የኢትዮጵያ ሕግ መጽሔት

JOURNAL OF ETHIOPIAN LAW

ጽ/ቁ ቅፅ፣ ቁ. ፩
ታህሳስ ፪ሺ፱ ዓ.ም.

ISSN: 0022-0914

VOL. XXVIII NO. 1
DECEMBER 2016

በዚህ እትም

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Since 1964

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JOURNAL OF ETHIOPIAN LAW

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Our Address is: The Managing Editor,
Journal of Ethiopian Law
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The Journal is distributed by The Book Centre of Addis Ababa University. If you wish to subscribe, please address correspondence to:

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JOURNAL OF ETHIOPIAN LAW

Published at least once a year by the School of Law
Addis Ababa University
Founded in 1964
(To be cited as 28 J. Eth. L No. 1)

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[1] የከፍተኛ ትምህር አዋጅ፣ ቁጥር 650/2001 ዓ.ም. ፌዴራል ነጋት ጋዜጣ፣ 15ኛው ዓመት ቁጥር 64፣ አንቀጽ 20(1) (የከፍተኛ ትምህርት አዋጅ)።

[2] Pietro Toggia, *Unexamined Life Is Not Worth Living: An Introductory Note on Ethical Standards for Ethiopian Criminal Justice Professionals,* 2 BAHIR DAR U. J.L. 263 (2012). ፕሮፌሰር ፔትሮ በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት በተጋባዥ ፕሮፌሰርነት በት/ቤቱ የድህረ-ምረቃ ፕሮግራም ያስተምራሉ።

የምርምር ጽሁፎችን የማሳተም ጉዳይ አንድ የውይይት ጉዳይ ነበር። በውይይቱ መካከል አንድ የባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት ነባር መምህርና ተመራማሪ እኛ እዚህ ኢትዮጵያ ውስጥ እየኖርን በአማርኛ ቋንቋ መጻፍና ማሳተም ሳንችል እርስዎ ይህንን ማድረግዎ የሚደነቅ ነው የሚል አስታያዬት እንደሰጣቸው ፕሮፌሰር ፔትሮ ለፀሀፊው ገለጹለት። ይህ ጉዳይ በፀሐፊው አዕምሮ ለብዙ ጊዜ ሲመላለስ ቆዬ።

ሁለተኛው ምክንያት ይህን ጽሁፍ ከመጻፉ በፊት ፀሀፊው ከሰራው የምርምር ሥራ ጋር የሚገናኝ ነው። በኢትዮጵያ የሕግ ት/ቤቶች የሚሰራ የሕግ ምርምር ምን እንደሚመስል ለመመርመርና መረጃ ለመሰብሰብ ቀድሞ ቀዳማዊ ኃይለ ሥላሴ ዩኒቨርሲቲ ይባል በነበረው እና በኋላ አዲስ አበባ ዩኒቨርሲቲ በተባለው የሕግ ፋኩልቲ በሚታተመው የኢትዮጵያ ሕግ መጽሄት ቀደምት ቅጾች ላይ የወጡ የሕግ ምርምር ጽሁፎችን ሲመለከት ፀሀፊው አንድ ነገር ተገነዘበ። የኢትዮጵያ ሕግ መጽሄት የህትመት ታሪክ የመጀመሪያዎቹ ቅጾች በእንግሊዝኛ ቋንቋ የተጻፉ ሲሆኑ የአማርኛ ትርጉማቸውም ጎን ለጎን አብሮ ይታተም ነበር። ከዚህ በተጨማሪም በአማርኛ ቋንቋ የሚታተሙ ጽሁፎች በብዛት ነበሩ። የመጀመሪያወቹ የሕግ ፋኩሊቲው መምህራን እና ተመራማሪዎች የውጭ አገር ዜጎች በመሆናቸው ምርምራቸውን በእንግሊዝኛ ቋንቋ ቢጽፉም የአማርኛ ትርጉማቸው የግድ አብሮ ይታተም ነበር። ይህ አሰራር ግን ከጊዜ ወደ ጊዜ እየተረሳና እየቀረ መጣ። በእንግሊዝኛ ቋንቋ የተጻፉ የምርምር ጽሁፎችን ወደ አማርኛ ተርጉሞ አብሮ ማሳተሙ ይቅርና በአማርኛ ቋንቋ የሚታተሙ የምርምር ጽሁፎች ቁጥርም በከፍተኛ ሁኔታ እየቀነሰ ሄደ። በቅርብ ጊዜ በኢትዮጵያ የተለያዩ ዩኒቨርሲቲዎች የተቋቋሙት የሕግ መጽሄቶችም ይህ ችግር የሚታይባቸው ናቸው። ይህ የፀሀፊው ትዝብትም ቀደም ሲል እንደተነሳው ነጥብ ሁሉ ለዚህ የምርምር ጽሁፍ የመነሻ ሃሳብ ሆነ።

ሦስተኛው ምክንያት ከፀሀፊው የማስተማር ተሞክሮ ጋር የተገናኘ ነው። በሞያቸው ዳኞች፣ አቃብያነ ሕግና ጠበቆች የሆኑ ተማሪዎችን መደበኛ ባልሆኑ የቅድመ-ምረቃና ድህረ-ምረቃ ፕሮግራሞች ፀሀፊው ሲያስተምር የመማሪያ እና የማስተማሪያ ቋንቋ የተማሪዎች ዋነኛው ተግዳሮት መሆኑን ተገንዝቧል። ተማሪዎች በእንግሊዝኛ ቋንቋ የሚሰጠውን የክፍል ገለጻ በደንብ ለመረዳት፣ በእንግሊዝኛ ቋንቋ የሚጻፈውን ፈተናና ሌሎች ተያያዥነት ያላቸውን ተግባራት በሚገባ ለመከወን ሲቸገሩ ፀሀፊው ተመልክቷል። ቁጥራቸው ጥቂት የማይባሉ ተማሪዎች የማስተማሪያ ቋንቋው እንግሊዝኛ መሆኑ ዋናው ችግራቸው መሆኑን ይገልጻሉ። ይህንን ጉዳይ ፀሀፊው ያነሳው ስለማስተማሪያ ቋንቋ በሰፊው ለመተንተን ሳይሆን ቀደም ሲል በተጠቀሱት መደበኛ ባልሆኑ ፕሮግራሞች የሚማሩ ተማሪዎች የፍትሕ ሥርዓቱ ዋና አንቀሳቃሽ ሞተሮችና የምርምር ጽሁፎች ተደራሾች በመሆናቸው ነው።

በዚህ ጽሁፍ በሚከተሉት ነጥቦች ላይ ትኩረት ይደረጋል። በመጀመሪያ ቋንቋ፣ ሕግ እና የሕግ ሞያ ያላቸው ግንኙነትና መስተጋብር ምን እንደሚመስል በጉዳዩ ላይ ምርምር ያደረጉ ምሁራንና ሊቃውንት ሃሳቦችን ዋቢ በማድረግ ይተነትናል። በመቀጠልም ተመራማሪዎች ለምን በእግሊዝኛ ቋንቋ መጻፍና ማሳተም ይፈልጋሉ ለሚለው ጥያቄ መልስ ይሰጣል። በሦስተኛ ደረጃ በአገራችን አሁን በተጨባጭ ምን እየተሰራ ነው? በሕግ ትምህርትና ምርምር ቋንቋ እና በፍትሕ ሥርዓቱ የሥራ ቋንቋዎች መካከል ያለው ልዩነትስ ምን ይመስላል? ይህንን ልዩነት ለማጥበብ ከሕግ

ት/ቤቶች፣ ከሕግ መምህራንና ተመራማሪዎች እንዲሁም ከሌሎች የባለድርሻ አካላት ምን ይጠበቃል? የሚሉት ነጥቦች ይመረመራሉ። በመጨረሻም የማጠቃለያ ነጥቦችን በመዘርዘር ጽሁፉ ይቋጫል።

ይህንን የምርምር ጽሁፍ ለማዘጋጀት በጉዳዩ ላይ የተጻፉ የተለያዩ ጽሁፎች ተዳሰዋል። በኢትዮጵያ የሕግ ት/ቤቶች የታተሙ የምርምር ጽሁፎች ይዘት ተመርምሯል። በተደጋጋሚ የምርምር ሥራቸውን ያሳተሙ የሕግ መምህራን፣ የሕግ መጽሄት ዋና አዘጋጅ እንዲሁም ጉዳዩ የሚመለከታቸው ባለሙያዎች ቃለ-መጠይቅ ተደርጎላቸዋል።

በመጨረሻም የዚህ ጽሁፍ ትኩረት በዋናነት በሕግ ት/ቤቶች የሕግ መጽሄቶች ላይ የታተሙ የምርምር ጽሁፎች ላይ መሆኑን ፀሀፊው ማስገንዘብ ይወዳል።

1. ሕግ፣ ባህልና ቋንቋ ያላቸው መስተጋብር

የዚህን ጽሁፍ ዐቢይ ጉዳይ ይበልጥ ለመረዳት በሕግ፣ በቋንቋና በባህል መካከል ያለው ግንኙነትና መስተጋብር ምን ይመስላል? ሕግ ከሌሎች ሙያዎች ለምሳሌ ከህክምናና ምህንድስና ይልቅ ለምን ከቋንቋና ባህል ጋር ትስስር ኖረው? የሚሉትና ሌሎች ተያያዥ ጉዳዮች በዚህ ክፍል ይዳሰሳሉ።

ጉዳዩ የሚመለከታቸው ባለሙያዎችና ተመራማሪዎች በሕግ፣ በባህልና በቋንቋ መካከል ያለውን ትስስር ለማጥናትና ለመዳሰስ ሞክረዋል። የሕግ፣ የቋንቋ፣ የማህበራዊ ጥናትና የሥነ-ልቦና ምሁራንና ሊቃውንት ጉዳዩን አንስተው ከየራሳቸው ሙያ አንጻር ተንትነዋል።[3] በጉዳዩ ላይ ሰፊ ጥናትና ምርምር ካደረጉት ምሁራን መካከል ፕሮፌሰር ጀምስ ቦይድ ኋይት ይጠቀሳሉ።[4] ፕሮፌሰር ኋይት የሕግን ትርጉም ሲያስቀምጡ በቋንቋው ተናጋሪዎች የተሰጠ ለንግግርና ለክርክር የሚያገለግል ባህላዊ ሀብት ነው ይላሉ።[5] ይህም ሀብት ደንቦችን፣ ድንጋጌዎችን፣ የዳኞችን አስተያየት፣ ምሳሌያዊ አነጋገሮችን፣ ጠቅላላ ግንዛቤዎችን፣ እንዲሁም የሕግ ባለሙያው የራሱን አቋም በመግለጽ ሌሎችን ለማሳመን የሚጠቀምባቸውን ቴክኒካዊና ቴክኒካዊ ያልሆኑ ሀብቶችን ይጨምራል።[6] ፕሮፌሰር ኋይት ከአርስቶትል የማሳመን ጥበብ /rhetoric/ ትርጓሜ በመዋስ ሕግ የማሳመኛ መሳሪያ መሆኑን ያስገነዝባሉ።[7]

ሕግ በሕግ አውጭው አካል ጸድቆ የወጣና "ይህንን አድርግ"፣ "ይህንን አታድርግ" የሚል ወይም ለሰዎች መብት የሚሰጥ አልያም ገደብና ግዴታን የሚያስቀምጥ ትዕዛዝ

[3] Elizabeth Meritz, *Legal Language: Pragmatics, Poetics, and Social Power*, 23 ANNU. REV. ANTHROPOL. 435, 455 (1994).

[4] ፕሮፌሰር ኋይት የሚችጋን ዩኒቨርሲቲ የሕግ፣ የእንግሊዝኛ ቋንቋና ሥነ-ጽሁፍ ፕሮፌሰር በመሆናቸው በሕግና በቋንቋ መካከል ያለውን ግንኙነት በጥልቀት አጥንተዋል። የሁለቱ፣ ማለትም የሕግና ቋንቋ ሞያዎች ባለቤት መሆናቸው ከሌሎች ምርምር ካደረጉ ምሁራን በተለየ ለጉዳዩ ቅርበት እንዲኖራቸው አስችሏቸዋል።

[5] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 689 (1985).

[6] *ዝኒ ከማሁ።*

[7] *ዝኒ ከማሁ።*

ብቻ አለመሆኑን ፕሮፌሰሩ አጽንኦት ሰጥተው ይተነትናሉ። ኂይት "ሕግን የሚያከብሩት (የማይጥሱት) ትዕዛዝ ብቻ አድርገን መውሰድ የለብንም፤ ይልቁንም የሕግ ባለሙያው የሚጠቀምበት የመከራከሪያና የማሰቢያ ርዕስ መሆኑንም ልንረዳ ይገባናል"[8] ይላሉ። ይህ የሚያሳየን አንድ ሕግ ወይም ደንብ ይዘቱን ለመረዳት፣ በሕጉ ላይ ተመሥርቶ ለመከራከር ወይም በፍትሕ ሥርዓቱ ውስጥ የሚታይበትና በፍትህ ሥርዓቱ የተለያዩ ተዋንያን ዘንድ የሚኖረው ቦታ ከቋንቋ ጋር በእጅጉ የተቆራኘ መሆኑን ነው። ለዚህም ምክንያቱን ሲያስቀምጡ በሕግ ሙያ ውስጥ በተለይም ደግሞ በፍትሕ ሥርዓት ውስጥ ሕግ ወጥ ትርጉም የሌለው፣ አከራካሪና እርግጠኛ የማንሆንበት ጉዳይ መሆኑን ካሰመሩ በኋላ የሕግ ባለሙያው ሕጉ ምን እንደሚመስል ማሳየት ብቻ ሳይሆን በክርክር ሂደቱ ውስጥ የሕጉን ቋንቋ በሚገባ በመጠቀም ይዘቱን በደንብ መተንተንና መከራከር ይገባዋል ይላሉ።[9]

የዚህ ጽሁፍ ፀሀፊ እንደሚረዳው ቋንቋን ከማኅበረሰቡ፣ ማኅበረሰቡን ከቋንቋ ለይቶ ማየት የማይታሰብ ነው። ስለሕግና ቋንቋ ስንናገር የጉዳዩ ባለቤት ወይም ተጠቃሚ ስለሆነው ማኅበረሰብ መናገራችን ነው። አንድ ባለሙያ በተለይ ደግሞ የሕግ ባለሞያ የሚያገለግለው ማኅበረሰቡን በመሆኑ ማኅበረሰቡ የሚገለገልበትን የመግባቢያ መሳሪያ ወይም ቋንቋውን ከመናገርና ከመስማት፣ ከማንበብና ከመጻፍ አልፎ ማኅበረሰባዊ እሴቶችን ጠንቅቆ ማወቁ ለሙያው ስኬት ከዚያም አልፎ ማኅበረሰቡን በሚገባ ለማገልገል ጉልህ አስተዋፆ ይኖረዋል። በመሆኑም ሕግ የማሳመኛ መሳሪያነት፣ ግብረ-ገባዊ ባህሪ ወይም ማኅበራዊ ይዘት ጠንቅቆ ማወቅ ለሕግ ባለሙያው በጣም ጠቃሚ ነው። ፕሮፌሰር ኂይት አንድ ሰው ሁልጊዜም እንደ ሕግ ባለሞያ ሲናገር ወይም ሲጽፍ የራሱን ሥነ-ምግባራዊ ማንነት ወይም እንደ ጥንታዊ ግሪኮች አባባል ለራሱ፣ ለአድማጮች ወይም ለአንባቢዎቹ ማኅበራዊ እሴቶችን ማንፀባረቅ ወይም *ethos* መሆን ይገባዋል ይላሉ።[10] በመሆኑም የአንድ የሕግ ባለሙያ ንግግር (ጽሁፍ) ሁልጊዜም በማሳመን ላይ የተመሠረተ መሆን ሲኖርበት ክርክሩም ስለ ጉዳዩ ውጤት ማለትም ጉዳዩ እንዴት መወሰን አለበት የሚል ብቻ ሳይሆን እንደ አንድ የማኅበረሰቡ አካል ሕጉ በሥራ ላይ የሚውልበትን ማኅበረሰባዊ አውድ /rhetorical community/ ጭምር ግምት ውስጥ ማስገባት ይኖርበታል።[11] ሕጉን በሥራ ላይ የምናውልበት ማኅበረሰብ

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[8] *ዝኒ ክማሁ፣* (በዚህ ጽሁፍ ውስጥ የሌላ ሰው መሆኑ ካልተገለጸ የኢንግሊዘኛ ጽሁፎች የተተረጎሙት በፀሀፊው ነው)።

[9] *ዝኒ ክማሁ።* ፕሮፌሰሩ በዚህ ሂደት ውስጥ የሕግ ባለሞያው ቋንቋውን እንደማሳመኛ የሕግ መሳሪያ /legal rhetoric/ መጠቀም እንዳለበት ይመክራሉ።

[10] *ዝኒ ክማሁ።* *Ethos* የሚለው ቃል የግሪክ ቃል ሲሆን የቀጥታ ትርጉሙ ባህሪ ማለት ነው። የአንድን ማኅበረሰብ፣ አገር ወይም ርዕዮተ-ዓለም፣ የእምነት መርኅና ሃሳብ ለመግለጽ የሚያገለግል ቃል ነው። ጥንታውያን ግሪኮች መዚቃ በአንድ ሰው ልባዊ ስሜት፣ ባህሪ እንዲሁም ግብረ-ገብነት ላይ የሚኖረውን ተጽእኖ ለማሳየት ይገለገሉበት ነበር። ከዚህ በተጨማሪም ቃሉ በአርስቶትል አነጋገር በማሳመን ጥበብ /rheotoric/ ሂደት ውስጥ አንዱ እውነትን ማረጋገጫ መንገድ /artistic proof/ ነው። *Logos* እና *pathos* ሌሎች እውነትን የምናረጋግጥባቸው መንገዶች ናቸው። እንደ አርስቶትል አገላለጽ የአንድ ሰው *ethos* ወይም የግብረ-ገብነት ብቃት በአድማጮቹ ላይ እምነትን ስለሚያሳድር በቀላሉ ለማሳመን እንደመሳሪያ ያገለግላል። በመሆኑም የተናጋሪው ጥሩ ስሜት፣ ጥሩ ግብረ-ገብነት፣ እና መልካም ስም ይህንን ብቃት ለማዳበር ያገለግላሉ ሲል አርስቶትል ይገልጻል። ለበለጠ መረጃ *Nicomachean Ethics* የሚለውን አርስቶትል በግብረ-ገብነት ላይ የጻፈውን መድብል ይመልከቱ።

[11] *ዝኒ ክማሁ፣* ገጽ 690።

ማን ነው? የማኅበረሰቡ ቋንቋስ ምን ይመስላል? የሚሉትንና ሌሎች ተመሳሳይ ጥያቄዎችን የሕግ ባለሙያው በሚገባ ጠንቅቆ ሊመልሳቸው ይገባል። አንድ የሕግ ባለሙያ ከደንበኛውና ከተራው የኅብረተሰብ ክፍል ጋር ለመግባባት የአካባቢውን መደበኛ ዘዬ መናገር አለበት፤ ምክንያቱም ሕግ ሁልጊዜም በባህል ተጽእኖ ስር /law is always culture specific/ ነው በማለት ኂይት ይከራከራሉ።[12] ይህ ነጥብ ሕግን ከባህልና ቋንቋ ነጥለን ማየት እንደሌለብን ለመገንዘብ ይረዳናል። አንድን ጉዳይ የምንገልጽበት መንገድና የምንጠቀምባቸው ቃላት በማኅበረሰቡ ውስጥ ያላቸውን አንድምታና ትርጓሜ ጠንቅቆ ማወቁ እጅግ በጣም ጠቃሚ ነው። ይህንንም ሰር ሊናልድ ክሮም ጆንሰን የተባሉ እንግሊዛዊ ሲያብራሩ የሚከተለውን ምሳሌ ይሰጣሉ፦

> *አንዲት በእድሜ የገፋ ወግ አጥባቂ የፕረስቢተርያን ክርስትና እምነት ተከታይ ሴት በአንድ ማኅበራዊ ክዋኔ ላይ ሁለት የቤተ-ክርስቲያን ሰዎችን ያገኛሉ። አንደኛው ከፍተኛ ኤዲስ ቆጶስ ሲሆኑ ‹አባቴ› ብለው ጠሯቸው። ወደ ሁለተኛው ዞር ብለው ቀዝቀዝ ባለ አነጋገር 'እርስዎስ አባት ነዎት?' ብለው ጠየቋቸው። ሁለተኛው ቄስም 'አይደለሁም፤ ባለትዳርና የአምስት ልጆች አባት ነኝ' ሲሉ መለሱላቸው።*[13]

ከዚህ የምንረዳው "አባት" ወይም በእንግሊዘኛው father የሚለው ቃል ገጠመኙ ለተከሰተበት ማኅበረሰብ በቤተ-ክርስቲያን አካባቢ ያለው አንድምታና ትርጓሜ በመደበኛው ማኅበራዊ ህይወታቸው ከሚሰጠው ትርጓሜ የተለየ መሆኑን ነው። በዚህ ምሳሌ ውስጥ "አባት" የሚለው ቃል ለተጠቀሰው የክርስቲያን ማኅበረሰብ ያለው ትርጉም ላላገቡና በድንግልና ቤተ-ክርስቲያንን ለሚያገለግሉ ኤዲስ ቆጶሳት የሚሰጥ ስያሜ ሲሆን ቀሳውስት ሆነው ላገቡና ልጅ ላፈሩት ግን ቃሉን የስጋ ልጆቻቸው እንጂ የመንፈስ ልጆቻቸው ወይም የኃይማኖቱ ተከታዮች እንደማይገለገሉበት ነው። በሕግ ሞያ ውስጥም ተመሳሳይ የትርጉም ልዩነት መኖሩ ግልፅ ነው። ይህንን ልዩነት ለመረዳት እና በትክክል ሥራ ላይ ለማዋል የሕግ ባለሙያው የቋንቋ ችሎታና ማኅበራዊ እሴቶችን እና መስተጋብሮችን መለየትና መረዳት በጣም አስፈላጊ ነው።

የፕሮፌሰር ኂይትን አስተምህሮ በጥቅሉ ስንመለከተው አንድን ሕግ ለመረዳት ማድረግ ያለብን ነገር ቢኖር ሕጉን ከማኅበረሰቡ እንቅስቃሴና ባህላዊ ክንዋኔዎች ጋር በአንድ ላይ አጣምረን ማየት እንዳለብን ነው። አንድ ሕግ ማኅበረሰቡ የተዋቀረበት መሠረት በመሆኑ ሥራ ላይ የምናውለውም የማኅበረሰቡን እሴት፣ ቱባ ባህልና የአኗኗር ዘይቤን ግምት ውስጥ አስገብተን መሆን ይኖርበታል። ማኅበረሰቡ ለሕግና ለሞራል ያለው አሳቤ ምንድን ነው? ከምናነበው እና ከተጻፈው ሕግ በስተጀርባ ስለ ሕጉ ያለው ፍልስፍና እና መርህ ምንድን ነው? የሚሉት ጉዳዮች የሕግ ባለሙያው ሊረዳቸው የሚገቡ ነጥቦች ናቸው። ሕግ ባህልን መሠረት ያደረገ በመሆኑ ሥራ ላይ የምናውለውም በባህሉ አውድ ላይ ተመሥርተን መሆን ይኖርበታል። ይህንን ለማድረግ ደግሞ የሕግ ባለሙያው የማኅበረሰቡ አካል ሊሆን እና የማኅበረሰቡን ኑሮ ሊኖር እንዲሁም ባህሉን፣ አስተሳሰቡንና ወጉን ሊጋራ ይገባዋል።

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[12] *ዝኒ ከማሁ፣* ገጽ 689።

[13] Reginald Croom-Johnson, *Law and Language*, 13 CURRENT LEGAL THOUGHT 262, 264 (1947).

ከዚህ በላይ በጥቅሉ በሕግ፣ በቋንቋ እና በባህል መካከል ያለውን ትስስር የተመለከትን ሲሆን ቀጥሎ ሕግን በአፍ መፍቻና በሁለተኛ ቋንቋ[14] መማር፣ ማንበብና ሥራ ላይ ማዋል የሚኖረውን አንድምታ እንመለከታለን። ሕግን በት/ቤት በሁለተኛ ቋንቋ መማርና በአፍ መፍቻ ቋንቋ ሥራ ላይ ማዋል ተፈጥሯዊ ተግዳሮቶች እንደሚኖሩት ግልጽ ነው። ሰር ሪቺናልድ ክሮም ጆንሰን የተባሉ ለአምሳ ዐመታት ያክል በሕግ ትምህርት እና ሙያ ውስጥ እንደ ተማሪ፣ ጠበቃ እና ዳኛ ሆነው ያገለገሉ እንግሊዛዊ በሕግና በቋንቋ መካከል ያለውን ተፈጥሯዊ መስተጋብር እንዲህ ይገልጹታል፡-

> *የአፍ መፍቻ ቋንቋችሁ በነበረው የፈረንሳይኛ ቋንቋ የመጠቀም ዕድል የነበራችሁ ሰዎች ፍርድ ቤት ቀርባችሁ እንግሊዝኛ እንድትናገሩ ቢደረግ በጣም አስቸጋሪ ይሆንባችኋል፣ ለእናንተ ከእንግሊዝኛ ቋንቋ ይልቅ ፈረንሳይኛ ቀላል፣ አጭርና ሳይንሳዊ ቋንቋ ነው። ለምሳሌ le double entendre የሚለውን የፈረንሳይኛ ሐረግ ብንወስድ በእንግሊዝኛ አቻ ቃል አይገኝለትም።*[15]

ይህ አገላለጽ አንድ ቋንቋ የራሱ የሆኑ ቃላት እና ወይም ሐረጎች ማለትም ወደ ሌላ ቋንቋ ሊተረጎሙ የማይችሉ ቃላት እና ወይም ሐረጎች እንዳሉትና በሁለተኛ ቋንቋ ተናጋሪ ወይም ፀሀፊ በሚነገርበት ወይም በሚጻፍበት ጊዜ ምን ያክል ሊያስቸገር እንደሚችል አመላካች ነው።

በተመሳሳይ መልኩ የእንግሊዝኛ ቋንቋ ሁለተኛ ቋንቋቸው የሆኑ አንባቢዎች ቋንቋው የአፍ መፍቻ ቋንቋቸው ከሆኑት በተለዩ አንብቦ የጽሁፍን ይዘት በቶሎ የመረዳት ችግር እንደሚኖርባቸው ግልጽ ነው። የጽሁፉን አንድምታ በቀላሉ ያለመረዳት፣ ረጅምና ውስብስብ አረፍተ-ነገሮችን ያለመገንዘብ፣ ያረጁና ቴክኒካዊ የሆኑ ቃላትን በቀላሉ ያለመረዳት፣ በፍሬ ነገርና በጽንሰ-ሃሳብ መካከል ያለውን ልዩነት ያለመረዳት፣ እንዲሁም ለአዲስና ያልተለመዱ ቃላትና ጽንሰ ሃሳቦች ትርጉም ለመስጠት ሲታገሉ ማየት እንግሊዝኛን በሁለተኛ ቋንቋነት የሚያነቡ አንባቢዎች ችግሮች ናቸው።[16]

ሁሉም የሁለተኛ ቋንቋ ተናጋሪዎች እና አንባቢዎች በአፍ መፍቻ ቋንቋ የሚናገሩ እና የሚያነቡ ሰዎች ያሏቸውን ነገሮች በቀላሉ የመረዳት አዝማሚያ ፈጽሞ የላቸውም።[17] አስኪ አንድ ምሳሌ በማየት ይህንን ጉዳይ ይበልጥ እናብራራው። አንድ እንግሊዝኛ ሁለተኛ ቋንቋው የሆነ የሆንግ ኮንግ ተማሪ መምህሩ በተማሪው የቤት ሥራ ላይ የሰጡት አስተያየት 'good writitng style' የሚል ሲሆን ተማሪው የተረዳበት መንገድ ግን መምህሩ ተማሪው ለተጠቀማቸው ቃላት አድናቆት የሰጡት መስሎት ነበር፤ ከላይ የተጠቀሰውን አባባል መምህሩ የተጠቀሙት ግን የተማሪው የእጅ ጽሁፍ ጥሩ መሆኑን ለመግለጽ ነበር።[18]

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[14] በዚህ ጽሁፍ ውስጥ "ሁለተኛ ቋንቋ" የሚለው አገላለጽ ከአፍ መፍቻ ቋንቋ ውጪ ያለን ቋንቋ ለመግለጽ ይህ ፀሀፊ የተጠቀመበት ነው።

[15] Croom-Johnson, *supra* note 13, at 264.

[16] Alison Marriott; James O'Connell, *A Language Teaching Perspective on Professional Legal Education*, 13 J. PROF. LEGAL EDUC. 147, 161(1995).

[17] *ዝኒ ከማሁ።*

[18] *ዝኒ ከማሁ።*

እነዚህ ችግሮች በጥቅሉ እንግሊዝኛን እንደ ሁለተኛ ቋንቋቸው የሚጠቀሙ አንባቢዎች የሚያጋጥሟቸው ችግሮች ሲሆኑ ጉዳዩን ወደ ሕግ ሞያ ስናመጣው ደግሞ ይበልጥ ውስብስብ ይሆናል። የእንግሊዝኛ ቋንቋ ሁለተኛ ቋንቋቸው ለሆኑ አንባቢዎች ይቅርና የአፍ መፍቻ ቋንቋቸው ለሆኑ አንባቢዎችም በሕግ ዙሪያ የተጻፉ ጽሁፎችን በቀላሉ አንብቦ የመረዳቱ ጉዳይ በጣም አስቸጋሪ ነው። የተለያዩ ቴክኒካዊ ቃላትን አንብቦ መረዳት የሕጉን ፍሬ ሃሳብ እንደመረዳት ሊወሰድ ይችላል።[19] ይህም የሚሆንበት ምክንያት ሕግ ራሱን የቻለ ቋንቋ ማለትም የሕግ ቋንቋ /legal jargon/ ስላለው ነው።

የያዝነውን ነጥብ ለማጠቃለል አንድ የሕግ ባለሞያ ሁልጊዜ መጀመር ያለበት በራሱ ቋንቋና ባህል መሠረት ከተጻፉና ከተዘጋጁ ጽሁፎች ነው። ተማሪዎቻችንን ማስተማርና ማሰልጠን ያለብንም እነዚህን በራሳቸው ቋንቋና ባህል መሠረት የተጻፉና የተዘጋጁ ጽሁፎችና ሰነዶች እንዲረዱና እንዲሁም በሥራ ሕይወታቸው ወደ ተግባር መለወጥ እንዲችሉ ለማድረግ መሆን ይኖርበታል። እዚህ ላይ ግን ዘመናዊ የኢትዮጵያ ሕግ ንድፈ ሃሳቦች በምዕራቡ ዓለም የሥነ-ሕግ አስተምህሮ ላይ የተመሠረቱ መሆናቸውና ሕጎቹም ከ1920ዎቹ ጀምሮ የኢትዮጵያን ባህሎች ወደጎን ትተው ከምዕራቡ ዓለም የሕግ ትውፊት መቀዳታቸው የሚኖረው ተግዳሮት ከፍተኛ መሆኑ አያጠራጥርም። በመሆኑም እነዚህን ተግዳሮቶች ለመፍታት በምዕራቡ ዓለም የሥነ-ሕግ አስተምህሮ ላይ በመመሥረት ቀስ በቀስ አገራዊ የሕግ ንድፈ-ሃሳቦችን ለማዳበር መጣር የሁሉም ኢትዮጵያዊ ምሁርና ተመራማሪ ሞያዊ የውዴታ ግዴታ ነው።

2. ተመራማሪዎች ለምን በእንግሊዝኛ ቋንቋ መጻፍና ማሳተም ይመርጣሉ?

እስከ 13ኛው መቶ ክፍለ ዘመን ድረስ የአውሮፓ ዩኒቨርሲቲዎች የምርምርና የማስተማሪያ ቋንቋ ላቲን የነበረ ሲሆን በማርቲን ሉተር የተመራው የፕሮቴስታንት ተሃድሶ እንቅስቃሴ የአውሮፓ አገራት የየራሳቸውን ብሄራዊ ቋንቋ እንዲጠቀሙና እንዲያዳብሩ አድርጓል።[20] የማርቲን ሉተር የፕሮቴስታንት እንቅስቃሴ አስኪጀመር ድረስ ላቲን የሮማ ካቶሊካዊት ቤተ-ክርስቲያን ይፋዊ ቋንቋ ሆኖ ከማገልገሉም በላይ የአውሮፓ ዩኒቨርሲቲዎች የማስተማሪያና የምርምር ቋንቋ እንዲሆን የሮማ ካቶሊካዊት ቤተ-ክርስቲያን ሚናና አስተዋፆ ጉልህ ነበር። እ.ኤ.አ ከ1930ቹ እስከ 20ኛው ክፍለ ዘመን አጋማሽ ድረስ በተወሰነ መልኩ ጀርመንኛ ዓለም አቀፍ ሳይንሳዊ ቋንቋ በመሆን አገልግሏል።[21] ከጀርመንኛ በተጨማሪ ፈረንሳይኛ፣ የሩስያና የስፓኝ ቋንቋዎች ሳይንሳዊ የምርምርና የህትመት ቋንቋ በመሆን በዓለም አቀፍ ደረጃ አገልግለዋል፤ እያገለገሉም ይገኛሉ።[22]

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[19] *ዝኒ ከማሁ፣* ገጽ 162።

[20] Philip G. Altbach, *The Imperial Tongue; English as the Dominating Academic Language*, ECONOMIC AND POLITICAL WEEKLY, Sept. 08, 2007, at 3608-3611.

[21] *ዝኒ ከማሁ።*

[22] *ዝኒ ከማሁ።*

ወደ እንግሊዝኛ ቋንቋ ስንመጣ በአሁኑ ጊዜ በዓለማችን ከአምሳ አራት በላይ አገራት ቋንቋውን ብሄራዊ የሥራ ቋንቋ አድርገው በመገልገል ላይ ይገኛሉ።[23] ይህም ሊሆን የቻለው በመጀመሪያ የታላቋ ብሪታንያ የቅኝ ግዛት በኋላም አሜሪካና እንግሊዝ የደረሱበት ዓለም አቀፍ የኢኮኖሚና የፖለቲካ የበላይነት የእንግሊዝኛ ቋንቋን ያለ ተቀናቃኝ ዓለም አቀፍ ቋንቋ ብሎም የዩኒቨርሲቲዎች የማስተማሪያ፣ የምርምርና ህትመት ቋንቋ እንዲሆን አስችሎታል።[24] በአሁኑ ጊዜ በአፍሪካ አንድም ዩኒቨርሲቲ በነባር የአፍሪካ ቋንቋዎች የሚያስተምር የለም።[25] በአፍሪካ ውስጥ እንግሊዘኛ፣ ፈረንሳይኛ፣ ፖርቹጋልኛ፣ አረብኛ እንዲሁም አፍሪካን (በደቡብ አፍሪካ) የማስተማሪያ፣ የምርምርና የህትመት ቋንቋ ሆነው ያገለግላሉ።[26]

ከዚህ በላይ የተዘረዘሩት መረጃዎች ተመራማሪዎች ለምን በእንግሊዝኛ ቋንቋ መጻፍና ማሳተም እንደሚፈልጉ አመላካች ናቸው። በዓለም አቀፍ ደረጃ ስመጥርና ታዋቂ የሆኑት የምርምርና ህትመት መጽሄቶች የሚታተሙት በአሜሪካ፣ በእንግሊዝና በሌሎች የእንግሊዝኛ ቋንቋ ተናጋሪ በሆኑ አገሮች ነው። እንደሚታወቀው ለከፍተኛ ትምህርት ተቋም መምህር መመራመርና ማሳተም ዋናው ሙያዊ የውዴታ ግዴታ ሲሆን[27] ከዚህ ጋር ተያይዞ የሚነሳው ጉዳይ ምርምሩን የሚያሳትምበት መጽሄት ስመጥር፣ አታላይ ያልሆነ፣ ታዋቂና ኢንዴክስድ የተደረገ /prestigious, reputable and indexed/ መሆን ይኖርበታል። እነዚህን መስፈርቶች የሚያሟሉ የምርምር መጽሄቶች በአብዛኛው በእንግሊዘኛ ቋንቋ የሚታተሙ ናቸው። ከዚህ የምንረዳው ዋናው ነጥብ ተመራማሪዎች በእንግሊዘኛ ቋንቋ የሚጽፉበት ምክንያት ለዓለም አቀፉ አንባቢዎች /global readers/ ተደራሽ ለመሆን ነው። ለዓለም አቀፍ አንባቢዎች ተደራሽ መሆን አንዱ ጠቀሜታው የተመራማሪው ሥራ በሌሎች የምርምር ሥራ ውስጥ እንዲጠቀስ ማስቻል ነው።[28] ይህ በሌሎች የምርምር ሥራ ውስጥ መጠቀስ ለምርምሩ እና ለተመራማሪው ራሱን የቻለ ከፍ ያለ ዋጋና ክብር የሚያሰጥ ተግባር ነው።

በመሆኑም የአንድን ተመራማሪ የምርምርና ህትመት ደረጃ ለመለካት ከሚታተምበት መጽሄት ደረጃና ታዋቂነት አልፎ በሌሎች ተመራማሪዎች በዋቢነት መጠቀሱ፣

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[23] ለበለጠ መረጃ https://en.wikipedia.org/wiki/List_of_territorial_entities_where_English_is_an_official_language የሚለውን ድረ-ገጽ ይጎብኙ።

[24] *ዝኒ ከማሁ።*

[25] *ዝኒ ከማሁ።*

[26] *ዝኒ ከማሁ።*

[27] እዚህ ላይ "አሳትም ወይም ክለም" በእንግሊዝኛው "Publish or perish" የሚለውን በከፍተኛ ትምህርት ተቋማት የሚያስተምሩ መምህራንን የመመራመርና የምርምራቸውን ውጤት የማሳተም ግዴታን የሚገልፀውን መሪ ቃል ልብ ይበሉ።

[28] ለበለጠ መረጃ Peter P. Morgan, *The Importance of Being Cited*, 129 CAN MED ASSOC J, 9 (1983) ይመልከቱ።

ከተጠቀሰም ስንት ጊዜ መጠቀሱ እንደመስፈርት በማገልገል ላይ ይገኛል። እንደሚታወቀው እውቀት ዓለም አቀፋዊ በመሆኑ ድንበርና ቦታ አይገድበውም። ስለዚህ በአንድ አገር የታተመ የምርምር ሥራ ከአገሩ አልፎ በዓለም አቀፍ ደረጃ ጥቅም ላይ ካልዋለ፣ ካልተተቸና በሌሎች ተመራማሪዎች ካልተጠቀሰ ፋይዳው እምብዛም ነው። ነገር ግን ምርምሩ በአገር ቋንቋ በመታተሙ ምክንያት ለዓለም አቀፍ ምሁራንና ተመራማሪዎች መድረስ ካልቻለና ለአገር ውስጥ አንባቢዎች ብቻ ተደራሽ ሆኖ ከቀረ ምንም እንኳ ለአገሪቱ የሚኖረው ጠቀሜታ ጉልህ ቢሆንም በሌሎች ዓለም-አቀፍ ቋንቋ/ዎች ካልተተረጎመ በስተቀር ከዓለም አቀፍ ተደራሽነቱ አንጻር በኢትዮጵያውያን ብሂል የጋን ውስጥ መብራት ሆኖ መቅረቱ አያጠያይቅም። ይህም የፀሀፊዎችን በአገርኛ ቋንቋ የመጻፍና የማሳተም ፍላጎት በከፍተኛ ሁኔታ ይቀንሰዋል፣ ይገድበዋልም።

ተመራማሪዎች ለምን በአገራቸው ቋንቋ በብዛት አይጽፉም የሚለውን ጥያቄ ስናነሳ ከላይ ከተጠቀሱት ምክንያቶች በተጨማሪ ሌሎች ተያያዥ ምክንያቶችን አብረን ማንሳት እንችላለን። ተመራማሪዎች በራሳቸው የአፍ መፍቻ ቋንቋ ከማይጽፉባቸው ምክንያቶች ውስጥ አንዱ ቋንቋው ወደ ሳይንሳዊ የምርምር ቋንቋነት ካለማደጉ ጋር የተያያዘ ነው። አንድ ቋንቋ የአንድ አገር ብሔራዊና የሥራ ቋንቋ መሆኑ ብቻ ለማስተማር፣ ለምርምርና ህትመት ብቁ ላያደርገው ይችላል። ቋንቋው ለማስተማር፣ ለምርምርና ህትመት ብቁ እንዲሆን ወደ ሳይንሳዊ ቋንቋነት (scientific language) ደረጃ ከፍ ማለት ይኖርበታል። በመሆኑም ኢትዮጵያን ጨምሮ በየአገራቱ ብሔራዊና የሥራ ቋንቋ ጽፎ ማሳተም ከባድና እጅግ ብዙ ውጣ ውረድ የበዛበት መሆኑ አያጠራጥርም። ከዚሁ ጋር ተያይዞ የሚነሳው ሌላው ነጥብ በአገሩ ቋንቋ የተጻፉ ማጣቀሻና ዋቢ መጻሕፍትን እንደልብ ያለማግኘት ጉዳይ ነው። የምርምር ጽሁፍን ከልብ-ወለድ ጽሁፍ የሚለየው ዋናው ጉዳይ ተመራማሪው የሌሎች ተመራማሪዎችንና የዘርፉ ሊቃውንትን ሥራ በዋቢነትና በማጣቀሻነት መጠቀሙ ነው። የዚህ ጽሁፍ አንባቢያን ይህ ፀሀፊ በዋቢነትና በማጣቀሻነት የተጠቀመባቸውን ጽሁፎች ልብ ብለው ቢመለከቱ አንድም በአማርኛ ወይም በሌሎች የኢትዮጵያ ቋንቋዎች የተጻፉ አለመሆናቸውን ይገነዘባሉ። ይህ ጉዳይ ቀደም ሲል ከተጠቀሰው የቋንቋው ሳይንሳዊ መሆን አለመሆን ጋር በቀጥታ ስለሚገናኝ ከችግሩ አዙሪት እንዳይወጣ ያደርገዋል።

የያዝነውን ነጥብ ለማጠቃለል ምንም እንኳ የሕግ ምሁራን የሚመራመሩትና የሚጽፉት ለሌሎች የሕግ ምሁራን፣ ለሌላ የሙያ ዘርፍ ምሁራን፣ ለዳኞች፣ ለጠበቆች፣ ለሕግ ባለሙያዎች፣ ለሕግ ተማሪዎችና ለሌሎች የትምህርት ዘርፍ ተማሪዎችና ተመራማሪዎች ቢሆንም ምርምሩ የሚታተምበት ቋንቋ ከምሁራንና ከተማሪዎች ውጭ ያሉትን አንባቢዎች ገለል ማድረጉ አይቀሬ ነው።[29]

3. በኢትዮጵያ ያለው ተጨባጭ ሁኔታ

በዚህ ክፍል በኢትዮጵያ አግባብነት ያላቸው ሕጎችና የሕግ መጽሄቶች ፖሊሲዎች የምርምርና የህትመት ቋንቋን በተመለከተ ምን ይላሉ? በኢትዮጵያ አማርኛና ሌሎች የክልል የሥራ ቋንቋዎችን በመጠቀም የሚደረግ የሕግ ምርምርና ህትመት ምን

[29] የሕግ ምርምር ተደራሾችን (አንባቢዎችን) በተመለከተ Banks McDowell, *The Audiences for Legal Scholarship*, 40 J. LEGAL EDUC. 261, 261-277 (1990) ይመልከቱ።

ይመስላል? የሕግ መምህራን ለምን በእንግሊዝኛ ቋንቋ መጻፍና ማሳተም ይፈልጋሉ? የሚሉትንና ሌሎች ተያያዥ ጭብጦች ይዳሰሳሉ።

3.1. የምርምርና ህትመት ቋንቋን በተመለከተ ሕጉ ምን ይላል?

በኢትዮጵያ በሕግ ምርምርና ህትመት ቋንቋ እና የፍትሕ ሥርዓቱ የሥራ ቋንቋዎች መካከል ያለው ግንኙነት ምን ይመስላል የሚለውን ጉዳይ ከመመልከታችን በፊት የከፍተኛ ትምህርት የማስተማሪያና የምርምር ቋንቋን በተመለከተ በኢትዮጵያ ተፈጻሚነት ያለው ሕግ ምን ይላል የሚለውን ነጥብ እንመረምራለን። በከፍተኛ ትምህርት አዋጅ አንቀጽ 20(1) ላይ እንደተመለከተው በሌሎች ቋንቋዎች ላይ ትምህርት መስጠት ወይም ጥናት ማድረግ አስፈላጊ ሆኖ ካልተገኘ በስተቀር የማንኛውም የከፍተኛ ትምህርት ተቋም የማስተማሪያ ቋንቋ እንግሊዝኛ ነው።[30] ከዚህ የሕግ አንቀጽ የምንረዳው በመሠረቱ የማስተማሪያና የምርምር ቋንቋ እንግሊዝኛ ቢሆንም አስፈላጊ ሆኖ ሲገኝ አማርኛን ጨምሮ በሌሎች የአገሪቱ ቋንቋዎች ምርምር ማድረግና ማሳተም እንደሚቻል ነው። ከዚህ ጠቅላላ ድንጋጌ በተጨማሪ ማንኛውም ተቋም የሚያካሄደው ምርምር በተለየ በአገሪቱ ቀዳሚ ፍላጎት ላይ በመመሥረት በቴክኖሎጂ ሽግግር ችግር ፈች የሆነና የማስፈጸም አቅምን የሚገነባ መሆን እንዳለበት የአዋጁ አንቀጽ 24(3) ይደነግጋል። ምንም እንኳ የዚህ አንቀጽ ዓላማ በከፍተኛ ትምህርት ተቋማት የሚደረግን የምርምር አቅጣጫ ለመጠቆም የተቀመጠ ቢሆንም ቀደም ሲል ከጠቀስነው ከአንቀጽ 20(1) ጋር አጣምረን ስናነበው አንድ ምርምር በአስፈጻሚው አካል የሥራ ቋንቋ መሠራቱና መታተሙ የአገሪቱን ተጨባጭ ችግር የሚቀርፍና የማስፈጸም አቅምን የሚገነባ ከሆነ ከእንግሊዝኛ ውጭ ባሉ የአገሪቱ ቋንቋዎች መመራመርና ማሳተም እንደሚቻል ነው። ይህንን ጉዳይ ከያዝነው ነጥብ ጋር ስናገናኘው የፍትሕ አካላትን የማስፈጸም አቅም ከመገንባት አኳያ የሕግ ምርምር በአማርኛና በሌሎች የአገሪቱ ቋንቋዎች መሥራትና ማሳተም በከፍተኛ ትምህርት አዋጁ የተፈቀደ መሆኑን እንገነዘባለን።

ከከፍተኛ ትምህርት አዋጁ በተጨማሪ ከሕግ ትምህርትና ምርምር ጋር አግባብነት ያላቸውን ሌሎች ሰነዶችን ስንመረምር ተመሳሳይ ድምዳሜ ላይ መድረስ እንችላለን። ለምሳሌ የፍትሕ ሥርዓት ማሻሻያ ፕሮግራሙን ብንመለከት የሕግ ትምህርትን በከፍተኛ ትምህርት ተቋማት በእንግሊዝኛ ቋንቋ ማስተማር አግባብ ቢሆንም እንደየአካባቢው ተጨባጭ ሁኔታ ሕጉን ሥራ ላይ ለማዋል ሌሎች ቋንቋዎችን መጠቀም እንደሚቻል ያመለክታል።[31] "ሕጉን እንደየአካባቢው ሁኔታ ሥራ ላይ

[30] እዚህ ላይ በአንቀጽ 20(1) በአማርኛውና በእንግሊዝኛው ቅጅ መካከል ያለውን ልዩነት ልብ ይሏል። የእንግሊዘኛው ቅጅ "The medium of instruction in any institution, except possibly in language studies other than the English language, shall be English" የሚል ሲሆን ከዚህ የምንረዳዉ የእንግሊዝኛው ቅጅ ስለማስተማሪያ ቋንቋ ብቻ የሚናገር መሆኑን ነው። የምርምር ቋንቋን በተመለከተ በዚህ ንዑስ አንቀጽ ማካተት አስፈላጊ ቢሆን ኖሮ "the medium of instruction and research (……)" የሚል ሐረግ ይጨመርበት እንደነበር መገመት ይቻላል። የበላይነት ያለውና አስገዳጅ የሆነው የአማርኛው ቅጅ በመሆኑ ከእንግሊዝኛ ቋንቋ በተጨማሪ አማርኛንና ሌሎች የአገሪቱን ቋንቋዎች የምርምር ቋንቋ አድርጎ መጠቀም እንደሚቻል መረዳት እንችላለን።

[31] FDRE MINISTRY OF CAPACITY BUILDING, FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA COMPRCHENSIVE JUSTICE SYTEM REFORM PROGRAMME BASELINE STUDY REPORT, 287 (2005).

ማዋል" ሲባል በፌዴራል ነጋሪት ጋዜጣ የሚታተሙትንና በየክልሎቹ ምክር ቤቶች የሚደነገጉትን ሕጎች ብቻ ሳይሆን የሕግ ምሁራን የምርምር ሥራን እንደሚጨምር እንረዳለን፡፡ ስለሕግ ለፍትሕ ባለሙያዎች ከምናደርስበት መንገድ አንዱ ምርምርና ህትመት በመሆኑ የምርምርና ህትመት ቋንቋም አብሮ መነሳቱ አይቀርም፡፡ በመሆኑም የሕግ ት/ቤቶች የማስተማሪያ ቋንቋ እንግሊዝኛ ቢሆንም በሕግ ት/ቤቶችና በሌሎች አካላት[32] የሚታተሙ የሕግ ምርምር ህትመቶች ቋንቋ ከእንግሊዝኛ ቋንቋ በተጨማሪ የየክልሎቹ የሥራ ቋንቋ ከመሆን የሚያግደው ምንም የአመክንዮ መሠረት የለም፡፡

የፍትሕ ሥርዓት ማሻሻያ ፕሮግራሙ ከዚህ በተጨማሪ የኢትዮጵያ ሕግ መጽሄትና ሌሎች የሕግ መጽሄቶች በአገር አቀፍ ደረጃ ለሕግ ት/ቤቶችና ለሕግ ባለሙያዎች መድረስ እንዳለባቸው ያመለክታል፡፡[33] የሕግ መጽሄቶች በአገር አቀፍ ደረጃ ለፍትሕ ባለሙያዎች መድረስ አለባቸው ካልን የምርምርና የህትመት ቋንቋ ምን መሆን አለበት የሚለው ጉዳይ አብሮ መነሳቱ የግድ ነው፡፡ አሁን በኢትዮጵያ ባለው ተጨባጭ ሁኔታ የእንግሊዝኛ ቋንቋ የሕግ ት/ቤቶችን ጨምሮ የከፍተኛ ትምህርት ተቋማት የማስተማሪያና የምርምር ቋንቋ እንጂ የፌዴራል መንግስቱና የክልሎች ሁለተኛ የሥራ ቋንቋ አይደለም፡፡ በመሆኑም በእንግሊዝኛ ቋንቋ የታተሙ የሕግ ምርምር ጽሁፎች የሕግ ባለሙያዎች አንብበውና በቀላሉ ተረድተው በሥራ ይተረጉሟቸዋል ብሎ ማሰብ አስቸጋሪ ነው፡፡ ይህንን መሠረታዊ ችግር ለመቅረፍም የሕግ ምርምር ጽሁፎችን ከእንግሊዝኛው ቋንቋ ጎን ለጎን በሌሎች የክልል የሥራ ቋንቋዎች ማሳተም ጉዳዩን የውዴታ ግዴታ ያደርገዋል፡፡ እንደሚታወቀው በኢትዮጵያ ከሰማንያ በላይ የተለያዩ ቋንቋዎች ይነገራሉ፡፡ አሁን በኢትዮጵያ ባለው ተጨባጭ ሁኔታ በቅርብ ጊዜ ውስጥ በእነዚህ ከሰማንያ በላይ ቋንቋዎች በሁሉም መጻፍና ማሳተም እንደማይቻል ቀርቶ እንደማይሞከር ለማንም ግልጽ ነው፡፡ በመሆኑም በዚህ ፀሀፊ እምነት የተሻለው አማራጭ በክልል የሥራ ቋንቋዎች መጻፍና ማሳተም ነው፡፡ የዚህ ጽሁፍ ዋና መልዕክትም የምርምር ሥራዎች ለፍትህ አካላት ባለሙያዎች ተደራሽ መሆን አለባቸው የሚል በመሆኑ እና የፍትህ አካላት ባለሙያዎች የሥራ ቋንቋ የክልል የሥራ ቋንቋዎች በመሆናቸው ይህ አማራጭ የሌለው መፍትሄ ነው፡፡

የሕግ ምርምርና ህትመት ቋንቋ የግድ እንግሊዝኛ መሆን አለበት ወይ የሚለውን ጥያቄ ለመመለስ በሦስተኛ ደረጃ የምንመለከተው የሕግ መጽሄቶችን የአርትኦት ፖሊሲዎችን ነው፡፡ ለምሳሌ የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሄት የአርትኦት ፖሊሲን ብንመለከት የምርምር ጽሁፎች፣ ሀተታዎች፣ የመጽሀፍት ዳሰሳዎችና ምልክታዎች በእንግሊዝኛ ወይም በአማርኛ ቋንቋ ሊታተሙ እንደሚችሉ በግልጽ ያስቀምጣል፡፡[34] እነዚህ ጽሁፎች ፀሀፊው መጀመሪያ በጻፈበት ቋንቋ እንደሚታተሙ ወይም ወደ ሌላ ሁለተኛ ቋንቋ እንደማይተረጎሙ የአርትኦት ፖሊሲው ይገልፃል፡፡[35] የአርትኦት ፖሊሲው በተዘጋጀበት ወቅት ወደ ሌላ ሁለተኛ ቋንቋ ወይም ወደ አማርኛ

[32] የኢትዮጵያ ጠበቆች ማኅበር የሕግ መጽሄትን እንደምሳሌ መጥቀስ ይቻላል፡፡

[33] FDRE Ministry of Capacity Building, *supra* note 31, at 281.

[34] Editorial Policy of Bahir Dar University Journal of Law, Art. 14(1) (2010).

[35] *ዝኒ ከማሁ*፣ አንቀጽ 14(2)::

ተርጉሞ ጎን ለጎን የማሳተም ጉዳይ አለመነሳቱን የመጽሄቱ የቀድሞ ዋና አዘጋጅ ለዚህ ፀሀፊ ገልጸውለታል።[36]

ይህ ፀሀፊ በኢትዮጵያ ያሉ የሌሎች የሕግ መጽሄቶችን የአርትኦት ፖሊሲ ፈልጎ ማግኘት ባይችልም በመጽሄቶቹ ከሚታተሙት ጽሁፎች ቋንቋ መረዳት እንደሚቻለው ከእንግሊዝኛ ቋንቋ በተጨማሪ በአማርኛ ቋንቋ የሚታተሙ ጽሁፎች መኖራቸውን ነው። የኢትዮጵያ ሕግ መጽሄትን፣ ሚዛን ሎው ሪቪውን እና የኢትዮጵያ ጠበቆች ማኅበር የሕግ መጽሄትን እንደ አብነት መጥቀስ ይቻላል።[37] ቀደም ሲል እንደተመለከትነው ከሕግ መጽሄቶች የአርትኦት ፖሊሲና በተግባር እየሰሩበት ካለው ሁኔታ የምንረዳው የሕግ ምርምርና ህትመት የግድ በእንግሊዝኛ ቋንቋ ብቻ መሆን እንደሌለበትና በአማርኛና በሌሎች የክልል የሥራ ቋንቋዎች የምርምር ጽሁፎችን ማሳተም እንደሚቻል ነው።

3.2. የሕግ ምርምርና ህትመት ቋንቋና የፍትሕ ሥርዓቱ ቋንቋ ልዩነትና ተመሳሳይነት

በኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት[38] አንቀጽ 5(2) ላይ እንደተመለከተው የፌዴራል መንግሥቱ የሥራ ቋንቋ አማርኛ ሲሆን የፌዴሬሽኑ አባል ክልሎችም የየራሳቸውን የሥራ ቋንቋ በሕግ እንደሚወስኑ ተደንግጓል።[39] በዚህም መሠረት የየክልሎቹ ሕገመንግሥታት የክልሎችን የሥራ ቋንቋ ወስነዋል።[40]

በመሆኑም የፌዴራል መንግሥቱ የፍትሕ አካላት የሥራ ቋንቋ አማርኛ ሲሆን የየክልሎቹ የፍትሕ አካላት የሥራ ቋንቋ ደግሞ የየክልሎቹ የሥራ ቋንቋ ነው። ቀደም ሲል እንደተመለከትነው የፍትሕ ሥርዓቱ የሥራ ቋንቋዎች አማርኛና የየክልሎቹ የሥራ ቋንቋዎች ቢሆኑም በሕግ ት/ቤቶችና በሌሎች አካላት የሚደረጉ የምርምር ሥራዎች የሚታተሙት ግን በአብዛኛው በእንግሊዝኛ ቋንቋ ነው። ነገር ግን በዚህ ጽሁፍ መግቢያ ላይ እንደተገለጸው በኢትዮጵያ ሕግ መጽሄት የመጀመሪያዎቹ ህትመቶች የታተሙ ጽሁፎች በእንግሊዝኛ ቋንቋ ቢዘጋጁም የአማርኛ ትርጉማቸው ጎን ለጎን አብሮ ይታተም ነበር። ይህ የኢትዮጵያ የሕግ መጽሄት አሰራር በ1993 ዓ.ም. እስከወጣው 20ኛዉ ቅጽ ድረስ የቀጠለ ሲሆን ከዚያ በኋላ በወጡት ቅጾች የወጡት ጽሁፎች ግን ፀሐፊው መጀመሪያ በጻፈበት በአማርኛ ወይም በእንግሊዝኛ ቋንቋ ብቻ የተጻፉ ናቸው። በአማርኛ ቋንቋ ብቻ እየተጻፉ የሚታተሙ የምርምር ሥራዎችም በብዛት ነበሩ። ከዚህ በታች የኢትዮጵያ ሕግ መጽሄት እና በሌሎች የሕግ መጽሄቶች በተለያዩ ጊዜ የታተሙ የምርምር ሥራዎች ቋንቋ ምን እንደሚመስል በዝርዝር ይቀርባል።

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[36] ቃለ-መጠየቅ ከአቶ ወርቁ ያዜ ጋር፣ በባሕር ዳር ዩኒቨርሲቲ የሕግ ት/ቤት ረዳት ፕሮፌሰርና የመጽሄቱ የቀድሞ ዋና አዘጋጅ።

[37] በእነዚህና በሌሎች የሕግ መጽሄቶች በአማርኛ ቋንቋ ስለሚታተሙ የምርምር ሥራዎች የተደረገውን ሰፋ ያለ ዳሰሳ ከዚህ በታች ያለውን ንዑስ ክፍል ሁለትን ይመልከቱ።

[38] የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ ሕገመንግስት፣ ፌዴራል ነጋት ጋዜጣ፣ አዋጅ ቁጥር 1፣ (1987 ዓ.ም.)።

[39] ዝኒ ከማሁ፣ አንቀጽ 5(3)።

[40] አግብባብነት ያላቸውን የክልል ሕገመንግሥታት ድንጋጌዎችን ይመልከቱ።

በመጀመሪያ የምንመለከተው የኢትዮጵያ ሕግ መጽሄት የመጀመሪያውን የ1956ቱን ህትመት የቅጽ 1 ቁጥር 1ን ይዘት ነው። በዚህ እትም የምርምር ጽሁፋቸውን ያሳተሙት ዊሊያም ቡሐጂያር (የኢትዮጵያ ንጉሠ ነገሥት መንግሥት የከፍተኛው ፍ/ቤት ፕሬዝዳንት የነበሩ)፣ ጆርጅ ችችኖቪች (የቀዳሚዊ ኃይለ ሥላሴ ዩኒቨርሲቲ ሕግ ፋኩልቲ መምህር የነበሩ) እና ፊሊፕ ግራቨን (ፍርድ ሚኒስቴር ውስጥ ይሰሩ የነበሩ) ናቸው። እነዚህ ተመራማሪዎች የውጭ አገር ዜጎች በመሆናቸው አማርኛ መጻፍና ማንበብ ስለማይችሉ ምርምራቸውን የጻፉት በእንግሊዝኛ ቋንቋ ቢሆንም የአማርኛው ትርጉም እጅግ ባማረ አቀራረብ አብሮ ታትሞ ነበር። በቅጽ 1 ቁጥር 2[41] የታተሙ የምርምር ጽሁፎችን ስንመለከት በተመሳሳይ መልኩ በውጭ አገር ዜጎች ማለትም በጃን ግራቨን (የቀዳማዊ ኃይለ ሥላሴ ዩኒቨርሲቲ የሕግ ፋኩልቲ መምህርና የሰበር ሰሚ ፍ/ቤት ፕሬዚዳንት የነበሩ) እና በጆርጅ ችችኖቪች (የቀዳማዊ ኃይለ ሥላሴ ዩኒቨርሲቲ ሕግ ፋኩልቲ ፕሮፌሰር) የተጻፉ ሲሆን ከዋናው የእንግሊዝኛው ቅጅ ጎን ለጎን የአማርኛ ትርጉማቸው አብሮ ታትሞ ነበር። በውጭ አገር ዜጎች በእንግሊዝኛ ቋንቋ የተጻፉ የምርምር ሥራዎችን የአማርኛ ትርጉማቸውን ጎን ለጎን አብሮ የማሳተሙ ተግባር በመጽሄቱ ቅጽ 2 ቁጥር 1ና 2 [42]፣ ቅጽ 3 ቁጥር 1ና 2፣ ቅጽ 4 ቁጥር 1ና ቁጥር 2፣ ቅጽ 5 ቁጥር 1፣2ና 3[43]፣ እንዲሁም ከቅጽ 6 እስከ ቅጽ 20 ድረስ ቀጥሏል።[44] ቅጽ 21 ላይ ከታተሙ የምርምር ጽሁፎች ውስጥ የአንዱ ብቻ የአማርኛው ትርጉም አብሮ ሲታተም ቀሪዎች የምርምር ሥራዎች በእንግሊዝኛ ቋንቋ ታትመዋል። ቅጽ 22 ቁጥር 1 ላይ የታተሙት የምርምር ሥራዎች ሙሉ በሙሉ በእንግሊዝኛ ቋንቋ የታተሙ ሲሆን የአማርኛ ትርጉማቸው አብሮ አልታተመም። በቅጽ 22 ቁጥር 2 ላይ አንድ ምርምር ጽሁፍ በአማርኛ ቋንቋ ሲታተም የሌሎቹ የምርምር ጽሁፎች የአማርኛ ትርጉም አብሮ አልታተመም። ቅጽ 23 ቁጥር 1 እና 2 ሙሉ በሙሉ በእንግሊዝኛ ቋንቋ የታተሙ ናቸው። ከዚህ በኋላ በየኢትዮጵያ ሕግ መጽሄት የታተሙ የምርምር ጽሁፎች አልፎ አልፎ ካልሆነ በስተቀር ሁሉም በእንግሊዝኛ ቋንቋ የታተሙ ሲሆን ከዚህ በላይ እንደተመለከትነው የአማርኛ ትርጉማቸውን ጎን ለጎን የማተሙ ሥራ እስከ 1992 ዓ.ም ድረስ ቀጥሎ ከዚህ በኋላ ግን ይህ ተግባር እየተረሳና ቀስ በቀስ እየቀረ መጣ።

ከዚህ በላይ የኢትዮጵያ የሕግ መጽሄትን በሰፊው የዳሰስነው በሁለት ምክንያቶች ነው፡- መጽሄቱ በዕድሜ አንጋፋ በመሆኑና በኋላ የተቋቋሙት የሕግ ት/ቤቶች

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[41] የኢትዮጵያ ሕግ መጽሄት 1ኛ ቮልዩም፣ ቁጥር 2 (1957 ዓ.ም.)።

[42] በቅጽ 4 ቁጥር 2 ላይ ሁለት ኢትዮጵያዊያን አቶ ቡልቻ ደመቅሳ በኢትዮጵያ በጀት ላይ እንዲሁም አቶ ሰላሙ በቀለ ከጃክ ቫንደር ሊንደን ጋር በጋራ "የኢትዮጵያን ሕግ አርዕስት በማድረግ ስለተደረሱ ጽሁፎች ተጨማሪ መግለጫ" በሚል ርእስ የምርምር ሥራቸውን አሳትመዋል።

[43] በቅጽ 5 ቁጥር 1፣ 2፣ ና 3 ኢትዮጵያውያን የምርምር ሥራቸውን ያሳተሙ ሲሆን እንደ ሌሎች የውጭ አገር ዜጎች የምርምር ሥራዎች በእንግሊዝኛና በአማርኛ ቋንቋዎች ታትመዋል።

[44] በ1966 ዓ.ም. የተጀመረውን የኢትዮጵያ አብዮትና በ1967 ዓ.ም. የተደረገውን የሥርዓት ለውጥ ተከትሎ ቀደም ሲል በቀዳማዊ ኃይለ ሥላሴ ዩኒቨርሲቲ ሕግ ፋኩልቲ ሲያስተምሩ የነበሩ የውጭ አገር መምህራን ከአገር በመውጣታቸውና ቦታቸው በኢትዮጵያዊያን መምህራን እየተሸፈነ በመምጣቱ ከቅጽ 11 ጀምሮ ምርምራቸውን በመጽሄቱ የሚያሳትሙ ኢትዮጵያውያን ቁጥር እየጨመረና አብላጫውን እየያዘ አንደመጣ መገንዘብ ይቻላል። ነገር ግን ቀደም ሲል ከቅጽ 1 ጀምሮ ሲደረግ እንደነበረው ዋናውን የእንግሊዝኛ ቅጂና የአማርኛውን ትርጉም አብሮ የማሳተም ተግባር ከዚህ በታች እንደተጠቀሰው እስከ 1990ዎቹ መጀመሪያ ድረስ ብቻ ቀጥሏል።

የሚያሳትሟቸው የሕግ መጽሄቶች የዚህን መጽሄት ፈለግ ለመከተል መሞከራቸው ስለማይቀር ነው። ከዚህ በታች ሌሎች የሕግ መጽሄቶች ለአማርኛና ለሌሎች የክልል የሥራ ቋንቋዎች የሰጡትን ቦታ በአጭሩ እንቃኛለን። የባሕር ዳር ዩኒቨርሲቲ ሕግ መጽሄት፣ ሚዛን ሎው ሪቪው፣ የጅማ ዩኒቨርሲቲ ሕግ መጽሄት፣ የሀሮማያ ዩኒቨርሲቲ ሎው ሪቪው፣ ኢትዮጵያን ጆርናል ኦፍ ሌጋል ኢጁኬሽን እና የኢትዮጵያ ጠበቆች ማኅበር የሕግ መጽሄቶችን እንዳስሳለን።

የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሄት በ2002 ዓ.ም. የተመሠረተ ሲሆን ይህ ጽሁፍ እስከተዘጋጀበት ጊዜ ድረስ ቅጽ 6 ቁጥር 1ን አሳትሟል። ቀደም ሲል እንደጠቀስነው የመጽሄቱ የአርትኦት ፖሊሲ የምርምር ጽሁፎችን በእንግሊዝኛና በአማርኛ ቋንቋዎች ማሳተም የሚቻል መሆኑን ቢገልጽም እስካሁን ከታተሙት የምርምር ጽሁፎች ውስጥ ከአንዱ በስተቀር ሁሉም በእንግሊዝኛ ቋንቋ የታተሙ ናቸው።[45]

እንደ ምርምር ጽሁፎች ሁሉ የፍርድ ትችቶችም በተመሳሳይ ሁኔታ ከአንዱ በስተቀር ሁሉም በእንግሊዝኛ ቋንቋ የታተሙ ናቸው።[46] ከእነዚህ ሁለት አብነቶች ውጭ ሌሎች በአማርኛ ቋንቋ የሚታተሙት የተመረጡ ፍርዶች ብቻ ናቸው። ይህ ሁኔታ የኢትዮጵያ የሕግ መጽሄት ከ1992 ዓ.ም. ጀምሮ እየተከተለው ካለው መንገድ ጋር ተመሳሳይነት አለው። ይህም ሊሆን የቻለው በሁለት ምክንቶች ነው፤ የፀሀፊዎች በአማርኛ ቋንቋ ለማሳተም ፍላጎት ማጣትና[47] የመጽሄቱ የአርትኦት ፖሊሲ ናቸው። ቀደም ሲል እንደተመለከትነው በመጽሄቱ ለህትመት የሚቀርቡ ሥራዎች በእንግሊዝኛ ቋንቋ ቢዘጋጁም የአማርኛውን ትርጉም ጎን ለጎን ማተም እንደማይቻል የመጽሄቱ ፖሊሲ በግልጽ አስቀምጧል።[48] ከዚህ የምንረዳው በአማርኛ ቋንቋ ጽፎ ማሳተም ለተመራማሪው የተተወ አማራጭ እንጂ መጀመሪያ በእንግሊዝኛ ቋንቋ የተጻፈ የምርምር ጽሁፍን ወደ አማርኛ ቋንቋ ተርጉሞ አብሮ የማተሙ ተግባር በመጽሄቱ ያልታሰበበትና ቦታ የሌለው ጉዳይ መሆኑን ነው።

ሚዛን ሎው ሪቪው እ.አ.አ. በ2007 ዓ.ም. መታተም የጀመረ ሲሆን በመጽሄቱ የታተሙ የምርምር ሥራዎችን ስንመለከት ልክ እንደ ባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሄት ከአንዱ በስተቀር ሁሉም በእንግሊዝኛ ቋንቋ የታተሙ ናቸው።[49]

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[45] ከዚህ በላይ የግርጌ ማስታወሻ ቁጥር 2ን ይመልከቱ።

[46] በሪሁን አዳኛ ምህረቱ፣ *የገጠር መሬት አስተዳደርና አጠቃቀም ሕግ የተፈፃሚነት ወሰን ከጊዜ አንፃር፦ በፍርዶች ላይ የቀረበ ትችት*፣ 4 ባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሄት፣ (2006 ዓ.ም.) ይመልከቱ።

[47] ተመራማሪዎች ለምን በአማርኛ ወይም በሌሎች የክልል የሥራ ቋንቋዎች መጻፍና ማሳተም እንደማይፈልጉ ለመረዳት ቀጥሎ ያለውን ንዑስ-ክፍል ይመልከቱ።

[48] የመጽሄቱ ፖሊሲ አንቀጽ 15 "all contributions that appear on the Journal *shall be publihed in the language their author has originally authored them*" ይላል (አጽንኦት የፀሀፊው)። በእንግሊዝኛ ቋንቋ የተዘጋጁ ጽሁፎችን ወደ አማርኛ ተርጉሞ ማሳተም ያልተፈለገበት ምክንት የትርጉም ሥራው አድካሚና ራሱን የቻለ ባለሞያ መጠየቁ ሊሆን እንደሚችል ይህ ፀሀፊ ይገምታል። ከዚህ በላይ እንደተገለጸውና ፀሀፊው ከአቶ ወርቁ ያዜ ጋር ካደረገው ቃለ መጠይቅ እንደተረዳው የመጽሄቱ የአርትኦት ፖሊሲ በሚዘጋጅበት ጊዜ ይህ ጉዳይ ባለመነሳቱ ትክክለኛ ምክንያቱን ማወቅ አልተቻለም (ቃለ መጠይቅ፣ ከአቶ ወርቁ ያዜ ጋር፣ የግርጌ ማስታወሻ ቁጥር 36)።

[49] Aschalew Ashagre, *Tax Appeal Procedures in Ethiopia*, 8 MIZAN LAW REVIEW, (2014) ይመልከቱ።

የሀረማያ ሎው ሪቪው እ.አ.አ. ከ2012 ጀምሮ በመታተም ላይ ያለ ሲሆን በመጽሄቱ የሚታተሙ የምርምር ሥራዎች ሙሉ በሙሉ በእንግሊዝኛ ቋንቋ የታተሙ ናቸው። በመጽሄቱ ላይ እንደተገለፀው የምርምር ጽሁፎችን በእንግሊዝኛና በአማርኛ ቋንቋዎች ማሳትም ይቻላል። ይህ ፀሀፊ ይህን ጽሁፍ እስካዘጋጀበት ጊዜ ድረስ በሀረማያ ሎው ሪቪው የታተሙትን ሁሉንም ቅጾች ማግኘት ባይችልም በቅጽ 1 ቁጥር 2 ላይ በአማርኛ ቋንቋ የታተመ የፍርድ ትችት ማግኘት ችሏል።[50]

ኢትዮጵያን ጆርናል ኦፍ ሌጋል ኢጁኬሽን እ.አ.አ. ከ2008 ዓ.ም. ጀምሮ መታተም የጀመረ ሲሆን ከአንድ የምርምር ሥራና ከፍርድ ትችቶች ውጪ ሁሉም የምርምር ሥራዎች በእንግሊዝኛ ቋንቋ የታተሙ ናቸው።[51]

ጅማ ዩኒቨርሲቲ ጆርናል ኦፍ ሎው እ.አ.አ. ከ2007 ዓ.ም. ጀምሮ የሚታተም ሲሆን ይህ ፀሀፊ ማግኘት የቻለው ሁለት እትሞችን ብቻ ነው፤ ሁለቱም እትሞች በእንግሊዘኛ ቋንቋ የተጻፉ ናቸው። የህትመት ቋንቋን በተመለከተ የመጽሄቱ የአርትኦት ፖሊሲ የሚገልፀው ምንም ነገር የለም።

የኢትዮጵያ ጠበቆች የሕግ መጽሄት ከሚያዚያ 1998 ዓ.ም. ጀምሮ በመታተም ላይ ይገኛል። ቀደም ሲል ከተመለከትናቸው በሕግ ት/ቤቶች ከሚታተሙ መጽሄቶች በተለየ በዚህ መጽሄት የሚታተሙት የምርምር ሥራዎች በአብዛኛው በአማርኛ ቋንቋ የተጻፉ ናቸው። በመጽሄቱ ላይ በግልጽ እንደተመለከተው የምርምር ጽሁፎችን በአማርኛ ወይም በእንግሊዝኛ ቋንቋ ማቅረብ ይቻላል። ይህን መጽሄት ልዩ የሚያደርገው ነገር ቢኖር በእንግሊዝኛ ቋንቋ የሚቀርቡ የምርምር ጽሁፎች የአማርኛ ትርጉማቸው አብሮ ቢቀርብ ጎን ለጎን ሊታተም እንደሚችል ማመላከቱ ነው።[52] ይህም ቀደም ሲል እንደተመለከትነው የኢትዮጵያ የሕግ መጽሄት በህትመት ታሪኩ የመጀመሪያዎቹ አመታት ሲከተለው ከነበረው አሠራር ጋር ተመሳሳይነት አለው። ምንም እንኳ

[50] ፋሲል ወንድወሰን፣ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ 57337 በሰኔ 15/2003 እና በመ/ቁ 35621 በጥቅምት 11/2001 በሰጠው ፍርድ ላይ የቀረበ ምልከታ፣ የሥራ ውል ቆይታ በፐሮጀክት ሥራ ላይ 1 HARAMAYA LAW REVIEW, 137-144 (2013) ይመልከቱ።

[51] ፊሊጶስ አይናለም፣ ውርስ ማጣራትና የወራሽነት ሰርተፊኬት መስጠት ከፍርድ ቤት ስልጣን አንጻር ሲቃኝ፣ 3 ETHIOPIAN JOURNAL OF LEGAL EDUCATION, (2010), ዮሴፍ አዕምሮ፣ የመፋለም ክስና ይርጋ 3 ETHIOPIAN JOURNAL OF LEGAL EDUCATION, (2010), እና ኑሩ ሰኢድ፣ የፍርድ አፈጻፀም የሚታገድበት ሕግና ልማድ፡- መጠጣም ወይስ መጣረስ? 2 ETHIOPIAN JOURNAL OF LEGAL EDUCATION, (2010) በሕግ መጽሄቱ ከታተሙት የፍርድ ትችቶች መካከል የሚጠቀሱ ናቸው። ከዚህ በተጨማሪም በፍትህና ሕግ ጥናትና ምርምር ኢንስትቲዩት በባህላዊ ህጎች ዙሪያ የተደረጉ ጥናቶች "እጣፈ" በሚል ርዕስ በይድነቃቸው ክበደ፣ ኢሳያስ አየለና ገብረመስቀል ገብረዋህድ የተሰራ የምርምር ጽሁፍ በመጽሄቱ ቅጽ 4፣ ቁጥር 1 ላይ በአማርኛ ቋንቋ ታትሟል።

[52] "The Editorial Board welcomes articles written in Amharic and English, whether with or without Amharic translation" ሲል የአርታኢው ማስታወሻ ይገልፃል። ከዚህ የምንረዳው ምንም እንኳ በእንግሊዝኛ ቋንቋ ከተጻፉ የምርምር ሥራዎች ጋር የአማርኛ ትርጉማቸውን አብሮ ማቅረብ አስገዳጅ ባይሆንም ተመራማሪው ተርጉሞ ካቀረበ ግን መታተም እንደሚችል ነው። በመጽሄቱ የሚወጡ የምርምር ሥራዎች በአብዛኛው በአማርኛ ቋንቋ መታተማቸውና የአማርኛውን ትርጉም አብሮ ማተም መቻሉ የሚያመላክተው የመጽሄቱ ተደራሾች የሕግ ባለሙያዎች መሆናቸውንና ለምርምሩ ቋንቋ ልዩ ትኩረት መሰጠቱን ነው። ይህም ማኅበሩ ከተቋቋመበት ዓላማ አንጻር ተገቢና ሊበረታታ የሚገባ ተግባር መሆኑን ይህ ፀሀፊ ያምናል።

በእንግሊዝኛ ቋንቋ የሚቀርቡ የምርምር ጽሁፎችን የአማርኛ ትርጉማቸውን አብሮ ማቅረብ የሚቻል መሆኑን መጽሄቱ ቢገልጽም አንድም በእንግሊዝኛ ቋንቋ የተዘጋጀ የምርምር ጽሁፍ የአማርኛ ትርጉሙ አብሮ አልታተመም። ይህ የሆነበት ምክንያት ምናልባት የትርጉም ሥራው አድካሚ በመሆኑና በፀሀፊዎች ላይ ተጨማሪ ጫና በመፍጠሩ ሊሆን ይችላል። የትርጉሙ ሥራ በመጽሄቱ አዘጋጆች ቢሰራ ጥቅሙ ከማኅበሩ አባላት ማለትም ከጠበቆች አልፎ ለሌሎች በፍትሕ ሥርዓቱ ተዋናይ ለሆኑ የሕግ ባለሙያዎች የጎላ መሆኑ አያጠራጥርም።

በሕግ ት/ቤቶችና በኢትዮጵያ ጠበቆች ማኅበር ከሚታተሙት የሕግ መጽሄቶች በተጨማሪ በሌሎች አካላት የምርምር ሥራዎች መታተም ጀምረዋል። እነዚህ ህትመቶች በሕግ ት/ቤቶች ከሚታተሙት ልዩ የሚያደርጋቸው ትኩረታቸው ከእንግሊዝኛ ቋንቋ ውጭ ባሉ የአገሪቱ ቋንቋዎች ላይ መሆኑ ነው። በአማራ ክልል የፍትሕ አካላት ባለሙያዎች ማሰልጠኛና የሕግ ምርምር ኢንስቲትዩት የሚታተመው መጽሄት አንዱ ሲሆን መጽሄቱ በኢንስቲትዩቱ ተመራማሪዎች የተሰሩ የምርምር ጽሁፎችን በአማርኛ ቋንቋ አትሟል።[53]

በተመሳሳይ መልኩ የኦሮሚያ ሎው ጆርናል ከ2004 ዓ.ም ጀምሮ እየታተመ ሲሆን የምርምር ጽሁፎችን በኦሮምኛ፣ በእንግሊዝኛና በአማርኛ ቋንቋ ማቅረብ እንደሚቻል መጽሄቱ በግልጽ አስቀምጧል። በመጽሄቱ ቅጽ 1 ቁጥር 1 የታተሙ የምርምር ጽሁፎችን ለምሳሌ ብንመለከት በእንግሊዝኛና በኦሮምኛ ቋንቋ የታተሙ ናቸው።[54]

እነዚህ በመጨረሻ የተገለፁት ሁለት መጽሄቶች ጥሩ ጅምሮች ሲሆኑ ከታተሙበት ቋንቋ አንጻር ለፍትሕ ባለሞያዎች ተደራሽ የሚሆኑ በመሆናቸው ለፍትሕ ሥርዓቱ መሻሻል የሚያበረክቱት አስተዋጾ በቀላሉ የሚታይ አይደለም።

3.3. የሕግ ምርምርና ህትመት ቋንቋ እና የፍትሕ ሥርዓቱ ቋንቋ መለያየት ያለው አንድምታና የመፍትሄ ሃሳቦች

ከዚህ በላይ በዝርዝር እንደተመለከትነው በሕግ ት/ቤቶች የሚታተሙ የምርምር ጽሁፎች የፍትሕ ሥርዓት ባለሞያውን ግምት ውስጥ ያላስገቡና ለባለሞያው ተደራሽ ያልሆኑ ናቸው። አንድ ከፍተኛ የትምህርት ተቋም ከሚቋቋምበት አላማ ውስጥ አንዱ የአካባቢውን ማኅበረሰብ ለማስተማር፣ የምርምርና የማህበረሰብ አገልግሎት ለመስጠት እንደሆነ ይታወቃል።[55] የሕግ ት/ቤቶችም በተመሳሳይ መልኩ ለአካባቢው ማኅበረሰብ በጠቅላላ ለፍትሕ ባለሞያው ደግሞ በተለይ ተደራሽ ከሚሆኑባቸው መንገዶች ውስጥ አንዱ የምርምር ስርጸት ነው። ስለምርምር ስርጸት ስንናገር ምርምሩ የታተመበት ቋንቋ የመረጃ ድልድይ በመሆኑ ትልቁን ቦታ ይይዛል። በመሆኑም አንድ ተመራማሪ ማኅበረሰቡን ከማገልገልና ለፍትሕ ሥርዓቱ ባለሞያዎች ምርምሩን ተደራሽ ከማድረግ አኳያ 'ለማን ነው የምጽፈው?' ብሎ ራሱን በሚገባ መጠየቅ አለበት። እርግጥ ነው ቀደም ሲል እንደተመለከትነው በአካዳሚክ ሕይወት አንድ ተመራማሪ የሚጽፈው በሞያው ውስጥ (በአገር ውስጥም በውጭ አገርም) ላሉ ምሁራንና እንዲሁም ለመስኩ

[53] የሕግ ጥናትና ምርምር መጽሄት፣ ቁጥር 1 (2006) ይመልከቱ።

[54] 1 OROMIYA LAW JOURNAL (2004) ይመልከቱ።

[55] የከፍተኛ ትምህርት አዋጅ፣ አንቀጽ 4ን ይመልከቱ።

ተማሪዎች ነው። ከሕግ ሞያ አንጻር ግን እነዚህ አንባቢዎች ብቸኛው ግባችን ሊሆኑ አይገባም፤ ለፍትሕ ባለሙያዎች ተደራሽ መሆንና ምርምራችን ሞያቸውንና አሰራራቸውን ለማሻሻል እንዲያግዛቸው የሚያደርግና በፍትህ ሥርዓቱ ውስጥ የምርምር አሻራችንን የምናስቀምጥበት መንገድ አድርገን ልንወስደው ይገባል።

አሌክሳንድራ ብራውን የተባሉ ፀሀፊ በሕግ ምሁራንና በፍትሕ ባለሙያዎች መካከል መኖር ስላለበት ግንኙነት ሲገልጹ "አዳምጦና ሃሳቡን ተቀብሎ ወደ ተግባር የሚተረጉም ዳኛ ያላገኘ የሕግ ፕሮፌሰር አቅመ-ቢስ ነው፤ በሌላ መልኩ ውሳኔውንና ፍርዱን በሕግ ምሁራን አስተምህሮ ላይ ያላስመረኮዘ ዳኛ ሕግ አውጪ ነው።"[56] ይላሉ። በእነዚህ በሁለቱ በሕግ ሞያ ውስጥ ባሉ ተዋንያን መካከል ያለው ግንኙነት ለሕጉ መዳበር በጣም አስፈላጊ እንደሆነም እኒሁ ፀሀፊ ይገልጻሉ።[57] እነዚህ ተዋንያን መደማመጥና አብሮ መስራት እንዳለባቸውም ብራውን ያስገነዝባሉ።[58] የሕግ ምሁራንና የፍትሕ ባለሙያዎችን የሚያገናኘው አንዱና ዋናው ድልድይ ምርምርና ህትመት መሆኑ ለማንም ግልጽ ነው። የምርምርና ህትመቱ ቋንቋ ከመደበኛው የፍትሕ ሥርዓቱ ቋንቋ ከተለየ የተገነባው ድልድይ ሳያሻግር እንደተሰበረ መቁጠር ችግሩን ማጋነን አይሆንም።

እዚህ ላይ አንድ ጥያቄ መነሳቱ አይቀሬ ነው። አንድ የሕግ ተመራማሪ በአንድ ጊዜ ለዓለም አቀፍ አንባቢና በአካባቢው ላሉ የፍትሕ አካላት ባለሞያዎች እንዴት ተደራሽ መሆን ይችላል የሚለው ጥያቄ መሠረታዊና ልንመልሰው የሚገባን ጥያቄ ነው። በዚህ ፀሀፊ እምነት ለዚህ ጥያቄ (ችግር) የተለያዩ መፍትሄዎችን መጠቆም ይቻላል። ከዚህ በፊት በየኢትዮጵያ ሕግ መጽሄት እንደተሞከረው በእንግሊዝኛ ቋንቋ የሚቀርቡ የምርምር ሥራዎችን ወደ አማርኛ እና ወደ ሌሎች የክልል የሥራ ቋንቋዎች ለምሳሌ የመቀሌ ዩኒቨርሲቲ ሕግ ትምህርት ቤት የሕግ መጽሄት ወደ ትግርኛ፣ በኦሮሚያ ክልል የሚገኙ የሕግ ት/ቤት የሕግ መጽሄቶች (ጅማ እና ሀረማያ ዩኒቨርሲቲዎችን መጥቀስ ይችላል) ወደ ኦሮምኛ፣ የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሄት ወደ አማርኛ ተርጉሞ ከዋናው የእንግሊዝኛው ቋንቋ ቅጂ ጋር አብሮ ማተም አንዱ አማራጭ ነው።[59] ይህ ተግባር የትርጉም ባለሞያ፣ ገንዘብና ጊዜ መጠየቁ አይቀሬ ነው። ነገር ግን ከሥራው ከሚገኘው ጠቀሜታ አኳያ ሲመዘን እነዚህ በቀላሉ ሊታለፉ የሚችሉ ተግዳሮቶች ናቸው። ከዚህ አማራጭ ጋር የተያያዘው ሁለተኛው አማራጭ ተመራማሪው ከዋናው የእንግሊዝኛው ጽሁፍ በተጨማሪ ወደ አማርኛና ከላይ ወደተጠቀሱት የክልል የሥራ ቋንቋዎች ተርጉሞ እንዲያቀርብ ማድረግና አብሮ ማተም ለዚህም ተመጣጣኝ የሆነ የአይነትና የገንዘብ ማትጊያ መክፈል ነው።

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[56] Alexandra Braun, *Professors and Judges in Italy, It Takes Two to Tango*, 26 OXFORD J. LEGAL STUD. 665, 665-666 (2006).

[57] *ዝኒ ከማሁ*፣ ገጽ 666።

[58] *ዝኒ ከማሁ*።

[59] በዚህ አማራጭ የመፍትሄ ሃሳብ ፀጋዬ ረጋሳም ይስማማሉ። ለበለጠ መረጃ Tsegaye Regassa, *Launching a Law Journal in Ethiopia: Key Points to Note- Visisblity, Sustainability, Quality and Legal Relevance*, 20 JOURNAL OF ETHIOPIAN LAW, 88-89 (2009) ይመልከቱ።

ሦስተኛው አማራጭ የመፍትሄ ሃሳብ ከአገሪቱ ብሎም የሕግ ት/ቤቶች ከሚገኙበት ክልል ተጨባጭ ሁኔታ አንጻር የምርምር ትኩረት የሚሹ ጉዳዮችን በመለየት በእነዚህ ጉዳዮች ላይ የሚደረጉ የምርምር ሥራዎችን በአማርኛና በየክልሎቹ የሥራ ቋንቋ ማተም ነው። እዚህ ላይ አንድ ልንገነዘበው የሚገባን ነጥብ አለ። በእነዚህ አገራዊና ክልላዊ ጉዳዮች ላይ በእንግሊዝኛ ቋንቋ ምርምር ማድረግና ማሳተም ዓለም አቀፍ ማኅበረሰቡን በቀጥታ አይጠቅምም (ችግራቸው ስላልሆነ)፤ ኢትዮጵያዊያንንም አይጠቅምም (አንብቦና በሚገባ ተረድቶ ሥራ ላይ ማዋል ስለማይቻል)። በመሆኑም ለማሳተም ሲባል ከማሳተም በስተቀር በእነዚህ ጉዳዮች ላይ በእንግሊዝኛ ቋንቋ ማሳተም ፋይዳው እዚህ ግባ የሚባል አይሆንም።[60] ከዚሁ ነጥብ ጋር የተያያዘ አንድ ጉዳይ እንመልከት። በአንድ ወቅት የኔዘርላንድስ የትምህርት ሚኒስትር በአገሪቱ የሚገኙ ዩኒቨርሲቲዎች በዓለም አቀፍ ደረጃ ተማሪዎችን መሳብ እንዲችሉና ምሉዕ የሆኑ የትምህርት ማዕከላት እንዲሆኑ የማስተማሪያ ቋንቋቸውን ከደች ወደ እንግሊዝኛ ቋንቋ ይለውጡ የሚል ሃሳብ አቀረቡ።[61] ጉዳዩ በአገሪቱ ፓርላማ ቀርቦ ሰፊ ውይይትና ክርክር ከተደረገበት በኋላ የሚኒስትሩ ሃሳብ ተቀባይነት ሳያገኝ ቀረ።[62] ለዚህ የተሰጠው ምክንያት የማስተማሪያ ቋንቋው ወደ እንግሊዝኛ ቋንቋ የሚለወጥ ከሆነ ኔዘርላንድስ መለያ የሆነውን ባህሏን ታጣለች የሚል ነው።[63] እዚህ ላይ "ባህል" የሚለው ቃል ዳንኪራን፣ ጭፈራን፣ አመጋገብን፣ አለባበስና ሌሎች እሴቶችን ለመግለጽ የገባ ሳይሆን ከቋንቋ ጋር ተያያዥነት ያላቸውን አገር በቀል እውቀቶችን፣ አስተምህሮዎችንና አስተሳሰቦችን ለማመላከት ነው። ይህ የሚያመላክተው አገራዊ ፋይዳ ያላቸው ጉዳዮች ከአገሪቱ ቋንቋ ውጭ ባሉ ቋንቋዎች ከተጻፉና ከታተሙ ዓለም አቀፍ ማኅበረሰቡንም አይጠቅሙም፤ አገራዊ እውቀቶችና አስተምህሮዎች እንዳያድጉና እንዳያብቡ እንቅፋት መሆናቸውም አይቀርም። ይህንን ጉዳይ የባሕር ዳር ዩኒቨርሲቲ ሕግ መጽሄት በተወሰነ መልኩም ቢሆን ትኩረት ሰጥቶታል። በመጽሄቱ ረቂቅ የምርምር ጽሁፎች ከሚገመገሙበት መስፈርት ውስጥ አንዱ ነጥብ የምርምሩ አገራዊ ፋይዳ ነው። በኢትዮጵያ ሕግና ኢትዮጵያዊ ፋይዳ ባላቸው የዓለም አቀፍ ሕግ ጭብጦች ላይ የተጻፉ የምርምር ጽሁፎች ቅድሚያ እንደሚሰጣቸው መስፈርቱ በግልጽ ያስቀምጣል።[64] እዚህ ላይ ከምርምሩ ይዘት በተጨማሪ ምርምሩ የተጻፈበት ቋንቋ እንደመስፈርት ግምት ውስጥ ቢገባ ኖሮ የመጽሄቱን አገራዊና ክልላዊ አስተዋፆ እጅግ በጣም ያጎላው ነበር።

ከላይ የቀረቡትን የመፍትሄ ሃሳቦች ለመተግበር ማለትም በየክልሎቹ የሥራ ቋንቋ ጽፎ ማሳተም ቀደም ሲል እንደተጠቀሰው በራሱ ተግዳሮቶችን መደቀኑ አይቀርም። ከተግዳሮቶቹ ውስጥ ዋነኞቹ አማርኛን ጨምሮ በሌሎች የክልል የሥራ ቋንቋዎች

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[60] ለበለጠ መረጃ Altbach, *supra* note 20, at 3609-3610 ይመልከቱ።

[61] *ዝኒ ከማሁ።*

[62] *ዝኒ ከማሁ።*

[63] *ዝኒ ከማሁ።*

[64] መስፈርቱ "While not totally excluding consideration for publication of manuscripts on international law issues, the Journal gives priority for contributions pertaining to Ethiopian laws and international law issues relevant to the Ethiopian situation. This is intended to promote discourse on Ethiopian laws where literature is scanty" ይላል።

የተጻፉ የማጣቀሻና ዋቢ መጻህፍት እንደልብ ያለመገኘትና ከእንግሊዝኛ ቋንቋ ወደ እነዚህ ቋንቋዎች ቃላትን፣ ሐረጎችንና አረፍተ-ነገሮችን መተርጎም አስቸጋሪ መሆኑ ነው።[65] እነዚህ ችግሮች የትናንት እና የዛሬም ችግሮች ናቸው። ዛሬ ላይ ቀደም ሲል ይህ ፀሀፊ ወደጠቀሳቸው የመፍትሄ ሃሳቦች ካልተገባና በአገርኛ ቋንቋ መጻፍና ማሳተም ካልተጀመረ ችግሮቹ የዛሬ ብቻ ሳይሆን የነገም ችግሮች ሆነው ይቀጥላሉ። እነዚህ ተግዳሮቶች የዛሬ ተግዳሮቶች የሆኑት የትላንት እርሾ ስላልነበረ ነው። በመሆኑም አሁን ካለንበት ቦታ ትንሽ ወደ ፊት መራመድ ካልቻልን እነዚህን ተግዳሮቶችንና ችግሮችን ደጋግመን በማንሳት ብቻ የምንፈይደው ነገር አይኖርም። በዚህ ፀሀፊ እምነት ከነችግሮቹ ሁሉም ነገር በተቻለ መጠን ዛሬ መጀመር አለበት።

የማጠቃለያ ነጥቦች

ቋንቋ፣ ባህልና ማኅበረሰብ ጥብቅ ቁርኝት አላቸው። ይህ ጥብቅ ቁርኝት ከሚገለጽባቸው መንገዶች ውስጥ አንዱ በቋንቋና በሕግ መካከል ያለው መስተጋብር ነው። ከሌሎች ሞያዎች በተለየ የሕግ ሞያ ተከራክሮ ማሳመንን ያማከለ በመሆኑ የሕግ ባለሞያው የቋንቋ ችሎታ ሊያካብታቸውና ሊያዳብራቸው ከሚገቡ ጉዳዮች ውስጥ አንዱና ዋነኛው ነው። ስለ ሕግ ባለሞያው የቋንቋ ችሎታ ስንናገር ፍ/ቤት ቀርቦ ስለመከራከሩ፣ በጽሁፍ ስለሚመሠርተው ክስና ስለሚሰጠው መልስ ብቻ መናገራችን አይደለም። ፍ/ቤት ቀርቦ በሚገባ ለመከራከር፣ በጽሁፍ ክስ ለመመስረትና ደንበኛው ለቀረበበት ክስ መልስ ለመስጠት፣ ዳኛም ከሆነ ፍርዱ ትክክለኛና በሕግ መርኅ ላይ የተመሠረተ እንዲሆን ባለሙያው በሕግ ዙሪያ የተጻፉና የታተሙ ጽሁፎችን በሚገባ ማንበብና መረዳት ይኖርበታል። እነዚህን ጽሁፎች አንብቦ ለመረዳት የተጻፉበት ቋንቋና የባለሙያው የቋንቋ ችሎታ በቀጥታ ተያያዥነት ያላቸው ጉዳዮች ናቸው።

እንደሚታወቀው በኢትዮጵያ የከፍተኛ ትምህርት ተቋማት የማስተማሪያ ቋንቋ እንግሊዝኛ በመሆኑ የሕግ ት/ቤቶች የማስተማሪያ ቋንቋም እንግሊዝኛ ነው። የማስተማሪያና የምርምር ቋንቋ የሚነጣጠሉ ጉዳዮች ባይሆኑም ከእንግሊዝኛ ቋንቋ ውጭ ባሉ የኢትዮጵያ ቋንቋዎች ምርምር ማድረግና ማሳተምን የከፍተኛ ትህምርት አዋጁ አይከለክልም። በሕግ ት/ቤቶችና በሌሎች አካላት የሚታተሙ የሕግ መጽሄቶች ከእንግሊዝኛ ቋንቋ በተጨማሪ በአማርኛና በሌሎች የክልል የሥራ ቋንቋዎች መጻፍና ማሳተም እንደሚቻል ያመለክታሉ። አሁን ያለው ተጨባጭ ሁኔታ የሚያመላክተው ግን አልፎ አልፎ በአማርኛ ቋንቋ ከሚታተሙ የምርምር ጽሁፎችና የፍርድ ትችቶች በስተቀር ጉዳዩ በተግባር ተገቢው ትኩረት ያልተሰጠው መሆኑን ነው። የኢትዮጵያ ሕግ መጽሄትና በየክልሎቹ የተቋቋሙት የሕግ ት/ቤቶች የሚያሳትሟቸው መጽሄቶች በአብዛኛው በእንግሊዝኛ ቋንቋ በመታተማቸው ለፍትሕ ባለሙያዎች ተደራሽነታቸው እጅግ በጣም ውስን ነው።

የመጽሄቶቹ የአርትኡት ቦርዶች ችግሩን በሚገባ ተረድተው የሚታተሙት የምርምር ጽሁፎች የተመራማሪውን ፍላጎትና አገራዊና ክልላዊ ጠቀሜታን ያማከሉ እንዲሆኑ

[65] ከአቶ ወርቁ ያዜ ጋር የተደረገ ቃለ መጠይቅ፣ ከዚህ በላይ ማስታወሻ ቁጥር 36ን ይመልከቱ።

ለማድረግ መጣር ይኖርባቸዋል። በእንግሊዝኛ ቋንቋ ለህትመት የሚቀርቡ የምርምር ጽሁፎች እንደሁኔታው በፀሀፊው ወይም በመጽሄቱ የአርትኦት ኮሚቴ ወደ አማርኛና ወደ ሌሎች የክልል የሥራ ቋንቋዎች ተተርጉመው ጎን ለጎን አብረው እንዲታተሙ በማድረግ እንዲሁም አገራዊና ክልላዊ የምርምር የትኩረት ጭብጦችን ለይቶ በእነዚህ ላይ በአማርኛና በሌሎች የክልል የሥራ ቋንቋዎች ለሚቀርቡ የምርምር ጽሁፎች ቅድሚያ በመስጠትና ለፀሀፊው ማትጊያ በመክፈል መጽሄቶቹ ለፍትሕ ዘርፍ ባለሙያዎች ተደራሽ እንዲሆኑ ማድረግ ይቻላል። መጽሄቶቹ እነዚህን የምርምር ጽሁፎች ለፍትሕ ባለሙያዎች ተደራሽ ከማድረግ አልፈው አገርኛ እውቀት በአገርኛ ቋንቋ ለማዳበርና ለማበልጸግ ጥረት በማድረጉ ረገድ የመሠረት ድንጋይ መጣል ይችላሉ። ተመራማሪዎችም በአገርኛ ቋንቋ ምርምር ቢያደርጉ የሚገጥሟቸውን ፈተናዎችንና ተግዳሮቶችን ደጋግሞ በማንሳትና እንደመከላከያ በማቅረብ ችግሩን ወደፊት መግፋት ስለማይቻል ከነችግሮቹ ለጉዳዩ ትኩረት በመስጠት በአማርኛና በሌሎች የክልል የሥራ ቋንቋዎች መጻፍና ማሳተም መጀመርና ወደፊትም ጉዳዩ አካዳሚያዊ ባህል ሆኖ እንዲቀጥል ጥረት ማድረግ ይኖርባቸዋል።

To Whom Are We Writing? The Implications of the Difference between the Language of Legal Research and Publication, and the Working Language of the Justice System in Ethiopia

Nega Ewunetie Mekonnen[§]

Abstract

The medium of instruction and research of higher education institutions in Ethiopia is English. Similarly, English is used as the medium of instruction and language of research by law schools in Ethiopia. However, the working languages of the justice systems in Ethiopia are the respective working languages of regional states and Amharic (the working language of the Federal Government). This dissimilarity between the medium of instruction, language of research and publication; and the working language of the justice system provoked this author to ask himself the following central question: To whom are we writing? In relation to this the author believes that it is very important to answer the question whether the language in which we are writing and publishing will enable us to properly reach our potential readers. The author came to know that in the past the Journal of Ethiopian Law used to publish Amharic translation of articles it publishes in English. However, this good practice of the Journal of Ethiopian Law has been discontinued of late. Even if legal researchers write and publish to scholars and students of the legal discipline, this author argues that they should also consider and have in their mind legal professionals in the justice system. This author recommends that law journals in Ethiopia should publish scholarly works of national and regional importance in Amharic as well as the working languages of regional states.

Key words: Law, culture and language; legal research; medium of instruction; language of research; readers of legal research

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Ethiopia and the Universal Periodic Review Mechanism: A Critical Reflection

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Abstract

The UPR mechanism of the HRC is designed to periodically review the compliance of each member state of the UN with their human rights obligations. Ensuring the effectiveness of UPR requires states, inter alia, to set up the necessary institutions; prepare quality national UPR report and submit the same timely; allow the active and meaningful involvement of CSOs at different phases of UPR; make responsible decision in determining which recommendations to accept or reject; duly implement accepted recommendations; and design a strong follow-up system. Ethiopia has done better in terms of timely submission of national reports and actively taking part in the constructive dialogue compared to reporting to treaty bodies. The major gaps this article identified include: limited involvement of CSOs in Ethiopia's UPR process; exclusive reliance on ad hoc committees for the preparation of national reports; rejection of widely shared recommendations that could significantly contribute to the strengthening of human rights protection in the country; absence of UPR implementation matrix and follow-up mechanism. While resource constraints and lack of capacity can be mentioned as well founded challenges, this article contends that the underlying reason for Ethiopia's inadequate performance in the UPR mechanism within the available resources is lack of adequate attention paid to human rights by the government stemming from its developmental state ideological orientation. To improve its performance in the UPR process, this article recommends Ethiopia to establish a permanent organ responsible for UPR reporting and follow-up, allow the active participation of CSOs in its UPR process, reconsider the widely shared recommendations it has rejected whose implementation will strengthen human rights protection, and fully implement the recommendations it has accepted.

Key words: Universal Periodic Review, Human Rights Council, Ethiopia

Introduction

Up until 2006, the United Nations Commission on Human Rights (UNCHR) was the main political body of the United Nations (UN) in charge of supervising states' compliance with their human rights obligations as set out in the Universal Declaration of Human Rights (UDHR) and human rights treaties to which they are parties. The Commission achieved 'remarkable effectiveness in

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marshaling international public opinion against violator governments' and 'brought tremendous pressure to bear on governments whose practices have fallen seriously out of line with international human rights standards.'[1] However, the Commission was severely criticized for its double standards and 'discredited [for] its perceived [excessive] politicization.'[2]

On 15 March 2006, the General Assembly of the UN passed Resolution 60/251 to establish the Human Rights Council (HRC) replacing the Commission. Like the Commission, the HRC is entrusted with the task of 'promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner';[3] 'address[ing] situations of violations of human rights, including gross and systematic violations, and make recommendations thereon';[4] and 'promot[ing] the effective coordination and the mainstreaming of human rights within the United Nations system.'[5] Based in Geneva, the HRC is a subsidiary body of the General Assembly of the UN and is composed of 47 elected UN member states based on equitable geographic distribution.[6]

In order to address the credibility deficit of the UNCHR, the HRC is made different in several respects. In terms of membership, while member states of the UNCHR were elected by the majority vote of the 54 members of ECOSOC, member states of the HRC are elected by the majority vote of the General

[1] Lyal *S.* Sunga, *What Effect if Any Will the UN Human Rights Council Have on Special Procedures?*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOR OF JAKOB TH. MÖLLER 169, 174 (G. Alfredsson *et al.* eds., 2nd ed. 2009).

[2] Ibrahim Salama, *Institutional Re-engineering for Effective Human Rights Monitoring: Proposals for the Unfinished Business under the 'New' Human Rights Council*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOR OF JAKOB TH. MÖLLER 185, 186 (Gudmundur Alfredsson *et al.*eds., 2nd ed. 2009; Rhona Smith, *The United Nations Human Rights System*, *in* INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 215, 220 (Mashood Baderin and Manisuli Ssenyonjo eds., 2010); Rosa Freedman, *New Mechanisms of the UN Human Rights Council*, 29/3 Netherlands Quarterly of Human Rights 289, 292 (2011).

[3] UN General Assembly Resolution 60/251, at para. 2.

[4] *Id.*, at para.3.

[5] *Id.*

[6] *Id.*, at paras.1, 7 and 10.

Assembly to serve for a period of three years.[7] This shows that membership to the HRC requires broader political support than the UNCHR. In voting for candidates of the HRC membership, member states are required to 'take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.'[8] Moreover, based on the power vested in it by the General Assembly, the HRC improved and rationalized the special procedures of the UNCHR to make it more efficient, effective and transparent and established a new Human Rights Council Advisory Committee.[9] The most innovative aspect of the HRC that directly deals with the selectivity and politicization accusation levelled against UNCHR, however, is the Universal Periodic Review (UPR).[10] UPR is a mechanism which mandated the HRC to periodically review 'the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.'[11]

So far, the human rights situation of Ethiopia was reviewed twice by the Working Group on the UPR established in accordance with Human Rights Council Resolution 5/1 of 18 June 2007. While the first review was conducted at the sixth session of the Working Group on 9 December 2009, the second review was held at the 13th meeting of the Working Group on May 6, 2014. Both in the first and second cycles of review, Ethiopia received numerous recommendations by the HRC based on the assessment of the overall human rights situation in Ethiopia.

Despite the availability of a plethora of works on UPR in general, there is a dearth of specific research on Ethiopia.[12] This article seeks to critically assess

[7] *Id.*, at para.7.

[8] *Id.*, at para.8.

[9] See United Nations Human Rights Council: Institution-Building, Resolution 5/1 of 18 June 2007 [HRC Resolution 5/1]. The Advisory Committee replaces the former Sub-Commission on the Promotion and Protection of Human Rights.

[10] Meghna Abraham, *Building the New Human Rights Council: Outcome and Analysis of the Institution-Building Year* 34 (Friedrich-Ebert Stiftung, Dialogue in Globalization: Occasional Papers Series No. 33, 2007).

[11] UN General Assembly Resolution 60/251, *supra* note 3, at para. 5(e).

[12] There are only two works on Ethiopia. Magnus Killander, in his research, has devoted a section on Ethiopia. However, the scope of analysis of this author is limited only to analysis of Government departments or other focal persons responsible for the UPR and implementation of UPR recommendations focusing on ratification of treaties, policy and legislative measures

Ethiopia's experience in relation to the UPR mechanism and its implication for promotion and protection of human rights in the country. The article proceeds as follows. Section 1 provides a brief introduction about UPR in general. Sections 2 and 3 analyze, respectively, the institutional architecture for UPR reporting and follow-up and the extent to which Ethiopia has complied with its UPR reporting commitment. Section 4 scrutinizes the level of civil society organizations' (CSOs) participation in Ethiopia's engagement with the UPR mechanism, and Section 5 assesses the propriety of rejected recommendations and the status of implementation of accepted UPR recommendations. Capitalizing on the analysis of the institutional set up and implementation, section 6 is devoted to reviewing the availability or otherwise of strong follow-up mechanism in Ethiopia for the implementation of accepted UPR recommendations. Finally, section 7concludes the entire discussion.

1. What Is UPR and How Does It Work?

As mentioned above, UPR is a new and unique arrangement that enables the HRC to periodically review all UN member states' compliance with their human rights obligations and commitments. Ultimately, UPR aims at improving the human rights situation on the ground.[13] As a matter of principle, UPR should, *inter alia*, be a cooperative mechanism based on objective and reliable information and on interactive dialogue; ensure universal coverage and equal treatment of all States; be state-driven; fully involve the country under review; complement and not duplicate other human rights mechanisms; be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner; and ensure the participation of all relevant stakeholders.[14]

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and civil society. See M. Killander, *The Universal Periodic Review From Recommendations to Implementation: African Region's Experience in Respect of the UPR Process*, https://eiuc.org/tl_files/EIUC%20MEDIA/Global%20Campus%20of%20Regional%20Masters/research/2013-14/1.%20African%20region%E2%80%99s%20experience%20in%20respect%20of%20the%20UPR%20process.pdf. Ghetnet Metiku, on his part, made a brief analysis of the effectiveness of the UPR mechanism taking Ethiopia as a case study. This work, exclusively written based on the first cycle of review, made about a page long analysis on Ethiopian situation. See Ghetnet Metiku Woldegiorgis, *An Assessment of the Effectiveness of the UPR Mechanism: A Case Study*, http://www.slideshare.net/gmgiorgis/an-assessment-of-the-effectiveness-of-the-upr-mechanism-final.

[13] HRC Resolution 5/1, *supra* note 3, at para. 2.

[14] *Id.*, at para.3.

The basis of the review, its periodicity and order, process and modalities and final outcome are provided in institution-building package agreed up on by states in the HRC Resolution 5/1 adopted on 18 June 2007. Drawing lessons from the experience of the first cycle of review, the process and modalities of review set out in Resolution 5/1 were modified by Resolutions 16/21 and 17/119 of 2011 of the HRC .[15]

As UPR aims at reviewing the status of implementation of human rights by states, the instruments that should be used as a basis of review include: the UN Charter, UDHR; the human rights instruments to which a state under review is party, voluntary pledges and commitments made by states and pertinent international humanitarian law.[16] There are also other documents expected to be submitted to serve as a basis for review.[17] The first is a roughly 20 page national state report to be prepared by a state under review (SuR) in consultation with all relevant stakeholders.[18] The second document is a compilation by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the state concerned, and other relevant official UN documents. The third document is a summary, also prepared by the OHCHR, of credible and reliable information provided by other relevant stakeholders to the UPR. The latter two documents should not exceed 10 pages.

While it took 4 years to complete the review of all states for the first cycle, the HRC decided that the review for the second and subsequent cycles will be completed every 4.5 years.[19] The review stage is a 3 - 3.5 hours interactive dialogue between the delegates of the SuR and other states.[20] Each state review is conducted in one working group composed of 47 member states of the HRC

[15] Resolution 5/1 itself envisages that the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned.

[16] *Id.*, at para. 1.

[17] *Id.*, at para. 15.

[18] The General Guidelines on how to prepare information that is to be submitted as part of the UPR were adopted by the HRC on 27 September 2007. See Decision 6/102 of 27 September 2007.

[19] HRC Resolution 16/21, at para 3.

[20] The time of review has been extended from 3 to 3.5 hours by HRC Decision 17/119. See para. 3.

and facilitated by a group of three states rapporteurs (troika).[21] While all states including members of the Working Group and other states have the opportunity to participate in the interactive dialogue through raising questions or forwarding comments, other stakeholders can only attend the review.[22]

The outcome of the interactive dialogue is a report consisting of a summary of the proceedings of the review process and recommendations to the SuR.[23] The SuR has to take a stand on the recommendations it accepts or rejects (noted).[24] The outcome of the review shall be adopted by the plenary session of the Council at its regular meeting.[25] During a one hour time earmarked for the approval process, the SuR, members of the Council, observer states and other stakeholders including CSOs are given the opportunity to express their views on the outcome of the report before the endorsement.[26] The SuR, assisted by the international community, has the primary responsibility to implement the recommendations it accepted.[27]

One of the principles of UPR is that it is supposed to complement and not duplicate the existing human rights mechanisms. Thus, the whole exercise could be futile unless the review adds value to the other human rights mechanisms, particularly the works of the treaty bodies.[28] UPR, if properly applied, could complement the works of the treaty bodies and is advantageous in a number of ways. It plays an important reminder role for states to submit their reports to the treaty bodies and implement their recommendations.[29] The fact that the review in the UPR process covers all human rights instead of being confined to human rights enunciated in a single treaty sets it apart from the works of individual

[21] HRC Resolution 5/1, *supra* note 3, at para. 18(d).

[22] *Id.*, at paras.18(b) and (c).

[23] *Id.*, at para. 26.

[24] *Id.*, at para. 32

[25] *Id.*, at para. 25.

[26] *Id.*, at paras. 30 and 31.

[27] *Id.*, at para.33.

[28] Treaty bodies are committees composed of independent experts, established under each human rights treaty and mandated to monitor the implementation of the treaty in which they are established. To know more about treaty bodies, see OHCHR, *The United Nations Human Rights Treaty System* (Fact Sheet No. 30/Rev.1, 2012).

[29] *Id.*, at 4.

treaty bodies.[30] Unlike treaty bodies, the UPR is also a mechanism that allows the SuR to implement recommendations it accepts, although it can also willingly implement recommendations it rejects. It is believed that the SuR will be more committed to implement the recommendation which it consents to do so. Furthermore, the cooperative spirit among states throughout the UPR process; 'a peer group pressure from within the regional or sub-regional group' as a result of the political nature of the process; and the active technical and financial assistance that the OHCHR extends to states with limited capacities and resources are said to create a conducive atmosphere for states to submit report, come forward for the constructive dialogue, accept recommendation and implement the same.[31] Unlike that of the treaty bodies, all the working group and plenary sessions of UPR are webcast.

Based on the assessment of the first cycle of the UPR completed in 2012, there are signs of the success of the mechanism. First, all 193 UN member states had prepared their reports and participated in a review of their human rights records.[32] This in itself can be taken as an important achievement compared to the treaty bodies where a number of states seek to avoid scrutiny by the treaty bodies.[33] Second, out of more than 21,000 recommendations issued, more than 70 percent were accepted.[34] Third, in terms of implementation, a 2014 study by

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[30] For example, the Human Rights Committee receives state reports, engage in a constructive dialogue with member states and issue concluding observation only in respect of civil and political rights covered in the ICCPR.

[31] Rachel Brett, *A Curate's Egg: UN Human Rights Council* (August 2009), https://www.upr-info.org/sites/default/files/general-document/pdf/-acuratesegg200908.pdf.

[32] UPR Info, *Beyond Promises: The Impact of the UPR on the Ground* (2014), http://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf. UPR Info is a non-profit, non-governmental organization based in Geneva, Switzerland. It aims to raise awareness of the UPR and to provide capacity-building tools to all stakeholders, such as UN Member States, civil society, media, and academics.

[33] A 2010 data indicated that 'only 16 % of the [state] reports due in 2010 and 2011 were submitted in strict accordance with the due dates established in the treaties or by the treaty bodies.' For more information on this data, see Note by the Secretary-General, *United Nations Reform: Measures and Proposals* (2012), www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening_en.doc.

[34] UPR Info, *A Guide for Recommending States at the UPR*, https://www.upr-info.org/sites/default/files/general-document/pdf/upr_info_guide_for_recommending_states_2015.pdf. For similar data, see also E. McMahon, *The Universal Periodic Review: A Work in Progress: An Evaluation of the First*

UPR Info disclosed that, 48 percent of the recommendations had triggered actions by the SuR.[35] It is important to note, however, that although these data indicate success in their own right, the ultimate achievement of UPR has to be judged in the light of the improvements that it has brought in terms of the protection and promotion of human rights in the SuR.

There are a number of criticisms labeled against UPR and challenges that hamper its effectiveness as credible forum for open and frank discourse on concrete issues of human rights. To begin with, the performance of states in the realization of human rights is evaluated by other states instead of independent legal experts. Scholars contend that 'political bodies are inappropriate for dealing with legal questions.'[36] Second, many states wrongly view the constructive and cooperative process of UPR 'as a limitation on any criticism of the failure of a state to fulfill its human rights obligations.'[37] The third challenge observed by several CSOs and linked to the second is that 'governments use the UPR as a podium for grandstanding to defend their human rights record' instead of rectifying their deficiencies.[38] In relation to this problem, empirical research covering 55 states including the 47 members of the HRC disclosed that the majority of states (32 out of 55countries) 'acted as a mutual praise society, misusing the process in order to legitimize human rights abusers, instead of holding them to account.'[39] Fourth, while CSOs have significant role in the UPR

Cycle of the New UPR Mechanism of the United Nations Human Rights Council (2012), http://library.fes.de/pdf-files/bueros/genf/09297.pdf.

[35] UPR Info, *supra* note 32, at 5. For similar information, see also Brett, *supra* note 31, at 10.

[36] Olivier de Frouville, *Building a Universal System for the Protection of Human Rights: The Way Forward*, *in* NEW CHALLENGES FOR THE UN HUMAN RIGHTS MACHINERY 254 (Cherif Bassiouni and William Schabas, eds., 2011). See also Manfred Nowak, "It's Time for a World Court of Human Rights" *in* NEW CHALLENGES FOR THE UN HUMAN RIGHTS MACHINERY 23 (C. Bassiouni and W. Schabas eds., 2011). In case of treaty bodies, the members of each committee are appointed having regard to their recognized competence in human rights issues. See OHCHR, *supra* note 28, at 20.

[37] Abraham, *supra* note 10, at 40.

[38] CIVICUS, *Enhancing the effectiveness of the UN Universal Periodic Review: A Civil Society Perspective* (2015),

https://www.uprinfo.org/sites/default/files/generaldocument/pdf/civicus_enhancing_the_effectiveness_upr_2015.pdf.

[39] UN Watch, *Mutual Praise Society, Country Scorecard and Evaluation of the Universal Periodic Review System of the U.N. Human Rights Council* (2009), http://www.unwatch.org/wp-content/uploads/2016/01/Mutual-Praise-Society.pdf.

process, a number of CSOs reported that their governments 'employ divisive tactics to limit the impact of civil society engagement in the UPR.[40] These tactics include: enforcement of restrictive legislation, persecution and imprisonment of human rights defenders and 'mobilization of government affiliated or supported organizations (Government Organized and Non-governmental Organizations) to undermine the effective participation of independent civil society voices'.[41] Fifth, while lack of specificity of the recommendations to the SuR is raised as a concern,[42] a more debilitating drawback of the UPR mechanism is lack of a meaningful independent follow-up of implementation of recommendations by the SuR. The only mechanisms of follow-up recognized in the UPR resolutions, as mentioned above, are submissions of a non-mandatory mid-term report 2.5 years after the last review and holding the state accountable at the subsequent review. It is not adequately possible to closely and timely identify whether and to what extent states have implemented the recommendations applying these reporting procedures. In default of strong follow-up and enforcement mechanisms, states can simply ignore recommendations without consequences. It seems that it is out of this concern that HRC Resolution A/HRC/RES/5/1 authorizes the HRC to deal with, 'as appropriate, cases of persistent non-cooperation with the mechanism.'[43] However, what constitutes 'persistent non-cooperation' is not defined in the same document. It remains to be seen how the HRC will interpret this phrase and the implication thereof.

2. Ethiopia's Institutional Architecture for UPR Reporting and Follow-up

Arising from the treaties it ratified, Ethiopia has multiple reporting obligations to global and regional treaty bodies and other mechanisms. Furthermore, the country assumes the responsibility to implement the human rights treaties it ratified and recommendations of various treaty bodies and track and follow-up the status thereof. Undoubtedly, timely submitting reports with the expected quality and effectively following-up implementation requires a strong institutional arrangement.

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[40] CIVICUS, *supra* note 38, at 5.

[41] *Id.*, at 6.

[42] UPR Info and Addis Ababa University, *Post-UPR Conference on Ethiopia Accepted Recommendations* (2015),

https://www.upr-info.org/sites/default/files/document/ethiopia/session_19__april_2014/aau_uprinfo_ethiopia_post-upr_conference_proceedings.pdf.

[43] HRC Resolution 5/1, *supra* note 3, at para. 38.

Consolidating state practices, the OHCHR prepared an important practical guide to national mechanisms for reporting and follow-up.[44] According to this document:

> A national mechanism for reporting and follow-up is a national public mechanism or structure that is mandated to coordinate and prepare reports to and engage with international and regional human rights mechanisms (including treaty bodies, the universal periodic review and special procedures), and to coordinate and track national follow-up and implementation of the treaty obligations and the recommendations emanating from these mechanisms.[45]

The guideline further states that the national mechanism, which could be ministerial, inter-ministerial or a separate institution, discharges its activities in coordination and consultation with relevant governmental and non-governmental organizations.[46] The document goes on to pinpoint basic requirements for effective national mechanism. According to the guideline, the national mechanism should preferably be a well-staffed standing (non-*ad hoc*) structure and possess engagement, coordination, consultation and information management capacities.[47]

In Ethiopia, until recently, the Ministry of Foreign Affairs, in consultation with relevant governmental agencies and stakeholders, had the general legal mandate of handling issues of implementation of global and regional human rights treaties.[48] Within this general mandate, the Ministry was also entrusted to prepare and submit national human rights reports to the relevant treaty bodies and other mechanisms.[49] Within the Ministry, it was the International Legal Affairs Directorate that was entrusted with coordination and facilitation of the

[44] OHCHR, *National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms* (2016), http://www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf.

[45] *Id.*, at 2.

[46] *Id.*

[47] *Id.*, at 12-29.

[48] Foreign Service Proclamation, Proclamation No. 790, *Fed. Neg. Gaz.*, Year 22, No. 52, Art. 3(7), (2013).

[49] *Id.*

preparation of reports and follow-up the implementation of treaties and UPR recommendations.[50]

In practice,[51] national reports used to be prepared by *ad hoc* committees (taskforces) drawn from relevant ministries and other government offices and chaired by the Ministry of Foreign Affairs. The OHCHR East Africa Regional Office also assisted state reporting both to treaty bodies and the UPR, financially and technically. The *ad hoc* committees were organized and convened when the deadline for submission of reports is approaching. This practice had two implications: the reports were prepared without adequately assessing the implementation of previous recommendations and with limited input from all relevant stakeholders. CSOs were basically given the opportunity to express their views on the occasion of the draft report validation workshop.

Because the *ad hoc* national committees organized to prepare reports would become inactive after the completion of preparation of the reports, there was no organ that tracks the implementation of recommendations. There was a glaring problem in Ethiopia in terms of having an effective mechanism for monitoring the implementation of UPR recommendations throughout the implementation period. Once each ministry and other government office is initially informed about the recommendations Ethiopia received at a workshop organized for this purpose, there is no follow up mechanism afterwards to ascertain whether each institution is implementing the recommendations appertaining to its mandate.

Pursuant to the Federal Attorney General Establishment Proclamation of 2016, the mandate of the Ministry of Foreign Affairs regarding international human rights matters is taken over by the Attorney General. The Office of the Attorney General, which replaced the Ministry of Justice, is now in charge of all legal and prosecutorial matters formerly assumed by various ministries and agencies.[52] In

[50] Killander, *supra* note 12, at 2.

[51] The practice can be discerned from HRC, *Ethiopian National Report under the Universal Periodic Review Mechanism* para.1 (4 August 2009), [Ethiopian First Cycle Report] and HRC, *Universal Periodic Review Report of the Working Group on the Universal Periodic Report Review: Ethiopia* Para. 1 (4 January 2010), [First UPR Working Group Report on Ethiopia] as well as the interview the author conducted with individuals who took part in the preparation of reports.

[52] Federal Attorney General Establishment Proclamation, Proclamation No. 943, *Fed. Neg. Gaz.*Year 22, No. 62, Preamble, (2016). The preamble also states that the reason for the establishment of Attorney General is to 'comprehensively protect public and government interest and deliver uniform, effective and efficient service.'

relation to international human rights treaties and commitments, article 6(8)(e) of the establishment proclamation gives the Attorney General three specific powers: following up the implementation of international and regional human rights treaties ratified by Ethiopia, responding to issues and concerns relating to human rights in consultation with appropriate bodies and preparation of national human rights implementation reports in collaboration with appropriate stakeholders. It is not yet clear which department within the Office of the Attorney General will perform these activities. The participants of the roundtable discussion organized by Vision Ethiopia Congress for Democracy (VECOD)[53] and UPR-Info and attended by representatives of government, civil society, the media and other stakeholders to discuss the adoption of a joint UPR recommendations monitoring plan and cooperation between the government of Ethiopia and other stakeholders[54] suggested the establishment of a permanent inter-ministerial UPR implementation committee that includes CSOs. The participants further suggested the Secretariat of the National Human Rights Action Plan operating within the Attorney-General to serve also as a secretariat of the proposed inter-ministerial committee.

3. The State Reports and Quality of the Delegation

As earlier noted in section 1, the national report is one of the documents on the basis of which the UPR review takes place. The report, ideally, to be prepared through broad consultation process with all relevant stakeholders, should not exceed 20 pages[55] and be submitted at least 6 weeks before review by the Working group.[56] A state report has to be prepared based on the specific requirements of the General Guidelines for the Preparation of Information under the Universal Periodic Review adopted by the HRC in its Decision 6/102, 27 September 2007. The document states that, content wise, the state report should highlight: the methodology and broad consultation followed for the preparation of the report; overview of the country and normative and institutional framework; the promotion and protection of human rights on the ground; assessment of achievements and difficulties; priorities in order to overcome these difficulties; request for technical assistance; and presentation of the follow-up of the previous review.

[53] VECOD is a local CSO working on human rights and democratization issues.

[54] UPR Info, *Concept Note, Ethiopia UPR Stakeholders Roundtable*, May 10, 2016, Radisson Blu Hotel, Addis Ababa.

[55] HRC Resolution 5/1, *supra* note 3, at para. 15(a).

[56] *Id.*, para. 17.

These requirements were later modified by the HRC Decision A/HRC/DEC/17/1191 to suit the special features of reports of the second and subsequent cycles. The major change introduced which underlies specific requirements is the need to make sure that the second and subsequent cycles focus on information about implementation of the recommendations received during the previous review and new developments after the previous review.[57] Because the national report should comply with the 20-page limit requirement, the report has to include only basic information with the possibility of attaching more detailed information by way of annex to the report. One of the best practices documented by UPR Info after scrutiny of 84 state reports is states' inclination to use annexure to include additional but important information. Among others, the annexes could contain: a list of ratified international instruments; a list of legislation; training activities for law enforcement officials; jurisprudence; a copy of the provisions of the national action plan on human rights; civil society recommendations, requests and complaints raised during the national consultations; and a table containing the status of implementation of each recommendation. [58]

So far, Ethiopia has submitted two national reports, each 22 page long, without any annex, for the first and second cycles of UPR review. It submitted the first report on 4 August 2009 and the second report on 30 January 2014. These facts show that Ethiopia attempted to submit reports that comply with the page limit and well ahead of the sessions for the reviews.

Both reports state the methodology applied for their preparation. The preparation of the reports was preceded by an awareness creation training and consultation workshop about the UPR mechanism in general and preparation of national reports in particular, jointly organized by the Ministry of Foreign Affairs and the Ethiopian Human Rights Commission (EHRC) with the technical assistance of the East Africa Regional Office of the OHCHR.[59] The reports were then prepared by *ad hoc* drafting committees and the draft reports were presented to relevant stakeholders including CSOs for their enriching

[57] HRC Decision 17/119, *supra* note 20, at para. 2.

[58] UPR Info, *Identifying Best Practices: An Analysis of National Reports* (2015), https://www.upr-info.org/sites/default/files/general document/pdf/upr_info_identifying_best_practices_in_national_reports_2015.pdf.

[59] Ethiopian First Cycle Report, *supra* note 51, at para. 5; and HRC, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21* para.4 (30 January 2014), [Ethiopian Second Cycle Report].

comments.[60] The reports do not, however, give us information about the CSOs and other stakeholders who participated in the consultation workshop organized to collect feedbacks on the draft reports. The reports also lack information about the concerns, recommendations and questions raised by stakeholders, particularly CSOs and the outcome of the consultation with stakeholders. The incorporation of this information in the report is crucial to clarify the degree to which CSOs were allowed to voice their opinion in the drafting process in view of their allegation that they were not meaningfully involved in the process. These information could have been included using an annex not to exceed the page limit for the national report.

The second report of Ethiopia principally focused on providing information regarding the implementation of the accepted UPR recommendations and the progress achieved since the first report. However, the report also unnecessarily addressed events that took place before the first report or facts that should have been included in the first report, such as protections accorded by the Federal Democratic Republic of Ethiopia Constitution, the Revised Family Code, the Criminal Code and the establishment of children's parliaments.[61] The report provided data about status of implementation of 91 accepted recommendations[62] out of the total of 99 accepted recommendations by Ethiopia in the first review. The lack of update on the status of implementation of the remaining 8 accepted recommendations shows us that either these recommendations have not been implemented at all or data is unavailable. It is important to note that the absence of this information cannot be justified by the page limit requirement for the report. Similar to other countries, an annexed table to the report could have been used to indicate the status of implementation of each accepted recommendation.

Following the submission of the national report, states' human rights situation is reviewed in Geneva by a HRC working group on a date fixed by the Council. The review of Ethiopia in the first and second cycles took place on 9 December 2009 and 6 May 2014, respectively. The delegations of Ethiopia for the first and second cycle of review were headed, respectively, by Ambassador Fisseha Yimer,

[60] Ethiopian First Cycle Report, *supra* note 51, at paras. 1 and 3; and Ethiopian Second Cycle Report, *supra* note 59, at para. 2.

[61] Ethiopian Second Cycle Report, *supra* note 59, at paras. 5, 74, 75, 79, respectively.

[62] Recommendations 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33,34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 59, 60, 61, 62, 63, 64, 65, 66,67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95 and 97.

Special Adviser to the Minister, Ministry of Foreign Affairs[63] and Berhane Gebre-Christos, State Minister of Foreign Affairs[64]. The fact that the delegation is led by high-ranking government officials coupled with the fact that the delegation is representative of diverse government agencies and ministries could be indicative of the special attention Ethiopia paid to the UPR.

To sum up, except the problem associated with the lack of comprehensiveness of the UPR national reports, Ethiopia has done better in terms of timely submission of national reports and actively taking part in the constructive dialogue compared to reporting to treaty bodies. Ethiopia has generally a weak reporting record to treaty bodies. With the exception of fair reporting to the Committee on the Convention on the Rights of the Child and relatively better reporting status to the Committee on the Convention on the Elimination of All Forms of Discrimination against Women, the country is notorious for non-reporting and delay in reporting to other treaty bodies.[65]

At this juncture, a question worth pondering about is: why is this so given that state reporting under the UPR mechanism and before treaty bodies are more or less similar? One explanation for this, at least in relation to the first cycle, could be the benefit the UPR national reporting has gained from a project designed and implemented through the technical and financial assistance of the OHCHR to reduce Ethiopia's reporting backlogs to treaty bodies and an impetus arising from the project. It could also be explained by the fact that the UPR procedure is a live-streamed political exercise and states including Ethiopia worry for their images. However, the most plausible justification for such differential performance espoused by Takele Soboka as applied to all African states, is something related to the fact that the UPR is a state-driven mechanism and thereby fits in to the wishes of African states.[66] Unlike the adversarial nature of the procedure before treaty bodies, the UPR procedure is based on consensus

[63] First UPR Working Group Report on Ethiopia, *supra* note 51, at para. 1 and Annex.

[64] Ethiopian Second Cycle Report, *supra* note 59, at para. 1 and Annex.

[65] For more on this, see Mizanie Abate, *A Rights-Based Approach to HIV Prevention, Care, Support and Treatment: A Review of Its Implementation in Ethiopia* (2012), http://acumen.lib.ua.edu/content/u0015/0000001/0001073/u0015_0000001_0001073.pdf.

[66] Takele S. Bulto, *Africa's Engagement with the Universal Periodic Review: Commitment or Capitulation?*, *in* HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 235, 248 (Hilary Charlesworth and Emma Larking eds., 2015).

building.[67] Moreover, while NGOs have active role in the examination of state reports before treaty bodies, states in the UPR procedure 'do not fear questions from NGOs nor the presentation of contradictory data from NGOs during the dialogue, and as a result enjoy a sense of control over the dialogue.'[68]

4. CSOs Involvement in Ethiopia's Engagement with UPR

UPR is not an ideal procedure for CSOs to make optimal contribution. CSOs are not allowed to take floor at the interactive dialogue phase of the UPR process although they can attend the review sessions. This does not, however, mean that the UPR mechanism is totally devoid of space for CSOs to make an impact for its effectiveness. In spite of the fact that UPR is a state-driven exercise, the HRC Resolution 5/1 sets out areas for direct or indirect involvement of CSOs.[69] This resolution and prior experiences make clear that CSOs may contribute to the efficacy of the process, *inter alia*, through participation in national consultations held by the SuR as it prepares its national report; submitting their own report; lobbying participating states to play active role in the interactive dialogue phase; making oral statements at the HRC during the adoption of the report; monitoring the implementation by the SuR of the UPR recommendations it accepted with a cooperation spirit; encouraging recommending states to monitor their own recommendations made to the SuR; and dissemination of the UPR outcome report.[70]

The Ethiopian government, in both of its UPR national reports submitted so far, states that it invited CSOs to comment on the draft reports.[71] Similarly, the head of the Ethiopian delegation in his introductory presentation in the first cycle of review pointed out that the report 'was prepared in a transparent and participatory manner with the participation of all relevant actors and

[67] *Id.*

[68] *Id.*, at 247.

[69] See HRC Resolution 5/1, *supra* note 3, at paras. 15(c), 18(c), 31 and 33.

[70] James Jolley, *An Academic Study of the Universal Periodic Review (UPR) from the Perspective of Children's Rights* (2012), http://resourcecentre.savethechildren.se/sites/default/files/documents/6982. For discussions on the roles of CSOs under the UPR mechanisms, see also Lawrence Moss, *Opportunities for Non-governmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council*, 2/1 Journal of Human Rights Practice 122, 130-131 (2010); and UPR Info, *supra* note 32, at 10.

[71] Ethiopian First Cycle Report, *supra* note 51, at paras. 3-4.

stakeholders.'[72] However, the reports do not contain the list of CSOs that participated in the consultation; nor do they contain a detailed account of comments and concerns raised by the CSOs. Contrary to what the government stated in its report, CSOs 'have raised concerns about their exclusion in the preparations of UPR second cycle report'.[73]

In terms of submission of their own UPR reports, the participation of Ethiopian local CSOs is extremely low. Out of the total of 20 stakeholders' submissions to the first cycle review of Ethiopia, only four of the reports were submitted by local CSOs.[74] Similarly, out of the total of 22 stakeholders' submissions to the second cycle review of Ethiopia, only three of the reports were submitted by local CSOs.[75] In both cycles of review, the majority of submissions were made by foreign-based CSOs.

The situation is much worse when we see the role of CSOs in monitoring the implementation of UPR recommendations accepted by Ethiopia. Indeed, various workshops were organized by UPR Info, VECOD and Addis Ababa University School of Law and attended by CSOs and other stakeholders with a view to sharing the outcome of the second cycle of review[76] enhancing the involvement of CSOs in monitoring implementation of UPR recommendations in Ethiopia

[72] First UPR Working Group Report on Ethiopia, *supra* note 51, at para. 4.

[73] This concern was raised at UPR conference organized by AAU School of Law on the 7th of October 2015 in Addis Ababa. As included in the conference report, the theme of the conference was: effective monitoring of UPR recommendations through multi stakeholder engagement and awareness raising on the UPR process in Ethiopia. Representatives of the following CSOs attended the conference: Peace & Development Committee (PDC), VECOD, Ethiopian Centre for Disability Development (ECDD), Ethiopian Women Lawyers Association (EWLA), and Ethiopian Human Rights Council (HRCO).

[74] Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (C) of the Annex to Human Rights Resolution 5/1: Ethiopia, 22 September 2009. The local CSOs are: Action Professionals' Association for the People; Ethiopian Human Rights Council; Ethiopian Women Lawyers' Association; and Organization for Social Justice in Ethiopia.

[75] Summary prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Ethiopia, 27 January 2014[the 2014 Compilation of Stakeholders Submission]. The local CSOs are: Human Rights Council (HRCO), VECOD, Ethiopian Human Rights Service (EHRS), and Ye Ethiopia Ye Fiteh Seratoch Ma'ekel (Centre for Legal Pluralism in Ethiopia).

[76] UPR Info and Addis Ababa University, *supra* note 42, at 1.

and establishing cooperation among stakeholders for effective implementation;[77] and discussing the adoption of a joint UPR recommendations monitoring plan.[78] The outcomes of the workshops, however, have been hardly implemented. Thus, the level of participation of CSOs in Ethiopia's engagement with the UPR mechanism is unacceptably low. Given this fact, it is imperative to ask: why is that so?

First and foremost, the 2009 Charities and Societies (CSOs) Proclamation denied CSOs adequate space for their involvement in promotion of human rights in general and their participation at the UPR mechanism in particular. The Proclamation introduced a strange way of classification of CSOs as Ethiopian, Ethiopian resident [79] and foreign CSOs [80] with serious consequences. The Proclamation reserves human rights activism to only Ethiopian CSOs. [81] According to article 2(2) of the Proclamation, a CSO 'formed under the laws of Ethiopia' and 'all of whose members are Ethiopians' is regarded as an Ethiopian CSO provided that it uses not more than ten percent of its funds received from foreign sources. The implication of this stipulation is that foreign and foreign funded CSOs are not legally allowed to carry out promotion of human rights in Ethiopia. These CSOs are legally authorized to carry out only service delivery undertakings and relief activities.[82] Second, the local CSOs that are permitted by the Proclamation to engage in human rights-related activities have limited capacities to take part in the UPR process.[83] Owing to the foreign funding restriction as well as lack of domestic source of finance, these CSOs have serious financial problems. Third, because reports are prepared at the time when the deadline for submission is closing, the government does not have enough time to

[77] *Effective Monitoring and Follow-up on Implementation of the UPR Recommendations*, Workshop Report Prepared by the School of Law, Addis Ababa University. The Workshop was held on October 7, 2015.

[78] UPR Info, *supra* note 54, at 1.

[79] CSOs are categorized as Ethiopia resident CSOs if they 'are formed under the laws of Ethiopia and consist of members dwelling in Ethiopia, and…receive more than 10 percent of their funds from foreign sources.' See Charities and Societies Proclamation, Proclamation No. 621, *Fed. Neg. Gaz.* Year 15, no. 25, Art. 2(3), (2009) [the CSOs Proclamation].

[80] CSO are categorized as foreign CSOs if they 'are formed under the laws of foreign countries or consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources.' See CSOs Proclamation, *supra* note 79, Art.2(4).

[81] *Id.*, Art. 14 (5) cum (2) (j-n).

[82] *Id.*, Art. 14 (2) (a-i).

[83] UPR Info, *supra* note 42, at 2.

undertake adequate consultation with stakeholders. This prevents NGOs from providing inputs on the report prepared by the government.

5. Implementation of UPR Recommendations by Ethiopia

5.1 UPR Recommendations to Ethiopia

The most important outcome of the UPR review is recommendations by states which they believe, if implemented, will improve human rights in the SuR. Ethiopia has received a bunch of recommendations in both cycles of review. It received 142 recommendations in the first cycle of UPR of which it noted/rejected 43 recommendations. It also received 252 recommendations in the second cycle of review of which it rejected 64 recommendations.

While there is no restriction on the number and type of recommendations states may reject and the state will not be accountable for lack of implementation of recommendations it rejected, this author contends that this discretion of states should not go to the extent of making the entire UPR exercise fruitless and should not defeat the ultimate aim of UPR which is improving the human rights situation on the ground in the SuR. With respect to Ethiopia, there are several rejected recommendations which, if accepted and implemented, could significantly contribute to fostering the level of protection of human rights in the country. These recommendations include: amendment of the laws governing CSOs, Anti-Terrorism and Freedom of the Mass Media and Access to Information;[84] issuing an open-ended and standing invitation to all special procedures;[85] undertaking credible and independent investigations of alleged human rights violations;[86] and ratification of optional protocols which enable individuals to lodge complaints in the event of infringement of their rights by the Ethiopian Government.[87] The amendment of the above three laws have been recommended unanimously by all treaty bodies[88] as well as a host of states during

[84] First UPR Working Group Report on Ethiopia, *supra* note 51, Recommendations 23-27 and 32. HRC, *Report of the Working Group on the Universal Periodic Review: Ethiopia* (7 July 2014), Recommendations 158.34-47 and158.49-53[Second UPR Working Group Report on Ethiopia].

[85] *Id.*, Recommendations 6-12. See also Second UPR Working Group Report on Ethiopia, *supra* note 84, Recommendations 158.18-22 and 158.31.

[86] *Id.*, Recommendations 18-19.

[87] Second UPR Working Group Report on Ethiopia, *supra* note 84, Recommendations 158.3, and 158.8-158.9.

[88] This can be seen from the concluding observations they have issued to Ethiopia.

the constructive dialogue in both cycles of review of Ethiopia. This author believes that this widely shared recommendation is legitimate in the light of the threat they pose to the enjoyment of a host of human rights.[89] The latter three recommendations complement the level of protection of human rights by Ethiopian national institutions, such as courts and the EHRC by allowing independent investigation of human rights violations and providing redress for victims of human rights violations. At this point, it is important to note that being a party to a mother treaty which guarantees rights is less helpful unless the country also ratifies optional protocols and makes declaration that enables individuals to take human rights violations to treaty bodies. What Ethiopia has consistently done, however, is that it ratifies the mother treaties which set out rights without ratifying or accepting the procedures which give international quasi-judicial institutions the opportunity to provide redress for human rights infringements.[90]

Another worrisome issue in relation to UPR recommendations rejected by Ethiopia is the reason the government invoked to justify its stance. In response to the recommendations of several states to amend or repeal provisions of the media, CSOs and anti-terrorism laws that contravene human rights treaties to which Ethiopia is a party, the Government of Ethiopia contended that '[t]hese recommendations stem from disrespect to sovereign rights of states to design legislations and policies that are consistent with international human rights

[89] See studies undertaken in this area: Hiruy Wubie, *Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective*, 25/2 Journal of Ethiopian Law 24 (2012); Wondwossen Demissie, *Criminalization and Punishment of Inchoate Conducts and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law*, 24/1 Journal of Ethiopian Law 24 (2010); Debebe Hailegebriel, *Restrictions on Foreign Funding of Civil Society*, https://chilot.files.wordpress.com/2011/08/restrictions-on-foreign-funding-of-civil-society.pdf; Mizanie Abate, *The Implications of 2009 Ethiopian CSOs Law on the Right to Freedom of Association*, 27/1 Journal of Ethiopian Law (2015), Mesenbet A. Tadeg, *Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763600; and Tracy Ross, *A Test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation*, 114 Penn State Law Review (2010).

[90] With the exception of the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child, Ethiopia did not accept the competence of any treaty body to receive communications against it.

laws.'[91] A close reading of these recommendations, however, reveals that they are framed in specific manner indicating the rights these laws may infringe. Hence, the position of the Government of Ethiopia to reject recommendations based on sovereignty to make laws and policies is flawed. It arises from a misunderstanding of the obligation of Ethiopia to make sure that the laws and policies it makes should conform to human rights treaties it ratified.

The Ethiopian Government also rejected a number of recommendations on the ground that 'their implementation would contravene the Ethiopian Constitution and undermine the culture and societal assets of the various nations, nationalities and peoples of the country.'[92] The Government did not, however, specify which recommendations have this effect. The author of this article opines that these kinds of blanket justifications open a Pandora's Box for not accepting and thereby implementing recommendations that can improve the level of protection of human rights in Ethiopia. Moreover, the author believes that the merit and significance of recommendations should be weighted in the light of the UDHR and treaties ratified by Ethiopia, instead of national laws and cultures.

It is important to note that the UPR recommendations are not new to Ethiopia. Albeit with slight modifications in formulations, they were made by various treaty bodies in their concluding observations to Ethiopia.[93] The difference is that while states are given the opportunity to choose which recommendations they may accept or reject in the case of UPR recommendations, there is no formal procedure to make such election before the treaty bodies.

5.2 Preparation of Implementation Plan/Matrix

The SuR is primarily responsible for implementation of accepted recommendations and to facilitate the implementation, it is encouraged to

[91] HRC, *Report of the Working Group on the Universal Periodic Review: Ethiopia Addendum Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review* Para. 8 (18 March 2010).

[92] *Id.*, para. 11.

[93] See, for example, concluding observations issued by the CRC, CEDAW, HRC and ACHPR on Ethiopia. See also Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to the Human Rights Council Resolution 5/1: Ethiopia, 18 September 2009; and Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to the Human Rights Council Resolution 5/1and Paragraph 5 of the Annex to the Council Resolution 16/21: Ethiopia, 12 February 2014 [the 2014 Compilation of Information of UN Bodies].

undertake broad consultation with all relevant stakeholders.[94] The international community is also expected to provide financial and technical assistance to the SuR in its endeavor to implement recommendations.[95]

The implementation of accepted recommendations should commence after the adoption of the outcome report by the HRC and will last until the next UPR. It means that the implementation is supposed to be completed within four years for the first cycle of review and four and half years for the second cycle review recommendations. With respect to Ethiopia, the implementation period for the first cycle of UPR is over. What is an issue currently is the implementation of the recommendations of the second cycle of review. The HRC adopted the outcome of the UPR review on 19 September 2014. Thus, the implementation period will last from this date to March, 2019.

Although it is not required in the relevant HRC resolutions pertaining to UPR, countries' best practices show the instrumentality of developing UPR recommendations implementation plan/matrix.[96] The implementation plan, preferably to be developed in a consultative process involving all relevant stakeholders, is believed to facilitate follow-up of implementation of the recommendations. Taking Kenya's experience as an example, the implementation matrix can be prepared in a table containing recommendations (clustered based on substance, order of priority etc.), specific action areas, indicators to track progress, government body responsible, potential partners and timetable for the implementation of each recommendation.[97]

While the implementation of the first cycle of UPR recommendations in Ethiopia was not guided by a timely prepared implementation matrix, there are some attempts to prepare the plan for the second cycle. In January 2015, UPR-Info and Addis Ababa University School of Law organized a UPR dialogue forum attended by representatives of the government and CSOs and the participants, *inter alia*, discussed clustered recommendations accepted by

[94] HRC Resolution 16/21, *supra* note 19, para. 17.

[95] HRC Resolution 5/1, *supra* note 3, at para. 36.

[96] In this regard, one can mention Kenya's experience. See Office of the Attorney General and Department of Justice, *Universal periodic review 2nd cycle implementation matrix 2015-2019*, https://www.upr-info.org/sites/default/files/general-document/pdf/kenya_2nd_cycle_final_matrix_2016.pdf.

[97] *Id.*

Ethiopia and identified implementation modalities.[98] Several months later, in May 2016, VECOD and UPR-Info organized a one day roundtable discussion attended by representatives of government, civil society, the media and other stakeholders to deliberate on the possibility of laying down 'a joint UPR recommendations monitoring plan/tool'.[99] The meeting, however, did not result in monitoring plan as much of the time was devoted to awareness raising about the UPR mechanism and discussion on institutional arrangement for implementation of UPR recommendations in Ethiopia.

Generally, two years after the adoption of the outcome of Ethiopian UPR review, the country has not yet developed UPR recommendations action plan. Lack of action plan seriously has affected coordinated, efficient and effective implementation of the recommendations. In relation to this, UPR Info observed implementation challenges 'that are already glaring with the implementation of the 2014 recommendations including lack of proper coordination or knowledge of who is doing what, among others.'[100]

5.3 Implementation Status of Accepted Recommendations

As mentioned above, Ethiopia received 142 recommendations in the first cycle of UPR review, of which it accepted 99 recommendations. It also received 252 recommendations in the second cycle of review, of which it accepted 188 recommendations. This section attempts to analyze the implementation status of UPR first cycle accepted recommendations. The implementation status of UPR second cycle accepted recommendations is not discussed in this article for its period of implementation has not yet expired. The article does not attempt to analyze the implementation status of each and every recommendation accepted during the first cycle of review. Instead, it only focuses on recommendations calling for relatively specific action/s,[101] whose implementation has wider implication for protection of a set of human rights and that can be realistically implemented within the 4 year implementation period. The author made a broad assessment of the implementation status of more than 78 of the 99 accepted

[98] UPR Info and Addis Ababa University, *supra* note 42, at 1.

[99] UPR Info, *supra* note 54, at 3.

[100] *Id.*

[101] Most of the recommendations accepted by Ethiopia are general whereas recommendations rejected by the country are overwhelmingly specific. Consequently, it is difficult to ascertain the implementation of accepted but vague recommendations.

recommendations. The recommendations are thematically clustered for the purpose of analysis.

An attempt to evaluate the status of implementation or the actual impact of recommendations has to show whether the implementation of the recommendations has improved the human rights situation on the ground. However, doing so requires field research which needs more resource and time. This article limits itself to assessing the specific action/s that the government has taken to implement accepted recommendations. The assessment is made based on the personal observation of the author, implementation report submitted by Ethiopia in its second cycle UPR report, stakeholders' submissions to the HRC, information contained in the reports of different UN bodies as compiled by the OHCHR for Ethiopia's second cycle review, and states' views on the status of implementation of accepted recommendations during the second cycle of review. The author of this article does not take the position that the various measures the government of Ethiopian has taken as described in this Section are exclusively attributable to UPR recommendations.

There are times when states may implement rejected recommendations. An Assessment made by UPR Info in this regard disclosed that "an average of 19% of 'noted' recommendations do trigger action from governments."[102] The author has tried to investigate whether Ethiopia has implemented any of the recommendations it rejected but found none.

5.3.1 Ratification of Human Rights Treaties

The first cycle UPR recommendations for Ethiopia called for the signing and ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention on the Rights of Persons with Disabilities (CRPD), both of which were accepted by Ethiopia. The recommendation for the signature and ratification of the optional protocols to the CRC was also accepted without indicating which optional Protocol was accepted. Ethiopia has ratified CRPD on 7 July 2010, Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography on 25 March 2014 and the Optional Protocol to CRC on the Involvement of Children in Armed Conflict on 14 May 2014.

[102] UPR Info and Addis Ababa University, *supra* note 42, at 3.

5.3.2 Reporting to Treaty Bodies

Ethiopia received a recommendation calling for timely reporting to the treaty bodies. Within the period of implementation of the recommendations of the first cycle of review, Ethiopia has submitted reports in 2009 in respect of the following treaties: the International Convention on the Elimination of all forms of Racial Discrimination (CERD); CEDAW; the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); CRPD; the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); CRC, African Charter on Human and Peoples' Rights (ACHPR); and African Charter on the Rights and Welfare of the Child (ACRWC).[103]

However, Ethiopia failed to submit the seventeenth to nineteenth reports overdue since July 2013 under CERD, second report due in July 2014 under the ICCPR, eighth report due in 2015 under CEDAW and second report due in December 2014 under CAT.

5.3.3 Establishing an Effective and Inclusive UPR Follow-up Mechanism

In its report to the HRC on the implementation of a recommendation calling for the establishment of 'an effective and inclusive process to follow-up on recommendations emerging' from the UPR, the only thing Ethiopia stated is that it organized a national consultative workshop aimed at awareness raising and implementation of the accepted recommendations in December 2010.[104] The author, as discussed in Sections 2 and 6 of this article, found out that the country has not yet put in place effective UPR recommendations follow-up mechanism.

5.3.4 Taking Legal and Policy Measures

States made several recommendations, both general and specific, on the need to make legal and policy measures to strengthen the level of protection of human rights in Ethiopia. Although Ethiopia succeeded in adopting laws,[105] some of the

[103] Ethiopian Second Cycle Report, *supra* note 59, at para. 21.

[104] *Id.*, para. 2.

[105] The laws enacted within the fist cycle implementation period include: Anti-Terrorism Proclamation No. 652/2009; A Proclamation to Provide for the Electoral Code of Conduct for Political Parties No. 662/2009; Proclamation to Ratify the Convention on the Rights of Persons with Disability No. 676/2010; Federal Judicial Administration Council Establishment Proclamation (as Amended) No. 684/2010; Social Health Insurance Proclamation No. 690/2010; Proclamation to Ratify Protocol to Prevent, Suppress and Punish Trafficking in

legislation introduced pose a threat instead of fostering protection of human rights. A case in point in this regard is the Anti-Terrorism Proclamation which, as mentioned above, is widely criticized for its inconsistency with international human rights standards.

The recommendation for the formulation of a national plan of action on human rights has been given effect. Ethiopia launched a National Human Rights Action Plan (NHRAP) for 2013-15 in June 2013. However, in their joint submission to the second cycle of Ethiopian review before the UPR, local and foreign CSOs stated that the NHRAP, prepared without the participation of CSOs, did not: 'provide for specific modalities for participation of CSOs during its implementation and monitoring'; 'spell out specific implementation measures or timeframe'; and 'address mechanisms and official policies that violated citizens' human rights'.[106] The period of implementation of the NHRAP expired in 2015 and the Government has recently adopted the second NHRAP which is expected to be implemented in the next five years.[107]

While the specific recommendation to put in place a policy dedicated to assisting and protecting internally displaced persons and refugees was not implemented, Ethiopia has adopted a Criminal Justice Policy.[108]

5.3.5 Building Institutional Capacity

An important area where Ethiopia received and accepted several recommendations is regarding institution building in general and strengthening the EHRC in particular. In relation to the EHRC, Ethiopia was recommended to open more branch offices, give the Commission access to detention centers and ensure that the Commission complies with relevant international standards and the Paris Principles. Accordingly, the EHRC opened six more regional branch offices and monitored detention centers.[109] However, there are still concerns over the EHRC's compliance with relevant international standards and the Paris Principles and human capacities and competencies.[110]

Persons Especially Women and Children Ratification No. 737/2012; and Registration of Vital Events and National Identity Card Proclamation No. 760/2012.

[106] 2014 Compilation of Stakeholders Submission, *supra* note 93, at para. 6.

[107] The Federal Parliament approved the second NHRAP in December 2016.

[108] Ethiopian Second Cycle Report, *supra* note 59, at para. 9.

[109] *Id.*, paras. 14 and 28.

[110] 2014 Compilation of Information of UN Bodies, *supra* note 93, at paras.26-29.

Another important development in relation to institution building is the establishment of a National Committee on the Elimination of Harmful Traditional Practices mandated to oversee the implementation of the National Action Plan to Eliminate Forced Marriage, Arranged Marriage and Early Marriage.

5.3.6 Engagement with and Giving Space to CSOs

States forwarded a host of recommendations to Ethiopia pertaining to CSOs in general and human rights defenders in particular, including: furthering constructive engagement with CSOs in its human rights activities; guarantying that all CSOs operate freely; and ensuring full respect for the rights of association and assembly of CSOs in line with Ethiopia's Constitution and its international obligations. In its implementation report, the Ethiopian Government pointed out that the CSOs Proclamation created conducive environment for the operation of CSOs; that its senior officials held discussions with various CSOs to respond to their concerns; and the EHRC collaborated with CSOs in the protection and promotion of human rights.[111] It is important to note, however, that the CSOs Proclamation which the Government claimed to have created an enabling atmosphere for the functioning of CSOs has been identified by several states in the interactive dialogue and all treaty bodies in their respective concluding observations to Ethiopia as a law that limits the space for operation of foreign and foreign funded human rights CSOs. The human rights CSOs, on their part, also submitted that this law has actually hindered them from making contribution and there is limited engagement of the government with CSOs.[112]

5.3.7 Technical Assistance and Cooperation

During the interactive dialogue of the first cycle, Ethiopia received and accepted recommendations on the need to request necessary technical assistance and cooperation from international community to build its capacity, address challenges to the implementation of various human rights and put in place follow-up mechanism for the implementation of UPR recommendations.

In line with these recommendations, Ethiopia reported that it: organized a national consultative workshop in December 2010 on implementation UPR

[111] Ethiopian Second Cycle Report, *supra* note 59, at paras. 27 and 31.

[112] See 2014 Compilation of Stakeholders Submission, *supra* note 93, at paras. 6, 9, 29 and 53-58.

accepted recommendations with the technical assistance of the OHCHR; benefiting from the technical assistance and in collaboration with various international organizations, partner states, NGOs, it has implemented programs aimed at the realization of various rights; invited the Special Rapporteur of the African Commission on Human and Peoples Rights on Freedom of Expression and Access to information in Africa; permitted country visits by the Special Rapporteur on Freedom of Association and Assembly and the Special Rappourteur on Torture in 2011 and 2013 respectively; became a member of the International Ombudsman Institution and the African Ombudsman and Mediators Association; and requested technical assistance for institutional capacity building and implementation of human rights.[113]

5.3.8 Realizing the Rights of Specific Groups

The recommendations on the realization of human rights of specific groups include the rights of women, children, and internally displaced persons (IDPs). Regarding the rights of women, Ethiopia was recommended, *inter alia*, to eradicate violence against women (VAW), take additional measures to reduce maternal mortality, and address the gender disparity in accessing education and resources, women's limited political representation and participation in decision-making. In report detailing implementation progress, Ethiopia highlighted the various measures it took to reduce gender disparity in terms of ensuring women's and girls' access to education at all levels.[114] It also gave a detailed account of the strategies it implemented to eradicate VAW in terms of awareness creation, organizing capacity building workshops to law enforcement officials, putting in place the National Strategy on Elimination of Harmful Traditional Practices in 2012, investigation and prosecution of violence against children and provision of psychological and legal advice for victims of VAW;[115] improved maternal health as a result of improved access to medical facilities, antenatal care, post-natal service, skilled health personnel attendance of births; and the results achieved.[116] To deal with gender disparity in all aspects of women's public life, Ethiopia reported, it has mainstreamed gender issues in all sectors, implemented women empowerment strategies and established the necessary institutions.[117] While

[113] Ethiopian Second Cycle Report, *supra* note 59, at paras. 2, 101-05 and 109.

[114] *Id.*, para. 50.

[115] *Id.*, paras. 64-69.

[116] *Id.*, para. 53.

[117] *Id.*, paras.59 and 60.

Ethiopia is appreciated for the various measures it has taken, there are still concerns in respect of, among others, the high maternal mortality rate of 470 per 100,000 live births.[118]

As regards the rights of children, the recommendations basically focused on taking measures to realize rights of children to food, timely registration of all births and reduce infant mortality. Although the recommendation on birth registration has not been implemented within the implementation period, the law that requires birth registration, Registration of Vital Events and National Identity Cards, came into force on August 6, 2016. In terms of the realization of the right to food, the country reported the specific measures it has taken, such as providing street children with skills and vocational trainings and adoption of a community-based Revised National Nutrition Program and the International Code of Marketing on Breast-Milk Substitutes.[119] Also included in Ethiopia's implementation report is the achievement in reducing infant mortality.[120]

Referring to the recommendation to continue its efforts to protect IDPs, Ethiopia reported that it has signed, but not ratified, the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa and implemented a Disaster Risk Management System.[121] Unsatisfied with the measures taken, UNHCR and the Human Rights Committee continued to express their concerns over the lack of national strategic framework and a designated government institution for the protection and assistance of IDPs.[122]

5.3.9 Realization of Specific Human Rights

The rights to education and freedom of expression are the two rights in relation to which Ethiopia received frequent recommendations. With regard to the right to education, Ethiopia was recommended to progressively enhance the quality of education, make primary and general secondary education and related training free of charge, further develop the education system and increase education sector public expenditure. Ethiopia, with a view to implementing the recommendations, has 'allocated ever-increasing resources' to education, ensured the equitability of

[118] 2014 Compilation of Information of UN Bodies, *supra* note 93, at para.65.

[119] Ethiopian Second Cycle Report, *supra* note 59, at para. 86.

[120] *Id.*, para.54.

[121] *Id.* Para.92.

[122] 2014 Compilation of Information of UN Bodies, *supra* note 93, at paras.80-81.

access to education at all levels and made primary education free to all citizens.[123] Despite the progress Ethiopia has achieved, treaty bodies continue to express their concern over Ethiopia's failure to make primary education free and compulsory.[124] There is also a concern over quality of education at various levels.

The recommendations on freedom of expression were forwarded with reference to legal bottlenecks in the operation of the media and political parties. In its implementation report, Ethiopia stated that it took a position that the Proclamation to Provide for Freedom of the Mass Media and Access to Information No. 590/2008 enabled the media to operate freely and citizens to establish and run media services.[125] Ethiopia also mentioned that it opened additional TV channels, licensed more public and private media organizations and community-based radio stations to ensure 'that citizens would enjoy the plurality of opinions'.[126] Contrary to the claim of the Ethiopian Government, the Human Rights Committee opined that the aforementioned Proclamation undermines the right to freedom of expression through exorbitant 'registration requirements for newspapers, the severe penalties for criminal defamation and the inappropriate application of that law in the combat against terrorism.'[127] Unsatisfied by the measures taken, states also recommended Ethiopia to take steps to guarantee freedom of expression, particularly to journalists and media workers.[128]

5.3.10 Addressing Factors that Hamper the Enjoyment of Rights

Ethiopia received and accepted a host of recommendations on counter-terrorism, HIV/AIDS, unemployment, human trafficking, female genital mutilation (FGM) and human rights illiteracy.

In relation to the fight against terrorism, Ethiopia accepted recommendations on the necessity of taking measures to ensure that counter-terrorism actions are undertaken without undermining the country's human rights obligations. Ethiopia, in its implementation report, contended that the Anti-Terrorism

[123] Ethiopian Second Cycle Report, *supra* note 59, at para. 48.

[124] 2014 Compilation of Information of UN Bodies, *supra* note 93, at para.66.

[125] Ethiopian Second Cycle Report, *supra* note 59, at para. 24.

[126] *Id.*, para. 25.

[127] 2014 Compilation of Information of UN Bodies, *supra* note 93, at para.44.

[128] Second UPR Working Group Report on Ethiopia, *supra* note 84, Recommendations 155.104-05.

Proclamation mandated the parliament to proscribe and de-proscribe a group as a terrorist organization upon ascertainment of whether 'a particular group will pose a threat to the safety and security of the country and the population' and reported the educational campaign it undertook to law enforcement officials on the various principles of due process.[129] Given that the federal parliament is currently 100% controlled by the ruling party and its allies, there is little guarantee that the enlisting of groups as terrorists will be done based on legal than political considerations. Due to the incompatibility of provisions of the Anti-Terrorism Proclamation with Ethiopia's human rights obligations, the amendment of the Anti-terrorism Proclamation has been recommended by a number of states, which Ethiopia has rejected.

Ethiopia also accepted a recommendation calling for fighting HIV/AIDS. In its report on the implementation of this recommendation, Ethiopia stated that it has adopted and implemented the health sector development plan which 'focuses on prevention and mitigation of health problems such as HIV/AIDS, tuberculosis and malaria' and has significantly expanded comprehensive HIV/AIDS services.[130] Ethiopia has been one of the countries praised for putting HIV/AIDS under control. However, there are still concerns regarding the pervasiveness of stigma and discrimination against people living with HIV.[131]

In another recommendation, Ethiopia was requested to continue the efforts to tackle unemployment in urban areas. The Ethiopian Government reported that it, applying different employment generation mechanisms, was able to reduce unemployment by more than 2.6 million in the years 2010/11-2012/13.[132] This is a good progress; but, the situation requires more concerted and sustained efforts given that Ethiopia is still a country with high urban unemployment rate.[133]

Ethiopia was also requested to take all the necessary measures to prevent trafficking in persons, especially of children. Taking this recommendation

[129] Ethiopian Second Cycle Report, *supra* note 59, at paras. 29-30.

[130] *Id.*, para.56.

[131] 2014 Compilation of Information of UN Bodies, *supra* note 93, at para.21.

[132] Ethiopian Second Cycle Report, *supra* note 59, at para. 41.

[133] Urban unemployment rate in Ethiopia is above 18%. See Horn Affairs-English, *Urban Unemployment Hits Two Decades Low: Ethiopia*, http://hornaffairs.com/en/2011/04/27/urban-unemployment-hits-two-decades-low-ethiopia/.

positively, the country has established a National Council to Combat Trafficking in Persons in 2011; organized a series of awareness creation forums on trafficking and its consequences; set up human trafficking control centres; 'established Reception Centres around border posts for victims of trafficking'; implemented an action plan on reducing illegal migration and human trafficking; and brought perpetrators of this crime to justice.[134] Appreciating the measures taken, several treaty bodies and UNHCR, however, continue to express their concern over the prevalence of trafficking in women and children and requested Ethiopia to continue to put the situation under control, prosecute and punish perpetrators and assist victims.[135]

Cognizant of the prevalence of deep-rooted traditional harmful practices in the country, Ethiopia was requested to exert every possible effort to eradicate FGM. As a follow-up report to this recommendation, the Government reported that, with a view to eliminating FGM, it has earmarked the necessary budget to fight FGM; endorsed a national strategy and action plan on the elimination of harmful traditional practices including FGM; and designed programs aimed at dissemination of information and experience sharing among regional states and their law enforcement officials.[136] Even after the expiry of the period for the implementation of recommendations of the UPR first cycle, a number of treaty bodies kept on urging the country to eradicate FGM and other harmful traditional practices and CEDAW urged Ethiopia to amend the Criminal Code to increase penalties for FGM.[137]

As regards human rights literacy, Ethiopia was requested to double its effort in raising human rights awareness and, as part of this effort, translate international human rights instruments in to local vernaculars. In its implementation progress report, Ethiopia mentioned the activities undertaken including the translation of human rights instruments into Amharic, Affan Oromo, Tigrigna, Somali and Afar languages[138] and human rights awareness creation to prosecutors, the police, prison administrators and members of the military.[139]

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[134] Ethiopian Second Cycle Report, *supra* note 59, at paras. 76-77.

[135] 2014 Compilation of Information of UN Bodies, *supra* note 93, at para.36.

[136] Ethiopian Second Cycle Report, *supra* note 59, at paras. 71-73.

[137] 2014 Compilation of Information of UN Bodies, *supra* note 93, at para.32;

[138] Ethiopian Second Cycle Report, *supra* note 59, at para. 14.

[139] *Id.*, para. 92.

5.4 Challenges to Implementation of UPR Recommendations

The analysis in Section 5.3 above, although it does not give us a full picture of the level of implementation of UPR accepted recommendations of the first cycle, throws some light on what has been accomplished and what has not be accomplished within the four years implementation period. In as much as there are implemented recommendations, there are also recommendations either partially or totally unimplemented. An important indication of lack of full or partial implementation of most accepted recommendations in the first cycle is the fact that most of the recommendations Ethiopia received in the second cycle were similar to the recommendations it received in the first cycle of review.[140]

At this point, figuring out the challenges that hindered the full implementation of accepted recommendations is crucial. Ethiopia, in its report, indicated that the main challenges 'include poverty, resource constraints, lack of capacity, and climate change impacts' as well as 'the diverse and complex nature of the nation [which] makes it difficult to create uniform strategies and programs for the promotion and protection of human rights in all regions.'[141] Given that human rights instruments guide how national laws, policies and strategies have to be formulated and implemented, it makes less sense to contend that the diversity in Ethiopia is a challenge for implementation of human rights in Ethiopia. UPR Info agreed with the challenges that the Government pointed out except that it did not consider the diversity issue as a challenge and added that 'lack of proper coordination or knowledge of who is doing what' is also another problem.[142]

The author of this article agrees with most of the challenges identified; but, argues that the underlying cause for the problem is lack of adequate focus on the part of the Government stemming from its developmental state ideological orientation. I contend that the developmental state ideological disposition somehow detracts the focus of the Government from doing more within available resources. The lack of UPR implementation plan and follow up mechanism that contributes to the unsatisfactory level of implementation are themselves partly the result of limited attention that the Government paid for the protection and promotion of human rights. Characteristically, a developmental state like Ethiopia tends to prioritize economic development over protection of human

[140] UPR Info, *supra* note 54, at 1.

[141] Ethiopian Second Cycle Report, *supra* note 59, at para. 108.

[142] UPR Info, *supra* note 54, at 2.

rights on the unacceptable belief that this will enable the state to secure rapid economic growth.[143]

6. Follow-Up Mechanisms of Implementation of Accepted Recommendations

To ensure that UPR recommendations are timely and adequately implemented by the SuR, there has to be a follow up system. Strangely, however, UPR shares the problem of lack of tough follow-up mechanism with treaty bodies albeit it is supposed to introduce improvement over the existing procedures. It heavily relies on periodic reporting as a means of holding the SuR accountable for implementation of accepted recommendations. The SuR should report the status of implementation or progress made in terms of implementation of accepted recommendations at the next cycle of review. The HRC Resolution specifically states that the subsequent cycle of the review should, among others, focus on implementation of recommendations received in previous cycle. [144] Thus, according to the initial arrangement, it takes 4-4.5 years for the SuR to report the progress it made regarding implementation of recommendations and for the HRC and recommending states to express their views on the status of implementation of accepted recommendations. Cognizant of the inadequacy of this follow-up mechanism, the HRC, in its Resolution 16/21 of 2011, encouraged states 'to provide the Council, on a voluntary basis, with a mid-term update on follow-up to accepted recommendations.'[145] If states enthusiastically act according to this encouragement, they are expected to submit mid-term progress report to the HRC. The submission of the mid-term report enables the HRC to monitor progress roughly every two years.

The loose follow-up system of the HRC could be reinforced by putting in place a strong internal monitoring system by each state. The states' general duty to realize human rights at domestic level includes the obligation to design and apply an effective domestic system for monitoring their implementation. Experiences have demonstrated that the states' internal follow-up system for implementation of UPR recommendations could be effective where they set up well-organized

[143] For detailed discussion on this issue, see Assefa Fiseha Yeibyio, *Ethiopia: Development with or without Freedom? in* HUMAN RIGHTS AND DEVELOPMENT: LEGAL PERSPECTIVES FROM AND FOR ETHIOPIA 101-138 (E. Brems, C.Van der Beken and Solomon Abay eds., 2015).

[144] HRC Resolution 5/1, *supra* note 3, at para. 34.

[145] HRC Resolution 16/21 *supra* note 19, at para.18.

coordinating machinery and develop well thought out implementation plan.[146] While there is no single model on how the coordination mechanism should be structured, Section 2 of this article has outlined basic requirements for its effectiveness. Section 5.2 of this article has also discussed how a national UPR implementation plan can be prepared.

Turning our attention to the Ethiopian situation, again, Sections 2 and 5.2 of this article have uncovered the absence of a well-organized coordination mechanism and implementation plan, respectively. From this, it logically follows that the country cannot have an effective follow-up system. This is supported by the reality on the ground which shows a glaring lack of follow-up of the progress made in the implementation of UPR recommendations accepted by Ethiopia.[147]

7. Conclusions

The UPR mechanism of the HRC, put in place in 2006 as part of the UN human rights system reform, is envisioned to periodically review the compliance of each and every member state of the UN with its human rights obligations and to ultimately improve the situation of human rights in the SuR. So far, the human rights situation of Ethiopia was reviewed twice under this mechanism. Both in the first and second cycles of review, the country received and accepted numerous recommendations by the HRC based on the assessment of the overall human rights situation in Ethiopia. It is the implementation of these recommendations and resultant improvement in the situation of human rights on the ground that makes the UPR a fruitful exercise.

Ensuring the effectiveness of UPR, as a state-driven arrangement, requires states, among others, to set up the necessary institutions, prepare quality national UPR report and submit the same timely, allow the active and meaningful involvement

[146] See The Danish Institute for Human Rights, *Universal Periodic Review – First Cycle Reporting Methodologies from the Position of the State, Civil Society and National Human Rights Institutions* (2011), http://www.humanrights.dk/files/media/dokumenter/udgivelser/upr-first_cycle-reporting_methodologies.pdf; and International Organization of La Francophonie, *Universal Periodic Review: Implementation plan of recommendations and pledges* (2013), https://www.upr-info.org/sites/default/files/general-document/pdf/oif_guide_upr_implementation.30.04.2013_e.pdf.

[147] This fact was confirmed by government officials. See presentation by Mr. Mitiku Mekonnen, former Human Rights Protection & Monitoring Directorate Director, EHRC, entitled 'Reflection of the Two-Cycle UPR Process: Ethiopian Human Rights Commission.' *at* UPR Info and Addis Ababa University, *supra* note 42, *at* 6.

of CSOs at different phases of UPR, make a responsible decision in determining which recommendations to accept or reject, implement accepted recommendations, and design a strong follow-up system.

Institutionally, it was the Ministry of Foreign Affairs which had the general legal mandate of preparation of reports and follow-up until the mandate is handed over to the Federal Attorney General as of 2 May 2016. In practice, national reports used to be prepared by *ad hoc* committees drawn from relevant ministries and other government offices with the Ministry of Foreign Affairs serving as the chair. For lack of adequate time for report preparation by the committees, the reports were prepared without adequately assessing the implementation of previous recommendations and with limited input from all relevant stakeholders. The practice also shows us that the country is devoid of UPR implementation follow-up mechanism. It is not yet clear which department within the Attorney General will perform these activities.

So far, Ethiopia has submitted two national reports in the UPR exercise. Save the problem associated with the lack of comprehensiveness of the UPR national reports, Ethiopia has done better in terms of timely submission of national reports and actively taking part in the constructive dialogue compared to reporting to treaty bodies. CSOs had limited involvement in Ethiopia's engagement in the preparation of reports, submission of their own UPR reports, and monitoring the implementation of UPR recommendations accepted by Ethiopia. This is attributable to the limited legal space created by the CSOs Proclamation for their operation; weak capacity of local CSOs; and the reluctance of the Government of Ethiopia to engage CSOs.

Although Ethiopia has received a bunch of recommendation in both cycles of UPR, it rejected several of them. While there is no specific limit to a country's power to reject recommendations, it does not make sense to reject recommendations from the perspective of strengthening the level of protection of human rights in Ethiopia, such as recommendations calling for amendment of laws that are widely believed to be inconsistent with Ethiopia's human rights obligations, granting permission for UN independent investigations of alleged human rights violations and acceptance of individual complaint procedures. Rejecting UPR recommendations relying on sovereignty of the country and inconsistency of recommendations with national laws and culture would defeat the very purpose of the UPR exercise.

An analysis of the implementation status of UPR first cycle accepted recommendations disclosed that in as much as there are recommendations that have been fully or partially implemented, there are several recommendations not implemented within the four years' implementation period. The lack of satisfactory implementation can be gleaned from the similarity of most of the recommendations the Government of Ethiopia received in the second cycle review with the recommendations received during the first round. The absence of UPR implementation matrix and follow-up mechanism partly explains why several accepted recommendations have not been implemented. Overall, while resource constraints and lack of capacity can be mentioned as well founded challenges, the underlying reason for Ethiopia's inadequate exploitation of the UPR mechanism within the available resources is lack of adequate attention paid to human rights by the Government stemming from its developmental state ideological orientation. The insufficient attention paid by the Government for UPR in particular and human rights in general can be discerned from lack of permanent body dedicated to UPR reporting and follow-up, the indispensability of rejected recommendations, lack of full implementation of accepted recommendations and the limited space it afforded CSOs in its engagement with UPR. Thus, unless Ethiopia establishes a permanent organ responsible for UPR reporting and follow-up, allow the active participation of CSOs in its UPR process, reconsiders and accepts the widely shared recommendations it rejected whose implementation will strengthen human rights protection and fully implement the recommendations it accepted, the UPR's avowed purpose of improving human rights situation on the ground will remain a distant dream for this country.

Preferred Shares under Ethiopian Company Law: The Ignored Vehicles of Corporate Finance?

Assefa Aregay Sefara[*]

Abstract

There is growth in the number of share companies in present day Ethiopia. Generally, companies fund their operations from different sources. Equity financing and debt financing are the prominent ones. Ordinary shares and preference shares form the equity financing form of the corporate financing. Yet, in Ethiopia equity financing is dominated by the basic security forms (ordinary shares) and preference shares are underutilized. This article examines how the Ethiopian company law treats preference shares.

Key words*:* Corporate finance, Ethiopian company law, preference shares, ordinary shares

1. Introduction

The legal regime governing Company Law in Ethiopia consists of the 1960 Commercial Code and other complementary and/ or sector specific laws. The Commercial Code contains legal concepts mainly borrowed from the continental European legal codes. Rules on corporate financing are amongst the norms brought to Ethiopia by the promulgation of the 1960 Commercial Code. A study is underway for the complete revision of the 1960 Commercial Code, but as of today no new Commercial Code has been adopted and the 'old' Commercial Code is still in force.

Writing on the subject of reception of western laws and legal institutions in Ethiopia one author suggested that unlike the areas of family relations, successions and land-holding systems, the commercial laws could be better absorbed in Ethiopia as there were no customary laws in that field.[1] He correctly observed the dearth of rules on commercial matters compared to the diverse customary rules in the areas of personal relationships and land-holding system at that time. The author's observation remains agreeable even decades later with

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[1] John. H Beckstrom, *Transplantation of Legal systems: An early report on the Reception of Western Laws in Ethiopia*, 21 THE AMERICAN JOURNAL OF COMPARATIVE LAW 557, 561 (1973).

regard to the adoption and practice of business concepts such as preference shares.

The absorption of imported commercial norms in Ethiopia has taken longer time than predicted. Different factors account for this problem. In the first place, the level of economic development of Ethiopia and the donor countries (from where the rules were imported) was so dissimilar. Ethiopian business community at that time was unfamiliar with the foreign commercial legal concepts. The Imperial Government started implementing the Commercial Code despite unfamiliarity with the rules. What is worse, with the downfall of the Imperial Government in 1974 the application of the Commercial Code was practically suspended. The 'communist' government that succeeded the Imperial Government abolished private ownership of property and share companies were rarely allowed. The application of the Commercial Code was restored following the collapse of the 'communist' regime in 1991. Consequently, share companies started to emerge in the business landscape and the rules of the Commercial Code including those governing corporate financing have become effective again.

Ethiopia has witnessed a growth in the number of share companies offering their shares to the public in recent years. The existing commercial laws allow share companies to fund their business through different tools such as equity securities, debentures and corporate bonds. The Ethiopian company law recognizes two forms of companies, i.e. share company and private limited company. Only share companies[2] are allowed to go public through the issuance of shares in the form of common shares, dividend shares or preference shares.[3] Whilst ordinary shares are widely utilized by share companies, the other tools of corporate financing such as issuance of preferred shares and debentures are uncommon in Ethiopia.[4] That means share companies stick to the basic form of equity financing (ordinary shares) despite the recognition of other tools of corporate financing. This is attributable to the low development of the financial market in Ethiopia.[5]

[2] Owing to the legal limitations, simplicity of the requirements for formation and management, private limited companies are not suited for large scale investments. This is evident from the possibility of setting a private limited company between members of a family or close friends, the small amount of minimum startup capital required and the prohibition by the Commercial Code of private limited companies to engage in advanced form of business activities such as banking and insurance

[3] Art. 335, Art. 336 and Art. 337 of the Commercial Code of Ethiopia.

[4] ፍቃዱ ጴጥሮስ፣ የኢትዮጵያ ኩባንያ ሕግ (2ኛ ዕትም፣ 2008), ገፅ 102.

[5] *Id.*

Besides, the legislation regulating banking and insurance share companies in Ethiopia have adopted preferred-shares-unfriendly approach by requiring financial share companies to issue identical shares only in the form of ordinary shares.[6]

The concepts of corporate governance and corporate finance in Ethiopia are relatively new. Consequently, the level of familiarity with and expertise in financial securities in the country is low. It is generally assumed that the business lacks experience and expertise in administering diversified shareholders with different classes of shares. The chosen way out is then simply to issue identical classes of common shares with identical rights and avoid other security forms such as preference shares. This trend has an unintended consequence of perpetuating dominance of the basic security forms.

This article examines the position of Ethiopian commercial laws regarding preference shares. Preceded with a slight detour into a discussion of corporate financing in general, an examination of the role of preference shares in the start-up businesses and the common features of preferred shares follow.

2. Corporate Financing – Some Basics

A group of people with a similar business idea can come together to venture in business by bringing together contributions in cash and/or in kind and form a business firm. At the stage of capital formation, a firm has two options to raise capital. If founders want to collect a huge capital from interested investors, they offer shares to the public. Consequently, the ownership interest will be distributed to the public via shares. Alternatively, if they want their firm to be closely held by them, they do not go public. In that case, after successfully establishing their company and securing its legal personality, they may turn to lenders than distributing their company's ownership interests to investors in the form of securities.

2.1. Internal vs External Sources of Finance

Generally the sources of capital for companies could either be internal, i.e. contributions brought together by the founders, from earned and retained profits,

[6] Art. 10(1) of the Banking Business Proclamation No. 592/2008 states: 'bank shares shall be of one class and shall be registered as ordinary shares of the same par value'. Comparable restriction is imposed on insurance companies under Art. 11(1) of the Insurance Business Proclamation No. 764/2012.

and external sources.[7] The external sources include loans from banks or other financial institutions, debt-financing instruments (such as corporate bonds and equity financing instruments (such as common stocks and preference stocks).[8]

An important external source of finance for a company is issuing securities to interested investors.[9] This constitutes 'equity capital financing either in the form of shares or in other equity rights'.[10] Equity securities represent the investors' ownership interests in companies. Whilst they carry slightly different nomenclatures from jurisdiction to jurisdiction, different equity securities bring with them different packages of rights, privileges and duties.

The Ethiopian Commercial Code recognizes three forms of equity securities, i.e., ordinary shares, preference shares and dividend shares.[11] Preference shares and ordinary shares are the major forms of equities issued by companies. Both classes of shares endow legal rights such as income rights (right to payment of dividend), voting rights and capital rights (right to the return of capital in case of reduction of capital or on a winding up) upon their holders.[12] Common stocks endow their holders with identical packages of ownership interests[13], whereas preferred stocks may come in different forms and terms depending on the company's statutes and terms of the share sale contract.[14]

The other category of the external sources of fund for companies is borrowing money from banks and other financial institutions (debt capital financing).[15]

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[7] Michael Martinek, *Law and Economics of Corporate Finance in Europe - From Diversity to Convergence and Harmonization*, 2008 J. S. AFR. L.16, 16 (2008).

[8] *Id.*

[9] Companies grant bundles of ownership interests (rights) called securities in exchange for money.

[10] Martinek, *supra* note 7.

[11] Arts. 335, 336 and 337 of the Commercial Code of Ethiopia.

[12] Murray A. Pickering, *The Problem of the Preference Share*, 26 THE MODERN LAW REVIEW, Sept. 1963, at 1, 1.

[13] See also Art. 345 of the Commercial Code Ethiopia. This provision recognizes the shareholders' *income rights* (right to payment of dividend which is calculated in proportion to the amount of capital held unless agreed otherwise), *voting rights, the right to share in the net proceeds on a winding up, and the right to allotment of cash shares on an increase of capital*. Common shareholders also have rights listed under Arts. 406, 417 and 422 of the Commercial Code.

[14] WILLIAM W BRATTON, CORPORATE FINANCE, 354 (Foundation Press, 5th ed. 2003).

[15] Martinek, *supra* note 7, at 16.

Debt financing occurs when firms take loan from banks or other investors and through issuing debt securities (bonds, bills or debentures) to investors.[16] Unlike the equity investors, debt investors are entitled to the fixed claim (interest payments) which could be secured or unsecured, but have a limited or no role in the governance of a corporation depending on the particular jurisdiction.[17] The Ethiopian Commercial Code recognizes corporate bonds as debt financing instruments.[18] Under the Commercial Code debentures - just like shares - are required to have par values and companies interested in selling debentures to interested investors should issue prospectus.[19] Owing to the low development of the financial market in Ethiopia it is not common to see companies utilizing debentures as an alternative means of financing their ventures.[20]

3. Use of Preference Shares by Start-ups

In capital markets, companies in their first stage of operation (start-ups) seeking to raise capital to satisfy their financial needs issue different financial securities to venture capitalists.[21] These start-ups are financially risky operations that deploy high-tech businesses such as internet and robotics. By their nature, these kinds of business ventures may be highly profitable[22] or may end up in vain. Thus, investors supplying funds to them want their money to be invested in the form of preferred shares. 'Development stages companies are busy consuming capital, not earning profits, and do not anticipate being able to pay dividend until after the business becomes profitable'[23] Thus, investing in start-ups involves assuming a high financial risk by the venture capitalists. That is the primary reason that

[16] *Id.* Debt capital financing is in a way advantageous to the issuer firm in many ways. To mention some, debt financing providers in most jurisdictions have no say in the management of the company. Besides, the issuer is not going to share a profit with the investor which is not the case with the equity financing providers.

[17] Martinek, *supra* note 7, at 16.

[18] Arts. 425-444 of the Commercial Code.

[19] *Id.*, Arts. 433 and 434.

[20] Fekadu, *supra* note 4.

[21] Investopedia defines venture capitalist as 'an investor who either provides capital to startup ventures or supports small companies that wish to expand but do not have access to equities market'. They are referred to in the literature as 'angels'.

[22] Internet bookseller Amazon.com and internet auction portal eBay are examples of such companies.

[23] WILLIAM J. CARNEY, CORPORATE FINANCE: PRINCIPLES AND PRACTICES 452 (Foundation Press, 2005).

makes investors to demand privileges over ordinary stockholders through the preferred stocks arrangements. In other words, unlike common stockholders, venture capitalists do not want to be rewarded proportionate to their investment.[24] They rather choose to receive 'a greater than proportionate return, priority in receiving a return, or both'.[25]

As it will be shown later, the packages of privileges for preference shares emanates not from corporate laws but from preferred stock contract.[26] To reach at preference shares contract the investors negotiate with founders of start-ups. When a share purchase negotiation is successful, venture capitalists put a huge amount of money into a firm in return for preference arrangements. Yet compared to common stocks and bonds, preference shares constitute a smaller portion of most companies' total equities.[27] As it is the case with many emerging economies, the practice of funding start-ups by venture capitalists appears absent in Ethiopia.

4. Features of Preference Shares

As earlier noted, preference shares are contractual creations and not something imposed by corporate laws. Pursuant to the rule of parity among shareholders, absent special agreement with some shareholders, the rights and privileges of all shareholders are equal.[28] According to Buxbaum 'there is no ideal preferred stock but only a collection of attributes which the share contract says makes up a share of preferred stock.'[29] 'The share contract, in turn, is found in the articles of incorporation and the applicable statutes.'[30] Preference shareholders are also shareholders, after all, and are entitled to all the rights of the common shareholders except as modified by preferred share sale contract. However, preference shares as 'collection of attributes' created by contract also contain

[24] ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 154 (Aspen Publishers, 2006).

[25] *Id.*

[26] Bratton, *supra* note 14, at 355.

[27] *Id.*, at 354.

[28] George William Miller, *Preferred Shares: Participation Rights in Dividends and Surplus Assets: English and American Rules*, 39 CALIFORNIA LAW REVIEW 568, 568 (Dec.1951).

[29] Richard M. Buxbaum, *Preferred Stock: Law and Draftsmanship*, 42 CAL. L. REV. 243, 243 (1954).

[30] *Id.*

additional packages of privileges for its holders.[31] For instance, a preference share may give its holder a preferential claim to dividends or corporate assets upon liquidation.[32] Thus, compared to common stockholders, preferred stockholders have a greater claim to the company's assets - they have priority in receiving the percentage of dividends indicated in the articles of incorporation.[33] If the company goes bankrupt, they are paid off before common stockholders, but after creditors. In other words, holders of preference shares have liquidation preference.[34] In addition to determining the offered packages of privileges, a preferred stock clause also details the limitations or restrictions imposed on holders.[35]

As they emanate from contractual stipulations, the preference rights of preference shareholders are determined by active bargaining between such shareholders and the issuing company. Corporate membership rights such as voting rights and representation in the corporate board may or may not be available depending on the jurisdiction concerned.[36] For instance, under Delaware State's (in the USA) corporate law, preference shareholders are, in addition to the preferences, entitled to the residual rights as any other shareholders.[37] Yet limitations to these residual

[31] In principle, preferred stocks are created by the preferred stock clause of the preferred stock contract (the preferred stock clause of the articles of incorporation).

[32] BLACK'S LAW DICTIONARY (9th ed. 2009).

[33] Compared to common shares, preference shares are entitled to the fixed dividend payments. In cumulative preference shares dividend is paid regularly. If for some financial reasons an issuer company fails to pay out the dividends for some period the arrearages are owed and should be paid back when the company regains the dividend payments. This puts preference shareholders at significant advantages over common shareholders. Yet they might not be able to share the excess profit depending on whether the preference shares are participating or non-participating. Creating preference shareholders that are both cumulative and participating puts its holders at the utmost advantage over common shareholders. Thus the nature of preference shares a company issues should be carefully decided as it may create a huge imbalance of rights between common shareholders and preference shareholders.

[34] Black's Law Dictionary (9th ed. 2009) defines liquidation preference as 'the amount of money that constitutes the full satisfaction of the preferred's fixed claim.

[35] Bratton, *supra* note 14, at. 357

[36] *Id.*

[37] Art. 151(a) of Delaware Corporation Law states:

Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value and which classes or series may have such voting powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special

rights could be provided in the certificate of incorporation or resolution of the board of directors.[38]

The principle that preference shares are created contractually is applicable in Ethiopia. There is no clear reference to share sale contract under the Ethiopian Commercial Code. Art. 336 (1) of the Commercial Code states that preference shares are created either in *the memorandum of association or by resolution of an extraordinary general meeting*. The potential contents of the preference package in the memorandum of association or the resolution of an extraordinary general meeting authorizing issuance of preference shares include, 'preferred right of subscription in the future issues, or rights of priority over profits, or assets or both'.[39]

Art. 336(2) of the Commercial Code however prohibits share companies from issuing preference shares with increased voting rights. This prohibition is in line with the classic corporate law principle of *one share one vote* embodied under Art. 345 of the Code. The Commercial Code states that voting right of shareholders is a right inherent in corporate membership which a member cannot be deprived without his consent.[40] In addition, Art. 408 of the Commercial Code prescribes that all shares should carry equal voting rights and if there is a restriction it should be applicable to all classes of shares irrespective of their designation. Art. 410 of the Commercial Code even goes to the extent of invalidating any provision restricting the free exercise of voting rights in shareholders meetings. Furthermore, it is the right of any shareholder to take part in ordinary meetings regardless of any restriction to the contrary.[41] So it appears from the cumulative reading of these provisions that it is in principle prohibited to deny preference shareholders' voting rights in ordinary general meetings. Yet the voting rights of shareholders with preference rights in sharing profits and

rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation.

[38] *Id.*

[39] Art. 336 (1) of the Commercial Code.

[40] *Id.* Arts. 388 and 399.

[41] *Id.*, Art. 420.

distribution upon dissolution of a company may be restricted (in ordinary general meetings) through a company's memorandum of association.[42]

The scope of preference shares in principle extends to any share that possesses rights or privileges that differ from the statutory defaults, i.e. one-share one vote; equal shares of dividends. This may create an increased unpredictability into the very definition of the preferred stock.[43] Of course preferred shares can be denied of their voting rights. The prohibition in a way protects the common stockholder from dilution of voting rights thereby maintaining their control over the management and also protecting their company from hostile takeovers.[44] Common shareholders exercise their voting rights in important corporate matters such as the election of the board of directors and decisions regarding major company policy. Nevertheless, when it comes to payment of dividends, they do not enjoy priority.[45]

Preference shares come in different forms and/or classes. For instance, the issuer company can issue preferred shares either on cumulative or non-cumulative basis. Cumulative preference share 'has a fixed dividend based on the par value of the stock'.[46] In principle, the dividend is paid regularly for cumulative preferred stocks. However, if for some economic difficulties an issuer company fails to pay out the dividends for some period, the payments left unpaid (arrearages) are owed and should be paid back when the company regains the dividend payments. As long as the dividends on the preference shares remain in arrears, a company may not make dividend payments on ordinary shares. For non-cumulative preferreds, the holder is not entitled to the omitted dividends. Investors naturally demand the cumulative preferred shares to the non-cumulative ones. The Ethiopian Commercial Code does not indicate whether this category is recognized or not. In the opinion of the writer it is up to the concerned share

[42] *Id.*, Art. 336 (3).

[43] Charles R Korsmo, *Venture Capital and Preferred Stocks*, 78 BROOK. L. R. 1165, 1171(2013).

[44] A hostile takeover is the purchase of one company by another made by going directly to the company's shareholders or fighting to replace management to get the acquisition approved. It is possible through either a tender offer or a proxy fight.

[45] Common stockholders receive dividends, only after the preferred stockholders are paid off. Furthermore, they are the last to receive the company's assets in the event the company goes bankrupt. They are preceded by the creditors, bondholders and the preferred stockholders.

[46] 'Cumulative preferred stocks' INVESTOPEDIA (Sept. 08, 2017), https://www.investopedia.com/terms/c/cumulative_preferred_stock.asp

company whether to issue cumulative or non-cumulative preference shares so long as its right to issue preference shares is recognized.

Preference shares can also be participating or non-participating. Participating preference shares refer to shares that bring the agreed share of dividend or liquidation bonus as well as equal participation in the remainder with the common shareholders. In contrast a non-participating preference shareholder forgoes her/his right to partake in distributable assets beyond a fixed rate.[47] Cumulative and participating forms of preference shares give a supreme economic advantage to the preference shareholders than to the non-cumulative or non-participating counter parts. Conversely, they pose bigger disadvantages to the holders of common shares. The Ethiopian Commercial Code does not clearly indicate the category of preference shares into participating and non-participating. The opinion noted above in relation to cumulative versus non-cumulative preference shares also applies to participating and non-participating forms of preference shares, i.e. so long as the share company's right to issue preference shares is recognized it's up to it to issue participating or non-participating preference shares. Yet it is important to clearly provide whether the preference shares are participating or non-participating in the memorandum of association or the resolution of shareholders' extraordinary general meeting.

Another feature of preference shares developed lately is the inclusion of the so called 'sinking fund provision'. This provision determines how the issuer company can call back the preference shares overtime by paying them off (amortization). This in a way creates an implied maturity date for the preference shares.[48]

In summary, preference share combines some features of debt securities with some of the features of equity.[49] It shares some features of debt financing documents such as debentures/corporate bonds. A preferred resembles a corporate bond in being the senior security that earns its holder regular payments. Yet, preference shares are grouped with ordinary shares on the balance sheet in the shareholders equity section, while debentures and bonds show up as a liability.[50] Because of its hybrid character 'the legal treatment of preference

[47] Miller, *supra* note 28, at 569.

[48] It is customary for corporate bonds to have a maturity date.

[49] Korsmo, *supra* note 43, at 1165.

[50] Bratton, *supra* note 14, at 354.

shareholders has long straddled the dividing line between corporate law and contract law'.[51]

5. Preferred Shares under Ethiopian Company Law

5.1. *Art. 336 of the Commercial Code*

As stated above, shares of share companies in Ethiopia can take different classes, notably: preference shares and common shares.[52] Different classes of shares confer different rights, duties and privileges upon their holders. The preference shares confer upon its holder a priority on the annual profits in the form of cumulative or non-cumulative preference dividends or the preferential dividend right upon the liquidation of the company or simply the right to receive the liquidation bonus. A probe into the nature of preference shares under Ethiopian company law begins with Art. 336(1) of the Commercial Code which states:

> A share company may create preference shares either *in the memorandum of association or by the resolution of an extraordinary general meeting.* Such shares enjoy a preference over other shares such as the preferred rights of subscription in the event of the future issues, or rights of priority over profits, assets, or both. (Emphasis added).

As can be understood from this authorizing provision, once a share company decides to issue preference shares, the provision to this effect must be inserted in a memorandum of association or ordered by a resolution of the extraordinary meeting of shareholders. The law recognizes preference shares by utilizing a permissive legal norm. As a result, it is up to the concerned share company to issue or not to issue preference shares. As preferred shares provide their holders with privilege(s) distinct from that of common shareholders' it is necessary to determine the contents/scope of preference arrangement under the Ethiopian Commercial Code. Art. 336(1) shows that preference shareholders might be entitled to the packages of privileges (preferences) such as the subscription of new shares, the right of priority in share of profits and/or liquidation bonuses.

Art. 336 of the Commercial Code seems to allow a share company to issue different classes of preference shares with different packages of rights. For instance a share company can issue some portion of its shares as cumulative preference shares only (priority in dividend), non-cumulative preference shares only (priority in dividend), participating preference shares (priority in dividend

[51] *Id.*

[52] Arts. 335, 336 and 337 of the Commercial Code.

and/or liquidation assets), and non-participating preference shares (priority in dividend and/or liquidation assets).[53] It is also a possibility for preference shares with priority in collection of profits to be cumulative and participating, non-cumulative and non-participating or cumulative and non-participating. Preference shares with a priority in the collection of liquidation assets can only be participating or non-participating.[54] For example, a share company with 5000 shares can issue 200 shares with a priority in collection of liquidation asset of 20% and participating. In this case the preference shareholders will first share 20% of the assets and take part, pro rata with their shares, in the partition of the remaining 80% with the common shareholders provided that there are no other third parties with priority of claims. If the preference to liquidation asset is non-participating, its shareholders will take only the fixed percent (20%) and cannot participate in the remaining assets with common shareholders.

Unlike the recognition of priority in cases of dividend (profit) and/or liquidation of assets, the law is not clear when it comes to the package of preference share recognized under Art. 336 of the Commercial Code, i.e., 'priority in form of subscription of new shares'. Art. 470 of the Code states that preferred right of subscription in case of issuance of new shares belongs to all shareholders. The literal reading of this provision may seem to guarantee priority of subscription to shareholders against the new investors (other than the existing shareholders). By this interpretation, it would have been possible to read Art. 470 to bestow on preferred shares right of 'priority in form of subscription of new shares' in line with Art. 336. But a stronger prohibition is provided under Art. 475 of the Commercial Code that disallows issuance of 'documents conferring special preferred rights of subscription'. If the term 'documents' utilized under Art. 470 is interpreted as preference shares authorizing 'priority in form of subscription of new shares', then 'priority in form of subscription of new shares' under Art. 336 cannot form part of the package of privileges of preference shares.

But, this writer contends that the package of privileges enumerated under Art. 336 is not exhaustive. Thus, the issuing share company can, in theory, provide preference(s) or contractual protections not stated under Art. 336 of the Commercial Code either in a corporate charter or via a resolution of the

[53] See section 4, above, for a general discussion on cumulative vs non-cumulative, participating vs non-participating shareholders.

[54] This preference in the collection of liquidation of assets cannot be categorized as cumulative vs non-cumulative as a company winds up only once and it's illogical to think the possibility of piling up of payments for preference shareholders of this class.

extraordinary meeting of shareholders. In the company laws of many jurisdictions, the scope of preference share is determined either in the authorizing corporate charter or in the resolution of an appropriate organ(s) of the issuing firm. Thus, exhaustively dictating the scope of preference shares does not seem to be the business of company laws. Similar position could be advanced in regards to the Ethiopian Commercial Code.

Nonetheless, although the packages of privileges for preference shares are determined by negotiations between the issuing company and preference shareholders, they are not without restrictions. One of the legal restrictions under the Ethiopian Commercial Code relates to voting rights. The law prohibits issuance of shares with 'a preference as to voting rights'.[55] It is by no means allowed to include preference as to voting rights via conferment of increased voting rights upon preference shares. Thus, increased voting rights cannot form part of preference packages authorized by a corporate charter or via a resolution of the extraordinary general meeting of shareholders.

One may wonder if preference shareholders can take part in the management of their company. Participation in the management of firm is normally manifested by participation in general meetings and representations in the board of directors. The general rule under Ethiopian Commercial Code is that, every share confers a voting right.[56] So a simple answer to the question is: yes preference shareholders can take part in the management of their company as the rules of the Commercial Code stand. The prerequisite to be appointed as a member of board of directors is to be a shareholder.[57] By this formula nothing prohibits a preference shareholder of a share company from being appointed as a director. The relevant provisions of the Commercial Code also reveal that preference shareholders, in principle, have the right to take part in corporate meetings and vote on important corporate matters just like the common shareholder. In many jurisdictions the issuance of preference shares enables common shareholders to retain their control over the corporate management, make decisions on important corporate matters and fight hostile takeovers as well. This position can also be true under the Commercial Code of Ethiopia, if a memorandum of association of a share company creating preference shares restricts the voting rights of preference shareholders to the matters concerning extraordinary meetings as per

[55] Art. 336 (2) of the Commercial Code.

[56] *Id.* Art. 345(3).

[57] *Id.* Art. 347.

Art. 336 (3) of the Commercial Code. The restriction of preference shareholders voting rights in ordinary general meeting helps to avoid the possible class struggle between the common shareholders and preference shareholders.[58] It is obvious that the class struggle between the two could result in difficulties in the management of the company and result in potential failure.

The conferment of equal voting rights for preference shareholders and ordinary shareholders may leave the ownership interests of the latter in a serious condition. To avoid this predicament, the law has devised a means by which the voting rights of preference shareholders could be sometimes limited in the memorandum of association.[59] Consequently, preference shareholders will not vote in ordinary general meetings and resolutions approving or rejecting the accounts for the past financial year, allocating or distributing profits, appointing or removing auditors or directors and decision on any matter other than those reserved to extraordinary general meeting will be passed without the vote of preference shareholders.[60] Art. 424 seems to indirectly confirm the possibility of denying preference shareholders' voting rights (in ordinary general meetings) by inserting a provision to that effect in the memorandum of association. Art. 424 states, thus, 'any shareholder, including preference shares holders may take part in an extraordinary meeting'.

5.2. Modes of Authorization of Preference Shares

As broadly alluded to earlier, the two modes of authorizing preference shares under the Commercial Code are a clause to this effect in the memorandum of association [61] and a resolution of the extraordinary general meeting of shareholders.[62] The paragraphs below elaborate these two modes.

[58] Fekadu, *supra* note 4, at 100.

[59] Art. 336 (3) of the Commercial Code Ethiopia. Besides, sub-article 4 of the same article restricts the number of shares having restricted voting rights not to exceed half the amount of the capital.

[60] *Id.*, Art. 419.

[61] Memorandum of association is a company's public document prepared at the formation stage that should contain relevant information about the future share company as per Art. 313 of the Commercial Code. Together with the articles of association, they form the foundation documents of a company.

[62] Art. 336 of the Commercial Code.

The general laws applicable to share companies provide a possibility for share companies to issue preference shares in their memorandum of associations.[63] Pursuant to Art. 313 of the Commercial Code having a memorandum of association is mandatory for a company.[64] Art. 313 (6) states that the memorandum of association shall, among other things, contain 'the par value, number, form and classes of shares'. Accordingly, a memorandum details if registered or bearer shares are allowed as well as the classes of shares to be issued. This mode of authorization gives shareholders an opportunity to vote on the specific preference packages to be included in preferred shares. Nonetheless, if special laws prohibit issuance of preference shares by certain types of companies, such companies cannot include preference shares in their memorandums of association. This concerns financial share companies and it will be dealt with under a separate section below.

The second technique embodied under the Commercial Code to create preferred shares is by the resolution of extraordinary general meetings of shareholders. One amongst the agenda of the extraordinary general meeting of a share company is approving increase in their investment and making amendment to the memorandum of association.[65] The amendment may target provisions of the memorandum governing preference shares.

If the original memorandum of association has not incorporated preference shares, the resolution of extraordinary general meeting can in principle amend it and incorporate one. The amended memorandum should then be deposited at the commercial register pursuant to the relevant rules governing the registration and licensing of share companies. Should the company decide to go public again, the new prospectus that should include amendments to the original memorandum should be available to interested investors (including those who want to become preference shareholders). Here it is worth mentioning that the amendment to the memorandum of association of some share companies require license/permission from the concerned governmental regulatory agency. For

[63] *Id.*, Art. 336(1). The French Commercial Code under its Art. 228(1) also states that the privileges that the preference shares can enjoy should be stated in the articles of incorporation. The American Model Corporation Act (MBCA) section 6.01(a) also incorporates similar provision.

[64] The same is reflected under Art. 5(6) of the Commercial Business Registration and Business Licensing Proclamation No. 980/2016.

[65] Art. 423 cum. Art. 425 of the Commercial Code.

example, the amendment of the statutes of banks and insurance companies require approval by the Ethiopian National Bank.[66]

5.3. Limitation on Financial Share Companies

The general rules of the Commercial Code governing issuance of preference shares examined above are inapplicable to banks and insurance companies operating in Ethiopia.[67] It is pointed out above that only companies incorporated in the form of share company are allowed to invest in the banking and insurance businesses.[68] Following the regime change in 1991, the government has allowed share companies to venture in the banking and insurance businesses with several investment limitations.[69] Concerning issuance of securities by banks and insurance companies, the law prohibits issuance of preference shares recognized under the Commercial Code. It instead, demands the issuance of the basic form of security, i.e., common shares. Art. 10(1) of the Banking Business Proclamation No. 592/2008 states 'bank shares shall be of one class and shall be registered as ordinary shares of the same par value'. Comparable restriction is imposed on insurance companies under Art. 11(1) of the Insurance Business Proclamation No. 764/2012. By doing so, these laws prohibit the utilization of dividend shares and preference shares by financial share companies, restricting the financial companies' access to fund collectable from issuing preference shares.

It is true that the legal requirements involved in the formation through operation of financial share companies are rigorous when compared to non-financial share companies. The government maintains a close watch over the financial sector.

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[66] Art. 3(3)g of the Banking Business Proclamation No. 592/2008 and Art. 3(3)g of the Insurance Business Proclamation No. 764/2012.

[67] The Banking Business Proclamation No. 592/2008 and Insurance Business Proclamation 764/2012 with other relevant regulations and directives govern the banking and insurance businesses.

[68] That rule of course does not include the government owned banks and insurance companies that are not incorporated by strictly following the rules of the Commercial Code. They are instead established by Regulation of the Council of Ministers in the form of public enterprises. Their corporate finance and corporate governance does not appear to follow the model of the private (share) companies venturing in banking and insurance businesses.

[69] There are several investment limitations on banks imposed by several banking laws in force in Ethiopia. For instance, foreign direct investment in the banking sector is prohibited, limitations on the ownership of bank shares, limitations and control on the activities of banks themselves, limitations on the banks' ownership of other companies, the requirement of approval by the National Banks on the appointment of directors, installation of new banking services, amendment to its corporate charters and so forth.

The laws barring banking and insurance share companies from issuing preference shares are one of the many manifestations of this close control and supervision. These laws have the effect of totally banishing the option of issuing preference shares, which, of course, are ignored even by the non-financial share companies.

The practice in jurisdictions with reputable corporate law such as the State of Delaware shows that the financial institutions, insurance companies or other corporations subject to the strict capital adequacy regulations as illustrated by the size and composition of the preferred stock exchange -tradable funds, issue all kinds of public preferred stocks.[70] The concern of the Ethiopian state seems to be protection of the stability of the financial system and protection of shareholders as well as customers of these financial share companies - possibly by prohibiting the concentrated ownership of shares by a few shareholders and avoiding the issuance of advanced security forms such as preference shares by financial share companies. As the country has a limited expertise and fledgling 'capitalist' market and corporate governance system, the precautions and legal restrictions are arguably justified.

As discussed above, there are not that significant differences between preference shareholders and common shareholders. The general rules of the Commercial Code which are in principle applicable to both financial and non-financial share companies state that both classes of shareholders do have rights to be appointed in the board of directors. Both classes of shareholders have rights to take part in the corporate meetings and take part in important company decisions. The only possible difference especially in relation to the voting rights is the fact that Art. 336 (3) of the Commercial Code allows the insertion of clause in the memorandum of association restricting preference shareholders voting rights in extraordinary meetings of shareholders. Different reports show that banking and insurance share companies are profitable even compared to non-financial share companies. It is not clear why preference rights cannot be conferred on some shareholders so that potential investors will get strong incentives to invest in this young financial sector which is relatively unexposed to foreign competition. This position may have the unintended consequence of limiting the financial companies' access to capital and hamper their growth and expansion which will, in turn, impact their readiness to compete regionally and globally. A middle ground would have been possible by limiting a percentage of funds that financial share companies could fetch through issuing preference shares.

[70] Ben Walther, *Peril and Promise of Preferred Stock*, 39 DEL. J. CORP. L. 161, 163 (2014).

6. Conclusion

Companies obtain their funds from different sources. These sources include internal (mainly contributions by founders) and external (money collected from investors by issuing shares). Ethiopian company law recognizes private limited company and share company as two distinct forms of companies. It allows only share companies formed through public offering of share to issue shares to the public via prospectus. Shares under the Commercial Code could either be ordinary shares or preferred shares. Nonetheless, the practice on the ground reveals that the securities market is dominated by the basic security form (ordinary shares). In one way, issuing diversified forms of securities widens share companies' access to capital. It in fact may likewise install difficulty into the relatively inexperienced corporate governance and corporate finance system of the country. The well-known practice by newly formed share companies in Ethiopia is to issue ordinary shares to interested investors through prospectus. Shares are sold to the public through banks as commission agents.

Financial share companies are prohibited by the law from issuing preferred shares. However, the non-financial share companies have the freedom to issue preference shares. The writer is of the opinion that the policy and laws that prohibit financial share companies from issuing preference shares are misguided. Financial share companies should be allowed to meet their need for finance by issuing preferred shares as well. The concern of the government is the protection of stability of the financial system in general and the security of ownership interest of investors and customers of the financial share companies in particular. Yet it can accomplish these objectives by allowing financial share companies to issue preference shares under certain conditions. In general, the level of familiarity with preference shares as vehicles of corporate finance in Ethiopia seems to be low. This ignorance coupled with the government's mistrust of preference shares may have the effect of depriving share companies of the option of utilizing preference shares in Ethiopia.

Reflection on the Legality of 'Private' Discrimination in Light of Recent Economic and Social Changes in Ethiopia

Mekonnen Firew Ayano[*]

Abstract

This essay is an attempt to draw attention to the discrimination people face in urban areas and the emerging market-oriented social relation. People face discrimination in various social settings. Women, children, and other vulnerable social groups face discrimination in the so-called "customary" spheres, and in other non-governmental and governmental settings. But discrimination by private businesses has also become ubiquitous, especially in the urban housing and labor sectors. This is partly because of the deregulation of the economy over the last couple of decades, and the steadily intensifying effort to outsource traditional state functions to local and global private interests. These developments raise questions about the application of constitutional rights to a private conduct, and about the legality of private discrimination more generally.

Key Words: Discrimination, Private / Public Distinction, Housing

1. Introduction

Charges of widespread discrimination by the State and its agents, social associations, and private businesses against individuals and groups of particular ethnic and social background have surfaced recently. The charges, especially those leveled on the social media, reveal that people face discriminations by governmental and non-governmental entities in multiple social settings, such as, employment, housing, and more generally, the procurement and provision of goods and services.[1]

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[1] *See e.g.,* William Davidson, *The Ethiopian Boomtown that Welcomes Water Firms but Leaves Locals Thirsty,* The Guardian, (Mar. 9, 2017). Available at: https://www.theguardian.com/global-development/2017/mar/09/ethiopia-boomtown-water-firms-locals-thirsty-sululta-oromia; Gregory Warner, *Ethiopian Runners Say They Face Discrimination,* National Public Radio (NPR), Heard on All Things Considered (June 5, 2016 at 5:17PM ET). Transcript Available at: http://www.npr.org/2016/06/05/480861401/ethiopian-runners-say-they-face-discrimination); Conor Gaffey, *Oromo Protest: Why Ethiopia's Largest Ethnic Group is Demonstrating,* Newsweek, (Feb. 26, 16). Available at: http://www.newsweek.com/oromo-protests-why-ethiopias-biggest-ethnic-group-demonstrating-430793. *See also,* Adanech Gedefaw, *Determinants of Relationship Marketing: The Case of Ethiopian Airlines,* 14

This essay concerns the legality of these various forms of discrimination people face in the non-governmental sector, also called "private" sphere, from the standpoint of the rights and liberties protected under the Federal Democratic Republic of Ethiopia (FDRE) Constitution. The focus on the discriminations in the "private" sphere is not to suggest that discrimination in other settings is unimportant. In fact, discrimination by the State and its agents is not only ubiquitous and grave; but also the enforcement of constitutional rights and liberties of ordinary citizens against the offices and officials of the State is extremely limited.[2]

Private discrimination raises a curious legal question in light of the profound power and influence that the private entities have come to command in the economy and society. That is: how can constitutional rights and liberties be applied to govern a private conduct that violates constitutionally protected rights and liberties? This question is germane to an important theme in comparative constitutional jurisprudence: the scope of application of constitutional rights and liberties to private conduct, also known as "horizontal effect" or "state action" doctrine.[3]

A particularly important question is whether and how the judicial bodies — i.e., the courts, the Council of Constitutional Inquiry and the House of Federation, apply the constitutional rights and liberties to a discriminatory conduct of a

GLOBAL JOURNAL OF MANAGEMENT RESEARCH 3, 45, 48 (2014) (discussing discrimination between foreigners and locals by the Ethiopian Airlines; Milkessa Midega, *The Politics of Language and Representative Bureaucracy in Ethiopia: The Case of Federal Government,* 7 JOURNAL OF PUBLIC ADMINISTRATION AND POLICY RESEARCH 1, 15 (2015) (discussing discrimination people face at the bureaucracies because of language). For additional discussion, *see* text and references accompanying *infra*, notes 28, 37 - 38, 42 – 43.

[2] The lack of constitutional accountability in Ethiopia has been widely discussed among scholars as well as the public. For the detail discussion, *see e.g.,* Jon Abbink, *The Ethiopian Second Republic and the Fragile "Social Contract",* 44 AFRICA SPECTRUM 2, 3 (2009); John M. Cohen, *"Ethnic Federalism" in Ethiopia,* 2 NORTHEAST AFRICAN STUDIES, NEW SERIES, No.2, 157 (1995); Marina Ottaway, *The Ethiopian Transition: Democratization or new Authoritarianism?*, 2 NORTHEAST AFRICAN STUDIES, New Series, No.3, 67(1996); Theodore M. Vestal, *An Analysis of the New Ethiopian Constitution and the Process of Its Adoption,* 3NORTHEAST AFRICAN STUDIES New Series No.2, , 21(1996).

[3] For further discussion, *see* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights,* 102 MICHIGAN L. REV. 3 387 (2003).

private person.[4] The broad purpose of the essay is to highlight the incipient asymmetry of power and property wrought by the EPRDF officials' effort to deregulate the economy.

The subject obviously requires thorough and sustained legal and sociological researches. This essay is an initial reflection of my interest in the intersections of constitutional rights and the public/private divide. Hence, it is an attempt to highlight general questions and insights regarding discrimination and the public/private distinction that can stimulate interest on the part of the legal profession.

In the next part of the essay, I draw on comparative materials to discuss the notion of private discrimination by situating it within the public/private distinction in liberal constitutional law and theory. The subsequent parts canvas some general yet key points in regards to socio-legal aspects and significance of private discrimination in the urban settings.

2. Discrimination and the Public/Private Distinction

The principal object of constitutional rights and liberties in a liberal constitutional regime is the governance of conduct of the State and its agents.[5] In other words, the primary purpose of a liberal constitution is to regulate vertical relation between State and individuals or community of individuals. Thus, how the State and its agents decide to serve one person instead of another concerns the constitutional rights and liberties. The distribution of burdens and benefits by the State and its agents on the basis of race, ethnicity, sex and other classifications would be a constitutionally suspect discrimination in liberal constitutional regimes. This means that, among other things, the body charged with the authority of constitutional review has the power to review decisions of a governmental agent on the basis of the constitutional rights and liberties concerning discrimination.

[4] In addition to the FDRE Constitution, various international legal instruments and domestic laws and regulations are important to appraise the question of legality of private discrimination. The essay, nonetheless, is limited to the Constitution.

[5] *See e.g.,* Paul Brest, '*State Action and Liberal Theory: A Case Comment on* Flagg Brothers v. Brooks', 130 U. PA. L. REV. 1296 (1982). The liberal constitutional thought can be understood in at least two traditions: The Lockean "natural rights" tradition that prescribes sharp public/private distinction and the Hobbesian "positive constitutionalism", which tends to collapse the distinction.

According to the logic of liberal constitutional thought, private conducts, however, are a secondary object of the constitutional rights and liberties.[6] They are the primary objects of private law regimes, if even an object at all. This means, among other things, that the body charged with the authority of constitutional review lacks the power to review a private conduct that violates the constitutional rights and liberties. Thus, for example, while such a body can review the constitutionality of a public university's admission policy that requires students waive the right to associate or express their opinion; it arguably lacks the authority to review if a private university enforces the same policy.

The divide in the application of constitutional rights and liberties stems from a broader conceptual and doctrinal divide that permeates the liberal legal thought known as the "public/private" distinction. Morton J. Horwitz shows that the distinction emerged as early as the formation of the European nation-state and the enlightenment thought that began in the 16th Century. The rise of market as the dominant mode of economic and social organization and the concurrent effort of "orthodox judges and jurists to create a legal science that would sharply separate law from politics" in the 19th Century engendered a global proliferation of the distinction.[7]

The classic conceptual and architectural division of the law into "public law" that is conceived as political and proper sphere of regulation/intervention by State, and "private law" that is conceived as apolitical and the proper sphere of individual autonomy is an aspect of the distinction.[8] The distinction is understood in the area of constitutional law and jurisprudence to mean that constitutions concern the conduct of State and its agents, whereas private law concerns the private conduct of individuals.

A plethora of problems have been identified with the theory and applications of public/private distinction. To begin with, a coherent conception of the distinction is impossible.[9] The line between the "private" sphere and the "public" sphere is less obvious than it is assumed. Jurists who influenced

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[6] ERWIN CHEMERENSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507 (3rd ed., 2006) (hereinafter, Principles and Policies).

[7] Morton J. Horwitz, *The History of Public Private Distinction,* 30 PENN. L. REV 6, 1423, 1425 (1982).

[8] *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY, Vol. 2, 6541-54 (Guenther Ross & Claus Wittish Transl., 1958).

[9] *See e.g.,* Erwin Chemernsky, *Rethinking State Action,* 80 NE. U. L. Rev 3 (1985).

Western legal thought staring from the late 19th Century up to the 1960s, which is often referred to as the period of "Social Legal Thought", show that the "private" constitutes and is constituted by the "public".[10] Robert Hale, one of the iconoclastic jurists of that period, for instance, argues that the public/private distinction is an ideological construct in the service of capital as opposed to labor.[11]

Another problem concerns the idea that the power of the State is anti-thesis of autonomy of the individuals. The idea is derived from the Lockean theory of limited government, understood to mean that a private sphere must be reserved to protect the rights and liberties of the individuals against threats of the State.[12] However, ample legal and socio-legal materials confirm that private actors, such as corporations, traditional/customary regimes, dominant racial and ethnic groups, and other social categories can wield formidable power and influence that can threaten the rights and welfare of individuals and vulnerable social groups.[13]

A related problem concerns the conception of the "private" as an apolitical sphere that must be free from interventions by the State. This conception is premised on the assumption that the "private" is pre-political and internally symmetrical — i.e., individuals in this sphere wield equal (or equivalent) power and the State must be assigned the role of the arbiter whose duty it is to keep the rules of the game.[14] It has long been recognized that the "private" sphere involves serious political stakes and that the Lockean conception of State-society relations masks the stakes and distributive outcomes. In other words, the "private" is

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[10] Duncan Kennedy, *Three Globalization of Law and Legal Thought: in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 37-59, (David M. Trubek & Alvaro Santos eds., 2006).

[11] Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 POLITICAL SCIENCE QUARTERLY 3, 470 (1923).

[12] *See* Brest, *supra* note 5, *at* 1296 -97.

[13] For detail discussion on the significance of customary/informal regimes in Ethiopia, *see* ALULA PANKHURST & GETACHEW ASSEFA (EDS.), GROSS-ROOTS JUSTICE IN ETHIOPIA: THE CONTRIBUTION OF CUSTOMARY DISPUTE RESOLUTIONS (2008). *See also* Larry Alexander, *The Public/Private Distinction and Constitutional Limits of Private Power,* 10 CONST. COMMENT. 361 (1993) (for a discussion on the role of private corporations in other jurisdictions).

[14] JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 137 (Macpherson ed. 1980).

asymmetrical and deeply political, and non-intervention by the State in this sphere is intervention by another name.

3. The Distinction in Comparative Constitutionalism

The effort to establish a neat public/private distinction in constitutional law and jurisprudence has been largely futile. But judges and jurists in various jurisdictions have developed and continue to develop techniques and doctrines to navigate the intricate problems inherent in the distinction. Post-Cold War constitutions approach the issue along the spectrum between two opposite doctrines: the doctrine that prescribes sharp public/private distinction, on the one hand, and doctrine that collapses the distinction, on the other hand. The constitutional regimes that follow the first approach are often called "classical liberal", whereas the second approach is understood to resonate with the "social liberal" constitutions.[15]

The classical liberal approach prescribes a bright-line rule of the distinction. Judges and jurists in this approach maintain a sharp vision of the "private" sphere to which, according to their vision, constitutional rights and liberties must not apply. The approach was epitomized by the "state action" doctrine, which judges and jurists in the United States developed during the period often referred to as the "Classical Legal Thought".[16]

The US Supreme Court deployed the doctrine to draw a sharp distinction between the "private" and the "public" (as well as between the "federal" and the "state" spheres) in one of its landmark decisions of the 19th Century, the *Civil Rights Cases*.[17] The case, which in fact was a group of five cases, concerned the constitutionality of the Civil Rights Act of 1875[18], a statute enacted by the US Congress.

Congress passed the Act to ban race and color based discriminations in regards to access to public accommodations in order to curb the pervasive discriminations faced by African Americans and other people of color in public places, such as public transportations, hotels, inns, and theatres. Relying on the

[15] Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law,* 1 I. Con. 1, 79, 80 - 4 (2003).

[16] Kennedy, *supra* note 10, at 26 - 58.

[17] 109 US 3, (1883).

[18] 18 Stat. 335-37.

Act, some African Americans sued certain "whites only" establishments that refused them services because of their race. The Court held, however, that the Act was unconstitutional on the ground that the "federal constitutional rights do not govern individual behavior" and that "Congress lacks the authority to apply them to private persons."[19]

Beginning in the early 20th century, the Supreme Court eventually retreated from this orthodox version of the state action doctrine in favor of more flexible interpretations. Subsequent court decisions overturned the *Civil Rights Cases* precedent, and Congress enacted several civil rights laws since the 1960s. To be sure, US courts have not rejected the doctrine totally. It is still binding in the sense that courts cannot consider a claim of constitutional violation in the absence of some action by a state entity.[20] But courts have often found state action and applied federal constitutional rights to what would have been a private conduct under the orthodox approach.

Shelley v. Kraemer[21] is the landmark case in this vein. Shelley, an African-American family, purchased a house in Missouri, and Louis Kraemer, a white resident in the neighborhood sued them alleging that the property was subject to a restrictive covenant that prevented "people of Negro or Mongolian" race from occupying the property. The Supreme Court of Missouri enjoined Shelley from occupying the property on the ground that a state action was lacking because the covenant was a private agreement. The Supreme Court reversed the injunction on the ground that an injunction ordered by the court that enforced a racially discriminatory covenant was state action flouting the equal protection clause of the US Constitution.[22]

The trend in constitutions of the social liberal approach collapses the public/private distinction. Constitutions that follow this approach commit to the so-called "positive rights" and "negative rights".[23] The commitment to positive rights is often understood to require the horizontal application of constitutional rights and liberties to private conduct. This application can be

[19] Chemerensky, Principles and Policies, *supra* note 6, *at* 513.

[20] Robin West, *Response to State Action and a New Birth of Freedom,* 92 GEO. L. J. 819, 823-24 (2oo4).

[21] 334 US 1. (1948).

[22] *Id.*

[23] For a classic reading on "negative rights" and "positive rights", *see* Isaiah Berlin, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY (Isaiah Berlin ed., 1969).

either direct or indirect. Direct application is likely if the substantive constitutional rights envisage the regulation of private conduct. Indirect application, which perhaps is the most common doctrine, holds when the State and its agents are required to take constitutional rights and liberties in to account in making decisions.

The German Constitutional Court gave a leading formula of the indirect horizontal effect of constitutional rights and liberties in the *Lüth case*,[24] a landmark case on the subject. Lüth, who was president of a press club, called for boycotting Veit Harlan, a film director who gained fame during Nazi regime for his anti-Semitic work. Two film companies claimed that Lüth has discouraged film companies and theatres to show Harlan's latest work, and the German public to see the film. The trial court granted injunction against Lüth on the basis of private law rule that required a person who causes damage to another person, intentionally and in a manner contrary to good morals, to compensate the victim. Lüth appealed against the judgment to the Constitutional Court, and the court reversed the injunction on the ground that the lower court's decision failed to take into account the constitutionally protected right to freedom of expression to which Lüth was entitled.

While conceding that the principal purpose of constitutional rights is to protect the rights and liberties of the individual against interference by public authorities, the Constitutional Court formulated the profoundly influential doctrine of "horizontal effect" which has been adopted into comparative constitutional jurisprudence. According to the Court's reasoning, the Constitution establishes an "objective order of values" that permeates the entire legal system, and hence courts must interpret private law in the spirit of the constitutional norms.[25] Other countries that uphold the doctrine of horizontal effect of constitutional rights and liberties include South Africa and Canada, both of which have been influential internationally.[26]

One of the key differences between the classical liberal and social liberal approaches is the degree to which constitutional rights and liberties govern private conduct. While the former tends to uphold a sharp public/private

[24] Lüth, BVerfGE 7, 198; 1 BvR 400/51 (1958).

[25] DONAL P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, 363 (1997).

[26] Tushnet, *supra* 15, *at* 80 – 83.

distinction and limit constitutional rights and liberties to state action, judges and jurists in social liberal constitutions emphasize not only the identity of the offender but also the rights and liberties at issue. Hence, the latter judges and jurists tend to collapse the public / private distinction.

Nevertheless, it is important to note that the doctrinal differences between the two do not necessarily translate into functional differences. The fact that the US constitutional jurisprudence upholds the state action doctrine does not mean that US courts are less likely to apply constitutional rights and liberties to conducts of private persons than the courts that uphold the doctrine of horizontal effect do. The application of constitutional norms in any jurisdiction depends not only on the doctrines but also on the entire constitutional structure, norms, and interpretive contexts.[27]

Which approach would bear comparison to Ethiopia's constitutional law and jurisprudence? Consider the following excerpt from Amanda Farrant's report about the stigma and discriminations faced by women living with HIV:

> … HIV-related stigma and discrimination in Ethiopia has a devastating impact on those affected. Not only do they find themselves rejected by their families and communities, but they can also be excluded from other elements of society: people stop eating food from their homes or buying produce they have grown. Of course, it also means you are no longer welcome at the most important local ritual: the coffee ceremony.
>
> Seblework Kebede, a 33-year-old mother of four, understands what it means to be shunned: 'It is eight years since I have known I am positive. I have lived a very terrible life not being able to be part of the community. I used to sell milk from home: when people heard that I was HIV positive they stopped buying from me.
>
> *'People would call me names like "woman with the virus". It really affected my life.'*
>
> Zenebech is 32. Like Seblework, her story is typical of the traumatic experiences many of the women had suffered. She explains: 'I was abducted when I was 18 and forced into marriage. I have two children. Some years later my husband died. I got tested after he died and found out I was positive, along with my children who are now 10 and five. They get bullied a lot at school.
>
> *'When my brother-in-law found out we were HIV positive, he took our property from us and forced us to move away. So we left the rural area where we had been living and my sister helped me to come to the town. I was stigmatized like hell.*

[27] *Id.*

> *When landlords found out that I was positive, they caused problems and tried to evict us. I wanted to kill myself.* [28]

The excerpt raises set of questions that concern the horizontal effect of rights and liberties protected by the Constitution. One of the questions is whether the landlords who evicted (or attempted to evict) Zenebech and her family can be held responsible for violation of the right to equality or the rights of women provided for in the Constitution. And whether Seblework's customers who stopped buying milk from her because of her health status can be held responsible for violation of the right to equality or the rights of women provided for in the Constitution.

A related question is how the constitutional rights of a victim of discriminatory private conduct interact with the rights and liberties of the private perpetrator. In other words, if court or the House of Federation has the authority to review the constitutionality of a private conduct, a follow up question would be whether and how Zenebech's constitutional rights and liberties trump the landlord's property and contract rights, and Seblework's rights and liberties trump the rights and liberties of her customer.

The key question is whether a court or the House of Federation can apply the constitutional rights and liberties to a private conduct that violates the constitutionally protected rights and liberties. Consider the following examples in the light of this question: Can an *'Idir'* that refuses to admit people of certain religion be held liable on grounds of the constitutional rights and liberties? How about a political party that admits only people of a particular ethnicity? How about a political party that is open to everyone *de jure*, but discriminates against women *de facto*? How about a real estate developer that rents apartment to single men only? How about a bar that admits foreigners only? How about an employer who fired an employee because of the employee's political views, or religious affiliation?

[28] Amanda Farrant, *Living with HIV: Ethiopia's Positive Women, (July 10, 2015), available at: https://medium.com/@caglobal/living-with-hiv-ethiopia-s-positive-women-91bb35f42143#.onidk7njk*. For further discussion on discrimination against people living with HIV and other diseases, *see* Garumma T Feyissa et al., *Stigma and Discrimination Against People Living with HIV by Health Care Providers, Southwest Ethiopia,* 12 BMC Public Health, 522 (2012). Available at: http://www.biomedcentral.com/1471-2458/12/522.

The answers to these questions are normally found in the constitutional texts and doctrines that judges' and jurists' develop. There are constitutional rights and liberties that are expressed in terms that suggest Ethiopia's approach is aligned with the approach of social liberal constitutionalists, but doctrines have not yet been developed.

The pertinent constitutional texts include the Supremacy Clause, Equality Clauses, and other rights protected by the Constitution. The Supremacy Clause declares that "customary practices" which contravene the Constitution are "of no effect",[29] and charges "[a]ll citizens, political organizations, other associations as well as their officials" with the duty to obey the Constitution and to ensure its observance.[30] The Equality Clause prohibits discrimination on the basis of race, color, and other classifications.[31] The provision on the right to access to justice guarantees the right to seek judicial enforcement of "justiciable matters".[32] In another clause, political parties and organizations that "significantly affect public interest" are charged with the duty to non-discriminatory membership, and citizens are entitled to the right to be members subject to the "special and general requirements" of the organization.[33]

These clauses guarantee rights and liberties that protect individuals and social groups against discriminations. They can also be understood to mean that the Constitution, particularly the Supremacy Clause, charges not only the State and its agents but also private actors, including the customary regimes, with the duty to comply and ensure compliance with the constitutional rights and liberties. However, there are clauses that express the conventional public/private distinction. The text of Article 13 (1), for instance, can be understood to mean that the duty to respect and enforce the constitutional rights and liberties is limited to the State and its agents.[34]

Another problem is the lack of evidence in regards to how judges and jurists interpret the clauses and the question of horizontal effect/state action doctrine more generally. Neither a court decision nor a scholarly material that deals

[29] FDRE CONST. Art.9 (1).

[30] FDRE CONST. Art.9 (2).

[31] FDRE CONST. Art. 25.

[32] FDRE CONST. Art. 37.

[33] FDRE CONST. Art. 38.

[34] FDRE CONST. Art. 13. (1).

directly with the constitutionality of a discriminatory private conduct is available. Indeed the legal and organizational process for reviewing the constitutionality of conducts of State agents is too imperfect to meet the minimum expectation. The situation in regards to review of a private conduct on the basis of the constitutional rights and liberties is worse.

This problem might be due to structural aspects of the Constitution, specifically the allocation of the power and the legal processes of constitutional review. The Constitution charges the House of Federation,[35] an assembly of officials nominated by state governments to represent ethnic groups, and the Council of Constitutional Inquiry,[36] a council of experts in various fields nominated by the President of the country for a term, with the authority to "interpret" the Constitution and the power to review the constitutionality of laws. Ambiguities surround the role of judges of the courts in the application / interpretation of the Constitution. The arrangement is motivated apparently by the desire to "democratize" the Constitution, which is premised on the assumption that professional judges have the propensity to cater to the demands of an elitist constituency. The structure, compositions, and decision-making processes of the House of Federation show, however, that the House is visibly political and parochial, i.e. a conduit implementing the ruling party's agenda. It has often acted in a way that is elitist and technocratic.[37]

To sum up, whether and how Ethiopian courts would treat a private conduct that flouts the constitutional rights and liberties is not obvious, if not totally unknown. The constitutional expressions of rights and liberties raise more questions than they answer about horizontal effect of constitutional rights and liberties. The next section highlights some of the private discriminations that are significant in the current Ethiopian social settings, and thence justify a greater attention on the part of the legal profession, and beyond.

[35] FDRE CONST. Art. 61-8, Art. 83.

[36] FDRE CONST. Art. 82, Art. 84.

[37] For discussion of the Ethiopian constitutional review mechanism and problems associated with the House of Federation, *see e.g.,* Chi Magbako et al., *Silencing Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights,* 32 FORDHAM INT'L L. J. 1 259 (2008); A. Fiseha, *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience,* 52 NETHERLANDS INT'L. L. REV. 1, 1 (2005); Minasse Haile, *The New Ethiopian Constitution: Its Impact on Unity, Human Rights and Development,* 20 SUFFOLK TRANSNAT'L L. REV. 1(1996).

4. Significant Kinds of Private Discrimination

People face private discrimination in many forms. Women, children, and other religious and social groups face discrimination in most of the traditional social settings in Ethiopia. The most egregious kinds of discriminations occur in the agrarian social arenas, often by the so-called "customary" regimes, despite efforts by governmental and non-governmental organizations to change these traditions and practices.[38] The fact that the social lives in Ethiopia have always been rife with various forms of discriminations, especially in relation to gender, age, social cast, sex and other social groups, is hardly contentious.

The 1990s saw the introduction of a supposedly liberal constitutional democracy and a free market economy.[39] However, the changes have engendered new social changes and a correspondingly different kind of private discriminations: discrimination by private market actors. Here I will attempt to explain how these types of discrimination occur, and why they are salient.

The changes over the last 25 years have been tremendous. They include: the diffusion of culturally homogeneous communities in to heterogeneous rural and urban communities; rapid urbanization; emergence of private providers of goods and services; rise of commerce and impersonal exchanges as the mainstay of the economic and social activities; and, steadily intensifying dependence and interdependence among individuals.

Various factors account for the changes. One of the factors is the movement of individuals from one community to another community. In particular, movements of people that traverse the contours of ethnicity and other identity-bound local social organizations bear a significant role in the fissions and fusions of culturally homogeneous local communities. To be sure, such movements are not new. Previous governments have made the effort to resettle people from one area into other areas under various programs, on top of the privately induced movement of people that has always existed.

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[38] For discussion of social discrimination, *see e.g.,* Marcus Baynes-Rock, *Ethiopia's* Buda *as Hyenas: Where the Social is more than the Human,* 126 FOLKLORE 3, 266 (2015); Sayuri Yoshinda, *Why Did the Monjo Convert to Protestant? Social Discrimination and Coexistence in Kafa, Southwest Ethiopia, in* PROCEEDINGS OF THE 16TH CONFERENCE OF ETHIOPIAN STUDIES 299 (Svein Ege et al., eds., 2009).

[39] *See* FASIL NAHUM, A CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT (1997).

The increased role of market as a medium of economic and social relations is another leading factor of the change. Population growth, scarcity of land, expansion of communication infrastructure, concentration of job and modern amenities of life in the urban areas, and the presence of labor and capital from abroad are some of the factors that accentuate the change. These factors explain also the proliferation of towns and cities, epicenters of micro-globalization, where individuals of various locales, professions, cultures and other social background come together.

The ideology that shapes and governs the changes and the emerging economy and society is neoliberalism, which centers primarily on privatization and deregulation of the economy, outsourcing the traditional functions of governments to private businesses, and the sanctity of private property.[40] Another key feature of the neoliberal ideology is what Jean and John Comaroff call the "fetishism of the law", which is unqualified faith in the law and courts, "rule of law", as the necessary and sufficient conditions of governing the economy and society.[41]

Some people face unfamiliar kinds of private discriminations in the emerging urban centers. Social dependence and inter-dependence are high in these areas. In a typical urban life in Ethiopia, an individual is likely to depend on another person, probably a corporate person, to get food, housing, medications, and other basic necessities through the medium of impersonal and paper-money market. Urbanization is often associated with progressive social change. It is believed, often intuitively, that diverse cultures, preferences, life-styles, and the autonomy of individuals more generally, flourish in urban centers. However, urbanization can also expose individuals to vulnerabilities, isolations and discriminations, particularly if life in the city means a sudden loss of the familiar social setting and exposure to impersonal economic and social relations.

Take the case of housing rental market in cities and towns. Only a small number of people who migrate to Addis Ababa and other cities afford to buy a house. Hence, the majority of in-migrants and new generations of the residents depend on the rental market. It is well known that the rental market is tough for

[40] For a discussion of Ethiopian neoliberalism, *see e.g.,* Fassil Demissie, *Situated Neoliberalism and Urban Crisis in Addis Ababa, Ethiopia,* 6 JOURNAL OF AFRICAN STUDIES 4, 1475 (2008).

[41] John L. Comaroff and Jean Comaroff, *Reflections on the Anthropology of Law, Governance and Sovereignity, in* RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW 31, 32 -3, (Franz von Benda-Beckmann et al., eds., 2009).

everyone on the demand side. But evidence from parts of Addis Ababa show it is nearly impossible for some people. Interviews with a few residents show that families with children, persons with disabilities, single women, religious and other distinct ethnic minorities face discrimination in the housing rental market because of stereotypes and prejudices associated with the needs and life-styles of these social categories.[42]

People prefer to rent out their houses to single and physically 'fit' men than families or single women or a person with a disability. Ethnicity, religion, and other social backgrounds are another set of the key determinants of a person's position in the rental market. The ability to communicate in the Amharic language, the language of the Amhara people and the *lingua franca* in Addis Ababa and other major cities, is another determinant. The lack of fluency in the language can militate against a person's chance in the rental market, because the lack of fluency is an indicator of a person's identity, and it can also impair communications with the landlord.[43]

To be sure, most of the renters in the Ethiopian urban centers are largely landlords living in one of the units they rent. Hence a degree of discriminatory admission the landlords may make is understandable. If a landlord wanted to choose individuals that are more likely to maintain the atmosphere of "home" in the accommodation, it should not be a serious social ill. The desire to protect the autonomy and preferences of such landlords might have to trump the right to equality of others.

The so-called "Mrs. Murphy exemption" governs a similar situation under the U.S. Civil Rights Act of 1968, also known as the "Fair Housing Act".[44] The Act bans discrimination in regards to sale, rental, and financing of housing on the basis of race, religion, national origin, and sex; but it exempts discriminatory rental provided that the owner who lives there rents the house to no more than three persons or families.[45]

Another aspect of the discrimination concerns the steadily increasing role of corporations and the corresponding vulnerability of consumers to discrimination. Private corporations have become significant parts of the lives and livelihoods of

[42] Interview with R. K. and T. G., Residents of Addis Ababa, Ethiopia (Apr. 25 2017).

[43] *Id. See also,* Midega, *supra* note *1*.

[44] 42U.S.C.A. §§ 3601-3631.

[45] *Id.*

ordinary individuals. This is mainly because of the policy of privatization and the steadily growing presence of transnational capital over the last two decades. The majority of state owned enterprises created during the previous government, which barely functioned anyway, have been privatized. A few have been restructured to act along the lines of the profit incentives — i.e., to provide goods and services on the basis of terms and conditions that are supposedly set by the logic of demand and supply in a supposedly free market economy.

Corporations shape how they relate to consumers, and even how people relate to each other. A case in point is the so-called "outsourcing", a practice that has become popular seemingly on the ground of business efficiency. When privatization does not occur, the government relegates its traditional functions to corporations in the interest of so-called "public-private partnership". The corporations outsource some of their business functions to other corporations. Both the government and the corporations deploy these maneuvers in order to rearrange the legal relations they have with the labor and the consumer and to refract their legal responsibilities. For instance, big companies use the so-called "employment agencies" to avoid direct legal and managerial relations with the labor.

Urban dwellers rely on corporate businesses for daily necessities as well as for jobs and income. Even in the rural areas that are thought to be beyond the realm of modern commerce, rural dwellers procure fertilizers, pesticides, herbicides, seed, and other farm inputs and technologies from foreign and local corporations and intermediaries such as banks and other credit firms. In short, private providers occupy important parts and are poised to have even more critical role in the emerging social relation.

The third issue concerns political imperatives of private discrimination in a multicultural society. The economic, social and political development over the last two decades suggest that private discriminations occur usually along the lines of ethnicity and other social cleavages among Ethiopians. An explanation is the fact that ethnicity, or identity more generally, has become the backbone of the politics and the governance narratives.

Multi-cultural societies that have social inequality along the lines of social cleavages often face factional competitions and confrontation. Outcomes of such factionalism have been devastating. Albert O. Hirschman, a renowned social theorist, gives a plausible explanation for the phenomena as follows: Unequal growth in such societies gives rise to "relative deprivation" that can lead to the

depletion of tolerance for social inequality, and eventually, to violence.[46] Economic growth is a noble thing; but unequal growth can be worse than poverty for it can lead to long-lasting factionalism and hostilities that undermine social fabrics. Evidence from Nigeria, Pakistan, and other multi-cultural societies shows factional objections and violence obliterated remarkable economic changes and promising prospects these societies once had, because of social inequalities.[47]

The recent protests in various parts of Ethiopia instantiate Hirschman's thesis. The reports about the protests and protesters show that many people believed not only that the distribution of power and property over the last two decades has been along the lines of ethnicity; but also that the state has been the main auxiliary of this exclusive social group and its growing economic and political clout. Some of the reports show that political affiliations shaped the unequal distribution of power and property. The important point is not about accuracy of the reports or what else might actually caused the protests. The question, rather, is what role private discrimination might have in creating or perpetuating social inequalities, relative-deprivations, and the emergence of factional hostilities and violence along the lines of social cleavages.

That social groups or networks often use private discrimination to maintain an exclusive status is a plausible observation. Thus, how the private actors, whose sphere of influence has been steadily increasing, would treat ordinary persons and people of the "other" social category can generate politically significant outcomes. The leaders do not seem to see social, political and legal significance of private discrimination. The "ownership" model of property, which means that the owner has an assailable power over the things he or she owns,[48] is deeply entrenched in the ideology and governance architecture of the ruling party.

The reflection in this essay is on the question whether the bodies charged with the authority of constitutional review can enforce constitutional rights and liberties to a private discriminatory conduct. It is not about legality of private discrimination *per se*. Statutory laws, State administrative bodies, and private regulatory regimes can regulate private discriminations. Labor laws and regulations, commerce laws, and business license regulations might concern some aspects of private discrimination.

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[46] ALBERT O. HIRSCHMAN, THE ESSENTIAL HIRSCHMAN 74 (Jeremy Adelman ed., 2013).

[47] *Id.*

[48] JOSEPH WILLIAM SINGER, THE PARADOX OF ENTITLEMENT (2000).

The constitutional clauses discussed in the preceding section of this essay can also offer tentative starting points to interrogate legality of private discrimination in certain fields. The Equality Clause and the Supremacy Clauses can be key to start with an effort to apply the constitutional rights and liberties to a private conduct that contradicts the anti-discrimination clauses of the Constitution. There exist various interpretive possibilities on the basis of the constitutional texts. However, in the absence of evidence of judges' and jurists' approach, the legality of private discrimination is a black hole of the Ethiopian constitutional jurisprudence. Even if a consensus emerges on the horizontal effect of constitutional rights and liberties, questions of standing, evidence or proof, remedy and other procedures may mar the enforcement of the rights and liberties to private conduct.

5. Conclusion

This essay attempted to situate private discrimination at the intersections of the steadily intensifying power of the "private" and the norms and values envisioned in the constitutional rights and liberties. Some problems of "private" discrimination might be addressed if courts give horizontal effect to constitutional rights and liberties. Other kinds of discriminations, the ones that occur often in the housing rental market and other personal relations and competing/conflicting values, might require special and specific laws and regulations detailed enough to guide decision-making. This is because of the fact that private discrimination often cuts both ways—i.e., it can be a legitimate expression or exercise of the rights and liberties of one person and violation of the rights and liberties of another. Judging the legality of private discrimination involves balancing fundamental and multiple values that compete and conflict.

An important caveat is in order. The reflection on private discrimination is neither to suggest that other kinds of discriminations, and the lack of respect for the other basic rights and liberties more generally, are less important. Nor is it to propagate the hope that a simple solution that can address the problem of private discrimination is available. I am acutely aware of the fact that law may actually depoliticize and normalize the questions of private discrimination and thereby aggravate the problem. But I think this is one of the questions worthy of debate and discussion.

Provisional Attachment Order *vs.* Judicial Mortgage in Ethiopia: Comments on Decisions of the Cassation Bench of the Federal Supreme Court

Aschalew Ashagre Byness[*]

1. Introduction

It is a fact of life that persons, both legal persons and physical persons, become debtors of other persons by virtue of legal, contractual or extra-contractual relationships. The creditors of the debtors may be ordinary or secured creditors as the case may be. However, when circumstances allow, creditors always want to be secured creditors as opposed to rank-and-file ones because the former are better off than the latter if there are many competing creditors over one asset of a debtor which cannot satisfy the claims of all creditors. One of the security devices, recognized in many jurisdictions in general and in Ethiopia in particular, is mortgage. In Ethiopia, the 1960 Civil Code (Civil Code) has clearly provided that a mortgagee-mortgager relationship can be created by virtue of the law (legal mortgage), by virtue of agreement (contractual mortgage) and by virtue of a verdict of a court of law or an arbitral tribunal (judicial mortgage).[1] However, irrespective of the source of the mortgage, a mortgage should be registered by a competent government agency[2] so that it can be valid and binding on the mortgager and can give the creditor priority right over other secured creditors who come next to the first secured creditor and other ordinary creditors.

Despite the clear message of the Civil Code, as shall be discussed below, the Cassation Division of the Federal Supreme Court decided in one case that provisional attachment order made by a court of law can create a mortgagee-mortgager relationship even in the absence of registration. In another decision, however, the Cassation Bench has tried to demonstrate that attachment order

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[1] The Civil Code of the Empire of Ethiopia, Proclamation No. 165/ 1960, *Neg. Gaz.*, Year, No, Art. 3041.

[2] *Id.*, Art. 3052.

cannot create a judicial mortgage. This unclear stance of the Cassation Bench has become a source of confusion among practicing lawyers and lower courts instead of insuring predictability, uniformity and certainty of decisions. We have to bear in mind that the equivocation created by the Bench has far reaching effects as decisions of the Bench are declared to be binding interpretative precedents by virtue of a Proclamation issued in 2005.[3]

The purpose of this contribution is, therefore, to analyze these decisions of the Cassation Bench in light of the applicable provisions of the Civil Code and the Ethiopian Civil Procedure Code. To this end, four cases have been selected and critically analyzed. Through this analysis, the writer has come to the conclusion that the stance of the Cassation Bench is still a source of confusion since it has not made clear distinction between the legal effects of provisional attachment order and judicial mortgage, though attachment order is quite different from judicial mortgage both in terms of its essence, its operation and its legal effect.

In this case analysis, the writer argues that attachment order does not give rise to priority right and hence it cannot be equated with judicial mortgage. Therefore, the writer recommends that the Cassation Bench has to reconsider its position in future cases and has to clearly decide that attachment order cannot be taken as a judicial mortgage since the former lacks the elements of the latter as provided by the Civil Code.

This comment is organized as follows. The second part discusses fundamentals of mortgage very briefly. Under the third section the selected cases are summarized, analyzed and commented. Finally, brief concluding remarks are presented.

2. Fundamentals of Mortgage

2.1. What is Mortgage?

Before we delve into the discussion of other matters which are germane to the title of this work, it is better to give some definitions of mortgage which help us have a clear picture of the concept. According to Black's Law Dictionary,[4] 'mortgage is a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void up on

[3] See Federal Courts Amendment Proclamation, Proc. No 454/2005, *Fed. Neg. Gaz.*, Year 11 No. 42.

[4] BLACK'S LAW DICTIONARY 3201 (Bryan A. Garner ed., 8th ed. 2004).

payment or performance according to the stipulated terms.' Though this definition sheds some light on the concept, it does not give us a complete picture of mortgage since some other basic elements of mortgage are missing. In addition, it has not defined what properties are subject to mortgage since all properties are not, as a matter of rule, brought within the ambit of mortgage. In addition, the above definition does not show the sources and effect of mortgage. However, this definition is useful because it tells us that mortgage is an accessory obligation which becomes void upon the extinction of the principal obligation.

According to Investopeida,[5] a mortgage 'is a debt instrument, secured by collateral of specified real estate property that the borrower is obliged to pay back with a predetermined set of payments.' This definition tells us that mortgage is a security device which is meant to secure the payment of borrowed money. Again, this definition cannot be taken as a definition which conveys the complete essence of mortgage. This is because the definition has narrowed down the scope of application of mortgage as it has confined mortgage to obligation arising only from borrowing while mortgage can be a security device for the performance of any obligation emanating from the law or a contract or from an extra-contractual obligation, for that matter.

According to Planiol, mortgage is a real security which, without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold, in whosever hands it is found and get it paid from the proceeds by preference to the other creditors.[6] As compared to the previous definitions of mortgage, the definition accorded to the term under consideration by Planiol is better because it has incorporated the most important pillars of mortgage.

In Ethiopia, mortgage has been regulated by the 1960 Civil Code. Though the Code did not define mortgage, it has contained several provisions dealing with the types of mortgage, the requirements for the formation of a valid mortgage, effects of mortgage and extinguishment of mortgage. When one closely reads

[5] See INVESTOPEDIA (December 23, 2016), http://www.investopedia.com/terms/m/mortgage.asp.

[6] See 2/2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 472 (Louisiana State Law Institute trans., 1959) (11th ed. 1939).

these provisions, one can conclude that the elements of mortgage under the Civil Code are similar to the elements of mortgage described by Planiol.[7]

2.2. Creation of mortgage (Types of Mortgage)

When we see various legal systems in the world, we realize that there are various modes of establishment or creation of mortgage. In other words, mortgages are distinguished from one another on the basis of their source.[8] If we take the case of France, mortgage could be:[9]

- a legal mortgage
- Conventional mortgage
- Judicial mortgage

In France, legal mortgage is a mortgage which the creditor obtains by virtue of the law without obtaining an express agreement of the mortgagor. This type of mortgage was called tacit mortgage due to the absence of agreement between the mortgagee and the mortgagor. There are numerous legal mortgages in France. According to Planiol, there are close to fifteen legal mortgages. To mention some of them: [10]

- Mortgages of married women on the property of her husband;
- The mortgage of persons under trusteeship (minors and interdicts) ;
- The mortgage of the state, of the communes and of the public establishments on the property of those accountable for public funds;
- The mortgage of legatees on the property of their debtors in state of bankruptcy;
- The mortgage of the customs office on the property of those indebted to it, and the like.

The second type of mortgage, conventional mortgage, is established by agreement of the parties (by the mortgagee and mortgagor). The contract constituting the mortgage should be passed before a notary as provided under Art. 2127 of the French Civil Code. The mortgage contract in France is one of the rare contracts which should be made solemnly. Therefore, the conventional

[7] See Kibreab Habtemichael, Mortgage: Effects and Practice under the Ethiopian Law 2-3 (1972) (unpublished senior thesis manuscript, on file with Faculty of Law, Addis Ababa University).

[8] Planiol, *Supra* note 6, at 531.

[9] *Id.*

[10] *Id.*

(contractual mortgage) depends not only on the contact but also on the exterior form of the acts.[11]

Judicial mortgage is a general mortgage which the law attaches to every judgment which condemns a castor to execute his obligation as stipulated under Art. 2123 of the French Civil Code. The existence of this type of mortgage is important because it assures the execution of judicial decisions in the most efficacious way possible. In France, judicial mortgage is not a mortgage established by judicial discretion since the courts do not have the power to refuse the creation of judicial mortgage. That is why it is said that judicial mortgage is a legal mortgage taking effect by the operation of the law.[12] Nonetheless, the French Civil Code does not give a complete picture of judicial mortgage. In this regard, Planiol wrote that:[13]

> It is to be observed that the Civil Code is very brief on the judicial mortgage. It can be said that in this matter … it confined itself to vaguely consecrating existence, leaving it to jurisprudence guided by tradition, to provide the necessary rules. Thus, it does not either enumerate the jurisdiction nor the judgments giving rise to this mortgage, nor does it define its conditions; it does not even contain the essential concept that the judgment should contain a condemnation to something.

In Ethiopia, the principle governing the creation of mortgage is laid down under Art. 3041 of the Civil Code. This article provides that mortgage results from the law, or a judgment or may be created by a contact or other private agreement. The first two sources are self explanatory. However, the phrase 'other private agreement' is a vague expression. This is because one cannot stop wondering as to what is meant by a private agreement other than a contract since every contact is a private agreement.[14] In other words, because the bedrock for the formation of a contract is agreement of the contracting parties, every contract is an agreement though every agreement is not a contract. Therefore, if we stick to the English version of the above article, we cannot arrive at the right conclusion regarding the exact meaning of the phrase 'private agreement'.

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[11] Planiol, *Supra* note 6, at 531-532.

[12] *Id.*, at 573.

[13] *Id.*

[14] See the definition of contract under the Civil Code of Ethiopia, *Supra* note 1, Art. 1675. According to this Article, a contract is an agreement whereby two or more persons as between themselves create, vary, or extinguish obligations of proprietary nature.

Nevertheless, a reference to the Amharic version, which is the controlling version, is very much helpful to understand the meaning of the phrase under discussion. This is because the Amharic counterpart of the phrase 'private agreement' is the word '**ኑዛዜ**' (will) which means that the English version of this phrase is not the same as the corresponding Amharic version. Here, what we have to bear in mind is that will is not a result of agreement since it is a juridical act which can be made and broken by the testator until his/her death without any involvement of the legatee.[15] Therefore, on the basis of the above analysis, we can conclude that in Ethiopia, mortgage may be created by virtue of the law, a contract, a judgment or a will. Discussion of each source of mortgage in the Ethiopian context is briefly presented as follows.

As to a legal mortgage, Art. 3042 of the Civil Code has provided that whosever sells an immovable shall have a legal mortgage on such immovable as a security for the payment of the agreed price and for the performance of any other obligation laid down in the contract of sale. As can be gathered from this article, we can safely conclude that while the principal obligation (contract of sale) is a result of the agreement of the contracting parties, the accessory obligation (mortgage) is established by virtue of the law which is aimed at best protecting the interest of the seller where the buyer fails to discharge his/its/her most important obligation: payment of price.[16]

In addition to the above type of legal mortgage, Art. 3034 of the Civil Code has stated that a co-partitioner has a legal mortgage. Sub-Art. 1 of this Article states that a co- partitioner shall have a legal mortgage on the immovable allotted to his co-partitioners in accordance with the act of partition. As provided under sub-Art. 2 of the same article, the purpose of such legal mortgage is securing the payment of any compensation in cash that may be due to him/her or such other

[15] *Id.*, Arts. 857-941.

[16] In this connection, one question that crosses our mind is as to what other obligations, other than the payment of price, could be conceived that can be a cause for the establishment of a legal mortgage. Needless to say, contracting parties do have the freedom to determine the contents of their contract without contradicting mandatory provisions of the law. In concluding a contract of sale of a building (since land is not a subject of contract of sale in Ethiopia) the parties may agree that the buyer shall pay charges and fees owed by the seller to the government; the buyer may agree that he/she/it shall discharge obligations arising from servitude, lease, usufruct and the like that should have been discharged by the seller had it not been for such agreement. Hence, under those circumstances, the seller becomes a mortgagee by virtue of the law where the buyer fails to discharge such obligations that are stipulated in the contract of sale of the building.

compensation as may be due by the co-partitioners where he/she is dispossessed of any property allotted to him/her.

In relation to the above mentioned article, one relevant question worth raising is as to who are co-partitioners under the Ethiopian legal system. The answer to this question is to be obtained by a close examination of the Civil Code and other laws of the country. One instance which may give rise to co-partitioner is the case of joint ownership as provided under the Civil Code. In this regard, Art. 1257 of the Code has stated that a thing can be jointly owned. Because the term a thing is a very general term, it definitely encompasses immovable properties which can be brought within the ambit of mortgage. Though buildings or land may be jointly owned even perpetually, each joint owner is entitled to apply for the thing jointly owned, if an immovable, to be divided giving rise to the presence of co-partitioners as envisaged by Art. 3043 of the Civil Code. As far as the creation of joint ownership is concerned, it may be created by virtue of the law, a contact or a will.[17]

We can also argue that where the estate of a deceased person is divided among heirs and/ or legatees, each one of such persons can be taken as a co-partitioner. In this regard, Art. 1060(1) of the Civil Code has stated that the succession shall remain in common between the heirs until it is partitioned while Sub-Article (2) of the same Article has stipulated that the rights of co-heirs on the property of inheritance which is in common shall be governed by the provisions of the Civil Code dealing with joint ownership.

A close reading of Art. 3043 of the Code reveals that a legal mortgage is recognized in favor of a co-partitioner which is meant to secure the payment of any compensation due to a co-partitioner and such other compensation arising from dispossession. A question may be asked as to what the source of the harm that gives rise to compensation to the co-partitioner is, since compensation cannot be imagined without damage/harm. Should the harm occasioned be attributable to the fault of the co-partitioner or could it be a strict liability? Though nothing can be inferred from this Article to give adequate answers to these questions, we can argue that the source of the harm could be the other co-partitioner(s). Let us say that one co-partitioner discharged a debt individually which should have been discharged by all the joint owners. However, the other co-partitioners may fail to contribute to the payment of the debt in which case a

[17] MURADU ABDO, ETHIOPIAN PROPERTY LAW: A TEXT BOOK 245 (2012).

co-partitioner that discharged the common debt becomes a mortgagee over the partitioned immovable by virtue of the law. In the case of dispossession, the harm comes from third parties other than the other co-partitioners. In both cases, the co-partitioner who has sustained harm is entitled to be compensated and the immovable is a security to such compensation by virtue of the law.

In Ethiopia, the other type of mortgage is judicial mortgage. However, judicial mortgage is not defined under the Ethiopian legal system. Despite this, the Civil Code has something to say about judicial mortgage. According to Art. 3044(1) of the Civil Code, a court or an arbitration tribunal may secure the execution of its judgments, orders or awards by granting one party (the decree holder) a mortgage on one or more immovables belonging to the judgment debtor. Sub-Art. 2 of the same Article underscores that the judgment or award should specify the amount of the claim secured by mortgage and the immovable or immovables to which such mortgage applies. The absence of detailed legal provisions pointing out the essence of judicial mortgage and the dearth of judicial and scholarly analysis on the issue mean that the exact scope of application and the requirements for the creation of a valid judicial mortgage in Ethiopia remain unclear. For instance, a close reading of Art. 3044 of the Civil Code leads to the following questions: How can a judgment create mortgage? Is such mortgage established upon the application of the decree-holder or can it be established upon the initiation of the court or the arbitral tribunal? Can judicial mortgage be established by provisional orders? How is judicial mortgage different from an attachment order granted by a court or an arbitral tribunal while the case is pending? Should a judicial mortgage be created after the case is finally disposed of through an order, a judgment or an arbitral award?

It is not easy to give direct answers to the above queries though these issues are extremely important. It is true that a court of law can create a judicial mortgage through its judgment. However, arguing that a court of law can create a judicial mortgage on its own motion unless it is requested by a decree holder cannot hold water since no relief should be granted unless expressly pleaded by the party concerned. Should such mortgage be given after the judgment is made or the arbitral tribunal has handed down the award? Still no clear answer is to be found in the Ethiopian law and practice. In the opinion of this writer, it seems good if the decree holder applies before the finalization of the court or arbitral proceeding so that it would be convenient to the court or the arbitral tribunal to create a judicial mortgage along with the judgment or the award. Again, this writer believes that judicial mortgage may be established by a court or an arbitral

tribunal while the case is pending so long as such kind of mortgage meets other stringent requirements for the establishment of a valid mortgage in Ethiopia. We can also argue that judicial mortgage may be created after a case is decided.

Decision of a court or an award of an arbitral tribunal should specify the amount of the claim secured by mortgage. However, we have to bear in mind that since the mortgage is to be established after the amount due to the decree holder is clearly ascertained, what is secured by the mortgage is not a mere claim. In order to understand the clear message of Sub-Article (2) of Art.3044 of the Code, we need to make a reference to the Amharic version of the same Article which clearly states that the judgment or award should specify the amount of the debt.[18]

The other kind of mortgage in Ethiopia is contractual mortgage. When a mortgage is created through the agreement of the mortgagee and the mortgager, such contract should satisfy all the requirements of a valid contract stipulated under the Civil Code.[19] This means that in order to establish a valid contract of mortgage, the contracting parties should be capable, the object should be specifically defined, should be possible, moral and lawful.[20] In addition, the formality requirement should be satisfied as form is a requirement to establish a valid contract of mortgage in Ethiopia.[21]

2.3. Specific Requirements for the Creation of a Valid Mortgage in Ethiopia

In many jurisdictions, there are various specific requirements for the creation of a valid mortgage. For instance, in Bulgaria mortgage can be set up over immovable property and rights in *rem*.[22] In Bulgaria, mortgage can be valid where it clearly identifies the creditor and the debtor, the property over which mortgage is established, the secured claim as well as the amount for which the mortgage has been created.[23] In Bulgaria, contractual mortgage is concluded in the form of a notary deed while statutory mortgage is established upon an application by the mortgager containing the elements of the mortgage agreement. Registration of

[18] See the Amharic version of this Sub-Article.

[19] The Civil Code of Ethiopia, *Supra* note 1, Art.1678.

[20] *Id.* See also Arts. 1714-1716 and Art. 1723(1) of the same Code.

[21] *Id.*, See Arts. 1719- 1730.

[22] See DELLOITTE LEGAL GUIDE TO CROSS-BORDER SECURED TRANSACTIONS (December 15, 2016), available at https://www2.deloitte.com/global/en/pages/legal/articles/deloitte-legal-guide-to-cross-border-secured-transactions.html.

[23] *Id.*

mortgage is mandatory for its validity in Bulgaria.[24] In the Netherlands, mortgage is one of the most important security devices. In that country, rights of mortgage can be created over property subject to registration. Here, properties which are the subject of mortgage are immovable property, registered ships and aircraft. Registration of mortgage is another indispensable requirement to establish a valid mortgage.[25] In France, mortgage can be established over real estate which are immovable properties and movables attached to an immovable property. In order to create a valid mortgage, it must be executed by a notarized deed which must also state the maximum secured amount. In addition, the deed must be drafted in French.[26]

In Russia, mortgage is one of the security devices recognized by law to secure any type of obligation and registration of the mortgage is a validity requirement.[27] In Spain, real estate mortgage and chattel mortgage are recognized by law. In the case of real estate mortgage, all kinds of real estate assets such as surface rights, usufruct rights and administrative concessions are objects of real estate mortgage while chattel mortgage pertains to movable assets such as motor vehicles, airplanes, industrial machinery and intellectual and industrial property.[28] In Spain, all kinds of obligations can be secured by means of mortgage so long as the validity requirements are satisfied.[29] There are general and special requirements for validity of mortgage that need to be cumulatively satisfied. The general requirements include consent of the parties, capacity, clear identification of the main obligation, legitimate cause (the cause of the mortgage must be lawful, moral and in line with the demands of public order).[30] In addition, all types of mortgage securities (real estate and chattel) have to be executed as a public deed before a Spanish notary and, additionally, must be filed for registration with the property register of the place where the property is located. In the Spanish law, if any of those two requirements is missing, no valid mortgage is constituted.[31]

[24] *Id.*

[25] *Id.*, at 91.

[26] *Id.*, at 19.

[27] *Id.*, at 105.

[28] *Id.*, at 118.

[29] *Id.*

[30] *Id.*

[31] *Id.*

In Thailand, mortgage of immovable properties and certain movable properties (such as registered machinery and vessels) is an essential security device serving to secure any sort of obligation.[32] Here, a mortgage agreement should be made in writing and registered with relevant government authorities.[33] In the case of Chile, mortgage over real estate is among the security devices recognized. In Chile, mortgage must be granted by a public deed and it must be registered in the register of mortgages of the real estate register of the commune where the property is located as a condition precedent for its validity.[34]

The Ethiopian Civil Code has embodied some relevant provisions regarding requirements that need to be satisfied in order to establish a valid mortgage. To begin with, the contract or other agreement creating a mortgage cannot produce any legal effect unless it is made in writing. In addition to the writing requirement, the contract of mortgage is of no effect unless it specifies the amount of the claim secured by mortgage in Ethiopian currency.[35] This means that indicating the amount of the claim secured by mortgage in a currency which is not the legal tender of Ethiopia affects the validity of the mortgage.

In Ethiopia, a mortgage can be created to secure any claim whatsoever, whether existing, future, conditional or contingent. In addition, mortgage may be created to secure a claim embodied in a title to order or to bearer.[36] As to the types of property that can be object of mortgage, it is only immovables that are charged with mortgage[37] while the Code has given a room where certain movables may be mortgaged by virtue of special laws of Ethiopia.[38] In line with this exception, the Maritime Code of Ethiopia has provided that ships of two tons, gross tonnage and above may be mortgaged though ship is defined to be a movable property under Art. 3 of the same Code.[39] By the same token, though the Commercial

[32] *Id.*, at 130.

[33] *Id.*

[34] *Id.*, at 129.

[35] Civil Code of Ethiopia, *Supra* note 1, Art. 3045.

[36] *Id.*, Art.3046.

[37] *Id.*, Art. 3047(1).

[38] *Id.*, Art. 3047(2).

[39] Maritime Code of the Empire of Ethiopia, Proclamation No. 164/1960, *Neg. Gaz.* Year 19, No. 1, Art. 30.

Code of Ethiopia has considered a business as an incorporeal movable,[40] a business may be mortgaged and the source of such mortgage may be the law or a contract which means that judicial mortgage and mortgage created by will are missing under the Commercial Code of Ethiopia with regard to business mortgage.[41]

As provided under Art. 3048 of the Civil Code, the act creating the mortgage is required to specify the immovable mortgaged. Particularly, such act should specify the commune where the immovable is situated, the nature of the immovable and where appropriate the identification number of the immovable in the cadastral survey plan. The Civil Code provides that a mortgage may be created by a debtor or by any other third party in favor of the debtor.[42] In any case, a person cannot secure his debt by mortgage unless he is entitled to dispose of the immovable for consideration. Therefore, if mortgage is created by a person who is not entitled to dispose of the immovable property, the mortgage is invalid. In addition, such mortgage cannot be valid even if the mortgager acquires the mortgaged immovable subsequent to the establishment of the mortgage. Similarly, mortgage cannot be established on future immovables.[43]

In addition to the above requirements, in Ethiopia a valid mortgage cannot be established in the absence of registration as it is the case in other jurisdictions. The most important question, however, is: is registration a validity requirement for all types of mortgage in Ethiopia - contractual mortgage, legal mortgage, judicial mortgage and mortgage created by will? The relevant article concerning this question is Art. 3052 of the Civil Code. Sub-Art. 1 of this Article has clearly provided that mortgage, *however created*, (emphasis supplied) shall not produce any effect except as from the day when it is entered in the registers of immovable property at the place where the immovable mortgaged is located. Now, the question is: what is the meaning of the phrase "however created?" Does it mean that registration is a mandatory requirement for the creation of a valid mortgage whether mortgage is created by contract, will or judicial decision or an arbitral award? It has been indicated above that the Ethiopian Civil Code has made it clear that mortgage can be created by contract, will, judicial decision, arbitral

[40] Commercial Code of the Empire of Ethiopia, Proclamation No., 166 /1960, *Neg. Gaz.*, Year 19, No.3, Art. 124.

[41] *Id.*, Art. 171.

[42] The Civil Code of Ethiopia, *Supra* note 1, Art. 3049.

[43] *Id.*, Art. 3050.

award and by virtue of the law. Therefore, in the opinion of this writer, when we relate the way mortgage is created with strong message of Art. 3052 of the Code, we can safely conclude that no valid mortgage can be established in the absence of registration.[44]

2.4. Can Provisional Attachment of an Immovable Property be taken as a Judicial Mortgage in Ethiopia?

Before we give any positive or negative answer to this query, we have to first analyze what attachment is, its source and its effects. Under Ethiopian legal system, the word 'attachment' is not defined. Hence, first we have to consult foreign materials to have a fair understanding of the term 'attachment'. Black's Law Dictionary defines attachment as *the seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment*.[45] Attachment order, otherwise known as provisional seizure in civil law countries, is a measure taken by a court of law or an arbitral tribunal, before which civil proceeding is pending upon the application of the plaintiff. This provisional measure is widely practiced in many jurisdictions of the world. For instance, in the USA, attachment order may be made so as to ensure that a judgment will be carried out where it is believed that the defendant may dissipate his assets before judgment is handed down. In the USA, the attachment is made against the property of the defendant which means that the measure is basically *in rem*.[46] The purpose of attachment in America is not to create a preferential right for the beneficiary of the seizure in case the debtor becomes bankrupt.[47]

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[44] The worrisome issue, however, is why is registration a validity requirement in Ethiopia as is the case in other jurisdictions of the world? Because mortgage is the most important one of all security devices, special attention is given to mortgage. To begin with, mortgage, as a matter of rule, encumbers real estate which is a very much valuable asset all over the world. Therefore, to know the exact scope of application of the encumbrance and to assure its authenticity, mortgage should be registered. Most importantly, registration plays irreplaceable roles to clearly understand the exact order of priority right among competing mortgagees. The interests of third parties are also best protected where there is a system of registration of mortgages. Therefore, it is safe to conclude that registration is a validity requirement for all types of mortgage in Ethiopia.

[45] Garner, *Supra* note 4, at 387.

[46] Catherine Kessedjia, *Note on Provisional and Protective Measures in Private International Law and Comparative Law 17* (1998), available at https://assets.hcch.net/docs/b6b726b3-1597-40c0-a9c6-894dd5fc9518.pdf.

[47] *Id.*, at 18-19.

In Germany, there are two kinds of measures to protect assets with a view to insuring that writs of execution can be enforced in a future date. These are arrest and the provisional injunction. However, by arrest here we do not mean arrest of a defendant: rather arrest is a means of blocking of the assets and property of the debtor and is ordered by a court. In Germany, arrest is a decision of a general kind which is valid without specifying which assets are involved. However, such general order must be followed by an enforcement measure which may take a variety of forms such as attachment, sequestration or special entry in the land register.[48] Here, the arrest has a particular effect as it accords a priority right over the attached assets. The priority right is reckoned from the date of the attachment.[49] In Switzerland, too, provisional measures are recognized by law. The term used in place of attachment is sequestration when the measure is to recover a sum of money. Accordingly, a sequestration order is a measure which freezes the debtor's assets so that the creditor may be paid out of these assets if he prevails in the litigation on the merits of the case. However, the creditor does not enjoy any preferential claim over other creditors.[50]

In our own case, provisional measures are recognized under the 1965 Civil Procedure Code. Of these provisional measures, attachment order is one. Under the Civil Procedure Code, attachment order can be granted by the court upon the application of the plaintiff at any stage of the civil proceeding.[51] However, the plaintiff cannot get the property of a defendant attached by the mere fact that suit has been brought against the defendant. Rather, the plaintiff should show to the court entertaining the case that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or part of his property from the local limits of the jurisdictions of the court with a view to obstructing or delaying the execution of the decree that may be passed against him. The applications for attachment order may be supported by affidavit though affidavit is not always a requirement.[52]

According to the Ethiopian Civil Procedure Code, the court cannot grant attachment order without giving the defendant the opportunity to be heard. To

[48] *Id.*, at 25-26.

[49] *Id.*

[50] *Id.*, at 39-46.

[51] The Civil Procedure Code of the Empire of Ethiopia, 1965, Decree No 52/1965, *Neg. Gaz.* Year 25, No., 3, Art. 51.

[52] *Id.*

this end, where an application to an attachment order is made the court summons the defendant to produce security or to show cause why such security should not be produced. If the defendant's argument is not accepted and if he/she fails to produce security as determined by the court, the court grants an attachment order.[53] The Civil Procedure Code also provides that attachment can be granted against any property though there are some assets which are not subject to attachment. In addition, attachment before judgment cannot affect rights of persons not parties to the suit, existing prior to the attachment. Moreover, the presence of attachment order cannot bar any person holding a decree against the defendant from applying for the sale of the property under the attachment in execution of the decree. Under the Ethiopian legal system, attachment order may be given after a decree is passed where the decree holder applied for execution and where attachment of a property of the judgment debtor is necessary.[54]

In Ethiopia, both pre-judgment and post judgment attachment orders do not give rise to priority right to a decree holder in whose favor attachment order is granted. This is so because the Ethiopian Civil Procedure Code has nowhere stated that attachment order gives preferential right to a decree holder in whose favor attachment order is granted. When we see the purpose, establishment and effects of attachment orders, be it pre-judgment or post judgment, we can conclude that attachment order cannot be equated with judicial mortgage and hence cannot give rise to priority right to the person in whose favor such order is granted. In this regard, Robert Allen Sedler wrote:

> The plaintiff who obtained attachment of property prior to the decree should not be in a better position as regards execution than any other plaintiff. The fact that the Code refers to the rights of the parties in an attachment before judgment should not mean that after the judgment, the attachment gives the plaintiff greater [share] than other decree holders.[55]

Moreover, attachment order cannot be taken to be a judicial mortgage because the former cannot meet other requirements of mortgage in addition to the requirement of registration. For instance, attachment order is not required to specify the amount of the claim secured by attachment while this is a strict requirement in judicial mortgage. Secondly, once an attachment order is given,

[53] *Id.*

[54] *Id.*, Art.52.

[55] See ROBERT ALLEN SEDLER, ETHIOPIAN CIVIL CODE 364 (1968).

the property attached cannot be sold by the owner of the property while a mortgagor has the liberty to sell the mortgaged property (irrespective of the mode of creation of the mortgage) since the mortgagee has the right to follow the property mortgaged.[56]

We have to bear in mind that attachment and mortgage are mutually exclusive because a mortgaged property can be attached as we can understand by closely examining the Civil Code.[57] We can mention some conspicuous examples in support of this by citing relevant provisions from the Civil Code. For instance, Art. 3068(1) of the Code states that where the mortgaged immovable is leased, the mortgage shall apply to the rent having run from the day when the immovable was attached. Again, when we read Arts. 3081(1), Art. 3083(1), Art 3079, Art. 3080, 3085, 3090 3093, Art. 3094 and 3095 of the Code, we can realize that attachment comes into the picture regardless of the type of mortgage securing the performance of any lawful civil obligation.

From the foregoing discussions, we can understand that attachment order made by a court of law cannot in any case be equated with judicial mortgage which means that attachment cannot confer priority right on the person in whose favor attachment order is given.[58] What is the stance of the Cassation Bench of the Federal Supreme Court with regard to the issue under discussion? We will examine various positions of the Bench in the following section of this piece.

3. Case Analysis and Comments

Case 1

This case was litigated between the Commercial Bank of Ethiopia (herein after referred to as "the applicant") and Ato Walelign Ayalew and W/ro Lemech

[56] Civil Code of Ethiopia, cited above at note 1, Art. 3085.

[57] In this regard, see Menberetsehay Taddese, *ሞርጌጅ፡- ዋስትና የተነፈገው የዋስትና ሕግ* (1998 E.C) (Unpublished) (Available with the author in hard copy)

[58] This view is supported by some legal professionals with whom I held discussions in the course of writing this paper. For instance Judge Sintayehu Zeleke, a judge in the Federal High Court strongly argues that attachment order is quite different from judicial mortgage. I also heard the same arguments from other fellow lawyers. There are also scholarly works which support the view of this writer. See Beza Dessalegn, *በሰበር መዝገብ ቁጥር 29269 ጥቅምት 15 ቀን 2000 ዓ.ም የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰጠው ፍርድ ላይ የቀረበ ትችት፡* 4/1 MIZAN LAW REVIEW 176, 176-182 (2010).

Lakew[59] (hereafter cited as the respondents). From the decision of the Cassation Bench, we can understand that Ato Walelign lent 80,000.00(eighty thousand) Birr to W/ro Lemech. However, the borrower failed to repay the loan on the due date. Because of this, Ato Walelign brought suit against W/ro Lemech and judgment was rendered in his favor. Following the judgment, the decree holder (Ato Walelgin) filed execution application against the judgment debtor (W/ro Lemech) before the Zonal High Court of West Gojjam, Amhara Regional State. The decree holder applied to the court which was entertaining the execution proceeding to transfer to the decree holder a building belonging to the judgment debtor located in the town of Finote Selam.

While the execution proceeding was pending, the Commercial Bank of Ethiopia applied to intervene in the proceeding as per Art. 418 of the Civil Procedure Code alleging that the bank got the above building attached prior to the institution of the execution proceeding by Ato Walelign since W/ro Lemech was also the judgment debtor of the bank. The court accepted the application of the Bank and heard the arguments of both sides. The Bank argued that because it got the building attached by a court of law prior to the institution of the execution proceeding by Ato Walelign, it would enjoy priority right. However, the Zonal High Court decided in favor of Ato Walelign saying that attachment order could not give rise to priority right. Aggrieved by this decision, the Bank appealed to the Regional Supreme Court. Nonetheless, the Supreme Court of the Region confirmed the decision of the lower court. Finally, the Bank appealed to the Federal Supreme Court Cassation Bench which reversed the decision of the regional courts. The Cassation Bench reasoned that attachment orders are judicial mortgages as per Art. 3044(1) of the Civil Code giving rise to a priority right. The main part of the decision of the Cassation Bench reads:

> *አኛም ጉዳዩን መርምረናል። እንደመረመርነውም የአሁን 1ኛ ተጠሪ የብድር ውል መሠረት አድርጐ ክስ ከማቅረቡና ከማስወሰኑ በፊት የአሁን አመልካች በ2ኛዋ ተጠሪ ላይ ባቀረበው ክስ ምክንያት ጥቅምት 28 ቀን 1995 ዓ.ም ይሽው ክርክር ያስነሳው ንብረት በማናቸውም መንገድ ቢሆን ወደ ሦስተኛ ወገን እንዲይተላለፍ ያሳገደው ስመሆኑ በግራ ቀኙ መካከል የተካደ ፍሬነገር አይደለም። ይህ መሆኑ ከተረጋገጠ በአመልካች በኩል የተፈፀመው ተግባር በ2ኛ ተጠሪ ላይ የገንዘብ ክስ አቀርቤያለሁ፤ እንደ ክሱ ባስፈርድ ፍርዱ ውጤት ያገኝ ዘንድ የተከሳሽ ንብረት ወደ ሦስተኛ ወገን እንዲይተላለፍ በማለት ተከብሮ ይቆይልኝ የሚል*

[59] Commercial Bank of Ethiopia v Ato Walelign Ayalew and W/ro Lemech Lakew, Cassation Civil File Number 29269, 7 FEDERAL SUPREME COURT, CASSATION DECISIONS 42-47 (2007 E.C.).

በመሆኑ በፍ/ብ/ሕ/ቁጥር 3044 እንደተመለከተው ይህ የማሳገድ ተግባር ክፍርድ የመካጨ የመያዣ መብት መሆኑን ያመለክታል።[60] which is translated into English as:

> We have examined the case. As we have understood from our examination, the fact that the applicant got the property subject to this litigation attached on the 28th of Tikimit 1995 E.C. so that the property would not be transferred to any third party by any means prior to the suit brought by present first respondent against the present second applicant on the basis of contract is a fact that was not disputed by either of the parties. If this fact is established, the request of the applicant, saying that because it instituted suit against the 2nd respondent and got her property attached for the purpose of execution of the decree, indicates that a judicial mortgage has been established by virtue of Art. 3044 of the Civil Code.[61]

Having made the above reasoning, the Cassation Bench finally decided that the Bank had priority right over other creditors since the Bank got the building attached prior to the other party - Ato Walelign Ayalew. However, in the opinion of this writer, the stance of the Bench is absolutely at loggerheads with the spirit of both the Civil Code and Civil Procedure Code. This is because the Civil Code has unequivocally provided that judicial mortgage becomes valid, giving rise to priority right in whose favor it is is established, where one of the most important validity requirements – registration - is satisfied. In Ethiopia, the law has made it clear that the requirement of registration is not declarative in nature. Rather, registration is constitutive since the law has stated that irrespective of the mode of creation of mortgage, mortgage cannot produce any effect whatsoever unless it is registered.

In addition to the Civil Code of Ethiopia, the Civil Procedure Code has nowhere provided that attachment of property gives priority right to a person in whose favor attachment order is granted. Therefore, the Bench made its decision without having any legal basis. Even worse, the Cassation Bench made no clear justification that made it boldly conclude that attachment order is equivalent to judicial mortgage. While a court of law is expected to give adequate analysis and reasoning when it renders a decision, the Bench reached a wrong conclusion without any legal analysis and reasoning. As noted above, the interpretive decisions made by the Cassation Bench are binding precedents that need to be followed by all lower courts of the country - both federal courts and regional courts. Because of this, the decision of the Cassation Bench has to be well reasoned and analyzed so that the *ratio decidendi* of the Bench can be clear.

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[60] *Id.*, at 44-45.

[61] Translation mine.

In the case under consideration, however, the Bench comfortably concluded that attachment order is a judicial mortgage and made the Commercial Bank of Ethiopia to unduly and unlawfully benefit at the expense of the afore-mentioned respondent. The Bench did this without making any analysis as to what is meant by judicial mortgage and as to how judicial mortgage is the same as attachment order. By doing so, the Bench resorted to judicial law making which is beyond its constitutional competence under the current constitutional order of the country. The Bench is only allowed to lay down interpretative precedents as opposed to law making precedents which are known in common law countries. In contradistinction to its true role, the Cassation Bench rendered a decision which was not contemplated by the Ethiopian law maker at the time of writing the Civil Code and the Civil Procedure Code.

Case 2

In this case, too, the applicant was the Commercial Bank of Ethiopia while the respondents were Ato Kinde Afraso and Ato Jibril Immam.[62] In this case, the Bank argued that it was entitled to priority right by the mere fact that it was the first person which got the building attached by a court of law. The Cassation Bench accepted the arguments of the bank and decided that attachment order is equivalent to judicial mortgage entailing priority right to the person who obtained the attachment. In its decision the Bench stated that:

> *……በፍ/ብ/ሕግ ቁጥር 3041 እንደተደነገገው መያዣ ከውል ብቻ ሳይሆን በቀጥታ ከህግ ወይም በፍርድ ሊቋቋም ይችላል። በዚህም ጉዳይ ፍ/ቤቱ በዚህ ቤት ላይ የሰጠው የእግድ ትእዛዝ በፍ/ብ/ሕ/ቁጥር 3044 እንደተመለከተው ለአመልካች ከፍርድ የመነጨ መብትን ያጐናጽፋል። ይህ ሰበር ሰሚ ችሎትም በመ. ቁጥር 25863 በሰጠው የህግ ትርጉም በፍ/ቤት በንብረት ላይ የሚሰጥ የእግድ ትእዛዝ ከፍርድ የመነጨ የመያዣ መብት ተቋቁሟል ለማለት እንደሚያበቃ በመጥቀስ ውሳኔ ሰጥቷል።*[63]

The above quotation is translated into English as:

> As stipulated under Art. 3041 of the Civil Code, mortgage can be created not only by contract but it can also be created by law and by judicial decision. In this case, too, an attachment order given by the court conferred upon the applicant a mortgage right as provided under Art. 3044 of the Civil Code. This Cassation

[62] Commercial Bank of Ethiopia v Ato Kinde Afraso and Ato Jibril Immam, Cassation Civil File Number 39170, 8 FEDERAL SUPREME COURT, CASSATION DECISIONS 340-343(2008 E.C.).

[63] *Id.*, at 359.

> Bench decided, under file No. 25863, that an attachment order granted on a property establishes a judicial mortgage right.[64]

Here, too, I strongly believe that the stance of the court is absolutely wrong for mere attachment order given against a certain immovable property cannot establish a judicial mortgage for the reasons I gave under the above case. In addition, another point deserves mentioning here. The Bench under this case was not loyal to its previous decision let alone giving well reasoned and analyzed decision since it wrongly cited file No. 25863 which was decided prior to the case under discussion. Under file No. 25863, the litigants were the Development Bank of Ethiopia (DBE) and the Commercial Bank of Ethiopia (CBE).[65]

Under that case, the DBE alleged that it got registered a certain property belonging to its borrower on the 6th of March 1988 E.C. while the CBE alleged that it got registered the same property on the 23rd of June 1990 E.C. The argument of the latter Bank was that the allegation made by the DBE was false since the seal of the registering organ was not clear. However, because the claim of the CBE was not accepted, the lower courts decided that the DBE was entitled to priority right. Then, the CBE applied to the Cassation Bench which confirmed the decisions of the lower courts saying that priority is to be given on the basis of order of the dates of the registration of the property.

This clearly shows that the Bench wrongly cited a case which does not have anything to do with judicial mortgage and attachment of property. From this, we can conclude that let alone giving carefully analyzed decision regarding the essence of attachment order and judicial mortgage, the Bench did not realize that the case it cited to substantiate its decision (under file number 30170) was absolutely irrelevant. In sum, since the Bench made a wrong legal citation and an erroneous legal analysis, the stance it took under file number 39170 could not serve as precedent. Instead, it has remained (to be) a source of confusion and uncertainty in the country.

Case 3

In this case, the applicants were Ato Tesfaye Battu and W/ro Almaz Tasew while the respondents were W/rt Hilina Feleke, Ato Alemu Shashe and W/ro

[64] Translation mine.

[65] Development Bank of Ethiopia v Commercial Bank of Ethiopia, Cassation Civil File Number 25863, 7 FEDERAL SUPREME COURT, CASSATION DECISION 38-41(2007 E.C.).

Yeshiwork Seyoum.[66] The applicants instituted suit against the 2nd and 3rd respondents before the Federal First Instance Court in Addis Ababa. Then, the applicants applied to the court so that the court would give an order of attachment on a condominium unit belonging to the respondents which is located in Woreda 4, Arada Sub-city, Addis Ababa. The Court accepted their application and gave an attachment order on May 2, 2004 E.C. (May 10, 2012). On the other hand, the first respondent sued the 2nd and 3rd respondents before the Federal First Instance Court and got the above condominium house attached on the 6th of July, 2004 E.C.

Then, the applicants filed an execution application on the 15th of October 2005 E.C. and pleaded for the sale of the hitherto attached condominium unit belonging to the aforementioned judgment debtors. By the same token, the 1st respondent filed an execution application against the same judgment debtors and pleaded for the sale of the same condominium unit so that the decree granted in her favor would be executed. Then, the execution applications of the present applicants and the 1st respondent were entertained by the execution bench separately. Later, the execution bench ordered the Execution Department of the Federal Supreme Court to sell the said condominium house to satisfy the decrees of both decree holders. Because of this, two execution files were opened in the Execution Department. At the execution Department, these two files were consolidated. Then, the condominium was sold by auction and the proceeds of the sale were paid to the Department by the buyer of the building.

Following the sale of the building, the present 1st respondent applied to the court for *pro rata* distribution of the proceeds between the decree holders. The court to which the application was filed ordered the Execution Department to distribute the proceeds of the sale of the building *pro rata* as stipulated under Art. 403 of the Civil Procedure Code. However, the present applicants were dissatisfied by the order of the court since they believed that priority right should have been given to them in preference to the other decree holder. Because of this, they lodged an appeal to the Federal High Court for the reversal of the order of the low court. To their dismay, however, the appellate court confirmed the order of the lower court and dismissed their appeal.

[66] Ato Tesfaye Battu and W/ro Almaz Tasew v W/rt Hilina Feleke, Ato Alemu Shashe and W/ro Yeshiwork Seyoum, Cassation Civil File Number 106494 , Federal Supreme Court Cassation Decision (October 8 , 2015) (unpublished) (File available with author).

Again, aggrieved by the decision of the appellate court, the applicants applied to the Cassation Bench of the Federal Supreme Court for reversal of the decisions of the lower courts, since they believed that the lower courts committed fundamental error of law. The Cassation Bench, having entertained the arguments of both sides, confirmed the decisions of the lower courts which means that the Cassation Bench in effect reversed its previous stances which declared that mere attachment orders are equivalent to judicial mortgage giving rise to priority right. Though the stance the Bench took in this case is basically correct, the decision of the Bench is full of confusions and contradictions. It does not show the *ratio decidendi of the* Bench. In order to make those discussions clearer, further explanations and analysis are in order.

To this end, citing the crux of the decision is important here. The main part of the decision of the Bench in part reads:

> *አመልካቾች እና 1ኛ ተጠሪ በሥር ፍ/ቤት ተከሳሾች የነበሩትን የ2ኛ እና የ3ኛ ተጠሪዎችን ንብረት በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 154(ለ) መሠረት በፍ/ቤት በተሰጠ ጊዜያዊ የእግድ ትእዛዝ ማሳገዳቸው በፍ/ብ/ሕ/ቁጥር 3044 እንደተመለከተው ከፍርድ የመነጨ የመያዣ መብት ማቋቋማቸውን ያመለክታል። አመልካቾችና 1ኛ ተጠሪ በዚህ ረገድ ያላቸው የመያዣ መብት የጊዜ ቅደም ተከተል ልዩነት ከመኖሩ በቀር ተመሳሳይ ነው። በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 154(ለ) መሠረት ጊዜያዊ የእግድ ትዕዛዝ የሚሰጥበት ምክንያት ከሳሽ የሆነው ወገን በክርክሩ ቢረታ ውሳኔውን ማስፈፀሚያ እንዲሆን ነው። አመልካቾችና 1ኛ ተጠሪ ንብረቱን በማሳገድ ሁለቱም እኩል ከፍርድ የመነጨ የመያዣ መብት አቋቁመዋል።*[67]

Translated into English, the quotation reads:

> The attachment of the property of the 2nd and the 3rd respondents upon the application of the applicants and the first respondent indicates that they established judicial mortgage as provided under Art. 3044 of the Civil Code. The right of the applicants and the 1st respondent, in this regard, is the same except the time difference. The purpose of giving provisional attachment order, as per Art. 154(b) of the Civil Procedure Code, is to secure execution of the decree in case where the plaintiff wins the case. The applicants and the 1st respondents have equally established a mortgage right emanating from a court judgment.[68]

The decision of the Cassation Bench clearly shows that the Bench consistently confused the quintessence and application of provisional attachment order with judicial mortgage. In addition, the stance of the Bench is against the very purpose of attachment order and judicial mortgage. Therefore, as noted earlier in relation

[67] *Id.*, at 4.

[68] Translation mine.

to case No. 1, the reasoning of the court is wrong and arbitrary since it is not supported by any legal provision.

In contradistinction to the conclusion quoted above, the Cassation Bench (on the same file) concluded that "አመልካቾች ንብረቱን ከ1ኛ ተጠሪ አስቀድመው በፍ/ብ/ሥ/ሥ/ሕ ቁጥር 154(ለ) መሠረት በተሰጠው የእግድ ትእዛዝ መሠረት ማሳገዳቸው የቀደምትነት መብት የሚያሰጣቸው አይደለም።"[69] which in English means "*the fact that the applicants got the property attached prior to the 2nd respondent does not give them priority right*".[70]

In addition to this, the mere fact that a decree holder got a property attached prior to other decree holders does not give rise to priority right over the attached property as decided by the same Bench on the 28th of July 2008 E.C. under file number 97206.[71] Again, the conclusion of the Bench is fallacious and absolutely erroneous. This is because on the one hand, the Bench concluded that attachment order is equivalent to judicial mortgage; on the other hand, the same Bench concluded that attachment order could not give rise to priority right to a decree holder who got the asset attached prior to any other creditors. This clearly demonstrates that the Bench contradicts itself in one and the same decision. Secondly, the Bench tried to support its decision by citing file No. 97206 which was decided on the 28th of July 2008 E.C. This citation, however, is completely irrelevant because file no. 97206 has nothing to do with the case at hand. To be specific, under file No. 97206, what was attached by the order of the court upon the application of a decree holder was money owed to the judgment debtor by the Construction and Road Transport Bureau of Tigray Region. As a matter of fact, in that file the Cassation Bench decided that attachment order given on a sum of money could not give rise to priority right to a decree holder who got attached money prior to other decree holders.

On account of this, the decision of the Cassation Bench rendered on July 28, 2008 E.C. could not be cited to support the decision rendered under file No. 106494 since the properties attached are different. Under file No. 97206, the asset attached was money while under file No. 106494 (the subject of this analysis) the asset attached was an immovable property. Hence, the attempt of the Cassation Bench to relate two unrelated things was a very futile exercise. In

[69] *Id.*

[70] Translation mine.

[71] See Ato Amare Melkamu v Ato Kaleb Hiluf, Cassation Civil File Number 97206**,** 16 FEDERAL SUPREME COURT, CASSATION DECISIONS 337-341 (2014).

other words, the Bench failed to understand the contents of its own decisions rendered at different times.

Though the arguments and explanations of the Cassation Bench are wrong, the final judgment is correct since the Bench decided that the proceeds of the sale of the building attached upon the application of the present applicant and the first respondent be distributed *pro rata* as per Art. 403 of the Civil Procedure Code. Nonetheless, the decision of the Bench cannot serve as a dependable precedent since the Bench has not clearly underscored that attachment order is not a judicial mortgage. Besides, the Bench did not expressly or impliedly state that the stances it took under its previous decisions are reversed by the new decision. Because of this, we have now two contradictory stances of the Bench which have left us in a state of confusion.

It is known that the Cassation Bench was empowered by law to render binding decisions (precedents) since it was believed that such binding decisions would enhance predictability, uniformity and certainty of decisions of Ethiopian courts. To enhance predictability and uniformity of decisions, the Federal Supreme Court is duty bound to publish the decisions of the Cassation Bench. Because of this, the Supreme Court has been publishing and distributing its decisions so far. Nonetheless, though the decision of the Bench under discussion was decided by five judges and it is binding on all courts of Ethiopia, this decision has not been published. The effect of the omission of this decision is extremely far reaching as it affects uniform application of the law.

Case 4

In this case, the applicant was Ato Amerra Seifu while the respondent was Ato Adane Negede.[72] A certain women called Kedija Mohammed borrowed money from Adane Negede amounting to more than 400,000.00 Birr. Again, this same lady borrowed more than 500,000.00 Birr from Amerra Seifu. When the repayment date under each contract was due, the borrower failed to return the money to each lender. Therefore, each lender sued the borrower at different times before different benches of the Federal First Instance Court. The benches where the suits were instituted decided in favor of the lenders.

[72] Amerra Seifu v Adane Negede, Cassation Civil File Number 102161, Federal Supreme Court, Cassation Decision (January 4, 2017) (Unpublished,) (File available with author).

After decision was made in his favor, Adane Negede found a condominium, belonging to Kedija and got it attached prior to Ato Amerra Seifu. Amerra also got the same building attached. Then, each decree-holder filed execution application to different execution benches. Their applications were accepted by the respective execution benches and the execution process was transferred to the Execution Directorate of the FSC so that the attached building would be sold to satisfy the decrees of the decree-holders - Adane Negede and Amerra Seifu.

The Execution Department consolidated the two files before the house was sold by auction. Then, auction was announced and both Adane and Amerra participated in the auction as bidders having obtained the permission of the court. In the auction, Adane won in an auction price of 485,000.00 Birr and claimed that he should not give anything to Amerra since he (the former) was the one who first got the building attached. Amerra, on the other hand, prayed for *pro rata* distribution of the proceedings of the sale since first attachment order would not give priority right to Adane. Because of this stalemate, the Execution Department referred the case to the execution bench which was entertaining Adane's execution application. The bench ruled that Adane was entitled to take the whole proceedings of the sale since he had priority right by virtue of first attachment order rendered in his favor. Because of this, Amerra lodged an appeal to the Federal High Court (FHC) praying for the reversal of the ruling of the lower court. However, the appellate court confirmed the ruling of the lower court by citing the decisions of the Cassation Bench which we cited under Case 1and Case 2 above.

Again, Amerra filed an application to the Cassation Bench of the FSC arguing that the stance of the lower courts is wrong. Amerra boldly argued that the stances of the lower courts as well as the previous stances of the Cassation Bench (cited under Case 1and Case 2 above) were wrong. Adane, on the other hand vehemently argued that the decision of the lower courts as well as the previous stances of the Cassation Bench were correct and prayed for the confirmation of the decisions of the lower courts. The Bench, having entertained the arguments of both sides, decided in favor of Amerra underscoring that attachment order is not judicial mortgage and could not give rise to priority right. In its decree, the Cassation Bench ordered for *pro rata* distribution of the proceeds of the sale of the aforementioned building belonging to Kedija.

As a rule, the stance of the court is to be appreciated since it has made it clear that attachment order does not result in priority right since it is not the same as a

judicial mortgage. In its reasoning part, the Cassation Bench underscored that attachment order is a provisional measure which is not equivalent to judicial mortgage. Nevertheless, the decision of the Cassation Bench is incomplete since it has not analyzed the requirement of registration irrespective of the type of mortgage. Even worse, the Bench has wrongly cross referred to its previous decisions which are irrelevant to the case under discussion. Nor did it expressly declare that the previous stances were wrong and replaced by this decision.

4. Concluding Remarks

In Ethiopia, any type of mortgage cannot produce any legal effect unless it satisfies all the requirements of a valid mortgage. Owing to this, a provisional attachment order cannot be taken as a judicial mortgage since it cannot satisfy all the requirements of a valid mortgage. Therefore, the stance taken by the Cassation Bench under cases discussed in Cases No. 1 and 2 above is absolutely wrong. However, the stances the Bench took in the cases discussed under Cases No. 3 and 4 above are correct in principle. But, under Case No. 3, the reasoning is confusing. Even under Case No. 4, the analysis and reasoning of the Bench is not satisfactory. Hence, in future similar cases, the Cassation Bench has to expressly and deeply declare that a provisional attachment order is not equivalent to judicial mortgage since the former cannot satisfy the legal requirements for the establishment of judicial mortgage. In addition, the decisions of the Bench should be deep and well reasoned containing a clear *ratio decidendi* so that lower courts would follow without much trouble.

ANNEXURE†

የሰበር መ/ቁ 106494
ቀን 28/01/2008 ዓ.ም

ዳኞች፡- ተሻገር ገ/ስላሴ
ብርሃኑ አመነው
ተፈሪ ገብሩ
ሸምሱ ሲር.ጋ.ጋ
አብርሃ መሰለ

አመልካች፡- 1ኛ. አቶ ተስፋዬ ባቱ - ቀረቡ
2ኛ. ወ/ሮ አልማዝ ጣሰው - አልቀረቡም

ተጠሪዎች፡-1ኛ. ወ/ሪት ሕሊና ፈቀለ - አልቀረቡም
2ኛ. አቶ አለሙ ሻሼ - አልቀረቡም
3ኛ. የሺወርቅ ስዩም - ቀረቡ

መዝገቡን መርምረን ተከታዩን ፍርድ ሰጥተናል፡፡

ፍርድ

ጉዳዩ በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት የሚሰጥን የዕግድ ትዕዛዝ የሚመለከት ሲሆን ክርክሩ የጀመረው በፌ/መጀ/ደ/ወረዳ ፍ/ቤት ነው፡፡ አመልካቾች በ2ኛ እና 3ኛ ተጠሪዎች ላይ ክስ መስርተው ግንቦት 2/2004 ዓ.ም በዋለው ችሎት ከፍ/ቤቱ በተሰጠ ትዕዛዝ በአራዳ ክ/ከተማ ወረዳ 4 የቤ/ቁ E-B2-3/10 የሆነ ኮንደሚኒየም ቤት በተከሳሾች /በአሁኑ 2ኛ እና 3ኛ ተጠሪዎች/ ስም የተመዘገበ መሆኑ ተጣርቶ ታግዶ እንዲቆይ በሰጠው ትዕዛዝ መሰረት ተጣርቶ ታግዷል፡፡ ሐምሌ 27 ቀን 2004 ዓ.ም በዋለው ችሎት ለከሳሾች /ለአሁኑ አመልካቾች/ ተወስኖላቸው አፈጻጸም ፋይል አስከፍተው ጥቅምት 15 ቀን 2005 ዓ.ም ቀደም ሲል ያሳገዱት የተከሳሾች ንብረት የሆነው ኮንደሚኒየም ቤት በፌ/ፍርድ አፈጻጸም ዳይሬክቶሬት አማካኝነት በሐራጅ ተሸጦ ገንዘቡ እንዲከፈላቸው የአፈጻጸሙን ጉዳይ በያዘው ችሎት ትዕዛዝ ተሰጥቶ መጋቢት 23 ቀን 2006 ዓ.ም ቤቱ በሐራጅ ተሸጧል፡፡

1ኛ ተጠሪ ደግሞ በ2ኛ እና 3ኛ ተጠሪዎች ላይ በፌ/መ/ደ/ፍ/ቤት በሌላ መዝገብ ሐምሌ 5 ቀን 2004 ዓ.ም ክስ መስርተው ሐምሌ 6/2004 ዓ.ም በተሰጠ ዕግድ ትዕዛዝ ከዚህ በላይ

† EDITOR'S NOTE: The cases which are the bases for the Case Comment presented in the preceding pages were decided by the Cassation Bench of the Federal Supreme Court of Ethiopia. The decisions were rendered under Cassation Civil File Numbers 29269; 39170; 102161; and 106494. The decisions under the first two file numbers have been published in Volume 7 and Volume 8, respectively, of the Federal Supreme Court's publication of cassation decisions and the reader is referred to those volumes for a firsthand reading of the decisions. The decisions of the Cassation Bench under the last two file numbers have not been published and for the benefit of the reader they have been reproduced and attached here as part of the case comment. These decisions of the Cassation Bench, copies of which are available with the author, are reproduced verbatim, except changes in formatting made to fit them into the style of the Journal.

የተመለከተውን የተከሳሾች ንብረት የሆነውን ኮንደሚኒየም ቤት በፍ/ብ/ስ/ስ/ቁ 154/ለ/ መሰረት አሳግደዋል፡፡ ሐምሌ 30 ቀን 2004 ዓ.ም በዋለ ችሎት ለከሳሽ /ለአሁኗ 1ኛ ተጠሪ/ ተወስኖላቸው ጥር 1 ቀን 2005 ዓ.ም በዋለ ችሎት በተሰጠ የአፈጻጸም ትዕዛዝ ቤቱ በሐራጅ ተሸጦ ገንዘባቸው እንዲከፈላቸው ተብሏል የተከሳሾች /የአሁኗ 2ኛ እና 3ኛ ተጠሪዎች/ ንብረት የሆነው ኮንደሚኒየም ቤት በፌ/ፍ/አፈ/ዳይሬክቶሬት በኩል በሐራጅ ሲሸጥ የአሁኑ አመልካቾች እና 1ኛ ተጠሪ ያስከፈቱዋቸው የአፈጻጸም መዝገቦች ተጣምረው በሐራጅ ቃለ ጉባኤ ላይም ተመዝግቦ ሽያጩ ተደርጓል፡፡

1ኛ ተጠሪ በኮ/መ/ቁ 196945 በቀን 8/8/2005 ዓ.ም ባቀረቡት አቤቱታ ከኮንደሚኒየም ቤቱ ሽያጭ ገንዘብ ላይ በፕሮራታ ይከፈለን ብለው አመልክተው የአፈጻጸም ችሎቱ በፍ/ብ/ሥ/ሥ/ቁ 403 መሰረት ከቤቱ ሽያጭ ገንዘብ ለፍ/ባለመብቶች /የአሁኑ አመልካቾች እና 1ኛ ተጠሪ/ በፕሮራታ ይከፈላቸው ብሎ ለፌ/ፍ/አፈ/ዳይሬክቶሬት ትዕዛዝ ተጥቷል፡፡

የአሁኑ አመልካቶች ይህን ትዕዛዝ በመቃወም በዚህ የአፈጻጸም መዝገብ ላይ የተሸጠውን ቤት በፍ/ቤት ትዕዛዝ አሳግደን የመያዝ መብት ያቋቋምንበት በመሆኑ የሽያጭ ገንዘቡ የሚገባው ለእኛ ብቻ ነው በቀን 8/08/06 ዓ.ም በዋለ ችሎት የተሰጠው ትዕዛዝ ይነሳልን ብለው አመልክተው ፍ/ቤቱ በሰጠው ብይን ፍ/ቤቱ እራሱ በሚሰጠው የዕግድ ትዕዛዝ የተለያዩ ባለገንዘቦች በቅደም ተከተል ገንዘብ እንዲያገኝ ሲሆን ሁሉም ባለገንዘቦች ፍትሐዊ በሆነ ሁኔታ የተለየ መያዣውን ውል ከሌለ በቀር እንዲሰራ ለማድረግ ነው፡፡ ጊዜያዊ የዕግድ ትዕዛዝ የቀዳሚነት መብት የሚሰጠው በፍርድ ቤቱ በአንድ ባለዕዳ ላይ አስፈርደው አፈጻጸም ለጠየቁ ብዙ ባለገንዘቦች ሳይሆን ከፍርድ ባለመብቶች ውጭ የሆኑትን ሌላ ዕዳ ጠያቂዎች ለመከላከል ነው በማለት አቤቱታውን አልተቀበለውም፡፡

አመልካቾች በዚህ ትዕዛዝ ላይ ያላቸውን ቅሬታ በይግባኝ ለማሳረም ለፌ/ከፍ/ፍ/ቤት ይግባኝ አቅርበው ፍ/ቤቱ የስር ፍ/ቤት ትዕዛዝ የሚነቀፍበት ነጥብ የለም በማለት ይግባኙን ሰርዞታል፡፡

አመልካቾች በስር ፍ/ቤቶች ትዕዛዝ ላይ ተፈጸመ ያሉትን መሰረታዊ የሕግ ስህተት በመጥቀስ በዚህ ሰበር ሰሚ ችሎት ለማሳረም አቤቱታ አቅርበዋል፡፡

የአቤቱታው ይዘት በፍ/ቤት አስቀድመን በማሳገድ ከፍርድ የመነጨ የመያዣ መብት አግኝተናል፡፡ የቀደምትነት መብት አለን ይህን የሚደግፍ በሰ/መ/ቁ 25863፣ 39170 እና 40945 ተወስ'ል የሚል ሲሆን፡-

አቤቱታው ለዚህ ሰበር ችሎት ይቅረብ የተባለው አከራካሪውን በሐራጅ የተሸጠ ንብረት አሳማኝ ስለነበር ከሽያጭ ክፍያው የቀደምትነት መብት አለኝ በማለት ያቀረበው ክርክር በስር ፍ/ቤቶች ውድቅ የመደረጉን አግባብነት ከሰበር መ/ቁ 39170፣ 25863 እና 40945 አንጻር ለመመርመር ነው፡፡

1ኛ ተጠሪ የሰጡት መልስ አመልካች የጠቀሱት የሰበር ውሳኔ ለተያዘው ጉዳይ አግባብነት የለውም፡፡ በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሠረት አንድ ንብረት ማሳገድ የቀደምትነት መብት አይሰጥም፡፡ በፍ/ብ/ሥ/ሥ/ቁ 403 ከፍ/ባለዕዳው የተገኘው ገንዘብ ለፍ/ባለመብቶች አልበቃ ሲል ያለው ገንዘብ እንዴት እንደሚከፋፈል የሚደነግግ ነው፡፡ በሰ/መ/ቁ 97206 ትርጉም ተሰጥቷል የስር ፍ/ቤቶች ትዕዛዝ በአግባቡ ነው የሚል ሲሆን 2ኛ ተጠሪ ለክርክሩ ምን እንደሆነ አልተረዳሁም በእስር ላይ ነኝ መልስ ለመስጠት አልችልም ብለዋል 3ኛ ተጠሪ ደግሞ 1ኛ ተጠሪን ከዚህ በፊት አላቃትም ግንኙነት የለንም፡፡ አመልካቾች ትክክል ናቸው የሚል መልስ ሰጥተዋል አመልካቾችም አቤቱታቸውን መሰረት በማድረግ የመልስ መልስ አቅርበዋል፡፡

በግራ ቀኙ መካከል የተደረገው ክርክር ከዚህ በላይ አጠር ተደርጎ የተመዘገበው ሲሆን እኛም ክርክራቸውን ለሰበር አቤቱታ መነሻ ከሆነው የስር ፍ/ቤቶች ትዕዛዝ፣ የአመልካች አቤቱታ ለዚህ

ሰበር ችሎት ይቅረብ ተብሎ ከተያዘው ነጥብ እና አግባብነት ካለው የሕግ ድንጋጌ ጋር እንደሚከተለው መርምረናል፡፡

እንደመረመርነውም አመልካቾች እና 1ኛ ተጠሪ በስር ፍ/ቤት ቀደም ሲል በ2ኛ እና 3ኛ ተጠሪዎች ላይ በመሰረቱት ክስ ቢወሰንላቸው ለማስፈጸሚያ እንዲሆናቸው የተከሳሾችን /የ2ኛ እና 3ኛ ተጠሪዎች/ ንብረት የሆነውን በአራዳ ክ/ከተማ ወረዳ 4 የቤ/ቁ E-B2-3/10 በሚል የተመዘገበውን ኮንደሚኒየም ቤት አመልካቾች ግንቦት 2 ቀን 2004 ዓ.ም 1ኛ ተጠሪ ደግሞ ሐምሌ 6 ቀን 2004 ዓ.ም ከፍ/ቤት በተሰጠ ትዕዛዝ ይህን ንብረት በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት አሳግደዋል፡፡ የአፈጻጸም ችሎት በሰጠው ትዕዛዝ መሰረት የፌ/ፍ/አፈ/ዳይሬክቶሬት በአመልካቾች እና በ1ኛ ተጠሪ የተከፈተውን የአፈጻጸም ፋይል አንድ ላይ በማድረግ ንብረቱ ወይም ኮንደሚኒየም ቤቱ በሐራጅ እንዲሸጥ አድርጓል፡፡

አመልካቾች እና 1ኛ ተጠሪ በስር ፍ/ቤት ተከሳሾች የነበሩትን የ2ኛ እና 3ኛ ተጠሪዎችን ንብረት በፍ/ብ/ስ/ስ/ቁ 154/ለ/ መሰረት በፍ/ቤት በተሰጠ ግዜያዊ የዕግድ ትዕዛዝ ማድረጋቸው በፍ/ብ/ሀ/ቁ 3044 እንደተመለከተው ከፍርድ የመነጨ የመያዣ መብት ማቋቋማቸውን ያመለክታል፡፡ የአመልካቾች እና የ1ኛ ተጠሪ በዚህ እረገድ ያላቸው የመያዣ መብት የጊዜ ቅደም ተከተል ልዩነት ከመኖሩ በቀር ተመሳሳይ ነው፡፡ በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት ጊዜያዊ የዕግድ ትዕዛዝ የሚሰጥበት ምክንያት ከሳሽ የሆነው ወገን በክርክሩ ቢረታ ውሳኔውን ማስፈጸሚያ እንዲሆን ነው፡፡ አመልካቾች እና 1ኛ ተጠሪ ንብረቱን በማሳገድ ሁለቱም እኩል ከፍርድ የመነጨ የመያዣ መብት አቋቁመዋል፡፡

አመልካቾች ንብረቱን ከ1ኛ ተጠሪ አስቀድመው በፍ/ቤት በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት በተሰጠ የዕግድ ትዕዛዝ ማሳገዳቸው የቀደምትነት መብት የሚያሰጣቸው አይደለም፡፡ አንድ የፍርድ ባለገንዘብ ከሌሎች የፍ/ባለገንዘቦች አስቀድሞ የባለዕዳውን ንብረት ማስከበሩ ብቻ የቀደምትነት መብት እንደሚያሰጠው በዚሁ ችሎት በሰ/መ/ቁ 97206 ሐምሌ 28/2006 ዓ.ም ተወስ'ል፡፡ አመልካቾች ካቀረቡት የሰበር አቤቱታ ጋር በተመሳሳይ ተወስ'ል ብለው የጠቀሷቸው የሰበር መዝገቦች 39170፣ 25863፣ እና 540945 ላይ የተመለከተው ግራ ቀኙ ተከራካሪዎች እኩል የመያዣ መብት ያገኙበትን ሁኔታ መሰረት የማያደርግ በመሆኑ ከተያዘው ጉዳይ ጋር ተመሳሳይ ባለመሆኑ ለተያዘው ጉዳይ እነዚህ የሰበር ውሳኔዎች ተፈጻሚነት የላቸውም፡፡

አመልካቾች እና 1ኛ ተጠሪ በፍ/ቤት ትዕዛዝ በታገደው ንብረት ላይ ያላቸው መብት እኩል በመሆኑ በፍ/ብ/ሥ/ሥ/ቁ 403 መሰረት እንደተራ የፍ/ባለገንዘቦች ተወስደው በፕሮራታ እንዲከፋፈሉ የስር ፍ/ቤቶች የሰጡት ትዕዛዝ በአግባቡ በመሆኑ መሰረታዊ የሕግ ስህተት የተፈጸመበት ነው የሚባል አይደለም ብለናል፡፡

ውሳኔ

1. የፌ/መጀ/ደ/ፍ/ቤት በኮ/መ/ቁ 196945 ነሐሴ 23 ቀን 2006 ዓ.ም በዋለ ችሎት እና የፌ/ከፍ/ፍ/ቤት በኮ/መ/ቁ 156913 ጥቅምት 14 ቀን 2007 ዓ.ም በዋለ ችሎት የሰጡት ትዕዛዝ በፍ/ብ/ሥ/ሥ/ቁ 348/1/ መሰረት ጸንቷል፡፡
2. ግራ ቀኙ በዚህ ሰበር ችሎት ላደረጉት ክርክር ያወጡትን ወጪ እና ኪሳራ የየራሳቸውን ይቻሉ ብለናል፡፡
3. በቀን 5/03/2007 ዓ.ም በዋለ ችሎት የተሰጠው የዕግድ ትዕዛዝ የተነሳ መሆኑ ተገልጾ ለሚመለከተው ይጻፍ፡፡

መዝገቡ ዕልባት ያገኘ በመሆኑ ተዘግቷል ወደ መ/ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰ/መ/ቁ. 102161
ታኅሳስ 26 ቀን 2009 ዓ/ም

ዳኞች፡- 1. ዓሊ መሐመድ
2. ተኽሊት ይመሰል
3. ቀነዓ ቂጣታ
4. ሰናይት አድነው
5. ጳውሎስ ኦርሺሶ

አመልካች፡- አቶ አመራ ሰይፉ - አልቀረበም

ተጠሪ፡- አቶ አዳነ ነገደ - ጠበቃ አዜብ ገ/ወልድ ቀርባለብ

መዝገቡ ተመርምሮ ቀጥሎ ያለው ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

የዚህ የሰበር አቤቱታ ምክንያት የሆነው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ልደታ ምድብ ችሎት በአፈጻጸም መዝገብ ቁጥር 1608025 በቀን 14/9/2005 ዓ/ም የሰጠው ትዕዛዝ እና የአሁን አመልካች በትዕዛዙ ቅር ተሰኝቶ ያቀረበውን ይግባኝ የፌዴራል ከፍተኛ ፍርድ ቤት መርምሮ የከ/መ/ቁ፡- 137290 በቀን 2/10/2006 ዓ/ም የሰጠው ውሳኔ ነው፡፡

የአሁን አመልካች የሥር ፍርድ መቃወሚያ አመልካች ሲሆን ተጠሪ ደግሞ የፍርድ ባለመብት ነበር፡፡ የክርክሩ ምክንያት በአሁን ተጠሪ እና በፍርድ ባለዕዳ ከድጃ መሀመድ መካከል ባለው የፍርድ አፈጻጸም ክርክር የስር የፍርድ ባለመብት የአሁኑ ተጠሪ የባለዕዳን በቦሌ ክፍለ ከተማ በወረዳ 10 በአያት ሳይት ቁጥር 1 የህንፃ ቁጥሩ 94 የቤት ቁጥር 27 የሆነ የኮንዶሚኒየም ቤት አስቀድሞ በ25/01/2003 ዓ/ም በማሳገድ ፍርዱን ለማስፈጸም የሀራጅ ሽያጭ ታዞ፣ ተጠሪም በሀራጅ ሽያጩ ላይ በገዥነት በመሳተፍ ጨረታውን ማሸነፉና የአሁን አመልካች በሌላ የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ቂርቆስ ምድብ ችሎት በፍርድ ባለዕዳ ላይ የፍርድ ባለመብት በመሆን ድርሻ እንዲካፈል ትዕዛዝ ይዞ ወደ ፍርድ አፈጻጸም መምሪያ መምጣቱን በመግለጽ ክፍፍሉ በምን መልክ መሆን እንዳለበት የፍርድ አፈጻጸም መምሪያው የተጠሪን ጉዳይ ለሚያየው የመጀመሪያ ደረጃ ፍርድ ቤት 13ኛ ፍትሓብሔር ችሎት በቀን 5/9/2005 ዓ/ም መመሪያ ጠይቆ ባለበት ላይ ፍርድ ቤቱ በ14/9/2005 ዓ/ም በሰጠው ተዕዛዝ አመልካች በቤቱ በሀራጅ ሽያጭ የተገኘውን ገንዘብ ድርሻ ሊካፈል አይገባም ሲል ትዕዛዝ ሰጥቷል፡፡

የአሁኑ አመልካች በትዕዛዙ ቅር በመሰኘት ይግባኝ ለፌዴራል ከፍተኛ ፍርድ ቤት አቅርቧል፡፡ የከፍተኛ ፍርድ ቤቱ የግራ ቀኙን ክርክር ከሰማ በኃላ በፍርዱ ሀተታው ላይ ሰፋ ያሉ ዝርዝር ነገሮችን ያነሳ ሲሆን፣ በፍርዱ ማጠቃለያ የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ተጠሪ በጨረታው በመሳተፍ አሸናፊ ስለሆነ አመልካች ድርሻ ሊካፈል አይገባም ሲል የደረሰው ድምዳሜ ስህተት መሆኑን ገልጾ፣ ነገር ግን ተጠሪ ንብረቱን አስቀድሞ ያሳገደ በመሆኑ ከንግድ ባንክ ቀጥሎ ከአመልካች የቀዳሚነት መብት ያለው ነው፡፡ ይህም መያዝ መብቱ የስር ፍርድ ቤት በመ/ቁጥር 168025 በቀን 20/01/2003 ዓ/ም በሰጠው ትዕዛዝ መሰረት በፍትሓብሔር ህግ ቁጥር 3041 መሰረት ተጠሪ መያዣ መብት አግኝቶ ሳለ ሁለቱም ተራ ገንዘብ ጠያቂ ናቸው ተብሎ የተደረሰበት ድምዳሜ በፍርዱ ዝርዝር ላይ የተጠቀሰውን ድንጋጌና የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁጥር 39190 የሰጠውን ውሳኔ ያላገናዘበ ትዕዛዝ ሆኖ አግኝተነዋል፡፡ የሥር ፍርድ ቤት ተገቢ ያልሆነ ምክንያ በመስጠት የአመልካችን አቤቱታ ያለመቀበሉ ተገቢ ባይሆንም በውጤት ደረጃ ግን ተጠሪ የመያዣ መብት በፍርድ ያገኘ በመሆኑ በአመልካች ላይ ይህ ፍርድ ለውጥ የሚያመጣና መብት የሚሰጠው አይደለም በማለት የስር ፍርድ ቤትን ትዕዛዝ አጽንቷል፡፡

ይህ የሰበር አቤቱታ የቀረበውም በየደረጃው ያሉ ፍርድ ቤቶች የሰጡትን ትዕዛዝና ውሳኔ ለማስለወጥ ነው፡፡ የሰበር አቤቱታ ይዘትም በአጭሩ፡- አመልካችና ተጠሪ ከፍርድ ባለዕዳ ላይ እኩል መብት ያላቸው መሆኑን፡- የግራ ቀኙ ተራ ገንዘብ ጠያቂዎች መሆናቸውን፣ ይህም በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሠረት ታይቶ ከፍርድ ባለዕዳ ቤት ሽያጭ ላይ እኩል ድርሻ ልኖራቸው ሲገባ ለተጠሪ ብቻ መወሰኑ ያለአግባብ መሆኑን፣ ይግባኝ ሰሚ ችሎትም ቤቱን ተጠሪ በፍርድ ቤት በቅድሚያ በማሳገዱ ምክያት የመያዣ መብት ይሰጠዋል በማለት ተርጉሞ መወሰኑ መሰረታዊ የህግ ስህተት የተፈጸመበት በመሆኑ እንዲታረም የሚል ነው፡፡

የሰበር አቤቱታ ተመርምሮ ተጠሪ የጨረታው ተካፋይ ሆኖ ተጠሪ አሸናፊ ከመሆኑ ጋር በማያያዝና እንዳይሸጥ እንዳይለወጥ ተጠሪው አሳግዷል በሚል የመያዝ መብት ያሰጠዋል ተብሎ ተጠሪ ቅድሚያ መብት ያገኛል የመባሉን አግባብነት ከፍትሓብሔር ህግ ቁጥር 3044 እና ከፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 ጋር በማገናዘብ ለመመርመር ሲባል ጉዳዩ ለሰበር ችሎት እንዲቀርብ ተደርጓል፡፡

የአመልካች አቤቱታ ለተጠሪ ደርሶት መስከረም 13 ቀን 2007 ዓ/ም የተጻፈ መልስ የሰጠ ሲሆን አመልካችም ጥቅምት 3 ቀን 2007 ዓ/ም የተጻፈ የመልስ መልስ ሰጥቷል፡፡

የጉዳዩ አመጣጥ አጠር ባለ መልኩ ከላይ እንደተገለጸው ሲሆን ጉዳዩን ከሥር ፍርድ ቤቶች ትዕዛዝና ውሳኔ፣ በዚህ ችሎት ከተደረገው ክርክር እንዲሁም አጣሪው ያስቀርባል ሲል ከያዘው ጭብጥ አንጻር መርምረናል፡፡ ጉዳዩን እንደመረመርነውም የግራ ቀኙ ከወ/ሮ ከድጃ መሐመድ ላይ የፍርድ ባለመብቶች መሆናቸው፣ የወ/ሮ ከድጃ መሐመድ ንብረት የሆነው የግራ ቀኙ ለእዳው ተሸጦ እንድከፈል የሚከራከሩበት በቦሌ ክፍለ ከተማ በወረዳ 10 በአያት ሳይት ቁጥር 1 የህንፃ ቁጥሩ 94 የቤት ቁጥር 27 የሆነ የኮንዶሚኒየም ቤት መሆኑ፣ ይህ ቤት ቀደም ሲል የኢትዮጵያ ንግድ ባንክ በመያዣ የያዘ መሆኑ፣ የአሁን ተጠሪ ቤቱን በሀራጅ እንዲገዛ የመጀመሪያ ደረጃ ፍርድ ቤት ፈቅዶለት በብር 485.000.00 (አራት መቶ ሰማንያ አምስት ሽህ) ብር መግዛቱ፣ ከዚህ ገንዘብ ውስጥ የባንኩን እዳ ብር 95.333.24.00 (ዘጠና አምስት ሽህ ሶስት መቶ ሰላሳ ሶስት ብር ከሃያ አራት ሳንቲም) ተጠሪ መክፈሉ፣ ተጠሪ ቤቱን እንዲረከብ የተደረገ መሆኑ በሥር ፍርድ ቤት የተረጋገጡ ፍሬ ነገሮች ናቸው፡፡ በዚህ ጉዳዩ አከራካሪ ሆኖ የሚታየው ተጠሪ ከአመልካች በቅድሚያ የፍርድ ባለዕዳን ንብረት እንዳይሸጥ እንዳይለወጥ እና ለሶስተኛ ወገን ተላልፎ እንዳይሰጥ የአግድ ትዕዛዝ ከፍርድ ቤት በመውሰድ ማሳገዱ የመያዣ መብት ይሰጠዋል ወይ? የመያዣ መብትንስ ለማቋቋም የሚያስችሉ ህጋዊ መሰረቶች ምንድናቸው? የሚለው ነው፡፡

የግራ ቀኙን ክርክር ስንመለከት ተጠሪ ከፍርድ ባለዕዳ ጋር ክርክር እንደጀመረ ወዲያውኑ ክርክር የተነሳበትን ቤት በፍርድ ቤት ትዕዛዝ እንዳሳገደና ይህም የመያዣ መብትን እንዳቋቋመለት ሲከራከር አመልካች በበኩሉ ደግሞ እርሱም በበኩሉ በሌላ ችሎት ከፍርድ ባለዕዳ ጋር በነበረው ክርክር አሁን እያከራከረ ያለውን ቤት በፍርድ ቤት ትዕዛዝ እንዳሳገደ ገልጾ፣ የአመልካችም ሆነ የተጠሪ የፍርድ ቤት የአግድ ትዕዛዞች የመያዣ መብትን ለማቋቋም የሚያስችል ህጋዊ መሰረት ስለሌላቸው የግራ ቀኙ በቤቱ ላይ ሊኖር የሚችለው መብት ሊታይ የሚገባው በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሰረት ነው በማለት ተከራክሯል፡፡

ለዚህ ክርክር ተገቢ ምላሽ ለመስጠት የፍትሓብሔር ህጉ በአንድ በማይንቀሳቀስ ንብረት ላይ የመያዣ መብት እንዴት ሊቋቋም እንደሚችል የደነገጋቸውን ድንጋጌች መመልከት ያስፈልጋል፡፡ የማይንቀሳቀስ ንብረት መያዣ በቀጥታ በህግ ወይም በፍርድ ወይም በውል ወይም ደግሞ በኑዛዜ ሊቋቋም እንደሚችል የፍትሓብሔር ሕግ ቁጥር 3041 ይደነግጋል፡፡ በህግ የሚገኝ መያዣ መብትን በተመለከተ ደግሞ የፍትሓብሔር ህግ ቁጥር 3043 ሲደነግግ፣ በፍርድ የሚገኘውን የመያዣ መብትን በተመለከተ ደግሞ የፍትሓብሔር ህግ ቁጥር 3044 የሚደነግግ ሲሆን ይህም መብት በፍርድ ቤት እንዲቋቋም ከተፈለገ የፍርድ ውሳኔ ሊኖር እንደሚገባ

በግልጽ ተደንግጓል፡፡ በተያዘው ጉዳይ ተጠሪ የመያዣ መብት የተቋቋመው ፍርድ ቤቱ በሰጠው የእግድ ትዕዛዝ መሰረት እንደሆነ ተከራክሯል፡፡ ፍርድ ቤት በፍትሓብሔር ሥነ ሥርዓት ሕግ ቁጥር 154 መሰረት የሚሰጠው እግድ የመያዣ መብትን ለማቋቋም አይችልም፡፡ የፍ/ሥ/ሥ/ሕ/ቁ.154 ዓላማ አንድ ንብረት እንዳይሸጥ፣ እንዳይለወጥ፣ እንዳይበላሽ፣ እንዳይጠፋ፣ በማንኛውም ሁኔታ ለሶስተኛ ወገን ተላልፎ እንዳይሰጥና ፍርድ እስከሚሰጥ ተከብሮ እንዲቆይ ለማድረግ ነው እንጂ የመያዣ መብትን ለማቋቋም ተብሎ አይደለም፡፡ የሚሰጠውም ትዕዛዝ ጊዜያዊ እንደሆነ የዚህ አንቀጽ ድንጋጌ በግልጽ ያስረዳል፡፡ አንድ የፍርድ ባለገንዘብ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 154(ለ) መሰረት የንብረት እግድ ቢያሰጥ የቀደምትነት መብት የሚያቋቁም ስለመሆኑና አለመሆኑ ከአሁን በፊት የሰበር ሰሚ ችሎት በሰ/መ/ቁ.27808፣ 29269 እና 97206 አስገዳጅ ውሳኔዎችን ሰጥቷል፡፡ በመሆኑም ተጠሪ በዚህ ረገድ አንስቶ የሚከራከረው ክርክር ህጋዊ ድጋፍ ያለው ሆኖ አልተገኘም፡፡ የፌዴራል ከፍተኛ ፍርድ ቤት ተጠሪ ክርክር የተነሳበትን ቤት በፍርድ ቤት በቅድሚያ በማሳገዱ የመያዣ መብት ይኖረዋል ሲል የደረሰው ድምዳሜ ከላይ የተገለጹትን የህግ ድንጋጌዎችን እና የሰበር ሰሚ ችሎት በተለያየ ጊዜ የሰጣቸውን አስገዳጅ ውሳኔዎችን በአግባቡ ሳያጤን የሰጠው ውሳኔ የሚነቀፍ ሆኖ ተገኝቷል፡፡

መያዣውን በተመለከተ ተጠሪ ቅድሚያ ማሳገዱ ህጋዊ መብት የሚያሰጥ እንዳልሆነ ከላይ እንደተመለከተው ሲሆን የፍርድ ባለዕዳ ቤት ተሸጦ ከተገኘው ገንዘብ የኢትዮጵያ ንግድ ባንክ እዳ በቅድሚያ ተከፍሎ በሚቀረው ገንዘብ ላይ አመልካችና ተጠሪ የሚኖራቸው መብት ከህግ አንጻር እንዴት ይታያል? የሚለው ምላሽ ሊሰጠው የሚገባ ነው፡፡ በተያዘው ጉዳይ አመልካችም ሆነ ተጠሪ ተራ ገንዘብ ጠያቂዎች ናቸው፡፡ የዚህ ዓይነት ገንዘብ ጠያቂዎች በሚኖሩበት ጊዜ የክፍያ ሥርዓቱ ሊመራ የሚገባው በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሰረት ነው፡፡ ይህ አንቀጽ በግልጽ የሚደነግገው በፍርድ ቤት ትዕዛዝ ተከብሮ የተያዘ ሀብት በፍርድ ባለመብቶች መካከል እንደየድርሻቸው እንደሚከፋፈል ነው፡፡ የፍትሓብሔር ሥነ ሥርዓት ሕግ ቁጥር 403‘ን’ በጥልቀት ስንመለከተው ሁለት ተራ ገንዘብ ጠያቂያዎች /ordinary creditors/ በሚኖሩበት ጊዜ የፍርድ ባለእዳውን ንብረት ቀድሞ ያሳገደው ገንዘብ ጠያቂ የቅድሚያ መብት ሊኖረው እንደማይችል ነው፡፡

በእጃችን ባለው ጉዳይ የፍርድ ባለእዳዋን የወ/ሮ ከድኛ መሐመድን የኮንዶሚኒየም ቤት ተጠሪው ቀድሞ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ልደታ ምድብ ችሎት ቢያሳግደውም አመልካችም በበኩሉ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የቂርቆስ ምድብ ችሎት እንዳሳገደ ከስር ፍርድ ቤቶች ውሳኔ ለመመልከት ተችሏል፡፡ ሁለቱም ምድብ ችሎቶች የሰጡት ትዕዛዝ የወ/ሮ ከድኛ ቤት ሳይሸጥ ሳይለወጥ ታግዶ እንዲቆይ የሚል በመሆኑ ለተጠሪ የተሰጠው የቅድሚያ የእግድ ትዕዛዝ ቅድሚያ መብትን ሊያጎናጽፍ የሚችልበት ህጋዊ ምክንያት ሊኖርው አይችልም፡፡ ስለሆነም ከላይ እንደተመለከተው ተጠሪው ተራ ገንዘብ ጠያቂ ሆኖ እያለ የፍርድ ባለዕዳን ንብረት ቀደሞ ስላሳገደ ብቻ ከቤቱ ሽያጭ ላይ የተገኘውን ገንዘብ ለብቻው ሊወስድ ይገባል ተብሎ የተሰጠው ትዕዛዝም ሆነ ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ሆኖ ተገኝቷል፡፡ በመሆኑም የሚከተለው ውሳኔ ተሰጥቷል፡፡

ው ሳ ኔ

1. የፌዴራል የመጀመሪያ ደረጃ ፍርደ ቤት ልደታ ምድብ ችሎት የከ/መ/ቁ.168025 በቀን 14/09/2005 ዓ/ም የሰጠው ትዕዛዝ እንዲሁም የፌዴራል ከፍተኛ ፍርድ ቤት የከ/መ/ቁ.137290 በቀን 2/10/06 ዓ/ም የሰጠው ውሳኔ በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 348/1/ መሰረት ተሻሽሏል፡፡
2. የፍርድ ባለዕዳ ንብረት የነበረው በቦሌ ክፍለ ከተማ ወረዳ 10 በአያት ሳይት ቁጥር 1 የህንጻ ቁጥር 94 የቤት ቁጥር 27 የሆነ ኮንዶሚኒየም ቤት ተጠሪ አስቀድሞ በማሳገዱ ምክንያት የመያዣ መብት በፍትሓብሔር ህግ ቁጥር 3041 እና 3044 መሰረት በፍርድ የመያዣ መብት የሚያቋቁም አይደለም ብለናል፡፡

3. የፍርድ ባለዕዳ ንብረት የነበረው በቦሌ ክፍለ ከተማ በወረዳ 10 በአያት ሳይት ቁጥር 1 የህንፃ ቁጥሩ 94 የቤት ቁጥር 27 የሆነ ኮንዶሚኒየም ቤት በጨረታ ከተሸጠው ገንዘብ የኢትዮጵያ ንግድ ባንክ ከፍርድ ባለዕዳ የሚፈልገው የእዳ ብር 95333.24.00 (ዘጠና አምስት ሽህ ሶስት መቶ ሰላሳ ሶስት ብር ከሃያ አራት ሳንቲም) አስቀድሞ ተከፍሎ ከሆነ የተከፈለው ተቀንሶ የቤቱን ሽያጭ ቀሪ ብር አመልካችና ተጠሪ ድርሻቸውን /ንሮራታ/ ሊካፈሉ ይገባል ብለን በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሰረት ወስነናል፡፡
4. የዚህን ችሎት ወጪና ኪሳራ የየራሳቸውን ይቻሉ፡፡
5. ነሐሴ 14 ቀን 2006 ዓ/ም በዚህ ችሎት የተሰጠው እግድ ተነስቷል፡፡ ለሚመለከተው አካል ይጻፍ፡፡

መዝገቡ ውሳኔ ስላገኘ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት