwise fall within the range of activities from which the copyright owner would usually expect to receive compensation.[41] However, such approach is not much helpful in that right owners normally exploit their works only in those areas the law guarantees them legal rights and this automatically excludes market for exempted uses. Therefore, this approach will not help us identify those uses the right holder will not normally expect to exploit. Accordingly, it is suggested that a better way of understanding the empirical approach is to postulate that the owner has the capacity to exercise his right in full, without being inhibited by the presence of an exemption, and to ask simply whether a particular usage is something that the copyright owner would ordinarily (reasonably) seek to exploit.[42] This goes in line with the Panel's finding that 'normal' exploitation means something less than full use of an exclusive right.[43] This is said to be an approach that takes into account only present modes of exploitation and excludes potential modes of exploitation.

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[39] Id., Para. 6.165.

[40] Id., Para. 6.166.

[41] Sam Ricketson, The Three-Step test, Deemed Quantities, Libraries and Closed Exceptions, (Center for Copyright Studies ltd., 2002), p.32.

[42] Ibid

[43] United States-Section 110 (5) of the US copyright Act, cited above at note 22 Para. 6.167.

On the other hand, the normative approach is understood to embrace potential modes of utilization (that might be brought about by business models and technological developments) but which so far have not been common or normal in empirical sense. For instance, as per the prevailing technological and economic reality in a particular jurisdiction right holders may not reasonably expect to assert their rights against private copiers (due to the cost of monitoring such uses) but such potential use may be conceivable standing on today's economic, cultural, and technological realities. In the language of the Panel 'one way of measuring the normative connotation of the normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance'.[44]

One may seriously question the wisdom behind extending the reach of the second requirement of the three-step test to (qualitative) normative approach. It seems to be needless rush to prohibit a given limitation that currently does not conflict with normal exploitation of the work, simply because there is a 'plausible' possibility of conflict in the future. Such an approach may render the exception meaningless as the condition will cover each and every possibility of deriving profit from protected subject matter.[45] Rather it would have been better to amend the laws when such conflict actually arises.

The fact that the Panel emphasized on the economic effect on the right holder of limitations in defining the second requirement of the three-step test[46] has provoked concern as to whether the TRIPS system of copyright limitation leaves any latitude to members to design limitations to accommodate their peculiar policy priorities and balance protection and access.[47] It should be stressed that this approach undermines our earlier assertion that copyright

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[44] Id.,para. 6.180. The Berne Convention revision in Stockholm in 1968 also makes reference to normative connotation.

[45] Correa, cited above at note 23, p.307 (in relation to Patent provision Article 30 of TRIPS).

[46] See United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.183. It provides that limitation in domestic legislation rises to extent of conflict with normal exploitation of the work if uses, that in principle are covered by the right but exempted under the limitation or exception, enter in to economic competition with the ways that the right holders normally extract economic value from the right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

[47] This becomes much more catastrophic in the current technological world that promises to enable the right holder to control any form of exploitation.

limitations form part and parcel of copyright system on account of various (superior) reasons like protection of freedom of expression. In the Panel's approach whatever superior (non-economic) explanations a country may invoke (for example promotion of education, research, freedom of expression etc) any limitation that enters into economic competition with the right holder will not be tolerated. If we stick to the Panel's economic definition of the test simply because TRIPS is a trade agreement and if the technology enables the right holder to control any kind of exploitation, there will not be any room for exceptions. However, it would be unwarranted interpretation of TRIPS to disregard public policy considerations under Articles 7 and 8. In this regard the Berne Convention that allows specific exemptions to exclusive rights irrespective of their economic impact on the author can be seen as adopting clearer approach and conceding greater flexibility.[48] It sounds hypocritical that freedom for national policy choice appeared to have been endorsed by the Panel in relation to the first requirement as seen above.

Finally, it should be mentioned that whether a limitation conflicts with normal exploitation of the work has to be assessed against each exclusive right and not against the aggregate of all exclusive rights. Conflict with normal exploitation of a particular exclusive right cannot be counterbalanced or justified by the mere fact of the absence of conflict with normal exploitation of another exclusive right. Similarly, the absence of any exception with respect to one right cannot be invoked to justify exceptions on other rights even if its exploitation would generate more income.[49] This is justifiable in that each right is granted separately by the law and any impairment should be assessed separately; otherwise huge suppression of economically less important rights may be covered by light restraint on the economically important ones.

When we come to the third element of the three step test, it requires limitation not to 'unreasonably prejudice the legitimate interest of the right holder.' The formulation of the third condition of the three-step test slightly varies across various international instruments. While both Articles 13 and 30 of the TRIPS Agreement and Article 5 (5) of the European Union Information Society

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[48] See Articles 2(4), 2bis (1), 10(1) & (2), 10bis (2) etc of Berne Convention. Moreover, unlike the Panel's approach to the second requirement under article 13, preparatory works to Berne Convention (article 9 (2)) are said to accommodate non-economic considerations especially in view of the then national laws that provide exceptions to reproduction right on account of non-economic reasons (to be determined by national legislation). See Ricketson, cited above at note 41, pp. 34-36.

[49] United States-Section 110 (5) of the US copyright Act, cited above at note 22,Para. 6.172-73.

(InfoSoc) Directive[50] refer to unreasonable conflict with the legitimate interests of the 'right holder', Article 9 (2) of the Berne Convention and Article 10 of the 1996 WIPO Copyright Treaty (WCT) refer to the legitimate interests of 'the author.' Thus for the purpose of the latter two instruments both economic and moral interests will be considered.

The WTO Panel in the *United States-Section 110 (5) of the US copyright Act* also went on ascertaining the ordinary meanings of the words 'interest', 'legitimate', 'prejudice' and 'unreasonable'. The word 'interest' is understood to encompass 'a legal right or title to a property or to use or benefit of property (including intellectual property).'[51] The Panel added it may also refer to 'a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person.' The Panel added in same paragraph that the notion of 'interest' 'is not necessarily limited to actual or potential economic advantage or detriment.'

The Panel went on to state the meanings of the word 'legitimate' as: a) 'conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper; b) normal, regular, comfortable to recognized standard type.'[52] In the same paragraph it further elaborated that 'the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of objectives that underlie the protection of exclusive rights'. This goes in line with another Panel's finding in relation to Article 30 of TRIPS that defined the term legitimate 'as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms.'[53]

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[50] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the
Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

[51] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.223.
[52] Id., Para. 6.224.

[53] Canada-Patent Protection of Pharmaceutical products, (World Trade Organization, Panel Report, 2000, WT/DS114/R,) para.7.69. The fact that this Panel was partly influenced by reference to legitimate interests of 'third parties' cannot be invoked against this finding because Articles 13 of TRIPS and 9 (2) of the Berne Convention also take in to account the 'legitimate' interests of users of protected works.

'Prejudice' is defined by the Panel as connoting damage, harm, or injury.[54] The Panel also defined 'not unreasonable' to connote 'slightly stricter threshold than reasonable.'[55] In the same paragraph the word 'reasonable' is defined by the panel as "proportionate", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", or "of a fair, average, or considerable amount or size."

Hence, the TRIPS allows exceptions to exclusive rights that prejudice the legitimate interest of the right holder as long as such prejudice is reasonable. The Panel clarified that 'prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.'[56] This approach is condemned by commentators like Professor Gervais as conflating the third step requirement in the three-step test with the second step.[57] Their contention is that a limitation will be acceptable under the third condition as long as it is 'reasonable' or 'justified' by public policy considerations even though it may entail economic loss or loss of revenue.[58] However, in any case the choice of public policy considerations should be left to national government.

5. Copyright Limitations under Current Ethiopian Law

Domestic laws of member countries of international instruments like the Berne Convention and the TRIPS Agreement do not explicitly adopt the three-step test rather provide limitations (in specific terms and/or general manner) that they deem to be compatible with the triple test. Under the current Ethiopian Copyright Proclamation No 410/2004 (the 'Proclamation' hereunder)[59] limitations to copyright are provided under Articles 9 through 19. Except for compulsory license under Article 17, all of the limitations are not compensated limitations. In addition, except in relation to limitations to the exclusive right of reproduction under Article 9 (2) (e) the Proclamation does not provide for the three-step test. This may be due to the fact that the legislature foresaw the need to conform to the standards of Article 9 (2) of Berne Convention up on WTO membership. We will see that the other

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[54] United States-Section 110 (5) of the US copyright Act, cited above at note 22, para. 6.225.

[55] Ibid

[56] Id., Para. 6.229.

[57] Gervais, cited above at note 32, p.20.

[58] They reiterate that what is meant by 'not unreasonable prejudice', if properly translated from the French text, should mean 'unjustified prejudice.'

[59] Copyright Proclamation, cited above at note 13.

exceptions in the Proclamation can be traced to the specific limitations in the Berne Convention and do not need to be weighed against the triple test.

From the preceding we can also see that in Ethiopia the judiciary is not empowered to go beyond the limitations explicitly stated by the legislature and derive triple-test-compliant limitations that may be necessitated by changes in technological and market landscape.[60] There is no common law-style open system of fair use limitation in the Ethiopian copyright legislation. The following paragraphs briefly analyze some of the main exceptions provided in the Ethiopian Copyright Proclamation.

a) Reproduction for personal purposes

Article 9 (1) of the Proclamation states:

> *Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid private reproduction of a published work in a single copy by a physical person exclusively for his won personal purposes.*

This provision allows every user of copyright material to reproduce a copy of the work without being constrained by copyright considerations. It does not require that the copy from which a reproduction is made has to be acquired lawfully.[61] Furthermore, there is no requirement that the copy be made by the consumer himself, i.e., it can be made even by third parties acting for commercial considerations as long as the reproduction is made on individual request and for personal purposes of the consumer.[62] Such approach benefits those who do not have their own means of reproduction.

Three justifications have been invoked in various jurisdictions for retaining exception for private reproduction of copyright works. These are: its insignificant adverse economic effect on copyright owner, market failure

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[60] On the other hand, it is not possible for the legislature to foresee circumstance that may occur in the future thereby upsetting the balance between protection and exploitation.

[61] One of the justifications for allowing copying for private use is that a person who has lawful access to the work has an implied right to enjoy the work in a manner convenient to him does not seem to be strictly adhered to.

[62] This point is more vivid from the Amharic text that does not have any indication as to how the reproduction is made; the phrase 'by a physical person exclusively for his own personal purposes' in the English text itself is simply meant to stress on the purpose/use the copy has to be destined for; however, this does not condone those who, acting on their own, commercially engage in reproduction and distribution of works. The author reckons that the formulation does not say 'by or for' but it will be far away from the legislative intent to argue otherwise.

(enforcement difficulty) and protection of public (users') right to privacy. Before the emergence of new technologies, private reproduction basically refers to hand copying or type writing of a manuscript and this was believed to cause only minimal effect on right holders.[63] However, now technologies related to reprography, home taping and the current digital and network have tremendously made private reproduction easy. This implies that its economic impact on the right holders has become significant and the above justification is waning out of favor.[64] Especially on the Internet private users are directly reached out by right holders without the need for intermediaries (distributors) and private reproduction constitutes the main market for right holders. This also means that in such cases even if the limitation may pass the first test of the TRIPS triple test, there is no way that it will pass the other two (economic) tests.

The idea behind market failure justification is that the costs of exercising rights against private copiers (which includes myriad of measures ranging from negotiation to enforcement) may exceed the benefits so much that it is not efficient to assign proprietary rights (as it cannot be assigned by private bargain).[65] Such is said to have become worse with the emergence of private reproduction technologies that make each house hold license impracticable and the price system unworkable.[66] This led in some jurisdictions to imposition of levies on copying machines and recordable formats to compensate right holders. In other words, private copying was reckoned as a kind of compulsory license. However, with coming into prominence of encryption technology that enabled right holders to monitor exploitation of their works and block unlicensed utilization the market failure justification has become at least partially defunct.

The third justification in favor of private use exception is that right holders would have to physically enter, search and possibly seize material in individuals' homes thereby intruding into people's privacy.[67] In the era of digital and network technology rather than physical privacy it is the 'information privacy' of users that is at stake. That is, the right holders will be

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[63] Guibault, cited above at note 3, p. 52.

[64] Not only that it is possible to reproduce indistinguishable copies for virtually zero expense and with least inconvenience but also copies can be distributed world wide instantly.

[65] There is an assumption that in principle users should pay as long as market allows such transaction (and right owners should be given opportunity to address such failures including through collective societies).

[66] Giuseppe Mazziotti, EU Digital Copyright Law and the End-User, (2008), P. 28.

[67] Guibault, cited above at note 3, p. 51.

able to use monitoring technique and track the use of their work and detect acts of infringement by placing electronic device inside works to record every use by a person, as well as frequency and duration of such use and uncover overall consumption patterns of users.[68] Tracking private use through technologies is also feared to have the effect of discouraging use of works and further affect right to information (and expression).

It is not clear if private copy exception as enshrined in Article 9 would pass the first requirement of the triple test. One may argue it is clearly defined as it applies to 'single copy for one's own use.' But the problem is that such exploitation is rule of exploitation for digital works made available online and generally exclusive right of reproduction is supposed to be effective via private copies ultimately falling in private hands.

Article 9 (2) (e) of the Copyright Proclamation prohibits reproduction for personal purposes that 'would conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author.' This seems a clumsy way of incorporating the Berne second and third steps of the triple test because it will be unwise to treat the words 'conflict' and 'unreasonably harm' used in the Copyright Proclamation as equivalent. Therefore, under the current Ethiopian copyright system because of application of the second and third steps of the triple test in the Berne Convention/TRIPS Agreement, reproduction for personal uses seems to be excluded in relation to digital copies. This is particularly the case in the context of exploitation of creative works on the Internet.[69] Judges should confine the exception to works exploited in physical copies even though serious objections can be anticipated regarding reprography and tape recording.

Therefore, any concern that the private use exception under Article 9 of the Copyright Proclamation may conflict with the Berne/TRIPS triple test[70] is simply unfounded concern because sub-Article (2) (e) of same provision itself requires that such exception should comply with the test.

b) Quotation

Article 10 (1) of the proclamation provides:

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[68] Id., p. 55. However, technologies that merely prohibit copying and blocking access may not have such privacy concerns.

[69] Also this limitation can not be invoked against works made available only online; because while the exception applies only to published works, publication is defined under article 2 (22) of the proclamation only in terms of tangible copies.

[70] Such concern is raised by the members of the Working Party on the Ethiopian accession to the WTO.

Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid the reproduction of a quotation of a published work.

Quotation is useful tool to convey a message accurately in various fields like political arena, in media, in research, assemblies, in art and culture etc. For instance, it may be important for news reporter or critique to capture the mood, the tone or nuances of an address which may not be possible without reproducing part of the speaker's expression. Similarly, historians, biographers, and scientists also need to be able to portray reality in truthful manner in their own work by relying on prior writings.[71] It has to be stressed that the purpose of quotation is not specified as long as the limitations in sub-article (2) are satisfied.[72] The purpose can be scientific, educational, critical, informatory, or educational, judicial, political and entertainment purposes. It can also be made in historical or scholarly works by way of illustration or evidence of a particular view, and quotations for artistic effect.

Since this exception is specifically provided under the Article 10 of the Berne Convention there is no need to examine the compatibility of this exception with the TRIPS triple test. However, under the Ethiopian law the limitation seems to be unnecessarily restricted to 'published' works whereas the Berne Convention refers to 'works lawfully made available to the public.'[73] Under the Ethiopian system quotation from useful unpublished sources (including most research works in libraries) is not allowed and this seems to be unwarranted in Berne/TRIPS-plus approach. Similarly, since quotation is understood as (partial) reproduction of a work, the Ethiopian law as it stands does not allow quotation in the course of performance, broadcasting etc.

Sub-article (2) of Article 10 of the Proclamation provides the limit of quotation. That is, it has to be 'compatible with fair practice and does not exceed the extent justified by the purpose.' Moreover, sub-article (3) provides the duty to indicate the source and the name of the author where the quotation is taken from a source which contains the name of the author. These requirements are

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[71] Dr. Lucie Guibault, "The Nature and Scope of Limitations and Exceptions to Copyright and Neighboring rights with regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment," UNESCO e-Copyright Bulletin, (October-December 2003) p. 6.

[72] This is important in view of the fact that the proclamation does not provide specific limitations for purposes like review and criticism.

[73] We have to recall our earlier discussion that publication is understood under Article 2 (22) of the Proclamation in terms of availability to public of adequate tangible copies of work (by sale, rental or public lending).

also provided under Article 10 (1) & (3) of the Berne Convention. In the absence of specific standards provided by the legislature whether a practice of quotation is 'fair' has to be determined on case by case basis by applying 'fair use' standards used in common law countries.[74]

c) Reproduction for Education

Article 11 (1) of the Proclamation states:

> *Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation the owner of copyright cannot forbid, without exceeding fair practice and the extent justified by purpose, a reproduction of published work or sound recording for the purpose of teaching.*

This exception also does not need to be evaluated against the triple test as it can be specifically traced under Article 10 (2) of the Berne Convention. This exception applies to all works protected by copyright and this seems to be in line with Article 10 (2) of the Berne Convention that refers to literary and artistic works. However, reference to sound recording in the Proclamation may provoke controversy. We understand from Article 32 (d) of the Proclamation that limitations to copyright are also applicable to neighboring rights.[75] We can only speculate that probably the legislature wanted to clarify a situation where reproducing a work also entails reproducing a sound recording.

Educational institutions (particularly higher learning institutions) are main producers of teaching materials. They also intensely use such materials in the course of dissemination and creation of knowledge. They also use contemporary books, newspapers, magazines, photographs, films, slides (and sound recordings), broadcasts and other media products, and make compilations in their effort to create and disseminate knowledge to students. The main outstanding question is whether this exception should apply to materials prepared for teaching and instructional purposes. There is real risk that allowing educators and the educated (i.e., the main market/consumers of such materials) to invoke this limitation to reproduce such materials (without compensation) takes away the very incentive to produce such materials and entail counterproductive effect. In fact, the legislature follows a different approach in case of limitations on neighboring rights under Article 32 (2)

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[74] These are nature of the copyrighted work, the purpose and character of the use, the amount and substantiality of portion used, the effect of the use up on potential market.

[75] Sound recordings are protected by neighboring rights under article 27 of the proclamation.

where educational limitations do not apply to performances and sound recordings which have been published as teaching or instructional materials.

The Proclamation does not clearly provide who benefits from the exception, except that reference is made to 'teaching'. It can be understood as referring to teaching in the context of educational establishments[76] and home-teaching/private instruction irrespective of commercial motive and it appears that use by commercial educational establishments does not contravene from the outset the requirements of 'fair practice' as will be seen later. Similarly, this limitation applies irrespective of whether it is face to face or distance teaching. It also seems to benefit both the learner and educator. For example, the educators can copy materials on black board or on slide presentation and preparation of lecture notes (and learners can copy the same), photocopy a book or extract of it and distribute to students, reproduce works for examinations, etc. It should be reckoned that the law does not restrict the means of reproduction whether it is manual, reprographic or otherwise.

Article 10 (2) of the Berne Convention allows members to permit utilization by way of illustration in publications, broadcasts or sound or visual recordings for teaching. This provision does not seem to allow such acts as translation for teaching purpose (except in the context of the Berne Appendix) as reference is made to 'utilization by way of illustration in publications, broadcasts or sound or visual recordings for teaching'. However, members can allow for teaching such acts as broadcasting, performance, communication to public, display etc. Article 11 of the Proclamation is unnecessarily restrictive as it confines the scope of the limitation only to exclusive right of reproduction. This means educators cannot perform, broadcast, lend, display, communicate etc works for purpose of teaching and this will surely curtail the noble objective of promoting education. This will only add pressure on already overstretched libraries acting under severe resource constraints and copyright hurdles as will be seen below.

The Proclamation also failed to clearly provide what is known in other jurisdictions as exceptions for research and private study. It is obvious that such exceptions have firm public interest explanations and are likely to be TRIPS complaint. One may argue that part of such interests can be accommodated under other limitations like reproduction for personal use or for teaching or by libraries and similar institutions as will be seen later. However, such limitations do not fully accommodate the desire for limitations

[76] However, it is submitted that libraries within the educational establishments shall be treated under exceptions dedicated for libraries to be discussed later.

for research and study. Given such problems and in the absence of clear legislative guidelines, it becomes odious task for the judiciary to define the scope of such limitations.[77]

Regarding the limits of the teaching exception, Article 11 requires that reproduction for teaching shall be compatible with fair practice and extent should be justified by purpose. These notions are not defined by the legislature and should be explained by the judiciary in light of the yardsticks for 'fair use' employed in common law countries (as we have seen in relation to quotation above).[78] Close scrutiny of such factors reveals that multiple copies for class room use of entire work may be justified.

d) Reproduction by Libraries, Archives and Similar Institutions

This exception is not specifically provided in the Berne Convention. But it is not difficult to trace it within the ambit of the so called *minor exceptions* as manifested widely by the practice of member sates.

Article 12 (1) of the Proclamation states:

> *Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid reproduction of a work by a library, archive, memorial hall, museum, or similar institutions whose activity directly or indirectly is not for gain.*

This exception follows particular users. That is, these institutions are engaged in collecting, preserving, archiving, and dissemination of information.[79] This means the main public interest justification behind this exception is dissemination and preservation of knowledge, culture, and heritage.[80] However, it is not clear why such exceptions do not benefit private individuals and other entities that may be engaged in similar activities. We may ponder the provision is justified in view of the extensive effect such broader approach may have on the copyright owner, especially such is the

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[77] For instance should a court condone reproduction for commercial research? Does research include both preparatory (like material collection) and final stages like (presentation and publication)? Is this purely restricted to the researcher or does it cover also others who may be involved in one way or other? What should be the quantitative restrictions, if any, and the kind of works it applies?

[78] See supra note 74

[79] The traditional role of these institutions as repositories of printed materials has also broadened to embrace audiovisual and digital materials accessible online (i.e., expansion in terms of both holdings and facilities).

[80] Robert Burrell and Alison Coleman, Copyright Exceptions: the Digital Impact, (2005), p. 136.

case in view of the fact that library exception entails reduction in book purchase to some extent.

One may also wonder why the Ethiopian law distinguishes between libraries acting for gain and those that do not have profit motive. This is particularly true in view of small number and budgetary constraints of (public) non-profit oriented libraries. On the other hand we can imagine the adverse effects it may entail to rights of copyright owners when profit motivated institutions are encouraged into such business. There are authors who interpret the above provision to include libraries of private schools and universities.[81] They argue that since such educational establishments to which the libraries belong benefit from teaching exceptions under Article 11 of the Proclamation, their libraries should also benefit from the library exceptions under Article 12. However, this author finds it difficult to see how it leads to a conclusion that libraries of profit motivated establishments benefit from library exceptions simply because the establishments they belong benefit from teaching exception unless we show any law which defines libraries separately from the institutions they belong.

The fact that this exception allows libraries and similar institutions only to reproduce works is simply inadequate. Such institutions cannot properly discharge their activities without exceptions to other exclusive rights like performance, display, communication to public, broadcasting etc. For instance, a public gallery cannot properly discharge its function as center for exhibition unless it benefits from exception to exclusive right to display works.

Furthermore, the role of libraries will seriously be compromised without exception to the excusive right of public lending. One can also make strong case against putting the public lending as part of the exclusive right of the right holder in the first place as this right is not recognized under the Berne/TRIPS system.[82] In fact the approach of the Proclamation towards the exclusive right of public lending is utter anomaly. Article 2 (23) defines 'public lending' as a temporary transfer of possession of an original or copy of a work or sound recording by libraries, archives, or similar institutions whose service is available to the public without making profit. So, does this mean that those

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[81] Mandefro Eshete and Molla Mengistu, 'Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of Impact on Expansion of Education, Journal of Ethiopian Law, vol. XXV, No 1, (2011), p. 176.

[82] The fact that public lending is part of right holder's exclusive right can easily be deduced from Article 7 (2) of the proclamation.

libraries and similar institutions, working for profit, are not inhibited by this right? Or, do such acts automatically constitute rental?

Sub-article (3) of Article 12 of the Proclamation provides conditions to be satisfied under which the beneficiaries avail themselves of the library exception provided under sub- article (1). Accordingly, a copy can be made: a) to preserve and, if necessary to replace a copy or a copy which has been lost, destroyed, or rendered unusable in the permanent collection of another similar library, b) where it is impossible to obtain a copy under reasonable conditions,[83] and c) the act of reproduction is an isolated one occurring and if repeated on separate and unrelated occasion. Despite the clumsy formulation, this provision allows libraries to reproduce works to enrich (and preserve) their own collection or supply copies to other libraries (interlibrary reproduction for stock). This is an important exception especially in view of the fact that physical copies are susceptible of dilapidation and wear and tear and such is even more important when the work is out of market. This exception also facilitates (cross boarder) digitization projects. One apparent logical jump in this exception is that it does not clearly allow libraries to reproduce and supply copies of works to other libraries to enable them acquire copies they never had while it is possible for a library to reproduce a work to acquire copy itself. If it is allowed for a library to reproduce a work and retain copy it does not have, logically it should be also possible for it to reproduce or authorize reproduction to enable other libraries to acquire a copy. Therefore, there is no copyright infringement if libraries of (older) public universities with richer stocks authorize their counterparts in younger universities to copy books and other materials their collections and acquire copies of such works.

There is no clear requirement that such work be published. One may argue that it will contravene the author's moral right to 'publish' the work if libraries acquire and make available such works to public without the consent of the author.[84] Furthermore, it is not clear if this provision imposes obligation on the supplying library not to refuse request by other libraries. Had that been the case, it would have also provided for terms of reproduction including settlement of expenses it incurs in the course.

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[83] In the Amharic version we cannot easily trace the qualification 'reasonable conditions'.

[84] However, such argument will not be much strong with respect to materials kept in the library with the consent of the right holder who has not placed contrary instructions.

Sub-article (2) of the provision under consideration allows libraries to directly reproduce and supply works or part of works to individuals. It provides conditions for reproduction of a published article, short work or short extract of a work to satisfy the request of a physical person. Such is possible under the following conditions: a) the library or archive is satisfied that the copy will be used solely for the purpose of study, b) the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion, and c) there is no available administrative organization which the educational institution[85] is aware of, which can afford a collective license of reproduction.

The major handicap under this exception is that it allows reproduction of only published articles, short work or short extract of a work.[86] There is no doubt that library users usually require the entirety of (other) works for use. Also the Proclamation does not define what is meant by article nor is the quantitative benchmarks of what constitutes short (extract of) works provided; this not only subjects users to arbitrary restrictions by libraries but also exposes libraries to infringement actions. It is not also known how much time has to elapse for a person to request various parts of a work (or even same copy for that matter) without being blamed for seeking reproduction on related occasions.

The requirement of 'publication' is also difficult to explain; library collections may not necessarily be published materials. For that matter museums and archives are known for their rich collection of unpublished materials. There are also ample instances of copyright owners of such works who deposit them in archives and museums do not place any explicit prohibition of copying. This issue becomes particularly strong if one subscribes to argument that libraries and similar institutions are allowed to acquire and retain unpublished materials under sub Article (1) because in such case there is no much point in preserving materials users cannot take copy when needed for private study.

As to the requirement that copy shall be used solely for the purpose of study, libraries usually satisfy themselves by requiring their clientele to sign declaration forms.[87] There are libraries that (additionally) require prima-facie

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[85] Reference to 'educational institution' is a slip of pen; same can be discerned from the Amharic version.

[86] The situation is much worse when we see that this formulation is not clear enough to allow reproduction of non textual works; on the other hand photographs, films, and other artistic works are important for private study and research.

[87] In fact the legal effect of such declarations is not clear except as reminder to the users of possible action for copyright infringement.

evidence to that effect like by producing letter of cooperation from institutions/patrons that support such study. Such may appear unnecessarily cumbersome requirement that deprives those who cannot produce such evidence of their 'entitlement'. On the other hand, if the libraries simply rely on mere declaration of users, it undermines the legislative requirement that they shall be 'satisfied' that the work will be used solely for study since users will simply get around it by making false declarations. However, in a situation where libraries have no reason to suspect otherwise (like in case of request by students and researchers) such additional requirement will be unnecessary.

e) **Limitations for 'Informative Purposes'**

Article 13 (1) of the Proclamation allows the reproduction in newspaper or periodical, the broadcasting or other communication to the public of an article published in a newspaper or periodical on current economic, political, social or religious or similar topics. Thus this exception applies to limited published works and can be traced under Article 10 *bis* (1) of the Berne Convention. This exception facilitates dissemination of information intended to public. However, it is not clear why both in the Berne Convention and the Proclamation this limitation is conditional upon the absence of contrary reservation by copyright owner. Moreover, the fact that the legislature left undefined such concepts as 'periodical' and 'newspaper' will raise controversy regarding the scope of this exception.

Sub-article (2) allows reproduction and broadcasting or other communication to the public of short excerpts of a work seen or heard for the purpose of reporting current events. We should not confine this provision to textual works; it should include important works like photographic and audiovisual works necessary for news organizations for fully reporting current events. This is highly important for public freedom of expression (to have access to both the substance/idea of the work and its form of expression) which is apparently the main justification for the whole exceptions in Article 13.[88] This provision hardly allows media organizations to freely broadcast interviews or other words spoken and notes taken without the consent of copyright owner although sub-article (3) covers part of such scenario. On other respect, the exception seems to be liberal in that it does not require the work to be published; rather it applies to works 'seen or heard'. In fact the Amharic version of same provision suggests that as long as the work relates to current events heard or seen such work can be reproduced or broadcast for purpose of reporting current event. The works do not need to be seen or heard but relate

[88] Otherwise the problem will be severe especially when we see that there is no provision in the proclamation to use such works in reporting current events even up on payment of compensation.

to events heard or seen. The limitation does not allow borrowing the entire work but excerpts of a work.

The difficult task of defining 'events', when they are regarded as 'current' and what is meant by 'reporting' within the range of media activities is left to the courts.[89]

Sub-article (3) of Article 13 of the Proclamation also allows reproduction in newspaper or periodical, the broadcasting or other communication to the public of a political speech, lecture, address, sermon, or other work of similar nature delivered in public, or a speech delivered during legal proceedings to the extent justified by purpose of providing current information. This exception is drawn from Article 2*bis* (2) of the Berne Convention. This exception helps disseminate information which is put in the public sphere by the author himself.

Finally, in all three cases the Proclamation imposes obligation to indicate the source and name of the author as far as practicable.

f) Compulsory License

Uncompensated limitations we have seen above basically refer to a situation where a person who has access to copies of works can deal with them in the permitted manners. But the main problem in LDCs is access to legitimate copies in their languages in the first place. One way embarked by members of the Berne Convention to address persistent concern by developing world to ensure bulk access to copies of works at affordable price in their language is to recognize a facility of compulsory license that allows them to derogate from the exclusive rights of reproduction and translation. As a result, the Berne Appendix was adopted and later integrated into the TRIPS system. However, lengthy substantive and procedural requirements make the facility scarcely available to LDCs.[90] Moreover, the requirements do not reflect the main problems of LDCs. For instance, both in the cases of compulsory license for translation and reproduction, non-availability of copies at affordable price does not trigger granting of license. License for translation is granted if the work is not published in local language or if all editions of translation

[89] For instance the court has to decide whether local, regional, and national occurrences constitute an 'event', whether commentary or opinion on such event constitute 'reporting', and whether report relating to an event which occurred long in the past constitute report on 'current' event.

[90]See the requirements under Articles II, III, and IV of the Berne Appendix. We can easily observe that the transaction cost involved and the waiting and grace period hugely discourage resorting to the facility.

published in the language concerned are out of print.[91] Compulsory license for reproduction is granted if copies of (published) edition of a work have not been distributed (in that) country) to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works.[92] Given the fact that important copyright works in LDC markets are expensive foreign materials, the price comparison is between expensive materials and this in no way guarantees availability of copyright materials at affordable prices. This means the Appendix has dearly missed to hit its cherished objective of equipping developing countries with means to deal with undersupply and/or unreasonably priced copyright works.

One may argue that Article 40 of the TRIPS Agreement should be used by LDCs to ensure bulk access. Article 40.2 provides that members can specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. It is not clear if undersupply due to high prices or absence of supply in local languages would constitute abuse of copyright; such is particularly the point where the copyright owner does not resort to any suspicious licensing practice or does not employ technological mechanisms to restrict access. Further more, historically and doctrinally the copyright has been, as opposed to patent, less a subject of competition law. This means Article 40 of the TRIPS Agreement is no easier route to ensure bulk access compared to the Berne Appendix.

Article 17 of the Proclamation leaves to the regulations the task of determining the 'conditions, forms of such authorization and in particular fair compensation' thereby implementing the Berne procedural and substantive requirements. However, the regulations remain elusive to date and this is a huge gap that tilts copyright balance in favor of protection as the Ethiopian Intellectual Property Office has not lived up to its mandate to initiate such legislation.[93]

Conclusion

Copyright limitations in Ethiopia are grounded on multifaceted monetary and non-monetary justifications. Some are grounded on market failure

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[91] Article II (2) (a) & (b), Berne Appendix. Sub-article (5) makes the matter worse by restricting the availability of the facility only for the purpose of teaching, scholarship or research.

[92] Article III (2) (a) (ii), Berne Appendix.

[93] See Article 5 (3), Ethiopian Intellectual Property Office Establishment Proclamation, 2003, Article 5 (3), Proc. No 320, Fed. Neg. Gaz. 9th year, no. 40

explanations thereby adhering to maximalist precepts. Others are designed to balance conflict between proprietary interests of copyright owners and fundamental rights of the public, like freedom of expression, right to information, and privacy. There are also exceptions framed based on the need to pave way to the preservation and dissemination of knowledge and culture and further creativity. However, both international copyright instruments and the Ethiopian copyright law have not integrated copyright limitations within copyright system on same footing as rights. The fact that the international copyright instruments do not adequately systematize limitations and guarantee minimum limitations adversely affects LDCs which are technically ill-equipped. The WTO Panel interpretation of the triple test in terms of purely economic effects of limitation on the right holder has also gone out of way in disregard of the principles and objectives of the TRIPS Agreement. This has the effect of denying members of flexibility for domestic policy options. The wealth of procedural and substantive requirements in Berne Appendix rendered the facility scarcely available. The facility also doesn't guarantee availability of copyright materials at affordable price and mass access cannot be ensured unless the procedural and substantive requirements are eased.

The Ethiopian law unnecessarily adopts a closed system of limitation thereby depriving the judiciary room to derive limitations compatible with the triple test. It also follows unnecessarily restrictive (TRIPS-plus) approach even with respect to those specific exceptions it spells out. Education and library limitation are unnecessarily restricted to exclusive right of reproduction. Limitation for quotation is also unduly confined to published works. Moreover, lack of clear standards for application of limitation for education, quotation and library exception will discourage such uses. The law also fails to provide with adequate clarity limitations for research, review, criticism, incidental reproduction (and broadcasting), caricature etc. The recognition of exclusive right of public lending without appropriate exceptions has also the clear effect of undermining library activities. Above all, copyright balance in Ethiopia is affected due to lack of regulations that would give effect to provisions on compulsory license.

Rethinking the Ethiopian Rape Law

Tsehai Wada*

Introduction

The word "rape" is at present a household word. In a classical rape scenario, what easily comes to mind is a bogeyman, who is a stranger, armed with some type of weapon, jumping on a victim from where he is hiding, uses force and intimidates his victim to have sexual intercourse with him. Despite such an apparent simplicity, rape is not a simple term that can be encapsulated in such a narrow scope. Contrary to such conventional thinking, the notion of rape is the most difficult subject to handle in any discourse. It may also be added that, of all the crimes, it is rape that has changed its features through time, so much so that, every elements of its definition are criticized and changed time and again. Accordingly, today's definition of rape as a crime is so much different from what it used to be in the past. It helps to note from the outset that, the Women's Movement represented by feminist intellectuals and other lobbyists has contributed a lot to this radical change by highlighting the gendered and unequal treatment of the law and focusing on non-discrimination. The animated debate on rape in general, or anyone of its elements, has not yet died out though many changes were introduced into the law either by legislatures or courts.

An attempt to write on rape as a subject naturally raises many questions than answers. This is so mainly due to the multitude of issues that surround the crime, and the divergent views held by proponents of this or that line of argument. As mentioned above, almost every element of the classical definition of rape is challenged and changed. Accordingly, the gendered outlook that has so far focused on a male perpetrator and a female victim is made gender neutral[1]; the force element which was a central issue in the past no more exists at present; consent, which has triggered almost every relevant discourse has moved from passive acquiescence to "no means no" and explicit oral expression; and marital rape which was not an offense in the past is now made a crime. Moreover, the instrumentalities of rape, i.e., genital organs or

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[1]Rape can be committed by a male upon a female or by a female upon a male or between individuals of the same sex, as in the case of homosexuals. Despite such variations in perpetrators and victims, the main form of rape that is committed quite frequently is the first type, i.e., a male upon a female. It is also this variety of rape that has given rise to the divergent gender issues covered in this article. Just for this purpose, unless and otherwise specifically mentioned, the following discussions will mainly focus on a male upon a female rape only.

others; the manner of perpetration, i.e., copulation or other forms; types of punishments on rapists; date raping wherein consent may be given tacitly; and statutory rape are some of the issues that have occupied most of the literature. These issues and changes are just the tip of the ice berg as a result of which, an attempt to cover the whole gamut of the subject matter in an article with a limited space amounts to doing injustice to the subject matter. Accordingly, this article attempts to cover major issues of the subject matter alone. In line with this I will attempt to compare and contrast the different positions held on the subject in other jurisdictions[2] with that of Ethiopian law and practice.

The article has two parts. Part One discusses major issues of rape law, mainly drawn from literature that emanated from the US. Part Two, following the structure of Part One, will compare the laws and practices of other jurisdictions with that of Ethiopia. These will be followed by a brief conclusion and recommendations.

1. Definitions and Major Elements of Rape as a Crime

1.1 Definition

A non-legal definition provides that rape is "the crime of having sexual intercourse, usually forcibly, with a person who has not consented; specifically, this crime is committed by a man upon a woman or a girl."[3] At common law, rape is defined as "the carnal knowledge of a woman forcibly and against her will".[4] These definitions share the following elements: the act has to be an act of sexual intercourse/carnal knowledge, it has to be done - if not always, but usually - forcibly, the victim has to oppose the sexual advance - not consented/against will - and that the victim has to be a female while the perpetrator should be a male.

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[2] Almost all the literatures found on the internet as well as in hard copies in the Law Library and accessible to this writer have their origin in Common Law jurisdictions. Thus, an attempt to check the position of the crime of rape in other jurisdictions, more importantly in Civil Law jurisdictions, could not meet success.

[3] Webster's New World Dictionary, Third College Edition, Webster's New World, New York, (1988)

[4] W. Blackstone, Commentaries*210 as quoted by Wayne R. LaFave, Substantive Criminal Law, 2006 Thomson / West, S 17.1- 17.5, Rape overview, Current through the 2007 update. The current edition is written by David C. Baum (hereafter, Baum). Of all the materials that were accessible to this writer, this book stands first in comprehensiveness. Accordingly, the structure of this article has followed that of this book. Nonetheless, since the soft copy that is in file with this writer has no page numbers, but only section numbers, the latter are shown in all appropriate places. (Except in few instances, foot notes are omitted.)

Though these definitions appear to be simple and leave no room for interpretation, recent developments have proved that the law as well as the definitions cannot accommodate the different legal issues that arose in rape trials. The instances that called for legal amendments and the developments achieved in this regard are discussed hereunder.

1.2 Major elements

1.2.1 The act

According to the traditional definitions, quoted above, the act requirement of the crime is sexual intercourse/carnal knowledge. This naturally means the penetration of the female sex organ by the male sex organ (genital copulation). The act requirement is now expanded to include, anal and oral copulation, as well as digital (finger) and mechanical penetration.[5] These varieties are also known as cunnilingus, fellatio, and anal intercourse. Some writers include any intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body, into this category.[6]Though it is clear that the latter varieties are added to the list after reform, none of the sources indicate whether they were unknown to the ancient people or not. It may, however, be presumed that these are new cultures that grew within a "free society".

The criminal act, alias, *actus reus*, in criminal law parlance, has raised some collateral issues, such as: the degree/depth of penetration, the requirement of emission and capacity of procreation. According to the contemporary position, at least in the US,

> …slight penetration is enough… and it is sometimes elaborated that penetration between the labia… or of the vulva will suffice….Entry of the vagina… or rupturing of the hymen…is not necessary. Despite rare suggestions to the contrary...emission is not necessary for the requisite act to be completed. Moreover, proof of emission is not a substitute for showing penetration.[7]

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[5] Ibid.

[6] Meredith J. Duncan, (hereafter, Duncan) Sex Crimes and Sexual Miscues: the need for a clearer line between forcible rape and nonconsensual sex, Wake Forest Law Review, Vol. 42, 2007, p.1096, Quoting S. C. Code Ann. Sec. 16- 3. 651(2003). The act is expressed as: sexual penetration, penetration, vaginal intercourse, sexual act, sexual battery, sexual intrusion, sexual conduct, and sexual abuse. For the sake of consistency, however, the act will be called as sexual intercourse, in this article.

[7] Baum, supra note 4, Sec. 17.2

Moreover, lack of capacity regarding emission is not a defense because it is not part of the definition of the crime, and impotency is similarly not a defense, for the crime can be committed by an erect or non-erect penis.[8]

1.2.2 Mental state

Under the Common Law, rape was a general intent crime. Accordingly, for the purpose of prosecution, once it is shown that the act was committed voluntarily - by the rapist - it does not matter whether he believed that the victim has consented. The current position is that [a reasonable] mistake of fact can serve as a defense unless held negligently or recklessly.[9]

1.2.3 Force

Though the word "force" appears to be simple, its role in the prosecution and conviction of rape defendants is not as simple as one may imagine it. Thus, it is one of the controversial elements of the crime and these controversies are discussed below.

1.2.3.1 Intrinsic and extrinsic force

Intrinsic force refers to the act that is inherent in the act of the nonconsensual intercourse, while extrinsic force refers to, use of force or threat of force above and beyond the intrinsic force, and courts in the US employ both standards depending on circumstances.[10] What sets apart the latter from the former is the requirement of more evidence that force in general or physical force was employed during the intercourse. This issue of additional evidence has called for a variety of issues, such as the degree of force required to be employed.

As the story of the bogeyman described above tells, what he has used is a direct or actual physical force against the victim. However, force is not necessarily limited to such overt acts only, and rapists can use different methods to intimidate their victims. Such constructive forces can take different forms such as: threat, and coercion. Moreover, even when force is not required to be employed in order to achieve the victim's submission, a rapist may

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[8] Ibid.

[9] Id. Mistake refers to a reasonable mistake on the part of the rapist that the victim has consented to the act. See also, Duncan, supra, Note 6, at pp. 1094 and 1095. Duncan argues that rape at Common Law was a general intent crime, for there was no specifically identified state of mind and that holding a morally blameworthy state of mind suffices for prosecution or conviction. With regard to mistake of fact, what matters is the reasonableness or unreasonableness of his belief in the consent. At present, however, many jurisdictions require a specific mental state, such as: knowingly, recklessly, or negligently doing the act. ibid, at pp.1096, 1097 and 1103.

[10] Baum, Supra note 4, Sec.17.3

employ fraud, or make use of drugs or intoxicants. In all these situations, the victims submit to the demands of rapists, because, submission is the lesser evil under the circumstances. As the sexual intercourses consummated in these situations are nonconsensual, they fall under the general rubric of rape. Each instance further calls for collateral issues and these are discussed below.

1.2.3.2 Threat

It is well known that threat is one of the grounds that can invalidate obligations, for valid consent cannot be given in the presence of a threat. So also under rape law, a sexual intercourse, done under threat proves the absence of consent. Despite such simplicity, it is interesting to note that the degree of force to be imposed on the victim has become a subject of intense disputes. Accordingly, the degree of force was required to be such as that cannot be resisted under the circumstances, which requires the victim to put up utmost resistance and should induce in the victim fear of death, or serious bodily harm, personal injury, a fear that so overpowers her that she dares not resist, and so on.[11] Moreover, it was also required that the victim's fear has to be "reasonable" and the actor should have present capacity to inflict the harm.[12] Such qualifications, as it is apparent, place unnecessary burden on the part of the victim and are unjustifiable. This is aptly expressed in Baum's book as follows:

> ....such limitations are... inappropriate...one who takes advantage of a woman's unreasonable fears of violence should not escape punishment any more than a swindler who cheats gullible people by false statements which they should have found incredible. Neither the blameworthiness of the actor nor the gravity of the insult to the victim is ameliorated by a finding that the threat was implausible or that the actor lacked capacity to carry it out.[13]

As far as the issue of threat is concerned, the threat can be express or implied from the intimidating behavior of the actor and that implied threat is greater when the victim and the defendant are strangers and lesser when they are not. Moreover, according to the contemporary standards, the threat should not be directed at the victim or anyone related to her, but against any other person.[14]

1.2.3.3 Coercion

It is again well known that coercion like threat vitiates consent and that sexual intercourse done under coercion amounts to rape. Coercion may take place

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[11] State v. Hoffman, 228 Wis. 235, 280 N.W. 357 (1938) in id.

[12] Model Penal Code Sec.213.1, Comment at 308 (1980) in id.

[13] Id.

[14] Id.

under different circumstances, such as: extortionate behaviors, understood to be unprivileged and illegitimate, those that arise out of institutional and professional relationships and via economic pressures.[15] The current trend towards combating such behaviors is criminalizing behaviors that lead to sexual intercourse between victims and those that hold positions of trust or authority, such as psychotherapists and patients, sexual extortion in employment, threats to retaliate, or expose the victim to public humiliation and disgrace, exposing secrets or harming another in health, business or reputation.[16]

1.2.3.4 Fraud

In the case of a sexual intercourse obtained through fraud, the victim can technically give consent to the act, but the ground that led her to give consent was misrepresented. Put, differently, had the victim known the true nature of the circumstances she would not have given the consent. According to Baum,[17] fraud can be divided into two and these are: fraud in factum and fraud in inducement. In the former case, usually expressed within the context of the acts of doctors, the defendant has had sexual intercourse with the patient but has managed to conceal from her the fact that it occurred by representing the event as nothing more than a routine pelvic examination. In the latter case, the doctor has had achieved intercourse with his patient by fraudulently misrepresenting that such intercourse was a necessary medical treatment for some real or pretended malady. The former was understood to qualify for rape charge while the latter does not, for the victim knew that she was engaging in sexual intercourse. The legal response has been towards abolishing such dichotomy, either by totally forbidding such relationships between patients and physicians, clergy and those under their care, or totally overriding such a distinction and making consent ineffective if obtained by "deception".[18]

The distinction between the two forms of fraud has resulted in divided positions, and the current trend appears to be that:

> …the traditional dividing line is about the best that can be hoped for because what is customarily characterized as fraud in the inducement "is too difficult to distinguish …from many instances of

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[15] Schulhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 Law and Phil. 35, 79, 85 (1992) in id.

[16] Id.

[17] Id.

[18] Model Penal Code, Sec.213.1, Comment at 331 (1980) and Falk, Rape by fraud and Rape by Coercion, 64 Brook. L. Rev. 39 (1998), in id.

> ordinary seduction,".... The difficulty, of course, is in drawing clear lines without giving protection to interests not worthy of being protected by criminal sanctions, such as "the cheated expectations of women who sought to sleep their way to the top but discovered, too late, that they were dealing with swindlers.[19]

Fraud has also raised the issue of those that have given consent as a result of husband impersonation, i.e. when the rapist tells or pretends to be the victim's husband and sham weddings.[20]

1.2.3.5 Drugs and intoxicants

There is no doubt that consent given under the influence of alcohol or other intoxicants cannot be taken as legitimate. But the issue is not as simple as that, for these substances may be administered by the defendant or another person or by the victim herself. Moreover, the degree of intoxication or lack of control may vary depending on circumstances. The usual consumption of such items in ritual courtship and the resulting sexual relationship being labeled as rape has prompted the following reaction:

> The traditional routine of soft music and wine or the modern variant of loud music and marijuana implies some relaxation of inhibition. With continued consumption, relaxation blurs into intoxication and insensibility. Where this progression occurs in a course of mutual and voluntary behavior, it would be unrealistic and unfair to assign to the male total responsibility for the end result.[21]

As far as intercourse after intoxication is concerned, it appears that there is a consensus among writers that if intoxicants are administered by the defendant for the same purpose, then this amounts to rape. However, the issue gets complicated when the defendant merely takes advantage of the intoxication, though he took no part in the affair. The legal position depends on whether the defendant was aware of the incapacity. Depending on circumstances, recklessness or negligence might suffice to constitute rape. To sum up, the position with regard to self imposed intoxication is not yet settled, for some hold that the defendant should not be made liable in particular when intoxicants are self administered, while others argue that the defendant

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[19] Berger, Not So Simple Rape, 7 Criminal Just. Ethics 69, 76 (1988) in id.

[20] See footnotes 82-85 id, for the position of states' laws and court decisions on this specific issue.

[21] Id.

should not take advantage of the victim's intoxication, depending on the requisite *mens rea*.[22]

1.2.4 Consent

It may be said at the outset that of all the elements of the crime of rape, consent is the most controversial issue. The major controversies revolve around, the manners of its expressions, the interpretation of silence, withdrawal, and capacity to give consent more importantly, in cases of minors, and whether a wife has a legal right to say "no" to a sexual advance by her husband. These issues have generated volumes of literature and the gendered outlook of the ancient and the present day society is reflected more on this issue than others. Leaving that as it may, I will, in the following sections, give a bird's eye view of the issues involved.

1.2.4.1 Proof of lack of consent

It is shown above that rape is a nonconsensual sexual intercourse. Thus, the absence or presence of consent matters a lot in determining guilt. That is to say that if it is proved that there was consent on the part of the two adult participants, what took place is a consensual intercourse not subject to any liability except where the participants are incapable. As aptly noted by one writer, "rape…is the only form of violent criminal assault in which the physical act accomplished by the offender is an act which may, under other circumstances, be desirable by the victim".[23]

According to the traditional standard, it was required that the woman should be compelled and resist the sexual advance to the utmost, the resistance should not abate during the encounter and she should be overcome. These were later changed into a requirement of earnest or reasonable resistance. The more recent position is that physical resistance is not a requirement.[24]

As far as resistance is concerned, a victim can resist a sexual advance physically or verbally. In the former case, it appears that this is no more a requirement, for physical resistance may invite danger of death or bodily injury and that a rapist should not be excused on the ground that the victim has failed to resist as a reasonable person. With regard to verbal resistance, however, whether or not a "no" means "yes" or "no" has remained a controversial issue for a long time. According to the traditionalists, it is so

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[22] Regarding the requisite mental state, most sources quoted in Baum, supra note 4, Sec.17.4 refer to the Model Penal Code, though some state laws are quoted in some instances.

[23] Model Penal Code, Sec.213.6, Comment at 428 (1980) in id.

[24] For further details, see Baum, ibid at Sec. 17.4 (a).

common among women to say no, so as not to be taken as promiscuous, even when they are interested in engaging in the conduct. The current view is that a woman's "no" response to sexual advances should be taken as a sincere response.[25]

A related issue is whether silence amounts to acceptance of a sexual offer or not. In the US, at least, it appears that there is no consensus on this issue. Accordingly, some argue that it is only in rape that silence is not taken as refusal and that this is a sexually biased position.[26] Others, however, argue that, though silence is sometimes the product not of passion and desire, but of pressure and pain,[27] non-consent should not be presumed from silence in particular in sexual activities between acquaintances. A writer advocating for the presumption of silence as consent - in particular among intimate partners - has aptly described this position as follows:

> ....sexual encounters ought not to be lived or analyzed as sequences of particular touches. In practice couples do not discuss in advance each specific sex act that one or another might initiate, and there is no strong reason why the law should attempt to compel them to do so.... If uncertainty and spontaneity can enhance the pleasures of love-making, people of either sex might prefer not being asked--so long as they can be sure that behavior they don't like will be stopped on demand.[28]

Apart from the above, rape law has raised a very unique issue, and that is whether or not consent is required in cases of sexual intercourse between a husband and a wife. This issue, like the other controversial issues identified above, has become the subject of intense discussions. This, therefore, calls for a relatively expanded treatment here.

1.2.4.2 Marital Rape

Under the traditional view, it was held that it was impossible for a husband to rape his wife. This position was justified under various theories: the theory of implied consent, the theory of unities of persons, and the theory of property.[29]

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[25] Id. For more on this issue, see Nicholas J. Little, From No Means No to Only Yes Means Yes: The Rational results of an Affirmative consent Standard in Rape Law, Vanderbilt Law Review, Vol. 58, 1322-1364 (2005)

[26] Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev.at 1792 n.41(1992); Comment, 141 U. Pa. L. Rev. 1103, 1111 (1993) in id.

[27] Estrich, Rape, 95 Yale L. J., 1182 (1986) in id.

[28] Id.

[29] Fus, Theresa, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, Vanderbilt Journal of Transnational Law, Vol.39,(2006), pp. 481 -

The implied consent theory is structured around contract law. It is said that it was enunciated by Sir Matthew Hale in the seventeenth century. According to Hale, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract". This view was later ameliorated by a requirement that such consent can be revoked if the marriage is suspended, such as in the case of separation.[30]

Under the theory of unity of person, a wife is not recognized as a separate being capable of being raped, for when two people marry, they become one. Put differently, the being of the woman is incorporated into that of the husband such that the existence of the woman is effectively suspended during marriage. Marital rape is thus impossible because a husband is not capable of rapping himself.[31]

The property theory holds that, by marriage a woman becomes the property or chattel of her husband. The goal behind is to inspire and perpetuate marital harmony as a result of which sexual intercourse can never be rape because the husband is merely making appropriate use of his property.[32]

According to Fus, these positions violate the "equal protection" clause that is enshrined in so many constitutions and international human rights conventions. Hence, though this does not amount to discrimination based on race, color or sex, the differentiation of treatment is not reasonable or objective and is not for the purpose of obtaining a legitimate goal, and thus

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517.This part heavily draws from this article, written wholly on the subject. Fus's discussions are summarized.
See also, Baum, Supra note 4, Sec. 17.4 for further information on this particular issue. According to Baum, as recently as 1985, marital exemption existed in about thirty five states in the US but, currently, no state retains an absolute version of the old rule.

[30] Sonya A. Adamo, Note, The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries, 4 Am. U. J. Int'. L. & Pol'y, 555, 557-60 (1989); Sir Mathew Hale, The History of The Pleas of the Crown 629 (Law book Exch. 2003) (1736) in Ibid, at p. 483.

[31] Constance Backhouse & Lorna Schoenroth, A Comparative Study of Canadian and American Rape Law, & CAN. US. L. J. 174, Adamo, supra note 30, at 560; Note, To have and to Hold: The Marital Exemption and the fourteenth Amendment, 99 HARV. L. REV. 1255,1256 (1984) in id.

[32] Melisa J. Anderson, Note, Lawful Wife , Unlawful Sex- Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland, 27 GA. J. INT'L & COMP. L. at 146-47 (1998) and Adamo, supra note 30 at p.56 at id.

unconstitutional. In the case of marital rape, marital exemption classifies unmarried rape perpetrators differently from rape perpetrators. A man who rapes his wife is not guilty of rape while an unmarried man who commits the same act is guilty.[33]

In addition to the above, Fus argues that none of the justifications forwarded to support differential treatment is reasonable and objective and is in furtherance of a legitimate goal.[34] Accordingly, the argument that permitting criminal charges against a man who rapes his wife requires impermissible government intrusion in the privacy of marriage and hinders reconciliation is untenable because:

a. It is unthinkable to extend marital privacy to nonconsensual acts. Just as a husband cannot invoke a right to marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy.
b. With regard to impediment to reconciliation, if a woman is ready to press charges against her husband, the marriage has already passed a stage of reconciliation.
c. The concern over the prevention of fabricated accusations is criticized on the ground that it can hardly be the case that marital rape is the only claim that is prone to being fabricated, for claims of theft, and arson for insurance purposes are at least as susceptible to fraudulent claims.
d. The argument that marital rape is not as serious an offense as non-marital rape and can be handled under assault statutes is criticized on the ground that there is no reason to believe that a wife who is raped by her husband is harmed any less than a woman raped by a stranger. It is further argued that being raped by one's spouse is worse than being raped by a stranger because the offending spouse was in a position of trust.[35]

1.2.4.3 Withdrawal of consent

What have been discussed so far are situations that can make one criminally liable for rape in the absence of consent. Thus, if consent is secured in these situations, there is no liability. However, another troubling issue is the time when consent should be given. Theoretically, it may be argued that consent shall be given before the commencement of the sexual relationship and that suffices for all intentions and purposes. A related issue is whether consent given just before commencement can be withdrawn before consummation.

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[33] Ibid, at p.512.
[34] Ibid, at p.513.
[35] Ibid, at 513 – 514 (footnotes are omitted).

Some argue that such withdrawal suffices, provided it was communicated to the male who thereafter ignored it. "[A] court found no support for the defendant's "primal urge" theory, and added that in any event there was no language in the rape statute lending any support to the notion that the defendant is entitled to persist in intercourse once his partner withdraws her consent".[36]

1.2.4.4 Incapacity

Incapacity here refers to lack of capacity to give a legally valid consent. The legal position either in the law of obligation, marriage or others is simply that a person afflicted with any form of incapacity cannot give a legally binding or valid consent, or put differently, the consent given under such situations cannot lead to a legally valid transaction, or relationship. The situation is the same in cases of sexual intercourse, i.e. consent given by an incapable person is invalid. Incapacity is mainly brought about by two factors, namely, age and mental disease. This section will first deal with incapacity due to mental problems and then due to age.

1.2.4.4.1 Incapacity due to mental problems

Under the traditional formula, forcible intercourse with a woman in a state of unconsciousness at the time was unlawful. Currently, phrases, such as: unconscious, asleep, physically incapable of resisting, unaware that a sex act is being committed, incapable of consent, substantially limited in the ability to resist, physically helpless, physically unable to communicate non-consent, etc.,[37] are employed to express incapacity. Despite such variations, the central issue is whether or not the defendant has knowledge about the state of incapacity. There is no consensus again with regard to the requisite mental state. Accordingly, all mental states, namely, intent/knowledge, recklessness and negligence can be requisite mental states.[38] The degree of mental disease or deficiency is another issue that causes trouble in this area. Accordingly, many alternatives are seen in different laws, such as: mental defect or disease which renders a person incapable of appraising the nature of his conduct, severe mental incapacity, etc. Whatever the standard, the logical standard

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[36] Re John Z., 29 Cal. 4th 756, 128 Cal. Rptr. 783, 60 p. 3d 183 (2003) in Baum, Supra note 4,Sec. 17.4 Foot Note No. 7. In an earlier version of Baum's book, the former authors seem to argue that "consent by the woman to sexual intercourse negatives an element of the offense....unless the consent is withdrawn before penetration occurs". It, therefore, appears that consent once given before penetration cannot be withdrawn, thereafter. See, Wayne R. LaFave and Austin w. Scott Jr., Criminal Law, Second Edition, West Publication Co., St. Paul, Minn. (1986), p.487.

[37] Ibid, Foot Note 46-53.

[38] Id, Foot Note 55-58.

"should not be so broad as to cover persons suffering from only a relatively slight mental deficiency, not so narrow as to protect only those in a state of absolute imbecility".[39]

1.2.4.4.2 Statutory rape

Statutory rape refers to a situation wherein an adult engages in a sexual intercourse with a minor. Accordingly, this is a situation of lack of capacity to give a valid consent due to the victim's being underage. This variety of rape came to be known as "statutory rape", apparently because it was originally engrafted onto the common law by statute, and that term is used even today notwithstanding the fact that now statutes everywhere encompass the totality of the crime.[40] Though the rationale behind this form of incapacity is well known, there is no uniformity in the upper age limit within which a minor can give a valid consent. Accordingly, the age limit varies, between 11 and 14 or even higher than this, in the US.[41] Two outstanding issues in this regard are: whether or not sex with an adolescent female is dangerous or morally undesirable[42] and whether there should be a range of age differences between the adolescent participants inside of which sexual intercourse is lawful, which wisely excludes sexual experimentation between contemporaries from the penal law.[43] Whatever the argument, the current position is justified by the need to prevent: teenage pregnancy, consent to sex in an uninformed manner, thereby exposing minors to physical and emotional harm and deterring men from preying on young females and coercing them into sexual relationships.[44] Though statutory rape was a strict liability offense till quite recently, it is now possible to raise mistake of fact as a defense. Accordingly, a reasonable mistake is a defense when the age at issue is a higher age setting the very upper limits of the crime, but is not a defense when the age at issue is a lower age.[45]

Probably, one of the major reasons that prompted the gender neutrality of rape law is the abuse of minor males in the hands of adult females.[46]Originally it was thought that the male body is impenetrable and males were encouraged to present themselves as invulnerable in order to live up to this expectation.

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[39] Williams v. State, 125 Tex. Crim. 477, 69 s.w. 2d 418 (1934) in id.
[40] Ibid, Sec. 17.4(c).
[41] Model Penal Code Sec.213.1, Comment at 324 (1980) in id.
[42] Comment, 65 U. Chi. L. Rev. 1251, 1254 (1998) in id.
[43] Modal Penal Code Sec.213.1 Comment at 326 (1980) in id.
[44] Supra note 42 at 1259-60 in id.
[45] Model Penal Code in id.
[46]The following heavily draws from, Levine, Kay L, No Penis, No Problem, Fordham, urb.L.J. Vol.33, 2005 - 2006, pp. 357 - 405.

Moreover, it was also thought that if a boy physiologically responds to sexual overtures, he must be a willing and happy participant.[47]

Despite all these, researches made in the field amply demonstrate that young males are equally vulnerable to sexual abuse committed on them by adult females. Accordingly, male victims feel humiliated and angry when an older woman takes advantage of them sexually, and significant negative aftershocks, such as substance abuse, suicidal thoughts, sexual disorders, and violent behavior, are quite common after effects of such behavior.[48] Based on these findings, statutory rape laws are at present gender neutral.

Before closing this sub section, it helps to note that some feminist legal scholars are against the prohibition of sexual acts by minor females. One such scholar is Marsha Greenfield,[49] who argued that

> The simple need to control women is endemic to our socio - economic system and our society fears that giving females freedom to engage in sexual activity would probably destroy society as we know it. In response to that fear, the government withholds from the underage female the legal right to define her sexuality and punishes the male for violating the state's power to control the female's sexual activity. In fact the gendered law renders the minor girl literally incapable of having lawful sexual intercourse until she reaches the statutory age. The same is not true of minor boys, who are authorized to have lawful intercourse as long as their partners are not underage girls. Such presumptions reinforce the male sense of sexual adventure without consequence while stifling adolescent girls' sexual freedom or women's sense of their power in society.

1.2.5 Issues pertaining to procedure and evidence laws

Apart from the above discussed controversies, rape trials have raised so many other issues that pertain to the procedures in trials and evidences that need to be submitted to courts. It is alleged that rape claims are ridden with false accusations and therefore need special scrutiny. Accordingly, under the

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[47] Catherine Waldby, Destruction: Boundary Erotics and refiguration of the Heterosexual Male Body, in Sexy Bodies: The Strange Carnalities of Feminism 266, 268 (1995), Michael Thomson , Masculinity, Reproductively and Law, Emory Univ. Law School, Feminism and Legal Theory Project presentation, Working paper, (2005) in ibid, at p.385, 386.

[48] Ibid, at p. 397.

[49] Marsha Greenfield, Protecting Lolita: Statutory Rape Laws in Feminist perspective 1 Women's L.J. 1, 3(1977) in ibid, p.365.

traditional view, complainants were required to report the incident as soon as possible, or within a specific short period,[50] the victim's statements should be corroborated by other supplementary evidences[51] and the prior sexual conduct of the victim either with the defendant or any other person should be admitted to impeach her.[52]

As mentioned above, it is often said that rape is unique because it is premised on a conduct that under other circumstances may be welcomed by the victim so that the outcome will often turn upon a central fact difficult to resolve after the fact, what the woman's state of mind was at the time of the sex act. Accordingly, it is argued that victims will be tempted to fabricate complaints in particular, when pregnancy follows or bitterness at a relationship that has gone sour; or simply to blackmail the defendant;[53] and so on. Thus, it was assumed that a victim will speak out about the incident soon after the act or report this to the authorities, in the absence of which it will be presumed that her claim is fabricated. Because this presumption is unique to rape claims and premised on a non-logical ground, it is now abolished through reform.[54]
The corroboration requirement was premised upon the belief that, stories of rape are frequently lies or fantasies in that a woman may accuse an innocent man ...because she is mentally sick and given to delusions; or having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply because she hates the man.[55] This position is criticized on the ground that fabrication of claims is not unique to rape and such difficulties can be managed through the standard of proof beyond reasonable doubt in which case, any doubt will favor the accused. This requirement is abolished through reform.[56]

The requirement of admission of prior sexual conduct of the victim was premised on the belief that it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent, than one whose past reputation was without blemish.[57] The other justification is presumed on the fact that in rape prosecutions, the inducement

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[50] Baum, supra note 4, Sec.17.5 (a).
[51] Ibid, at (b).
[52] Ibid, at (c).
[53] Model Penal Code, Sec.213.6, Comment at 421(1980) in Baum, supra note 50.
[54] Graham, The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence, 19 Willamette L. Rev. 486, 504-5 (1983) in ibid.
[55] Note, 67 Colum. L. Rev. 1138 (1967) in ibid (b).
[56] Model Penal Code, Sec.213.6, Comment at 428 (1980) in id.
[57] People v. Johnson, 106 Cal. 289, 39 p.622 (1895) in id.

to perjury and revenge is so great that it is of the highest importance that the motive and character of the prosecutrix should be rigidly investigated.[58] This position has been criticized on many grounds, such as it makes it appear that the victim rather than the defendant is standing trial and it is also one of the major causes for underreporting in the face of compelling evidences.[59] Currently, rape shield laws[60] are enacted with the view that such requirements should be limited and applied in rare situations that compel submission of evidences under evidence law, of course without impinging on the right of the accused.[61]

1.2.6 Gradation of the offense of rape and its punishments

There is no doubt that rape is one of the most serious crimes, as a result of which, it was punishable by death in the past.[62] Rape is now viewed simultaneously as a crime of violence, a sex crime, and a privacy offense. Today, the crime is properly classified as a crime against the person, one which hopefully protects the female's freedom of choice and punishes unwanted and coerced intimacy. As regards the punishment, though death sentence is criticized for being disproportionate and contrary to the constitutionally recognized right against cruel and unusual punishment, it is still made punishable by the severest forms of punishment, such as long prison terms.[63] Because of the concern over sex predators, there are now laws, that demand sex offenders who have already served their terms of imprisonment to: register in their jurisdictions, which may be for life; or require such individuals not to live within a certain distance of schools and childcare centers; not change their addresses or leave their state of residence without notice; register their place of employment; be prohibited from unsupervised parenting time or acquiring legal custody of their own children,

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[58] Kidwell v. United States, 38 App. D.C. 566 (1912) in id.

[59] Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763 (1986); Hanford & Botching, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980) Tuerkheimer, A Reassessment and Redefinition of Rape Shield Laws, 50 Ohio St. L. J. 1245 (1989), Note, 27 U. Tol. L. Rev. 217 (1995) in id.

[60] A typical clause of the Criminal Law of Ireland provides that, "if at trial any person is for the time being charged with a rape offence to which he pleaded not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience of a complainant with a person other than the accused". Criminal Law (Rape) Act, 1981 of Ireland, Sec.3.1, www.legislationonline.org. Accessed on July 18, 2009.

[61] Baum, supra note 4, Sec.17.5(d).

[62] Ibid, at Sec.17.5(e).

[63] Duncan, supra note 6, at p.1104.

as well as allowing registration information to be available on the internet and in occasional circumstances not to use an emergency shelter with their own families, and to be tracked by satellite.[64]

It appears that the severity of the sentence to be awarded to rapists across the board has been found to be untenable as a result of which rape as a crime is now divided into degrees. The typical case is that of the Model Penal Code, wherein punishment depends on the severity of the injury inflicted and the type of force if any, used. Accordingly, when the defendant inflicts serious bodily injury upon anyone, this will be a crime that needs to be met with the severest punishment, then follows the case when the victim was not a voluntary social companion of the defendant on that occasion and had not previously permitted him sexual liberties, and at last gross sexual imposition, covering in the main cases where deception or lesser threats were utilized.[65]

2. Rape in Ethiopia: The Law and the Practice

It goes without saying that, rape is undoubtedly one of the rampant crimes in Ethiopia. At the social level, it can easily be noticed that sexual matters are so private, so much so that, individuals including those that may be considered as "modern and educated" by the society's standard, are not free to discuss such matters with anyone except with close associates. This culture of introversion has bred disincentives not only to seek advice from others but also report sexual crimes to the concerned authorities.

Contrary to such deep - seated culture of silence, there is a nascent trend that promises to propel the issue of sexual violence to the forefront and make it one of the burning issues of the time. Accordingly, civil society organizations, particularly those engaged in gender issues have done their best to sensitize the issue using different fora. As a consequence of this development, there is media hype on such issues wherein shocking incidents of grave violations of sexual integrity, particularly on minor children are reported, probably every week, if not every day. It appears that as a result of such sensitization, the agencies of the country's criminal justice system have given a special attention to such matters, as a result of which, many criminals are sent to prison, to serve their sentences and special benches are established in some courts to deal with rape cases.

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[64] Ibid, at pp. 1104 – 1108.

[65] Baum, supra note 4, Sec.17.5 (e). See also Model PC, Sec. 213.1. Note that such gradations are actually shown in many state laws, and the Model PC's position is also criticized. (The author's sources are by and large, state laws. Given the great number of laws cited therein, all footnotes are omitted.)

As indicated at the introductory part, the scope of this article is limited to highlighting the major issues of rape, but not to go any further. In line with this limitation, the following part discusses first, the treatment of rape under the Criminal Code and other relevant laws and then the practice, albeit very briefly.

2.1 Rape under the Criminal Code of Ethiopia[66]

The current Criminal Code of Ethiopia was enacted on 9th of May, 2005.[67] The code places rape under, Part II (Special part), Book III, Title IV, "Crimes against Morals and the Family", and more particularly, under Chapter I –

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[66] The current Criminal Code of Ethiopia is a revised version of the Penal Code of the Empire of Ethiopia, Proclamation No.158 of 1957. The revised code, however, does not add any new element into the definition of the crime of rape as a result of which most of the elements of sexual crimes of the new code are verbatim copies of the former law. It should, however, be noted that the new code has aggravated the punishments and made minor changes here and there. One of its major contributions is making the crime of rape gender neutral. Accordingly, a female upon male rape is introduced for the first time with the enactment of the new law. Moreover, perpetration of other sexual crimes by females is given express recognition. It should be noted that under the 1957 Penal Code as well as the Criminal Code, females could be made liable through participation when the crimes are committed materially by male, See, Art.33 of both codes.

The 1957 code is, however, very different from its predecessor, i.e., The Criminal Code of Ethiopia, 1930. The latter code was inspired by its predecessor, i.e., the Feteha Negest, which is an amalgam of religious and secular rules. That section of the 1930 code had heavily drawn from the Feteha Negest – which came into effect in the 13th Century - so much so that the section that deals with "illicit sexual intercourse" directly quotes and cites the former law in so many instances. The two instances where the 1930 code provided for illicit sexual intercourse without consent are, when a man forces this act on a married woman –Art.387 and when a man has a sexual intercourse with a girl who has not reached the age of puberty without the consent of her parents – Art.395. In the latter case, it does not matter whether the girl has consented or not. Another article that comes close to the subject at hand is, Art. 398, which criminalizes sexual intercourse between a teacher and his student and a person and a girl whom he is teaching, or a man with a girl entrusted to his charge whom he received to bring up. All other articles deal with incest, adultery, seduction, etc. It will be interesting to note that all these crimes were punishable upon complaint unless done in public. As shown above, nonconsensual sexual intercourse was criminalized under two instances only. Accordingly, all other nonconsensual acts of sexual intercourse were not recognized.

[67] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proclamation No. 414/2004, (hereinafter, the Criminal Code).

"Crimes against morals" and Section I – "Injury to sexual liberty and chastity".

Rape as a crime, is legally defined under Art. 620(1) of the code as an act of,

> [Compelling] a woman to submit to sexual intercourse outside of wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance.

As per the definition in the above provision, the constituent elements of rape are:

- The act has to be an act of compulsion, and the purpose behind is, naturally to have a sexual intercourse with the victim;
- The perpetrator can be anybody – female or male – because the word " whosever" is gender neutral, though it appears that the lawmaker has male perpetrators in mind, for rape between or by homosexuals is treated independently.[68]
- The victim has to be a woman;
- The act has to be committed outside of wedlock, which means that marital rape is not a crime;
- The manners of compulsion are: use of violence, grave intimidation, rendering the victim unconscious, or incapable of resistance.

The full scope of the constituent elements of rape are given under this sub article and the other articles that deal with similar offences make use of the same elements or emphasize on absence of consent. For this reason alone, the following part discusses, these elements in light of the major issues identified and discussed in Part One.

2.1.1 The Act

Material act, as a prerequisite to criminal liability, takes on two forms, i.e. a positive behavior/ physical act or negative behavior, omission.[69] Rape falls under the former, i.e., physical act. It is implicit under Art.620 (1) that a rapist

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[68] Art.629 and the following. It is interesting to note here that the equivalent of Art.620 (1) under this section, i.e., Art.630 (2) (a), that deals with sexual deviation, alias, 'homosexual acts', reads as "[using] violence, intimidation or coercion, trickery or fraud, or [taking] unfair advantage of the victim's inability to offer resistance or to defend himself or his feeblemindedness or unconsciousness". Note that though rape proper under Art.620(1) and the crime defined under Art.630(1)(A) are identical except for the gender of the partners, the latter article has added extra elements such as coercion and fraud and different forms of incapacity are lumped together with violent acts.

[69] See, Art.23(1) of the Criminal Code.

has to do a physical act, such as the very act of sexual intercourse, or an additional act/s to compel the victim.

Given the remarks made with regard to intrinsic and extrinsic forces, above - 1.2.3.1- it appears that Art.620(1) demands extrinsic force, but not only intrinsic. This is so, because, a rapist is required to use violence or grave intimidation and then render the victim unconscious or incapable of resistance before raping her. Thus, a simple sexual intercourse without these qualifications cannot make one a rapist.

As shown above, under Sec. 1.2.1, sexual intercourse may take different forms, such as: anal, oral, digital, mechanical, etc. Moreover, the degrees of penetration as well as lack of capacity regarding emission and impotency may determine whether one is a rapist or not. Notwithstanding the remarks made under the next paragraph, the code, however, says nothing about these issues and it remains to be seen whether Ethiopian courts will take into account these factors to determine guilt.

In addition to rape proper, the code provides for a definition of another crime known as "sexual outrage accompanied by violence," under Art.622 and it reads as follows:

> Whoever, by use of violence or grave intimidation, or after having in any other way rendered his victim incapable of resistance, compels a person of the opposite sex, to perform or to submit to an act corresponding to the sexual act, or any other indecent act…is punishable…

The difference between the two articles is that in the case of rape proper, the act has to be an act of sexual intercourse, while in the case of sexual outrage it has to be an act "corresponding to" a sexual act or an indecent act. A look at their respective punishments shows that the former is a serious offence compared to the latter. Despite this difference, the code makes use of all these acts alternative elements of certain crimes, such as: sexual outrage on unconscious or deluded persons, or on persons incapable of resisting – Art.623; sexual outrage on persons in hospital, interned or under detention – Art.624; and taking advantage of the distress or dependence of a woman – Art.625, though here the term "corresponding to a sexual act" is missing. In all other cases, though, the three different acts are elements of other crimes, the punishments are different, i.e., the punishment provided for sexual acts is more sever compared to that of a corresponding act or an indecent act.[70] It may be argued that, if the two crimes are different in degree, then, in those

[70] See, Arts.626 (1) and (3); 627(1) and (3).

instances where they are provided as alternative elements, at least for the sake of consistency, the punishments should have been different too. Thus, lumping them under one crime, as alternative elements is not a wise choice, to say the least.

Be that as it may, the crucial issue here is what are these offences? Are they any different from sexual intercourse? In the absence of a source material, it may be reckoned that the law maker has in mind non-genital copulation - such as anal, oral, digital, mechanical, etc - and these may be taken as acts corresponding to a sexual act. One may surmise here that the difference between the two acts is the lawmaker's fixation on pregnancy which may be brought about by genital copulation alone but not through the other forms. Such fixation can , however, be criticized for failing to take into account the trauma that follows from the other forms of rape which may be equally or even more disastrous than rape committed through genital organs.

As regards, indecent acts, - though very vague - the probable act that may come to mind is touching or kissing, if at all these may be taken as indecent by societal standards. Such broad terms will naturally pose serious problems of interpretation on the part of the judiciary and it remains to be seen how this issue will be handled in the future.

2.2 Requisite criminal mentality.

Under the Criminal Code of Ethiopia, the requisite criminal mentalities, alias, the moral elements, for liability are intention and negligence.[71] Intention may either be direct or indirect. A person commits a criminal act through direct intention, when he did the act with full knowledge and intent (will and voluntariness) and through indirect intention, alias, *dolus eventualis*, when he did the act being aware, that his act may cause illegal and punishable consequences, regardless that such consequences may follow. Moreover, intentional acts are always punishable save in cases of justification or excuse expressly provided by law. Negligence also takes two forms, i.e. advertent and inadvertent. In the former case, an actor does an act by imprudence or in disregard of the possible consequences of his act while he was aware that his act may cause illegal and punishable consequences and in the latter case, through lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences. Unlike in the case of intentional acts, however, negligent acts are liable to punishment only if the law so expressly provides.[72] It should be noted here,

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[71] Arts.57-59.

[72] See, Arts.23, 58 and 59.

that recklessness as a criminal mentality is unknown to the Criminal Code, though it falls in between indirect intention and advertent negligence.[73]

As far as sexual crimes are concerned – Arts. 620 – 628, as well as 629 – 633 - none of the articles of the code provides negligence – expressly – as a requisite criminal mentality. Thus, all crimes have to be committed intentionally in order to bring about criminal liability. It may be argued in this regard that, the different provisions that define the offences seem to demand direct intention, than indirect, for the terms employed appear to indicate purposeful acts rather than the opposite.[74]
As mentioned above - Sec.1.2.2 - a reasonable mistake can serve as a defense in rape trials. This defense is also recognized under Art.80 (1&2) of the Criminal Code. Accordingly,

> Whoever commits a crime under an erroneous appreciation of the true facts of the situation shall be tried according to such appreciation.
>
> Where there is no criminal intention the doer shall not be punishable. Where he could have avoided the mistake by taking such precautions as were commanded by his position and the circumstances of the case…he shall be punishable for negligence in cases where such negligence is penalized by law.

Since all sexual crimes under the code are required to be committed intentionally, then, a person who is mistaken negligently cannot be convicted. Thus, in order to fully avail this defense, a defendant has to show that, though he had done the act under a mistaken impression, he did not do it intentionally.

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[73] See, Sklar, Ronald, "Desire" , " Knowledge of Certainty" and dolus eventualis, Journal of Ethiopian Law, Vol. VII,No.2,pp.373-416, for further explanations on this point.

[74] As shown above, acts of violence, intimidation, etc. are required prior to or accompanying the sexual act. Thus, the reason for doing these acts is undoubtedly to secure sexual service from the victim. If so, such acts should be done for the same purpose and the mentality is more likely direct intention than indirect, which needs to be committed regardless that consequences may follow. Furthermore, though knowledge/awareness is implicit in all articles, Art.623 expressly requires knowledge, by providing that the criminal has to do the act "knowing of his victim's incapacity". If full knowledge as opposed to probability that consequences may follow is required, then the requisite criminal mentality has to be direct intention.

Before we leave this discussion, it helps to note that rape is a gender neutral crime under the Criminal Code.[75]The relevant article, i.e., Art.621 reads "A woman who compels a man to sexual intercourse with herself ...is punishable." Though the punishment prescribed for this crime is much lower than the case of a male raping a female,[76] it is interesting to note that except for compulsion, other elements of rape proper are not required for this offence. There is no explanation given for such a difference in the *expose des motifs*.[77] In the absence of this, it appears that the law maker is much concerned with pregnancy or the psychological trauma that may follow. But these factors are taken into account to aggravate the punishment, under Art.628. Then the basis for the difference in punishments is something else. Whatever the rationale, this opens the door for a constitutional issue of unfair discrimination.

2.3 Threat, coercion, drugs and intoxicants

To begin with, none of these elements are employed in the code. This does not, however, mean that they have no relevance. This is so for the following reasons:

- The word "intimidate" under Art.620 (1) is defined as "to frighten or threaten someone, usually in order to persuade them to do something that you want them to do".[78] Accordingly, a rapist who employed intimidation to secure sexual submission from the victim is undoubtedly, liable to punishment. Apart from this, it is not clear whether the victim has the duty to resist the threat in earnest, as discussed above, under Sec.1.2.3.2. It, however, appears that the law demands a high level of intimidation, but not the ordinary one, for it is required that the degree of intimidation has to be "grave", and the victim should be made unconscious, or incapable of resistance. Thus, any threat short of this, may lead to a conclusion that the victim could have resisted the intimidating force and the actor cannot be held liable. Since this stringent qualification is highly criticized in other jurisdictions, it remains to be seen whether Ethiopian courts will disqualify them. Moreover, whether the threat should be posed against the victim or

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[75] See, Supra note 66.

[76] Under Art.620 (1) the punishment is rigorous imprisonment from five years to fifteen years, while under Art. 621, it is rigorous imprisonment not exceeding five years.

[77] This is a document issued by the legislature, though not officially published. It attempts to explain the reasons why changes are made on the repealed law. It is printed in Amharic (the working language of the Federal Government of Ethiopia). The only reason given in this regard is that "a new article is added due to the increase in the number of such crimes".

[78] Cambridge, Advanced Learners' Dictionary, soft copy, in file with the writer. No date given.

someone else related or unrelated to her is an issue that demands a judicial interpretation. It may, however, be suggested that as far as there is intimidation, it should apply to all situations, for the law has not limited this circumstance to any specific person or relationship.

Coercion is very similar to threat in definition. Accordingly, it is defined as "to persuade someone forcefully to do something which they are unwilling to do".[79] This issue is, however, discussed in light of institutional or professional relationships between a victim and the perpetrator of the crime.

Institutional and professional relationships are reflected under two articles of the code on sexual offenses.

> Art. 624: Whoever, by taking advantage of his position, office or state, has sexual intercourse or performs an act corresponding the sexual act or any other indecent act with an inmate of a hospital, an alms house or an asylum, or any establishment of education, correction, internment or detention, who is under his direction, supervision or authority…is punishable….
>
> Art.625: Whoever, apart from the cases specified in the preceding article, procures from a woman sexual intercourse or any other indecent act by taking advantage of her material or mental distress or the authority he exercises over her by virtue of his position, function or capacity as protector, teacher, master or employer, or by virtue of any other like relationship…is punishable [upon complaint]. [80]

It will be interesting to note here, that the victim in the former case can be anyone of the genders, while in the latter case, it should be a woman. Moreover, though educational institutions are mentioned in the former case, the term "teachers" is mentioned again in the latter case. Though, it will be difficult to explain such disparities in the absence of authority, it appears that the law's fixation on female victims has contributed to this legal position, in

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[79] Ibid.

[80] Note that "an act corresponding to the sexual act" is missing here. It will be interesting to note here, that Art.596 of the former Penal Code, entitled as " Seduction" and which reads as " Whosoever, by taking advantage of the inexperience or trust of a female minor between fifteen and eighteen years of age, induces her to have sexual intercourse with him, whether by promise of marriage, trickery or otherwise, is punishable, upon complaint, with simple imprisonment" is repealed on the ground that it is made a constituent element of Art.626 of the Criminal Code, which is not so in fact. See, the *Expose de Motif,* Supra note 77.

particular the latter position. As mentioned above, however, sexual crimes are by and large made gender neutral under the revised code and the same position should have been reflected under Art.625. Moreover, though the crime defined under Art.625 is named as "taking advantage of the distress or dependence of a woman", it is an old equivalent of "sexual harassment," though it does not include the modern element of "hostile working environment" and other expressions. Given modern institutional relationships between individuals, and the current trend of females holding important institutional positions, the crime should have been made gender neutral.

Another interesting aspect of the difference between the two articles is the punishments provided for the two crimes. Here, while the punishment for the former crime is simple imprisonment for not less than one year, or rigorous imprisonment not exceeding fifteen years, the punishment for the latter is simple imprisonment.[81] Moreover, the latter crime is punishable upon complaint, meaning charges cannot be instituted without complaint and the victim can condone the act while this is not so in cases of the former crime. Though it may not necessarily be a warranted position, it appears that in the former case, victims are taken as helpless individuals who cannot bargain over their sexual conducts, while in the latter, the bargaining power is relatively stronger. In addition to this, given the fact that in both cases, the sexual intercourse that took place are technically consensual, but not extorted through violence, intimidation etc., the punishment provided for under Art.624 is almost equivalent to rape proper.[82] It should be noted here that when rape proper is committed against those individuals listed under Art.624, the punishment ranges from five years to twenty years under Art.620(2). Though, aggravation under sub two may appear to be logical, the initial punishment for consensual intercourse seems to be disproportionate.

So far, the Ethiopian law seems to accord to the standards discussed above - Sec.1.2.3.2 and 1.2.3.3 - except for threats to retaliate, exposing the victim to public humiliation or disgrace, etc. These situations are not covered under that section of the code that deals with sex offences, but rather blackmail is provided as a crime against right in property under Art.714.

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[81] Simple imprisonment normally extends from ten days to three years. – Criminal Code, Art.106

[82] The punishment provided for rape proper is rigorous imprisonment from five years to fifteen years, while in the case of Art.624 it is simple imprisonment for not less than one year, or rigorous imprisonment not exceeding fifteen years. Though the lower limits are different, the upper limits are identical and this is the point that needs to be highlighted.

As regards fraud, within the context of rape, - discussed above, under Sec. 1.2.3.4 – none of the sex offenses in the code contain an element that may lead one to conclude that a sexual intercourse secured through fraud is a crime. So, it may safely be concluded that this act can be done with impunity unless and otherwise the law is to be amended in such a way as to include fraud.[83]

As far as drugging a person so that he should lose feelings or consciousness is concerned, it may be argued that one of the elements provided under Art.620(1), i.e. "rendering the victim unconscious or incapable of resistance", can be taken to mean, drugging or intoxicating a victim, provided that the intention or purpose is to secure sexual intercourse. It also appears that the provision requires that a rapist should administer the drug or intoxicant. With this in mind, it is very unlikely that a person who took advantage of an intoxicated person for sexual ends will be made criminally liable.[84]

2.4 Consent in general

It is noted above, - Sec.1.2.4 - that consent as an element of rape raises so many collateral issues. Given the controversial nature of these issues, the debates over them have not yet abated. This section will attempt to show whether anyone of the issues are reflected under Ethiopian law.

To begin with, the word consent does not appear anywhere in those sections of the code that deal with sexual crimes. It may, however, be said that it is implicitly provided in all articles. The general drafting style of the relevant articles evinces that such crimes are divided into two, i.e., those that require use of violence, grave intimidation, and rendering a victim unconscious or incapable of resistance and those that do not require these qualifications. The latter types of crimes are provided as having sexual intercourse only, and mainly the victims are those who cannot give valid consents. Thus, since violence, intimidation, etc. are circumstances which compel a victim to submit to sexual advances without consent, then such acts are naturally nonconsensual, and the rest are consensual.[85]

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[83] Art.591(2) and 596 of the repealed code had provided that sexual intercourse with unconscious or deluded persons or those incapable of resisting secured through misrepresentation and a minor between the ages of fifteen and eighteen through trickery are punishable. These two come closer to fraud, but they no more exist in the revised code.

[84] Deprivation of powers of decision against one's wills by administering alcohol, narcotic, etc. is a punishable act, under Art.583.

[85] Arts.620 – 622 belong to the former group, while all the rest of the articles under the section belong to the latter.

With regard to the requirement of resistance, it appears that this is an important element of the crime of rape under the law, for the degree of intimidation has to be grave and it should be so strong so much so that the victim has to be incapable of offering resistance. So, if it was possible to put up resistance, then the victim has to exhaust this before submitting to the demand of the rapist. Whether or not the victim should show her non-consent verbally or whether an oral resistance suffices, is just a matter of opinion, though it appears that the code's requirement of violence, grave intimidation, etc. seem to suggest that the intensity of coercion has to be very great and the victim should not give in to average or minor threats and that she should fight the force coming from the rapist as far as she could, or in earnest and that the resistance should be physical. Thus, a mere "no" may not necessarily be taken as an expression of resistance. This forecloses any discussion about verbal resistance and for stronger reasons, silence, for the law has provided in clear terms that the victim has to be deprived of her power of resistance. Such requirements, as shown above, have been subject to criticisms, as a result of which they are now modified or made useless *in toto*. The Ethiopian law maker should also take into account this development and amend the law accordingly, for the presence of this requirement can expose rape victims to further damages and victims' expression of non-consent should be allowed to be made in any form. What is required at the end of the day is whether the victim has expressed her rejection in any form, but not necessarily physically.

As regards, withdrawal of consent, though the Ethiopian law has no clear stand on this position, what matters is the type of coercion exerted on the victim under the circumstances. So, it may be argued that a victim has the right to withdraw her consent but the rapist has to employ the necessary force, - mentioned above – to continue with the sexual intercourse. If no such force is employed or the victim has failed to put up resistance, then under the existing law, such an act cannot amount to rape.

Marital rape, as explained above, - Sec.1.2.4.2, - has remained as a defense for a long time in the law books. At present it no more exists as an exception in so many jurisdictions. Despite this, it still exists as an exception under Ethiopian law.[86] The reasons for maintaining this exception were premised on different theories that reflect the moral values of different societies, which are undoubtedly discriminatory against women. To the best knowledge of this

[86] The term "outside of wedlock" under Art.620 (1) expresses this exception. It should be noted that marital rape is not a constituent element of Art.621, i.e. a female upon rape male rape as a result of which a female cannot be made criminally liable if she rapes her husband.

writer, the issue is still mute, for it is nowhere discussed as an issue.[87] Probably, the only time when the issue was raised, though in passing, was when a gender based NGO published its research on violence against women, in 2004.[88] Interestingly enough, the research does not show a strong condemnation of marital rape among the sample groups singled out for response. The different data collected by the researchers or quoted by them do not bode well for any effort to delete the exception from the law. Here are some of the major statistics: one in two women believes that a husband is justified in beating his wife if she refuses to have sex with him;[89] the incidence of marital rape is 14.9%, though many respondents were hesitant to be frank; 5.4% females were raped when they refused to have sex; and 10.4% of student respondents agree that a woman deserves some form of punishment if she refuses to have sex with her husband;[90]

Moreover, the researchers' reaction is lukewarm, to say the least, for in those instances in which they attempted to show their disapproval, they were so general so much so that one may be tempted to conclude that they were passionless.[91] Against this background, it may be difficult to forecast that the exception will be removed soon. Gender based civil societies have to work a

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[87] Though the presentations under the above sections deal strictly with the law and legal elements, the writer has opted to deal with the practice for this sub section only, for it is intended to show the social perception of this particular act as a departure. Accordingly, this writer had attended a few workshops organized by different bodies to collect suggestions to revise the old penal code. As member of the drafting committee for some time, he had also the opportunity to read recommendations submitted by different bodies, such as gender based NGOs. Though these groups have expressed their disagreement with this legal position, they were not passionate enough to arouse public support, as they did with regard to other crimes such as abortion. The general mood of participants of the different workshops tends to show that removing the exception is "contrary to our culture", it disrupts the bond that needs to exist between spouses, etc. So, the exception that was seen in the repealed law is allowed to continue.

[88] Original Welde Ghiorgis, Emebet Kebede, and Melesse Damte, (hereafter Orignal et al.) Violence Against Women in Addis Ababa, Berchi, the Annual Journal of Ethiopian Women Lawyers Association, 2004.

[89] Ibid, at p.126, quoting, Ethiopian Demographic and Health Survey 2000, Central Statistics Authority, Addis Ababa, Ethiopia.

[90] Ibid, pp.144, 148 and 152, respectively.

[91] In the two instances wherein they showed their position, their expressions are limited to saying that "the failure of the law to protect the wife from marital rape contributes towards weakening her position to negotiate safe sex" at p.120 and "the [Criminal Code] fails short of international standards in according women adequate protection. For example, [ ] marital rape … [is] not considered as [a] crime", p.254.

lot in order to propel this issue to the public agenda, for the issue as discussed above, provokes serious constitutional issues such as those discussed above under Section 1.2.4.2. Incidentally, it helps to note that Ethiopia's position on 'marital rape' had been raised as a cause for concern, by the UN, Human Rights Committee when it considered Ethiopia's report in 12 July, 2011, but the country's representatives did not respond to the request.[92] Hence, it remains to be seen whether such societies or any other stakeholder will do something to amend the law any time soon in the future.

2.5 Incapacity

Incapacity as shown above, - Sec.1.2.4.4, - takes two forms, i.e. those that emanate from mental disease or defect and those that arise out of age. These factors are well taken into account under the Criminal Code of Ethiopia and these will be discussed hereunder.

Art.620 (2) (c) provides that

> Where rape is committed on a woman incapable of understanding the nature or consequences of the act, or of resisting the act, due to old age , physical or mental illness , depression or any other reason...[the act will be considered as an aggravated form of rape][93]-[underline added].

Another facet of rape, i.e., sexual outrage, which is required to be done without violence or intimidation, but to be done against unconscious or deluded persons incapable of resisting, is also a punishable act.[94]

It is here, interesting to note that though there was an attempt to make all sexual offences gender neutral, in the case of rape, the victim has to be a female while it is not so in the other case. Moreover, though all sexual crimes require intention as a criminal mentality, sexual outrage expressly, requires "knowledge", which may be taken arguably, to mean, direct intention. In both cases, the degree of incapacity, i.e., total or partial is not indicated sufficiently, though it appears that the wordings of the relevant articles demand total incapacity. All these shortcomings call for a reconsideration of the relevant

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[92] http://www.unog.ch/80256EDD006B9c2E, last visited on August 23, 2012.

[93] Normally rape is punishable by rigorous imprisonment from five to fifteen years, while aggravated rape is punishable by rigorous imprisonment from five years to twenty years.

[94] The article reads as follows: "whoever, knowing of his victim's incapacity, but without using violence or intimidation, performs sexual intercourse, or commits a like or any other indecent act, with an idiot, with a feeble-minded or retarded, insane or unconscious person, or with a person who is for any other reason incapable of understanding the nature or consequences of the act ....is punishable – Art.623.

articles in light of the development of the issue in other jurisdictions. The gender specific crime under Art.620 (2) in particular, is not justifiable under any condition.

With regard to rape or sexual outrage against minors, alias "statutory rape", it appears that the code has given sufficient protection against these acts. Accordingly, rape committed against a young woman between thirteen and eighteen years of age, is an aggravated crime under Art.620 (2) (a); per Art.626(1&2), sexual outrage with a minor of the opposite sex – under the same age bracket – is made a crime, though the punishment varies when the act is done by a male and a female;[95] and performing an act corresponding to the sexual act or any other indecent act, as well as, *deliberately performing such acts in their presence*,– against minors in this age group – is a punishable act, under Art.626(3). [Emphasis added]. Moreover, per Art.626 (4), the respective punishments are made more sever, when the victim is the pupil, apprentice, domestic servant or ward of the criminal. According to Art.627, all these crimes when committed against minors who are below the age of thirteen are made punishable with more severe penalties, compared to those provided for sexual outrage. At last, per Art.628, unless and otherwise a more severe penalty is provided, the penalty will be aggravated where: the victim becomes pregnant; the criminal transmits to the victim a venereal disease which he knows himself to be infected; or the victim is driven to suicide by distress, shame or despair.

The dividing line in all the provisions is thirteen years of age. Though, whether this uniform threshold age, is scientific or not is a matter of opinion, the relevant articles mentioned above, raise some critical issues. Accordingly, given the fact that sexual intercourse with a minor of tender age, say, ten years or less - which is not uncommon in this country - causes more harm than the same act committed on a thirteen to eighteen years of age minor, the law had failed to take this as a special aggravating circumstance. What is provided in this regard is sexual outrage, not rape.[96] In addition to this, the law's fixation

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[95] The act when committed by a male is punishable with rigorous imprisonment from three years to fifteen years, while it is rigorous imprisonment not exceeding seven years, when it is committed by a female- Art.626(1) and (2).

[96] Sexual intercourse with a minor under thirteen years of age is taken as sexual outrage only, and this is a consensual intercourse, according to the definition given to the act under the code, for no violence or intimidation is required. Though the punishment for sexual outrage on such minors is more severe than rape against those who are between thirteen and eighteen – rigorous imprisonment from thirteen years to twenty five years for the former and from five years to twenty years for the latter – it would have been preferable to separate the acts into rape proper and sexual outrage

on pregnancy or chastity – presence of hymen - has made the punishments different when the victim is a female and a male. Given the consequences of rape or sexual outrage on male minors, more particularly, the psychological harm, this point appears to demand reconsideration. At last, the alternative form of sexual act provided under Art.623 (3), i.e. performing acts that correspond to the sexual act or an indecent act *in the presence of a minor* is quite different – in the extent of consequences - from doing the acts themselves on the minor. Thus, its inclusion as an alternative element is unwarranted, to say the least, for the extent of harm that may ensue as a result of being a victim of the physical act and simply watching sexual partners perform the act or even engage in indecent acts are obviously quite different. Whether or not the age limit discourages sexual experimentation between minors or is an impediment to free sexual expression is a matter opinion, but needs reconsideration.

2.6 Issues of Procedure and evidence

As noted above, - Sec. 1.2.5,- rape trials have developed their own unique issues and solutions, most of which were solved after reform. Such issues pertain to, *inter alia*: false accusations that emanate from pregnancy, sour relationships after the affair, blackmail, etc. Accordingly, rape victims were required to report the incident within a short time, their testimonies should be corroborated by additional evidences and their prior sexual conducts should be admitted for the purpose of impeachment.

Such issues are more academic than practical in the present day Ethiopia, for at least one reason, and this is the absence of an evidence law that governs the area. Ethiopia, has not yet enacted an evidence law, as a result of which evidence provisions are scattered in other laws, either substantive or procedure laws. These scattered provisions do not help much in addressing the multifarious issues that arise in rape litigations. Thus, it is common among professionals to grapple with such issues and litigate cases based on a draft evidence law – which has no binding force – but is taught in law schools, and may arguably be taken as a persuasive sort of law. This draft, of course contains provisions that deal with admissibility of evidences, relevance of

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and provide appropriate punishments at least for the sake of consistency. It is well known that a minor – under eighteen – cannot give a legally valid consent, but consent, nonetheless. Despite this, those who are between thirteen and eighteen are minors, and their consent, though invalid in the eyes of the law makes the crime committed against them a less serious offence, i.e., sexual outrage, but not rape proper. So in the case of those who are under thirteen years of age too, the same formula should have been followed and it should have been left for the defendant to prove that there was consent, which will be hard to prove as the age in question decreases.

evidences, etc. But, given its nature, i.e., that it is just a non - binding draft law, it will be of no help here. Accordingly, no discussion is offered here regarding issues of evidence. The Criminal Procedure Code also does not offer much help here, for its provisions are very general so much so that an attempt to search for precise solutions to the above issues simply leads to a dead end. Nonetheless, this code provides that both the prosecution and the defense have rights to submit their own evidences, call witnesses, put questions to witnesses, in the form of examination in chief, cross examination, and reexamination. Moreover, as the country follows the inquisitorial system as opposed to the adversarial, courts may also call any witness whose testimony it thinks is necessary in the interest of justice. Both parties have the right to object the admission of any evidence or the putting of a question to a witness and the court has to the duty to decide forthwith on the admissibility of such evidence.[97] Given such a lacuna, it may be argued that parties to rape litigation, more particularly, the defense, can raise all the issues mentioned above, and it will be difficult for the prosecution to oppose the submission of evidences provided that they are relevant. Given the difficulties that arose vi`s a vi`s these issues in other jurisdictions, Ethiopia has to enact an evidence law and take these factors pertaining to rape litigations into account. The enactment a rape shield law should also be considered.

2.7 Punishment

Rape is naturally considered as one of the most serious crimes under the code. This can be gleaned from the different punishments provided for rape proper and its other facets. Accordingly, rape proper is punishable with rigorous imprisonment from five to fifteen years; from five years to twenty years when the victims are those that are incapable to give valid consent; and life imprisonment when the act has caused grave physical or mental injury or death.

These punishments are comparable with those provided for other well known serious crimes such as homicide and robbery. Comparative punishment scale also shows that rape is more serious than grave willful injury, for the punishment for the latter is rigorous imprisonment not exceeding fifteen years under Art.555.

By way of conclusion, though the different mechanisms that have developed in other jurisdictions to track rape offenders are not put in place in Ethiopia,

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[97] See, Arts. 136 - 147 of The Criminal Procedure Code Proclamation 1961, Extraordinary Issue No.1 of 1961, on evidence. The code, however, does not provide how the court can rule on such issues.

for the economic development does not allow their presence, policy makers should, however, consider their implementation if not now, but in the future.

2.8 The practice

2.8.1 Court cases

Seventeen court cases decided in 2006/7, 2008/9 [1999 and 2001 E.C][98] and one case in 2012 are analyzed in the following section. Two of the cases were entertained by the Federal High Court, while the rest were entertained by the First Instance Court.

Profiles of the cases

- Defendants were represented in two of the cases in the First Instance Court and one case in the Appellate Court only.
- The rate of conviction was 12/15 and nil at the First Instance, and at Appellate Court, it was 12/13, respectively.
- The age of victims ranges from 9 months to 25 years. Four of these are adults, i.e., above eighteen years of age, while the rest are minors and infants, i.e., below thirteen years of age.
- Sentences passed on convicts range from 1 year of rigorous imprisonment up to life. Only one out of the fifteen defendants was acquitted by the First Instance Court, while two of the appellants – who were sentenced to 5 years of imprisonment – are set free by the Appellate Court[99]. In two cases of attempted rape,- Cases NO.69602

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[98] Courtesy of judges Kedir Mhammed and Maria Kahsay. File Numbers of these cases are: First Instance cases: 85118, 83089, 64260, 57206, 70125, 69602, 144610, 137377, 108791, 124402, 131807, 144573, 146952, and 150068 and 68086 and 71034 from the appellate court. All the cases were decided between 2007 and 2009.
Court decisions are not normally published in Ethiopia. Despite this, the Federal Supreme Court more particularly, its Cassation Division has started publishing its decisions quite recently. To the best knowledge of this writer, it is only one case that pertains to rape that is reported in this publication and this case does not help much in elucidating anyone of the issues treated in this article. In all other cases, court files are stored in archives and researchers have to sift through many box files to locate cases of their interest. The cases discussed here do not in any way represent the cross section of issues or decisions of courts, but these are mere samples. The writer believes that those cases discussed hereunder throw light on the critical issues that need to be covered and show judicial trends.

[99] In Case No.144573, the First Instance Court acquitted the defendant who allegedly inserted his penis, fingers and a scissor into the vagina of a 3 years old female on the ground that medical examination was sought five months after the first incident, though the parents claimed that they had forgiven the first act, but forced to seek examination when the defendant repeated the act soon before the examination. The medical report shows that though some lacerations are visible, the hymen is intact. The Appellate Court reversed the two cases in which defendants were convicted and

and 131807 - wherein the victim raised hue and cry and saved by those who heard that and a victim who noticed that the defendant was attempting to rape her while asleep, but managed to escape, the court awarded a 5 years and 1 year imprisonment, respectively

- Typical acts of violence were proved to have been employed in at least five of the cases. Accordingly defendants had muffled the mouths of their victims, tied and pulled their arms, threatened them with knives, dragged them into toilets and closed doors behind victims, took off their clothes and in some cases victims were seen lying unconscious after the acts. In those cases that involved infants consent was not required to prove, while in the other cases it is not clear whether the acts were done violently or otherwise.
- As regards defenses raised by defendants, two defendants argued that the acts were done upon consent – cases NO.83085 and 71034 – discussed above. In the former case, the defense was rejected by the court, for victim was seen lying unconscious after the act and the second case, the decision of the lower court was reversed on the ground that the act was done consensually. Two defendants raised an oblique defense of absence of resistance in which they denied doing the act and argued that had they done it, victims would have raised hue and cry – cases NO.144610 and 146952. Interestingly enough, victims were 9 and 10 years old and a grand and a step daughter of the rapists, respectively.
- The severest injury inflicted was permanent gynecological problem in Case NO.8510 in which the victim was a 9 months old child. The next

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punished with 5 years of imprisonment on the following grounds: The defendant – a visitor to the home of the victim's parents – requested the victim- who is only 13 years of age - to give him a glass of water and then asked her to kiss him. Then after he pushed her onto a nearby chair, threw himself on her, attempted to take off her clothes and started to struggle. The victim, however, managed to escape the attack by pushing him off herself and crying for help in which case he desisted from going any further. The Appellate Court, argued that what were done in the case amount to preparation, but not attempt, for there should be further acts that need to be done by the defendant, so that the acts could have amounted to attempted rape. Note that per Arts.26 and 27 of the Criminal Code, "preparatory acts are not usually punishable, unless in themselves they constitute a crime defined by law or they expressly constitute a special crime by law… and an attempted crime is always punishable save as is otherwise provided by law". In the second case, defendant took the victim – a 17 years old female - to his house promising to marry her and she stayed there for a single night. A medical report proved that an old defloration is observed. The court argued that the victim has contradicted her testimonies. The prosecution cannot prove violence and the act amounts to seduction, but not rape. Cases NO.68086 and 71034, respectively.

severe injury was inflicted on a 10 years old female by her step father who deflowered her and repeated the act at a later time. The victim's injury was communicated to the mother through the former's instructors. The rapists were awarded a life and 25 years of imprisonment, respectively.

- Incidental issues – the First Instance Court took prompt reporting as a factor to convict a rapist in Case NO.57206 and acquitted a defendant on the ground that medical examination was sought five months after the incident. In Case NO.137377, the Court rejected the defendant's plea to have a reduced punishment on the ground that the medical report shows that the victim's hymen is intact and what was proved was the presence of a recovering laceration. The Court reasoned out that partial penetration of the penis suffices for the purpose of conviction.
- The only case in which a female was convicted for raping a 2 years old male infant is the one reported in Ethiopian Reporter[100]. The convict caused the infant to have sexual intercourse with her as a result of which he started to raise the skirts of and show acts of sexual intercourse on other maids who were employed by the family after the termination of the contract of employment of convict. Medical evidence proved that the kid has suffered from psychological trauma and referred to a specialist. The convict is sentenced to a five and a half years of imprisonment.

The sample cases presented above may lead one to conclude that rape cases do not call for any sophisticated legal issues and can be disposed with ease. The rate of conviction may also be indicative of the fact that suspects have little opportunity to escape the harsh consequences of criminal liability. Though these may not necessarily be the only conclusions that may be drawn from the practice, it appears that Ethiopian lawyers – at every level – need to give full effect to the letters of the law by raising critical issues and resolving rape disputes according to the spirit of the law. It can be easily gleaned from the above cases that necessary elements of the law were not applied in all cases.[101] Though the absence of defense counselors might have contributed to this state of affair, judges should also do their best in handling delicate issues that determine innocence or guilt, and the severity of sentences passed by them and provided by the law for such crimes call for extra vigilance.

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[100] Ethiopian Reporter, Amharic Version, June 3, 2012. No case number is shown in the report.

[101] It should be noted that all the court decisions are not beyond criticism. Given the scope of this article, however, no attempt is made to do so.

2.8.2 Other researches

Contrary to the above presentation, wherein the majority of defendants were found guilty and sentenced to prison terms, a study conducted in 2004,[102] draws a gloomy picture of rape cases handled by different agencies of the criminal justice system. According to this research, which has studied 123 files of rape cases at different police stations, offices of the prosecution and courts, "even if it is not proved whether it is due to the actual increase in the rape numbers or the number of reports, the trend shows that there is an increase in the crime of rape rate that has been reported, prosecuted, and adjudicated.[103]"

The research also shows that different forms of sexual intercourse, such as anal, oral and digital are not uncommon in the country.[104] This may not be surprising given the uncontrolled circulation of pornographic materials, not only in the capital city wherein the study was conducted, but all over the country. Sadly enough, most of the victims were infants – in the wording of the law – and most of the rapists were those known to them, such as biological fathers, and step fathers.

The researchers lament about the deplorable state of handling rape cases at the different agencies and in particular the fixation of officials on the presence or absence of hymen to prove or disprove that a rape has taken place. Moreover, though consent, is mentioned incidentally in the research, it is shown that prosecutors and courts tend to treat rape cases as cases of sexual outrages even when these are committed against infants below the age of ten, provided that no force is employed. The abuse of bail rights, the short sentences given by the courts, and fake marriages[105] that are concluded after the cases are reported to the authorities are some of the major shortcomings of the justice system identified by the researchers. The researchers also opine that "the difficulty to prove the offence beyond reasonable doubt, pressures created by the offenders or their families against the victim or her family members…economic dependency of the victims on the offenders (e.g. step

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[102] Original W/Ghiorgis, et al. Supra, Note 88.

[103] Ibid, p.251.

[104] Id.pp.167, 217,218,224,227 and 242.

[105] An article under the repealed law had provided that "where the victim of rape, indecent assault or seduction or abuse of her state of distress or dependence upon another, freely contracts a marriage with the offender, and the marriage is not declared null and void, no prosecution shall follow. Where proceedings have already taken place, and have resulted in a conviction, the sentence shall terminate forthwith" - Art. 599. This article was highly criticized for giving a shelter to those who want to escape liability in the name of marriage which may be dissolved upon minor pretexts and prejudicial to females. Accordingly, it is now repealed.

fathers and employers)…fear, embarrassment, self-blame, confusion and ignorance of their rights" have contributed to the underreporting of rape case.[106]

Conclusion

There is no denying the rampancy of rape crimes as well as their consequences in Ethiopia. These are mainly caused due to legal loopholes, the male chauvinist culture that has deep roots in the cultures of many societies, the inefficiency of the different agencies of the criminal justice system and lack of awareness on the part of victims. It may also be added that lack of knowledge on the part of lawyers regarding the legal requirements necessary to handle rape cases is undoubtedly another predicament in this regard. The fact that many legal issues that include constitutional interpretation are not yet tested in the country bears witness to this fact. The close to total absence of the exercise of the right to defense counsel, has led to a vacuum to raise such intricate legal points mentioned in this article. Given the severity of punishments prescribed for sexual offenses, however, all defendants should have been given this opportunity.

The Ethiopian rape law is definitely in need of a rethinking for it leaves much to be desired. Accordingly, the law needs to incorporate the different standards that have developed in other jurisdictions. In this regard, it is recommended that in the future rape law: All sex crimes should be made gender neutral and their punishments should be similar if not necessarily identical; the distinction between rape and sexual outrage accompanied by violence should be made clear; or alternatively, the two crimes should be merged. Moreover, the lumping of these crimes as alternative elements of certain crimes should be done away with.

Moreover, the future law should also address the reconsideration of marital exemption; appropriateness of punishments for the crime of rape and its variants; and enactment of rape shield law.

Civil society organizations should also endeavor to create awareness among the general public in general and potential victims of rape in particular. Sensitization of the law among law enforcement agencies should be considered as well. With these recommendations, it will be hoped that the future rape law of Ethiopia will serve all in equality.

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[106] Id. at p.251.

ቼክና ዋስትና

በዮሴፍ አእምሮ*

መግቢያ

በአንድ አገር የገበያ ሥርዓት ውስጥ ክፍያ የሚካሄድበት ደንብ አለ። የክፍያ ሥርዓቱም በዓይነት፣ በጥሬ ገንዘብ፣ በሰነድ ወይም በኤሌክትሮኒክስ ሊሆን ይችላል።[1] በዓይነት ወይም በጥሬ ገንዘብ የሚደረጉ ግብይቶች በአብዛኛው ተጨማሪ ወጭ የሚጠይቁ፣ ለአያያዝ የማይመቹ እና የደህንነት ሥጋት ያለባቸው የክፍያ መፈፀሚያ ዓይነቶች ናቸው። እነዚህን ሥጋቶች ለመቅረፍ እና የክፍያ ሥርዓቱን የበለጠ ቀልጣፋ እና ውጤታማ ለማድረግ ክፍያ በቀላሉ ሊፈፀምባቸው የሚችሉ ተላላፊ የንግድ ሰነዶች ተፈጥረዋል። በኢትዮጵያ የንግድ ህግ አራተኛ መፅሃፍ ሥርም ከአንቀጽ 715-895 ስለ ተላላፊ የገንዘብ ሰነዶች ዓይነት፣ አጠቃቀም እና ኃላፊነት በዝርዝር ተደንግጓል። በንግድ ህጋችን እውቅና የተሰጣቸው ተላላፊ የሆኑ የክፍያ መፈፀሚያ ሥርዓቶች አራት ናቸው። ከዚህ በተጨማሪም በመጋዘን ለተቀመጡ ዕቃዎች የሚሰጥ ደረሰኝ (warehouse goods deposit certificate) እንደ ንግድ ወረቀት እውቅና ተሰጥቶታል። ይህ ግን የክፍያ መፈፀሚያ ሳይሆን፣ በመጋዘን የተቀመጡ ዕቃዎችን መጠየቂያ ነው። ከንግድ ህግ በተጨማሪም በፍትሃብሔር ህጉ እና የተለየ ህግ ወጥቶለት ይገኛል።[2] የክፍያ መፈፀሚያ የንግድ ወረቀቶችም የሃዋላ ወረቀት፣ ቼክ፣ የተስፋ ሰነድ እና የመንገድ ቼክ ናቸው። ከእነዚህ የክፍያ ሥርዓቶች ውስጥ በኢትዮጵያ ከሌሎች አንፃር በተሻለ በስፋት የሚሰራበት ቼክ ነው። ቼክ ለባንክ ወይም ለተመሳሳይ ተቋም እንደቀረበ ክፍያ የሚፈፀምበት እና ለሌላ አገልግሎት የማይውል ነው። ይህንን በተመለከተ ሮይ ጉድ የተባሉ የንግድ ህግ ምሁር ሲፅፉ፡-

> "...It is primarily a payment direction, not a credit instrument, and is by its nature intended to be presented and paid almost immediately ..." ብለዋል[3] ትርጉሙም ... የዱቤ ሰነድ ሳይሆን በቀጥታ ክፍያ የሚፅምበት እና በባህሪውም እንደቀረበ ወዲያውኑ የሚከፈል ነው።

በኢትዮጵያ ፍርድ ቤቶች ቼክን በተመለከተ በሚደረጉ ክርክሮችም፣ ቼክ ለባንክ እንደቀረበ የሚከፈልበት የንግድ ወረቀት እንደሆነ እና ለሌላ አገልግሎት

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* ኤል.ኤል. ቢ፣ኤል.ኤል. ኤም፣ የሕግ አማካሪና ጠበቃ፣ በአዲስ አበባ ዩኒቨርሲቲ የሕግ ትምህርት ቤት የከፊል ጊዜ መምህር።

[1] በኤሌክትሮኒክ የሚፈፀም የክፍያ ስርዓት ለኢትዮጵያ በብዛት የማይሰራበት ነው። በአሁኑ ጊዜ ግን ባንኮች በኤቲኤም እና ቪዛ ካርድ ክፍያዎችን መፈፀም ጀምረዋል። የብሔራዊ የክፍያ ስርዓት አዋጅ ቁ. 718/2003 ታውጇል። በዚህ አዋጅ መሠረት በኤሌክትሮኒክ የሚፈፀሙ ክፍያዎች በኮምፒውተር፣ በሽያጭ ነቁጥ (poin of sale)፣ ራስ ሰር የክፍያ ማሽን (ATM)፣ ቴሌፎን እና በሌሎች ተመሳሳይ መገልገያዎች የሚፈፀመውን ነው።

[2] የፍትሐብሔር ህግ ቁጥር 2806-2824፣ አዋጅ ቁጥር372/96.

[3] Roy Goode, commercial law, Penguin books, 1995 page 580.

እንደማይውል መግባባት አለ።[4] ይህ አቋም ግን አስገዳጅ የህግ ትርጉም የመስጠት ሥልጣን ባለው የፌዴራል ጠቅላይ ፍ/ቤት የተለወጠ ይመስላል። የዚህ ፅሑፍ ዓላማም በቼክ ባህሪ እና በፍርድ ቤቱ ውሳኔ ላይ ምልከታ ለማድረግ ነው።

የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በመሰረታዊ የህግ ትርጉም ስህተት ላይ ከ5 ባላነሱ ዳኞች የሚሰጠው ውሳኔ በሃገሪቱ የሚገኙ የዳኝነት እና ዳኝነት መሰል አካላት እንዲከተሉት በአዋጅ ቁጥር 454/97 ተደንግጓል። በዚህ ሥልጣኑ መሠረት ፍ/ቤቱ በበርካታ ጉዳዮች በበታች ፍ/ቤቶች አስገዳጅነት ያላቸው የህግ ትርጉም ውሳኔዎች እየሰጠ ይገኛል። ፍ/ቤቱ ውሳኔ ከሰጠባቸው ጉዳዮች አንዱ ከቼክ አጠቃቀም ጋር በተያያዘ በሚነሱ ክሶች ላይ በሠበር መዝገብ ቁጥር 24435 የካቲት 4/2000 ዓ.ም የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት የሰጠው ውሳኔ ነው።

የጉዳዩ አመጣጥና የተሰጡት ውሳኔዎች በአጭሩ የሚከተለው ነው። በሰበር ችሎት አመልካች የሆኑት ግለሰብ ቁጥር 0574420 በሆነ ቼክ ብር 55,000 (አምሳ አምስት ሺ ብር) እንዲከፈልበት ለተጠሪ ፈርመው የሰጡ ሲሆን ቼኩ ለባንክ ቀርቦ ሳይከፈልበት ተመልሷል። ተጠሪ ከዚህ የቼክ ገንዘብ ውስጥ ብር 25,000 (ሃያ አምስት ሺ ብር) ተከፍሏቸው ብር 30,000 (ሰላሳ ሺ ብር) ያልተከፈላቸው ስለሆነ ይኸው ገንዘብ እንዲከፈላቸው ክስ ይመሰርታሉ። አመልካች ክሱ ሲቀርብባቸው በሰጡት መልስ ቼኩ የተሰጠው በተጠሪና አቶ ሙሳ መሐመድ መካከል በነበረው አለመግባባት በሽምግልና ጉባኤ በቀረበው ሃሳብ መሠረት ለሁለቱ ተከራካሪዎች መተማመኛነት የተሰጠ እንጂ ለክፍያ የተሰጠ አይደለም ብለዋል። ጉዳዩን መጀመሪያ ያየው ፍ/ቤትም ቼክ ግልጽ የሆነ የክፍያ ትዕዛዝ፣ በአውጭው ላይ የክፍያ ኃላፊነት የሚፈጥር የገንዘብ ሰነድ እንጅ በዋስትናነት የሚሰጥ አይደለም በማለት የአመልካችን ክርክር ሳይቀበል ገንዘቡን እንዲከፍሉ ወስኗል። ጉዳዩን በይግባኝ ያየው ፍ/ቤትም ቅሬታውን ሳይቀበል የሥር ፍ/ቤቱን ውሳኔ አፅንቷል።

ከዚህ በኋላ ጉዳዩ የቀረበው ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ነው። የሃገሪቱ ፍ/ቤቶች የመጨረሻ የሆነው ይኸው ችሎትም ግራ ቀኝ ወገኖችን አከራክሮ በድምጽ ብልጫ በመ/ቁ. 24435 በ4/6/2000 በሰጠው ውሳኔ ቼክ በዋስትና ሊሰጥ የማይችል ለመሆኑ በንግድ ህጉ አልተደነገገም፣ በአመልካች እና ተጠሪ መካከል የዋስትና ውል ግንኙነት ያላቸው ለመሆኑ ስለተገለፀ እና ይህ ደግሞ የግል ግንኙነት ያላቸው ለመሆኑ ስለሚያመለክት እና ይህ ደግሞ የግል ግንኙነት (Personal relation) መኖሩን ስለሚያሳይ አመልካች በመቃወሚያነት ሊያቀርቡት ይችላሉ የሚል ድምዳሜ ላይ ደርሷል። በአጭሩ በሰበር ውሳኔ መሠረት ቼክ በዋስትናነት ወይም መተማመኛነት ሊሰጥ የሚችል ሰነድ ነው ማለት ነው።

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[4] ፀሃፊው ከ10 ዓመት በላይ በፌዴራል ፍርድ ቤት እየሰሩ፣ ቼክ ለባንክ እንደቀረበ የሚከፈልበት ገንዘብን ተክቶ የሚሰራ የንግድ ወረቀት ስለሆነ ለዋስትና ወይም ለመያዣነት አያገለግልም የሚለው አቋም ሥር የሰደደ እና ተቀባይነት ያለው ነበር።

እውን ቼክ በዋስትናነት ወይም መተማመኛነት ሊሰጥ የሚችል ሰነድ ነውን?

ቼክ እንደ ዋስትና

ቼክ ምንድን ነው? ዋስትና ምንድን ነው? ቼክን ከሌሎች ተላላፊ የገንዘብ ሰነዶች የሚለዩት ባህሪያት ምንድን ናቸው? የቼክ አይነቶች ምንድን ናቸው? የሚሉትን መመልከት መነሻችንን ለመረዳት ጠቃሚ ነው። ቼክን የተለያዩ ምሁራን በተለያየ መንገድ ይገልፁታል። ሁሉም የሚስማሙበት ትርጉም ግን ቼክ ገንዘብ የሚከፈልበት ተላላፊ ሰነድ መሆኑን ነው። ቼክ እውነተኛ ገንዘብን ተክቶ ክፍያን ለማቀላጠፍ የሚያስችል እንደቀረበ የሚከፈልበት እና ሃተታ የሌለበት ተላላፊ የንግድ ወረቀት እንደሆነ black's law የተሰኘ የህግ መዝገብ ቃላት ተርጉሞታል።[5] ይህ ትርጉም ተቀባይነት ያለውና በእኛ ሀገር የንግድ ህግም የተካተተ ለመሆኑ የንግድ ህግ ቁጥር 732፣ 827 እና 854 ገጣጥሞ በማንበብ መረዳት ይቻላል።

ቼክ መብቱ ከሰነዱ ተነጥሎ አይሰራበትም። የቼኩ አውጭም ቼኩ ላይ ለተፃፈው ገንዘብ አከፋፈል ኃላፊነት አለበት። ቼክ ከሌሎች ተላላፊ የንግድ ወረቀቶች ያለውን አንድነት እና ልዩነት በአጭሩ መመልከት መልካም ነው። በንግድ ህግ ቁጥር 732(2) ላይ 5 ዓይነት የንግድ ወረቀቶች ተመልክተዋል። እነዚህም

1. የሃዋላ ወረቀት (Bill of Exchange)
2. የተስፋ ወረቀት (Promissory notes)
3. ቼክ (chque)
4. የመንገድ ቼክ (Travelers cheque)
5. በመጋዘን ላሉ ዕቃዎች የሚሰጡ የምስክር ወረቀቶች (Warehouse certificate) ናቸው::

ቼክና የሃዋላ ወረቀት

ሁለቱ ሰነዶች በርካታ ተመሳሳይነት አላቸው። ሃዋላም ቼክም ሃተታ የሌለባቸው እና የመተላለፍ ጠባይ ያላቸው ናቸው። በኮመን ሎው የህግ ሥርዓት ተከታይ አገሮች ዘንድ ቼክ አንድ ዓይነት የሃወላ ወረቀት ነው።[6] ልዩነቱ ከፋዩ ባንክ መሆኑ ነው። የሲቪል ሎው የህግ ስርዓት በሚከተሉ ሃገሮች ግን ቼክ እና ሃዋላ ራሳቸውን ችለው የቆሙ ናቸው። ተመሳሳይነታቸው የበዛ ቢሆንም የሚከተሉት ዋና ልዩነቶች አሏቸው።

1. የቼክ ከፋይ ምን ግዜም ባንክ ነው። የሃዋላ ከፋይ ግን ባንክ ላይሆን ይችላል። (የንግድ ህግ ቁጥር 829).

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[5] Black's Law dictionary, 9th edition (2009)

[6] In the UK Bills of Exchange Act of 1882 as cited in Roy Goode, Commercial Law (2004) cheque is defined as a bill of exchange drawn on a banker payable on demand.

2. በሃዋላ ወረቀት ላይ ተከፋይ ወለድ ሊታዘዝ ይችላል፡፡ በቼክ ግን አስቀድሞ ሊታዘዝ አይችልም፡፡ በቼክ ወለድ የሚታሰበው ቼኩ ለባንክ ቀርቦ ሳይከፈል ከተመለሰበት ጊዜ ጀምሮ ነው (የንግድ ህግ ቁጥር 739 እና 873)
3. ቼክ የሚያዝ ሰው በባንክ ሂሳብ ሊኖረው ሲገባ ለሐዋላ ግን አስፈላጊ አይደለም፡፡
4. የሃዋላ ወረቀት ለእሽታ (Acceptance) መቅረብ ሲገባው ቼክ ግን እሽታ አያስፈልገውም (የንግድ ህግ ቁጥር 757)
5. የሃዋላ ወረቀት በዋስትና ሊያዝ እንደሚችል በንግድ ህግ አንቀጽ 754 ላይ ተመልክቷል፡፡ ቼክ ግን በዋስትና ሊያዝ እንደሚችል በየትኛውም የህጉ ክፍል አልተመለከተም፡፡

ቼክና የተስፋ ሰነድ

ሁለቱም ሰነዶች ሃብታ የሌለባቸው እና ተላላፊ የንግድ ወረቀቶች መሆናቸው ያመሳስላቸዋል፡፡ በቼክ ሦስት ባለድርሻዎች ማለትም የቼኩ አውጭ (drawer) ባለመብት (holder) እና ከፋይ (ባንክ) ሲኖሩ በተስፋ ሰነድ ግን የሰነዱ ሰሪ (Maker) እና ተከፋዩ ብቻ ናቸው፡፡ የተስፋ ሰነድ ወደፊት ያለ ዕዳ ክፍያ ማረጋገጫ ሰነድ ነው፡፡

ሌሎች የንግድ ወረቀቶች ማለትም የመንገድ ቼክ እና የመጋዘን የምስክር ወረቀት ተላላፊ የንግድ ወረቀቶች መሆናቸው ከቼክ ጋር ያመሳስላቸዋል፡፡

የቼክ ዓይነቶች

በአብዛኛው የሚታወቁት የቼክ ዓይነቶች

1. ለአምጪው የሚከፈል ቼክ (Bearer cheque)
2. የአምጪው ስም ያለተፃፈበት ቼክ (Blank cheque)
3. የስርዝ ምክልት ያለበት (crossed cheque)
4. ሲቀርብ እንደሚከፈልበት በአውጪው የተረጋገጠ ቼክ (ምልክት ያለው ቼክ) (Marked cheque or certified cheque)
5. የሠረዝ ምልክት የሌለበት (open cheque)
6. የትዕዛዝ ቼክ (order cheque)
7. ማረጋገጫ ቼክ (Memorandum cheque) ናቸው፡፡[7]

ለአምጪው የሚከፈል ቼክ ማንነትን መነሻ ሳያደርግ ቼኩን ላመጣ ሰው ክፍያ የሚፈፀምበት ነው፡፡ ባዶ ቼክ ደግሞ የአምጪው ስም ያልተፃፈበት ሰነድ ነው፡፡ የሰረዝ ምልክት ያለበት ቼክ የሚከፈለው አምጪው ደንበኛ የሆነለት ባንክ ወይም ለራሱ ለባንኩ ደንበኛ ብቻ ነው፡፡ ምልክት ያለው ቼክ ደግሞ ለባንክ ሲቀርብ እንደሚከፈልበት በተጨማሪም በአውጪው የማረጋገጫ ምልክት የሚሰጥበት ነው፡፡ ግልጽ ቼክ ምልክት የሌለው እንደቀረበ የሚከፈልበት ነው፡፡ የትዕዛዝ ቼክ ለተወሰነው ሰው ወይም እሱ ለሚያዝለት ብቻ የሚከፈልበት ነው፡፡ የማረጋገጫ ቼክ ደግሞ ተበዳሪ ብድሩን እስኪከፍል በመተማመኛነት ለአበዳሪው

[7] Black's Law dictionary, 9th edition (2009)

የሚሰጥ ነው። በእኛ ሀገር የንግድ ህግ ውስጥ ዕውቅና የተሰጣቸው 1፣ 2፣ 3፣ 5 እና 6ኛ ላይ የተመለከቱት ናቸው [የንግድ ህግ ቁጥር 833፣ 848፣ 863]።

በሰበር ችሎቱ ውሳኔ ላይ የቀረበ ትችት

የቼክ ባህሪያት እና ዓይነቶች ከላይ የተመለከቱት ከሆኑ፣ ቼክ በዋስትና ሊሰጥ ይችላል ወይ? የሚለውን ቀጥለን እንመለከታለን። ዋስትና በራስ ወይም በንብረት ለአንድ ግዴታ መፈፀም የሚገባ ውል ነው። ዋስትና በራስ (surety) ወይም በንብረት ሊደረግ ይችላል። በራስ የሚሰጥ ግዴታ ባለዕዳ የሆነው ሰው ግዴታውን ሳይወጣ ቢቀር ዋሱ ባለዕዳውን ተክቶ ግዴታውን የሚወጣበት ሂደት ነው። የዚህ ዓይነት ዋስትና በአገራችን ፍትሐብሔር ህግ ከቁጥር 1920-1951 ተደንግጎ ይገኛል። የግል ዋስትናን በህጉ የተተረጎመው እንዲህ በሚል ሁኔታ ነው።

> ‹‹ለግዴታው አፈፃፀም ዋስ የሚሆን ሰው ባለዕዳው ግዴታውን ያልፈፀመ እንደሆነ ለባለገንዘቡ ይህንን ግዴታ ሊፈፅም ይገደዳል›› (አንቀጽ 1920).

ስለዚህ በራስ የሚደረግ ዋስትና (Personal guarantee) ባለዕዳ የሆነው ሰው ግዴታውን መፈፀም ያልቻለ እንደሆነ ዋሱ በእርሱ እግር ተተክቶ ዕዳውን ለመክፈል የሚገደድበት የህግ ማዕቀፍ ነው።

በንብረት የሚደረግ ዋስትና ደግሞ ንብረቱን የሚከተል ነው። በንብረቱ ዋስ የሆነው ባለዕዳ ግዴታውን ባይወጣ ዋሱ በመያዣ የሰጠው ንብረት ለግዴታው ማስፈፀሚያ ይሆናል። የዚህ ዓይነት ዋስትና ተንቀሳቃሽ ንብረት ወይም መሰል ንብረቶች መስጠትን (pledge)፣ የማይንቀሳቀስ ንብረት በመያዣ መስጠትን (Mortgage)፣ የወለድ አገድ ውልን (Antichresis) የሚጨምር ነው።

ቼክ መብቱ ከሰነዱ ተነጥሎ የማይሰራበት፣ እንደቀረበ የሚከፈልበት፣ ተላላፊ ሰነድ ስለሆነ በንብረትነት ይያዛል። መደቡም በተንቀሳቃሽ ንብረት (Corporeal chattle) ስር ነው (የፍ/ብ/ህ/ቁ. 1128)። ቼክ በተንቀሳቃሽ ንብረት ስር የሚመደብ ስለሆነ በህግ በዋስትና ሊሰጥ ይችላል ቢባል እንኳ ሊሰጥ የሚችለው በንብረት ዋስትናነት (Pledge) እንጅ በራስ ዋስትናነት (surety) አይደለም። ነገር ግን ቼክ በዋስትና ሊሰጥ ይችላልን? ቼክ እውነተኛ ገንዘብን ተክቶ ክፍያን ለማቀላጠፍ የሚያስችል እንደቀረበ የሚከፈልበት ሃተታ የሌለው ዋጋው ከፍ ያለ የንግድ ወረቀት መሆኑን አስቀድመን ተመልክተናል። ቼክ እንደቀረበ የሚከፈልበት ሰነድ መሆኑ በህግ ከተመለከተ እንዴት በዋስትና ሊሰጥ ይችላል? በእርግጥ በቼክ ላይ መቃወሚያ ማንሳት እንደሚቻል በንግድ ህጉ ቁጥር 717 እና 850 ላይ ተመልክቷል። የመቃወሚያ ዓይነቶችም የግል ግንኙነትን መነሻ የሚያደርጉ (Personal defences) እና በማንም ላይ ሊሰሩ የሚችሉ መከላከያዎች (real defences) ናቸው።

በማንም አምጪ ላይ ሊነሱ የሚችሉ መቃወሚያዎች የሚባሉት ፊርማን በተመለከተ፣ ውክልናን በተመለከተ፣ የቼኩን ፎርም በተመለከተ፣ ችሎታን

በተመለከተ፣ ክስ ለማቅረብ የሁኔታዎች አለመሟላትን በተመለከተ የሚነሱ ናቸው። የግል ግንኙነትን መነሻ የሚያደርጉ መቃወሚያዎች ግን በአምጪው (ከሳሽ) እና ከፋዩ (ተከሳሹ) መካከል ያሉ ግንኙነቶችን ነው። የግል ግንኙነት ምንነት በህጉ በግልፅ ባይተረጎምም ለቼኩ መሠጠት መነሻ የሆነው ህጋዊ ድርጊት (juridical act) እንደሆነ በርካታ የህግ ባለሙያዎች ይስማማሉ። ለቼኩ መሰጠት ምክንያት የሆነው ነገርም ህጋዊ መሆን ይጠበቅበታል። ተዋዋይ ወገኖች በህጉ የተደነገገውን ግዴታ በመጣስ ቢዋዋሉ ስምምነታቸው ውጤት ሊሰጠው አይገባም። በንግድ ህግ ቁጥር 854 መሠረት ቼክ እንደቀረበ የሚከፈልበት ሰነድ ስለሆነ በዋስትና ሊሰጥ አይችልም። በሌላ በኩል ቼክ የተወሰነ ገንዘብ ለመክፈል የሚሰጥ ሃተታ የሌለበት ትዕዛዝ (unconditional order to pay) እንደሆነ የንግድ ህግ ቁጥር 827 (ሀ) ይደነግጋል። ይህ ማለትም በቼኩ ላይም ሆነ በሌላ ሰነድ የቼኩን ክፍያ በሁኔታ ላይ የተመሰረተ (conditional) ማድረግ አይቻልም። ቼኩ ለመተማመኛ ዋስትና ነው የተሰጠው የሚለው የአመልካች ክርክር የሚያመለክተው፣ ቼኩ ለክፍያ አለመሆኑን ነው። የቼኩ አውጭ ደግሞ ለአከፋፈሉ ኃላፊነት አለበት። ከአከፋፈሉ ኃላፊነት ለመዳን በቼኩ ላይ ወይም በሌላ ሰነድ የሚደረግ ቃል ሁሉ ደግሞ ተቀባይነት የሌለው እና እንዳልተፃፈ የሚቆጠር እንደሆነ በንግድ ህግ ቁጥር 840 ላይ በአዛዥነት ተደንግጓል። ስለዚህ በዋስትና ተሰጥቶ ቢገኝ እንኳ እንዳልተፃፈ ተቆጥሮ ውድቅ መደረግ እንጅ በፍ/ቤት ፊት እንደ ግል ግንኙነት ታይቶ ውጤት ሊሰጠው አይገባም።

ቼክ እንደቀረበ የሚከፈልበት መሆኑ በዋስትና እንዳይሰጥ የመከላከል ውጤት አለው። ዋስትና ገና ወደፊት ለሚፈፀም ግዴታ የሚሰጥና የዋሱ ግዴታ የሚደርሰው ዋናው ሲያቅተው ወደፊት የሚታይ ሲሆን ቼክ ግን ሲፈረም ግዴታው እንደበሰለ ስለሚቆጠር ሁለቱ ይለያያሉ። በሌላ በኩል ሌሎች ተላላፊ ንግድ ወረቀቶች በመያዣነት ሊያዙ እንደሚችሉ ሲገለፅ ለቼክ ግን አልተገለፀም። በንግድ ህግ ቁጥር 764 ላይ የሃዋላ ሰነድ (Bill of exchange) በመያዣ (pledge) ሊያዝ እንደሚችል ተደንግጓል። ይህ ድንጋጌ ለተስፋ ሰነድም ተፈፃሚ እንደሚሆን በቁጥር 825(1)(4) ላይ የተደነገገ ስለሆነ ይህ ሰነድም በመያዛነት ሊሰጥ ይችላል። አብዛኛዎቹ የሃዋላ ሰነድ ድንጋጌዎች በቼክ ላይ የሚፈፀሙ ለመሆናቸው በንግድ ህግ ቁጥር 886 ላይ ሲነገር ስለመያዣ የሚደነግገው አንቀጽ 754 ግን በቼክ ላይ ተፈፃሚ አልሆነም። ስለዚህ ህጉ ራሱ ከተላላፊ የንግድ ወረቀቶች መካከል ቼክን በመያዣ ወይም በዋስትና ከሚያዙት ውጭ ያደረገው ስለሆነ ቼክ ለዋስትና ሊሰጥ አይችልም። ቼክ በዓለም አቀፍ ደረጃም ሃተታ የሌለው እና እንደቀረበ የሚከፈልበት፣ የንግድ ልውውጥን ቀላል የሚያደርግ ሰነድ ነው። ቼክን በስፋት ከተጠቀምንበት ሽያጭን ግዢን በማቀላጠፍ የገበያ ልውውጥ ያሳድጋል። የጥሬ ገንዘብ ዝውውርን ይቀንሳል። በዚህም ለገንዘብ ኖቶችና ሳንቲሞች የሚወጣውን ወጪ መቀነስ ይቻላል። ከዚህ በተጨማሪም የቼክ ግብይት እንደጥሬ ገንዘብ ለዝርፊያ እና ለስርቆት የተጋለጠ አይደለም። የቼክ ተጠቃሚውም ሂሳቡን በቀላሉ ለመቆጣጠር ይችላል። ይህን የመገበያያ መንገድ ግን በቂ የሕግ ጥበቃ

ካላደረግንለትና በሕብረተሰቡ ካልታመነበት ዜጎች ቼክን በስፋት ስለማይጠቀሙበት ከላይ የተመለከቱትን ጥቅሞች ማግኘነት አይቻልም፡፡ በአጠቃላይ ቼክ ከባህሪውና ከአላማው አንፃር በዋስትና ሊሰጥ አይችልም፡፡ በህግም የተፈቀደ አይደለም፡፡ ስለዚህ ቼክ በዋስትና ሊሰጥ ይችላል የሚለው ትርጉም ቼክን ከንግድ ማቀላጠፊያነት ማሰናበት ነው፡፡

ከላይ ከተዘረዘረው የቼክ ባህሪ አንፃር የፌራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በመ.ቁ. 24435 በ4/6/2000 ውሳኔ ትክክል ነው ወይ? እንደምታውስ? የሚለውን ቀጥለን እናያለን፡፡

በአዋጅ ቁጥር 454/97 *መሠረት* የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በህግ ጉዳዮች ላይ ከ5 ባላነሱ ዳኞቹ የሚጠው ውሳኔ ለተመሳሳይ ጉዳዮች ገዥ (precedent) ነው፡፡ የበታች ፍ/ቤቶች ወይም መሰል አካላት ለተመሳሳይ ጭብጥ በተመሳሳይ *መልኩ* የመወሰን ግዴታ አለባቸው፡፡ የሰበር ችሎቱ ይህንን *ሥልጣኑን* በመጠቀም ቼክ በዋስትና ሊሰጥ ይችላል የሚል መደምደሚያ ላይ ደርሷል፡፡ የድምዳሜው *መንደርደሪያም* በቼኩ አውጭ እና ተቀባይ *መካከል* ያለውን የግል ግንኙነት *መነሻ* በማድረግ ነው፡፡ በንግድ ህግ ቁጥር 717(1) ላይ የተመለከተው የግል ግንኙነት (Personal relations) ግን ከላይ ከተገለፀው የቼክ ባህሪ አንፃር የዋስትናን ግንኙነት ሊጨምር አይችልም፡፡ ዋስትና የወደፊት ቀጠሮ አለው ቼክ ግን የወደፊት ቀጠሮ የሌለው እንደተፃፈ/ የበሰለ በመሆኑ ከዋስትና ባህሪ ጋር አይጣጣምም፡፡ በሌላ በኩልም አመልካች ቼኩን ሰጠው የሚሉት ለክርክሩ 3ኛ ወገን ለሆነው አቶ ሙሳ *መሀመድ* ከተጠሪ ጋር ላላቸው ግልግል *መተማመኛ* (ዋስትና) ነው፡፡ ከቼክ ባህሪ አንፃር ለዋስትና ሊሰጥ አይችልም እንጅ የግል ግንኙነት ሥር ይወድቃል ተብሎ ቢደመደም እንኳ፣ የግል ግንኙነት እንደ *መከላከያ* ሊነሳ የሚችለው በክሳሹ እና ተከሳሹ *መካከል* ያለ ሲሆን ነው፡፡ አመልካች ያቀረቡት ክርክር ግን ከሁለቱ ውጭ ያለ ሦስተኛ ወገን ጋር ያለን የመተማመኛ ግንኙነት የሚጠቅስ ነው፡፡ የሰበር ችሎት ስለ አንቀጽ 717 እና 850 በአግባቡ ካብራራ በኋላ፣ ድምዳሜው ግን ማብራሪያውን የተከተለ አይደለም፡፡ *መከላከያ* እንዲቀርብ የሚፈቀደው በዕዳ ክፋዩና ሰነዱን በያዘው ሰው የግል ግንኙነት ላይ ብቻ ተወስኖ መሆን ይገባዋል፡፡ የአመልካች *መከላከያ* ግን ሶስተኛ ወገንን የሚጨምር ስለሆነ፣ ሊፈቀድላቸው አይገባም ነበር፡፡ የሰበር ችሎት የጠቀሰው ሌላው ነጥብ አከራካሪው ጉዳይ ሊተረጎም የሚገባው የንግድ ህግን ዓላማ የሚያሳካ እና ከተለመደው አተረጓጎም አንፃር መሆን እንዳለበት ገልጿል በእርግጥ ህግ ሲተረጎም የህጉን ዓላማ የሚያሳካ መሆን ይገባዋል፡፡ ቼክ እንደቀረበ የሚከፈልበት የንግድ ማቀላጠፊያ *መሳሪያ* ነው፡፡ አላማው ሊሳካ የሚችለው ቼኩ ውጤታማ ሲሆን ነው፡፡ ቼኩ ውጤታማ ከሆነ የንግድ ህጉ ዓላማ ይሳካል፡፡ የሰበር ችሎቱ የህግ አተረጓጎም ግን የቼክን ጠቀሜታ እና ተዓማኒነት የሚቀንስ ስለሆነ፣ የንግድ ህጉን ዓላማ ሊያሳካ አይችልም፡፡ የተለመደው አተረጓጎምም ቼክ እንደቀረበ የሚከፈልበት፣ ለዋስትና ሊሰጥ የማይችል፣ አውጪው ወይም በጀርባ ፊራሚዎች ለአከፋፈሉ ኃላፊነት ያለባቸው ናቸው የሚል እንጅ ቼክ ለዋስትና ሊሰጥ ይችላል የሚል አልነበረም፡፡ የሰበር ችሎቱ የህግ ስህተት ተሰርቷል? አልተሰራም? የሚለውን የመመዘን እና

የመተርጎም ሥልጣን አለው። ህግ ሲተረጎም ፍ/ቤቱ 3 ሁኔታዎችን ግምት ውስጥ ማስገባት እንደሚገባ ታዋቂው የህግ ምሁር ያስረዳሉ እነዚህም፡-

1. የህጉን የተለያዩ ክፍሎች ወጥነት እና ተመሳሳይ በሆነ ሁኔታ (consistency and uniformity) ማየት፣
2. ባልተፋለሰና እና ወጥ በሆነ ሁኔታ (Coherence) ማየት፣
3. ውጤቱን (Consequence) መተንበይ ናቸው።[8]

የሰበር ችሎቱ ቼክ ለመተማመኛ ሊሰጥ ይችላል በሚል የሰጠው ትርጉም ከላይ የተመለከቱትን መለኪያዎች የተከተለ አይደለም። የንግድ ህጉን የተለያዩ ክፍሎ ከቼክ ዓላማ እና ባህሪ ጋር በመመዘን ወጥነት ባለው ሁኔታ አልተረጎመውም። ቼክ ለመተማመኛነት ሊሰጥ ይችላል በሚል ትርጉም ሲሰጥ በኢትዮጵያ ወንጀል መቅጫ ህግ አንቀጽ 693 ላይ የቼክ አውጭ የሚያዝበት በቂ ስንቅ ሳይኖው ቼክ ጽፎ ከሰጠ እና ሳይከፈልበት ከተመለሰ በአታላይነት ይቀጣል በሚል ከተደነገገው ጋር ያለውን ወጥነት (Coherence) ግምት ውስጥ አላስገባውም። ቼክን ለዋስትና የሰጠ ተከሳሽ ይህንኑ በወንጀል ክስ ክርክር ጊዜ በማንሳት ከወንጀሉ ኃላፊነት መዳን ይችላል ወይ? የሰበር ችሎቱ ትርጉም መከላከያ አይሆነውም ወይ? የሚሉት ከወጥነቱ መርህ ጋር የሚያያዙ ናቸው። ቼክ እንደቀረበ የሚከፈልበት ሃብታ የሌለበት ገንዘብን ተክቶ የሚሰራ እና ለንግድ ማቀላጠፊያ የሚውል አለም አቀፍ ዕውቅና ያለው ሰነድ እንደመሆኑ መጠን በዋስትና ሰነድነት መተርጎሙ ዋጋውን የሚቀንስ እና የቼክ ተጠቃሚዎችን ስጋት ላይ የሚጥል ነው። ቼክ ዋጋው የማይከፈልበት ወረቀት ሊሆን እንደሚችል የሚረዳ የቼክ ተቀባይ እንዴት ቼክን አምኖ በክፍያነት ሊቀበል ይችላል? ስለዚህ የሰበር ችሎቱ የትርጉሙ ውጤት በሃገሪቱ የንግድ እንቅስቃሴ ላይ ያለውን ተፅዕኖ በቅጡ አላጤነውም።

ችሎቱ ከሰጠው ውሳኔ ውስጥ አብዛኛውን ገጽ የሸፈነው የቼክ ክስ ሲቀርብ የግል ግንኙነትን ማንሳት የሚቻለው በማን እና በማን መካከል ነው በሚለው ላይ ነው። ዋናው ጭብጥ ቼክ በዋስትናነት ሊሰጥ ይገባል? አይገባም? የሚለው ስለሆነ በዚህ ነጥብ ላይ የሰፋ ትንታኔ ቢሰጥበት የተሻለ ይሆን ነበር።

በዚህ ውሳኔ ላይ የልዩነት ሃሳብም አለ። የልዩነት ሃሳብ የሰጡት ዳኛ ቼክ በዋስትናነት ሊሰጥ አይገባም የሚለው ድምዳሜአቸው ህጉን የተከተለ እና ተገቢ ነው። ነገር ግን የፍ/ብ/ህ/ቁ. 1920 በመጥቀስ የሙግታቸው መነሻ ማድረጋቸው ግን ትክክል አይደለም። የፍ/ብ/ሕሕቁ. 1920 የሚደነግገው ስለ ግል ዋስትና (Surety) እንጅ በንብረት (ለምሳሌ በቼክ) ዋስ ስለመሆን አይደለም። ስለዚህ የህጉ አንቀጽ ከተያዘው ጉዳይ ጋር ግንኙነት የለውም። ይኹን እንጅ መደምደሚያቸው ትክክለኛ ነው።

[8] Neil MacCormic, Legal Reasoning and Legal Theory (1994)

ማጠቃለያ

በአጠቃላይ የጠቅላይ ፍ/ቤት ሰበር ችሎት እንደቀረበ የሚከፈልበትን፣ የቼኩ አውጭ ለአከፋፈሉ ግዴታ የሚገባበትን፣ ሃተታ የሌለበትን፣ ንግድን ለማቀላጠፍ በህጉ የተካተተውን ተዘዋዋሪ የንግድ ሰነድ ለመተማመኛ እንጅ ለክፍያ የሰጠሁት አይደለም ለሚሉ ተከሳሽ መከላከያ (defence) ሊሆናቸው ይችላል የሚል የህግ ትርጉም መስጠቱ የንግድ ህግ ቁጥር 827፣ 840 እና 854 የሚጥስ ነው። እንደ ፀሐፊው አስተያየት ችሎቱ የሰጠው ውሳኔ የህግ ትርጉም ሳይሆን አዲስ ህግ ማውጣት ነው። የተከበረው ሰበር ችሎት ደግሞ ህግ የመተርጎም እንጅ ህግ የማውጣት ስልጣን የለውም።

ቼክ ለዋስትና ወይም ለመተማመኛ ሊሰጥ ይችላል የሚል መደምደሚያ በሀገራችን የንግድ ህግ፣ በህግ አውጭው እውቅና ያልተሰጠውን የማረጋገጫ ቼክ (Memorandum cheque) በህግ ስርዓቱ ውስጥ መጨመር ነው። የዚህ ውሳኔ ውጤት መቀጠል ቼክን ከንግድ ማቀላጠፊያ መሳሪያነት የማሰናበትን ያህል ነው። ስለዚህ ፍ/ቤቱ በአዋጅ ቁጥር 454/97 በተሰጠው ስልጣን መሠረት ውሳኔውን ቼክ ለክፍያ እንጅ ለመተማመኛነት ወይም ዋስትናነት አይሰጥም በሚል የህግ ትርጉም ይገባል።

The Effect of Bigamous Marriage on Distribution of Marital Property in Ethiopia: A Case comment

Aschalew Ashagre*

1. Introduction

Marriage is a sacred institution which has been well accepted by society in every corner of the world. As such, marriage has been recognized and protected by both national laws of countries[1] and international legal instruments.[2]Legal recognition and protection is given to marriage because it is through marriage that humanity establishes and maintains family, which is the fundamental unit of society.[3]The recognition and protection of marriage becomes meaningful when the law gives recognition and protection to the effects produced by marriage. The basic effects of marriage can be divided into personal and pecuniary.[4] In Ethiopia, personal effects of marriage

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[1]Nowadays, it is possible to conclude that almost all countries of the world have put in place laws dealing with the family in general and marriage in particular.

[2]The Universal Declaration of Human Rights of 1948 (hereinafter cited as the UDHR), the International Convention on Civil and Political Rights(hereinafter cited as ICCPR), adopted in 1966 which entered into force in 1976, Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature in 1979 and entered in to force in 1981.

[3]But we have to bear in mind that marriage is not the only arrangement through which family is established as family may be established by irregular union and/or cohabitation.

[4]The effects of marriage in Ethiopia are the same regardless of the mode of celebration of marriage. See generally, chapter three of the Revised Family Code of Federal Ethiopia, 2000, Arts.40-73, Proc.No.213, Federal Neg,Gaz.,Year 6, Extraordinary Issue No.1.

pertain to respect, support, assistance,[5] joint management of family,[6] cohabitation,[7] determination of residence,[8] duty of fidelity[9] and the like.

Pecuniary effects of marriage, in turn, relates to the creation of new legal relationship between the spouses regarding property. In this regard, the most fundamental effect is the presumption that all property of the spouses shall be deemed to be common property even if registered in the name of one of the spouses[10] unless such spouse proves that he/she is the sole owner thereof.[11] From this, we can understand that in the absence of contrary proof, spouses have equal share from the common property. This can be true only when the marriage is a monogamous marriage.

However, there are circumstances where a man may have two or more wives at the same time, although polygamous marriage or bigamous marriage is not allowed under the Revised Family Code of Ethiopia of 2000. In this regard, Art 11 of the Code clearly provides that a person shall not conclude marriage as long as he/she is bound by bonds of a preceding marriage. In addition to the Federal Family Code, the Criminal Code of the Federal Democratic Republic of Ethiopia of 2005 had declares that bigamy is a criminal act.[12]Despite the fact that bigamy is prohibited both by the Federal Family Code and the Criminal Code, there are incidences of bigamous marriages in Ethiopia.

As a matter of fact, bigamous marriage poses multifaceted problems. The problem posed by a bigamous marriage, *inter alia*, looms large when the issue of determining the share of the spouses from the common property comes into the picture in the case of dissolution of such bigamous marriage. In other

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[5] Id, Art.49
[6] Id, Arts.50-52
[7] Id,Art.53
[8] Id,Art.54
[9] Id,56
[10] Id, Art. 63
[11] Ibid
[12]See of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, Art.650(1),Proc.No.214, Federal Neg.Gaz. According to this provision of the Code whosoever, being tied by a bond of a valid marriage, intentionally contracts another marriage before the first union is dissolved or annulled, is punishable with simple imprisonment not exceeding five years. Art 650(2) has stipulated that any unmarried person who marries another he knows to be tied by a bond of an existing marriage is punishable with simple imprisonment. However, it must be borne in mind thatArt.651 of the Code has put an exception to the rule as it provides [bigamy is not punishable] where it is committed in conformity with religious or traditional practices recognized by law.

words, determining the exact share of the spouses has remained to be an arduous task for courts when a bigamous marriage is dissolved for various reasons. Because of this, Ethiopian courts, both at the Federal and regional level, have held divergent positions on the issue under consideration. Nonetheless, because treating many court decisions is absolutely beyond the scope of this short case comment, I have confined to the analysis of two decisions of the Cassation Division of the Federal Supreme Court of Ethiopia (hereinafter cited as the Cassation Division) in which the Cassation Division held two conflicting positions though the facts of the case were similar and the questions of law involved in both the cases were identical.

The first case I selected was litigated between two wives of a man (their husband) who had died at the time of the litigation. In this case, the Cassation Division decided that half of a building (a common property) was to be given to the son of the deceased born to one of the disputants, and the remaining half to be divided between the two wives. The second case I have selected was again litigated between two wives of a man(the husband) in which the Cassation Division decided that one of the wives was entitled to half of a house (which was the subject of the litigation) and the other half should be divided between the husband and the other wife of this man.[13]

From the above brief presentation of the facts and decision of the Cassation Division, we can grasp that the Cassation Division has held different positions at different times with regard to determining the actual share of spouses, out of the common property, in the case of dissolution of a bigamous marriage. The question, however, is how did the same Bench arrive at different conclusions in a similar case brought to it? Did the Cassation Division have any concrete legal basis to negate its previous position and to hold the latter position? Will the vacillating approach of the court mean any thing towards insuring the predictability of the decisions of the Bench? At any rate, how can we put in place a lasting solution to the problem of determining share of spouses in the case of bigamous marriages? As a modest response to the call made by the Federal Supreme Court of Ethiopia,[14] this case comment is, therefore, meant to carefully analyze the

[13]For full account of the facts of the case and the holding of the courts, see the discussions made under section two of this piece, particularly 2.1 and 2.2 of the work.
[14]The preface of the publications of the Cassation Division in which the decisions of the Division are contained has clearly called up on legal professionals engaged in different fields and students to give their constructive comments and critics on such decisions so that these comments and critics will be important inputs for the improvement of the decisions of the court. In this regard, see, the prefaces of Decisions *of the Cassation Division of the Federal Supreme Court*, any volume. So far 12 volumes have been published and distributed to the public.

above issues and recommend possible solutions. Nevertheless, the author cannot claim that he will suggest an absolute solution to the problem. Rather this case comment is basically aimed at exposing the problem and provoking thoughts among legal scholars and students of law. To this end, this case comment has been organized as follows. The second section of the work has been devoted to the summary and presentation of the facts of the case and the holding of the courts while the third part deals with the analysis of the cases and the accompanying comments. The fourth section deals with brief concluding remarks.

2. Summary of the Facts and Holding of the Courts

2.1 Case One (Cassation file No. 24625)

This case came from Amhara region. In this case, a man called Ato Maru Suleiman married two wives called W/ro Sadiya Ahmed and W/ro Rahima Ali. Later on, the husband died a natural death and the marriage that he had with his two wives was dissolved by virtue of the law.[15] The deceased left a son who was born from Sadiya Ahmed. Following the death of her husband, Sadiya sued Rahima claiming her share and the share of her son from the common property. The common property which was the subject of litigation was a house. The suit was brought at Debarq Woreda Court,[16]North Gondar Zone, Amhara National Regional State. The house, over which the parties litigated, was under the possession of W/ro Rahima. The relief sought by the plaintiff was that the defendant should give her (the plaintiff) share and the share of her son on the house which was known in the name of the deceased husband of both women.

Both the plaintiff and the defendant presented their arguments and proved to the satisfaction of the court that both were the wives of the deceased. Based on this, the Woreda Court decided that half of the house should be divided by the two wives and the remaining half should be given to the son of the deceased husband born from W/ro Sadiya. The defendant, W/ro Rahima, was aggrieved by the decision of the Woreda Court and lodged an appeal to

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[15]In Ethiopia, death is one of the grounds for the dissolution of marriage as clearly provided in Art.75(a) of the Revised Family Code, cited above at note 4.The regional family codes have also recognized that death is one of the grounds of dissolution of marriage irrespective of the mode of celebration of marriage.

[16]Here, I am not able to indicate the file number of the Woreda Court because the Cassation Division did not cite the case number of the woreda court except it did declare that the decision of the woreda court was affirmed. Yet, the Cassation Division should have cited the file number of the case at the woreda court in its decision for easy reference.

High Court of North Gondar Zone.[17] The appellate court, having heard the arguments of both sides, reversed the decision of the Woreda Court, on 31 December 2004, holding that the house was bought by the deceased husband and W/ro Rahima which means that W/ro Sadiaya was not entitled to take any share from it. Then W/ro Sadiya lodged an appeal to the Supreme Court of Amhara Regional State. However, to the dismay of the appellant, the appellate division of the Supreme Court affirmed the decision of the Zonal High Court.[18]

As W/ro Sadiya was discontented by the decisions of the Zonal High Court and the regional Supreme Court, she lodged an application to the Cassation Division of the Federal Supreme Court.[19] The Cassation Division (of the Federal Supreme Court) accepted her application and summoned W/ro Rahima. Both parties presented their case. W/ro Sadiya prayed the Cassation Bench for the reversal of the decisions of the Zonal High Court and the regional Supreme Court while W/ro Rahima prayed for the affirmation of those decisions. The Cassation Division examined the case and framed an issue. The issue framed by the Cassation Division was: *if the house, which was the subject of litigation, was bought during the conjugal life of W/ro Sadiya and the deceased Ato Maru Suleiman, how could W/ro Sadiya be deprived of her right of getting her legitimate share from the common property?* In the course of the litigation and by examining the files of the lower courts, the Cassation Division realized that the house was bought by Maru Suleiman, while the marriage between the deceased and the W/ro Sadiya was still valid. Owing to this, the Cassation Division reversed the decisions of the regional courts on the 7th of November 2008.[20] The Cassation Division stressed that since no adequate proof was adduced by the defendant to the effect that the house belonged only to her (the defendant) and the deceased, it is presumed that the house was a common property. Consequently, the Cassation Division reversed the decisions of the Zonal High Court and of the regional Supreme

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[17]See W/ro Sadiya Ahmed v W/ro Rahima Ali, (Civil File Number 07983, North Gondar Zone High Court, December 31, 2004)

[18]See W/ro Sadiya Ahmed v, W/ro Rahima Ali ((Civil File Number 005615, Amhara National Regional State Supreme Court, Appellate Division, March 16, 2006)

[19]This was so because the Amhara Regional Supreme Court did not organize the Regional Cassation Bench at that time. Currently, all regional states of the Ethiopian Federation have established cassation benches at regional levels which entertain final decisions of regional courts decided on regional matters.

[20]See W/ro Sadiya Ahmed v, W/ro Rahima Ali (Cassation Civil File Number 24625, Federal Supreme Court, Cassation Division, November 7, 2008).This decision has also be published under Decisions of the Federal Supreme Court, Cassation Division, vol.8, pp195-197.

Court. Instead, the Cassation Division affirmed the decision of the Woreda Court. The Cassation Division maintained that the decisions of the Zonal High Court and the Supreme Court of the Region contained fundamental error of law as they denied the right of W/ro Sadiya to take her share from the house which led to litigation. The Cassation Division decreed that the division of the house should be executed in accordance with the decision of the Woreda Court which declared that the two wives would take one fourth (1/4) of the house each, and the son of the deceased would take the remaining half.

2.2 Case Two (Cassation File No. 50489)

This case arose from another corner of Ethiopia, Southern Nations, Nationalities and peoples' Region. In this case, a man called Haji Mohammed Halis had two wives named W/ro Zeineba Kelifa and W/ro Kedija Siraj. W/ro Kedija was a resident of Alaba-kolito while w/ro Zeineba was a resident of Saudi Arabia. Following the dissolution of the marriage that existed between her and Haji Mohammed Halis by divorce, W/ro Kedija sued her husband at the Woreda Court of Alaba-Kolito for the division of common property. On account of this, W/ro Zeineba applied to the Court (which was entertaining the case) to intervene in the court proceeding as the outcome of the decision of the court would be detrimental to her right. She was allowed to intervene and she claimed that she was entitled to take her share from the subject of the litigation- a house. The Woreda Court examined the arguments and evidence presented by both the litigants.[21] Then, it decided that the intervener, W/ro Zeineba, was not entitled to any share as the house was possessed by W/ro Kedija and that the intervener was not able to prove that she contributed anything for the construction of the building. Therefore, the woreda court decided that the house should be equally divided between Haji Mohammed Halis and W/ro Kedja.

Aggrieved by the Decision of the Woreda Court, W/ro Zeineba lodged an appeal to the Zonal High Court of Alaba for the reversal of the decision of the lower court. However, the appellate Court rejected her appeal.[22] She did not stop there; she applied to the Cassation Bench of the Regional Supreme Court although her case was not accepted by the Bench.[23]Owing to the rejection of

[21]See W/ro Zeineba Kelifa v W/ro kedija Siraj(Civil File Number 02464, Alaba-Kolito Woreda Court Court, unpublished, May 18, 2009).
[22]See W/ro Zeineba Kelifa v W/ro Kedija Siraj (Civil File Number 01969, Alaba Zonal High Court, unpublished, June 12, 2009).
[23]See W/ro Zeneba Kelifa v W/ro Kedija Siraj (Civil File Number 29217, SNNP,Federal Supreme Court, Cassation Division, unpublished, October15, 2007).

her case by the regional courts of all levels, W/ro Zeineba filed an application to the Cassation Division (of the Federal Supreme Court) on November 7, 2009. The Cassation Division accepted her application and summoned W/ro Kedija, the respondent. In her defense, the respondent maintained that W/ro Zeineba did not establish any marital tie with Mohammed Hails and did not contribute anything to the construction of the house. The respondent further added that the house was built by her and Haji Mohammed Halis. By examining the arguments presented by both parties and the documents contained in the file, the Cassation Division established that the marriage between W/ro Zeineba and Haji Mohammed Halis was established in 1984 E.C (around 1991/1992). On the other hand, the marriage between Haji Mohammed and W/ro Kedija was established in 1987 E.C (around 1994/95).

Having realized that both the applicant and the respondent were the wives of Haji Mohammed Halis, the Cassation Division moved to the determination of the share of the spouses in the house under discussion. The Cassation Division maintained that both the regional and the Federal Family laws have registered partition of common property of spouses in the case of monogamous marriage since the laws clearly prohibited bigamous marriages. Despite this, the court said, bigamous marriage has been actually practiced by the society and where a dispute in relation of partition of common property between and/or spouses arises, court decisions should be geared towards promoting social values.

After it entertained the arguments of the litigants, the Cassation Division reversed the decisions of the regional courts of all levels. The Cassation Division decided that half of the house building should go to W/ro Kedija Siraji, who possessed the building, and the other half should be divided between Haji Mohammed Halis and W/ro Zeineba Kalifa. From the decision of the Cassation Division, it is possible to realize that one the wives of Ato Haji Mohammed Hails, W/ro Kedja, was entitled to half of the common property while the other wife, w/ro Zeineba was entitled to ¼ of the common property. The husband of the ladies was also entitled to ¼ of the common property. It is also understandable that the Cassation Division of the Federal Supreme Court negated the position it held in the case which arose between Sadiya Ahmed and Rahima Ali. This is because in the case of Sidiya v. Rahima, the Cassation Division decided that the wives take ¼ of the common property while in the latter case, in the case Zeineba v. Kedija, the Cassation Division decided that one of the wives take half of the common

property and the other half should be divided by the husband and the other wife.[24]

3.Analysis

3.1 Analysis on Case One

As I have indicated previously, the first case was decided in November 2008 in which the Cassation Division decided that half of the common property should go to the successor of the deceased husband and the remaining half should be equally apportioned between the surviving wives of the deceased. The question is, however, as to why the Cassation Division adopted this formula. Was the Cassation Division motivated by legal provisions or equity and fairness? As can be understood from the close reading of the decision of the Cassation Division, the court did not provide any reason as to why it declared that half of the property should go to the successor of the deceased. The Cassation Division simply endorsed the decision of the Woreda Court without any analysis and reasoning. The only thing the Cassation Division did was declaring that if it was proved that both ladies were the wives of the deceased, the property, which was the subject of litigation, was a common property.

Although the Ethiopian family laws have not contained provisions which can regulate the determination of share of spouses in the case of bigamous marriages, courts are duty-bound to resolve the issue by taking into consideration the principle of equality before the law in general and equality of spouses in particular. Judged in light of these constitutional and human rights values which are cherished by national as well as international legal instruments, the decision of the Cassation Division is not acceptable, at least

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[24]See W/ro Sadiya Ahmed v W/ro Rahima Ali (Cassation Civil File Number 50489, Federal Supreme Court, Cassation Division, October 04, 2010).This decision has also be published under Decisions of the Federal Supreme Court, Cassation Division, vol.11, pp 2-5.In relation to the holding of the Cassation Division, one is prompted to ask the following relevant questions: Why did the Cassation Division decide in the first case that the husband was entitled to half of the common property? Couldn't that be against equality before the law and spousal equality which are deeply entrenched under the FDRE Constitution and other international human rights instruments to which the country is a party? Did the Cassation Division have any concrete legal basis to absolutely negate its former stand and decide that one of the wives is entitled to half of the common property and the other wife to ¼ of the common property? Did the Cassation Division have any legitimate ground to decide that the husband is entitled to ¼ of the common property in the second case? Couldn't this decision be contradictory to the equality clause incorporated in the FDRE constitution and international human rights instruments to which Ethiopia is a party?

to this writer. To begin with, the decision has undermined the principle of equality before the law as it did not treat the wives of the deceased on equal footing with the successor. Needless to say, equality before the law is nowadays one of the cardinal constitutional principles. At the same time, it has been embodied in the major international human rights instruments. For example, Art. 7 of the Universal Declaration of Human Rights, the UDHR, [25] (which has become part and parcel of the Ethiopian legal system since 1991[26] and which serves as a guiding principle to interpret the human rights section of the FDRE Constitution,[27]) states that all are equal before the law and are entitled without discrimination to equal protection of the law. By the same token, Art. 2(1) of the International Convention on Civil and Political Rights (the ICCPR hereinafter) also provides that each state party to the covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the covenant without distinction on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. What is more, Art. 3 of the African Human Peoples' Rights Charter declares that every individual shall be equal before the law and shall be entitled to the equal protection of the law.

All the above legal instruments have been part and parcel of the Ethiopia law since Ethiopia is a party to all of them. Accordingly, the provisions of these international legal instruments should be given due consideration by our courts as any other legislation enacted by House of Peoples' Representatives and regional councils. Besides, the values of the afore-mentioned instruments have been incorporated under the FDRE constitution. For instance, Art 25 of the FDRE Constitution provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. This same article adds that the law shall guarantee to all persons equal and effective protection without discrimination on grounds of any sort. In addition to incorporating values of equality before the law, Art.13(2) of the FDRE constitution declares that all human and democratic rights enshrined

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[25]See the full text of the UDHR, cited above at note 1.

[26]See the Transitional Period Charter of Ethiopia, 1991, Art.1 Proc. No.1, Neg.Gaz. Year 50, No.1.The Charter declared in black and white that human rights incorporated in the UDHR were transformed in to the domestic laws of Ethiopia as of the adoption of the Charter in July 1991.

[27]See the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 13(2), Proc.No.1, Federal Negarit Gazeta, Year 1, No.1. See also Assefa Fisseha, '*The Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia*', in Assefa Fiseha and Getachew Assefa,(editors), *Institutionalizing Constitutionalism and the Rule of Law: Towards Constitutional Practice in Ethiopia*, Ethiopian Constitutional Law Series, 2010,Volume 3, pp.7-53.

in the same constitution should be interpreted in a manner conforming to the principles of the UDHR, the ICCPR and other international instruments adopted by Ethiopia.

Despite this, however, the Cassation Division did not reflect equality of spouses before the law with respect to their shares when a common property is divided among the spouses. This is because the Cassation Division endorsed a decision of a Woreda court of Amhara Regional State which decided that women spouses should take less than the husband. The decision of the Woreda Court as well that of the Cassation Division have also violated equality of spouses which has gained international as well as national recognition. At the international level, the ICCPR, the International Convention on Economic, Social and Cultural Rights (hereinafter the IESCR), the Convention on the Elimination of any Form of Discrimination against Women and the African Charter on Human and People's Rights. In this regard, Art. 23 (4) of the ICCPR stipulates that states parties to the convention shall take appropriate steps to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. To realize this international duty, Ethiopia has taken appropriate legal and institutional a measures. Equality of spouses has been clearly provided in the FDRE Constitution. In this connection, Art 34 (1) of the Constitution declares that men and women have equal rights while entering into, during marriage and at the time of dissolution of marriage. Besides, when we closely examine the family laws of the country, both federal and regional,[28] we can realize that the equal protection of spouses is insured irrespective of the mode of establishment of marriage- whether the marriage is civil, religious or customary.[29]

In addition, Art 35 of the FDRE Constitution is entirely devoted to the protection of the rights of women taking into consideration the fact that women were historically disadvantaged groups of society in Ethiopia as was the case elsewhere in the world. Accordingly,Art. 35(1) of the Constitution states that women shall, in the enjoyment of rights and protections provided for in the constitution, have equal rights with men and sub-article 2 of the same article provides that women have equal rights with men in marriage as prescribed by the constitution. In addition to these constitutional principles,

[28]In Ethiopia, following the Ethiopian Federal experiment in Ethiopia, there are ten family codes, nine those of the regions and the Revised Family Code which is applicable in Addis Ababa and Dire Dawa.

[29] In Ethiopia, both at the federal and regional levels, there are three types of celebration of marriages. These are civil, religious and customary marriage; yet the legal effects attached to all of them are the same.

the family laws of the country, federal and regional, have tried to insure the equality of spouses in entering into marriage, during marriage and after dissolution of marriage.[30] Therefore, it can be safely concluded that Ethiopia has put in place legal instruments to ensure equality of spouses in all respects in general and in division of marital property in particular. In other words, that means the country has worked its best, as far as legislation is concerned, to discharge its international obligation imposed upon it by Art. 23 of the ICCPR.

It can also be said that Ethiopia has enacted laws which can be used as important vehicles to domestically implement the Convention on the Elimination of All Forms of Discrimination against Women which, *inter alia*, requires all state parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of elimination of discrimination against women. The Convention also declares that State parties to the Convention undertake to embody the principle of equality of men and women in their national constitutions or other appropriate legislation with a view to eliminate any form of discrimination against women. Moreover, State parties to the convention are also required to establish legal protections of the rights of women on equal basis with men and to insure, through competent tribunals, and other public institutions the effective protection of women against discrimination. As far as institutional protection is concerned, Ethiopia has declared in its constitution that an independent judiciary has been established both at the state[31] and federal levels,[32] which is amenable to the proper implementation of all laws in general and laws dealing with the equality of spouses in particular.

However, it must be borne in mind that, enacting laws and establishing courts do not by themselves suffice to ensure the equal protection of spouses. Equality of spouses is ensured when the courts are active enough to carefully examine national as well as international legal provisions before they arrive at a certain decision. Particularly much is expected from the decision of the Cassation Division since it is empowered to interpret both federal and

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[30]When we closely examine the regional family codes we can easily realize that they are copies of the Revised Family Code of the Federal Government except some minor differences.

[31]The federal Constitution has declared that states shall be required to establish three levels of courts i.e. state Supreme Court, high court and first instance court. See Art.78 (3) of the FDRE Constitution, cited above at note 27. Accordingly, all regions of the Federation have established three tiers of courts.

[32]Id, see Art.78(2).See also Federal Courts Proclamation, 1996, Proc.No25, Federal Neg.Gaz. Year 2, No.13.

regional laws of Ethiopia and whose decision is declared to be binding on all lower courts in Ethiopia, be it federal of regional courts.[33] In the case at hand, it can be concluded that the Cassation Division tried to interpret the law to insure that spouses receive share from the common property since the case presented to Cassation Division was not regulated either by the Amhara Region Family Law or the Federal Family Law. The absence of legal provision which may directly resolve the issue at hand is attributable to the fact that these family laws did not contemplate the appearance of bigamous marriage since this type of marriage was outrightly prohibited by both laws. The question, however, is how should courts of law go about determining the share of spouses where a bigamous marriage is dissolved? The Cassation Division has somehow resolved the problem in its decision. However, the Cassation Division did not give any reason which pushed it to decide the case the way it did, although the Cassation Division, as any other Court, is required by the Ethiopian Civil Procedure Code to give reasons for its decisions.[34] Therefore, the Cassation Division of the Court should have given reason as to why it arrived at such decision which entitled the husband more shares than his two wives. In sum, on the basis of the reading of the decision of the case under consideration, it can be concluded that the decision of the Cassation Division did not address equality of spouses in taking equal shares out of marital property. It can also be argued that the Cassation division did not attach appropriate weight to the protection of rights of women after the dissolution of marriage.

3.2 Analysis on Case two

As I have indicated above, the second case arose in SNNP Regional State and it was litigated again by two women who were the wives of a man called Haji Mohammed Halis. In this case, the Cassation Division took a position squarely in contradiction to the one it took in the case one above. The Cassation Division held that ½ of the house (that was the subject of litigation) should be given to one of the wives who was in possession of the house and the remaining half of the house be divided between the husband and the wife who was not in possession of the house.

First of all, why did the court negate its previous stance (position) and come to its current position? If that is the case, how can the court claim that the

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[33]See Federal Courts Proclamation Re-amendment Proclamation, 2005, Art.2 (1), Proc.454, Federal Neg.Gaz., Year 11, No.42.

[34]The Civil Procedure Code of the Empire of Ethiopia ,1965, Art.182(2), Dcree No 52, Year 25, No.3.See also Robert Allen Sedler, Ethiopian Civil Procedure,(1968),pp.208-211, Serkaddis Zegeye, *'Judgment Writing: An Overview of the Ethiopian Context'*, Ethiopian Journal of Legal Education, Volume 4,No.1,(2011), pp.27-49.

interpretation of laws by the Cassation Division is instrumental to ensure predictability of decision of courts in Ethiopia? Because the decision of the Cassation Division did not contain any thing which hints at the alteration of the stance of the Cassation Division, we cannot understand the reason that pushed the Cassation Division to depart from its previous position.[35]

Let us now come to the analysis of the case. In this case, too, the holding of the Cassation Division is wrong in the opinion of this writer. This is because, as we have analyzed in relation to the previous case, the decision of the Cassation Division jeopardized the interests of one of the wives, W/ro Zeineba and the husband Haji Mohammed Halis while it unduly favored W/ro Kedija who was in possession of the house. Why was W/ro Kedija entitled to half of the spousal property? Did the fact that she was in possession of the building give the impression to the Cassation Division that she was entitled to take much more share than the other spouses?

When we closely read the relevant part of the decision, we can realize that the Cassation Division was cognizant that proof was adduced at the woreda court that she/W.ro Kedija/ had direct contribution in the construction of the house. Nonetheless, from the decision of the Cassation Division, we cannot understand whether or not the contribution of W/ro Kedija was exactly 50% of the house. This is so because the Cassation Division in its decision did not sufficiently summarize the facts of the case. Nor did it present and analyze the type of evidence adduced at the Woreda Court which convinced it to decide that W/ro Kedjia contributed 50% and hence she was entitled to half of the property (the house).

Because the court did not adequately analyze and support its findings with adequate legal reasoning, we cannot clearly grasp the rationale behind the decision of the Cassation Division in this regard. Apparently, we can make a wild guess that the Cassation Division was convinced that the evidence produced by W/ro Kedija was sufficiently demonstrated that she expended half for the construction of the house. Yet, on reading of the decision of the Cassation Division, one can wonder as to how she proved to this effect and what types of evidence were produced. These worries are legitimate worries because without the proper analysis of this point, the Cassation Division could not reach any concrete decision that would serve as a precedent for the resolution of the same cases that will inevitably arise in the future. However,

[35]However, we know for sure that the law which amended the Federal Courts establishment proclamation has empowered the Cassation Division to take any positions as it wishes though the facts of the cases and the questions of law are similar.

the decision of the Cassation Division under consideration will remain to be a source of confusion and uncertainty unless it is totally altered or amended with adequate reasons.

Nevertheless, one can imagine that the Cassation Division might be satisfied (for the purpose of rendering the decision) that the evidence produced at the woreda court might be weighty to show that W/ro Kedija contributed half towards the construction of the house. Despite that, however, we cannot appreciate the true intention of the Cassation Division as its decision has failed to speak for itself. Therefore, we are still obliged to maintain that the decision of the court was contrary to equality of spouses. As we have mentioned previously, equality of spouses is an accepted international norm. Side by side with the international norms, national laws of various countries are also adapted to suit the requirements of international conventions which require member states to take adequate legal and institutional measures regarding ensuring the equality of spouses. As we have said previously, Ethiopia has put in place legal and institutional frameworks for the purpose of insuring spousal equality in all respects.

In Ethiopia, one cannot imagine that courts of law are not unaware of the national as well as international commitment of the country towards insuring gender equality in general and spousal equality in particular. Courts of law are one of the most important organs of government which are expected to play irreplaceable roles for the protection of fundamental rights in general and equality of spouses in particular.[36] To our dismay, however, studies conducted so far have demonstrated that judges at the federal and state level think that they have little or no role in interpreting the human rights provisions of the constitution.[37]However, the belief of the judges is not acceptable because their belief is contrary to Art. 13(1) of the FDRE Constitution which provides that all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of chapter three of the constitution which is entirely devoted to the protection of fundamental rights and freedoms.

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[36]In our modern world, courts of law are expected to play irreplaceable roles in protection and enforcement of fundamental human rights recognized both under international human rights instruments as well as domestic laws. This is also true in Ethiopia at least legally speaking. In this regard, refer to the following works: Menberetsehay Taddesse, *የኢትዮጵያ ህግና ፍትህ ገጽታዎች*, (1999 E.C), Tsegaye Regassa, '*Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia,*' (2009) Mizan Law Review 3(2), pp. 288-330. John Hatchard, Muna Ndulo and Peter Slinn, Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective, (2004), pp. 150-183.

[37]See Assefa Fisseha, cited above at note 27, pp.24-32.

When we come to the case at hand, the stance taken by the regional courts was very much astounding as we can understand from the decision of the Cassation Division. The Woreda courts denied the right of one of the wives to take her share although it was clear for them that the husband was married to two wives. Since the stance of the Woreda Courts is very much dangerous in the future (given the fact that similar cases will definitely arise in the future), the Cassation Division of the Federal Supreme Court should guide them by handing down critically analyzed and well reasoned decisions with respect to the issue under discussion. The Cassation Division is expected to live up to the powers conferred upon it and the expectations of the stakeholders. However, if the decision of the Cassation Division is very much shallow and is not well reasoned (as it is the case in the decision under consideration), the problem of determining the share of spouses in bigamous marriage shall remain as perplexing as it has been so far.

The Cassation Division of the Federal Supreme Court should be aware that the issue of determining the share of a spouse in bigamous marriage has remained to be a bothersome issue among the legal practitioners and legal scholars and other stakeholders alike. In this regard, when I set out to analyze and comment these cases, I held discussions with some legal experts both from the bar and the academic circle who unreservedly forwarded different opinions on the issue under consideration. The professionals whom I discussed with believe that the issue under discussion is worthy of critical examination and analysis. They maintained that the problem can finally be alleviated by amending the family codes of the country. According to these professionals, the problem can be resolved by the courts until the law maker amends the law.[38]

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[38]The first legal professional I discussed with was Ato Solomon Immiru, who was a judge before he became an attorney and consultant at law. Ato solomon told to this writer that the problem under consideration is a serious problem worthy of close examination and discussion. He recounted to this writer that he encountered such problem when he was working as a judge. He said that a case was brought to his bench where a man had two wives, one in the rural area of Gurage Zone and the other in the city of Addis Ababa. A dispute arose among the spouses regarding division of common properties. He gave a verdict to the effect that the common property located in the rural areas should be divided between the husband and the wife residing in the rural area. On the other hand, the common property located in the urban area was to be equally divided between the husband and the wife residing in Addis Ababa. None the less, the decision of Ato Solomon is still questionable because his decision seems to be detrimental to the interest of the wife who was residing in the rural area as it can be understood that common properties located in rural areas may not be equivalent to the properties and assets existed in urban areas.

4. Conclusions and Recommendations

The Cassation Division of the Federal Supreme Court of Ethiopia has been entrusted with a grand duty of interpreting both federal and regional laws so as to achieve the purpose of uniform application of laws and insuring predictability of decisions in Ethiopia. Accordingly, decisions rendered by the Cassation Division, with not less than five judges, are taken as precedents which are binding on federal as well regional courts of all levels.

Coming directly to the cases I have analyzed, the Cassation Division has tried to determine the share of the spouses out of the common property in both cases. In case one, the Cassation Division merely approved the decision of Debarq Woreda Court which (the latter) decided that half of the house should go to the successor of the deceased who was the husband of W/ro Sadiya and W/ro Rahima. On the other hand, the wives were compelled to

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At any rate, how can we say that the wife residing in rural area is not entitled to share from the properties located in urban areas? Besides, I conferred with Ato Yoseph Aemero, who was formerly a judge, currently an attorney and consultant at law. Ato Yosph believes that when courts of law are confronted with the issue of determining the share of spouses in a bigamous marriage, they should give decision to the effect that all spouses should get equal share from the common property. He maintained that we have to be cautious not jeopardize the interest of the first wife. The problem is, however, sometimes the first wife may not know that her husband has a second wife for that matter, even the second wife may not know that her husband is tied to another wife by marriage. In those situations, it may not be possible to avoid the merger of common properties of the spouses. The other legal professional who gave me his opinion in connection to the problem I am dealing with was Professor Tilahun Teshuma of Addis Ababa University. Professor Tilahun maintained that the problem of hand should be resolve by amending the family lows of the country. However, he warned that when we amend the law to alleviate this problem we should not undermine the importance of polygamous marriage which is recognized by the federal family code and the codes of the reigns. At any rate according to Ato Tilahun, where a lady married to a man with full knowledge that the man has another wife the second wife should not be entitled to equal share from the common property since one should not benefit from one's illegal out. She should take a share from the share of the husband, according to Professor Tilahun. However, professor Tilahun said that if the common properties are acquired by the industry and labor of all the spouses, the spouses can have equal share of the common property. Can the stances taken by professor Tilahun alleviate the problem at hand? Should a woman who married a man knowing that he was married to another wife be denied the right to share from the common property? What if her contribution towards the common property was more substantial than the contribution made by the first wife and the husband?

share only half of the property. Nonetheless, the Cassation Division did not put forward any reason as to why it affirmed the decision of the Woreda Court.

In the second case, the Cassation Division took a different stance and decided that one of the wives, who allegedly contributed half of the house, should take that half and the other wife and the husband should divide the remaining half between themselves which means that each would receive one fourth of the property. In this case, too, the decision of the Cassation Division is not true to life. Rather it is susceptible to serious criticisms as it failed to contain reasonably satisfactory justifications which led the Cassation Division to arrive at such conclusion. On the basis of the bare reading of the decisions of both the woreda courts and that of the Cassation Division, one cannot help but conclude that the decisions are contrary to equality before the law and equality of spouses which have gained relevant places both under national laws and international human rights instruments.

One may, however, positively think that the courts could not give such outrageous decisions without having a concrete factual background. But unless we can read this factual background particularly from the decision of the Cassation Division, it cannot be good to put forward mere conjectures that will be detrimental to the development of the jurisprudence in this regard. Instead, our courts should be criticized and at the same time encouraged to write well reasoned and critically analyzed decisions. In other words, the Cassation Division of the Federal Supreme Court of Ethiopia should be gently informed that it is its constitutional duty to give well-thought decisions with sufficient analysis and reasons. This is so because its decisions are important tools for the uniformity and predictability of decisions in Ethiopia which was the intention and aspiration of the Ethiopian law-maker when it (the law-maker) conferred the power on the Cassation Division to lay down precedents.

If neither the law nor the decision of the Cassation Division is sufficient to deal with the problem of determining the share of spouses in bigamous marriage, what is the way out? Should we leave the lower courts to decide the share of the spouses on case by case basis? Should we expect the Cassation Division to come up with a better formula than it has provided so far? Or will it be better if we amend our family laws, both regional and federal, with a view to incorporating legal provisions which will clearly and sufficiently regulate the share of spouses in bigamous marriages? This writer recommends two alternatives. The first one is that the Cassation Division of the Federal Supreme Court, which has been empowered to give decisions binding on all courts of Ethiopia, should give a well analyzed decision on

how to determine the share of spouses in the case of bigamous marriages. To this end, the Cassation Division may conduct a legal research which helps it deal with the issue as satisfactorily as possible. In any case, the decision of the Cassation Division should be well- thought, detailed and critically reasoned so that it will serve as an accurate precedent for the proper decision of similar cases that will arise in the future. The other alternative is to amend the family codes so that the problem can adequately be resolved. When we amend the law, we have to bear in mind that we must not lose sight of the values of monogamous marriage and that we have to be careful to balance the equality of spouse during the distribution of the common property. To be more specific, unless there is a contrary proof which unequivocally shows that one of the spouses is entitled to more shares from the common property, all spouses should take equal share from the common property.

የተጨማሪ እሴት ታክስ ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ ስለሚደረጉ የወንጀል ክርክሮች፡ አንዳንድ ምልከታዎች

አበበ አላመረ*

1. መግቢያ

ኢትዮጵያ የገቢ ግብር አዋጁ ተሻሽሎ እና ተጠቃሎ እንዲወጣ ከተደረገበት ከ1994 ዓ.ም[1] ጀምሮ ከፍተኛ የግብር እና የታክስ ሕጉች ማሻሻያና የአፈፃፀም ለውጥ እያደረገች ነው። በዚህ መሠረትም ለረዥም ጊዜ በሥራ ላይ የነበረው የገቢ ግብር አዋጅና ማሻሻያዎቹ፣ የተርን ኦቨር ታክስና ማሻሻያዎች፣ የተጨማሪ እሴት ታክስ አዋጅና ማሻሻያዎቹ ተጠቃሾች ናቸው። ከአዳዲሶቹ የግብር እና ታክስ አዋጆችና ማሻሻያዎቻቸው በተጨማሪ የግብር አሰባሰብ ስርአቱና ተቋማቱም አብረው የማሻሻያዎቻቸው እርምጃ እንዲወሰድባቸው ተደርጓል[2]።

በአሰባሰብ ስርአቱ ላይ የሚፈፀሙ ጥፋቶችም የወንጀል ሐላፊነትን ሊያስከትሉ ስለሚችሉ አስቀድሞ በወንጀል ክስነት የማይታወቀው የታክስ ወንጀል አሁን አሁን ከወንጀል ክርክሮች ተርታ አንዱ ሆኖ እንዲሰፍ ሆኗል[3]። እነዚህ አጠቃላይ የግብር እና ታክስ ማሻሻያ አርምጃዎች እንዲሁም በተለይ የተጨማሪ እሴት ታክስ ተፈፃሚ መሆን መንግስት በተለያዩ ዘርፎች እየወሰዳቸው ያሉ የማሻሻያ አርምጃዎች አካል ናቸው።[4]

ከታክስ ወንጀሎች መካከልም አንዱ የተጨማሪ እሴት ታክስ ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ ያለው የወንጀል ሐላፊነት ነው። አስከአሁን /ታህሣሥ 9 ቀን 2005 ዓ.ም/ ባለው መረጃ ቁጥራቸው 110,328.00/አንድ መቶ አሥር ሺህ ሶስት መቶ ሃያ ስምንት /የሚሆኑ የተጨማሪ እሴት ታክስ ተመዝጋቢዎች አሉ። ከነዚህ ውስጥ ከ60 ሺህ በላይ የሚሆኑት የሽያጭ መመዝገቢያ መሣሪያ ተጠቃሚዎች ናቸው። ወደፊትም

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* ኤል ኤል ቢ፣ እና ቢ.ኤ. (አ.አ.ዩ) ዐቃቤ ህግ፣የህግ አማካሪ፣የህግ ጥናት ኤክስፐርት እና በአዲስ አበባ ዩንቨርሲቲ የክፊል ጊዜ መምህር ሆኖ ሰርቷል። በአሁኑ ጊዜ የህግ አማካሪ እና ጠበቃ ሆኖ እየሰራ ነው።

1. ለረጅም ጊዜ በስራ ላይ የነበረው የገቢ ግብር አዋጅ በ1953 ዓ.ም የወጣው አዋጅ ቁጥር 173/53 ነበር። ይህ አዋጅ በተደጋጋሚ እየተሻሻለ ቆይቶ በመጨረሻም በአዋጅ ቁጥር 286/94 እንዲሻርና በምትኩም ይህ አዋጅ ተፈፃሚ እንዲሆን ተደርጓል።ይህም አዋጅ በአዋጅ ቁ. 608/2001 ተሻሽሏል።
2. በርግጥ ተቋማዊ ለውጡ ከ94 ዓ.ም በፊትም ተጀምሮ ነበር። ፀሐፊው በአዲስ አበባ መስተዳድር የጥናት ፕሮጀክቶች ውስጥ ይሰራ በነበረበት ጊዜ በ1989 ዓ.ም ገደማ ግብር ሰብሳቢ መ/ቤቶችን ለግብር ክፈዩ ተደራሽ በማድረግ የግብር መሠረቱ (tax base) አነስተኛ ነው ወይም የግብር ክፍተቱ (tax gap) ክፍተኛ ነው በሚል የሚተቸውን የከተማው መስተዳደርን የግብር መሠረት ማስፋት ያስፈልጋል በሚል የቀበሌ ፋይናንስ ጽ/ቤቶች እንዲቋቋሙ ተደርጉ ነበር። ይህ መዋቅራዊ ለውጥ አሁንም ቀጥሉ የአዲስ አበባ መስተዳድር ገቢዎች ጽ/ቤት /የቀድሞው ፋይናንስ ቢሮ/ በፌደራል ገቢዎችና ጉምሩክ ባለስልጣን ስር ሆኗል። በዚህ መሠረትም ባለስልጣን መ/ቤቱ የአዲስ አበባ መስተዳድርን ገቢ በውክልና እየሰበሰበ ይገኛል።የግብር ክፍተት ማለት ሊሰበሰብ የሚገባውና እየተሰበሰበ ባለው የግብር መጠን መካከል ያለው ልዩነት ነው።
3. ለምሣሌ በያዝነው የ2004 ዓ.ም በፌደራል የመጀመሪያ ደረጃ ፍ/ቤት ልደታ ምድብ 10ኛ የወንጀል ችሎት በርካታ የታክስ ወንጀል ጉዳዮች እየታዩ ይገኛል።
4. በአጠቃላይ የግብር ማሻሻያው ኢህአዴግ ስልጣን ከያዘበት ከ1983 ዓ.ም ጀምሮ እያደረገ ያለው የሕግ፣የተቋማት፣የኢኮኖሚና ማኅበራዊ ጉዳዮች የለውጥ አርምጃዎች (Reform Measures) አካል ተደርገው የሚወሰዱ ናቸው/ ለምሣሌ Amin Abdella and John clifford ;The impact of tax reform on private sector development ; November 2011; pp1

የተመዘጋቢው ቁጥር እና የሽያጭ መመዝገቢያ መሣሪያው ተጠቃሚዎች ቁጥር እየጨመረ እንጂ እየቀነሰ ሲመጣ እንደማይችል ይታመናል።

በዚህ መሠረት የዚህ ጽሑፍ መሠረታዊ ትኩረት ከሆነው የተጨማሪ እሴት ታክስ ደረሰኝ[5] /ከዚህ በኋላ "ደረሰኝ" ወይም "የተ.እ.ታ. ደረሰኝ" በሚል ይጠቀሣል/ ከመስጠት ግዴታ ጋር በተያያዘ ያለው የወንጀል ሐላፊነትም እየጨመረ ሲሔድ የሚችልና ለሁሉም ወገን የትኩረት ጉዳይ ሆኖ ሊቀጥል እንደሚችል ይታመናል።

ደረሰኝ ካለመስጠት ጋር በተያያዘ ያለው የወንጀል ተጠያቂነትን በተመለከተ በክስ ደረጃም በአዲስ አበባ ብቻ ተወስኖ የነበረው የወንጀል ክስ በአሁኑ ጊዜ በሐዋሣ[6] እና በመቀሌ[7] ተጀምሮ ፍርድ የተሰጠባቸው ጉዳዮች ያሉ ሲሆን በርካታ ጉዳዮችም በክርክር ሳይ መሆናቸው ይህንኑ አስተሣሰብ የሚያጠናክር ነው። ስለሆነም የተጨማሪ እሴት ታክስ ተመዝጋቢ ታክስ ከፋይ ድርጅቶች እና የግል ባለሀብቶች አራሳቸውን፣ ሠራተኞቻቸውን፣ ደረሰኝ በመስጠት ሐላፊነት ሳይ የሚያስቀምጧቸውን የቤተሰብ አባላትና ሥራ አስኪያጆችን ከወዲሁ ከወንጀል ሐላፊነት እንዲጠብቁ የሚረዳቸውን ጥንቃቄ እንዲያደርጉና የሚከሰሱም ከሆነ፣ የክርክሩን ባህሪ በሚገባ እንዲረዱ ለማስቻል ይህን ጽሑፍ ማዘጋጀት አስፈልጓል።

ከዚህ በተጨማሪ ጽሑፉ የተዘጋጀው ፀሐፊው በክርክር ተካፋይ የሆነባቸውንና በችሎት ውስጥ ተቀምጦ የተመለከታቸውን እውነተኛ ጉዳዮች መሠረት በማድረግ፣ ከጉዳዩ ጋር በተያያዘ ልምድ ካላቸው የህግ ባለሙያዎች ጋርም በመወያየትና በኑሮ ልማድ እውቀት የሚታወቁትን የድርጅቶች አሠራርና አደረጃጀት ባህሪና የአገልግሎት አሰጣጥ ሁኔታ መሠረት በማድረግ ስለሆነ እውነተኛውን የክርክር ባህሪ ለመረዳትና የግብር ሕጉን አስፈፃሚ የሆነውን አካል ሐሣብም ለመገንዘብ ፁሁፉ ደረጃል ተብሎ ይታመናል። ህግ የሚዳብረው ስለወጣ ሳይሆን ሲፈጸም ነው። በአፈፃፀሙም ሂደት የሚያጋጥሙ የትርጉም እና ተያያዥ ችግሮች በፍርድ፣ በትችት እና በጥናት እየተነቀሱ እና እየዳበሩ ሲሔዱ የህግ ሳይንስ ያድጋል። በዚህ ረገድም ፅሁፉ ተጨማሪ አስተዋፅኦ ሊኖረው ይችላል ተብሎ ይታመናል።

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5. በዚህ ጽሑፍ "ደረሰኝ "የሚለው ቃል የተ.እ.ታ. ደረሰኝን ብቻ የሚያመለክት ነው።አመታዊ ሽያጫቸው ከብር 100,000.00 እስከ 500,000.00 የሆኑ የደረጃ "ለ" ግብር ከፋዮች የተርን ኦቨር ታክስ ደረሰኝ አስፈቅደው በማሣተም እንዲጠቀሙ ይጠበቅባቸዋል። ይሁን እንጂ በዚህ ጽሑፍ ውስጥ "ደረሰኝ" የሚለው ቃል እነዚህ ግብር ከፋዮች የሚሰጡትን ደረሰኝ ወይም በማናቸውም ሁኔታ ከተ.እ.ታ ደረሰኝ ውጪ የሚሰጡትን ደረሰኞች አይመለከትም።

6. በሐዋሣ ከተማ የተጨማሪ እሴት ታክስ ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ የወንጀል ክስ ተመስርቶባቸው የተፈረደባቸውና በክርክር ላይ ያሉ ጉዳዮችም እንዳሉ ፀሐፊው ከጠበቃ ቸርነት ገ/ህይወት ጋር ባደረገው ውይይት ተገንዝቧል። ፀሀፊው እራሱም ከጉዳዩ ጋር በተያያዙ በይግባኝ የመጣ ጉዳይ በፌደራል ጠቅላይ ፍርድ ቤት የይግባኝ ክርክር ሲደረግበት በችሎት ተቀምጦ አድምጧል።

7. ፀሐፊው ስሥራ ጉዳይ በህዳር ወር 2004 ዓ.ም ወደመቀሌ ሔዶ በነበረበት ጊዜ ይህንኑ ተገንዝቧል።

2. ስለ ታክስ ወንጀሎች በጠቅላላ

2.1 ፅንሰ ሐሣብ

የተጨማሪ እሴት ታክስ አዋጅ ቁ. 285/94 እና ማሻሻያዎቹ /ከዚህ በኋላ አንደየሁኔታው "አዋጁ" በሚል ይጠቀሳል/ የሚጠቀሙት ቃል "ታክስ" የሚለውን ሲሆን በሌሎች የግብር ሕጐች ላይ ደግሞ "ግብር" የሚለው ቃልም ጥቅም ላይ ውሏል::[8] በዚህ መሠረት በዚህ ጽሑፍ ውስጥ ወጥ የቃላት አጠቃቀምን ለማረጋገጥ ሲባል "ግብር" ከሚለው ቃል ይልቅ "ታክስ" የሚለውን ቃል ብቻ እንጠቀማለን::[9] በአማርኛ "የታክስ ወንጀል" በሚል የሚጠሩት የወንጀል አይነቶች በእንግሊዝኛ በአብዛኛው tax offence, tax non compliance, tax evasion, tax crime tax fraud ወዘተ በሚል ይጠቀሳሉ:: ለምሣሌ ብላክስ ሎው ዲክሽነሪ የተባለው የሕግ መዝገበ ቃላት የሚጠቀመው ቃል tax evasion የሚለውን ሲሆን ይህ ቃል tax fraud ሊባል እንደሚችልም ይገልፃል::[10]

የወንጀሉ አይነት ወይም የወንጀሉ ምድብ (category of crime) በተለያየ ስያሜ ቢጠራም መሠረታዊ የወንጀሉ ይዘት ግን ተመሣሣይ ነው: በአጠቃላይ ታክስ ከፋዮች ለመንግስት ሊከፍሉና ሊያሣውቁ፣ ወይም ከሶስተኛ ወገን እየሰበሰቡ ገቢ ሊያደርጉ የሚገባቸውን አንድ የተወሰነ የግብር አይነት ለምሣሌ፣ የገቢ ግብር፣ የሽያጭ ታክስ፣ ተጨማሪ እሴት ታክስ፣ ወዘተ በሕግ በተደነገገው መሠረት በወቅቱ አለመክፈል፣ አለማሣወቅ፣ ቀንሶ መክፈል፣ መረጃን ወይም ገቢን በሙሉ ወይም በከፊል አለማስታወቅ፣ የግብር መረጃ በተሣሣተ ሰነድ ማስደገፍ ወይም ሰነዶችን ማጭበርበር ፣ ግብርን ሰብስቦ ለራሱ ጥቅም ማዋል ሳይፈቀድለት ታክስ መሰብሰብ ወዘተ የታክስ ወንጀሎች በሚል ይጠራሉ::ከዚህ በተጨማሪም ከታክስ ጋር የተያያዙ መረጃዎችን በሕግ ለተወሰነ ጊዜ ጠብቆ አለማቆየትም የወንጀል ሐላፊነትን ሊያስከትል ይችላል::[11]

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8 በእንግሊዝኛ tax የሚለው ቃል ቀጥተኛ ታክስ የሚባለው (direct tax) እና ቀጥተኛ ያልሆነውን(indirect tax) የግብር አይነቶች የሚገልጽ ቃል ነው:: ሁለቱን የታክስ አይነቶች ለመለየት በአማርኛ ቀጥተኛ ታክስ ስለሆነው ለምሣሌ የንግድ ትርፍ "ግብር" የሚለው ቃል ጥቅም ላይ ሲውል እንደተጨማሪ እሴት ታክስ ላለው ቀጥተኛ ላልሆነው ግብር ደግሞ "ታክስ" የሚለው ቃል ጥቅም ላይ ዋለ:: ስለሆነም "ግብር" የሚለው ቃል ቀጥተኛ ግብርን የሚመለከት ሲሆን "ታክስ" ደግሞ ቀጥተኛ ያልሆነ ግብርን የሚመለከት ነው ለምሳሌ የተጠቀሱት የግብር እና ታክስ አይነቶች በዚሁ መልክ የተከፋፈሉ ለመሆኑ የኢትዮጵያ ገቢዎች እና ጉሙሩክ ባለስልጣን ጥቅምት 2003 ዓ.ም #በሀገርዎ የግብር እና ታክስ ስርአት መሰረታዊ ጉዳዮችን ይረዱ$ በሚል ርዕስ ያሳተመውን የግንዛቤ መፍጠሪያ ብሮሸር ይመለከቷል::

9. ለምሣሌ የገቢ ግብር "income tax" አዋጅ /አዋጅ ቁ. 286/94 "ግብር" የሚለውን ቃል ይጠቀማል::የገቢዎችና ጉምሩክ ባለስልጣን ማቋቋሚያ አዋጅ ደግሞ "ታክስ" የሚለውን ቃል ይጠቀማል/ አዋጅ ቁ. 587/2000 አንቀጽ 2/1/ ይመለከቷል::

10. Bryan Garner; Black's law dictionary;8th ed. pp 1501

11. ለምሣሌ የግብር መረጃን ሆነ ብሎ አጥፍቷል በሚል የተከሰሰ ተከሣሽ «መረጃው የጠፋው በመብራት መቋረጥ ምክንያት በኮምፒዮተሩ ላይ የነበረው መረጃ በመጥፋቱ የተነሣ ነው እንጂ እኔ ሆነ ብዬ ያጠፋሁት አይደለም$ የሚል የመከላከያ ጭብጥ አስይዞ የኮምፒውተር ባለሙያ የሆነ ምስክር ሲሰማ ፀሐፊው በችሎት ተቀምጦ አዳምጧል/በ2004 ዓ.ም/::በሊሎች ሃገሮችም ለምሳK? በአውስትራሊያ ከተዘረዘሩት የታክስ ወንጀሎች ጋር በተየያዘ ክስ ተመስርቶ የተቀጡ እንዳሉ መረጃዎች ይጠቁማሉ ለምሳሌ http://www.ato.gov.au/corporate/content.aspx?Doc=/content/00322716.htm በሰኔ 13/2004 አ.ም፡ የታየ::

እነዚህን ተግባራት ተራ ወንጀል አድርጉ መውሰድ፣ እንደገንዘቡ መጠንም ቀላል ወይም ከባድ ወንጀል አድርጉ መውሰድ፣ወይም የፍትሐብሔር ጉዳይ ብቻ አድርጉ መውሰድ በየሐገርቹ የግብር ፖሊሲ፣የወንጀል ፖሊሲ፣የዜጐች የግብር ግዴታን የማክበር ባህል (culture of tax obligation Compliance)፣መንግስት በግብር ላይ እንዳሰው የፖገኝነት መጠንና[12] ሴሎች ሁኔታዎች ላይ የተመሠረተ ነው::

ስምሣሴ በስዊዘርላንድ[13] እጅግ በጣም የከፋ ወንጀል ካልሆነ በስተቀር በጠቅላላ ያሰው ዝንባሴ የታክስ ጥፋቶችን የፍትሐብሔር ጉዳይ ብቻ አድርጉ መውሰድ ነው:: በአሜሪካም ያሰው ዝንባሴ የግብር ግዴታ ጥሰትን እንደስዊዘርላንድ ባይሆንም ወደፍትሐብሔር የመውሰድ ዝንባሴ ይታያል:: የወንጀል ጉዳይ ከሆነም ግልጽ በሆነ በአውቆ ማጥፋት የሀሳብ ሁኔታ ላይ የተመሠረተ መሆን አለበት የሚል ነው:: ይህ የወንጀል ሀላፊነቱ በዚህ አስተሳሰብ ላይ እንዲመሰረት የተደረገበት ምክንያት የታክስ ሕግና አፈፃፀም በባህሪው ውስብስብና ማንም ተራ ሰው ወይም ባለሙያ ያልሆነ ሰው በቀላሉ ተረድቶት ሀላፊነቱን ሊያውቅ ይችላል ሊባል የሚችልበት ስላልሆነ የታክስ ባለሙያዎቹ ሳይቀሩ በችልተኝነት፣ ባለማወቅ፣ ወይም የተስያየ አተረጓጉም፣ ስሌትንና አሠራርን በቅን ልቦና አምነውበት ስህተት ሲፈጽሙ ይችላሉ ተብሎ ስለሚታመን ነው:: በዚህ የተነሣ ግልጽ በሆነ ሁኔታ ሆነ ተብሎ የሚፈፀም የግዴታ ጥሰት (clear violation of actually known legal duty) ስለመኖሩ በበቂ ማስረጃ ካልተረጋገጠ በስተቀር የታክስ ወንጀል ሐላፊነት አንዲኖር አይደረግም::[14]

በሌላ በኩል በሀገራችን የሚታየውን የታክስ ወንጀል ክስ በተመለከተ የወንጀል ተጠያቂነትን ማስፋት ታክስ የመክፈል ወይም የታክስ ግዴታ የመወጣትን ባህል አንዲዳብር ስለሚያደርግ በተስይ ይህ ባህል ዝቅተኛ ነው ተብሎ በሚታሰብበት ህብረተሰብ የወንጀል ሐላፊነት አንዲኖር ማድረግና በዚህ መሠረትም ክሶ ማስቀጣት ተገቢ ነው በሚል የሚከራከሩ ባለሙያዎች አሉ[15]::

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12. መንግስት ከማዕድንና ከነዳጅ አንዲሁም ከሴሎች ትላልቅ ኩባንያዎችና ከመሣሣሰሉት የገቢ ምንጮች የሚያገኘው ገቢ ከፍተኛ ከሆነ አነስተኛ ግብር ከፋይ ላይ የሚኖረው ጥገኝነት(dependency) ዝቅተኛ ይሆናል::

13. David f williams; Tax and corporate social responsibility; discussion paper; sept;2007

14 Definition of tax evasion; an affirmative act ; http:11en.m. wikipedi. org. በግንቦት 6/2004 ዓ.ም ¾ታ¾::የታክስ ባለሙያዎች በመባል የሚታወቁት የታክስ ህግ ባለሙያዎች፣ታክስ አካውንታንቶች፣ታክስ ኦዲተሮች እና የታክስ ኢኮኖሚስቶች ወዘተ ናቸው::

15 ስምሣሴ የገቢዎችና ጉምሩክ ባለስልጣን ዐ/ሕግ የነበረና በአሁኑ ጊዜ ጠበቃ የሆነ የሕግ ባለሙያ ይህ አምነት አንዳሰው ስፀሐፊው ገልጾስታል/ስሙ አንዲጠቀስ ስላልፈለገ አልተጠቀሰም:: ከዚህ በተጨማሪ ለምሳሌ በግብር ህግ ላይ በማተኮር ጥናትና ምርምር የሚሰሩት የአዲስ አበባ ዩኒቨርሲቲ የህግ ፋኩልቲ መምህሩ አቶ ታደሰ ሌንሮ ሰኔ 3/2004 ዓ.ም ለታተመው የሪፖረተር ጋዜጣ በሰጡት ቃለ መጠይቅ ገፅ 15 ላይ "በአንድ በኩል በእኛ ሀገር ዜጎች ታክስ እና ግብር የመክፈል ባህል የላቸውም" የሚል ድምዳሜያቸው ተጠቅሷል::

በተቃራኒው ደግሞ መንግስት ሊያገኝ የሚገባውን ግብር በፍትሐብሔር መጠየቅ አየቻለ ግብር ከፋዩን በትናንሽ ፕሬቶች ሣይቀር በወንጀል ተጠያቂ ማድረጉ ለግብር ከፋዩም፣ ለመንግስትም፣ ለሐገር አድገትም የሚበጅ አይደለም በሚል የሚከራከሩ አሉ።[16]

በሐገራችን በግብር ከፋዩ በኩል ያለው ቅሬታ ለምን የወንጀል ሐላፊነት ወይም የገንዘብ ቅጣት ናረ ሣይሆን የቅጣት መጠኑ በጣም ከፍተኛ እና ከሚፈፀመው ስህተት *ወይም ጥፋት ጋር ሲነፃፀር* ተመጣጣኝ ያልሆነ፤ አንዳንድ ጊዜም የቅጣቱ መጠን ድርጅቱን እስከመዝጋት የሚያደርስ ስለሆነ ቅጣቱ ከባድ ነው፣ ግብር ከፋዩ በቅን ልቦና የሠራውን ስህተትም ለማረምና ለማስተማር የሚደረገው ጥረት አነስተኛ ነው የሚል ቅሬታ በግብር ከፋዩ በኩል አንዳስ ፕናቶች ይጠቁማሉ።[17]

በግብር ሰብሣቢውም በኩል የወንጀል እርምጃ የመጨረሻው የማስተማሪያና የመቅጫ እርምጃ እንጂ እንደመደበኛ እርምጃ እየተወሰደ ያለ አይደለም በሚል የሚቀርብ መከራከሪያ አለ።[18] በርግጥም የታክስ ሕጉቶን የወንጀል ድንጋጌዎች ብዛት ልብ ብሎ ለተመለከተ ሰው በግብር ከፋዩ በኩል እየተፈፀመ ያለው ስህተት /የአውቆ ማጥፋትና የቅን ልቦና ስህተት/ ሁሉ የወንጀል ክስ ይመስረትበት ቢባል ማንም ከተጠያቂነት ይድናል ብሎ መገመት አይቻልም። ባለስልጣን መ/ቤቱ ይህን መከራከሪያ የሚያቀርበው ከዚህ አንፃር በመመልከትና "በእያንዳንዱ የታክስ ፕፋት ሳይ *የወንጀል* ክስ ልመስርት ብል በርካታ ግብር ከፋይ ሊከሰስና ሊቀጣ ይችል ነበር"፣ ይሁን እንጂ የወንጀል ክስ እየመሰረትን ያለነው በጥቂት ጉዳዮች ሳይ ብቻ ነው በሚል አስተሳሰብ ይመስላል። በአጠቃላይ ግን በታክስ ጉዳይ የወንጀል ክስ የመጨረሻ አማራጭ፣ በአውቆ ማጥፋት ሳይ የሚመሠረት፣ የግብር ከፋዩን የአካልና የሥራ ነፃነት የማያሳጣ፣ የድርጅቱን ህልውና ክፉኛ የማይጉዳ መሆን አለበት የሚለው አስተሳሰብ በመስኩ ባለሙያዎችና በግብር ፖሊሲ አውጪዎች በኩል መግባባት ሳይ የተደረሰበት መሠረታዊ ሐሣብ ነው።

2.2 የታክስ ወንጀል ሕጉቻችን

የታክስ ወንጀል በወንጀል አይነት አመዳደቡ በአብዛኛው በመንግስት የኢኮኖሚ ጥቅም ሳይ የሚፈፀም ወንጀል ተደርጉ የሚመደብ ነው።በወንጀል ሕጉ ሳይም የተመደበው በዚህ አመዳደብ ነው።[19] የግብር ወንጀል መሠረት የሚያደርገው በወንጀል ሕጉ ሳይ ከተደነገጉት ወንጀሎች በተጨማሪ[20] በተለያዩ የግብር አዋጆችና ደንቦች ሳይ የተደነገጉትን የወንጀል ሐላፊነት የሚያስከትሉ ድንጋጌዎችን ጭምር ነው። የገቢ ግብር አዋጁ፣ የተርን ኦቨር ታክስ አዋጅ፣ የተጨማሪ እሴት ታክስ አዋጅ በርካታ የወንጀል ድንጋጌዎችን ይዘዋል።እነዚህ ድንጋጌዎች በጠቅላላ የታክስ ወንጀሎች በሚል ሊመደቡ የሚችሉ ናቸው። የተጨማሪ እሴት ታክስ አዋጁን ብቻ ስንመለከት አዋጁ የወንጀል ድንጋጌዎቹን "የወንጀል ጥፋቶች" በሚል ርዕስ በክፍል 12 ሳይ ዘርዝሯቸዋል፣ በዚህ መሠረት ይህ ክፍል ከተጨማሪ እሴት ታክስ ጋር

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16 ይህ አስተሣሰብ የገንዘብ ቅጣትንም ይጨምራል። በወንጀል እንዲከሰሱ ሳይደረግ ከፍተኛ ገንዘብ መቅጣትም የባለሐብቶች ወይም የባለአክስዮናች ገቢ ወይም የትርፍ ድርሻ እንዲቀንስ ስለሚያደርግ፣ ስሠራተኞች የሚሰጡ የተለያዩ ጥቅማጥቅሞች እንዲቀንሱ ስለሚያደርግ፣ የሠራተኛ ቅነሣም ሊያስከትል ስለሚችል ጉንቃቄ የሚፈልግ አርምጃ ነው በሚል የሚከራከሩ አሉ /ለምሣሌ ጠበቃ ይሁን ፀሐይ ይህን አይነት አስተሳሰብ ካሳችው ባለሙያዎች መካከል አንዱ ነው።

17 ለምሣሌ አሚን እና ጆን ማስታወሻ ተ.ቁ. 7ጽ 39

18 የገቢዎችና ጉምሩክ ባለስልጣን መ/ቤቱ የቴሌቪዥን ፕሮግራም፣ ጋዜጣና መሰል ዘገባዎች ሳይ ይህ አስተሳሰብ በተደጋጋሚና በስፋት የሚነገር ነው።

19 የ1996 ዓ.ም የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ የወንጀል ሕግ/ ከዚህ በኋላ "የወንጀል ሕጉ"/ በሚል ብቻ ይጠቀሣል። በመንግስት የኢኮኖሚና የገንዘብ ጥቅሞች ሳይ የሚፈፀሙ ወንጀሎች በሚል የተጠቀሰውን ክፍል ይመለከቷል።

20 ለምሣሌ የወ/ሕ/ቁ. አንቀጽ 349፣350 እና 351 ይመለከቷል።

በተያያዘ ምን አይነት ተግባራት እንደሚያስቀጡ፣ እነማን እንደሚቀጡና የወንጀል ተሣትፎ አይነትንና ያስቀጥተኛ የወንጀል ተሣትፎ ሲቀጡ የሚችሉ እነማን እንደሆኑ በዝርዝር ደንግጓል። ይህን ወንጀል መተላለፍ የወንጀለኛ መቅጫ ሕጉን እንደመተላለፍ የሚቆጠር ስለሆነ ክርክሩ የሚመራው በወንጀለኛ መቅጫ ስነስርአት ሕጉ /ከዚህ በኋላ "የወ/መ/ሥ/ሥ/ሕግ" በሚል ይጠቀሣል/መሠረት ነው።[21]

የዚህ አዋጅ ማሻሻያ የሆነውና የዚሁ አዋጅ አካል እንደሆነ የሚቆጠረው አዋጅ ቁጥር 609/2001 ተጨማሪ የወንጀል ድንጋጌዎችን ይዟል። በዚህ መሠረት ማሻሻያው ደረሰኝ ከመስጠት ግዴታ ጋርና ከሽያጭ መመዝገቢያ መሣሪያ አጠቃቀም ጋር በተያያዘ ምን አይነት ተግባር በወንጀል እንደሚያስጠይቅና እነማን ሊጠየቁ እንደሚችሉ ደንግጓል። በዚህ መሠረትም ማንኛውም ስተ.እ.ታ. የተመዘገበ ግብር ከፋይ ከግብይቱ በኋላ ወዲያውኑ ደረሰኝ ካልሰጠ በወንጀል እንደሚጠየቅ ደንግጓል።

ይህ ግዴታ የተጣለው የሽያጭ መመዝገቢያ መሣሪያ በሚጠቀሙና በማይጠቀሙ ተመዝጋቢዎች ላይ ነው።ይህን ግዴታቸውን ካልተወጡ በወንጀል ይጠየቃሉ።[22] በዚህ መሠረት የገቢዎችና ጉምሩክ ባለስልጣን ዐ/ሕግ /ከዚህ በኋላ "ዐ/ሕግ" በሚል ይጠቀሣል/ የወንጀል ክስ እየመሠረተ በርካታ ግለሰቦችና ድርጅቶች ተፈርደባቸዋል። አሁንም በክርክር ላይ ያሉ ቁጥራቸው ከፍተኛ የሆኑ ክሶች ይገኛሉ። በሥራ ላይ ካሉት የታክስ ሕጉች በፊት የነበሩት የተሻሩት የታክስ ሕጉችም የወንጀል ድንጋጌዎችን ይዘው የነበር ቢሆንም እንደጉምሩክ ወንጀሎች የወንጀል ክስ በብዛት የተመሠረተባቸው የነበረ ስመሆኑ አጠራጣሪ ነው።[23] በተገኘ ው መረጃ መሠረት ከ1996 ዓ.ም በፊት በግብርና ታክስ ጉዳይ ላይ የቀረበ የወንጀል ክስ የለም። በጉምሩክ ጉዳዮች ግን በርካታ የወንጀል ክሶችና ፍርዶች አስቀድሞ ከ1996 ዓ.ም በፊትም ነበሩ።[24]

የተጨማሪ እሴት ታክስ ደረሰኝ ምንነት ማብራሪያ የሚፈልግ አይደለም። በመሣሪያው የታተመ የተጨማሪ እሴት ታክስ ደረሰኝ ምንነትን በተመለከተ ግን ወደ ዝርዝር ጉዳዮች

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21 አዋጅ ቁ. 285/94 አንቀጽ 48 ይመለከቷል።

22 የተጨማሪ እሴት ታክስ /ማሻሻያ/አዋጅ ቁ. 609/2001 አንቀጽ 50/ሰ/ እና አዋጅ ቁ. 285/94 አንቀጽ 48 እና የዚህኑ ሕግ ማብራሪያ የሆነውን 'የተጨማሪ እሴት ታክስን በሥራ ላይ ለማዋል ስለተዘጋጀው አዋጅ ረቂት የቀረበ አጭር መግለጫ፣ ያልታተመ :ገጽ 42 ይመለከቷል። ይህ የማብራሪያ ሰነድ የታክስ ሕጉ ምንጭ ሰነድ (source document) ተደርጉ የሚወሰድ ነው። የወንጀል ድንጋጌዎችን በተመለከተ ግን የማብራሪያ ሰነዱ ዝርዝር ጉዳዮችን የያዘ አይደለም።

23 በታክስ ጉዳዮች ላይ የተመሠረቱ የወንጀል ክሶች ስለመኖራቸው ፀሐፊው መረጃ ማግኘት አልቻለም። አጠራጣሪ ነው የተባለውም ፀሐፊው ሊያገኛቸው ያልቻሉ ጉዳዮች ሊኖሩ ይችላሉ በሚል እምነት ብቻ ነው። ፀሐፊው ስረዝም ጊዜ በግብር ሕጉች ላይ ከሰሩት ከሚች ከአቶ ግርማ ሐ/መስቀል ጋር ባደረገው ተደጋጋሚ ውይይት እስከ 1996 ዓ.ም ድረስ የወንጀል ክስ ስለመቅረቡ እንደማያውቁ ገልፀውለታል። በታተመው የፍርድ ቤት ውሣኔዎች ላይም የታክስ ወንጀል ጉዳይ አላጋጠመውም።

24 የቀድሞው የጉምሩክ ባለስልጣን በጉምሩክ ወንጀሎች ላይ አራሱ ምርመራ በማድረግ በራሱ ዐ/ሕግ የወንጀል ክስ ይመሠርት ነበር። የቀድሞው ገንዘብ ሚኒስቴር ወይም ሐገር ውስጥ ገቢ ባለስልጣን ግን የራሱ ዐ/ሕግ አልነበረውም።አንዳንድ ጊዜ የታክስ ወንጀል ጉዳይ ለምን በመደበኛው ዐ/ህግ አይታይም የሚል አስተያየት ይሰማል የሌሎች ሀገሮች ልምድ ሲታይም የተለየ ነው። ለምሳሌ በአውስትራሊያ የግብር ኮሚሽኑ እራሱ ክስ ይመሰርታል(ከላይ በማስታወሻ ተ.ቁጥር 11 ላይ የተጠቀሰውን ድህረ ገፅ ASKŸ...M። በስዊዘርላንድ ደግሞ በዐ/ህግ መ/ቤቱ ውስጥ እያንዳንዱ መምሪያ የተዋቀረው የገቢዎች እና ጉምሩክ የስራ ክፍል ክስ ይመሰርታል። (http:/ynamtax.co.uk/abouttax/tax prosecution.php/3/18/tax.prosecutions/

ከመግባታችን በፊት ስለመሣሪያው ምንነት የሕግ ግንዛቤ መያዝ ስለሚያስፈልግ ይህንኑ እንደሚከተለው በአጭሩ እንመለከታለን::

3. ስለሽያጭ መመዝገቢያ መሣሪያ ምንነት

በሽያጭ መመዝገቢያ መሣሪያ የመጠቀም ግዴታን የደነገገው የሚኒስትሮች ምክር ቤት ደንብ የሽያጭ መመዝገቢያ መሣሪያ ማለት ምን ማለት እንደሆነ ትርጉም ሰጥቶታል:: በዚህ መሠረት የሽያጭ መመዝገቢያ መሣሪያ ማለት የጥሬ ገንዘብ መመዝገቢያ መሣሪያ (cash register machine) ወይም የሽያጭ ነቁጥ መሣሪያ (Point of Sales Machine) ነው በማለት ደንቡ ተርጉሞታል :: የጥሬ ገንዘብ መመዝገቢያ እና የሽያጭ ነቁጥ መሣሪያ ማለት ምን ማለት እንደሆነም ትርጉም ተሰጥቷቸዋል:: በዚህ መሠረት የሽያጭ መመዝገቢያ መሣሪያ በሽያጭ መደበኛ ደረሰኝ ምትክ የሸቀጦችን ወይም አገልግሎቶችን ሽያጭ የሚመዘግብና ለማንበብ ብቻ የሚቻል ማስታወሻን የሚያከማች በኤሌክትሮኒክ ዘዴ ፕሮግራም የሚደረግ ቲን የተገጠመበት በሰርኪዩት የተረጋገጠ ፕሮግራም የሚጠቀም፣ ወይም ተጨማሪ ተግባራት ለማከናወን የሚያስችል ተጨማሪ አቅም ያለው መሣሪያ ነው::[25]

ይህ መሣሪያ ነጋዴዎች በተስመደው ሁኔታ ሲጠቀሙበት ከነበረው የሽያጭ መመዝገቢያ መሣሪያ (Cash register Machine) መሣሪያ[26] ይለያል:: የሚለይበት *መሰረታዊ* ምክንያትም የታክስ አከፋፈልን በተመለከተ አስፈላጊ መረጃ የሌለውና ከማዕከላዊ የመረጃ ማዕከሉም ጋር ያልተገናኘ በመሆኑ ነው:: የመሣሪያውን ይዘትና አቀራረብ በተመለከተ መሣሪያው ሕጋዊ አውቅና እንዳለው የሚቆጠረው በአቅራቢነት ከተመዘገቡ አቅራቢዎች የተገዛና የተገጠመ መሆኑ ሲረጋገጥ ብቻ ነው:: በቴክኒካል መሣሪያነታቸው እነዚህ መሣሪያዎች እንደሚጫንላቸው ሶፍትዌር አይነት፣ ከሒሣብ አያያዝና የክምችት አስተዳደርን (Stock management) ለመቆጣጠርና ለግብር መረጃ አቀባበል ካሳቸው የቴክኒዩሎጂ ብቃት አንፃር የተለያዩ ደረጃና ጥራት አሳችው:: በዚህ መሠረትም ባለስልጣን መ/ቤቱ ያወጣውን መስፈርት አሟልተው በአቅራቢነት የተመዘገቡና ማሽኑን እያቀረቡ ያሉ በሕጉ አነጋገር "አቅራቢዎች" የሚባሉ ድርጅቶች አሉ:: ስለሆነም *ተመዝጋቢው ግብር ከፋይ መሳሪያውን ሊገዛና ሊጠቀም የሚገባው ለእዚሁ ባእቅራቢነት ከተመዘገቡት ተቋማት ብቻ ነው::* ይህን አለማድረግ የህግ ተጠያቂነትን ሊያስከትል ይችላል::

4. የተጨማሪ እሴት ታክስ ተመዝጋቢ ግዴታዎች

ደረሰኝ የመስጠት ግዴታታ ያለባቸዉ የተ.እ.ታ *ተመዝጋቢዎች* /ከዚህ በኃዋላ *ተመዝጋቢዎች* በሚል የሚጠቀሱ/ በሁለት የተከፈሉ ናቸዉ:: ታአንደኛው ክፍል መሣሪያውን የሚጠቀሙ ሲሆን ሁለተኛው ክፍል ደግሞ መሣሪያውን የማይጠቀሙ በደረሰኙ ብቻ ሽያጭ የሚያከናውኑ ናቸው:: የሽያጭ መመዝገቢያ መሣሪያ ለመጠቀም ግዴታ ያለባቸው ግብር ከፋዮች እነማን እንደሆኑ የሚለየው በደንቡ መሠረት ሣይሆን የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር በሚያወጣው መመሪያ መሠረት ነው::[27] በዚህ መሠረትም አመታዊ ሽያጫቸው ከብር 500,000.00 /አምስት መቶ ሺህ ብር/ በላይ ከሆኑ ግብር ከፋዮች በተጨማሪ በተለያየ ጊዜ በወጡ መመሪያዎች መነሻነት በአስመጪነት፣ በላኪነት፣

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[25] ደንብ ቁጥር 139/99 አንቀጽ 2 ንኡስ አንቀጽ 1፣2 እና 6 ላይ የተደነገጉትን የትርጉም ድንጋጌዎች ጣምራ ንባብ ይመለከቷል::

[26] ይህ መሣሪያ ከታክስ የመረጃ ማዕከል ጋር ግንኙነት የሌለው ነጋዴዎች የተ.እ.ታ. አዋጅ ከመውጣቱ ከ1994 ዓ.ም በፊትም ይጠቀሙበት የነበረው መሣሪያ ነው:: በአብዛኛው ትላልቅ ሆቴሎች ፣ ሬስቶራንቶች ፣ መጠጥ ቤቶች የትርቻር መደብሮች ፣ሱፐርማርኬቶት ይጠቀሙበት ነበር::

[27] ከላይ በማስታወሻ ቁ. 25 ላይ የተጠቀሰውን ደንብ አንቀጽ 3 ይመለከቷል::

በማምረት፣ በጅምላ ማከፋፈል፣ በሌሌክትሮኒክስ፣ ወዘተ ዘርፍ የተሰማሩ ግብር ከፋዮች ስተጨማሪ እሴት ታክስ ከፋይነት እንዲመዘገቡ ተደርጓል።[28]

በበርካታ ሐገሮች እንደተደረገው[29] ሁሉ በአዋጁ የመሸፈን ጉዳይ የሽያጭ መጠን መሠረት ያደረገ ነው፣ በፈቃደኝነት ያልተመዘገቡት ግን በንግድ ዘርፋቸው አይነት፣ በንግድ ቦታቸው ወዘተ ምክንያት የግዴታ ተመዝጋቢ እንዲሆኑ ተደርገዋል።አሁንም በዚህ መልክ አየተሰራ ይገኛል። አመታዊ ሽያጫቸው ብር 500,00.00 የማይሞላ ግብር ከፋዮች ስተጨማሪ እሴት ታክስ ከፋይነት መመዝገብ ይችላሉ። አብዛኛው ግዥያቸው/ግብአታቸው/ ከተጨማሪ እሴት ታክስ ተመዝጋቢዎች ጋር የሆኑ ነጋዴዎች የከፈሉትን ተ.እ.ታ. ለማስመለስ ወይም ለማወራረድ የሚያስችላቸው እራሳቸውም ተመዝጋቢ ከሆኑ ስለሆነ የተጠቀሰው የሽያጭ መጠን ሣይኖራቸው የተመዘገቡ አሉ።

ስተጨማሪ እሴት ታክስ ከፋይነት የተመዘገበ ግብር ከፋይ ደረሰኝ ሲሰጥ የሚገባውና መሣሪያውን ሲጠቀም የሚገባው በዘፈቀደ ሣይሆን በሕግ የተቀመጡ ግዴታዎችን አክብሮ በመከተል ነው። በዚህ መሠረት የተመዘገቡ ግብር ከፋዮች በመሠረታዊነት የሚከተሉት ሁለት ግዴታዎች አሉባቸው። እነዚህም፤

1. ደረሰኝ ወዲያውኑ የመስጠትና[30]
2. በአያንዳንዱ የሒሣብ ጊዜ ውስጥ ሒሣቡን ለግብር አስገቢው ባለስልጣን ማሣወቅ[31] ናቸው።

ከዚህ በተጨማሪ ከሽያጭ መሣሪያ አጠቃቀም ጋር በተያያዘም ግብር ከፋዩ በባለስልጣን መ/ቤቱ ከተፈቀደው ውጪ እንዳይጠቀም፣ ጥገና እንዳያስደርግ፣ በአመት አንድ ጊዜ የቴክኒክ ምርመራ እንዲያስደርግ ወዘተ ግዴታ አለበት። ተጠቃሚዎች እነዚህን ግዴታዎች ካልተወጡ ሊከተልባቸው የሚችል የወንጀልና የፍትሐብሔር ሐላፊነቶች በሕጉ ላይ ተደንግገዋል።[32] የፍትሐብሔር ኃላፊነቱ የዚህ ጽሑፍ መሠረታዊ ትኩረት ስላልሆነ የምንመለከተው አይደለም።የወንጀል ኃላፊነትን በተለይም ደረሰኝ ወዲያውኑ ስለመስጠትን በተመለከተ ያለውን የወንጀል ሐላፊነት ግን ቀጥሎ እንመለከታለን።

4.1 ደረሰኝ የመስጠት ግዴታ

ተመዝጋቢዎች ዕቃ ወይም አገልግሎት ለገዛው ሰው ደረሰኝ መስጠት ግዴታ አለባቸው። ይህን ግዴታ የሚጥለው አዋጅ ቁጥር 285/94 ያሻሻለው አዋጅ ቁጥር 609/2001 አንቀጽ 10/1/"... ስተጨማሪ እሴት ታክስ የተመዘገበና ታክስ የሚከፈልበት ግብይት የሚያካሒድ ሰው ደረሰኝ ወዲያውኑ መስጠት አለበት" በማለት ይደነግጋል። ይህ ድንጋጌ ከእንግሊዝኛው ትርጉም ጋር መጠነኛ ልዩነት ያለው ይመስላል።ወዲያውኑ የሚለውን የእማርኛ ቃል " to simeltanously issue" በሚል ተተርጉሟል። የእንግሊዝኛው ትርጉም "አብሮ መስጠት "የሚለውን የአማርኛ ትርጉም የሚመስክት ነው። በመሆኑም በአማርኛው ድንጋጌ መሠረት ለገዥው ደረሰኝ ሲሰጥ የሚገባው ገንዘቡን እንደከፈለ ወዲያውኑ መሆን አለበት የሚል ሲሆን በእንግሊዝኛው ደግሞ ገንዘቡ የሚከፈለው ደረሰኝ ከመቀበል ጋር መሆን አለበት እንደማለት ነው።

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[28] ለምሣሌ ጥር 28 ቀን 2002 ዓ.ም በአዲስ ዘመን ጋዜጣ የወጣውን የህዝብ ማስታወቂያ ይመለከቷልለምሣሌ በእንግሊዝ ሐገር አመታዊ ሽያጫቸው ከ70,000.00 ፓውንድ በላይ የሆኑ ነጋዴዎች ስተጨማሪ እሴት ታክስ ከፋይነት የመመዝገብ ግዴታ አለባቸው (ACCA paper F6 Taxation(UK) FA 2010 AND F(NO.2) A2010 study Text for exams in 2011 pp 326

[29] አ.ቁ. 609 አንቀጽ 10/1/ ይመለከቷል።

[30] አ.ቁ. 609 አንቀጽ 12/1/ሀ/ ይመለከቷል።

[31] አ.ቁ 609/2001 አንቀፅ 10/1 እና 12/1/ሀ ይመለከቷል።

[32] የአዋጁን አንቀጽ 18/47/ሀ/ ይመለከቷል።

በሴላ በኩል ታክስ የሚከፈልበት ግብይት ተከናወነ የሚባለው ስግብይቱ የተጨማሪ እሴት ታክስ ደረሰኝ ሲሰጥ ነው በማለት አዋጅ ቁጥር 285/94 አንቀጽ 11/1/ ይደነግጋል። ይሁን እንጂ ደረሰኝ ሲሰጥ የሚችልበት ጊዜ አቅርቦቱ ከተከናወነ በኋላ እስከ አምስት ቀናት ውስጥ ሲደርስ እንደሚችልም የዚሁ አንቀጽ ንኡስ አንቀጽ 2 እና 3 ይደነግጋሉ። የንግድ አሰራርና የሽማቾች ጥበቃ አዋጅም ነጋዴው ደረሰኝ የመስጠት ግዴታ አለበት የሚል ሲሆን ነጋዴው ደረሰኝ ሲሰጥ የሚገባበትን[33] የጊዜ ሁኔታ ግን አላመለከተም።

ይህ አዋጅ የሚመለከተው ማንኛውንም ነጋዴ ሲሆን ስተ.እ.ታ. የተመዘገቡ ነጋዴዎችም በዚህ ግዴታ ውስጥ እንደሚካተቱ ግልጽ ነው። እነዚህን ድንጋጌዎች በጥንቃቄ ስንመለከት ሁለት መሠረታዊ ጥያቄዎች ይነሣሉ፣ አንደኛው ተመዝጋቢው ግዴታውን እንዳልተወጣ የሚቆጠረው ክፍያ ከተፈፀመ በኋላ ምን ያክል ጊዜ ቆይቶ ደረሰኝ ካልሰጠ ነው የሚለውና፣ ገዥው ደረሰኝ እንዲሰጠው መጠየቅ የለበትም ወይ? የሚሉት ናቸው። እነዚህን *ጥያቄዎች በክርክር ጊዜ ከሚያጋጥሙ የክርክር ነጥቦች* አንፃር እንደሚከተለው እንመለከታለን። ከበርካታ ክርክሮች እንደሚታየው የገቢዎችና ጉምሩክ ባለስልጣን ተቆጣጣሪዎች ወደነጋዴው ይሄዱና አገልግሎት ወይም ዕቃ ይገዛሉ። ስገዙት ዕቃ ወይም አገልግሎት ገንዘብ ከከፈሉ በኋላ ደረሰኝ እንዲሰጣቸው የተወሰነ ጊዜ ይጠብቃሉ፣ ወይም ወጣ ይሉና ትንሽ ቆይተው ተመልሰው ይገባሉ።

ነጋዴው ደረሰኝ እንዲሰጣቸው በፍጹም አይጠይቁም።ከዚያም ድርጅቱ የመሣሪያው ተጠቃሚ ከሆነ መሣሪያው እንዳይሠራ ያስቆሙና ጆርናል ከኮምፒዩተሩ ያወጣሉ። በጆርናሉ ላይ የተሸጠው ሸያጭ ስለመመዝገቡ ያረጋግጣሉ።[34]

ድርጅቱ መሣሪያውን የማይጠቀም ከሆነ ሽያጭ የሚደረግበትን ደረሰኝ ይወስዳሉ።በዚህ ሁኔታ ማሽኑን ሲያስቆሙና አስፈላጊ ሰነዶችን ሲወስዱ አብረዋቸው የባለስልጣኑ መርማሪዎች ስለሚኖሩ ሽያጩን ያከናወኑትንና የድርጅቱ ባለቤት ካስ ባለቤቱን፣ የሽርክና ማኅበር ከሆነ ደግሞ ሥራ አስኪያጁን ጨምረው ምርመራ እንዲጣራባቸው ይወስዳሉ።[35] የገቢዎችና ጉምሩክ ባለስልጣን ምርመራውን በራሱ መርማሪዎች ስማከናወን ስልጣን ስላለው ምርመራውን የሚያደርገው እራሱ ነው።[36]

ይህ ሒደት በራሱ ተገቢ አይደለም በሚል የሚከራከሩ ባለሙያዎች አሉ። ምክንያቱም ገቢዎችና ጉምሩክ ባለስልጣን ወንጀል እንዳይፈፀም መከላከል፣ ተፈጽሞም ከተገኘ ገለልተኛ ሆኖ ማጣራት ይገባዋል እንጂ የራሱን ሰራተኞች ልኮ ሆነ ብሎ ደረሰኝ እንዲሰጣቸው ሳይጠይቁና ነጋዴው *ወይም ግብር ከፋዩ ወይም ሰራተኛው* ደረሰኝ አልሰጥም ማለቱ ሳይረጋገጥ ደረሰኝ የመስጠት ግዴታውን አልተወጣም በማለት ወደ ክስ መሄድ ተገቢ አይደለም፣ ይልቁንም ግብይቱ እንደተጠናቀቀ ሲቆጠር የሚገባው ነጋዴው ደረሰኝ እንዲሰጥ ተጠይቆ ስመስጠት እንዳልቻለ ወይም እንዳልፈለገ ሲረጋገጥ ነው የሚል መከራከሪያ

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33 አዋጅ ቁ. 685/2002 አንቀጽ 25 ይመለከቷል።

34 ጆርናል ማለት እያንዳንዱ ሽያጭ፣ ዋጋና ሽያጩ የተደረገበት ሰአት የሚመዘገብበትን መረጃ የያዘ ሕትመት (print out) ነው። የሽያጭ ማጠቃለያው ዜድ ሪፖርት (Z.report) የሚባል ሲሆን፣ ይህ ሪፖርት እንደ ጆርናሉ ዝርዝር መረጃን የያዘ አይደለም።ዐ/ህግ *በምስክርነት የሚያቀርባቸው ምስክሮች ይህን ሂደት ሲያስረዱ መሰማት የተለመደ ነው ለማለት ይቻላል*።

35 ፀሐፊው ይህን ሒደት የተገነዘበው የገቢዎችና ጉምሩክ ዐ/ሕግ ምስክሮች በጉዳዩ ላይ ምስክርነት ሲሰጡ ከሚናገሩትና በማስታወሻነት ከመዘገበው እንጂ እራሱ ሒደቱን ስስተመለከተ ወይም በሆነ አጋጣሚ ተሣትፎ ስለነበረው አይደለም።

36 የገቢዎችና ጉምሩክ ባለስልጣን ማቋቋሚያ አዋጅ ቁ. 587/2000

የሚያቀርቡ ጠበቆች አሉ::[37] ይሁን እንጂ በወ/ሕግ በኩል ያለው አስተሣሰብ ደረሰኝ ስመስጠት ግዴታው የተጣለው በተመዝጋቢው ላይ ብቻ ስለሆነ ይህንን ግዴታውን አስቦና ተጠንቅቆ መፈፀም ያለበት እራሱ ተመዝጋቢው ነው:: በባለስልጣን መ/ቤቱ በኩል የሚደረገው በክትትል መልክ የመያዝ ስነስርዓትንም በተመለከተ ይህን *ከመድረግ የሚከለክለው* ሕግ ካለመኖሩ በተጨማሪ በዚህ መልክ የሚያዙት ነጋዴዎች አስቀድሞ በቂ ጥናት የተደረገባቸው፣ እንዳንዶቹም በቂ ማስጠንቀቂያ፣ ትምህርትና ቅስቀሣ የተደረገላቸው ሆነው ሳለ ጥፋት ከመፈፀም *ሊቆጠቡ አለመቻላቸው የተረጋገጠባቸው* ስለሆኑ ያለው የመጨረሻ አማራጭ በዚህ መልክ ደዞ ማስቀጣት ስለሆነ ነው የሚል *መከራከሪያ ይቀርባል*::

"ወዲያውኑ" የሚለውን የጊዜ ሁኔታን በተመለከተ አከራካሪ የጊዜ መመዘኛ ይታያል:: በተለይ ከታክስ አዋጁ በኋላ የወጣው የሽማቾች መብት ጥበቃ አዋጅ ደረሰኝ የመስጠት ግዴታን ብቻ እንጂ "ወዲያውኑ" በሚል የተቀመጠ የጊዜ ገደብ የለውም:: በዚህ መሠረት የሚነሣው የሕግ ጥያቄ የጊዜ ገደብን በተመለከተ ተፈፃሚ ሲሆን የሚገባው ግዴታ በኋላ ላይ የወጣው ሕግ መሆን የለበትም ወይ? የሚለው ነው:: ሌላው ወዲያውኑ የሚለው ግዴታ ግልጽ የፍሬ ነገር መመዘኛ ሰንት ደቂቃን የሚመለከት ነው የሚለው ነው::

5. የግብር ከፋዩ የወንጀል ተጠያቂነት

ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ የወንጀል ኃላፊነት እንዲኖርባቸው እየተደረጉ ያሉት የግል ባለሐብቱና ድርጅቶች ብቻ አይደሉም:: በወንጀል እየተከሰሱ ያሉት መሥሪያውን በቀጥታ የሚያከናውኑ ወይም ደረሰኝ ከመስጠት ሥራ ጋር ተያያዥ የሆኑ የሽያጭ ሥራና የመሣሰሉትን የሚያከናውኑ እንዲሁም ሥራ አስኪያጅንና ወኪልንም ጭምር ነው:: እነዚህ ኃላፊነት ያለባቸው ወገኖች/ከዚህ በኋላ "ተጠቃሚዎች" በሚል ይጠራሉ/እንደየድርጅቱ ትልቅነትና ትንሽነት፣ እንደ ድርጅቱ የውስጥ አሰራር ባህሪ፣እንደድርጅታዊ አቋሙ ወዘተ የመሣሪያ አጠቃቀማቸውና የተጠቃሚዎች ሁኔታና በድርጊቱ ያላቸው ተሣትፎ ሲለያይ ይችላል::[38]

የድርጅቱ ባለቤት ገንዘብ ተቀባይም/ካሸርም/[39]፣ የሽያጭ ሠራተኛም ሆኖ የሚሰራበት ተጠቃሚ አለ[40]፣ ካሸር ለብቻ የሽያጭ ሠራተኛ ለብቻ ተመድቦ ዝርዝር የሥራ ሐላፊነት

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37 ለምሣሌ ጠበቃ ይሁን ፀሐይ በዚህ መልክ የሚደረገው ምርመራ የወ/መ/ሥ/ሥ/ሕ/ቁ. 9 ድንጋጌን የሚቃረን ነው የሚል እምነት አለው:: አንዳንድ ባለሙያዎች ደግሞ ደረሰኝ ጠይቀው የማይሰጣቸው መሆኑ እስካልተረጋገጠ ድረስ ግብይት እንደተጠናቀቀ ሲቆጠር አይገባም ይላሉ (ለማቸው እንዲጠቀስ ለላልፈለጉ አልተጠቀሰም)

38 የድርጅቶች አሰራር፣ አደረጃጀትና መዋቅር እንዲሁም ድርጅታዊ ባህላቸው የተለያየና ውስብስብ ነው:: ይህ ሁኔታ በአኛ ሐገር ብቻ ሣይሆን በአደጉት አገሮችም ጭምር እንደሆነ ሙያዊ ጽሑፎች ይጠቁማሉ/ለምሣሌ Robert Heller;The complete guide to modern management ;2006 pp25-32

39 ገንዘብ ተቀባይ ለሚለው ቃል የእንግሊዝኛው አቻ ትርጉም "ካሸር" " cashier" የሚለው ነው:: አንዳንድ የአማርኛ ቃላት በጊዜ ሒደት በእንግሊዝኛ ትርጉማቸው እየተተኩ በስፋት ጥቅም ላይ ሲውሉ መመልከት የተለመደ ነው:: ከእነዚህ ቃላት መካከል "ካሸር" የሚለው ቃል ነው:: በዚህ ሥራ ላይ ያሉ ግለሰቦች በምስክርነት ወይም የተከሣሽነት ቃላቸውን ሲሰጡ በአብዛኛው "ካሸር" ነኝ በሚል የሥራ መደባቸውን ይናገራሉ:: ዳኞችም አንዳንዶቹ ምን ማለት ነው በማለት በአማርኛ የተለመደውን "የአማርኛውን የሥራውን መጠሪያ እንዲነግሯቸው ሲያደርጉ" አንዳንድ ጊዜ ደግሞ ዝም ብለው ያልፉታል:: እንዲተረጉም የሚፈልጉት ዳኞች የፍ/ቤቱ የሥራ ቋንቋ አማርኛ ስለሆነ በተቻለ መጠን በአማርኛ ተተርጉሞ መነገር አለበት ከሚል እምነት በመነሣት ይመስላል::

ተሰጥቶ የሚሠራበት ድርጅት አለ፣ የሽያጭ ሠራተኛና ካሸር ሁሉም ስልጠና ወስደው እንደሥራ ብዛቱ ሁሉም የሁሉንም ሥራ የሚሰራበት አሰራር ያለው ድርጅት አለ።

አንዳንዱ ደግሞ የቤተሰብ ድርጅት ይሆንና የቤተሰብ አባላት ያለደመወዝ ወይም ያለቅጥር ግንኙነት የሚሠራበት አለ።[41] አንዳንዱ ደግሞ መሣሪያውን በመኖሪያ ቤቱ አድርጉ ባለቤቱ ወይም ልጁ ብቻ የሚጠቀምበት አለ።ለምሣሌ ቢሮ የሌላቸው ተቋራጮችና አማካሪዎች በዚህ ምድብ ሊካተቱ

የሚችሉ ናቸው።[42] ስልጠና በመውሰድም ረገድ ያለው ልዩነት የተለያየ ነው።መሣሪያውን በሚሸጠው ድርጅት ስልጠና ወስደው መሥሪያውን የሚጠቀሙ ያሉ ሲሆን ያለምንም ስልጠና መሣሪያውን የሚጠቀሙም አሉ።[43] በአጠቃላይ የተለያዩ ድርጅቶች ላይ የተለያየ የድርጅት ባህሪ (organizational behaviour) ይታያል።

የድርጅቱ ባህሪ አደነትና ስልጠና በመውሰድና ባለመውሰድ ረገድ ያለው የተጠቃሚው ግንዛቤ የተለያየ መሆን ስግብር ወንጀል የሚኖረውን ተጋላጭነት በመወሰን ረገድ የራሱ አስተዋጽኦ ቢኖረውም ምርጥ ተመክሮዎችን (Best Practices) በዳሰሳ መልክ በማጥናት፣ ይህኛው ይሻላል የሚል መደምደሚያ ግን አያጋጥምም።በአጠቃላይ ግን ደረሰኝ ወዲያውኑ ከመስጠት ግዴታ ጋር በተያያዘ ሕጉ በድርጊት ተሣትፎአቸውና ያስጥፋት ተጠያቂ ሊሆኑ የሚችሉ ሰዎችን የወንጀል ሐላፊነት መሠረት ስላስቀመጠ በዚሁ መሠረት እነዚህ ግለሰቦችና ድርጅቶች በወንጀል እየተጠየቁበት ያለውን ጥቅል የሕግና የፍሬ ነገር መሠረት ቀጥሎ በዝርዝር እንመለከታለን። በእነዚህ ግለሰቦች ላይ እየቀረቡ ያሉ ክሶች ይዘትን በተመለከተ ደግሞ በሌላኛው ክፍል እንመለከታለን።

5.1 የሠራተኞች ተጠያቂነት

ሠራተኛ ማለት ለአንድ የግል ድርጅት (Sole proprietor) ወይም ሕጋዊ ሰውነት ላለው ተቋም በቋሚነት ወይም በጊዜያዊነት ተቀጥሮ ደመወዝ እየተከፈለው የሚሠራ ሠራተኛን የሚመለከት ነው።[44] በተግባር እንደሚታየው እነዚህ ሠራተኞች በጽሑፍ የቅጥር ውል ያላቸው፣የጽሑፍ የቅጥር ውል የሌላቸው ወይም የቅጥር ደብዳቤ ያላቸው፣ወይም እነዚህ ሰነዶች የሌላቸው ሆነው፣ የደመወዝ መክፈያ ሰነድ (Payroll) ያላቸው ወይም ይህም የሌላቸው ሊሆኑ ይችላሉ። ምክንያቱም እነዚህን ሁኔታዎች በተመለከተ ድርጅቶች ያላቸው፣ አሰራርና ድርጅታዊ ባህል በጣም የተለያየ ነው። ከዚህ ጋር በተያያዘም የሚነሣ መሠረታዊ ክርክር አያጋጥምም።[45]

በአጠቃላይ ስዚህ ጽሑፍ አመቺነት ሲባል ሠራተኛ ማለት ደመወዝ እየተከፈለው ለአንድ ድርጅት በገንዘብ ያዥነት፣በሽያጭ ሠራተኛነት ወይም በተመሣሣይ ሥራ ለጥቅም የሚሠራ

የፌደራል ፍ/ቤቶች ማቋቋሚያ አዋጅ ቁ.25/88 የፍርድ ቤቱ የስራ ቋንቋ አማርኛ እንደሆነ ይደነግጋል።

40 ለምሣሌ ትናንሽ የመጠጥ ግሮሰሪዎች፣ባርና ሬስቶራንቶች፣ ሚኒ ሱፐርማርኬቶች

41 ለምሣሌ መርካቶ በርካታ በዚህ መልክ የሚተዳደሩ የንግድ መደብሮች አሉ።

42 ለምሣሌ አንድ ኮንትራክተር በዚህ መልክ የሚጠቀም እንዳለ ፀሐፊው ያውቃል።

43 በተለይ የመጀመሪያው ካሸር ከለቀቀ በኋላ አዲስ ካሸር ሲተካ ስልጠና ያልወሰዱትን ማሰራት የተለመደ እንደሆነ ይታያል።

44 በአሠሪና ሠራተኛ አዋጅ ቁ. 377/96 ለሥራ ውል የተሰጠውን ትርጉም ይመለከቷል። ጠቅላላ በግል ባለሐብቶች እንዲሁም ሕጋዊ ሰውነት ያላቸው ተቋማት ከሠራተኞቻቸው ጋር ያላቸው የቅጥር ግንኙነት የሚገዛው በዚህ ሕግ መሠረት ነው። የተጨማሪ እሴት ታክስ አዋጅም ማሻሻያዎቹ ሠራተኛ ለሚሰው ቃል ያስቀመጡት የትርጉም ድንጋጌ የለም።

45 ፀሐፊው ይህን የተገነዘበው በሥራው አጋጣሚ ሊያውቃቸው ከቻለው የቅጥር ግንኙነቶች በመነሣት ነው።

ማለት እንደሆነ ተደርጉ ሲወሰድ ይገባል። የሠራተኛን የወንጀል ኃላፊነት በተመለከተ የግል ድርጅት ሠራተኛም ሆነ ሕጋዊ ሰውነት ያለው ድርጅት ሠራተኛ የወንጀል ኃላፊነቱ ተመሣሣይ ነው። ሠራተኞች የሚጠየቁት እራሣቸው በተሣተፉበት ተግባር ስለሆነ በአብዛኛው የሚከሰሱት እራሣቸው በቀጥታ እንደፈፀሙ ተደርጉ በሚቆጠረው ተግባር ነው። የድርጊት ተሣትፎአቸው ሲገለጽ ግን የተለያየ ሁኔታ ያጋጥማል።

በአብዛኛው እንደሚታየው ግብይት እንዲያከናውኑና ደረሰኝ እንዲሰጡ የሚመደቡት የግብር ከፋዩ ድርጅት ተቀጣሪ ሠራተኞች ሲሆኑ እንደየ ሥራ ባህሪያቸው ተደራራቢ ሥራ የሚሠሩ፣ ለምሣሌ የሽያጭ ሠራተኞችም ሆነው ካሸርም የሆኑ ወይም የተናጠል ሥራ ብቻ የሚሠሩ ሲሆኑ ይችላሉ፣ በአንዳንድ ደረሰኞች ላይ የካሸር ስም የሚፃፍ ሲሆን በአንዳንዶች ላይ ግን አይፃፍም። ደንቡ የካሸር ስም በደረሰኙ ላይ መጠቀስ አስበት አይልም።

በደረሰኝ ላይ የካሸር ስም የመፃፍና ያልመፃፍ ልዩነት የሚታየው እንደሚጫነው ሶፍትዌር እና እንደድርጅቱ አሰራር ቢሆንም ከተጠያቂነት አንፃር ግን ልዩነት አያመጣም። ምክንያቱም ለተጠያቂነት ምክንያት የሆነው ድርጊት ሲፈጠር ካሸር ካለ ካሸር ተጠያቂ ሲሆን ካሸር ከሌለ ደግሞ በወቅቱ ገንዘብ የተቀበሉ የሽያጭ ሠራተኞች ወይም አስተናጋጆች አንዳንድ ጊዜም እቃ ያቀበሉ፣ ወይም ወኪል ተጠያቂ ይሆናሉ። በተግባር በሚደረጉ ክርክሮች የግል ባለሐብቶችን በተመለከተ በአጠቃላይ የቅጥር ግንኙነት ሕጉ በሚያዘው መሠረት የመኖሩና ያለመኖሩ ጉዳይ የክርክር ነጥብ ሆኖ አያጋጥምም። ዐ/ሕግ በክሱ ላይ "የሽያጭ ሠራተኛ" ወይም "ገንዘብ ያዥ" ወዘተ ነው በማለት ከጠቀሰም በኋላ ይህንኑ ለማስረዳት በሚል የቅጥር ውል በማስረጃነት የሚያያዝበት ክስ አያጋጥምም።

ሕጋዊ ሰውነት ያላቸው ድርጅቶች *ሠራተኞችን* በተመለከተ ግን አከራካሪ የሕግ ጉዳይ ሲነሳ *ያጋጥማል*። የድርጅት ተጠያቂነት የሚመሠረተው በሐላፊዎቹ ወይም በሠራተኞቹ ጥፋት ላይ ስለሆነ[46] ጥፋቱን የፈፀመው ሠራተኛ *መሆኑ ካልተረጋገጠ በስተቀር ሰራተኛ* ያልሆነ ግለሰብ በሐላፊነት ሊጠየቅ አይገባውም የሚል አስተሳሰብ አለ። ሠራተኛ ያልሆነን ሰው በመመደቡ *ክስ ሊመሠረትበትና* ጥፋተኛ ሊሆን የሚገባው በሐላፊዎቹ አማካኝነት ድርጅቱ ሲሆን ይገባል እንጂ *ሰራተኛ ያልሆነው ግለሰብ መሆን የለበትም የሚል መከራከሪያ ይቀርባል*። የወንጀል ሕጉም ሆነ የተ.እ.ታ.ክስ አዋጅ ሠራተኛ ለሚለው ቃል የትርጉም ማዕቀፍ አለማስቀመጣቸው የሕጉቹ ክፍተት ይመስላል። ሕጋዊ ሰውነት ያላቸውን ድርጅቶች በተመለከተ የታክስ አዋጁ ቢያንስ ከተመዘጋቢው ውጪ ግብይቱን ያከናወነ ማንኛ ውም ሰው የተመዘጋቢው ሠራተኛ እንደሆነ ይቆጠራል በሚል የትርጉም ድንጋጌ ቢያስቀምጥ የተሻለ ግልጽነት ያለው ድንጋጌ ይሆን ነበር።

5.2. የሌሎች ሰዎች ተጠያቂነት

በአንዳንድ የግል ባለሐብት ድርጅቶች ውስጥ ተቀጣሪ ወይም መደበኛው የአሰሪ ሠራተኛ ግንኙነት የሌላቸው *ሰዎችን የተለያየ ስራ* ሲሰሩ ማግኘት የተለመደ ነው። ባል ወይም ሚስት፣ እህትና ወንድም፣ ወይም ጓደኛ፣ የቅርብ ዘመድ፣ በገንዘብ ያዥነት፣ በሽያጭ ሠራተኝነት፣ በተቆጣጣሪነት ወዘተ የሚሠሩባቸው ድርጅቶች በርካታ ናቸው። ስለሆነም በዚህ መሠረትም በበርካታ ክሶች ላይ በእነዚህ የቤተሰብ አባላት ላይ ክስ ይቀርባል። ለምሣሌ በአንድ ጉዳይ በባለቤቷ ወንድም ሱቅ ውስጥ ለስነበረችና ግብይት ሲደረግ ደረሰኝ አልሰጠችም በሚል ከባለቤቷ ጋር እና ከባለቤቷ ወንድም ጋር ተጣምራ የተከሰሰች አለች።[47] ሶስቱም ተከሣሾች ቤተሰብነት እንጂ የቅጥር ግንኙነት የላቸውም። ተከሣሾቹ በመጀመሪያ አካባቢ የነበራቸው አስተሳሰብ ግለሰባ ተጠያቂ ልትሆን የሚገባው ተቀጣሪ ከሆነች እንጂ የቤተሰብ አባል የሆነችና ደመወዝ የማይከፈላት ስለሆነ ተጠያቂ ልትሆን አይገባም የሚል

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[46] የወ/ሕ/ቁ. 34/1/ ዝርዝር ድንጋጌ ይመለከቷል።

[47] ፌ/መ/ይ/ፍ/ቤት በወ/መ/ቁ. 181768 ያለውን ክርክር ይመለከቷል።

ነበር። በሌላ ጉዳይም ሱቁን ጠብቂ የተባለች ሞገዚት በአጋጣሚ አልፎ አልፎ ወደሱቅ ስትመጣ ሲሸጥ የምታውቀውን አቃ የገቢዎችና ጉምሩክ ባለሥልጣን ተቆጣጣሪዎች እንደገዙ ሆነው በመቅረብ እንድትሸጥላቸው ሲጨቀጭቋት ስለሸጠች ተከሣለች።[48]

ይሁን እንጂ በወ/ሕግ በኩል ያለው *የመከራከሪያ ምክንያት* ደረሰኝ ከመስጠት ጋር በተያያዘ ያለው ተጠያቂነት የሚመሠረተው በወቅቱ ግብይት ሲደረግ፣ ገንዘብ ተቀብሎ ደረሰኝ ወዲያውኑ ካለመስጠት ጋር ብቻ ስለሆነ ገንዘብ ተቀብሎ ደረሰኝ ያልሰጠው ሰው ሠራተኛም ሆነ አልሆነ በኃላፊነቱ ላይ ለውጥ አያመጣም። *በመደብሩ/ሱቁ/* ውስጥ ተገኝቶ ይህን ተግባር የፈፀመ ማንኛውም ሰው ተጠያቂ መሆን አለበት የሚል ነው። እስከአሁን በሚመሠረቱ ክሶች ላይም ድርጊቱን የፈፀመው ሰው ሠራተኛ ስለመሆኑና ስላለመሆኑ ይህንንም ተከትሎ ሐላፊ ሊሆን ይገባል ወይም አይገባም በሚል የሚደረግ መሠረታዊ ክርክር አያጋጥምም።

5.3. የግል ባለሐብቱ ተጠያቂነት

የግል ባለሐብት ማለት ክሽርክና ማኅበራት ወይም *ይህን መሰል* አደረጃጀት ካለቸውና *የህግ ሰውነት ከተሰጣቸው ድርጅቶች* ውጪ በአንድ ግለሰብ ባለቤትነት *ተመዝግቦ* ያለን የንግድ ድርጅት የሚመለከት ነው፡ በሐገራችን ይህ አይነት የንግድ ባለቤትነት ከፍተኛ ውን ቁጥር የሚይዝ ነው። እነዚህ ባለሐብቶችም ደረሰኝ ወዲያውኑ የመስጠት ግዴታ አለባቸው እየተባለ በወ/ሕግ ክስ እየተመሰረተባቸው ይገኛል። በተግባር በሚታዩ ክርክሮች አንዳንዶቹ ባለሐብቶች ግብይቱ ሲደረግ በቦታው ያልነበሩ ሲሆን ይኸው ፍሬ ነገርም በወ/ሕግ ምስክሮች ሣይቀር *የሚረጋገጥበት አጋጣሚ በርካታ* ነው። የወ/ህግ ምስክሮች *የምስክርነት ቃላቸውን* ሲሰጡ ባለሐብቱ በቦታው ነበር ወይ? ተብለው ሲጠየቁ አልነበረም ይላሉ።[49] በግብይቱ ወቅት ያልነበሩ ባለሐብቶችን በተመለከተ ሊከሰሱም ሆነ ፕሬተኛ ሊባሉ የሚገባቸው የወንጀል ተሣትፎ ካላቸው ብቻ እንጂ ያለ ወንጀል ተሣትፎ ኃላፊ ሊሆኑ የሚችሉበት የሕግ መሠረት የለም በሚል ክርክሮች ሲቀርቡ መሰማት፣ ተከሣሾች የመፋረጃ ሐሣብ ሲያቃርቡም ይህን መከራከሪያ ማንሣት የተለመደ ነው ለማለት ይቻላል።

5.4 የወኪል ተጠያቂነት

ወኪል ማለት በሌላ ሰው ስም እና ትእዛዝ የሚሠራ ማናቸውም ሰው ማለት ነው በሚል የተጨማሪ እሴት ታክስ አዋጅ የትርጉም ድንጋጌ አስቀምጦለታል።[50] በፍትሐብሔር ግንኙነቱ የውክልና ወሳኝ ሕጋዊ ተግባራትን እንዲያከናውንለት ሲል ወካዩ ከተወካዩ ጋር የሚገባው የውል ግንኙነት ነው።[51] በንግድ ሥራ ውስጥ *የሚገኙ የግል ባለሃብቶች* ተግባሮቻቸውን ሌላ ሰው እንዲያከናውንላቸው ሲሉ የውክልና ስልጣን *መስጠት በጣም የተለመደ*።የውክልና ስልጣኑም ከተራ ጉዳይ ማስፈፀም አንስቶ የንግድ *መደብራቸውን* እስከመሸጥ፣ አስይዞ እስከመበደርና በማናቸውም ሁኔታ ለሶስተኛ ሰው እስከማስተላለፍ የሚደርስ ልዩ የውክልና ስልጣን ሊሆን ሊሆን ይችላል። አንዳንድ ባለሃብቶች ይህን የሚያደርጉት በቅን ልቦና እና በእውነት ላይ ተመስርተው ነው። ለምሣሌ አባት ወይም እናት በእርጅና ፣በህመም ወይም በተለያዩ ምክንያቶች ተሯሩጦ መስራት *ወይም የንግድ ስራውን በቅርበት ለመቆጣጠርና ለማስተዳደር* ስለማይችሉ ለልጅ፣ ወይም ለቅርብ

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48 ከጠበቃ ጫንያለው አሸቱ የተገኘ መረጃ ነው።

49 ፀሐፊው በችሎት ተቀምጦ ምስክር ሲሰማና ይህ አይነት ክርክሮች ሲቀርቡ ሰምቷል። አራሱ በተከራከረባቸው ጉዳዮችም ባለሐብቱ በሌለበት ድርጊቱ በተፈፀመ ጉዳይ ክስ የተመሠረተባቸው ተከሣሾች አሉ/ለምሣሌ የመ/ቁ. 181768 ይመለከቷል።

50 አዋጅ.ቁ. 285/94 አንቀጽ 2/2መ/

51 የፍ/ሕ/ቁ. 2199

ዘመድ የውክልና ስልጣን በመስጠት የንግድ መደብሩን በውክልና እንዲመራና እንዲተዳደር ያደርጋል:: ወይም ደግሞ የግል ባለሃብቱ ልጅ ከሆኑ ለአባቱ[52]፣ ለወንድሙ፣ ለእናቱ የውክልና ስልጣን ሲሰጥ ይችላል:: በዚህ መልክ በወኪል የሚተዳደሩ የንግድ መደብሮችንም ማግኘት የተለመደ ነው::

አንድንድ ጊዜ ግን በወካዩና በተወካዩ መካከል ያለው ግንኙነት ውስጥ ለውስጥ የሽያጭ ግንኙነት የሚሆንበት አጋጣሚ አለ:: ከዚህ ውጪም ተወካዩ ሠራተኛ ወይም በየወሩ መጨረሻ ትርፉን እየተሳሰበ የተወሰነ መቶኛ ከባለቤቱ ጋር የሚካፈል ሲሆን ይችላል:: በዚህ መሠረት የንግድ መደብሩ" በውክልና ስልጣኑ መሠረት በእውነተኝነት የማስተዳደርን ጉዳይ በተመለከተ አንዳንድ ወኪል በርግጥም የሚያስተዳድር ሲሆን አንዳንዱ ግን የውክልና ስልጣን ማረጋገጫ ሰነዱን ከመያዝ ውጪ በውክልና ስልጣኑ መሠረት የሚሠራ አይደለም:: ሕጋዊ ሰውነት ያላቸው ድርጅቶችንም በተመለከተ ተመሣሣይ ነው:: ሥራ አስኪያጁ ሥልጣኑን በሙሉም ሆነ በከፊል ለሌላ ሰው ለማስተላለፍ የኩባንያው መተዳደሪያ ደንብ ወይም መመሰረቻ ጽሑፉ ከፈቀደለት በውክልና ከማስተላለፍ የሚከለክለው ሕግ የለም:: በተግባርም እንደሚታየው በዚህ መልክ በሚወከሉ ተወካዮች አማካኝነት የሚተዳደሩ ድርጅቶች በርካታ ናቸው::

የውክልናው ይዘትም ሲታይ ተመዝጋቢውን የንግድ መደብር ለመቆጣጠርና ለማስተዳደር የሚል ሲሆን ሲችል፣ አንዳንዱ ደግሞ በደፈናው የድርጅቱን ጉዳይ ለማስፈፀም የሚል ይሆናል:: አሁን ባለው ሁኔታ በበርካታ ወኪሎች ላይ የወንጀል ክስ እየተመሠረተ ክርክር የሚደረግ ሲሆን ጥፋተኛ ተብለው የተፈረደባቸውም አሉ:: ወኪል ሆነው እየተከሰሱ ያሉት ግን የግል ባለሐብቶች ወኪል ናቸው:: ሕጋዊ ሰውነት ያላቸው ድርጅቶች ሥራ አስኪያጅ ወኪሎች የተከሰሱበት ጉዳይ አያጋጥምም:: የወኪል የወንጀል ኃላፊነትን በተመለከተ የሚነሱ የህግ መከራከሪያዎች ያጋጥማሉ:: የታክስ ሕጉ እንደድርጅት ሥራ አስኪያጅ የግል ባለሐብት ወኪል ያለ ወንጀል ተሣትፎ ተጠያቂ ሊሆን የሚችልበትን የሕግ መሠረት አላስቀመጠም:: በዚህ ምክንያት የወንጀል ተሣትፎ የሌለው ወኪል በ"ወኪልነቱ" ብቻ የወንጀል ተጠያቂነት አለበት በሚል ሲከሰስ አይገባም የሚል ክርክር በተደጋጋሚ ይቀርባል::[53] ለምሣሌ አንድ ሥጋ ቤት በስማቸው ያላቸው በአድሚ የገፉ ሴትዩ ከወኪላቸው ጋር ተከሰው ፍ/ቤት ቀርበው ክሱ ከተነበበላቸው በኋላ ክሱ የገባቸውና መቃወሚያ ያላቸው ከሆነም እንዲያቀርቡ ፍ/ቤቱ ሲጠይቃቸው በተደጋጋሚ ሲያነሱትና በምሬት ሲናገሩ የነበረው፣ ውክልና ሰጥቼአለሁ፣ እኔ ስለሥራው የማውቀው ነገር የለም፣ ወኪሉ በሰራው ጥፋት እኔ ልጠየቅ አይገባኝም የሚል ነበር:: ዳኛውም በአድሚ የገፉ መሆኑን ከግምት ውስጥ ሀማስገባት በትዕግስት ሲያስረዷቸው ሞከሩ::[54]

የወኪል የወንጀል ኃላፊነትን በተመለከተ የተጨማሪ አሴት ታክስ ሕጉቹ በግልጽ የሚደነግጉት ነገር የለም:: በተግባር በሚታዩ ክርክሮች በርካታ ወኪሎች ከባለሐብቱ ጋር አብረው ሲከሰሱ ያጋጥማል:: ይሁን እንጂ አልፎ አልፎ በሚያጋጥሙ ክርክሮች ወኪሉ ብቻ ሲከሰስ ባለሐብቱ አይከሰስም:: ባለሐብቱ ተከሶም ወኪሉ የማይከሰስበት አጋጣሚ አለ:: ይህ

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52 ለምሣሌ አንድ ተከሣሽ በስሚ ያለውን የተጨማሪ አሴት ታክስ ተመዝጋቢ ድርጅት ለአባቷ በውክልና ሰጥታ የነቨርስቲ በሙሉ ጊዜ ወይም በመደበኛ ጊዜ ተማሪነት ትምህርቷን ትከታተል ነበር፡

53 ለምሣሌ ጠበቃ ጫንያለው አሸቱ ይህንን ከወንጀል ኃላፊነት ጋር የተያያዘ ክርክር ለፌ/መ/ደ/ፍ/ቤትና ለከፍተኛ ፍ/ቤት አቅርቧል::

54 ይህ ክርክር ሲደረግ ፀሐፊው በችሎት ተቀምጦ አዳምጧል::

ሁኔታ ከላይ በተመለከተው መሠረት በምርመራ ሒደት እንደተጣራው የወኪሉ የወንጀል ተሳትፎ መጠንና የውክልና ስልጣኑ ዓይነት ነው ተብሎ ይገመታል።

5.5 የድርጅቶች የወንጀል ተጠያቂነት

5.5.1 ጽንሰ ሐሳብ

ሕጋዊ ሰውነት ያላቸው ድርጅቶች የወንጀል ተጠያቂነትን (corporate criminal liability) ድርጅቶቹ ወይም በድርጅቶቹ ስም በሚሰሩ ሃላፊዎች ወይም ሴሎች ሠራተኞች ከስራቸው ጋር በተያያዙ ለሚፈፅሙት ጥፋት ድርጅቶቹ በወንጀል ተጠያቂዊ የሚሆኑበት የወንጀል ኃላፊነት ፅንሰ ሃሳብ ነው። ድርጅቶች ባስረቂቅ ስብእናዎች (abstract entities) ስለሆኑ እንደተፈጥሮ ሰው ተደዘው ምርመራ ሲጣራባቸውና ጥፋተኛ ተብለው በማረሚያ ቤት ሲታሰሩ ስለማይችሉ በወንጀል ሐላፊነት ሊጠየቁ አይገባም በሚል አስተሳሰብ የወንጀል ክስ አይመሰረትባቸውም ነበር። ይሁን እንጂ በተለይ ከኢንዱስትሪ አብዮት ዘመን አንስቶ ድርጅቶች በአንድ አገር የኢኮኖሚና የፖለቲካ ሕይወት ውስጥ ያላቸው ሚና ፍጹም እያደገ መምጣትና በንግድ ፣ በግብርና በኢንቨስትመንት፣በፈጠራ መብት ባለመብትነት ወዘተ ውስጥ የሚያከናውኗቸው ተግባራት ከፍተኛ ሐላፊነት እያስከተሉባቸው ስለመጡ እንዲሁም ኃላፊዎቹና ሠራተኞቹ በጋራ በመመሳጠር በድርጅቱ በወንጀል ያለመከሰስ ነፃነት ሽፋን ወንጀል መፈፀም እየጨመረ ስለመጣ የወንጀል ሐላፊነታቸውን በሕግ መደንገግ አስፈልጓል።[55] በመሆኑም በበርካታ ሐገሮች የወንጀል ሕግ ውስጥ ድርጅቶች እንደተፈጥሮ ሰው ሁሉ የሕግ ውጤት ያላቸው ተግባራት በወኪሎቻቸው ወይም በባለቤቶቻቸው አማካኝነት ስለሚያከናውኑና በዚህም የተነሳ ወንጀል ሲፈጽሙ ስለሚችሉ ድርጅቱም ምንም እንኳን መታሰር ባይችልም በገንዘብ ቅጣት፣የንግድ ስራና ሌሎች ማናቸውም ፈቃዶቹን በመሰረዝና ንብረቱን በመውረስ በወንጀል እንዲቀጣ ይደረጋል። በተለይ በአደጉት ሐገሮች በዚህ የወንጀል ክፍል ላይና ከዚህ ጋር ተያይዞ የሚነሳው የፍትሐብሔር ሐላፊነት (civil liability) ክርክሮች ውስብስብ ባህሪ እንዳላቸው ይታወቃል።[56]

ለምሣሌ በእንግሊዝ ሐገር የተበላሸ ባቡር የ9 ሰው ሕይወት አጥፍቶ የባቡር ኩባንያው በቸልተኝነት ሰው መግደል (corporate manslaughter by negligence) ወንጀል ተከሶ ነበር። ነገር ግን ኩባንያው ላይ የሐሣብ ክፍልን(*mens rea*) ለማስረዳት ስለማይቻል በጥፋት ላይ በተመሰረተ ሐላፊነት ብቻ ገንዘብ እንዲከፍል ተደርጓል። በርግጥ ድርጅቶች በሐላፊዎቻቸው ወይም በሠራተኞቻቸው አማካኝነት ሆነ ብለው ጉዳት ስለሚያደርሱ የወንጀል ሐላፊነት ሊከተልባቸው ይገባል የሚል መከራከሪያ በተደጋጋሚና በስፋት ቢቀርብም ከተወሰኑ በሕግ በግልጽ የወንጀል ኃላፊነትን ያስከትላባቸዋል በሚል ተግባራት ከተደነገጉት ተግባራት ውጪ በሁሉም ሁኔታ የወንጀል ሐላፊነት ሊኖርባቸው ይገባል የሚለው መከራከሪያ ተቀባይነት አላገኘም።[57]

በአገራችን የሕግ ሰውነት ያላቸው ድርጅቶችን የወንጀል ተጠያቂነት በተመለከተ የቀድሞው የወንጀልና መቅጫ ሕግ ግልጽ ድንጋጌ አልያዘም ነበር። በአዲሱ የወንጀል ሕግ ላይ ግን

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55 Cynthia lee and Angela Harris; criminal law፡ cases and materials 2005 pp1045-1167

56 ለምሣሌ Fried land Kent Roach; **Criminal Law and Procedure :Cases and Materials**; six edition; 1991 pp-583-600.

57 Micheal T Molan, Criminal Law; 2002,pp.81-83 And Dennis keenan; English Law; (12th ed) 1998 pp 535-538

ግልጽ ድንጋጌ ተቀምጧል።በዚህ መሠረት የመንግስት አስተዳደር አካላትን ሳይጨምር[58] የሕግ ሰውነት የተሰጠው ድርጅት በሕግ ላይ በግልጽ በተደነገገ ጊዜ በዋና ወንጀል አድራጊነት፣ በአነሣሽነት ወይም በአባሪነት በወንጀል ሊቀጣ እንደሚችል የወንጀል ሕጉ ደንግጓል።[59] በሕግ ላይ በግልጽ በተደነገገ ጊዜ ማለት ለምሣሌ፣በክብር ላይ የሚፈፀም ወንጀልን በተመለከተ[60] ከግብር ግዴታ ጋር፣በፕሬስ ጉዳይ፣ ተገቢ ካልሆነ የንግድ ውድድር ጋር ወዘተ በተያያዘ የድርጅት የወንጀል ተጠያቂነት በግልጽ ተደንግጓል። በሙስና ወንጀልም የሕግ ሰውነት የተሰጠው ድርጅት ጉቦ ከሰጠ የሙስና ወንጀል □ሳፊነት እንደሚኖርበትና በገንዘብ ሊቀጣ እንደሚችል በወንጀል ሕጉ ላይ ተደንግጓል።[61]

የድርጅት የወንጀል ኃላፊነት በግልጽ በተደነገገ ጉዳይ ላይ ብቻ እንዲሆን ያስፈለገበት ምክንያት ከመሠረታዊ የወንጀል ማቋቋሚያ ፣አንዱ የሆነውን የሐሣብ ክፍል በበርካታ ወንጀሎች ላይ በድርጅ„‹ን በተመለከተ ማቋቋም ስለማይቻል ነው። በአንዳንድ የወንጀል ዓይነቶችም የሕግ ሰውነት የተሰጠው ድርጅት ሊፈጽማቸው የማይችላቸው የወንጀል ተግባራት አሉ። ለምሣሌ የሕግ ሰውነት የተሰጠው ድርጅት ተቀጥሮ ሲሠራ ስለማይችል በስልጣን አላግባብ መገልገል ወንጀል ሊከሰስ አይችልም። ከፃታ ጥቃት ጋር በተያያዘ ወንጀልም ሊከሰስ አይችልም። በተግባር እየተደረጉ ካሉ ክርክሮች አንፃር በአጠቃላይ ሕጋዊ ሰውነት ያላቸው ድርጅቶችን የወንጀል ሐላፊነት በተመለከተ ሁለት አከራካሪ ጉዳዮች በየጊዜው ያጋጥማሉ። አንዱ "ሰው" ስሚለው ቃል የሚሰጠውን ትርጉም መሠረት በማድረግ በግልጽ ድርጅቶች ሊከሰሱ ይችሉባቸዋል በሚል በህግ ከተደነገጉት ተግባራት ውጪ የድርጅቶችን የወንጀል ኃላፊነት ለማቋቋም አልፎ አልፎም የሚያጋጥመው ክስ ሲሆን ሁለተኛው ደግሞ የወንጀል ሕጉ ከመውጣቱ በፊት የድርጅቶች የወንጀል ኃላፊነት እንዳለ ሊቆጠር ይገባል ወይ የሚለው ነው። ይሁን እንጂ እነዚህን አከራካሪ ነጥቦች መመልከት ከዚህ ጽሑፍ ሽፋን (scope) ውጪ ስለሆነ አንመለከትም። ይህ ሁኔታ እንደተጠበቀ ሆኖ በአጠቃላይ የወንጀል ሕጉ ለድርጅት የወንጀል ኃላፊነት መሠረት የሚያደርጋቸው የሕግ መመዘኛ ጉዳዮች ለሳሉ መመዘኛዎቹን እንደሚከተለው እንመለከታለን።

5.5.2 የድርጅት የወንጀል ተጠያቂነት መሠረቶች

የወንጀል ሕጉ በመርህ ደንጋጌው ላይ "አንድ ድርጅት ወንጀል እንደአደረገ ተቆጥሮ የሚቀጣው ከኃላፊዎቹ ወይም ከሠራተኞቹ አንዱ ከድርጅቱ ሥራ ጋር በተያያዘ ሁኔታ የድርጅቱን ጥቅም በሕገወጥ መንገድ ለማራመድ በማሰብ ወይም የድርጅቱን ሕጋዊ ግዴታ በመጣስ ወይም ድርጅቱን በመሣሪያነት አላግባብ በመጠቀም በዋና ወንጀል አድራጊነት በአነሣሽነት ወይም በአባሪነት ወንጀል ሲያደርግ ነው"[62] በማለት ይደነግጋል። በዚህ መሠረት አንድ ድርጅት የወንጀል ሐላፊነት እንዲኖርበት ለማድረግ የድርጅቱ ኃላፊዎች ወይም ሠራተኞቹ በሶስት ሁኔታዎች የወንጀል ተግባር በሚል በግልጽ የተደነገገውን ተግባር መፈፀምና በወንጀል ተሣትፎአቸውም በዚሁ ድንጋጌ ላይ በተጠቀሰው መሠረት የወንጀል ተሣትፎ ያላቸው መሆኑ ሲረጋገጥ ይገባል። ኃላፊዎቹ ወይም ሠራተኞቹ የሚፈጽሙት ተግባርም ሆነ ተብሎ

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58 የመንግስት አስተዳደር አካላት ማለት ሙሉ በሙሉ በመንግስት በጀት የሚተዳደሩትን መ/ቤቶች ለማለት ነው። ለምሣሌ ሁሉም የሚኒስቴር መ/ቤቶችና በክልል ደረጃ ደግሞ ሁሉም ቢሮዎች የኮሚሽን መ/ቤቶች፣የባለስልጣን መ/ቤቶች፣የቀበሌ የወረዳና ሌሎች የአስተዳደር መ/ቤቶች በጠቅላላ የመንግስት የአስተዳደር አካላት ናቸው።

59 የወ/ሕ/ቁ. 34 ይመለከቷል።

60 ለምሣሌ ይህን ወንጀል ሕጋዊ ሰውነት ያለው ተቋም ከፈፀመ በወንጀል እንደሚቀጣ የወ/ሕ/ቁ. 609 ይደነግጋል።

61 የወ/ሕ/ቁ. 427/5/ እና 90/3/ ይመለከቷል።

62 የወ/ሕ/ቁ. 34/1/ ይመለከቷል።

በሚፈፀም የሐሣብ ሁኔታ ላይ የተመሠረተ ወይም ሊመሠረት እንደሚገባውም ከሕጉ ድንጋጌ መረዳት ይቻላል።[63] የድርጅትን ኃላፊነት ለማቋቋም መሠረት ተደርገው የተጠቀሱትን ሶስት የሕግ መመዘኛዎች እንደሚከተለው እንመለከታለን።

5.5.2.1 የድርጅቱን ጥቅም በሕገወጥ መንገድ ለማራመድ በማሰብ መፈፀም

የድርጅቱ ኃላፊ ወይም ሠራተኛ የፈፀመው ጥፋት ሆነ ብሎ የድርጅቱን ጥቅም በሕገወጥ መንገድ ለማራመድ በማሰብ መሆን አለበት። ለምሣሌ ድርጅቱ ትርፍ ሊያገኝ የሚገባው በአግባቡ ከሚያከናውነው ሽያጭ መሆን እያለበት፣ የሚሰበስበውን የተጨማሪ እሴት ታክስ ለራሱ ለመጠቀም በማሰብ ሐሰተኛ የተጨማሪ እሴት ታክስ ደረሰኝ እንዲታተም አድርጉ ቢጠቀም ይህ ሕገወጥ ጥቅምን እናደማራመድ ሊቆጠር ይችላል። ድርጅቱ በሕገወጥ መንገድ ያስገባውን እቃ በደረሰኝ ቢሸጥ ድርጅቱ ይጎዳል በሚል እሣቤ ሃላፊዎቹ ወይም ሰራተኞቹ ያለደረሰኝ ቢሸጡም ተመሣሣይ ተግባር እንደፈፀሙ የሚቆጠር ነው። ለምሣሌ የተ.እ.ታ ደረሰኝ መጠቀም በተጀመረባቸው የመጀመሪያ አመታት ገደማ ላይ ይህ ወንጀል ይዘወተር ነበር። በዚህ መሠረትም ሐሰተኛ የተጨማሪ እሴት ታክስ ደረሰኝ አሣትመው ሲጠቀሙ የተደረሰባቸውና ይኸው ተረጋግጦ የተፈረደባቸው ግለሰቦችም በርካታ ናቸው።ስለሆነም ሐላፊዎችና ሠራተኞቹ ድርጅቱን በዚህ መልክ ለመጥቀም በማሰብ የሚፈፅሙት ተግባር የወንጀል ሐላፊነትን ሊያስከትልባቸው ይችላል። በዚህ ሁኔታ የሚፈፀሙ ወንጀሎች አንዳንድ ጊዜ የሰራተኛው ተሣትፎ የሌለባቸው ሲሆኑ ይችላሉ። ሥራ አስኪያጁ ወይም ሌሎች የድርጅቱ ሃላፊዎች በድብቅ ሃሰተኛውን ደረሰኝ አሣትመው ለሠራተኛው ሲሰጠውና ሠራተኛው እንደሕጋዊ ደረሰኝ ቆጥሮ ሽያጭ ሲያከናውንባቸው ይችላል። ይሁን እንጂ ሠራተኛው ደረሰኞቹ የተጭበረበሩ መሆኑን የሚያውቅ ከሆነ በሐሳፊነት የሚጠየቅ ሲሆን ፈጽሞ ሊያውቅ ካልቻለ ግን በሐሳፊነት አይጠየቅም።በተግባር እንደሚታየው ሃሰተኛ ሰነዶችን ከመገልገል ጋር በተያዘዘ የሚደረግ የወንጀል ክርክር ለመከላከል አስቸጋሪ ስለሆነ ሰራተኛው የራሱን ከፍተኛ ጥንቃቄ ሊያደረግ ይገባዋል።

5.5.2.2 የድርጅቱን ሕጋዊ ግዴታ መጣስ

የድርጅቱ ኃላፊ ወይም ሠራተኛ በግልጽ የሚያውቀውን የድርጅቱን ሕጋዊ ግዴታ ከጣሰ የወንጀል ሐላፊነት ይከተልበታል። የድርጅቱ ሕጋዊ ግዴታ በጣም ሰፊና አንዳንድ ጊዜም ውስብስብ ነው። ሕግን አለማወቅ ይቅርታ አያሰጥም የሚባለው መርህ በራሱ በግለሰቡ ላይ ተፈፃሚ ቢሆንም ሶስተኛ ወገን የሆኑ የድርጅቶችን ሕጋዊ ግዴታ ማወቅ ግን በጠባቡ ሊተረጉምና ሊፈፀም የሚገባ ነው በሚል የሚከራከሩ አሉ። በተለይ የታክስ ሕግ በባህሪው ሰፊና ውስብስብ ስለሆነ ባለሙያ ላልሆነ ሃላፊ ወይም ሰራተኛ ይቅርና ለባለሙያም አስቸጋሪ ስለሆነ "ኃላፊዎች ወይም ሠራተኞች ሊያውቁት ይገባል" የሚል አስተሳሰብ መውሰድ ተገቢ አይደለም። ብዙ አገሮች መንግስታት ግብር ከፋዩን በወንጀል ተጠያቂ ላለማድረግ

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[63] ከድርጅቶች የወንጀል ኃላፊነት ሕግ ጋር በተያያዘ አንድ የሕጉች ልዩነት ወይም አንድ የአስተሣሰብ ልዩነት እየሆነ ያለው ተጠያቂነቱ በሐላፊዎች ወይም በሠራተኞቹ የአውቆ ማጥፋት ላይ ብቻ ሊመሠረት ይገባል የሚለውና ከአውቆ ማጥፋት በተጨማሪም በቸልተኝነት የሚፈፀም ተግባርም የሐላፊነት መሠረት ሊሆን ይገባል የሚለው ነው/ የወንጀል ሕጉ ከጽንሰሐሣቡ አዲስነት አንፃር "በአውቆ ማጥፋት" ላይ የተመሠረተ ቢሆንም ወደፊት አያደገ ሊመጣ ከሚችለው የኩባንያዎች ሥራ አንፃር የቸልተኝነት ተግባራትም ተመሣሣይ ውጤት ሊኖራቸው እንደሚችል ይገመታል።ለምሣሌ እራሱን የቻለ አከራካሪ ጉዳይ ቢኖረውም፣ በአዋጅ ቁ. 609/2001 አንቀጽ 56/3/ ላይ ያለው የሥራ አስኪያጅ መከላከያ ከሥራ አስኪያጅ የቸልተኝነት ተግባር ጋር የተያያዘ ነው። በአጠቃላይ ግን ከዚያ ጋር በተያያዘ ያለው የሕግ አስተሣሰብ ሰፊና ጥልቅ እንደሆነ የሕግ ሰነጽሑፎች ያመለክታሉ

ተገቢውን ጥንቃቄ የሚያደርጉት ወደ ፍ/ብሄር ተጠያቂነት የሚያዘነብሉትም በዚህ ምክንያት ነው።

የወንጀል ሕጉ ኃላፊነትን የሚያቋቁመው በቀጥታ የድርጅቱን ግዴታ በመጣስ ሲሆን የታክስ ሕጉ ግን ኃላፊነትን የሚያቋቁመው ሥራ አስኪያጅ መሆንን ብቻ መሠረት አድርጉ ነው። ዝርዝር ሁኔታዎችን በተከታዩ ክፍሎች እንመለከታለን።ስለሆነም ሠራተኞችና ኃላፊዎች ይህንን የድርጅታቸውን ግዴታ እንዳይጣስ ማድረግ ያለባቸው ሲሆን ይህን ግዴታ ከጣሱ ግን ድርጅቱ በወንጀል ይጠየቃል:: *የተ.እ.ታ ተመዝጋቢ የሆነ ድርጅት ካለበት በርካታ ህጋዊ ግዴታዎች መካከል* አንዱ ከሽያጭ መመዝገቢያ መሣሪያ የወጣ ደረሰኝ መስጠት ነው። ይህንን ግዴታ የሚያውቅ ሠራተኛ ወይም ኃላፊ ግዴታው እንዳይጣስ ተገቢውን ጥንቃቄና አስፈላጊውን *ተግባር ሁሉ መፈፀም* ያለበት ሲሆን ግዴታውን ጥሶ ከተገኘ ግን በወንጀል ተጠያቂ ይሆናል። በተግባር ከሚታዩ ክርክሮች አንፃር አብዛኛው በሠራተኞች ላይ የሚቀርበው ክስ ይህንን የድርጅቱን *ግዴታ በመጣስ ያለ ተ.እ.ታ ደረሰኝ ሸያጭ* አከናውነዋል የሚል ነው።

5.5.2.3 ድርጅቱን በመሣሪያነት አሳግባብ መጠቀም

ይህ በአብዛኛው ድርጅቱን ሸፋን በማድረግ ሌሎች ሕገወጥ ተግባራት መፈፀምን የሚመለከት ነው።ሰምሣሌ በሕጋዊ የፕሬስ ሥራ ሕገወጥ *የፖለቲካ* ቅስቀሣ ማድረግ፣ አንድ አይነት *በሀግ የተከለከለ የፖስቲካ* አቋምን *ወይም የሃይማኖት* አስተሳሰብን ማራመድ ወዘተ ናቸው። ከዚህ በተጨማሪ *በህጋዊ* ሥራ ሸፋን ሕገ ወጥ የገንዘብ ዝውውር፣ ከሰዎች ሕገወጥ ዝውውር ጋር ወዘተ የሚሠሩ ሥራዎችን መስራት ወዘተ ናቸው። በዚህ መልክ የሚፈፀሙ ወንጀሎችን በተመለከተ የሚያጋጥም ክርክር የለም። በውጪ አገር ግን ሕጋዊ ስራን ሸፋን በማድረግ ሽብርተኝነት ሣይቀር የሚያስፋፉና በሌሎችም ሕገወጥ ተግባራት ላይ ተሰማርተዋል በሚል እየተጠረጠሩ እንዲፈርሱ፣ እንዲዘጉና ንብረታቸው እንዲወረስ የሚደረጉ ድርጅቶች አሉ።

5.6 የወንጀል ተሣትፎን በተመለከተ

የወንጀል ተሣትፎ ለወንጀል ተጠያቂነት መሠረታዊ ጉዳይ ነው። የድርጅት ሠራተኛ ወይም ኃላፊ አንድ ሕገወጥ ተግባር ሲፈጽም ስላየ፣ስለሰማ፣በቦታው ስለነበር ወይም ሠራተኛ ስለሆነ ብቻ የሚጠየቅ አይሆንም። ተጠያቂነት የሚከተልበት ተፈፀመ በተባለው የወንጀል ተግባር ውስጥ በዋና ወንጀል አድራጊነት፣ በአነሣሽነት ወይም በአባሪነት ወንጀል ተሳትፎ ካሳው ብቻ ነው። ይህ አስተሳሰብ ያለወንጀል ተሣትፎ የወንጀል ሐሳፊነት ሲኖር አይገባም የሚለውን *የወንጀል* መርህ መሠረት ያደረገ ነው። የወንጀል ተሣትፎ አስ የሚባለውም ተከሣሹ በወንጀሉ አፈፃፀም የገዙፍ ተግባር፣ የሐሣብና የሕግ ሁኔዎች መተሳሰፉ ሲረጋገጥ ነው። የወንጀል ተሣትፎ ዓይነቶችም በዘፈቀደ የሚተረጉሙና የምንረዳቸው ሣይሆኑ አራሣቸውን የቻሉ የሕግ ጽንሰ ሐሣቦች ናቸው።

በዚህ መሠረት ዋና ወንጀል አድራጊነት ማለት ወንጀል ተብሉ የተደነገገውን ተግባር በቀጥታ መፈፀም ነው። ለምሣሌ አንድ ካሸር ደረሰኝ ሣትሰጥ ገንዘቡን ከገዥው ተቀብሳ ዝም ብትል ወንጀሉን በቀጥታ እንደፈፀመች ይቆጠራል።የማነሣሣት ተሣትፎ ደግሞ ሌላውን ሰው በመጐትጐት፣ ተስፋ በመስጠት፣ በገንዘብ፣ በስጦታ፣በማስፈራራት ወይም በሌላ በማናቸውም ዘዴ አንድ ወንጀል እንዲያደርግ ያግባባ አንደሆነ ነው። ይህ የወንጀል ተሣትፎ ዓይነት በሌሎች ወንጀሎች ላይ በጣም የተለመደ የተሣትፎ ዓይነት ቢሆንም በዚህ ጽሑፍ በተያዘው ጉዳይ ግን የተለመደ የወንጀል ተሣትፎ ዓይነት አይደለም። የአባሪነት የወንጀል ተሣትፎ ዋና ወንጀል አድራጊው ወንጀል ከማድረጉ በፊት ሆነ ወይም በሚያደርግበት ጊዜ ወሬ

በማቀበል፣ በመምከር፣ ወንጀል የሚያደርግበትን ዘዴ ወይም መሣሪያ ወይም ግዙፋዊ እርዳታ በመስጠት ወይም ለወንጀሉ አፈፃፀም በሚጠቅም በማናቸውም ሌላ ዓይነት መንገድ አስቦ መርዳት ነው::[64] ይህም የወንጀል ተሣትፎ ዓይነት በሌሎች ወንጀሎች በጣም የተስመደ የተሣትፎ ዓይነት ቢሆንም በዚህ ጽሑፍ በተያዘው ጉዳይ ግን በብዛት የሚያጋጥም አይደለም::[65]

የታክስ አዋጁ ከእነዚህ የወንጀል ተሣትፎ ዓይነቶች ጋር በተያያዘ እንደጥፋት የተቆጠረውን የተሣትፎ ዓይነት ደንግጓል:: በዚህ መሠረት የአዋጁ አንቀጽ 55 "ማንኛውም ሰው የዚህ አዋጅ ድንጋጌዎች እንዲጣስ የረዳ፣ ያበረታታ፣ ያነሣሣ ወይም በሚስጥር የተባበረ እንደሆነ እንደዋነኛው ጥፋተኛ የዚህን አዋጅ ድንጋጌዎች በመጣስ ጥፋት ይፈጽማል" በማለት ደንግጓል:: በአብዛኛው በአስተናጋጅነት፣ በካሽሪነት፣ ወይም በሌላ ሁኔታ ያስደረሰኝ ሽያጭ አከናውነዋል በተባሉ ተከሣሾች ላይ የሚጠቀሰው የሕግ ድንጋጌ ይህ ነው:: ስለሆነም የወንጀል ተሣትፎን በተመለከተ ከወ/ሕጉ ጋር ሲነፃፀር አንዳንድ መሠረታዊ የሕግ ጉዳዮችን የሚያስነሱ ሲሆን እነዚህን ሁኔታዎች በተከታይ ክፍሎች ላይ እንመለከታለን::

5.7. የሥራ አስኪያጅ ተጠያቂነት

ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ ሥራ አስኪያጅ ስላለበት የተሰየ ሐላፊነት የተጨማሪ እሴት ታክስ አዋጁ ድንጋጌ አስቀምጧል:: በዚህ መሠረት አንድ ድርጅት የተጨማሪ እሴት ታክስ አዋጅን በመተላለፍ ጥፋት የፈፀመ እንደሆነ ጥፋቱ በተፈፀመ ጊዜ የድርጅቱ ሥራ አስኪያጅ የሆነ ማናቸውም ሰው በድርጅቱ የተፈፀመውን ጥፋት እንደፈፀመ ተቆጥሮ በአዋጁ ላይ የተጣለው ቅጣት ተፈፃሚ ይሆንበታል በማለት ደንግጓል::[66] ድርጅቶች በአዋጁ መሠረት ካለባቸው ግዴታ አንዱ ደረሰኝ ወዲያውኑ የመስጠት ግዴታ ነው::[67] ለዚህ አላማም ሲባል ሥራ አስኪያጅ ማለት ማንን እንደሚመለከት የትርጉም ማዕቀፍ ተቀምጧል:: በዚህ መሠረት የሽርክና ማኅበር አባል ወይም ሥራ አስኪያጅ ኩባንያን በሚመለከት የኩባንያው የሥራ መሪ፣ ሥራ አስኪያጅ ወይም ሌላ ሹም የሰዎችን ህብረት በሚመለከት ደግሞ የሕብረቱ ሥራ አስኪያጅ ወይም በዚሁ ኃላፊነት እንደሚሠራ ሆኖ የሚታይ ሥራ አስኪያጅ ተደርጉ ይወሰዳል::[68]

በወንጀል ሕጉ መሠረት የድርጅቶች የወንጀል ተጠያቂነት የሚመሠረተው በኃላፊዎቻቸው ወይም በሰራተኞቻቸው ጥፋት አማካኝነት ነው:: ከታክስ አዋጁ የኃላፊነት መሠረት ጋር ሲነፃፀር ሥራ አስኪያጁ ከድርጅቱ ሃላፊዎች መካከል አንዱ ስለሆነና በአንዳንድ ሁኔታዎች ደግሞ ተቀጣሪም ሊሆን ስለሚችል በወንጀል ሕጉና በታክስ አዋጁ ላይ የተደነገገው የጥፋት ፈፃሚው ማንነት የተጣጣመ ነው:: ይሁን እንጂ ጥፋቱን የፈፀመው ሌላ ሰራተኛ ወይም የድርጅቱ ሐላፊ ቢሆንም በታክስ አዋጁ መሠረት ሥራ አስኪያጁ ከመከሰስ አይድንም:: አንድ ድርጅት በርካታ ኃላፊዎች ሊኖሩት ይችላል:: ለምሣሌ የአክስዮን ማኅበራት የቦርድ አባላት ለሚኖሩት ኃላፊዎች ተደርገው ይቆጠራሉ:: ከዚህ በተጨማሪ የአንድ ድርጅት የሥራ

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64 የወ/ሕ/ቁ. 32፣36 እና 37 ይመለከቷል፣ በተጨማሪም የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ. 57644 የሰጠውን የሕግ ትርጉም መመልከቱ ይመከራል::

65 እነዚህ የወንጀል ተሣትፎ አይነቶች ጉዳዩን ቀለል ባለ አገላለጽ ለማስቀመጥ ሲባል የተገለጹ ናቸው እንጂ የወንጀል ተሣትፎ አየነቶች እነዚህና በዚህ መልክ የሚገለጹ ብቻ ናቸው ማለት አይደለም:: የወንጀል ተሣትፎ ጉዳይ ሰፊና ጥልቀት ያለው የሕግና የፍሬ ነገር ጉዳይ ነው:: ሰበለጠ ግንዛቤ በአቶ ፀሐይ ዋዳ የተፃፈው የወንጀል ሕግ መሠረታዊ መርሆዎች የሚለውን መጽሐፍ ከገጽ 168-179 ያለውንና Philippe graven; an Introduction to Ethiopian penal law; pp93-108 ያለውን ማንበቡ ይመከራል::

66 አ.ቁ. 285/94 አንቀጽ 56/1/

67 አ.ቁ. 609/2001 አንቀጽ 10/1/

68 አ.ቁ. 285/94 አንቀጽ 56/4/

አመራር አባላት እንደኃላፊ ሊቆጠሩ ይችላሉ::[69] ስለሆነም ከሥራ አስኪያጁ በስተቀር ሌሎቹ ኃላፊዎች በተሣትፎ ላይ የተመሠረተ ተጠያቂነት ሲኖርባቸው የሥራ አስኪያጁ ተጠያቂነት ግን ያለመንጀል ተሣትፎ ነው:: የወንጀል ሕጉን ብቻ መሠረት አድርገን ካየነው ሥራ አስኪያጅ ከድርጅቱ ኃላፊዎች መካከል ዋናው ሲሆን ጥፋት ካልፈፀመ በስተቀር ሥራ አስኪያጅ በመሆኑ ብቻ ሊከሰስ አይችልም:: ስለሆነም የታክስ ሕጉ ከኃላፊዎች መካከል ሥራ አስኪያጁን ብቻ መነጠሉና እሱንም ያስጥፋት ኃላፊ ማድረጉ የታክስ ሕጉ የወንጀል ሕጉን እንደመቃረን የሚቆጠር ነው::[70]

ከላይ በተመለከተው መሠረት ምንም እንኳን ሥራ አስኪያጅ ማለት ምን ዓይነት ኃላፊነት ያለበት እንደሆነ ትርጉም ቢሰጥም በተግባር በሚታዩ ክርክሮች ግን ከግል ባለሃብት የንግድ መደብሮችና የሕጋዊ ሰውነት አቋም ካላቸው ድርጅቶች ጋር በተያያዘ ሥራ አስኪያጅ ማለት ምን ማለት ነው የሚልና የግል ባለሐብት የንግድ መደብሮች ሥራ አስኪያጅ ሲኖራቸው ይችላል ወይ?የሚል አከራካሪ ጉዳይ ስለሚያስነሣ እነዚህን ሁኔታዎች እንደሚከተለው እንመለከታለን::

5.7.1 የግል ባለሐብት ድርጅት ሥራ አስኪያጅን በተመለከተ

አንዳንድ የግል ባለሐብቶች ክብ ማኅተም አስቀርፀውና ሥራ አስኪያጅ የሚሉትን ወይም የባለሐብቱን ስም በቲተር አስቀርፀው የሚጠቀሙ አሉ:: ክብ ማኅተሙን የሚያስቀርጹት በድርጅታቸው ስም ነው:: የሚጠቀሙት የድርጅት ስምም፣ በንግድ ፈቃዱ ላይ ያለውን የባለሐብቱን ስም ወይም የድርጅት ስም ካስመዘገቡም የድርጅቱን ስም ነው:: አንዳንዶቹ የተመዘገበ የድርጅት ስም ሣይኖራቸው በራሣቸው የሰጡትን ስም በንግድ ድርጅቱ በር ላይ በመለጠፍ፣ ማኅተምና የመፃፃፊያ ወረቀት አሣትሞ መጠቀም የተለመደ ነው::[71] ቲተር ሲያስቀርጹም ሥራ አስኪያጅ ብቻ ወይም ባለቤትና ሥራ አስኪያጅ ወይም ዋና ሥራ አስኪያጅ በሚል የሚያስቀርጹና ይህንኑ በተለያዩ መፃፃፊያዎች ላይ የሚጠቀሙ አሉ:: ከዚህ በተጨማሪ ሥራ አስኪያጅ ቀጥረው ኃላፊነቱንም ሙሉ በሙሉ በውል ወደእሱ አዙረናል በሚል እምነት ይህን የሚያደርጉ ባለሐብቶች አሉ::

የድርጅቱን ሥራ በተወሰነ ደረጃና ሐላፊነት ተረክቦ ስማከናወን ሥራ አስኪያጅ በሚል ኃላፊነት መቅጠር የሕግ ክልከላ የለውም:: ይልቁንም ከፍተኛ ኃላፊነት ያለበትን ሠራተኛ

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69 ሐላፊዎች ማለት እነማንን እንደሚመለከት አመሳካች ትርጉም የለም:: ይሁን እንጂ የቦርድ አባላትና በአዋጅ ቁ. 377/96 አንቀጽ 3/2/ሐ/ መሠረት የሥራ መሪዎች ኃላፊዎች ተደርገው ሲቆጠሩ ይችላሉ:: ስምሣሌ የቦርዱ አባላት ለኩባንያው ለአበዳሪዎች፣ ለሠራተኛው ወዘተ ያለባቸው ሐላፊነት ከፍተኛ ነው/ፈቃዱ ጴጥሮስ፡ የኢትዮጵያ የኩባንያ ሕግ; የካቲት 2004፣ ገጽ 151-164/ያለውን ማንበቡ ለበለጠ ግንዛቤ ይረዳል::ቢሆንም እነዚህ የቦርዱ አባላት ሃላፊዎች ተደርገው ሊወሰዱይገባል፣ አንዳንድ ጊዜ አማካሪ ብቻ የሆነ ባለሙያዎችም እንደሃላፊ ሊቆጠሩ ይገባል የሚል አስተሳሰብ አለ::

70 ይህ አመለካከት ካላቸው ባለሙያዎች መካከል አንዳንዶቹ የወንጀል ሕጉ የወጣው የተጨማሪ እሴት ታክስ አዋጁ ከወጣ በኋላ ስለሆነ የወንጀል ሕጉ የመርህ ድንጋጌ በአስገዳጅ ሁኔታ ተፈፃሚ ሲሆን ይገባዋል በማለት ይከራከራሉ::ይህ ክርክር ጠበቆች በተደጋጋሚ ሲያቀርቡ ፀሐፊው በችሎት ተቀምጦ አዳምጧል::

71 ድርጅቶች የንግድ ስም ሲጠቀሙ ስያሜው በሌላ ንግድ ድርጅት ያልተያዘ፣ ለሕግና ለሞራል ተቃራኒ አለመሆኑ ከተረጋገጠ በኋላ ነው:: ይሁን እንጂ አንዳንድ ድርጅቶች ይህን ሣያደርጉ የንግድ ስም ስያሜ የሚጠቀሙ አሉ:: ሌላው ወገን የንግድ ስም ስያሜዬን አላግባብ ተጠቀመብኝ በሚል አስካልተቃወመ ድረስ ጠያቂ ስለማይኖር ትክክል እንደሆኑ አድርገው ያስባሉ:: አንዳንድ ቀበሌዎች ግን ማስታወቂያ የተሰጠፈበትን ግብር ሲያስከፍሉ ይህንንም እንደሚቆጣጠሩ ፀሐፊው ካጋጠመው ልምድ ተገንዝቧል::

በዚህ የሥራ ድርሻ መቅጠር፣ በአሠሪና ሠራተኛ ግንኙነታቸው እንደ ሥራ መሪ ተቆጥሮ ከሌሎቹ ሠራተኞች የሚለይ የሥራ ግንኙነት እንዲኖረው ስለሚያደርግ ተገቢነት ይኖረዋል። የወንጀል ኃላፊነቱን በተመለከተ ግን "ሥራ አስኪያጅ" በሚል ስም ተጠራም አልተጠራም፣ ሥራ አስኪያጁ ቅጥር ሥራ አስኪያጅ ሆነም አልሆነም በድርጊቱ ውስጥ ተሣትፎ ከሌለው በታክስ አዋጁ ላይ በተመለከተው መሠረት እንደሥራ አስኪያጅ ተቆጥሮ ሊከሰስ የሚችልበት የሕግ መሠረት የለም። ይሁን እንጂ ከዚህ ጋር በተያያዘ አንዳንድ ጊዜ የግል ባለሐብቶች ሲከሰሱ ሥራ አስኪያጅ ስለቀጠርኩ እኔ ልጠየቅ አይገባኝም በሚል የሚቀርቡት መከራከሪያ አለ።[72] ስለሆነም የግል ባለሐብቶች የድርጅታቸውን ሥራ ካሸር፣ የሽያጭ ሠራተኛ ወዘተ በማለት ከፋፍለው እንደሚያሰሩት ሁሉ የተወሰኑ ሥራና ሐላፊነት ሥራ አስኪያጁ ሰሆነ ግለሰብ መድበው ማሰራታቸው[73] በታክስ ሕጉ መሠረት ያለባቸውን ሐላፊነት ወይም ተጠያቂነት እንዳስተላለፉ አይቆጠርም። በዚህ ሁኔታ ያለው አስተሳሰብ የተሳሳተ ስለሆነ ከፍተኛ ትምህርት ሊሰጥበት የሚገባ ነው።

5.7.2 ሕጋዊ ሰውነት ያላቸውን ድርጅቶች በተመለከተ

ከላይ ከተመለከቱት የግል ባለሐብቶች ውጪ በንግድ ሥራ ላይ የተሰማሩና ደረሰኝ የመስጠት ግዴታ ያለባቸው ታክስ ከፋዮች *የንግድ ማህበራት* ናቸው። ከንግዱ ማኅበራትም ውስጥ በአብዛኛው በአገልግሎትና እቃ መሸጥ ውስጥ ተሰማርተው የሚገኙት ኃላፊነቱ የተወሰነ የግል ማኅበራትና የሽርክና ማኅበራት ናቸው። በንግድ ሕጉ መሠረት የንግድ ማኅበራት ስድስት አይነት ሲሆኑ ሁሉም በጽሑፍ በተዘጋጀ ውል መሠረት የሚቋቋሙ ናቸው። ከስድስቱ ውስጥ አምስቱ በውልና ማስረጃ ጽ/ቤት ምዝገባ ያስፈልጋቸዋል። የአሸሙር ማኅበርን በተመለከተ ግን ምዝገባ ስለማያስፈልገው ለሕዝብ ወይም ለሶስተኛ ወገኖች የሚታወቀው ሸሪክ አንዱ ብቻ ነው።[74] አሱም የንግድ ፈቃድ በስሙ የተመዘገበው ብቻ ነው። ስለሆነም የወንጀል ተጠያቂነት ውጤቱ ከላይ ከተመለከተው ከግል ባለሐብት *የወንጀል ተጠያቂነት* ጋር ተመሣሣይ ነው።

ሌሎቹ የንግዱ ማኅበራት ግን በመመስረቻ ጽሑፋቸውና በመተዳደሪያ ደንባቸው ላይ ሥራ አስኪያጅ ማን እንደሆነ በግልጽ ይጠቅሣል። አንዳንድ ጊዜ ሁለትና ከሁለት በላይ ሥራ አስኪያጆችም ሊሰየሙ ይችላል።[75] ሥራ አስኪያጅና አንደ ወይም ከአንድ በላይ ምክትል ሥራ አስኪያጆች ሊሰየሙም ይችላል። ስለሆነም በተጠቀሱት ሰነዶች ላይ የተጠቀሰው የሥራ መሪ ተጠያቂ ይሆናል። አስከአሁን ክስ ከተመሰረተባቸው ድርጅቶች መካከል አብዛኛዎቹ

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72 ፀሐፊው በሁለት ጉዳዮች በግል ባለሐብትነታቸው የተከሰሱ ተከሣሾች ከሱ ከተነበባላቸው በኋላ ይህን መከራከሪያ ሲያቀርቡ በችሎት ውስጥ ተቀምጦ አዳምጧል።በሁለቱም ጉዳዮች ሥራ አስኪያጆቹ ከባለሐብቶቹ ጋር አልተከሰሱም።

73 ይህ አይነት የሥራ ክፍፍል ወይም ምደባ (job classification) ድርጅቶች የአስተዳደር ነፃነታቸውን (Management Autonomy) የሚተገብሩበት የአስተዳደር ስርአት ነው። በአዳጉት ሐገሮችም ቢሆን አንድን ድርጅት የተወሰነ አይነት የማኔጅመንት ስርአት ብቻ ተከተል ተብሎ በሕግ ሊገደድ አይችልም። ወደተጠያቂነት ሲመጣ ግን በዋንኝነት ተጠያቂነት ባለቤትነትን ተከትሎ ሊሔድ ይገባል የሚል አስተሳሰብ አለ። የታክስ ሕጉም ይህን አስተሳሰብ *መሰረት በማድረግ ሃላፊነትን ለማቋቋም ያሰበ ይመስላል*።

74 የንግድ ሕጋችን ስለንግድ ማኅበሮች የያዘውን ጠቅላላ ድንጋጌዎች በዝርዝር መመልከቱ ይመከራል። *ለማሳሌ የንግድ ህጉን ስለንግድ ማህበሮች ጠቅላላ ድንግጌዎች ከቁ.* 210-226 *ይመለከታል*።

75 ፀሐፊው እራሱ በባለሙያነት በተሣተፈባቸው የኩባንያ ምስረታዎች ላይ ሁለት ሥራ አስኪያጅ እንዲኖም የተደረገባቸውን መመስረቻ ጽሑፎችና መተዳደሪያ ደንቦች ያስታውሣል። ከሁለት በላይ በሥራ አስኪያጅነት የተመደቡባቸው ኩባንያዎች አንዳሉም ከባልደረባዎቹ ጋር ባደረገው ውይይት ፀሐፊው ተገንዝቧል።

ኃላፊነቱ የተወሰነ የግል ማኅበራት ናቸው። በአጠቃላይ ከሽርክና ማኅበራት ቁጥር መካከል ከፍተኛውን ቁጥር የሚይዘው ይኸው የንግድ ማህበር ዓይነት ስለሆነ የተከሣሽነት መጠኑ ከፍተኛ ሆኖ ቢገኝ ብዙ የሚያስገርም አይደለም።

ይሁን እንጂ በሁሉም ሁኔታ በመተዳደሪያ ደንቡና በመመስረቻ ጽሑፉ ላይ ስሙ በሥራ አስኪያጅነት የተጠቀሰው ሰው ተጠያቂ ይሆናል ማለት ግን አይደለም። አንዳንድ ድርጅቶች ምንም እንኳን በዚህ መልክ የተጠቀሰ ሥራ አስኪያጅ ቢኖራቸውም ሥራውን እንደሥራ አስኪያጅ ሆኖ የሚያከናውን በግልጽ የሚታወቅ የማኅበሩ አባል፣ወይም ኃላፊ ሲኖር ይችላል።[76] እንደዚህ ዓይነት ሁኔታዎች ሲያጋጥሙ ሥራ አስኪያጅ ሣይሆን ሌሎች ባለአክሲዮኖች ወይም የድርጅቱ ሐላፊዎች በኃላፊነት ሊጠየቁ ይችላሉ።

6. በወ/ሕግ የሚቀርቡ የወንጀል ክሶች ይዘት

በወ/ሕግ በኩል የሚቀርቡት ክሶች *የግል ባለሃብትን በተመለከተ በግል ባለሃብቱ ላይ* ፣ ካሽር ካለ በካሽር ላይ፣ በአስተናጋጅ ወይም በሽያጭ ሠራተኛ ላይ ሲሆን ድርጅቶችን ከሆነ ደግሞ በሥራ አስኪያጁ ላይ፣ በድርጅቱ ላይ እና *ሽያጩን ባከናወኑ ሰራተኞች* ላይ ነው። ከዚህ በተጨማሪ በሱቁ ውስጥ ተገኝተው ግብይት በፈፀሙ ማናቸውም ግለሰቦች ላይ እንዲሁም በወኪሎች ላይ የወንጀል ክስ ይቀርባል። አንድ ክስ የተሟላ የወንጀል ክስ ለመባል ተከሣሹ የተላለፈውን የወንጀል ድንጋጌ፣የተፈፀመውን ተግባር ወይም የወንጀል ፍሬ ነገርና ተግባሩ የተፈፀመበትን የሐሣብ ሁኔታ መግለጽ ይኖርበታል። ወ/ሕግ የሚያቀርባቸው ክሶችም እነዚህን ሁኔታዎች እንዲያሟሉ ይጠበቅባቸዋል። ክሱ እነዚህን መመዘኛዎች እንዲያሟላ የሚጠበቅበት ወ/ሕግ ሶስቱም ሁኔታዎች መሟላታቸውን ማስረዳት ስላለበት ነው። አንድ ወንጀል ተደረገ የሚባለው ሕጋዊ፣ ግዙፋዊና ሞራላዊ ፍሬ ነገር ሲሟሉ ነው።[77] ይህን መሠረታዊ የሕግ መዘኛ መሠረት በማድረግ በተግባር በሚታዩ ክርክሮች የእነዚህን መመዘኛ ዎች በክስ ላይ መሟላት፣የክሶቹን የአቀራረብ ይዘትና የሚሰጡ ምክንያቶችን እንደሚከተለው እንመለከታለን። የሚቀርበው ክስ እንደተከሣሹ የሥራ ወይም የሐላፊነት ድርሻና የወንጀል ተሣትፎ ስለሚለያይ የመመዘኛዎቹን አገላለጽ እንደየተከሣሹ ልዩ ሁኔታ በመነጣጠል እንመለከታለን።

6.1 ሠራተኞችን በተመለከተ

ወ/ሕግ በሚመሠርተው ክስ ላይ "ሬተኞችና ሌሎች" በሚል ከላይ የተመለከትናቸው ግለሰቦች ላይ የሚጠቅሰው ሕግ የተጨማሪ እሴት ታክስ አዋጅ ቁ. 285/94 አንቀጽ 55 እና የተጨማሪ እሴት ታክስ አዋጅ እንደተሻሻለው አዋጅ ቁጥር 609/2001 አንቀጽ 50/መ/2 ነው"። አንቀጽ 55 የሚደነግገው ስለመርዳት ወይም ማበረታታት ሲሆን አንቀጽ 50/መ/ /2/ ደግሞ በሽያጭ መሣሪያ ከታተመ ደረሰኝ ውጪ ወይም ያለደረሰኝ ግብይት ማከናወን የሚያስቀጣ ስለመሆኑ ነው።የሽያጭ መመዝገቢያ መሣሪያ የማይጠቀሙ ድርጅቶችን በተመለከተ ደግሞ አዋጅ ቁ. 609/2001 አንቀጽ 50/ለ/1/ ይጠቀሣል።

ሠራተኛው ግብይቱ ከደረሰኝ ውጪ እንዲካሂድ እንደረዳ የሚቆጠረው ዋናውን ጥፋተኛ እንደሆነ ከአንቀጽ 55 ድንጋጌ መረዳት ይቻላል። እዚህ ላይ የሚነሣው መሠረታዊ ጥያቄ

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[76] ይህ አይነት የኩባንያ ሥራ አመራር በስፋት ያጋጥማል። ሥራ አስኪያጁ ሰይስሙላ የተሾመባቸውና በሌላ ሰው ወይም በወኪል ብቻ የሚተዳደሩ ኩባንያዎች ፀሐፊው በሥራው አጋጣሚ በተደጋጋሚ ይመለከት ነበር። የአንዳንድ ኩባንያ ሥራ አስኪያጆችም ለረዥም አመት በሐገር ውስጥ የማይኖሩ እንደነበሩ አጋጥሞታል።

[77] የወ/ሕ/ቁ. 23/2/ እና የወ/መ/ሥ/ሥ/ሕ/ቁ. 111 እና 112 ጣምራ ንባብን ይመለከቷል። ለዚህ አጠቃላይ መመዘኛ እንደልዩ ሁኔታ የተቀመጠው የወ/ሕ/ቁ. 34 እንደሆነ በወ/ሕ/ቁ. 23/3/ ላይ ተደንግጓል።

ዋናው ጥፋተኛ ማነው የሚለው ነው::[78] ሠራተኛ በግል ባለሐብቱ ወይም በሥራ አስኪያጁ ተቆጣጣሪነት የሚሠራ ሰው ስለሆነ፣ ድርጅት በራሱ ጥፋት ሲፈጽም ስለማይችልና ጥፋት ሲፈጽም የሚችለው ሥራ አስኪያጁ ስለሆነ ዋንኛው ጥፋተኛ ተደርጉ የሚቆጠረው የሕግ ሰውነት ያለውን ድርጅት በተመለከተ ሥራ አስኪያጁ ሲሆን የግል ባለሐብትን በተመለከተ ደግሞ ባለሐብቱን ነው:: ስለሆነም በገንዘብ ያዥነት የሚሠራ፣ በአስተናጋጅነት የሚሠራና ገንዘብ ተቀብሎ ደረሰኝ አንዲሰጥ ወይም ደረሰኝ ሰጥቶ ገንዘብ አንዲቀበል ሹያጩ በተከናወነበት ወቅት ሐሳፊነት ያለበት ሠራተኛ ይህንን ሐሳፊነቱን ባለመወጣት የሚፈጽመው ተግባር አራሱን ችሎ "በዋና ወንጀል አድራጊነት" የተፈፀመ ተግባር እንደሆነ ተደርጉ የሚቆጠር ሣይሆን እንደመርዳት ወይም እንደመተባበር የሚቆጠር ነው:: ይሁን እንጂ ሠራተኞች አራሣቸው የፈፀሙት ተግባር ከሆነ የወንጀል ሕጉ ካስቀመጠው የወንጀል ተሣትፎ የመርህ ድንጋጌ አንፃር እንደመተባበር ሲቆጠር የሚችል አይደለም::

እንደመተባበር ሲቆጠር የሚገባው የድርጅቱ ሥራ አስኪያጅ ይህን ተግባር እንዲፈጽሙ ጠይቋቸው ፈቃደኛ ሆነው የፈፀሙት ሲሆን ወይም በማናቸውም ሁኔታ የተግባሩ መፈፀም የባለቤቱ ወይም የሥራ አስኪያጁ ፍላጉት ሆኖ፣ ይህንን ፍላጉቱን ለማስፈፀም ሲሉ ሠራተኞቹ ያለ ደረሰኝ ሸጠው ሲገኙ ነው:: በተግባር በሚታዩ ክርክሮች ግን የዐ/ሕግ ምስክሮች ቀርበው ይህን የመረዳዳት ወይም የመተባበር ፍሬ ነገር ሲያስረዱ አያጋጥምም:: በአንዳንድ ክሶች ላይ ግን ሠራተኞች በቀጥታ የሚፈጽሙትን ተግባር በዋና ወንጀል አድራጊነት እንደፈፀሙት ሆኖ የወ/ሕ/ቁ.32/1/ ተጠቅሶ የቀረቡ ክሶች አሉ:: በዚህ መልክ የቀረቡ ክሶች የወንጀል ተሣትፎውን አይነት አንደሕጉ አነጋገር በሚገባ የገለጹ ክሶች ናቸው ለማለት ይቻላል::

በሐሣብ ሁኔታ አጠቃቀስም ልዩነት ይታያል:: ለምሣሌ በአንድ ኃላፊነቱ የተወሰነ የግል ኩባንያ በተከሰሰበት ጉዳይ[1] ላይ 3ኛ እና 4ኛ ተከሣሾች በሆኑት ሠራተኞች ላይ የቀረበው ክስ ("... ሁለቱም ተከሣሾች በመንግስት ታክስ ላይ ጉዳት ለማድረስ ሆን ብለው ያለደረሰኝ ሽያጭ በማከናወናቸው 1ኛ እና 2ኛ ተከሣሾችን በመርዳትና በመተባበር በፈፀሙት ወንጀል ተከሰዋል"[79]) የሚል ነው:: 1ኛ ተከሣሽ ማለት ኩባንያው ሲሆን 2ኛ ተከሣሽ ደግሞ ሥራ አስኪያጁ ነው:: ሌላ ሁለተኛ ኃላፊነቱ በተወሰነ የግል ማኀበር ሠራተኞች ላይ የቀረበ ተመሣሣይ ክስ ስንመለከት ደግሞ ("... 1ኛ ተከሣሽ የተጣለበትን ከሽያጭ መመዝገቢያ መሣሪያ በታተመ ደረሰኝ ግብይት የማከናወን ግዴታ እንዳይወጣ በመተባበራቸው በፈፀሙት የመተባበር ወንጀል ተከሰዋል") የሚል ነው::[80] 1ኛ ተከሣሽ ማለት ኩባንያው ነው:: ሁለቱን ክሶች ስናነፃጽራቸው ሁለተኛው ክስ ሠራተኞቹ ተግባሩን የፈፀሙበት የሐሣብ ክፍልን ፈጽሞ አይጠቅስም:: ሠራተኞቹ ድርጊቱን የሚፈጽሙት አንድ የተወሰነ ውጤት ለማስገኘት ነው ተብሎ ይታመናል:: የወንጀል ሕጉ አንቀጽ 58/1/ሀ/ ማንም ሰው አለቦ ወንጀል አደረገ የሚባለው አንድ የተወሰነ ውጤት ለማግኘት ብሎ ሲያደርገው እንደሆነ ይደነግጋል::

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[78] በአንድ ክርክር ከኩባንያው ሥራ አስኪያጅ ጋር ተጣምረው የተከሰሱ ካሸርና አስተናጋጆች የጥፋተኝነት ቃላቸውን ሲሰጡ ባለቤቶቹ በደረሰኝ አትሸጡ ስለሚለን ነው በማለት ቃላቸውን ሰጥተው ነበር:: ባለቤቶቹ ደግሞ ያለደረሰኝ እየሸጡ ገንዘቡን ኪሣቸው ስለሚከቱ በዚህ አንግባባም ፣ ስለሆነም ለምን አንታመንም በሚል ለማጥቃት ሲሉ ነው በዚህ መልክ ቃላቸውን የሰጡት ይላሉ:: በተለይም በቅጥር ሠራተኛ ላይ ተመስርቶ የሚደረግ ሽያጭ በደረሰኝ መሠራቱ ግብር ከፋዩን ደጠቅመዋል:: ያለደረሰኝ መሆኑ ደግሞ ይጉዳዋል:: በባለስልጣን መ/ቤቱ በኩል የሽያጭ መመዝገቢያ መሣሪያ መጠቀም ለግብር ከፋዩ ከፍተኛ ጠቀሚታ እንዳለው ትምህርት ከሚሰጥባቸው መሠረታዊ ጉዳዮች መካከል አንዱ *መሳሪውን መጠቀም* ነጋዴው ሸያጩን በአግባቡ እንዲቆጣጠር ያስችለዋል የሚል ነው::

[79] ፌ/መ/ደ/ፍ/ቤት በመ/ቁ. 183174 ዐ/ሕግ ያቀረበውን ክስ ይመለከታል::

[80] ዐ/ሕግ መጋቢት 19/2004 ዓ.ም የመሠረተውን ክስ ይመለከታል::

ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ ሠራተኞች ደረሰኝ የማይሰጡት በመንግስት ታክስ ሳይ ጉዳት ስማድረስ ወይም ኩባንያውን ስመጥቀም መሆን አለበት። የድርጅት ሠራተኞች ከሆኑ ደግሞ ድርጅቱ ደረሰኝ ስመስጠት ያለበትን ግዴታ በመጣስ የተፈፀመ ተግባር እንደሆነ ከተጠቀሰም በቂ ነው።ስለሆነም ድርጊቱን የፈፀሙት ከዚህ ሐሣብና ግብ አንፃር መሆኑ በክሱ ላይ መጠቀሱ የቀረበውን ክስ የተሟላ ያደርገዋል። በዚህ ረገድም የመጀመረያው ክስ የተሟላ ነው ስማለት ይቻላል። ይሁን እንጂ ረድተዋል ወይም ተባብረዋል በሚል የሚገለፀው የወንጀል ተሣትፎ ዓይነት ግን በምን መልክ እንደተባበሩ በቂ የፍሬ ነገር ዝርዝር የሌለው ስለሆነ የወንጀል ተሣትፎ አገላለጽ መመዘኛንና ጽንሰሐሣብን የሚያሟላ አይመስልም። አንዳንድ ጊዜ ግል ባለሐብት ድርጅት ሠራተኛ ተከሣሽም ላይ የሐሣብ ሁኔታ አገላለጽ ተመሣሣይ ችግር ይታያል። ለምሣሌ በአንድ ክስ ላይ የተጠቀሰው" ያለተጨማሪ እሴት ታክስ ደረሰኝ በመሸጡ የግል ባለሐብቱ ያለበትን ግዴታ እንዲጥስ በመርዳት በፈፀመው ወንጀል ተከሳል" የሚል ነው። በዚህ ክስም ሠራተኛው ተግባሩን የፈፀመበት የሐሣብ ሁኔታ አልተጠቀሰም።

ይህ ችግር የመነጨው የታክስ ሕጉ ከወንጀል ሕጉ ጋር ካለው የመጣጣም ችግር ይመስላል። ሠራተኞች በቀጥታ ተግባር ስፈፀሙት ጥፋት በዋና ወንጀል አድራጊነት ተጠያቂ ከመሆን ይልቅ ሠራተኞች የፈፀሙት ጥፋት ሁሉ እንደመተባበር፣ መርዳትና መመሳጠር ስስተቆጠረ የፍሬ ነገር ዝርዝሩ የወንጀል ሕጉን መመዘኛ በሚያሟላ ሁኔታ ግልጽነት ያለው አይደለም። የዐ/ሕግ ምስክሮች ሲሰሙም ይህ የመተባበር፣የመርዳትና የመመሣጠር ሁኔታ ጥብጥ ሆኖ ሲያዝም ሆነ ሲመሰከር አያጋጥምም።

6.2 የግል ባለሐብትን በተመለከተ

የግል ባለሐብቶችን በተመለከተ ደረሰኝ ወዲያውኑ አልሰጣችሁም በሚል ክስ የሚመሠረትባቸው አዋጅ ቁ. 285/94 አንቀጽ 2/11/ እንደተሻሻለው አዋጅ ቁ. 609/2001 አንቀጽ 50/መ/2/ ተጠቅሶ ነው። አንቀጽ 2/11/ "ሰው" ስሚለው ቃል የተሰጠ ትርጉም ሲሆን አንቀጽ 50/መ/2/[81] ደግሞ "በሽያጭ መመዝገቢያ መሣሪያ ከታተመ ደረሰኝ ውጪ ወይም ያለደረሰኝ "ግብይት ያከናወነ" ጥፋተኝነቱ በፍ/ቤት ሲረጋገጥ ይቀጣል በማለት የሚደነግግ የጥፋት ድንጋጌ ነው።

በግል ባለሐብት ላይ የሚጠቀሰውን የሕግ ድንጋጌ በተመለከተ የሚነሱ የሕግ መከራከሪያዎች አሉ። እነዚህም፣ አንቀጽ 50/መ/ለ/ በቀጥታ ግብይቱን ያከናወነ የግል ባለሐብት ሊከሰስበት የሚገባው ድንጋጌ ነው፣ ግብይቱን ያላከናወኑና በቦታውም ያልነበሩ የግል ባለሐብቶች ላይ ይህ ድንጋጌ ሊጠቀስ አይገባም፣በተለይ የአንቀጽ 50/መ/2/ ድንጋጌ የዋና ወንጀል አድራጊነት የወንጀል ተሣትፎ ዓይነትን የሚመለከት ነው። ይህ ዓይነት ተጠያቂነት ያለው የሕግ ሰውነት ላላቸው ድርጅቶች እንጂ ስግል ባለሐብቶች አይደለም። የግል ባለሐብቱ ተመሣጥር ከሠራተኛው ጋር ድርጊቱን ፈጽሟል ከተባለም ሊከሰስ የሚገባው በተለያየ ክስ ሣይሆን በወ/ሕ/ቁ. 32 መሠረት በግብረአበርነት አንቀጽ 50/መ/2/ ተሳልፈሐል ተብሎ እንጂ በተለያየ ክስ ሊሆን የሚችልበት የሕግ መሠረት የለም የሚሉ ክርክሮች በተከሣሾችና በጠበቆቻቸው በኩል ይቀርባሉ።

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[81] የአንቀጽ 2/11/ ሙሉ ድንጋጌ "ሰው" ማለት የተፈጥሮ ሰው ፣ የግል ባለሐብት፣ድርጅት፣ የጋራ ልማት ማኅበር ወይም የሰዎች ኅብረት ሲሆን፣ ሌላን ሰው በመወከል ተቀማጭነቱ በኢትዮጵያ ውስጥ ሆኖ የንግድ ሥራ የሚያካሂድ የንግድ ወኪልን ይጨምራል፣ የሚል ነው። የ50/መ/2/ ሙሉ ድንጋጌ "መሣሪያው በጥገና ላይ ባለበት ጊዜ ካልሆነ በስተቀር በሽያጭ መመዝገቢያ መሣሪያ ከታተመ ደረሰኝ ውጪ ወይም ያለደረሰኝ ግብይት ካከናወነ ጥፋተኛ መሆኑ በፍርድ ቤት ሲረጋገጥ ከአንድ ዓመት በማያንስና ከሁለት ዓመት በማይበልጥ እሥራት ይቀጣል "የሚል ነው።

በዐ/ሕግ በኩል የሚቀርበው መከራከሪያ ደግሞ "ሰው" ስሚለው ቃል የተሰጠው ትርጉም የግል ባለሐብትንም ስለሚጨምር፤ የግል ባለሐብቱ ደግሞ ደረሰኝ የመስጠት ግዴታ እንዳለበት በሕጉ ላይ በግልጽ ስለተጠቀሰ፤ ድርጅቶችን በተመለከተ ሥራ አስኪያጁ ያለወንጀል ተሣትፎ ተጠያቂ እንዲሆን አየተደረገ የግል ባለሐብትን በተመለከተ ግን "ግብይቱን ካላከናወነ " ሲከሰስ አይገባውም ማለት የሕጉን አላማና ግብ የሚቃረን ስለሆነ በዚህ ረገድ የሚቀርበው መከራከሪያ ተገቢ አይደለም የሚል ነው::[82]

ፍ/ቤቱም በተከሣሾች በኩል የሚቀርበውን መከራከሪያ መሠረት በማድረግ የግል ባለሐብቱን ክስ ነፃ ያደረገበት ውሣኔ አያጋጥምም:: ይሁን እንጂ የግል ባለሐብቱ እንደሥራ አስኪያጁ ሁሉ ድርጊቱ በተፈፀመበት ጊዜ ጥፋቱን እሱ እንደፈፀመ ይቆጠራል የሚል ድንጋጌ አስከሌለ ድረስ የግል ባለሐብቱ ተጠያቂነት አከራካሪ መሆኑ አይቀርም:: ስዚህ መሠረታዊ መፍትሔ የግል ባለሐብቱን ተጠያቂነት በግልጽና ለትርጉም ባልተጋለጠ ሁኔታ መደንገጉ እንደሆነ ይታመናል:: ይህ ደግሞ የሕግ ማሻሻያ ሁኔታዎች ሲታሰቡ እንደሚገባ የሚያመለክት ነው::

6.3 ወኪልን በተመለከተ

በሁለት የወንጀል ክሶች ላይ በወኪሎቹ ላይ የተጠቀሰው አንቀጽ አዋጅ ቁጥር 285/94 አንቀጽ 55 እና አዋጅ ቁ. 609/2001 አንቀጽ 50/ለ/1/ ተላልፈዋል የሚል ነው:: አንቀጽ 50/ለ/1/ የተጠቀሰው ሁለቱም የግል ባለሐብቶች መሣሪያውን መጠቀም ስላልጀመሩ ነው:: አንቀጽ 55 የተጠቀሰው የግል ባለሐብቱን ረድተዋል ወይም አበረታተዋል በሚል ነው:: የውክልና ስልጣናቸውን በተመለከተ በክሱ ላይ የግል ባለሐብቱን ንብረት የማስተዳደር የውክልና ስልጣን እንዳሳቸው ተጠቅሷል:: በሁለቱም መዝገቦች ላይ የግል ባለሐብቶቹም ተከሰዋል::

የውክልና ሰነዱን ይዘት ስንመለከት በአንደኛው ክስ ላይ ያለው ወኪል የንግድ ፈቃድ ቁጥሩ ተጠቅሶ፤ በግልጽ ድርጅቱን እንዲያስተዳድርና እንዲቆጣጠር ስልጣን ያልተሰጠው ሲሆን በደፈናው ግን ማናቸውንም የሚንቀሣቀስና የማይንቀሣቀስ ንብረት እንዲሸጥ እንዲለወጥና ለሶስተኛ ወገን እንዲያስተላልፍ የሚል የውክልና ስልጣን ተሰጥቶታል:: በሁለተኛው መዝገብም ወኪሉ የተሰጠው ስልጣን ከዚሁ ጋር ተመሣሣይ ነው::[83] በሌላ ወኪል ላይ ተመሣሣይ ሕግ ተጠቅሶ በቀረበ 3ኛ ክስ ላይ ደግሞ ለወኪሉ የተሰጠው የውክልና ስልጣን የንግድ ፈቃድ ቁጥር፤ የዋና ምዝገባ ምስክር ወቀት ቁጥርና የንግድ ዘርፉ ተመዝግቦ ነው:: በዚህ መዝገብ[84] ላይ ወካዩ አልተከሰሰም::

የታክስ አዋጁ ወኪል ማለት በሌላ ሰው ስም የሚሠራ ማናቸውም ሰው ነው በማለት ይደነግጋል:: በመርህ ደረጃ የውክልና ስልጣን በጠባቡ ሲተረጉም የሚገባው ነው:: ከዚህ አንፃር ተወካዩ አንድን ድርጅት እንዲቆጣጠርና እንዲያስተዳድር ወይም በሕጉ አነጋገር በወካዩ ትዕዛዝ እየሠራ እንደሆነ ተደርጉ ሊወሰድ የሚገባው በማንኛውም ጥቅል የውክልና ሰነድ መሠረት ነው ወይስ ድርጅቱን በሚመለከት በግልጽ በተጠቀሰ የውክልና ስልጣን መሠረት ነው የሚለው መሠረታዊ የሕግ ነጥብ ነው:: ከዚህ አንፃር በግልጽ የንግድ መደብሩ በስም፤ በንግድ ፈቃድና በዋና ምዝገባ ሰርተፊኬት ቁጥር ተጠቅሶ እንዲያስተዳድሩና እንዲቆጣጠሩ ስልጣን የተሰጣቸው ወኪሎች የበለጠ ለተጠያቂነት የቀረቡ ሲሆን በዚህ መልክ የወከሱ ባለሐብቶችም በምርመራ ሒደት የድርጊት ተሣትፎ ያሳቸው መሆኑ ካልተረጋገጠ በስተቀር ለመክሰሳቸው ተገቢ ነው:: ከዚህ አንፃር ሶስተኛው ክስ የሕጉቱን መመዘኛ ያሚሳ ነው ስማለት ይቻላል::

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[82] ፀሐፊው እነዚህን መከራከሪያዎች ለማወቅ የቻለው በችሎት ከሚደረጉ ክርክሮች ነው::

[83] ፌ/መ/ደ/ፍ/ቤት የኮ/መ/ቁ. 192995 እና 183397፤181242

[84] ከጠበቃ ጫንያለው እሸቱ የተገኘ መረጃ

ወ/ሕጉች በራሣቸው ስመወሰን ያሳቸው ነፃነት ስዚህ ዓይነት ልዩነት አንዱ ምክንያት ሲሆን ይችሳል። ስምሣሴ አንዳንድ ወ/ሕጉች ባስሐብቱ ወኪል ካሰው ወኪሱም መከሰስ አሰበት ብሰው ሲያምኑ አንዳንዶቹ ደግሞ፣ ወኪል ከተከሰሰ ባስቤት ሲከሰስ አይገባም ብሰው ያምናሱ። አንዳንዶች ደግሞ የወኪል ተሣትፎና የተሰጠው የውክልና ስልጣን ዓይነት ከግምት ውስጥ ሲገባ ይገባል ይሳሱ። ማንኛውም ወ/ሕግ በክስ አመሠራረት ሳይ ያሰው ነፃነት ተገቢውን ክብር ሲያገኝ የሚገባው ቢሆንም መሠረታዊ የሕግና የፍሬ ነገር ጉዳዮችን ታሣቢ ባደረገ ሁኔታ መሪ ደንቦችን የመከተል አሰራር ቢኖር ተገቢ ነው።[85] ከዚህ አንፃር በወንጀል ተሣትፎ ከሴሳቸው በስተቀር በግልጽ ተመዝጋቢውን የንግድ መደብር እንዲያስተዳድሩና እንዲቆጣጠሩ የውክልና ስልጣን ከተሰጣቸው ድርጅቶች ውጪ በሴሱች ወኪሱች ሳይ ክስ እንዳይመሠረት ጥንቃቄ ቢደረግ የተሻስ ነው።

6.4 ድርጅቶችን በተመስከተ

በአንድ ኩባንያ ሳይ በተመሠረተ ክስ በኩባንያው ሳይ የቀረበው ክስ ሳይ የተጠቀሰው የሕግ ድንጋጌ "በወንጀል ሕግ አንቀጽ 34/1/ እና በተሻሻስው የተጨማሪ አሴት ታክስ አዋጅ ቁጥር 609/2001 አንቀጽ 22 /1/[86] አንቀጽ 50/መ/2/ የተደነገገውን ተሳልፏል የሚል ሲሆን በሴሳ ኩባንያ ሳይ በቀረበ ሁስተኛ ተመሣሣይ ክስ[87] ደግሞ ከሳይ በመጀመሪያው ክስ ሳይ የተጠቀሰው አንቀጽ 22/1/ ሣይኖር የተጠቀሰው አዋጅ ቁ. 609/2001 አንቀጽ 10/1/[88] ነው። ይህ ድንጋጌ ደረሰኝ ወዲያውኑ መስጠት አስበት የሚል ድንጋጌ ሲሆን 22/1/ ደግሞ "ደረሰኝ መስጠት አስበት" በሚል የሚደነግገው አንቀጽ ነው።

የድርጅት ኃሳፊነት ሲቋቋም የሚገባው በኃሳፊዎቹ ወይም በሠራተኞቹ ጥፋት ሳይ ተመስርቶ ነው። ይህን የወንጀሱን ማቋቋሚያ ፍሬ ነገር በተመስከተ በመጀመሪያው ክስ ሳይ ሠራተኞቹ /3ኛ እና 4ኛ ተከሣሾች/ "<u>የድርጅቱ ሕግና ደንብን አክብር የመስራት ግዴታውን ጥሰዋል</u>" በሚል የተገስፀ ሲሆን በሁስተኛው ክስ ሳይ ግን በደፈናው ሠራተኞች/3ኛ እና 4ኛ ተከሣሾች/ ከሽያጭ መመዝገቢያ መሣሪያ የሚታተም ደረሰኝ ባስመስጠታቸው ያስሽያጭ መመዝገቢያ መሣሪያ ደረሰኝ ግብይት ማካሄድ ወንጀል ተክሰዋል የሚል ነው። ሁስቱንም ክሶች ስናነፃጽር የመጀመሪያው ክስ የወ/ሕ/ቁ. 34/1/ መመዘኛ ያሟሳል። ይኸውም ሠራተኞቹ ድርጅቱ ደረሰኝ የመስጠት ግዴታውን ጥሰዋል በማስት ይገስፃል። ሁስተኛው ክስ ግን ይህን ስስማይገልጽ የተሟሳ አይደስም። ስምን አሳማ የድርጅቱን ግዴታ ጣሰ ስሚስው ግን ሁስቱም ክሶች የሚገልጹት ነገር የስም።

የሐሣብ ሁኔታን በተመስከተም ሆነ ተብሎ ሲፈፀም የሚገባው ተግባር እንደመሆኑ መጠን ሠራተኞቹ የድርጅቱን የሕግ ግዴታ የጣሱት ሆነ ብስው ስስመሆኑ በሁስቱም ክሶች ሳይ አልተጠቀሰም። ይሁን እንጂ ተግባሩን የፈፀሙት ስምን ስምን ዓሳማ እንደሆነ ስምሣሴ በመንግስት የታክስ ጥቅም ሳይ ጉዳት ከማድረስ በማሰብ ወይም ድርጅቱን ስመጥቀም ነው በሚል ባይጠቀስም ሆነ ብስው ስመፈፀማቸው ግን ሲጠቀስ ይገባል። የወንጀል ተሣትፎአቸውን በተመስከተ በጀመሪያው ክስ መደምደሚያ ሳይ በዋና ወንጀል አድራጊነት ተክሰዋል የሚል ሲሆን በሁስተኛው ክስ ሳይ ግን ምንም የተጠቀሰ የተሣትፎ ዓይነት የስም። ስስሆነም የመጀመሪያው ክስ ስ34/1/ መመዘኛ የቀረበ ሲሆን ሁስተኛው ክስ ግን ይህን

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[85] ከቀድሞው የባስስልጣኑ ወ/ሕግ ጋር የተደረገ ውይይት/ስማቸው እንዲገስጽ ስሳልፈስጉ አልተገስፀም/

[86] የአንቀጽ 22/1/ ሙሱ ድንጋጌ ይመስከቷል።

[87] ሁስቱም ኩባንያዎች ኃሳፊነቱ የተወሰነ የግል ማኅበራት ሲሆኑ፣ ድርጊቱ ሲፈፀም የሁስቱም ኩባንያ ሥ/አስኪያጆች በቦታው አልነበሩም፣ ሁስቱም የሽያጭ መመዝገቢያ መሣሪያ የሚጠቀሙ ኩባንያዎች ናቸው። ስስሆነም ጉዳዮቹ ስንጽጽር የተመረጡት ይህንኑ መመሣሰል መሠረት በማድረግ ነው።

[88] የአንቀጽ 10/1/ ሙሱ ድንጋጌ ይመስከቷል።

አያሚሳም። የታክስ ሕጉን በመተላለፍ የሚቀርብ ክስ የወንጀል ሕጉንና የወ/መ/ሥ/ሥ/ሕጉን መመዘኛዎች አሚልቶ መቅረብ ያለበት ስለሆነ የሠራተኞቹ ድርጊትና የወንጀል ተሣትፎ እንዲሁም ድርጊቱ የተፈፀመበት የሐሣብ ሁኔታ የወ/ሕ/ቁ. 34/1/ እና ወ/ሕ/ቁ. 23/2/ መሠረት አድርጉ ሲቀርብ ይገባል።

6.5 ሥራ አስኪያጅን በተመለከተ

በሁለት የተለያዩ ኩባንያዎች ሥራ አስኪያጆች ላይ የቀረበ ክስን ስንመለከት በአንደኛው ክስ ላይ በሥራ አስኪያጁ ላይ የተጠቀሰው አንቀጽ የወንጀል ሕግ ቁ. 32/1/ስ/ እና በ94 ዓ.ም የወጣውን የተጨማሪ እሴት ታክስ አዋጅ አንቀጽ 56/1/ የተሻሻለው የተጨማሪ እሴት ታክስ አዋጅ ቁ. 609/2001 አንቀጽ 50/መ/2/ በመተላለፍ የሚል ሲሆን በፍሬ ነገር ዝርዝሩ ደግሞ የመቆጣጠርና የማስተዳደር ኃላፊነታቸውን አልተወጡም የሚል ነው።[89]

በሁለተኛው ክስ ደግሞ የወ/ሕ/ቁ. 32/1/ስ/ ካለመጠቀሱ ውጪ በሌላው የተጠቀሰው ሕግ ተመሣሣይ ሆኖ የፍሬ ነገር ዝርዝሩ "ሥራ አስኪያጅ ድርጊቱን እንደፈፀመ ስለሚቆጠር፣ ከመሣሪያው የታተመ ደረሰኝ ባለመስጠት ወንጀል ተከሳል" ይላል። በአንዳንድ ክሶች ላይ ደግሞ የወ/ሕ/ቁ. 34/1/ ይጠቀሣል። ከላይ የተመለከቱት ሁለቱ ክሶች ግን የወ/ሕ/ቁ. 34 መሠረት ያደረጉ አይደለም። የወንጀል ተሣትፎን በተመለከተ የመጀመሪያውን ክስ 32/1/ስ/ መሠረት በማድረግ የተሣትፎ ዓይነቱን ሲገልጽ የሞከረ ቢሆንም ይህ አንቀጽ ከአንቀጽ 56/1/ ጋር ካለው አለመጣጣም የተነሣ በክሱ ዝርዝር ላይ በግልጽ አልተጠቀሰም። 2ኛው ክስ ግን በደፈናው የ56/1/ ድንጋጌ ብቻ ያሰፈረ ነው። በአንዳንድ ክሶች ላይ ደግሞ የሥራ አስኪያጅ ተጠያቂነት የድርጅት ተጠያቂነት ውጤት ነው በሚል የወንጀል ሕጉ አንቀጽ 34/1/ ይጠቀሣል። በአጠቃላይ ይህ ችግር የሚታየው የወንጀል ሕጉን ከታክስ አዋጆቹ ድንጋጌዎች ጋር አጣጥሞ ለመሔድ ካለው ችግር የተነሣ ስለሆነ የታክስ ሕጉቹን ድንጋጌ ከወንጀል ሕጉ ጋር አጣጥሞ ለማስኬድ የሚያስችል የሕግ ማሻሻያ ሥራዎች ሲኖሩ እንደሚገባ የሚያሣይ ነው።[90]

7. የወቃቤ ሕግ ማስረጃ ይዘት

እንደማንኛውም የወንጀል ክርክር ከሣሽ የሆነው የገቢዎችና ጉምሩክ ባለስልጣን ዐ/ሕግ ያቀረበውን ክስ በማስረጃ የማስደገፍ ግዴታ አለበት። ዐ/ሕግ በማስረጃነት ሊያቀርብ የሚችለውን የማስረጃ ዓይነት በተመለከተ የተለየ የማስረጃ ደንብ ስለሌለና ተፈፃሚነት ያለውም የሥነሥርአት ሕግ የወንጀለኛ መቅጫ ሥነሥርአት ሕጉ ስለሆነ ይህንኑ መሠረት አድርጉ ይጠቅመኛል የሚለውን ማንኛውንም ማስረጃ ማቅረብ ይችላል።[91] በዚህ መሠረትም ዐ/ሕግ ምስክርና የሰነድ ማስረጃዎች በማስረጃነት ያቀርባል። ይሁን እንጂ የሚቀርበው ማስረጃ በአብዛኛው ተመሣሣይነት ያለው ነው። በተለይ ምስክሮቹ በጉምሩክና ገቢዎች ባለስልጣን የክትትል ቡድን አባላት ስለሆኑ በአብዛኛው ታስቦበትና ታቅዶ በሚደረግ ክትትል ወይም በድንገተኛ ክትትል ወቅት ያጋጠማቸውን የሚመሰክሩ ምስክሮች ስለሆኑ የምስክር ማስረጃው ጠቅለሳ ይዘት ተመሣሣይነት ያለው ነው። በሰነድ ማስረጃ ረገድም ተመሣሣይነት ይታያል። ስለሆነም የሁለቱንም ማስረጃዎች ይዘት እንደሚከተለው እንመለከታለን።

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89 በፌ/የመ/ ደ/ ፍ/ቤት የመ/ቁ. 183174

90 በዚህ ረገድ በአጠቃላይ የታክስ ሕጉቻችን ያለባቸው ችግር በጥልቀት ለመረዳት አቶ ታደሰ ሌንጮ በኢትዮጵያ ሕግ መጽሔት 25ኛ ቮሊየም ቁ. 1 ላይ The Ethiopian Tax System Cutting Through the Labyrinth and Padding the Gaps በሚል ርዕስ የፃፉትን ጥልቀት ያለው የምርምር ጽሑፍና ይህንኑ ጽሑፍ ተንተርሶ ሰኔ 3/2004 ዓ.ም በታተመው ሪፖርተር ጋዜጣ ላይ የሰጡትን ቃለ ምልልስ ማንበቡ ይመከራል።

91 በወ/መ/ሥ/ሥ/ሕ/ቁ. ከ142-145 የተደነገጉትን ይመለከቷል።

7.1 ምስክሮች

በተግባር በሚደረጉ ክርክሮች በወ/ሕግ በኩል ምስክሮች በማስረጃነት እየተቆጠሩ ይሰማሉ፡ ምስክሮቹም የራሱ የከሣሽ መ/ቤት ባልደረቦች የሆኑ አስቀድሞ በደረሰ ጥቆማ ወይም በድንገት ወይም ጥቆማ ባይኖርም በአቅድ በተያዘ ክትትል መሠረት የሚሰማሩ የባለስልጣን መ/ቤቱ ተቆጣጣሪዎች ሲሆኑ በማስረጃ ዓይነትነቱ ቀጥተኛ ማስረጃ (direct evidence) ሲባል የሚችል ነው። አንዳንድ የታክስ ሕጐች የማስረጃ ደንቦችን ይዘዋል። በእነዚህ የማስረጃ ደንቦች ሳይ ተቀባይነት ስላላቸው ማስረጃዎች (admisible evidences) በግልጽ ተደንግጓል። ለምሣሌ በተ.እ.ታ. ማሻሻያ አዋጅ ቁ. 609/2001 አንቀጽ 13/3/ ሳይ በድንገተኛ ቁጥጥር የሚገኝ መረጃ ያለፍ/ቤት ትእዛዝ ሲያዝ እንደሚችልና በፍ/ቤትም በኩል ተቀባይነት እንዳለው ተደንግጓል። ከዚህ አንፃር ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ በፍ/ቤት ተቀባይነት ስላለውና ስለሌለው ማስረጃ የታክስ ሕጉ የተለየ ድንጋጌ አልያዘም። በዚህ መሠረት በምስክርነት የሚቀርቡት የመ/ቤቱ ባልደረቦች ስለሚሰበስቡት ማስረጃና ስለማስረጃው ተቀባይነት የሚደነግገው የተለየ የማስረጃ ደንብ የለም። ምስክሮቹ ቀርበው ሲመሰክሩም የሚመሰክሩት ድርጊቱ ተፈፀመ በተባለበት ጊዜና ቦታ እንደነበሩ፣ ስራቸውም የከሣሽ መ/ቤት ባልደረባ እንደሆኑና በቦታው በነበሩበት ጊዜ ከተመዝጋቢው ድርጅት እቃ ወይም አገልግሎት ገዝተው ወይም አገልግሎት ተጠቅመው ደረሰኝ እንዳልተሰጣቸው በመመስከር የወ/ሕግን ክስ የሚያስረዱ ናቸው። ወ/ሕግ ምስክሮቹ ቀርበው ምን እንደሚመሰክሩ ጭብጥ ሲያሲዝ የሚያስመዘግበው ጭብጥ በአብዛኛው ይህንኑ ነው።

ደረሰኝ አለመስጠትን በተመለከተ በሚቀርቡ የወንጀል ክሶች ወ/ሕግ ሌሎች ምስክሮችን አቅርቦ ያስመሰክረበት አጋጣሚ የለም። ለምሣሌ በቦታው የነበሩ ሌሎች ገዥዎች ወይም አገልግሎት ተጠቃሚዎች በወቅቱ ስለተመለከቱት ሁኔታ እንዲመሰክሩ ሲባል በምስክርነት ተቆጥረው ቀርበው እንዲመሰክሩ የተደረገበት ጉዳይ የለም ለማለት ይቻላል። በዚህ ምክንያት የገቢዎችና ጉምሩክ ባለስልጣን መ/ቤት አራሱ ምርመራ የሚያጣራ፣ አራሱ ከሣሽ ፣አራሱ ምስክር መሆኑ ተገቢ አይደለም በሚል በጠበቆች የሚቀርቡ መከራከሪያዎች አልፎ አልፎ ያጋጥማሉ።[92] ምክንያታቸውም እንደዚህ ዓይነት ምስክሮች ለምስክርነት የሚመጡት አስቀድመው ተከሣሽ ጥፋተኛ ነው የሚል ሐሣብ በጭንቅላታቸው ይዘው ስለሆነ፣ እውነቱን ለመመስከርም የከሣሽ መ/ቤት ባልደረባ ስለሆነ በስራቸው ላይ መጥፎ ውጤት ሊከተል ይችላል በሚል ፍርሐት ያዩትንና የሰሙትን፣ እንዲሁም በነፃ ህሊናቸው የተገነዘቡትን በትክክል ለፍ/ቤቱ ይመሰክራሉ ተብሎ አይታመንም፣ በአጠቃላይ እንደዚህ አይነት ምስክሮች ገለልተኛ ናቸው ተብሎ ለማመን አስቸጋሪ ስለሆነ ነው የሚል ነው።

በተቃራኒው ምስክሮቹ የሚመሰክሩበት ጉዳይ አስቀድሞ በተገቢው ክትትል የተደረሰበት ፍሬ ነገር ስለሆነ፣ የመንግስት ሠራተኛ መሆናቸውም በቀላሉ ሊታመኑ የሚገባ እንደሆኑ ያሣያል፣ ተከሣሽም በራሱ በኩል ምስክሮችን አዘጋጅቶ ለማቅረብ እድል ስላለው፣ በተለያዩ ምክንያቶች ገለልተኛ የሆነን ሰው ለማስመስከር አስቸጋሪ ስለሆነና እንደ እንግሊዝ ያሉ ሐገሮችም ጭምር የታክስ ሰርቪላንስ ሠራተኞቻቸውን በዚህ መልክ ማስመስከር የተለመደ ስለሆነ፣ እንዲሁም የሥነሥርአት ሕጉ በዚህ መልክ ምስክሮችን ማሰማት ስለማይከለክል መቃወሚያው ተገቢ አይደለም የሚል መከራከሪያ በባለስልጣኑ ባለሙያዎች በኩል ይቀርባል።

በሌላ በኩል ከምስክርነቱ አለማም ጋር በተያያዘም አልፎ አልፎ የሚታዩ አከራካሪ ሁኔታዎች አሉ። የወ/ሕግ ምስክሮች የፍሬነገር ምስክር ናቸው ከተባለ በኋላ እንደባለሙያ ምስክር ሆነው ሲመሰክሩ ያጋጥማል። ለምሣሌ በብዛት የሚያጋጥመውን ለማንሣት ለምን ደረሰኝ ይሰጠን

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92 ለምሣሌ አንድ ጠበቃ ደህን መከራከሪያ በችሎት ሲያቀርቡ ፀሐፊው ሰምቷል። ፍ/ቤቱ ደህን መከራከሪያ እንደማይቀበለው ስለሚያውቅ ፀሐፊው በያዛቸው ጉዳዮች ደህን ክርክር አንስቶ አያውቅም። መከራከሪያው ምክንያታዊነት ሊኖረው ቢችልም ባለስልጣን መ/ቤቱ በሕግ የተሰጠውን ግልጽ ስልጣን ወደጉን በመተው ፍ/ቤቱ ሊያደርግ የሚችለው የተለየ ነገር የለም። ፍ/ቤቱ የግድ የባለስልጣን መ/ቤቱን ስልጣን ማክበር ይኖርበታል።

ብሳችሁ አልጠየቃችሁም? በሚል በተከሣሾች ወይም /በጠበቃቸው/ ሲጠየቁ ደረሰኝ የመጠየቅ ግዴታ የለብንም በማለት ይመልሣሉ። በምን ምክንያት ሲባሉ "ሕጉ ስለማይል" በማለት ይመልሣሉ፤ ከዚህ በኋላ ሕጉን ያውቁታል ወይ? ወዘተ የሚል ጥያቄ ሲቀጥል ምስክራችን የሙያ ምስክር ስላልሆኑ ይህን ጥያቄ ሊጠየቁ አይገባም በሚል ዐ/ሕግ ስለሚቃወም ፍ/ቤቱ እንዳይጠየቅና የተጠየቀው ጥያቄም እንዳይመለስ ይከለክላል።[93] የከሣሽ ወገን ምስክርነት፤ የህፃናት ምስክርነትና የሙያ ምስክርነት ጉዳዮች ሳይ አንዳንድ አገሮች መሪ ደንቦችና ዝርዝር የስነስርአት ሕግ አላቸው። በዚህ ረገድ ካናዳ አንዷ ተጠቃሽ አገር ነች።[94] ይሁን እንጂ የስነስርአት ሕጋችን ግልጽ ድንጋጌ ስለሌለው ዐ/ሕግ ከሳይ በተመለከተው ሁኔታ የራሱ መ/ቤት ባልደረቦች ቀርበው ሲመሰክሩ አይገባም የሚለው መቃወሚያ የሕግ መሠረት የለውም። የተከሣሽ ንጹህ ሆኖ የመገመት መብት እንዳይጉዳና አሳማባብ እንዳይወነጀል ግን ፍ/ቤቱ ተገቢውን ጥንቃቄ ሊያደርግ ይገባል።

7.2 የሰነድ ማስረጃዎች

ዐ/ሕግ በሚመሠርታቸው ክሶች ሳይ የሰነድ ማስረጃዎችን ያቀርባል። ክስ የሚመሠረትባቸው ድርጅቶችና የግል ባለሐብቶች የተ.እ.ታ. ተመዝጋቢዎች ስለሆኑ ይህንኑ የሚያረጋግጠውን የተጨማሪ እሴት ታክስ የምዝገባ ምስክር ወረቀት፤ የንግድ ፈቃድ፤ ተከሣሽ ሕጋዊ ሰውነት ያለው ድርጅት ከሆነም የመተዳደሪያና የመመስረቻ ጽሑፍ በማስረጃነት ተያይዞ ይቀርባል። ወኪል በተከሰሰበት ጉዳይ ደግሞ ለወኪሉ የተሰጠው የውክልና ስልጣን ማስረጃ በሰነድ ማስረጃነት ተያይዞ ይቀርባል። በዐ/ሕግ ያቀረበው ክስ ተመዝጋቢው መሣሪያውን መጠቀምና ከመሣሪያው የወጣ ደረሰኝ መስጠት ሲገባው አልሰጠም የሚል ከሆነ ደግሞ ተከሣሽ መሣሪያውን እንዲጠቀም ግዴታ ያለበት መሆኑ የሚያሣይ የጋዜጣ ማስታወቂያ፤ በዚሁ መሠረት የሰጠው የደብዳቤ ማሳሰቢያ ካለም አሱንና እንዲሁም ደብዳቤ ሳይሰጠው በቤት ለቤት ቅስቀሳ የተነገረው ከሆነም አራሱ ተከሣሽ ወይም ሠራተኛው ይኸው ስመደረጉ የፈረሙበት ሰነድ በማስረጃነት እንዲቀርብ ይደረጋል። እነዚህ ማስረጃዎችን መሠረት በማድረግ ተከሣሾች ደረሰኝ የመስጠት ግዴታቸውን ያልተወጡ መሆኑን ሰነዶቹ እንደሚያስረዱለት ዐ/ሕጉ ለፍ/ቤቱ ይገልፃል።

ስለሆነም የሚቀርቡት የሰነድ ማስረጃዎች በጥቅሱ የሚያስረዱት ተከሣሾች ያለባቸውን የሕግ ግዴታ እና ግዴታቸውን ያልተወጡ መሆናቸውን ነው። ይህ በአብዛኛው የሚታየውን የሰነድ ማስረጃ ይዘት ጥቅል ሁኔታ ለማሣየት እንጂ በሁሉም ክርክሮች ሳይ የማስረጃ ዓይነትና ይዘት ፍጹም ተመሣሣይ ነው ለማለት እንዳልሆነ ልብ ሊባል ይገባል። ለምሣሌ በአንዳንድ ክርክሮች ሳይ ግብይት የተፈፀመበት ዕቃ በኤግዚቢትነት እንደተያያዘ በማስረጃ ዝርዝር ሳይ ይጠቀሣል። ይሁን እንጂ ይህን ማስረጃ በተመለከተ የሚነሣ ክርክር ስለሌለ ኤግዚቢቱ እንዲቀርብ ፍ/ቤቱ ትእዛዝ የሰጠበትና በዚህም መሠረት እንዲቀርብ የተደረገበት ሁኔታ የለም ለማለት ይቻላል።

የሰነድ ማስረጃዎቹን ተከትሎ በተከሣሾች በኩል የሚቀርብ መቃወሚያ ወይም መከራከሪያ ቢኖርም በአብዛኛው ስክርክር ያክል የሚቀርቡ እንጂ የሰነድ ማስረጃዎቹን የሚያስተባብሉ አይደሉም። ይሁን እንጂ መቃወሚያው የሚቀርብበትና ፍ/ቤቶችም መቃወሚያውን የሚያስተናግዱበት ሥነ ሥርዓት ግን ከችሎት ችሎት ይለያያል። አንዳንዱ ችሎት በሰነዱ ሳይ ያለ መቃወሚያ ከመደበኛው መቃወሚያ ጋር ከክስ መስማቱ በፊት እንዲቀርብ ሲያደርግ አንዳንዶቹ ደግሞ የዐ/ሕግ ምስክር ከተሰማ በኋላ ተከሣሽ ሊከላከል ይገባል ወይም አይገባም የሚለው ብይን ከመሰጠቱ በፊት በሰነድ ማስረጃዎች ሳይ ተከሣሽ አስተያየት

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[93] ፀሐፊው አራሱ በተከራከረባቸውና በችሎት ተቀምጦ የዐ/ሕግ ምስክር ሲሰማ በተከታተላቸው በርካታ ጉዳዮች ይህ ክርክር አጋጥሞታል።

[94] David watt, watt's manual of criminal evidence,200:pp 5-24

እንዲሰጥበት ደፈቅዳሉ::[95] አንዳንዱ ችሎት ደግሞ በዐ/ሕግ የሰነድ ማስረጃ ላይ ተከሣሽ አስተያየት እንዲሰጥ የሚፈቅድ ወይም የሚያስገድድ ሥነ ሥርዓት የለም በማለት ተከሣሽ አስተያየት እንዳይሰጥ ይከለክላል:: ይሁን እንጂ ተከሣሽ በአግባቡ የመከላከል መብቱ በሕገመንግስቱ ጥበቃ የተደረገለት መብት ስለሆነ በሰነድ ማስረጃዎች ላይ አስተያየት እንዲሰጥ መፍቀዱ ተገቢ ነው::

8. ስለተከሣሾች የመከላከያ ማስረጃ ይዘት

በሽያጭ መመዝገቢያ መሣሪያ የታተመ ደረሰኝ የመስጠት ግዴታችሁን አልተወጣችሁም በሚል የሚከሰሱ ተከሣሾች ሲያቀርቡት የሚችሉትንና እያቀረቡ ያሉትንም መከላከያ ማስረጃ በተመለከተ በሁለት የተከፈለ ነው:: የድርጅት ሥራ አስኪያጅ የሆኑ ተከሣሾች ሲያቀርቡት የሚገባውን የመከላከያ ማስረጃ ይዘት የታክስ አዋጁ በግልጽ ስለደነገገ በዚሁ መሠረት እንዲያቀርቡ የሚጠበቅባቸው ሲሆን ከእነሱ ውጪ ያሉ ተከሣሾች ግን ሲያቀርቡት የሚገባው መከላከያ እንደማንኛውም የወንጀል ተከሣሽ ነው:: ሕጋዊ ሰውነት ያላቸው ድርጅቶች ጥፋት የሚቋቋመው ኃላፊነታቸው ወይም ሠራተኞቻቸው በሚፈጽሙት ጥፋት ላይ ተመስርቶ ስለሆነ እነዚህ ግለሰቦች የሚያቀርቡት መከላከያ ነፃ የሚያወጣቸው ከሆነ ድርጅቱም ነፃ ከሚወጣ በስተቀር ድርጅቱ ሲያቀርበው የሚችለው ራሣሱን የቻለ የተሰየ የመከላከያ ማስረጃ የለም:: ስለሆነም በሕግ የተገደበውን የመከላከያ ማስረጃ ይዘትና እንደማንኛውም የወንጀል ተከሣሽ ይጠቅመኛል በሚል ተከሣሹ ሲያቀርበው የሚችለውን ማስረጃ ይዘት እንደሚከተለው በሁለት ክፍለን እንመለከታለን::

8.1 ሠራተኞች፣ ባለሐብትና ወኪል ስለሚያቀርቡት መከላከያ

ሠራተኞችና ሌሎች ደረሰኝ ከመስጠት ግዴታ ጋር ግንኙነት ያላቸው ሰዎች በተከሣሽነት ሲቀርቡ በመከላከያ ማስረጃነት ሲያቀርቡ ስለሚገባቸው ጉዳዮች የታክስ ሕጉቹ የተሰየ የማስረጃ ደንብ (rules of evidence) አልደነገጉም:: በዚህ መሠረት መከላከያቸውን ሲያቀርቡ የሚገባቸው በወ/መ/ሥ/ሥ/ሕጉ መሠረት ነው:: የወ/መ/ሥ/ሥ/ሕጉ ተከሣሽ ይጠቅመኛል የሚለውን የሰነድና የሰው ማስረጃ፣ ፍ/ቤት እንዲያስቀርብለት የሚፈልገውን ማናቸውንም ማስረጃዎች ሲያስቀርብ እንደሚችል ስለሚፈቅድ የገደብ ወይም የክልከላ ድንጋጌ የለውም::[96] በተግባር በሚደረጉ ክርክሮችም ተከሣሽ የመከላከያ ማስረጃ እንዲያቀርብ ተጠይቆ በተሰያየ ምክንያት ፍ/ቤቱ ሲከለክለው አያጋጥምም:: ተከሣሽ በራሱ ምክንያቶች የመከላከያ ምስክሮችን ማቅረብ ካልቻለም ሰፋ ያለ ጊዜ እና ተደጋጋሚ ቀጠሮ እየተሰጠው እንዲያቀርብ እድል ሲሰጠው ይታያል:: ይህም ተከሣሽ የመከላከል መብቱን በአግባቡ እንዲጠቀም ስለሚያስችለው የሚነቀፍበት ምክንያት የለም:: ይሁን እንጂ ጉዳዩ ውስብስብነት የሌለው ከመሆኑና በጭብጥነት የሚያዘው ነጥብ የተወሰነ ፍሬ ነገር ላይ የሚያጠነጥን ስለሆነ በአብዛኛው ተከሣሾች የሚያቀርቡት የመከላከያ ማስረጃ ምስክሮችን ነው:: የሰነድ ማስረጃዎችን በተመለከተ የሚቀርቡበት አጋጣሚ በጣም ውስን ነው:: ይህ የሚሆንበት ምክንያትም በተሰያየ ሁኔታ ገደብ ስላለ ሳይሆን ከክርክሩ ባህሪ የተነሣ የሰነድ ማስረጃ አስፈላጊነት አምብዛም ስለሆነ ነው::

የመከላከያ ምስክሮቹ የሚመሰክሩበት ጭብጥም ተመሣሣይነት ያለው ነው:: ግብይቱ በተደረገበት ጊዜና ቦታ የነበሩ ሠራተኞችና ሌሎች ሰዎች የሚያነሱት መከላከያ ግብይቱ በተደረገበት ጊዜና ቦታ ነበርኩ፣ የከሣሽ መ/ቤት ነን ያሉ ገዥዎች እቃውን ከገዙ ወይም አገልግሎቱን ከገዙ በኋላ ገንዘቡን ጠረንጴዛ ላይ አስቀምጠው ደረሰኝ ሣይወስዱ ወጡ፣

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[95] ፀሐፊው በተሰያዩ ችሎቶች በተጠቀሱት የሥነሥርዓት ሁኔታዎች ተስተናግዷል:: ተከሣሽ በማስረጃዎቹ ላይ አስተያየቱን እንዲሰጥ የሚፈቅዱ ችሎቶች የተከሣሽን የመከላከል ሕገመንግስታዊ መብት በማስከበር ረገድ የሚከተሉት ሥነ ሥርአት ተገቢ ስለሆነ ሊመሰገኑ ይገባል::

[96] የወ/መ/ሥ/ሥ/ሕ/ቁ. 142-145 ይመለከቷል::

ገንዘቡን ከሰጡ በኋላ ደረሰኝ ጠብቁ እየተባሉ ዝም ብለው ወጡና ተመልሰው መጡ፤ ወረፋ ስለነበር ደረሰኝ እየተሰራላችሁ ስለሆነ ጠብቁ እየተባሉ ወጡና ተመልሰው መጡ፤ መሣሪያው ስጊዜው አልሠራም ብሉ ነበር፤ ካሸሯም ገንዘቡን አልቀበልም ብላ፤ ግዴለም ደረሰኝ አንፈልግም ካሏት በኋላ ወጡና ተመልሰው ገብተው አቁሚ አሏት፤ ሐዘን ላይ ስለነበርን ሱቅ አልከፈትንም ነበር፤እቃ ስመውሰድ ወደሱቅ ስንሔድ፤ካልሸጣችሁንል አሉ፤እኔ ሰራተኛ ስላልሆንኩ አልሸጥም፤ሱቁን ስመጠበቅ ነው የተቀመጥኩት፤ ሻጪ እስክትመጣ ጠብቁ እያልኳቸው እንችኩሳለን ብለው ሲያጣድፉኝ ሸጥኩላቸው፤ የመሸጫ ኮድ እየታየ አቃዎቹ ማሽኑ ላይ እስከምመታ ጊዜ ደወስዳል፤ ኮድ እየታየ ሲመታላቸው ሲል አቁሚ ብለው አስቆሙን፤የሽያጭ መመዝገቢያ መሣሪያው በወቅቱ እየተበላሸ አስቸግሮን ስለነበር ወዲያውኑ ደረሰኝ ቆርጠን መስጠት አልቻልንም ነበር፤ አንሸጥም እያልን ገዥዎቹ ካልሸጣችሁልን ብለው ስለጉተጉቱን ነው የሸጥንላቸው[97] ወዘተ በሚሉ የመከላከያ ጭብጦች ዙሪያ የመከላከያ ምስክሮችን አቅርበው ያሰማሉ።

በአጠቃላይ የመከላከያ ጭብጡ መሠረታዊ ነጥብ ደረሰኝ ወዲያውኑ ያልተሰጠበትን ምክንያት ማስረዳት ነው። ወኪሉም ግብይት አልፈፀምኩም፤ በቦታው አልነበርኩም ድርጅቱን የማስተዳድረውና የምቆጣጠረው እኔ አይደለሁም፤ እኔ መሐይም ነኝ፤ ስለማሽኑና ስለአሰራሩ የማውቀው ነገር የለም ወዘተ የሚል ነው።በባለሐብት በኩል የሚቀርበው መከላከያም የተለያየ ነው። ግብይቱን እራሱ ያከናወነ ባለሐብት ከላይ የተመለከተውን ሠራተኞችና ሌሎች ተከሣሾች የሚያነሱትን የመከላከያ ነጥቦች ያነሣል። ግብይቱ ሲፈፀም ያልነበረ ከሆነ ደግሞ በቦታው ስላልነበርኩ ልጠየቅ አይገባም የሚል መከላከያ ያነሣል። ከዚህ በተጨማሪ የድርጅት ሥራ አስኪያጅ እንደሚያነሣው መከላከያ ዓይነት ደረሰኝ ሣይቀበሉ አይክፈሉ የሚል ማሳሰቢያ ስጥፌአለሁ፤ ካሸር ስልጠና እንዲወስድ አድርጌአለሁ፤ ሠራተኞች ያለደረሰኝ ቢሸጡ ኃላፊነቱ የራሳቸው እንደሆነ አስፈርሜአለሁ በማለት በአዋጅ ቁ. 285/94 አንቀጽ 56/3/ መሠረት የተደነገጉትን መከላከያዎች የሚያስረዱ አሉ። ነገር ግን ይህ አይነት ተገቢውን የአሰራር ፕበብ መከላከያ በግልጽ የሥራ አስኪያጁ መከላከያ ተደርጉ የተደነገገ እንጂ የግል ባለሐብት በመከላከያነት ሊያነሳ የሚችለው ስላልሆነ በመከላከያነት ሊያገለግል የሚችል አይደለም በሚል የሚከራከሩ ባለሙያዎች አሉ።

በሌላ በኩል ደረሰኝ ከመስጠት ግዴታ ጋር በተያያዘ የግል ባለሐብትና ድርጅት ያለባቸው ግዴታ ተመሣሣይ ስለሆነ ተገቢውን የአሰራር ፕበብ የተከተለ ባለሐብት ይህንኑ እንዳያስረዳ ሊከለከል አይገባም በሚል የሚከራከሩ አሉ። ይህ መከራከሪያ ምክንያታዊነት ያለው መከራከሪያ ነው። ድርጊቱን እራሱ ያልፈፀመ የግል ባለሐብት ዋና መከላከያው የሚሆነው ድርጅቱ ሕጋዊ ግዴታውን በአግባቡ እንዲወጣ በሚያስችለው የአስተዳደር ስርአት መሠረት እያስተዳደረው መሆኑን ማስረዳት እንደሆነ የድርጅት ኃላፊነት ጽንሰሐሣብ ላይ የተደረጉ ጥናትና ምርምሮች ያስረዳሉ።[98] ይህ መሠረታዊ አስተሳሰብ ከላይ ስተመለከተው የግል ባለሐብት መከላከያም ተፈፃሚ ነው። ከዚህ በተጨማሪ ይህን መከላከያ ስግል ባለሐብቱ አስመፍቀድ ተመሣሣይ ግዴታ ያለባቸውን ተመዝጋቢዎች በተለያየ የመብት አያያዘ ማእቀፍ ውስጥ እንዲካተቱና ሥራ አስኪያጁ የተሻለ የመከላከል እድል ሲኖረው ተመሣሣይ ጥንቃቄ ያደረገ የግል ባለሐብት ጥንቃቄው ዋጋ ቢስ ሆኖ በወንጀል እንዲቀጣ ስለሚያደርገው አድሎአዊ ውጤትን ያስከትላል። ይህ ደግሞ የሕጉ አላማ ነው ተብሎ አይታሰብም።

በመከላከያ ምስክርነት የሚቀርቡትን ሰዎች ማንነት በተመለከተም የተለያየ ሁኔታ ያጋጥማል። በወቅቱ እንደማንኛውም ገዥ በቦታው የነበሩ፤ ሌሎች የሽያጭ ሠራተኞች፤

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97 ፀሐፊው የከሣሾች የመከላከያ ምስክሮቻቸውን ሲያሰሙ በችሎት ውስጥ ተቀምጠ ከሰማውና ማስታወሻ ከያዘበት በርካታ ጉዳዮች እንዲሁም አራሱም በጠበቃነቱ ካስመዘገባቸው ጭብጦችና ካሰማቸው የመከላከያ ምስክሮች ቃል ይህን ሁኔታ ስማረጋገጥ ችሏል።

98 ስምሣሌ : Jonathan herring: Criminal law; 5th ed (palgrave macmillan, new York,2008) :pp109-128 ያለውን ማንበቡ ይመከራል

የሽያጭ ሠራተኛ ብቻ በተከሰሰበት ደግሞ ካሸር የነበረ፣ በቦታው የነበረ ማንኛውም ሰው ወይም የሆነውን ነገር ሰማሁ ወይም እገሌ ነገረኝ የሚል የሰሚ ሰሚ ምስክር በመከላከያ ምስክርነት ይቀርባል። በፍ/ቤቱ በኩል ሲመዘን ግን በአብዛኛው የመከላከያ ምስክሮች ቃል እርስ በርሱ ይቃረናል፣ ደረሰኝ ያልተሰጠበት ምክንያት በቂ መሆኑን አላስረዱም፣ ምስክርነታቸው በመጠናናት ላይ የተመሰረተ ስለሆነ እምነት የሚጣልበት አይደለም ወዘተ በሚሉ ምክንያቶች ውድቅ ይደረጋል።[99] በዚህ ሁኔታ የሚደረገው የማስረጃ ምዘና ሙሉ በሙሉ የፍ/ቤቱ ስልጣን ነው። ተከሣሽ ማስረጃው የተመዘነው አላግባብ ነው የሚል ከሆነ ይግባኝ ማቅረብ መብቱ ነው።

8.2 ሥራ አስኪያጅ ስለሚያቀርበው መከላከያ

ሥራ አስኪያጅ ስለሚያቀርበው መከላከያ አዋጅ ቁ. 285/94 በአንቀጽ 56/3/ ሀ/ስ/ ላይ የገደብ ድንጋጌ አስቀምጧል። በዚህ መሠረት ጥፋቱ ሲፈፀም ሥራ አስኪያጁ ሳያውቅ ወይም ሣይስማማ ብቻ ከሆነ፣ ጥፋቱን ስመከላከል ተገቢውን ትጋት እና የአሰራር ፕበብ የተሞላበት እርምጃ ሣይወስድ ስለመሆኑን ማስረዳት ይገባዋል። ይህን ማስረዳት ካልቻለ የወንጀል ኃላፊነት ይኖርበታል። በ"ሀ" እና በ"ለ" ላይ የተጠቀሱት ገደቦች በአማርኛው ክፍል በ"እና" አለበለዚያም በ "ወይም" የተያያዙ አይደሉም። እንግሊዝኛው ግን "እና" በሚል አብረው (cumulatively) መሚሳት ያለባቸው የገደብ መመዘኛዎች እንደሆኑ ይጠቅሣል።

እነዚህ የገደብ ፕንቃቄዎች አንዳንድ ጊዜ አከራካሪ የሕግ ጉዳዮችን ያስነሣሉ።የመጀመሪያው ሥራ አስኪያጁ አስቀድሞ በሕግ ያልተጣለበት ግዴታ፣ በመከላከያ እንዲያስረዳ መደረጉ ተገቢ ነወይ? የሚልና በ"ሀ" እና በ"ለ" የተጠቀሱት ገደቦች በ"እና" ያልተያያዙ ስለሆነ፣ እንዲህ በሆነ ጊዜ ሕጉ ሲተረጉም የሚገባው ተከሣሹን በሚጠቅም መልክ ስለሆነ ጥፋቱ ሲፈፀም፣ ሥራ አስኪያጁ ሣያውቅ ወይም ሣይስማማ የተፈፀመ ከሆነ ሥራ አስኪያጁ በሐላፊነት ሊጠየቅ አይገባም በሚል የሚከራከሩ አሉ።

የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በዚህ ሕግ ላይ በሰጠው ትርጉምን የሚመስከት ውሣኔ ገደቦቹ በአንድነት መሚሳት እንዳለባቸው አድርጉ የተረጉመው ሲሆን በ"ለ" ላይ የተቀመጠውን ገደብን በተመለከተም "--- ገዝዎች የተጨማሪ እሴት ታክስ ደረሰኝ ወዲያውኑ እንዲያገኙ የሚያስችል አሠራር መዘርጋት ሲገባቸው ይህንን በሕግ የተጣለባቸውን ግዴታ ባለማክበር - - - " በሚል ትርጉም ሰጥቷል። ይህ ግዴታ በየትኛው ሕግ መሠረት የሥራ አስኪያጁ ግዴታ ሆኖ እንደተደነገገ ግን በውሣኔው ላይ አልተጠቀሰም።

ይሁን እንጂ ከድርጅቶች የወንጀል ኃላፊነት ጋር በተያያዘ የሥራ አስኪያጆች ወይም የቤሎች ኃላፊዎች ተጠያቂነት ተገቢውን ፕንቃቄ ከመውሰድ ጋር የተያያዘ መሆኑ የሚያከራክር አይደለም።[100] አልፎ አልፎ አከራካሪ አየሆነ ያለው ሲወሰዱት የሚገባው የፕንቃቄ እርምጃ አስቀድሞ በሕግ ላይ ሲደነገግ ወይም ሲመለከት ይገባል ወይስ አይገባም የሚለው ነው። ይህም ቢሆን በአዋጅ ቁ. 609/2001 /እንደተሻሻለው/ አንቀጽ 47/9/ሐ ላይ የሽያጭ መመዝገቢያ መሣሪያው ፕቅም ላይ በሚውልበት የንግድ ሥራ ቦታ "ደረሰኝ የማይሰጥ ከሆነ አይክፈሉ" የሚል ጽሑፍ ያለበት ማስታወቂያ መለጠፍ እንዳለበት ይደነግጋል።

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[99] ለምሣሌ በ06/10/2004 ዓ.ም በፌ/መ/ይ/ፍ/ቤት 1ኛ ወንጀል ችሎት የተሰጠውን የጥፋተኝነት ውሣኔ ይመለከቷል። ከዚህ በተጨማሪ ፀሐፊው በዚህ መልክ የተሰጡ ፍርዶች ሲነበቡ በችሎት ተቀምጦ አጸምጧል።

[100] በዚህ ጉዳይ ጠበቃ የነበረው አቶ ጫንያለው ሌሳው ደንበኛው ሠራተኛውን አስፈርሞ ግብር ከሚከፈልበት ማንደር ጋር እንዲያያዝለት ሲጠይቅ ተከልክሏል። ይህን ያደረግነው ደንበኛው በሠራተኞቹ ጥፋት ቢከሰስ ያስፈረሙበት ሰነድ ከግብር አስገቢው ማንደር እንዲቀርብ ስለሚደረግ የሰነድን ታማኝነት ለማረጋገጥ አሰቦ ነው። ተመዝጋቢዎች ይህን አይነት ጥረት ካደረጉ ሲበረታቱና ሰነዱም ከግብር ማንደሩ ጋር ሲያያዝ ይገባል።

ይህ መከራከሪያ እንደተጠበቀ ሆኖ ወደሥራ አስኪያጁ መከላከያ ስንመለስ በአንዳንድ ክርክሮች ሥራ አስኪያጅ ሠራተኞች ያስደረሰኝ ቢሸጡ ኃላፊነቱ የራሣቸው እንደሆነ ካስፈረሙ፣ደረሰኝ ሣይሰጥዎ አይክፈሉ የሚል ማሳሰቢያ ከለጠፉ፣ በመሣሪያው ላይ የተመደበ ሰራተኛ ስልጠና እንዲወስድ ካደረጉ ኃላፊነታቸውን ተወጥተዋል በሚል በነፃ እንዲሰናበቱ ይሆናሉ። ይሁን እንጂ በሌላ በኩል ሠራተኛቸውን ያስፈረሙበትን ሰነድ በመከላከያ ማስረጃነት ከሰጡ በኋላ ከክስ ወዲህ ያስፈረማችሁት ነው፡፡[101] በሚልና ደረሰኝ ላይሰጥዎ አይክፈሉ የሚለውን ማሳሰቢያ እንዳልተለጠፈ በዐ/ሕግ ምስክሮች በማያጠራጥር ሁኔታ ተመስክሯል በማለት ውድቅ ተደርጉ ተገቢውን የአሰራር ፕበብ ሥራ ላይ አላዋልክም በሚል ጥፋተኛ የተባሉ በርካታ ሥራ አስኪያጆች አሉ። ሥራ አስኪያጆችና የግል ባለሐብቶች በዚህ ረገድ ሊያደርጉት ስለሚገባው የጥንቃቄ እርምጃ ያለው ግንዛቤ በጣም አነስተኛ ስለሆነ ከፍተኛ ሥራ ሊሰራ እንደሚገባው ግልጽ ነው።

ማጠቃለያ

የተጨማሪ እሴት ታክስ ደረሰኝ መስጠት ግዴታ የተጨማሪ እሴት ታክስ አዋጅን ተከትሎ የመጣ ግዴታ ነው። ይህ ግዴታ ተፈፃሚ መሆን ከጀመረበት ጊዜ አንስቶ በርካታ የወንጀል ክሶች የተመሠረቱ ቢሆንም በርግጠኝነት የቁጥሩን መጠን መናገር ግን አይቻልም። ክሶቹ ከተመሰረቱ በኋላ ክሱ ስተከሣሽ ከተሰጠበት ጊዜ አንስቶ ክርክሩ እስከሚጠናቀቅ፣ ከዚያም በይግባኝ ደረጃ የሚነሱ በርካታ የሕግና የፍሬ ነገር መከራከሪያዎች አሉ። ከክርክሩ ባህሪ አዲስነት ጋር በተያያዘ እነዚህ መከራከሪያዎች ለውይይት ክፍት ሆነው የባለሙያ አእምሮ በሚገባ እንዲፈትሻቸው የተደረጉ ስመሆኑ መረጃ ባይኖርም ለወደፊቱ ግን ሲፃፍባቸውና በነፃ አእምሮ ውይይት ሲደረግባቸው የሚገቡ ጉዳዮች እንዳሉ ይታመናል።

አሁን ባለው አዝማሚያ የታክስ ወንጀል ጉዳይ ትኩረትን የሚሻ ጉዳይ እየሆነ እንደሚቀጥል ይገመታል። ግብር ከፋዩ በቂ ግንዛቤ እየያዘ አራሱን እንዲጠብቅና መንግስትም የሚወስዳቸው እርምጃዎች ግብር ከፋዩን የሚያስጨንቁና የሚያሸማቅቁ ሆነው የሲንቨስትመንትና የንግድ እንቅስቃሴው እንዳይጉዳ አግባብ ያለው የታክስ ወንጀል አስተዳደር ሥርአትን ማስፈን ያስፈልጋል። ይህን ለማድረግ ደግሞ በቀናነት ከማሰብ ፣ከመተባበርና ሕጉን ለማስፈፀም በጋራ ጥረት ለማድረግ አንስቶ መሻሻል ያለበት ሕግ ካለም ከማሻሻል ውጪ የተሻለ አማራጭ የለም። ጽሑፉም የቀረበው እነዚህን ጉዳዮች ለማሣየትና በጉዳዩ ላይ ሐሣብ ለመለዋወጥ መነሻ የሚሆን ነገር ለመሰንዘር እንጂ ጽሑፉ በራሱ በጉዳዩ ዙሪያ እየተነሱ ያሉ ጉዳዮችን ጠቅላላ የዳሰሳና የተሟላ ነው ሊባል የሚችል አይደለም። በመጠኑ ግን የክርክሩን ባህሪና ወደፊት ሊታሰብባቸው የሚገቡ ጉዳዮች ያሉ ስመሆኑ ያመላከተ እንደሆነ ይገመታል።

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[101] ፀሐፊው በዚህ መልክ የተወሰኑ ውሣኔዎችን ለማግኘት ጥረት ቢያደርግም አላገኘም። በወረ ደረጃ ግን ነፃ የወጣ ሥራ አስኪያጅ እንዳለ ሰምቷል።