የኢትዮጵያ ሕግ መጽሔት
JOURNAL OF ETHIOPIAN LAW

፴፩ኛ ቅፅ
ታሕሣሥ ፪ሺ፲፪ ዓ. ም.

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የቅጅ መብት

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The Journal of Ethiopian Law is a scholarly publication devoted to publishing unsolicited original scholarly submissions that make significant contribution to or bring new insight as regards the understanding, development and implementation of the law applicable in Ethiopia. The Journal accepts scholarly works of any genre: doctrinal, empirical, interdisciplinary, critical, socio-legal, feminist, historical, or comparative scholarships pertaining to the broad spectrum of legal, economic, political, social and technological issues arising in relation to Ethiopian law and related international law.

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* ኤል.ኤል.ቢ.፣ ኤል.ኤል.ኤም.፣ አዲስ አበባ ዩኒቨርሲቲ ሕግ ትምህርት ቤት ረዳት ፕሮፌሰር፣ የሕግ አማካሪና ጠበቃ። ጸሐፊው የLegal Knowledge Sharing ቡድን አባላትን እና የቡድኑን አስተባባሪ አቶ ብስራት ተክሉን ለማመስገን ይወዳል። የዚህ ጽሁፍ የመጀመሪያ ረቂቅ የቀረበው በዚያ ስብሰባ ሲሆን ለጽሁፉ መዳበር ብዙ አስተያየቶችን ሰጥተዋል። በተጨማሪም ለጸሐፊው ማንነታቸው ያልተገለጸውን ሁለቱን የጽሁፉን ገምጋሚዎች ጸሐፊው ያመሰግናል። ለጽሁፉ መሻሻል አስተያየታቸው ከፍተኛ አስተዋጽኦ ነበረው። በተረፈ በጽሁፉ ውስጥ ላለው ማንኛውም ጉድለት ኃላፊነቱ የጸሐፊው ብቻ ነው።

መግቢያ

የግልግል ዳኝነት መነሻው የተከራካሪዎች ስምምነት መሆኑ ባያከራክርም ይህ የተከራካሪዎች ስምምነት ከተዋዋዮቹ ውጭ ባሉ ሦስተኛ ወገኖች ላይ ያለው ተፈጻሚነት ግን ያልተፈታ ችግር ነው። ተከራካሪዎች ጉዳያቸውን በግልግል ዳኝነት ለመፍታት የሚያደርጉት ስምምነት ሁለት ተያያዥ ውጤቶች አሉት። በአንድ በኩል በተዋዋዮች መካከል የሚነሳን ያለመግባባት በግልግል ዳኝነት የመፍታት ግዴታን የሚፈጥር ሲሆን በሁለተኛ ደረጃ ለግልግል ዳኛው/ዳኞች/ ደግሞ የዳኝነት ስልጣንን ያጎናጽፋል።[1] የግልግል ዳኝነት አካል በተከራካሪዎች በተሰጠው ስልጣን መሠረት የሚወስነው ውሳኔ የሦስተኛ ወገኖችን መብት/ጥቅም የሚነካ ሊሆን ይችላል። አሊያም በክርክሩ ውስጥ መግባት ያለበት ሌላ አካል ሳይገባ ቢቀር የሚሰጠው ውሳኔ ሊፈጸም የማይችል ሰንካላ ሊሆን ይችላል። ከተፈጸመም የሦስተኛ ወገንን መብት የሚጎዳ ሊሆን ይችላል። ይህ የፍትሐብሔር ክርክር ባህሪ ስለሆነ በፍትሐ ብሔር ሥነ-ስርዓት ሕግ ውስጥ በክርክር ውስጥ መብቱ ሊነካ የሚችል ሦስተኛ ወገን ጣልቃ የሚገባበት፣ በክርክሩ ውስጥ ተከሳሽ ሊሆን የሚገባው ሰው ተገዶ የሚገባበት፣ በስህተት በከሳሽነት ወይም በተከሳሽነት የተሰየመ ሰው በትክክለኛው ሰው የሚተካበት፣ በክርክሩ ሳይሳተፍ ውሳኔ የተሰጠበት ሦስተኛ ወገን ውሳኔን የሚቃወምበት ድንጋጌዎች ሰፍረው እናገኛለን። እነዚህ ሥነ-ሥርዓቶች የፍትሐ ብሔር ክርክሮችን ወጪ ቆጣቢ፣ ቀልጣፋ እና ፍትሃዊ በሆነ መንገድ ለመምራት እንዲያስችሉ ታስበው የተቀመጡ ናቸው። የግልግል ዳኝነት መሠረቱ የተዋዋዮች ስምምነት በመሆኑ ከስምምነቱ ውጭ ያሉ ሦስተኛ ወገኖችን በእነዚህ የሥነ-ስርዓት መንገዶች ወደ ግልግል ዳኝነት ክርክር ማስገባት ይቻላል ወይስ አይቻልም? የሚለው ጥያቄ ይህ ጽሁፍ መልስ የሚፈልግለት ጉዳይ ነው።

በመደበኛ ፍርድ ቤት እነዚህን ጥያቄዎች ለማስተናገድ ፍርድ ቤቶች ሕገ-መንግስታዊ ስልጣን ስላላቸው አስቸጋሪ አይደለም። በግልግል ዳኝነት ግን የዳኝነት ስልጣን የሚመነጨው ከተከራካሪዎች ስምምነት ስለሆነ የግልግል ዳኝነት አካሉ በሦስተኛ ወገኖች ላይ ስልጣን አለው ወይ? የሚል ጥያቄ ይነሳል። የግልግል ዳኝነት መነሻው የተከራካሪዎች ስምምነት ነው ከተባለ ከተዋዋዮች ውጭ ያሉ 3ኛ ወገኖችን ለማሳተፍ የሚቻልበት አግባብ ምንድነው? የሚለው መልስ የሚሻ ጥያቄ ነው። እዚህ ላይ የሚነሳው ጥያቄ ሁለት ዓይነት ነው። በአንድ በኩል በግልግል ዳኝነት መብቱን ለማስወሰን ያልተስማማ አካልን አስገድዶ ወደ ግልግል ዳኝነት ማስገባት ይቻላል ወይ? የሚል ጥያቄ ይነሳል። በተቃራኒው ደግሞ በግልግል ዳኝነት ስምምነት ውስጥ ያልነበረ ሦስተኛ ወገን በጣልቃ ገብነት ወይም በተተኪነት ወደ ግልግል ለመግባት ቢፈልግ ለመከልከል ወይም ለመፍቀድ የሚቻለው በምን የሕግ አግባብ ነው? የሚል ጥያቄ ይነሳል። ይህ ጸሀፊ ሦስተኛ ወገኖች በፍትሐብሔር ክርክሮች በመግባት መብታቸውን ለማስከበር የሥነ-ስርዓት ሕጉ የሚሰጣቸውን ዕድል በግልግል ዳኝነት ወቅት መነፈግ የለባቸውም ብሎ ይከራከራል። ሦስተኛው

[1] James Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent,* 4(3) PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 476 (2004); https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1138&context=drlj accessed on 27 January 2019.

ወገን እስከተስማማ ድረስም የክርክሩ ተሳታፊዎችን መብት በተሟላ አኳኋን ለማስከበር ለማገዝ ወደ ክርክር እንዲገባ መፈቀድ አለበት ብሎ ያምናል። ዋናው መመዘኛ የሦስተኛው ወገን ስምምነት እንጂ የሌሎች ተከራካሪዎች ሊሆን አይገባውም ብሎም ያምናል።

ሌላው በግልግል ዳኝነት የሦስተኛ ወገኖች ጉዳይ የሚነሳው የግልግል ዳኝነት ስምምነት ለሦስተኛ ወገን መተላለፍ ጋር በተያያዘ ነው። በመሰረቱ የውል መብትና ግዴታ ከአንድ ተዋዋይ ወደ ሦስተኛ ወገን የመተላለፍ ጉዳይ በሕግ የተፈቀደ እና በተግባርም የተለመደ ሲሆን ለግልግል ዳኝነት ስምምነት ይሰራል ወይስ አይሰራም የሚለው መመርመር ያለበት ጥያቄ ነው። ይህ ዓይነቱ ጥያቄ ዓይነተኛ በሆነው የውል መተላለፍ ድርጊት በተለይም በዳረጎት ወቅት ይነሳል። ይህ ጥያቄ የውል ሕግ መርሆችን መተንተን የሚጠይቅ ሲሆን በተጨባጭ በፍርድ ቤት ቀርበው ውሳኔ የተሰጠባቸው መዝገቦችን መመርመር የሚሻ ጉዳይ ነው።

ይህ ጽሁፍ በእነዚህ ጥያቄዎች ዙሪያ አግባብነት ያላቸውን የሰበር፣ የበታች ፍርድ ቤት እና የግልግል ዳኝነት ውሳኔዎች ከሕጉ እና በዘርፉ ከተጻፉ ጽሁፎች አንጻር በማየት ለችግሩ መፍትሄ ለመጠቆም ያለመ ነው። በግልግል ዳኝነት የዳበረ ሕግና ልማድ ያላቸውን ጥቂት አገሮች ተሞክሮም ቀንጭቦ ለማቅረብ ይሞክራል። ይሁን እንጂ በዓለም ዓቀፍ የግልግል ዳኝነት ከፍተኛ ተጽዕኖ ያላቸውን የአንሲትራል (UNCITRAL) እና የዓለም ዓቀፍ የንግድ ምክር ቤት (International Chamber of Commerce-ICC) ደንቦች እና ተሞከሮዎች ግን በዚህ ጽሁፍ አይዳሰሱም። ምክንያቱም የእነዚህ ተቋማት ሥራ እና የሚያወጧቸው ደንቦች ትኩረት የሚያደርጉት በዓለም ዓቀፍ የግልግል ዳኝነት ስለሆነ ከውል ሕጋችን እና ከፍትሐብሔር ሕጋችን አተገባበር የሚመነጩ ችግሮችን ለመፍታት ጥሩ የተመክሮ ምንጭ ሊሆኑ አይችሉም።

ጽሁፉ በቅድሚያ የግልግል ዳኝነት ስምምነት በሦስተኛ ወገኖች ላይ ያለው ተፈጻሚነት ላይ ንድፈ ሃሳባዊ ነጥቦችን ያነሳሳል። ይህ በክፍል ሁለት የሚደረግ ይሆናል። ክፍል ሦስት በሦስተኛ ወገኖችላይ የግልግል ዳኝነት ያለውን ተፈጻሚነት ከሌሎች አገሮች ተሞክሮ አንጻር ይዳስሳል። ክፍል አራት በኢትዮጵያ ሕግ የሦስተኛ ወገኖች ተሳትፎ የሥነ-ስርዓት መንገዶችን ይተነትናል። በዚህ ክፍል ውስጥ የሥነ-ሥርዓት ሕጉ ድንጋጌዎች በጉዳዩ ላይ ከተወሰኑ የፍርድ ቤቶች እና የግልግል ዳኝነት ውሳኔዎች አንጻር በሰፊው ይዳሰሳሉ። ጸሐፊው በዚህ ጉዳይ ላይ ለማግኘት የቻላቸው የሰበር ውሳኔዎችም ይተነተናሉ። በመጨረሻም ማጠቃለያ እና አንዳንድ መሻሻል ስላለባቸው ሕጎች ጥቆማ በማድረግ ጽሁፉ ይጠናቀቃል።

በዚህ ውስብስብ በሆነ ጉዳይ ላይ የጸሀፊው እይታ ብቸኛው የተረጋገጠ የመፍትሄ ሀሳብ ነው ብሎ የሚያቀርበው አይደለም። ዋነኛው የጸሃፊው ዓላማ በጉዳዩ ላይ የተለያዩ አማራጭ ሀሳቦችን ማነሳሳት እና በብዙ አማራጭ ሀሳቦች ላይ የተመሰረተ መፍትሄ እንዲበጅ መነሻ ሀሳብ ማቅረብ ነው።

1. የግልግል ዳኝነት ስምምነት እና ሦስተኛ ወገኖች፡ ዋና ዋና ንድፈ ሀሳባዊ ጉዳዮች

1.1 በግልግል ዳኝነት የሦስተኛ ወገኖች ተሳትፎ የሚነሳባቸው አውዶች

አብዛኞቹ ትልልቅ ዘመናዊ ውሎች ውስብስብ እና ብዙ አካላትን የሚያሳትፉ ናቸው።[2] ዋና ተዋዋይ ወገኖች ሁለት ሊሆኑ የሚችሉበት አግባብ የተለመደ ቢሆንም በዋና ተዋዋይ ወገኖች ስር ሆነው ግዴታዎችን የሚፈጽሙ ንዑስ ተዋዋዮች የሚኖሩበት ሁኔታ ብዙ ነው።[3] ውሎች በዚህ መንገድ ውስብስብ እየሆኑ ለመምጣታቸው ከሚጠቀሱ ምክንያቶች ውስጥ ዋናው የክህሎት ልዩነት (specialization) እየተስፋፋ መምጣቱ ሊሆን ይችላል። በመሆኑም አንድ የውል ግዴታ ውስጥ የገባ ተዋዋይ ሁሉንም ስራዎች ራሱ ከመፈጸም ይልቅ ልዩ ልዩ ክህሎት የሚጠይቁ ስራዎችን ለሌሎች አካላት በማስተላለፍ ግዴታውን በተዘዋዋሪ ይፈጽማል። አገልግሎት ተቀባይ ግዴታው በ3ኛ ወገን በኩል እንደሚፈጸም በግልጽም ይሁን በውስጠ ታዋቂነት ሊስማማ ይችላል። አገልግሎት ተቀባይ በበኩሉ የሚቀርብለትን አገልግሎት በራሱ ገምግሞ ለማረጋገጥ ብቃት ላይኖረው ይችላል። በዚህም ስራውን የሚከታተልለት፣ የተሰጠው አገልግሎት የተሟላ እና ደረጃውን የጠበቀ መሆኑን ከሚገመግምለት ሌላ አካል ጋር ንዑስ ውል ሊዋዋል ይችላል። ዞሮ ዞሮ በእንዲህ ያለ ግንኙነት ውስጥ ዋናዎቹ ተዋዋዮች ያለመግባባትን በግልግል ዳኝነት ለመፍታት የሚያድርጉት ስምምነት በንዑስ ውል ፈጻሚው/ፈጻሚዎች/ ላይ የሚኖረው ውጤት መታየት ያለበት ነው።

ይህ ዓይነት ጉዳይ የሚያጋጥመው በግለሰብ ነጋዴዎች ወይም ኩባንያዎች ላይ ብቻ አይደለም። በዓለም አቀፍ የግልግል ዳኝነት መንግስታት የዚህ ተጠቃሚ አሊያም ተጎጂ የሚሆኑበት ጊዜ አለ። ብዙ ጊዜ በመንግስት ባለቤትነት ስር ያለ ኩባንያ ከውጭ አገር ኩባንያዎች ጋር የሚገባበትን ውል ተቆጣጣሪ የሚኒስቴር መስሪያ ቤት በቀጥታ ወይም በተዘዋዋሪ ይሳተፍበታል። ይህም ውሉን በመደራደር፣ በማጽደቅ፣ አሊያም የልማት ድርጅቱን በመቆጣጠር ተሳትፎ ይኖረዋል። በእንዲህ ዓይነት ጉዳይ ላይ የሚደረግ የግልግል ዳኝነት ውስጥ መንግታት የውሉ አካል ባይሆኑም ተገደው የሚገቡበት ጊዜ ብዙ ነው። አብዛኞቹን በዓለም ዐቀፍ የግልግል ዳኝነት መንግስታት እንደ ሦስተኛ ወገን ተገደው የገቡባቸውን የግልግ ዳኝነቶች በርናርድ ሃኒቷ የተባለ ጸሐፊ በዝርዝር አጥንቶ ያቀረበ ሲሆን የበለጠ ለመረዳት ጽሁፉን ማየት ይጠቅማል።[4] በዚህ ጽሁፍ ግን ትኩረት የሚደረግበት በግለሰቦች ወይም በኩባንያዎች መካከል ባለው አውድ ውስጥ ብቻ ይሆናል።

እዚህ ላይ በልማድ ከሚያጋጥሙ ውስብስብ ውሎች የሚከተሉትን መጥቀስ ይቻላል፡-

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[3] James Sentner, *Who is Bound by Arbitration Agreements: Enforcement by and Against Non-Signatories,* 6 BUS L. INT'L 57 (2005).

[4] Bernard Hanotiau, *The Issue of Non-Signatory States,* 23(3) THE AMERICAN RVIEW OF INTERNATIONAL ARBITRATION (2012).

1.1.ሀ. በዚህ ረገድ በመጀመሪያ ሊነሱ የሚገባቸው የግንባታ ውሎች ሊሆኑ ይችላሉ።[5] በግንባታ ውል ተቋራጩ ንዑስ ተቋራጮችን በማሰማራት ግዴታውን ሊወጣ ይችላል። በአሰሪ እና በተቋረጭ መካከል ተቆጣጣሪ መሃንዲስ ወይም አማካሪ ይኖራል። እንዲሁም የስራ አፈጻጸም ዋስትና የሚሰጡ የገንዘብ ተቋማት ሊኖሩ ይችላሉ። በእንደዚህ ዓይነት ሁኔታ ውስጥ በአሰሪ እና በተቋራጭ መካከል የሚደረግ የግልግል ዳኝነት የሌሎቹን ንዑስ ተዋዋዮች መብት የሚነካ ሊሆን ይችላል።

1.1.ለ. የተቧደኑ ኩባንያዎች ሌላ የግልግል ዳኝነት በሦስተኛ ወገን ላይ ያላቸውን የተፈጻሚነት ጥያቄ የሚያስነሱ ሁኔታዎችን የሚፈጥሩ ናቸው። ባለሀብቶች ኃላፊነትን ለመገደብ ሲሉ በተለያዩ የስራ ዘርፎች ኩባንያዎችን ያቋቁማሉ። በዚህ ጊዜ በአንዱ ስም ውሉን ሊደራደሩ፣ በሌላኛው ኩባንያ ስም ሊፈራረሙ እና በመጨረሻም ውሉን የሚፈጽመው ሌላ 3ኛ ኩባንያ ሊሆን ይችላል። በዚህ ጊዜ የግልግል ዳኝነት ስምምነት ያለበትን ውል የፈረመው ኩባንያ ብቻ ነው በግልግል ዳኝነቱ የሚገደደው ወይስ ውሉን በመደራደር እና በመፈጸም የተሳተፉት ኩባንያዎችም ይመለከታቸዋል? በተለይ ውሉን የፈረመው ኩባንያ ምንም ሀብት የሌለው (የከሰረ) ከሆነ፣ አሊያም የንግድ ፈቃዱ የታገደ ከሆነ፣ ወ.ዘ.ተ. በግልግል ዳኝነት ስምምነት ለታሰረው ሦስተኛ ወገን ይህን ድርጅት መክሰስ አያዋጣውም። ከሦስቱም ኩባንያዎች ጀርባ ሆኖ የሚያንቀሳቅሰው ያው አንድ ባለሀብት ከሆነ የግልግል ዳኝነት ውስጥ እንዲገባ ማድረግ ይቻላል ወይስ አይቻልም?

1.1.ሐ. አንድ ሀብትና ንብረቱ ተሟጦ ያለቀን ኩባንያ ገንዘብ ጠያቂዎች በፍርድ ቤት ሲከሱ ጥፋት ካለበት ዋና ስራ አስኪያጅንም አጣምረው ሊከሱ ይችላሉ። እንበልና በከሳሽ እና በተከሳሹ ኩባንያ መካከል የግልግል ዳኝነት ስምምነት ቢኖር ዋና ስራ አስኪያጁን በግልግል ዳኝነት አጣምሮ መክሰስ ይቻላል ወይስ አይቻልም? የሚለው መመርመር ያለበት ጥያቄ ነው።

1.1.መ. አንዳንድ ኩባንያዎች መተዳደሪያ ደንባቸው ውስጥ ኩባንያውን የሚመለከት ያለመግባባት በሙሉ በግልግል ዳኝነት እንደሚፈታ ይስማማሉ። ይህ ዓይነት ስምምነት ባለበት ኩባንያውን እና ስራ አስኪያጁን አጣምሮ ለመክሰስ የፈለገ ባለአክሲዮን ኩባንያውን በግልግል ዳኝነት ለመክሰስ ይገደዳል። ነገር ግን ዋና ስራ አስኪያጁን በግልግል ዳኝነት መክሰስ ይችላል ወይስ አይችልም የሚለው አጠያያቂ ነው። "ኩባንያውን የሚመለከት" በሚለው ሀረግ ላይ ብቻ ትኩረት ካደረግን ዋና ስራ አስኪያጁ በግልግል ዳኝነት ስምምነት ፈራሚ ባይሆንም ይገደድበታል ሊባል ይቻል ይሆናል። እዚህ ላይ ኩባንያውን በግልግል ዳኝነት፣ ስራ አስኪያጁን ደግሞ በፍርድ ቤት ይክሰስ ቢባል ሊያስከትል የሚችለው የልፋት ድግግሞሽ ብቻ አይደለም። ተቃራኒ ውሳኔ በሁለቱ የፍትህ መድረኮች ሊሰጥ እንደሚችል ልብ ማለት ያስፈልጋል።

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[5] በዚህ ላይ የበለጠ ለማወቅ Philip L. Burner, *Dual Track Proceedings in Arbitration and Litigation: Reducing the Perils of "Double Jeopardy" by Consolidation, Joinder and Appellate Arbitration,* 31 THE INTERNATIONAL CONSTRUCTION LAW REVIEW 538 (2014).

በአጠቃላይ በግልግል ዳኝነት ጉዳዩ እየታየ ያለ ተከሳሽ የሚያቀርበው መከራከሪያ የሌላ 3ኛ ወገን ተግባርን፣ ግዴታን፣ መብትን ወዘተ የሚመለከት ከሆነ የ3ኛው ወገን ወደ ክርክሩ መግባት እና በአንድ መደረክ ላይ ውሳኔ መሰጠቱ ፍትሃዊ ሊሆን ይችላል። አሊያም በተከራካሪዎች መካከል ያለው ጉዳይ ላይ የሚሰጥ ውሳኔ የ3ኛ ወገንን መብት ወይም ኃላፊነት የሚመለከት ከሆነ የሚመለከተው 3ኛ ወገን ወደ ክርክሩ መግባት ተገቢ ሊሆን ይችላል። እነዚህ ጥያቄዎች የፍትሐ ብሔር ክርክር በሚመራበት የሥነ-ስርዓት ሕግ ተገቢ ምላሽ የተሰጣቸው ቢሆንም የግልግል ዳኝነት መሠረቱ የተዋዋዮች ስምምነት ከመሆኑ አንጻር አከራካሪ ናቸው።

በግልግል ዳኝነት የሦስተኛ ወገኖችን መብት በሚመለከት የሚነሱትን ጥያቄዎች የበለጠ ለማብራራት ከላይ በቁጥር 1.1.ሐ. ላይ ያለውን ምሳሌ አብራርተን እንመለከት። ለምሳሌ ባለአክሲዮኑን "ሀ"፣ ኩባንያውን "ለ"፣ "መ"ን ደግሞ ሥራ አስኪያጁ ነው እንበል። በዚህ መሠረት "መ" በ"ሀ" እና "ለ" መካከል ባለ የግልግል ዳኝነት ስምምነት ውስጥ የመግባት ጉዳይ በሚከተሉት ስድስት የተለያዩ ሁኔታዎች ውስጥ ሊነሳ ይችላል።[6]

1. "ሀ" "መ"ን (እና "ለ"ን) በግልግል ዳኝነት ለመክሰስ ፋይል ቢከፍት "መ" የግልግል ዳኝነት ጉባኤውን ስልጣን ይቃወማል። በእሱ እና በሁለቱ ተዋዋዮች መካከል የግልግል ዳኝነት ስምምነት የለም በማለት፤
2. "መ" "ሀ"ን (እና "ለ"ን) በፍ/ቤት ቢከስ "ሀ" እና "ለ" ወይም አንዳቸው ማህበሩን የሚመለከት ጉዳይ በግልግል ዳኝነት እንዲወሰን ስምምነት ስላለን ክሱ ይቋረጥልን ሲሉ ያመለክታሉ፤
3. "ሀ" "መ"ን በፍ/ቤት ቢከስ እና "መ" በበኩሉ ማህበሩን የሚመለከት ክርክር በግልግል ዳኝነት እንዲወሰን ስምምነት አለ በማለት ክሱ እንዲቋረጥ ሲያመለክት፤
4. "መ" "ሀ" (እና "ለ") ላይ በግልግል ዳኝነት ክስ ቢመሰርት እና "ሀ" እና "ለ" ከ"መ" ጋር የግልግል ዳኝነት ስምምነት የለንም በሚል የግልግል ዳኝነት ጉባኤውን ስልጣን ቢቃወሙ፤
5. "ሀ" "ለ"ን በግልግል ዳኝነት ቢከስ እና "መ" በጉዳዩ ጣልቃ ለመግባት ቢያመለክት፤ ወይም
6. "ሀ" "ለ"ን በግልግል ዳኝነት ቢከስ እና "ለ" "መ" በክሱ ውስጥ ይግባልኝ ሲል ያመለከተ እንደሆነ።

ከላይ ከተጠቀሱት የተለያዩ ምሳሌዎች ውስጥ አንዳንዶቹ በተጨባጭ የሚያጋጥሙ ችግሮች ሊሆኑ እና ሌሎቹ ደግሞ ንድፈ ሀሳባዊ ብቻ ሊሆኑ ይችላሉ። ዋናው ለማሳየት የተፈለገው ነጥብ በግልግል ዳኝነት ውስጥ የሦስተኛ ወገኖች መብት በተለያዩ አውዶች ውስጥ ሊነሳ የሚችል መሆኑን ነው። ለእነዚህ ፈርጀ ብዙ ችግሮች የሚሰጡ መፍትሄዎችን ለማመልከት ከመሞከር

[6] James Hosking, *supra* note 1, at 488.

በፊት የግልግል ዳኝነት ስርዓት የሚመራባቸውን ዓላማዎችን እና መርሆዎችን ማየት ሊጠቅም ይችላል።

1.2 በግልግል ዳኝነት ስርዓት ውስጥ የሚጋጩ መርሆች እና ዓላማዎች

በዚህ ንዑስ ክፍል የግልግል ዳኝነት ስርዓት ውስጥ የሚፈጠሩ መሠረታዊ ተቃርኖዎችን እንመለከታለን። ከመርሆዎች አንጻር በአንድ በኩል የግልግል ዳኝነት መሠረቱ የተከራካሪዎች ፍቃድ ነው የሚለው የግልግል ዳኝነት ስርዓት መሠረት ነው። ከዚህ መርህ አኳያ በግልግል ዳኝነት በግልጽ ያልተስማማ አካል ላይ የግልግል ዳኝነት ጉባኤ ስልጣን ሊኖረው አይችልም። በመሆኑም ይህ መርህ ከተዋዋዮች ውጭ የሆኑ ሰዎች በግልግል ዳኝነት ውስጥ ሊሳተፉ አይችሉም ወደሚል ድምዳሜ ይወስደናል።

በሌላ በኩል ደግሞ የግልግል ዳኝነት ጉባኤ ዋጋ ያለው እና ሊፈጸም የሚችል ውሳኔ መስጠት አለበት የሚለውም እንዲሁ ራሱን የቻለ የግልግል ዳኝነት መርህ ነው። በሁለት ተከራካሪዎች መካከል ባለ ጉዳይ የግልግል ዳኝነት ጉባኤ የሚሰጠው ውሳኔ የሦስተኛ ወገንን መብት የሚነካ ሊሆን ይችላል፤ አሊያም የግልግል ስምምነቱ ተዋዋይ በሆነ ተከሳሽ ላይ ውሳኔ ቢሰጥበትም ምንም ሀብት የሌለው ወይም ዕዳውን ለመሸሽ ሲል ሀብቱን በተንኮል ለሦስተኛ ወገን አስተላልፎ ሊሆን ይችላል። በዚህ ሁኔታ ውስጥ ውሳኔ ቢሰጥም ተፈጻሚ ሊሆን አይችልም። በአንድ በኩል መብቱ የተነካበት 3ኛ ወገን ውሳኔውን ስለሚቃወም፤ በሌላ በኩል ደግሞ ሀብቱን በተንኮል ለሌላ ወገን ያስተላለፈ ወገን ፍርዱን እንዳይፈጸም ስለሚያደርግ። ስለዚህ በግልግል ዳኝነት መብቱ የተነካበት 3ኛ ወገን ጣልቃ እንዲገባ የሚፈቅድ መሆን አለበት። በሌላ በኩል ከተከሳሽ ጋር በተንኮል ተባብሮ ሀብት ያሸሸ ወገን በግልግል ዳኝነት ስምምነቱ ውስጥ ባይኖርበትም ተገዶ እንዲገባ ሊደረግ ይገባል ወደ ሚል ድምዳሜ ይመራናል።

1.2.1 የተከራካሪዎችን ፍቃድ በማክበር እና ዋጋ ያለው ውሳኔ በመስጠት መካከል ያለ ተቃርኖ (Consent v enforceable award)

ሀ. የተከራካሪዎች ፈቃድ መሠረታዊነት

በብዙ አገሮች ሕጎች፥ በኮመን ሎውም ሆነ በሲቪል ሎው፥ የግልግል ዳኝነት ስርዓት የሚገዛበት ዋናው መሰረተ ሀሳብ የተዋዋዮች ፍቃድ ነው።[7] ይህ መርህ ሁለት ተደራራቢ ውጤቶች አሉት። የመጀመሪያው ዜጎች ሕገ-መንግስታዊ የሆነውን በፍርድ ቤት ወይም በሕግ የዳኝነት ስልጣን በተሰጠው አካል ክርክራቸውን የማስወሰን መብት የሚያጡት ከተስማሙ እና በተስማሙበት ልክ ብቻ ነው። (የኢ.ፌ.ዲ.ሪ. ሕግ-መንግስት አንቀጽ 37ን ይመልከቷል።) ስለዚህ አንድ ሰው የግልግል ዳኝነት ስምምነት ውስጥ ካልገባ በግልግል ዳኝነት መብቱን እንዲያስወስን ማንም

[7] THOMAS CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION (Oxford University Press 4th ed., 2012).

ሊያስገድደው አይችልም። ይህ ግልጽና የማያከራክር ሲሆን የሚያከራክር ቅጥያም አለው። እሱም አንድ ሰው ለምሳሌ ‹‹ሀ›› ከ ‹‹ለ›› ጋር የግልግል ዳኝነት ስምምነት ቢኖረው የግልግል ዳኝነት ስምምነት ውስጥ የሌለው ‹‹መ›› በሁለቱ ክርክር እንዳይገባ መቃወም ይችላል የሚለው ነው።

ይህ የፈቃደኝነት መርህ (principle of consent) የተመሰረተው በሕገ-መንግስታዊ መብት ብቻ ሳይሆን ዲሞክራሲያዊ እሴትም ላይ ጭምር ነው። ሰዎች በሕግ የተጠበቀላቸውን ፍትህ የማግኘት መብት በፍቃዳቸው መተው የዲሞክራሲ አንዱ መገለጫ ነው። የግልግል ዳኝነት መሠረቱ የተዋዋዮች ፈቃድ መሆኑ ከዚህ የዲሞክራሲ እሴት የመነጨ ነው ማለት ይቻላል። በፍርድ ቤት የመዳኘት መብትን ትቶ በግልግል የመዳኘት ውሳኔ የዲሞክራሲ መገለጫ ሲሆን በፍርድ ቤት የመዳኘት መብቱን ለመተው ያልተስማማን ሰው አስገድዶ በግልግል ዳኝነት መዳኘት ግን ዲሞክራሲን ይቃረናል። በመሆኑም የግልግል ዳኝነት ስርዓት የዲሞክራሲ እሴቶችን ማጠናከር እንጂ ማዳከም የለበትም።[8] ሁለተኛው የዚህ መርህ ውጤት የግልግል ዳኝነት ጉባኤ የዳኝነት ስልጣን ላይ ያለው አንድምታ ነው። ይህም የግልግል ዳኝነት ጉባኤ ስልጣን የሚኖረው ጉዳያቸውን በግልግል ዳኝነት ለመፍታት በተስማሙት ወገኖች ላይ ብቻ ነው። በመሆኑም ሁለቱ ተከራካሪዎች 3ኛ ወገን ወደ ክርክሩ እንዲገባ ተስማምተው ቢያመለክቱም እንኳን የግልግል ዳኝነት ጉባኤው በሦስተኛ ወገን ላይ ስልጣን የለኝም ብሎ ከክስ ሊያስወጣው ይችላል። የግልግል ዳኝነት ስምምነት በመካከላቸው ያለ ተከራካሪዎች እና 3ኛ ወገን ከተስማሙ ግን ጉባኤው ብቻውን ስልጣን የለኝም ላይል ይችላል። ዞሮ ዞሮ የፈቃድ መርህ የግልግል ዳኝነት ስልጣንን የሚመለከት መሆኑ ሊሰመርበት የሚገባ ነጥብ ነው።

ለ. የግልግል ዳኛ የሚሰጠው ውሳኔ ሊፈጸም የሚችል /ዋጋ ያለው/ ሊሆን ይገባል

በግልግል ዳኝነት መድረክ የሚሰጥ ውሳኔ በፍርድ ቤት እንደሚሰጥ ውሳኔ ሁሉ መፈጸም የሚችል መሆን አለበት።[9] ነገር ግን የግልግል ዳኞች የሚሰጡት ውሳኔ በተለያዩ ምክንያቶች እንዳይፈጸም የሚያደርጉ ዕክሎች ሊፈጠሩ ይችላሉ። በልማድ ተደጋግመው ከሚፈጠሩ እክሎች ውስጥ አንዱ ውሳኔው በክርክሩ ያልተሳተፈ 3ኛ ወገንን መብት የሚነካ ከሆነ ነው። በዚህ ጊዜ ውሳኔው መብቱን የነካበት 3ኛ ወገን ውሳኔውን ስለሚቃወም ለውሳኔው ተፈጻሚነት እንቅፋት ይሆናል። በሌላ በኩል የፍርድ ባለዕዳ ቢደረግ ሊከፍል የሚችል 3ኛ ወገንን ያላከተተ ውሳኔ ዋጋ አይኖረውም። ይህም 3ኛ ወገን የከሳሽን መብት በሚጎዳ ሁኔታ የግልግል ዳኝነት ስምምነት ካለው ተከሳሽ ጋር በመተባበር ሀብት በማሸሽ ተግባር የተሳተፈ ከሆነ የግልግል ዳኝነት ስምምነት ውስጥ ያለመኖሩ ከለላ ሊሆንለት አይገባም። እንዲሁም በግልግል ዳኝነት እየታየ ካለው ጉዳይ ጋር አንድ አይነት የሕግና የፍሬ ነገር ክርክር ያለው 3ኛ ወገን የግልግል ዳኝነት ስምምነት ውስጥ ስለሌለ ብቻ ተከራካሪዎች ከእሱ ጋር ያላቸውን ክርክር ጎን ለጎን በፍርድ ቤት ያድርጉት ቢባል በውሳኔ አፈጻጸም ላይ እክል ሊፈጥር ይችላል። ይህም በተመሳሳይ ጉዳይ ላይ በሌላ መድረክ ተቃራኒ

[8] LEONARD L. RISKIN ET AL, DISPUTE RESOLUTION AND LAWYERS 549 (West Academic Publishing 5th ed., 2014).

[9] WILLIAM PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 8 (Oxford University Press 2nd ed., 2012).

ውሳኔ ቢሰጥ የአንደኛው ውሳኔ መፈጸም ሌላውን ስለሚያከሽፈው ነው።[10] ስለዚህ አንድ የግልግል ዳኛ እየዳኘ ያለው ጉዳይ ውስጥ ተሳታፊ የሆነ አንድ ወይም ከዚያ በላይ ተከራካሪ በተመሳሳይ የሕግና የፍሬ ነገር ላይ ከሦስተኛ ወገን ጋር ጎን ለጎን በፍርድ ቤት የሚከራከር ከሆነ የግልግል ዳኛው ሊፈጸም የሚችል ውሳኔ እንደሚሰጥ እርግጠኛ መሆን አይችልም።

1.2.2. ቅልጥፍና እና ወጪ ቆጣቢነት ከፍትሐዊነት ጋር ያለው ተቃርኖ (efficiency v. fairness)

ሰዎች ፍርድ ቤትን ትተው የግልግል ዳኝነትን ከሚመርጡባቸው መመዘኛዎች ዋነኛው የግልግል ዳኝነት ክርክሮችን በተቀላጠፈ እና ወጪ ቆጣቢ በሆነ መንገድ ለመቋጨት ይረዳል በሚል ሀሳብ ነው። በተለይ ነጋዴዎች የግልግል ዳኝነትን የሚመርጡበት ዋነኛ ምክንያት ይህ የመጀመሪያው ነው ለማለት ይቻላል። የፍትሐ ብሔር ሥነ-ስርዓት ሕግም ቢሆን ይህንን አይነት ፍላጎት ከግምት የሚያስገባ ነው የሚመስለው። ለምሳሌ በፍትሐ ብሔር ሕጋችን ውስጥ ስለቀደምትነት፣ ክሶችን ስለ ማጣመር፣ ያለ አግባብ ተከሳሾችን ማጣመርን መከልከል፣ ተከራካሪ ወገኖችን ስለ መጨመር ወይም ስለ መተካት፣ ስለ ጣልቃ ገብነት፣ ሦስተኛ ወገኖችን በክስ ውስጥ ስለማስገባት ወ.ዘ.ተ. የተቀመጡት ድንጋጌዎች ዋና ዓላማ ክርክሮችን በአጭር ጊዜ፣ እንዲሁም ያለ ብዙ ወጪና ድካም ለመፍታት እንዲያስችል ነው።[11]

በሌላ በኩል የፍትሐ ብሔር ሥነ-ስርዓት ሕጉ በግልግል ዳኝነት ሂደት የይግባኝ መብትን የመተው አማራጭን ማስቀመጡ (የፍ/ሥ/ሥ/ሕ/ቁ. 350(2))፣ እንዲሁም መብቱ ባልተተወበት ሁኔታ ይግባኝ የሚባልባቸው ምክንያቶችን ገድቦ ለማስቀመጥ መሞከሩ[12] (የፍ/ሥ/ሥ/ሕ/ቁ. 351) ቅልጥፍና እና ወጪ ቆጣቢነት የግልግል ዳኝነት አንኳር እሴቶች መሆናቸውን መቀበሉ እንደሆነ መገንዘብ ይቻላል። አለመግባባትን በአንድ የግልግል ዳኝነት መድረክ መቋጨት እና በውሳኔው ቅሬታ እንኳን ቢኖር ይግባኝ እያሉ ያለመጓተት ጊዜን፣ ገንዘብን እና ጉልበትን ከማባከን ያድናል።

በተመሳሳይ መንገድ ተከራካሪዎች የግልግል ዳኞችን ራሳቸው እንዲመርጡ በሕግ መብት መሰጠቱ ተከራካሪዎች ከጉዳያቸው ጋር በተያያዘ ልዩ ዕውቀት ያላቸውን ሰዎች መርጠው እንዲሾሙ ሲሆን ይህም ክርክርን በተፋጠነ መንገድ ለመወሰን ጠቃሚነቱ ከፍተኛ እንደሆነ ሊሰመርበት ይገባል። የግልግል ዳኝነት የተንዛዙ ሥነ-ስርዓታዊ ድንጋጌዎችን ማቅለልን

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[10] Stavros Brekoulakis, *supra* note 2, at 1176.

[11] ROBERT ALAN SEDLER, ETHIOPIAN CIVIL PROCEDURE LAW 87 (Faculty of Law HSIU, 1968).

[12] የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ከግልግል ዳኝነት ውሳኔ ይግባኝ የሚባልባቸውን ምክንያቶች የመገደብ ዓላማ እንዳለው የአንቀጽ 351 ቢያመላክትም በሕግና በፍሬ ነገር ስህተት ምክንያት ይግባኝ ማለትን ስለሚፈቅድ የይግባኝ ምክንያቶችን የመገደብ ዓላማው የሚሳካ አይደለም። ምክንያቱም ማንኛውም የቅሬታ ምክንያት የሕግ እና/ወይም የፍሬ ነገር ስህተት ተብሎ ሊቀርብ ይችላል። በተጨባጭ በግልግል ዳኝነት ውሳኔዎች ላይ የሚቀርቡ ይግባኞች እንደ ማንኛውም የመደበኛ ፍርድ ቤት ይግባኝ ነው የሚታዩት። የይግባኝ ፍርድ ቤቶች ከግልግል ዳኝነት ውሳኔ ይግባኝ ሲባል የይግባኝ ምክንያቶች የተገደቡ ከመሆናቸው አኳያ ይግባኙ ማስቀረብ አለማስቀረቡን ከተለየ መመዘኛ አንጻር አይመረምሩም።

መፍቀዱም ቅልጥፍናን እና ወጪ ቆጣቢነትን ለማስረጽ የታሰበ ነው። ከዚህ አንጻር የፍትሐ ብሔር ሥነ-ስርዓት ሕግ[13] የሚለው የግልግል ዳኝነት ሥነ-ስርዓት "በተቻለ መጠን በፍትሐ ብሔር ጉዳይ ከሚሰራበት ሥነ-ስርዓት ጋር ተመሳሳይ እና ተስማሚ መሆን አለበት" ነው። ይህ በግልጽም ባይሆን በተዘዋዋሪ ሂደቱን ለማቀላጠፍና እና ወጪን ለመቆጠብ ሲባል አንዳንድ የተንዛዙ አካሄዶችን ማቃለልን የሚፈቅድ ነው። ስለሆነም የግልግል ዳኞች የተከራካሪዎችን መሠረታዊ መብቶች ሳይነዱ ውስብስብ እና የተንዛዙ የሥነ-ስርዓት ድንጋጌዎችን ቢያቃልሉ የሕግ ጥሰት ፈጽመዋል ሊያሰኝ አይችልም። ዋናው ክርክሮችን በተቀላጠፈ እና ወጪ ቆጣቢ በሆነ አሰራር መፍታታቸው ነውና።

ስለሆነም በተከራካሪዎች መካከል ተመሳሳይ የሕግና የፍሬ ነገር ክርክሮች በግልግል ዳኝነት እና በፍ/ቤት በተመሳሳይ ጊዜ መታየታቸው ቅልጥፍናን ከማጥፋቱ እና ወጪን ከማብዛቱም በላይ በአንድ ጉዳይ ላይ ተቃራኒ ውሳኔዎች እንዲሰጡ ያደርጋል። ለምሳሌ በአሰሪው የተከሰሰ የስራ ተቋራጭ የመከሰሱ ምክንያት በንዑስ ተቋራጩ በተሰራው የግንባታው ክፍል ላይ ጉድለት መገኘቱ ከሆነ ዋናው ተቋራጭ ለአሰሪው ካሳ ከከፈለ በኋላ ንዑስ ተቋራጩን በፍርድ ቤት ወይም በሌላ የግልግል ዳኝነት ከሶ አስፈርዶ ለሰአሪው የከፈለውን ማስመለስ አታካች እና ረጅም መንገድ የሚያስኬድ ነው። ከዚህም በላይ በፍርድ ቤት ወይም በሌላ መድረክ በሚቀርብ ክስ ላይ ንዑስ ተቋራጩ ዋና ተቋራጩን ሊረታ ይችላል። ስለዚህ ከመጀመሪያው ንዑስ ተቋራጩ ወደ ግልግል ዳኝነቱ እንዲገባ ቢደረግ ወጪን ለመቀነስ ከማስቻሉም በላይ በተመሳሳይ የሕግና የፍሬ ነገር ክርክር ላይ የሚጣረሱ ውሳኔዎችን የመሰጠት አደጋን ያስወግዳል። ስለዚህ ቅልጥፍናን እና ወጪ መቆጠብን እንደ ዋነኛ የሥነ-ስርዓት መመሪያ አድርገን ከወሰድን በግልግል ዳኝነት ከተያዘው ጉዳይ ጋር አንድ ዓይነት የሕግና የፍሬ ነገር ክርክር ያለው ሦስተኛ ወገን ምንም እንኳን በግልግል ዳኝነት ስምምነት ውስጥ ባይኖርበትም በግልግል ዳኝነት ጉዳዩ ሊታይ ይገባል ወደሚል አንድምታ ይወስደናል።

ነገር ግን የፍትሐዊነት ጥያቄ ከዚህ በተቃራኒ ይቆማል። ይህም አንድ 3ኛ ወገን ባልተስማማበት የግልግል ዳኝነት ሊገደድ አይገባም፤ በሕገ-መንግስቱ የተጎናጸፈውን በፍ/ቤት መብቶቹን የማስወሰን ዕድሉን ማጣት የለበትም የሚል ነው። ስለዚህ የክርክሩን አካሄድ ለማቀላጠፍ እና ወጪን ለመቆጠብ ሲባል የግልግል ዳኝነቱ ስምምነት ሲደረግ ያልነበረን እና ያልተስማማንሰው ማስገደድ ፍትሐዊ አይሆንም። ከግለሰብ ሕልውና አንጻርም "የራስን ዕድል በራስ የመወሰን" ነጻነትን የሚያሳጣ እንደመሆኑ መሠረታዊ የዲሞክራሲ እሴትን ይሸረሽራል እንጂ አያሳድግም። ስለሆነም ከዚህ አንጻር ስናየው የሦስተኛ ወገኖች በግልግል ዳኝነት ውስጥ ተገዶ መግባት በሕግ የሚደገፍ አይመስልም። ሌላው ከዚህ ጋር የሚደጋገፍ መከራከሪያ የግልግል ዳኝነት ሂደት ሚስጢራዊነት ነው። ከዚህ አኳያ ሦስተኛ ወገኖች ያለተከራካሪዎች የጋራ ስምምነት ወደ ክርክር የሚገቡ ከሆነ የግልግል ዳኝነት የሚያስገኘው የተከራካሪዎችን ሚስጢር የማስጠበቅ ጥቅም ዋጋ ያጣል።[14]

[13] የኢትዮጵያ ንጉሰ ነገስት የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ፣ 1957፣ አንቀጽ ቁ. 317(1)).

[14] Stavros Brekoulakis, *supra* note 2, at 1172.

ስለዚህ የተሻለው አካሄድ ቅልጥፍና እና ወጪ ቆጣቢነት ከፍትሐዊነት ጋር አመዛዝኖ መጓዝ ነው እንጂ አንዱን ወይም ሌላውን እንደ ብቸኛ መመሪያ መከተል አይሆንም። እነዚህ እሴቶች በተወሰነ ደረጃ ቢቃረኑም የሚደጋገፉበትም ሁኔታ ብዙ ነው። በዚህ ነጥብ ላይ ዊሊያም ፓርክ የተባለ አሜሪካዊ ተመራማሪ ስለ እነዚህ እሴቶች ተደጋጋፊነት እና አለመነጣጠል ለማሳየት በታዋቂው የአሌክሳንደር ዱማስ ልብ ወለድ ውስጥ ባሉት ሦስቱ ባለነፍጦች (The Three Musketeers) ገጸ ባህሪያት ይመስላቸዋል።[15] ገጸ ባህሪያቱ ‹‹ሁሉም ለአንዱ፤ አንዱ ለሁሉም›› (all for one; one for all) በሚል ቢሂል እንደሚመሩት ሁሉ በግልግል ዳኝነትም ውስጥ ቅልጥፍናን እና ወጪ ቆጣቢነትን (efficiency)፣ ሚዛናዊነትን fairness፣ እና ስህተት አልባ ውሳኔ መስጠትን (accuracy) አንዱ ያለ ሌላው ምሉዕ ሊሆኑ የማይችሉ ተደጋጋፊ ናቸው ሲል ይገልጻል።[16]

1.3 በግልግል ዳኝነት ውስጥ ሦስተኛ ወገኖችን አስመልክቶ የሚነሱ ጥያቄዎችና ዓይነታቸው

የግልግል ዳኝነት ስምምነት ከሦስተኛ ወገኖች አንጻር የሚያስነሳቸው ጥያቄዎች ብዙ እና ውስብስብ ናቸው። ዋናዎቹ ጥያቄዎች (ሀ) መብቱ በሌለበት የሚወሰንበት ሦስተኛ ወገን፣ (ለ) ከስምምነታቸው ውጭ ከሆነ 3ኛ ወገን ጋር በግልግል እንዲዳኙ የሚገደዱ ተዋዋዮች፣ እንዲሁም (ሐ) በቀጥታ ባልተዋዋለው የግልግል ዳኝነት ስምምነት የሚገደድ ወይም የሚያስገድድ 3ኛ ወገን ናቸው። ይህ የመጨረሻው በተለይ የግልግል ዳኝነት ስምምነት ለሶስተኛ ወገን መተላለፍ መቻል ወይም አለመቻል ጋር የተያያዘ ጥያቄ ሲሆን አንድም በተላለፈው ውል ውስጥ ከጅምሩ አንስቶ የነበረ ወገን ውል የተላለፈለትን ሦስተኛ ወገን በግልግል ዳኝነት ስምምነቱ ሲያስገድደው ወይም እንዳይጠቀም ሲቃወመው የሚነሳ ጥያቄ ነው። ይህ ሙሉ በሙሉ የሥረ-ነገር ሕግ ማለትም የውል ሕግ ጉዳይ ነው። የመጀመሪያዎቹ ሁለቱ ጥያቄዎች (‹ሀ› እና ‹ለ›) ግን በከፊል የሥነ-ሥርዓት ሕግ ጥያቄዎች ቢሆኑም ዋናው ጉዳይ የግልግል ስምምነት ያለመኖር እስከሆነ ድረስ የሥረ-ነገርም ይዘት ያላቸው ጥያቄዎች ናቸው። ከዚህ አንጻር የሦስተኛ ወገን ተገድዶ ወደ ግልግል ዳኝነት መግባት እና ሦስተኛ ወገን ፈቅዶ ወደ ግልግል ዳኝነት መግባት የሚያስነሳቸው ጥያቄዎች የተለያዩ ናቸው።

ከስምምነታቸው ውጭ ከሆነ 3ኛ ወገን ጋር በግልግል እንዲዳኙ የሚገደዱ ተዋዋዮችን በተመለከተ ከ3ኛ ወገን ጋር የግልግል ዳኝነት ስምምነት ስለሌላቸው ከእሱ ጋር በግልግል ለመዳኘት በተወሰነ ደረጃ ‘‘አንጻራዊ የፈቃድ ጉድለት’’ (relative lack of consent) ይፈጠርባቸዋል። ይሁን እንጂ ይህ ዓይነቱ ‘‘አንጻራዊ የፈቃድ ጉድለት’’ ምንም ዓይነት የግልግል ዳኝነት ስምምነት ውስጥ ያልገባ 3ኛ ወገን ሲገደድ ከሚፈጠረው ‘‘ሙሉ የፈቃድ ጉድለት’’ (absolute lack of consent) ጋር ሲነጻጸር ብዙ የሚያሳስብ አይደለም።[17] አንጻራዊ የፈቃድ ጉድለት ላይ

[15] William Park, *supra* note 9, at 6.
[16] William Park, *supra* note 9.
[17] Ibid., at 309.

የተመሰረተ ክርክር ተቀባይነት ሊኖረው እንደማይችል አንድ የእንግሊዝ ዳኛ እንደሚከተለው አስቀምጠዋል፡-

> *I would be loathe to think that where a claim by party A to a contract with party B has been submitted to arbitration under that contract's arbitration clause, another claim based on identical facts brought by a third party to the same contract, party C, could not (without the agreement of B) be referred to the same arbitration…. No authority has been cited to me which compels me to determine that that would have to be done. I know of course that arbitration is a consensual process, but where the relevant parties are bound to arbitrate, I do not see why the respondent's refusal to recognize party C's submission of its claim to the same arbitrators can force parties A and C to arbitrate in separate arbitrations... The vice of that (apart from time and resources) is the danger of inconsistent decisions in separate arbitrations.*[18]

በሌላ በኩል የሦስተኛ ወገን በግልግል ዳኝነት ክርክር መግባትን አስመልክቶ የሚነሳው ክርክር ከሁለት አቅጣጫዎች መታየት ይኖርበታል። አንዱ በሌለበት መብቱ የሚነካበትን ሦስተኛ ወገን ጥቅም ማስጠበቅ ሲሆን ሌላው በክርክሩ ውስጥ ያለን ወገን መብት በተሟላ አኳሃን ማስከበር ነው። መብቱ የሚነካበትን ሦስተኛ ወገን በተመለከተ የግልግል ዳኝነት ተዋዋዮች የሦስተኛ ወገንን መብት ለመጉዳት የሚጠቀሙበት መድረክ ሊሆን አይገባውም። አንድ መብቱ የሚነካበት 3ኛ ወገን ጉዳዩ በፍርድ ቤት ቢታይ ኖሮ መብቱን ለማስጠበቅ የነበረው ዕድል ጉዳዩ በግልግል ዳኝነት በመታየቱ እንዲያጣ መደረግ የለበትም። ከዚህ አንጻር ሲታይ 3ኛ ወገን እስከተስማማ ድረስ ወደ ግልግል ዳኝነት ክርክር መግባት ሊፈቀድለት ይገባል። የተዋዋይ ወገኖች መስማማት ወይም አለመስማማት የሦስተኛ ወገኖችን መብት ለማስጠበቅ ወሳኝ ቅድመ ሁኔታ መሆን አይገባውም።

የተከራካሪዎቹን ጥቅም ለማስጠበቅ ሲባል የሦስተኛ ወገኖች ወደ ግልግል ዳኝነት ክርክር ይግቡ የሚለውን አቋም ለመደገፍ ሁለት መከራከሪያዎች ይቀርባሉ። አንደኛው መከራከሪያ የተከራካሪዎቹን የእኩልነት መብት ማስጠበቅ ነው። በብዙ አገሮች የግልግል ዳኝነት ሕግ እና በተቋማትም ደንብ ውስጥ የተከራካሪዎችን እኩልነት ማስጠበቅ አንኳር ከሚባሉ መርሆች ውስጥ ይመደባል።[19] ምሉዕ የሆነ እኩልነት የሚረጋገጠው ተከራካሪዎች እያንዳንዳቸው በእኩል ሁኔታ ላይ ሆነው ሲከራከሩ ነው። ለምሳሌ ከተከራካሪዎቹ አንዱ ሦስተኛ ወገን ወደ ክርክሩ ካልገባ በቀር ከሚጠይቃቸው መብቶች ውስጥ የተወሰነውን የሚያጣ ወይም ሊያቀርባቸው ከሚችላቸው መከራከሪያዎች ውስጥ የተወሰነውን ማንሳት የማይችል ከሆነ ከሌላኛው ተከራካሪ አንጻር በእኩል

[18] Willie & Co. v. Ocean Laser Shipping Ltd., "The SMARO," [1999] 1 Lloyd's Rep.225 (Q.B.D. Comm.) as cited in James Hosking, *supra* note 1, at 546, FN 360.

[19] S. Strong, *Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?* 31 VAND. J. TRANSNAT'L L. 978 (1998).

አቋም ላይ ሆኖ ነው የሚከራከረው ለማለት ያስቸግራል።[20] በመሆኑም የተከራካሪዎቹን እኩልነት ለማሰጠበቅ ሲባል የሦስተኛ ወገኖችን ወደ ክርክር መግባት መቀበል ያስፈልጋል የሚል ክርክር ይቀርባል። ሁለተኛው መከራከሪያ ክርክርን አሟለልቶ የማቅረብ መብትን ማክበር ነው። የፍትሐ ብሔር ሥነ-ስርዓት ሕግ የተከራካሪዎችን የመሰማት መብት እንደ አንድ መሠረታዊ መርህ ይቀበላል። የመሰማት መብት ሳይሸራረፍ የሚከበረው አንድ ተከራካሪ አሉኝ የሚላቸውን መከራከሪያዎች በሙሉ እንዲያቀርብ መብቱ ሲከበርለት ነው። መከራከሪያዎቹን አሟልቶ ለማቅረብ በክርክሩ ውስጥ የሌለ ሦስተኛ ወገን መግባት አስፈላጊ ከሆነ የግልግል ዳኝነት ሥርዓት ይህንን ሳያስጠብቅ በጉዳዩ ላይ ውሳኔ መስጠት የተከራካሪውን የመሰማት መብት ይጎዳል።[21] ምንም እንኳን ሦስተኛ ወገንን አስገድዶ ወደ ግልግል ዳኝነት ማስገባት ባይቻልም፣ የራሳቸውንም ሆነ በክርክሩ ተካፋይ የሆነን ተከራካሪ መብት ለማስጠበቅ ወደ ግልግል ለመግባት የሚስማሙ ሦስተኛ ወገኖች ሲኖሩ ግን ሊከለከሉ አይገባም።[22]

በአጠቃላይ በግልግል ዳኝነት ወስጥ የሦስተኛ ወገኖችን ተሳትፎ አስመልክቶ የሚነሱት ጥያቄዎች በሦስት ተከፍለው ሊታዩ ይችላሉ። አሊያም በሌላ አገላለጽ ከሦስት የተለያዩ አቅጣጫዎች ሊታዩ ይችላሉ። እነዚህም በአንድ በኩል የግልግል ዳኝነት ስምምነት በግልጽ ከተስማሙት ተዋዋዮች አልፎ ሌሎችን ሊሸፍን ይችላል ወይስ አይችልም? የሚለው ሲሆን ይህም ስምምነቱን ‘‘የማስፋፋት ጉዳይ’’ ሲሆን አንዳንድ ጸሐፍት extension of the arbitration agreement የሚሉት ነው። ሌላው ከዚህ ጎን ለጎን ሊታይ የሚገባው የግልግል ዳኝነት ስምምነት ለሌላ ሦስተኛ ወገን ሊተላለፍ ይችላል ወይስ አይችልም? በሚል ጥያቄ መልክ የሚታይ ሲሆን ይህም በተለምዶ transfer of arbitration agreement በሚል ርዕስ ስር የሚታይ ነው።[23] ሦስተኛው በቀጥታም ሆነ በተዘዋዋሪ የግልግል ዳኝነት በሦስተኛ ወገኖች ላይ የሚኖረው አንድምታ የዳኝነት ጉባኤውን የስልጣን ወሰን (arbitral jurisdiction) የሚመለከት መሆኑ ነው።

እነዚህን በአጭሩ ለየብቻቸው እንመልከት።

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[20] *Ibid.*, at 980.

[21] *Ibid.*, 982.

[22] በዚህ ዙሪያ የሚቀርቡ ዝርዝር ክርክሮችን ለማየት የሚከተለውን ጽሁፍ መመልከት ይረዳል:- Keechang Kim and Jason Michenson, *Voluntary Third Party Intervention in International Arbitration for Construction Disputes: A Contextualized Approach to Jurisdictional Issues,* 30(4) JOURNAL OF INTERNATIONAL ARBITRATION (2013).

[23] ከብዙ በጥቂቱ የሚከተሉትን መመልከት ይቻላል፡- Andrea Vincze, *Arbitration Clause – Is it Transferred to the Assignee,* 1 NORDIC JOURNAL OF COMMERCIAL LAW (2003). Mertcan İPEK, *Assignment of Contractual Rights and Its Impact on Arbitration Agreements*፣ MÜHF - HAD, C.22, S.1፣ at 521-548 available at https://dergipark.org.tr/download/article-file/274363፣ Anthony C. Sinclair, *The Assignment of Arbitration Agreements*, available at https://www.worldcat.org/title/enforcement-of-arbitration-agreements-and-international-arbitral-awards-the-new-york-convention-1958-in-practice/oclc/271654058

1.3.1 የግልግል ዳኝነት ስምምነትን የማስፋፋት ጥያቄ

ስምምነቱን ከተፈራረሙት ወደ 3ኛ ወገኖች የማስፋፋት ጥያቄ በሚነሳበት ጊዜ ጥያቄው የሚሆነው 3ኛወገን ከጅምሩ አንስቶ በቀጥታም ይሁን በተዘዋዋሪ በግልግል ዳኝነት ስምምነቱ ውስጥ አለበት ወይስ የለበትም? የሚለው ነው። ስለዚህ ማስፋፋት የሚለው አስተሳሰብ የሚሰራው ከግልግል ዳኝነት ስምምነቱ ጋር ምንም ግንኙነት የሌለው አካል ላይ ሳይሆን በቀጥታ ተዋዋይ ባይሆንም በተዘዋዋሪ በግልግል የመዳኘት ስምምነቱን ተቀብሏል ሊባል በሚችል 3ኛ ወገን ላይ ነው።[24] ይህ ጥያቄ የሚነሳው ግልጽ ስምምነት በሶስተኛ ወገን በኩል ከሌለ እና በተለይም ተከራካሪዎቹ ወይም አንዳቸው ሦስተኛ ወገን ወደ ክርክሩ እንዲገባ ሲጠይቁ ነው። ለምሳሌ በአንድ እናት ኩባንያ ስር ያሉ የተለያዩ ኩባንያዎች ወይም በአንድ ባለሀብት ቁጥጥር ውስጥ ያሉ ኩባንያዎች ውስጥ አንዱ የግልግል ስምምነት ያለበትን ውል ቢደራደር፣ ሌላው ኩባንያ ውሉን ቢፈርም እና 3ኛ ኩባንያ ደግሞ የውል ግዴታውን በመፈጸም ስራ ላይ ቢሳተፍ ያለመግባባት በሚፈጠርበት ጊዜ ውሉን ከፈረመው ኩባንያ ውጭ ያሉት ሌሎች ኩባንያዎች ላይ ወይም ከዚህ ሁሉ እንቅስቃሴ ጀርባ ባሉት ተቆጣጣሪ ባለአክሲዮን/እናት ኩባንያ ላይ የግልግል ዳኝነት ግዴታው ይፈጸማል ወይስ አይፈጸምም? የሚለው የግልግል ዳኝነት ስምምነቱን የመለጠጥ ጉዳይ ተደርጎ ሊታይ ይችላል። ነገር ግን ይህ አስተሳሰብ እነዚህ 3ኛ ወገኖች የግልግል ዳኝነት ስምምነቱን ያውቃሉ ብቻ ሳይሆን ውስጥ-ለውስጥ ተቀብለውታል (implied consent) በሚል የህሊና ግምት ላይ የተመሰረተም ጭምር ነው።

ይህ ዓይነት ጥያቄ ሊነሳ የሚችለው በተለይ የግልግል ዳኝነቱን የፈረመው ኩባንያ ምንም ሀብት ከሌለው እና ሌሎች ግን የከሳሽን የይገባኛል ጥያቄ መክፈል የሚችሉ ከሆነ ነው። በዓለም አቀፍ የግልግል ዳኝነት ልማድ የተቧደኑ ኩባንያዎች ውስጥ የሚፈጠረው ይህ ዓይነት ሁኔታ የግልግል ዳኝነት ስምምነትን ከቀጥተኛ ተዋዋዮች አልፎ ሌሎች ላይ ተፈጻሚ ለማድረግ አንዱ ንድፈ ሃሳብ ነው።[25] በኢትዮጵያ የፍትሐ ብሔር ሥነ ስርዓት ሕግ መሠረት በቁጥር 36 መሠረት ከአንድ በላይ ተከሳሾችን አጣምሮ ለመክሰስ የሚቀርብ ጥያቄ፣ አሊያም በቁጥር 43 መሠረት 3ኛ ወገን በተከሳሽነት እንዲገባ የሚቀርብ ማመልከቻ እንዲሁም በቁጥር 41 መሠረት ጣልቃ ለመግባት የሚቀርብ ማመልከቻ ሦስተኛ ወገን የግልግል ዳኝነት ስምምነትን በተዘዋዋሪ መቀበሉን እንደ መነሻ በመውሰድ ሊሆን ይችላል።

1.3.2 የግልግል ዳኝነት ስምምነት መተላለፍ ይችላል ወይስ አይችልም?

እዚህ ላይ ጥያቄው የግልግል ዳኝነት ስምምነት ሊተላለፍ ይችላል ወይስ አይችልም? ነው። ይህ በባህሪው የውል ሕግ ጥያቄ ነው። በውል አማካኝነት የሚፈጠር መብት ከአንድ ተዋዋይ ወደ

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[24] Bernard Hanotiau, *Groups of Companies in International Arbitration,* in PERVASIVE PROBLEMS IN INTERNNATIONAL ARBITRATION 280 (Lukas Mistelis and Julian Lew eds., Kluwer Law Internatuional, 2006).

[25] *Dow Chemicals et al v. ISOVER Saint Gobian, Interim Award*, Sept. 23 1982, reported in Peter Sanders (Edr.) 9 YEARBOOK ON COMMERCIAL ARBITRATION 131-137 (1984).

ሦስተኛ ወገን እንዳይተላለፍ የሚከለከለው መብቱ በባህሪው መተላለፍ የማይችል ከሆነ ወይም ተዋዋዮች እንዳይተላለፍ ከተስማሙ አሊያም ሕግ ከከለከለ ብቻ ነው። ስለ መብቶች መተላለፍ የሚደነግገው የፍትሐ ብሔር ሕግ ቁጥር 1962 እንደሚከተለው ይነበባል፡-

1962 - የገንዘብ መብትን ስለማስተላለፍ

የገንዘብ መብትን ማስተላለፍ በሕግ ወይም በውል ካልተከለከለ ወይም የጉዳዩ ተፈጥሮ ካላገደው በቀር የባለዕዳው ፈቃደኛነት አሰፈላጊ ሳይሆን ባለገንዘቡ መብቱን ለሌላ 3ኛ ወገን አሳልፎ መስጠት ይችላል።

ይህ ድንጋጌ ሲነበብ የሚመለከተው ገንዘብ የመከፈል መብትን ቢመስልም ሃሰቡ ግን በጠቅላላው ኢኮኖሚያዊ ጥቅምን የሚመለከት መብትን በሙሉ የሚመለከት እንጂ ገንዘብ የመከፈል መብት ላይ ብቻ የተገደበ አይደለም።[26] ቢሆንም ግን ድንጋጌው የሚመለከተው የስረ-ነገር መብትን (substantive right) ብቻ ይመስላል። የግልግል ዳኝነት መብት ደግሞ የስነ-ስርዓት መብት (procedural right) ነው። ስለዚህ ከቁጥር 1962 ድንጋጌ የግልግል ዳኝነት መብት መተላለፍ ስለመቻሉ ወይም አለመቻሉ መልስ ለማግኘት አይቻልም። ስለዚህ ስለ ሥነ-ስርዓት መብቶች መተላለፍ የሚናገረውን የፍ/ብ/ሕ/ቁጥር 1973ን መመልከት ያስፈልጋል።

1973 - የማስተላለፍ ወይም የዳረጎት ውጤት

1. የተዳረገው ባለገንዘብ ወይም የባለገንዘብነት መብት የተላለፈለት ሰው በዕዳው ላይ በተሰጡት ልዩ መብቶች፣ በዋስትናዎች እና በሌሎችም ተጨማሪ መብቶች ሊሰራባቸው ይችላል።

በዚህ ድንጋጌ ውስጥ ‹‹ልዩ መብቶች፣...ሌሎችም ተጨማሪ መብቶች›› የሚሉት አገላለጾች ያለመግባባትን በግልግል ዳኝነት የማስወሰን መብትን ይጨምራል ለማለት ይቻላል። ስለሆነም የግልግል ዳኝነት መብት መተላለፍ የሚችል የስነ-ስርዓት መብት ነው። በዚህ ጉዳይ ላይ ከኢትዮጵያ ሕግ ጋር ተመሳሳይ ድንጋጌ ያላትን የፈረንሳይን ሕግ ያጠና አንድ ጸሃፊ ተመሳሳይ ድምዳሜ ላይ መድረሱን እንደሚከተለው ያብራራል፡-

In France transfer of an arbitration agreement during assignment is justified on the basis of Article 1692 of the French Civil Code, which provides that the assignment of a claim "includes all accessories attaching thereto, such as a right against the surety and any right of property or mortgage securing the same," thus the arbitration agreement

[26] አዚህ ላይ በአጠቃላይ በኢትዮጵያ የፍትሐ ብሔር ህግ የውል ሕግ ውስጥ ‹‹ባለገንዘብ›› እና ‹‹ባለዕዳ›› የሚሉት ቃላት የእንግሊዝኛውን ‹‹Creditor›› እና ‹‹Debtor›› ለሚሉት ቃላት አቻ ሲሆኑ ባለገንዘብ ሲባል የገንዘብ ክፍያ ጠያቂን ብቻ ሳይሆን ከገንዘብ ክፍያ ውጭ በሌላ መንገድ የሚፈጸምን ግዴታ ባለመብትንም ያጠቃለለ ሀሳብ ሲሆን ባለዕዳም በተመሳሳይ መንገድ ሰፋ ተደርጎ የሚወሰድ ሀሳብ ነው።

is analogous to a "right attaching to the claim" and automatically forms part of the assignment.[27]

በሌሎችም አገሮችና በዓለም አቀፍ የግልግል ዳኝነት ያለው ተሞከሮ የሚያሳየንም አንድ ከውል ግንኙነት የመነጨ መብት ሲተላለፍ ያንን መብት አስመልክቶ የተቀመጠው ያለመግባባትን በግልግል ዳኝነት የመፍታት መብት አብሮ እንደሚተላለፍ ነው።[28] ይህ በቤልጂየም፣ በሲዊዘርላንድ እና በጀርመን ሕጎች ተቀባይነት ያለው እንደሆነ ጸሐፍት ያስረዳሉ።[29]

እዚህ ላይ አንድ ልብ ሊባል የሚገበው ነጥብ አለ። ይህም የፍ/ብ/ሕ/ቁጥር 1962ም ሆነ 1973 የሚናገሩት ስለ መብት መተላለፍ ነው እንጂ ስለ ግዴታ መተላለፍ አይደለም የሚል ሀሳብ ሊነሳ ይችላል። ይህ በጥሬው ሲታይ ድንጋጌው ያለመግባባትን በግልግል ዳኝነት የመፍታት መብት የተላለፈለት ሰው በመብቱ መጠቀም እንደሚችል ነው እንጂ እንደሚገደድ አይደነግግም ሊባል ይችላል። ይህም መብት የተላለፈለት ሰው ካልፈለገ በግልግል ዳኝነቱ ሊገደድ አይችልም ወደሚል ድምዳሜ ይመራናል። ይህ አተረጓጎም ግን የሚያዋጣ አይደለም። መብት ከግዴታ ተለይቶ ሊሰራበት አይችልም። ስለሆነም የውል መብት የተላለፈለት ሰው መብቱን ከተቀበለ ተያያዥ የሆኑ ግዴታዎችንም አብሮ ይቀበላል እንጂ መብቶቹን የሚደነግጉ አንቀጾችን ብቻ እየመረጠ ሊጠቀም አይችልም።

1.3.3 የግልግል ዳኝነት ስልጣን (Jurisdiction)

ሌላው የሦስተኛ ወገኖች በግልግል ዳኝነት ውስጥ የመሳተፍ ጥያቄ ባህሪ የግልግል ዳኝነቱን አካል የስልጣን ወሰን የሚመለከት መሆኑ ነው። የግልግል ዳኝነት ስርዓት መሠረቱ የተዋዋዮች ውል ነው ሲባል በአንድ በኩል የግልግል ዳኝነት አካል ተዋዋዮች በስምምነታቸው ከሰጡት ያነሰም ሆነ የበለጠ ስልጣን ሊኖረው አይችልም ለማለት ነው።[30] ይህም ብዙውን ጊዜ የግልግል ዳኝነት ስምምነቶች ላይ ጉባኤው በተዋዋዮች (ለምሳሌ በ ‹‹ሀ›› እና በ‹‹ለ››) መካከል ያለን ያለመግባባት ለመፍታት ነው ስልጣን የተሰጠው ስለሚል ከሦስተኛ ወገን (ለምሳሌ ከ‹‹መ››) ጋር ያለን ያለመግባባት ለመወሰን ይችላል ወይ? የሚል ጥያቄን ያስነሳል። በኢትዮጵያ ሕግ ይህ ከግልግል ዳኝነት ስልጣን ወሰን ጋር የተያያዘ ጥያቄ ከባድ እና ጥንቃቄ የሚጠይቅ ነው። ግልጽ ስምምነት የሌለውን 3ኛ ወገን አስገድዶ በጉዳዩ ውስጥ በማስገባት ውሳኔ መስጠት የግልግል ዳኝነቱን ውሳኔ እንዲሻር ሊያደርግ ይችላል። በሌላ በኩል ሦስተኛ ወገን ጣልቃ ለመግባት ቢያመለክት እንኳን ሌሎቹ ተከራካሪዎች ወይም አንደኛው ከጣልቃ-ገቡ ጋር ያለውን ያለመግባባት በግልግል ዳኝነት ለመፍታት አልተስማማሁም ሲል የግልግል ዳኝነቱን አካል ስልጣን ሊቃወም ይችላል።

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[27] James Hosking, *supra* note 1, at 498.
[28] Andrea Vincze, *supra* note 23, at 2.
[29] *Ibid.*
[30] James Hosking, *supra* note 1, at 476.

ጥያቄው የፈቃድ መኖር ያለመኖርን ብቻ ሳይሆን የፈቃድ ወሰንን ሚመለከት ነው። ብዙውን ጊዜ ተዋዋዮች ለምሳሌ ‹‹ሀ›› እና ‹‹ለ›› ለግልግል ዳኝነት አካል ስልጣን ሲሰጡ ሁለት ዓይነት ገደቦችን አሰቀምጠው ነው። የመጀመሪያው የስረ-ነገር (subject matter) ገደብ ሲሆን ሌላኛው ግለሰብን የሚመለከት (personal) ገደብ ነው። ስለዚህ በተለምዶ በግልግል ዳኝነት ስምምነት አንቀጾች ውስጥ ‘‘በተዋዋዮች መካከል የሚነሳ ያለመግባባት....’’ የሚለው አገላለጽ የግልግል ዳኝነት አካልን ስልጣን ከግለሰቦች አንጻር ለመገደብ (Personal Jurisdiction) ተብሎ የሚቀመጥ ሲሆን ‘‘ከዚህ ውል የሚመነጩ ያለመግባባቶች...፣ ከዚህ ውል የሚመነጩ ወይም ከውሉ ጋር በተያያዘ የሚፈጠሩ ያለመግባባቶች...፣ ወዘተ’’ በሚል የሚቀመጠው አገላለጽ ደግሞ በስረ-ነገር ረገድ (Material Jurisdiction) የግልግል ዳኝነቱን አካል ስልጣን ለመገደብ ታስቦ የሚቀመጥ ነው።[31]

በመሆኑም የግልግል ዳኝነት ጉባኤ ተዋዋዮች ወይም አንዳቸው እየተቃወሙ ጣልቃ ገብን ወደ ክርክሩ ሲያስገባ ከተሰጠው Personal Jurisdiction እና አንዳንዴም ከMaterial Jurisdiction እያለፈ ነው የሚል ክርክር ሊያስነሳ ይችላል።[32] ይህ ደግሞ ከላይ እንደተገለፀው በኢትዮጵያ ሕግ ውስጥ ውስብስብ ጥያቄ ነው።

ይህም የሚሆነው በፍትሐ ብሔር ሕግ ቁጥር 3329 እና 3330 ላይ የግልግል ዳኝነት ጉባኤ ስልጣኑን የመወሰን መብት ስለሌለው ነው። እዚህ ላይ የፍትሐ ብሔር ሕግ ቁጥር 3329 እና 3330ን ድንጋጌዎች ይዘት መመልከት ጠቃሚ ሊሆን ይችላል።

> *3329 - የግልግል ዳኝነት ስልጣንን የሚመለከት የግልግል ዳኝነት ስምምነት አንቀጽ በጠባቡ መተርጎም አለበት*
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> *3330 (2) - የግልግል ዳኝነት ጉባኤው የራሱን ስልጣን የሚመለቱ ክርክሮችን እንዲወስን የግልግል ዳኝነት ስምምነቱ ስልጣን ሊሰጠው ይችላል*
>
> *3330 (3) - የግልግል ዳኝነት ጉባኤው በማናቸውም ሁኔታ የግልግል ዳኝነት ስምምነቱ ዋጋ ያለው መሆን ያለመሆኑን ግን ሊወስን አይችልም*

እነዚህ ድንጋጌዎች የሚያመለክቱት በአንድ የግልግል ዳኝነት ስምምነት ውስጥ የግልግል ዳኛው የዳኝነቱን ስልጣን በተመለከተ የሚነሳን ጥያቄ መወሰን እንደሚችል የሚገልጽ አንቀጽ በግልግል

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[31] ሮበርት አለን ሴድለር በፍርድ ቤቶች የዳኝነት ስልጣን አወሳሰን የስረ-ነገር ስልጣን እና ግላዊ የዳኝነት ስልጣንን ሲለያይ የይገባኛል ጥያቄውን ባህሪይ በመከተል ነው። ይሄውም የይገባኛል ጥያቄው ንብረትን የሚመለከት (rights in rem) ከሆነ የስረ-ነገር የዳኝነት ስልጣን ጉዳይ ነው፤ ግለሰቡ ላይ የቀረበ የውል ግዴታ (rights in personam) ከሆነ ደግሞ የግላዊ የዳኝነት ስልጣን ጉዳይ ነው በማለት ነው። እንደ ሴድለር አተያይ የፍርድ ቤቶች የዳኝነት ስልጣን መሠረት ከሁለቱ በአንዱ ላይ ሊመሰረት ይችላል፤ ወይመ አንዱ ከተሟላ ጉዳዩን ለማየት ስልጣን ይኖራቸዋል። Alan Sedler, *supra* note 9, at 19-27 ያለውን ይመልከቷል። በግልግል ዳኝነት ግን የዳኝነት ስልጣን መሠረቱ ስምምነት ስለሆነ እና በፍትሐ ብሔር ሕግ ቁጥር 3329 መሠረት የግልግል ዳኛ ስልጣን በጠባቡ መተርጎም ስላለበት የስረ-ነገር እና የግላዊ ዳኝነት ስልጣን እንደ አማራጭ ሳይሆን ተደምሮ መታየት አለበት። ስለዚህ አንድ የግልግል ዳኛ የዳኝነት ስልጣኑን ሲወስን ከሁለቱም መመዘኛዎች አንጻር በማት ነው።

[32] William Park, *supra* note 9, at 310.

ስምምነቱ ውስጥ ከሌለ በቀር የግልግል ዳኛ/ጉባኤ ስልጣኑ ላይ የሚነሳውን ክርክር ለመወሰን እንደማይችል ነው። ከዚህ በተጨማሪ ይህን ዓይነት ክርክር የመወሰን ስልጣን ተሰጥቶት እንኳን ቢሆን በአጠቃላይ የግልግል ዳኝነት ስልጣንን የሚመለከት የስምምነቱ አንቀጾች በቁጥር 3329 መሠረት በጠባቡ መተርጎም አለባቸው። በሕግ አተረጓጎም አስተምህሮ በጠባቡ መተርጎም ማለት ለምሳሌ በግልግል ስምምነቱ መሠረት ዳኛው ስልጣን አለው ወይስ የለውም የሚለው አሻሚ ሆኖ ሲገኝ ስልጣን የለውም ወደሚል ድምዳሜ ማድላት፣ በግልጽ ያልተሰጠ ስልጣንን ለምሳሌ ከመደበኛ ዳኞች ስልጣን ጋር በማመሳሰል አስፋፍቶ አለመተርጎም፣ እና በመሳሰሉት መንገዶች ይገለጻል። ስምምነቱ ውስጥ የግልግል ዳኛው ስልጣኑን መወሰን እንደሚችል የሚገልጽ አንቀጽ ከሌለ በምንም መልኩ የግልግል ዳኛው ስልጣኑን መወሰን አይችልም። ስልጣንን የተመለከቱ አንቀጾች (ስልጣንን በራስ የመወሰን መብትን ቢሰጡም ባይሰጡም) በጠባቡ መተርጎም ስላለባቸው 3ኛ ወገን ላይ ጉባኤው የሚኖረው ስልጣን አከራካሪ ሊሆን ይችላል።

በቁጥር 3330(3) መሰረት ደግሞ የግልግል ዳኛውን ስልጣን የበለጠ አስቸጋሪ ያደርገዋል። ምክንያቱም በዚህኛው ድንጋጌ መሠረት የግልግል ዳኝነት ስምምነቱ ዋጋ ያለው መሆን ያለመሆኑን በተመለከተ በስምምነቱ ውስጥ ስልጣን ሊሰጠው አይችልም፤ ቢሰጠውም መወሰን አይችልም። ይህ ማለት በግልግል ዳኝነት ውስጥ ተከሳሽ የሆነ ማንኛውም ሰው የግልግል ዳኝነት ስምምነቱ ዋጋ የለውም የሚለውን ክርክር በማቅረብ ብቻ ጉዳዩን ከግልግል ዳኝነት ጉባኤው ስልጣን ውጭ ሊያደርግ የሚችልበት እድል ሊኖር ይችላል። የሦስተኛ ወገን ወደ ክርክሩ መግባት ለዚህ ዓይነት ክርክር አንዱ ምክንያት ሊሆን ይችላል።

ይህን በቀላል ምሳሌ ለማስረዳት ያህል በመስፋፋትም ሆነ በመተላለፍ አውድ ሦስተኛ ወገን ወደ ክርክሩ እንዲገባ ጥያቄ ሲቀርብ የመጀመሪያው የግልግል ዳኝነት ጉባኤው የሚያጣራው ነገር ተቀባይነት ያለው የግልግል ዳኝነት ስምምነት አለው ወይስ የለውም (is there a valid arbitration agreement) የሚለውን ነው። ነገር ግን በቁጥር 3330(3) ላይ የግልግል ዳኝነት ጉባኤው ይህን ዓይነት ጭብጥ ለመያዝ እና ለመወሰን እንደማይችል በማያሻማ አገላለጽ ተደንግጓል።

2. የግልግል ዳኝነትና ሦስተኛ ወገኖች፡- የሌሎች አገሮች ተሞክሮ

የግልግል ዳኝነት ከሦስተኛ ወገኖች አንጻር የሚያስነሳቸው ጥያቄዎች በሌሎች ሀገሮችም የሚፈጠሩ ናቸው። ስለሆነም ሌሎች አገሮች ችግሩን እንዴት እንደሚፈቱ ማየቱ በአገራችን የሚነሱ ተመሳሳይ ችግሮችን ለመተንተን እና መፍትሄ ለመጠቆም ሊያግዝ ይችላል። በግልግል ዳኝነት የዳበረ ሕግ እና በዓለምዓቀፍ ደረጃ ታዋቂነትን ያፈሩ አገሮችን ማለትም የፈረንሳይ፣ የኢንግላዝ፣ የሆላንድ እና የአሜሪካን ተሞክሮዎች ከዚህ ቀጥሎ በአጭሩ ይዳሰሳሉ። እነዚህን ተሞክሮዎች በሦስት ምድብ በመክፈል፤ ማለትም ወግ አጥባቂ፣ መካከለኛ እና ቀላል ቅድመ ሁኔታዎችን የሚጠይቁ በሚል ለአቀራረብ በሚያመች መልኩ ይቀርባሉ።

3.1 ወግ አጥባቂ አመለካከት፡- እንግሊዝ

እንግሊዝ እ.ኤ.አ. በ1996 የግልግል ዳኝነት ሕጓን ያሻሻለች ሲሆን እጅግ ዝርዝር እና የተብራራ ሕግ ነበር ያወጣችው። ቢሆንም ግን በግልግል ዳኝነት ሦስተኛ ወገኖች ስለሚኖራቸው ተሳትፎ የእንግሊዝ ሕግ ምንም የሚለው ነገር የለም። ይህ ማለት ግን በተጨባጭ በግልግል ዳኝነት ተዋዋይ ያልሆነ ሰው በክርክር ለመግባት ያመለከተበት፣ ወይም ወደ ክርክር እንዲገባ የተጠየቀበት የፍርድ ጉዳይ አልነበረም ማለት አይደለም። የተለያዩ ጸሐፊዎች ከፍርድ ቤቶች ውሳኔዎች በመነሳት የእንግሊዝ ፍርድ ቤቶች ሦስተኛ ወገኖች ተገደው ወደ ክርክር መግባት እንደሌለባቸው አቋማቸው እንደሆነ ይጠቅሳሉ። በዚህ ርዕሰ ጉዳይ ላይ የአውሮፓ አገሮችን ሕጎች ያጠኑ ጸሐፍት የእንግሊዝ ፍርድ ቤቶች የግልግል ዳኝነት ስምምነት ተዋዋይ ያልሆነ ሰው ላይ የግልግል ዳኝነት (በውስጠ ተዋዋቂ ስምምነት መሠረት) ተፈጻሚ እንዲሆን የወሰኑበትን መዝገብ ለማግኘት እንዳልቻሉ ጠቅሰዋል።[33]

በሌላ በኩል ያለመግባባትን በግልግል ዳኝነት ለመፍታት የሚደረግ ስምምነት በግልጽ መደረግ ያለበት እና ከአካባቢያዊ ሁኔታዎች በመነሳት በአተረጓጎም የሚደረስበት ሊሆን እንደማይችል በመጥቀስ የግልግል ዳኝነት ስምምነትን ወደ ሦስተኛ ወገኖች ለማስፋፋት የቀረቡ ጥያቄዎችን የእንግሊዝ ፍርድ ቤቶች ውድቅ ያደረጉባቸውን አያሌ መዝገቦች እነዚህ አጥኝዎች አቅርበዋል።[34] የእንግሊዝ ፍርድ ቤቶች ለሚይዙት ለዚህ ወግ አጥባቂ አቋም ዋናው ምክንያት ውል በተዋዋዮች መካከል ብቻ ነው የሚሰራው የሚለውን መርህ በጥብቅ መከተላቸው ሲሆን እንደ ሲቪል ሎው ሀገራት በውል ግዴታ አተረጓጎም ላይ ‘‘የቅን ልቡና’’ መርህን እና የተቧደኑ ኩባንያዎች መርህን[35] ስለማይከተሉም ጭምር ነው ይባላል።[36] ይሁን እንጂ በእንግሊዝ አገርም ቢሆን ወደ ግልግል ዳኝነት ልግባ የሚል 3ኛ ወገን ለመግባት እንደሚችል ሌሎች ጸሐፍት ይገልጻሉ።[37]

በመሆኑም ይህ ወግ አጥባቂ አቋም እየተለሳለሰ መምጣቱን የሚጠቁሙ ጸሐፍት አሉ። ለምሳሌ ድሮ ‹‹የግልግል ዳኝነት ስምምነት ግላዊ እና የስምምነቱ አንቀጽ ያለበት ውል ሲተላለፍ አብሮ የማይተላለፍ ነው›› የሚለው ጠንካራ አቋም[38] በቅርብ ጊዜ ተለውጧል። ዘመናዊው የእንግሊዝ ፍርድ ቤቶች አቋም የግልግል ዳኝነት ስምምነት ከዋናው ውል ጋር አብሮ የሚተላለፍ ነው የሚል እንደሆነ በአንድ የፍርድ ውሳኔ ላይ እንደሚከተለው ተመልክቷል።

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[33] Eduardo Romero and Luis Velarde Saffer, *The Extension of The Arbitral Agreement To Non-Signatories In Europe: A Uniform Approach?*, 5(3) AMERICAN UNIVERSITY BUSINESS LAW REVIEW 375-376 (2018)

[34] *Ibid.*

[35] ይህ እታች እንደሚቀርበው ከዶው ኬሚካል የፍርድ ጉዳይ ወዲህ የመጣ አዲስ መርህ ሲሆን አንዳንድ ሁኔታዎች ከተሟሉ በተቧደኑ ኩባንያዎች ውስጥ አንዱ የሚፈርመው የግልግል ዳኝነት ስምምነት ሌሎች የቡድኑ አባላትን ሊያስገድድ ይችላል የሚል መርህ ነው። ለበለጠ ዝርዝር ከታች በክፍል 3.3 የተደረገውን ትንታኔ ይመልከቷል።

[36] *Ibid.*

[37] S. Strong, *supra* note 19, at 948; See also, *Ocean Laser Shipping, supra* note 18.

[38] James Hosking, *supra* note 1, at 491.

> Where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary include … all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the arbitration clause in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate. Accordingly, it is clear both from the statute and from a consideration of the position of the assignee that the assignee has the benefit of the arbitration clause as well as other provisions of the contract.[39]

በዳረጎት (subrogation) ጊዜም የእንግሊዝ ፍርድ ቤቶች በዳረጎት አማካይነት የተተካው ገንዘብ ጠያቂ (subrogee) በግልግል ዳኝነት ክርክሩን የመፍታት መብቱን መጠቀም እንደሚችል፤ ሆኖም ክሱን የሚያቀርበው በራሱ ስም ሳይሆን በተካው ሰው ስም መሆን እንዳለበት ነው። የተዳረገው ባለገንዘብ (subrogee) በራሱ ስም መክሰስ ከፈለገ ከዳራጊው (subroger) ጋር የመብት ማስተላለፍ ውል መዋዋል ይኖርበታል።[40]

ሌለው በእንግሊዝ ሕግ መሰረት የሦስተኛ ወገኖች መብት በግልግል ዳኝነት የሚነሳው ለሦስተኛ ወገን ጥቅም ከሚደረጉ ውሎች ጋር በተያያዘ ነው። ከአብዛኞቹ የሲቪል ሎው ሥርዓት ተከታይ ሀገራት በተቃራኒ በእንግሊዝ የሕግ ሥርዓት ለሦስተኛ ወገን ጥቅም ብለው ሁለት ተዋዋዮች የሚያደርጉት ውል ተቀባይነት አልነበረውም ነበር። የዚህ አቋም ምክንያት ውል ከተዋዋዮች ውጭ መብትና ግዴታን ሊፈጥር አይችልም የሚለው አስተሳሰብ ነው።[41] ነገር ግን እ.ኤ.አ. በ1999 ለሦስተኛ ወገን ጥቅም ተብለው የሚደረጉ ውሎችን የሚመለከት ራሱን የቻለ ሕግ (Contracts (Rights of Third Parties) Act 1999)[42] ከወጣ በኋላ ይህ ዓይነቱ ሦስተኛ ወገኖች ተዋዋይ ሳይሆኑ ከውል የሚገኙ መብቶችን ተጠቃሚ የሚሆኑበት አሰራር በእንግሊዝ ተግባራዊ ሆኗል። ሕጉ በክፍል 8 ላይ ስለግልግል ዳኝነት የሚናገር ሲሆን ሦስተኛ ወገን በሁለቱ ተዋዋዮች መካከል የተደረገው ውል ውስጥ የግልግል ዳኝነት ስምምነት ካለ የስምምነቱ አካል ተደርጎ ይወሰዳል ይላል።[43] በመሆኑም በግልግል ዳኝነት ስምምነቱ ይገደድበታል፤ ይጠቀምበታልም።

2.2 መካከለኛ አቋም ያላቸው አገሮች፡- ሆላንድ እና አሜሪካ

ሆላንድ በግልግል ዳኝነት ውስጥ ሦስተኛ ወገኖች ጣልቃ መግባት እንደሚችሉ በግልጽ በሕግ የደነገገች አገር ነች። ጣልቃ ስለመግባት ብቻ ሳይሆን ተመሳሳይ ወይም ተያያዥ ክርክሮች

[39] *Ibid.*, at 492.
[40] *Ibid.,* at 502.
[41] *Ibid.*, at 510.
[42] Contracts (Rights of Third Parties) Act 1999, Section 8, https://www.legislation.gov.uk/ukpga/1999/31/section/8 accessed on 10 May 2019
[43] Contracts (Rights of Third Parties) Act, *supra* note 42.

በተለያዩ የግልግል ዳኝነት መድረኮች እየታዩ ካሉ በአንድነት ተጣምረው እንዲታዩ እ.ኤ.አ. በ2015 የተሻሻለው የሆላንድ ሕግ ይደነግጋል።

Article 1045 (Netherlands Arbitration Law)

1. Unless the parties have agreed otherwise, at the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may allow such party to join or intervene in the proceedings, provided that the same arbitration agreement as between the original parties applies or enters into force between the parties and the third party.

4. By the allowance of the joinder or intervention, the third party shall become a party to the arbitral proceedings.

5. After the allowance of a joinder or an intervention, the arbitral tribunal shall arrange the further course of the proceedings, unless the parties have made provisions for this by agreement.

ይህ ድንጋጌ እ.ኤ.አ. በ1984 የወጣው ሕግ ላይ የነበረ ሲሆን በንዑስ ቁጥር 1 መግቢያ ላይ "*Unless the parties have agreed otherwise (ተቃራኒ ስምምነት ከሌለ በቀር)*" ከሚለው ሀረግ ውጭ ያለው በቀደመው ድንጋጌ ውስጥ የነበረ ነው። ይህም ተዋዋዮች የሦስተኛ ወገኖችን በጉዳዩ መሳተፍ በተመለከተ አንድ ዓይነት ተቃራኒ ስምምነት ሊያደርጉ እንደሚችሉ ያሳያል።

የዩኤስ አሜሪካን ሕግ በተመለከተ በፌዴራል እና በክልሎች የተለያዩ ሕጎች ስላሉ አንድ ወጥነት ያለው አቋም ለማግኘት ያስቸግራል። ዋናው የግልግል ዳኝነት የሚመራበት ሕግ የፌዴራል የግልግል ዳኝነት ሕግ (Federal Arbitration Act በምህጻር FAA የሚባለው)[44] ሲሆን ሕጉ በይዘቱ አጭር በመሆኑ ስለ ሦስተኛ ወገኖች የሚናገረው ነገር የለም። በዚህ ምክንያት በፌዴራል ደረጃ የታዩ ጉዳዮችን መሠረት በማድረግ የሦስተኛ ወገኖች በግልግል ዳኝነት የመግባት ጉዳይ የሚታየው በመደበኛው የፌዴራል የፍትሐ ብሔር ስነ-ስርዓት ሕግ መሠረት እንደሆነ ጸሐፍት ይገልጻሉ።[45] በፌዴራል የፍትሐ ብሔር ስነ-ስርዓት ሕግ መሠረት በውሳኔው መብቱ የሚነካበት ማንኛውም ሦስተኛ ወገን በግልግል ዳኝነት ውስጥ ጣልቃ መግባት የሚችል ሲሆን የግልግል ዳኝነት ጉባኤውም የዳኝነት ስልጣን ይኖረዋል።[46]

በአሜሪካ የሕግ ስርዓት ክልሎች በፌዴራሉ መንግስት ሕግ ያልተሸፈኑ ጉዳዮች ላይ ሕግ መደንገግ ስለሚችሉ የክልል መንግስታቱ የፈደራሉን የግልግል ዳኝነት ሕግ ክፍተቶች የሚያሟሉ ሕጎችን አውጥተዋል። የሦስተኛ ወገኖች በግልግል ዳኝነት ውስጥ የሚኖራቸውን ተሳትፎ

[44] Federal Arbitration Act, 1925 (9 USC Section 1 et seq.) available at https://www.law.cornell.edu/uscode/text/9/chapter-1

[45] S. Strong, *supra* note 19, at 960.

[46] *Ibid.*

በተመለከተ በተለይ ደቡብ ካሮላይና እና ዩታህ ግልጽ ሕጎች አውጥተዋል። በደቡብ ካሮላይና ሕግ መሠረት ሦስተኛ ወገን ያለስምምነቱ ተገዶ ወደ ግልግል ዳኝነት እንዲገባ ማድረግ የሚቻል ሲሆን የዩታህ ሕግ ግን እስቀድሞ የግልግል ዳኝነት ስምምነት ያለው ሦስተኛ ወገን ብቻ እንደሚገደድ ይደነግጋል።[47] ይህ ማለት ቢያንስ ውስጠ ታዋቂ ስምምነት ከሌለው በቀር ሦስተኛ ወገን አይገደድም ማለት ነው።

ሌላው በአሜሪካ ሕግ መሠረት የሦስተኛ ወገኖች መብት ጉዳይ የሚነሳው ከውል መተላለፍ እና ከዳረጎት ጋር በተያያዘ ነው። በአሜሪካ ሕግ በውል ውስጥ የተጠቀሰ ያለመግባባትን በግልግል ዳኝነት የመፍታት ስምምነት ውሉ ሲተላለፍ አብሮ ይተላለፋል ወይስ አይተላለፍም? የሚለው ጉዳይ የሚታየው በመደበኛው የውል ሕግ መርህ መሠረት ነው። በመሆኑም ከውል የሚመነጭ መብት የተላለፈለት ሦስተኛ ወገን አስተላላፊው ሊጠቀምበት የነበረውን የግልግል ዳኝነት ስምምነት መጠቀም ይችላል፤ ምክንያቱም የግልግል ዳኝነት ስምምነቱ ከመብቱ ጋር የተያያዘ ነው ተብሎ ስለሚታመን ነው።[48] እንዲሁም በግልጽ መብትና ግዴታ የተላለፈለት ሰው በግልግል ዳኝነት ስምምነቱ መጠቀም ብቻ ሳይሆን ይገደድበታልም።[49]

ይሁን እንጂ በውል አስተላላፊው እና ውል በተላለፈለት ሰው መካከል ግልጽ ስምምነት ከሌለ በቀር በውሉ ውስጥ ያለው ያለመግባባትን በግልግል ዳኝነት የመፍታት ስምምነት አይተላለፍም የሚል አመለካከት ገዢ ሀሳብ ባይሆንም በአሜሪካ ፍርድ ቤቶች ውሳኔዎች ውስጥ ዱሮ ይንጸባረቅ እንደነበር ይገለጻል። የዚህ መነሻው የግልግል ዳኝነት ስምምነት ግላዊ ባህሪይ ያለው ነው የሚል ነበር። ነገር ግን አሁን አሁን ይህ ዓይነቱ አስተሳሰብ ከዘመናዊ የንግድ/ኢንቨስትመንት/ ባህሪ ጋር ያልተገናዘበ ነው በሚል ብዙም ተቀባይነት የለውም።[50] ከዚህ በተጨማሪ የአሜሪካ ፍርድ ቤቶች በፌዴራል የግልግል ዳኝነት ሕግ የተቀመጠውን ለግልግል ዳኝነት የማድላት ፖሊሲ (a policy in favour of arbitration) ስለሚተገብሩ በውል መተላለፍ ጊዜ ውሉ የተላለፈለት ሦስተኛ ወገን በግልግል ዳኝነት ስምምነቱ የመጠቀም መብት እንዳለው ሁሉ ሊገደድበትም ይችላል።[51]

ከመብት መተላለፍ ጋር ተቀራራቢ በሆነው የዳረጎት ጉዳይ የአሜሪካ ፍርድ ቤቶች ይልቁንም የማያወላዳ አቋም ነው ያላቸው። ይህም በዋናው ባለመብት እግር የተተካው ባለገንዘብ/ተዳራጊ/ መብቶቹን እና ግዴታዎቹን ሙሉ በሙሉ ስለሚወርስ በግልግል ዳኝነት ስምምነቱ ይጠቀማል፤ ይገደድበታልም።[52] ዓይነተኛ የሆነው የዳረጎት ግንኙነት ምንጭ የመድን ውል ነው። ለመድን ገቢው ካሳ የከፈለ መድን ሰጪ፣ ለመድን ክፍያው ምክንያት የሆነውን ጉዳት ያደረሰን ሦስተኛ ወገን ከሶ የከፈለውን ካሣ ማስመለስ ይችላል። በመድን ገቢው እና በጉዳት አድራሹ መካከል የግልግል ዳኝነት ውል ቢኖር መድን ሰጪው ከጉዳት አድራሹ ጋር የሚኖረው ክርክር የሚታው

[47] *Ibid.*, at 961.
[48] James Hosking, *supra* note 1, at 494.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*, at 497.
[52] *Ibid.*, at 504.

በፍርድ ቤት ሳይሆን በግልግል ዳኝነት ነው። ይህ በአሜሪካ ፍርድ ቤቶች የተለመደ አሰራር ነው ይባላል።[53]

ከዳረጎት እና የውል መተላለፍ በተጨማሪ ሦስተኛ ወገን ባላደረገው የግልግል ዳኝነት ስምምነት የሚጠቀመው እና /ወይም የሚገደድበት ተዋዋዮች ለሦስተኛ ወገን ጥቅም በሚል ያደረጉት ውል ሲኖር ነው። በአሜሪካ የሕግ ሥርዓት ለሦስተኛ ወገን ጥቅም ተብሎ የሚደረግ ውል ከዱሮም ጀምሮ የታወቀ ነው።[54] ነገር ግን ሦስተኛ ወገን የግልግል ዳኝነት ስምምነቱ ተጠቃሚ ለመሆን በተዋዋዮቹ ስምምነት ውስጥ ይህ ዓይነት ፍላጎት እንደነበራቸው በግልጽ መጠቀስ አሊያም በተዘዋዋሪ ከነገሮች ሁኔታ በመነሳት ሊረጋገጥ ይገባል።[55]

ሌላው በአሜሪካ ፍርድ ቤቶች የተለመደ በግልግል ዳኝነት ስምምነቱን ያልተዋዋለ ሦስተኛ ወገን እንዲገባ የሚገደድበት መርህ የእስቶፕል መርህ *(The Doctrine of Estoppel)* ነው። የእስቶፕል መርህ እንድ ሰው በሚያሳየው ጠባይ፣ በድርጊቱ፣ አሊያም እንድን ማድረግ ያለበትን ነገር ባለማድረጉ፣ ወይም መግለጽ ያለበትን ተቃወሞ ባለመግለጹ ምክንያት በሌሎች ሰዎች ዘንድ ከሚፈጥረው ዝንባሌ የተነሳ እንድ ዓይነት መብት የሚያጣበት ወይም ግዴታ ውስጥ የሚገባበት አሰራር ነው።[56] በዚህ መርህ መሠረት አንድ ሰው የግልግል ዳኝነት ስምምነቱን እንደሚቀበል በሚያሳይ መንገድ በተግባር፣ በዝምታ፣ ወይም በሌላ አኳኋን ካስመሰለ፣ በኋላ ላይ አልገደድበትም ለማለት አይችልም። ይህ በአሜሪካ በጣም ከመዘውተሩ የተነሳ አንዳንድ ጸሐፍት የአሜሪካ ፍርድ ቤቶች የእስቶፕል መርህን ከልክ ባለይ ስለሚጠቀሙበት የመዋዋል ነጻነትን ይቃረናል ሲሉ እስከመተቸት ደርሰዋል።[57]

በመጨረሻም የሕግ ሰውነትን ሽፋን በመግፈፍ (piercing the corporate veil) ሦስተኛ ወገን ወደ ግልግል ዳኝነት የሚገባበትን አግባብ እንመልከት። ይህ አሰራር በአሜሪካ የተለመደ ሲሆን የሕግ ሰውነትን ሽፋን በመጠቀም የተደረጉ የግልግል ዳኝነት ውሎችን የሕግ ሰውነትን ሽፋን በመግፈፍ በግልግል ዳኝነት ስምምነት ውስጥ ያልነበረ ሦስተኛ ወገን ወደ ክርክር እንዲገባ የሚደረግበት መንገድ ነው። ይህ በአጭር አጠራር Alter ego doctrine የሚባል ሲሆን በተለይ በንግድ ማህበራት አውድ ውስጥ የሚፈጸም ነው።[58] በአሜሪካ ፍርድ ቤቶች ልማድ በዚህ መንገድ ተገዶ ወደ ክርክሩ የሚገበው አካል በኩባንያ ውስጥ ‘‘አድራጊ ፈጣሪ’’ የሆነ ባለአክሲዮን ሲሆን ይህን መርህ ተጠቅሞ ሦስተኛ ወገን ወደ ግልግል ዳኝነት እንዲገባ ለማድረግ ብዙ መረጋገጥ ያለባቸው ፍሬ ነገሮች ይኖራሉ።

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[53] *Ibid.*, at 505.

[54] እ.ኤ.አ. በ1859 *Lawrence v. Fox* የሚል መዝገብ ከተወሰነ በኋላ ለሦስተኛ ወገኖች ተጠቃሚነት የሚደረግ ውል በአሜሪካ ተቀባይነት እንዳለው እና ይህም ሕጎቿን ካወረሰቻት እንግሊዝ የተለየ እንደሆነ ጸሐፍት ያስረዳሉ። James Hosking, *supra* note 1, at 517.

[55] James M. Hosking, *supra* note 1, at 518-519.

[56] *Ibid.*, at 531.

[57] *Ibid.*

[58] James Sentner, *supra* note 3, at 67.

እነዚህም የኩባንያ የተለመዱ የአሰራር ስነ-ስርዓቶችን መጣስ (disregard of corporate formalities)፣ የኩባንያው ካፒታል በቂ ያለመሆን (inadequate capitalization)፣ የባለአክሲዮን እና የኩባንያው ሀብት መቀላቀል፣ የኩባንያው እና የባለአክሲዮኑ ዳይሬክተሮች፣ ሰራተኞች፣ ኃላፊዎች፣ የስራ ቦታ፣ አድራሻ አንድ መሆን፣ በኩባንያው እና በባለአክሲዮኑ መካከል የሚደረገው ግብይት በገበያ ዋጋ መሰረት አለመሆን፣ የሚቆጣጠረው ባለአክሲዮን እና በቁጥጥሩ ስር ያለው ኩባንያ ራሳቸውን ችለው የቆሙ የትርፍ ማዕከላት ካልሆኑ፣ እና ተቆጣጣሪው ባለአክሲዮን ለኩባንያው ዕዳዎች ዋስትና የሚሰጥ ከሆነ፣ ወዘተ... ናቸው።[59]

2.3 በቀላሉ የሚፈቅዱ አገሮች፡- ፈረንሳይ

በሦስተኛ ወገኖች ጉዳይ ላይ የፈረንሳይ የግልግል ዳኝነት ሕግ ውስብስብነት ይታይበታል። ይህም ፈረንሳይ በዓለም ዓቀፍ ግልግል ዳኝነት ላይ ሕጎቿን የማላላት በአገር ውስጥ የግልግል ዳኝነት ደግሞ ሕጎቿን የማጥበቅ ዝንባሌ ስላላት ትክክለኛው የፈረንሳይ አቋም የትኛው ነው ለማለት ስለሚያስቸግር ነው። ዞሮ ዞሮ የፈረንሳይ የግልግል ዳኝነት ሕግ በሦስተኛ ወገኖች መብት ጉዳይ ላይ ግልጽ ድንጋጌ የለውም። በጉዳዩ ላይ የፈረንሳይን ሕግ የሚተነትኑ አያሌ ጸሐፍት መሠረት የሚያደርጉት የፍርድ ቤቶችን ውሳኔ ነው።[60]

የፈረንሳይ ፍርድ ቤቶች በዓለም ዓቀፍ ግልግል ዳኝነት አውድ ውስጥ የሦስተኛ ወገኖች ወደግልግል ዳኝነት በቀላሉ እንዲገቡ የሚፈቅድ አቋም ያራምዳሉ። በግልግል ዳኝነት ስምምነት ውስጥ የሌለ ሦስተኛ ወገን ተገዶ ወደ ክሱ እንዲገባ ሲጠየቅ መነሻ የሚደረገው ‘‘ውስጠ-ታዋቂ ስምምነት’’ (‘‘implied consent’’) የሚባለው መርህ የመነጨው ከፈረንሳይ ፍርድ ቤቶች ነው።[61] ለዚህ ፈር ቀዳጅ የነበረው የፍርድ ውሳኔ ‘‘ዶው ኬሚካልስ’’ እየተባለ የሚጠራው ታዋቂ የግልግል ዳኝነት ጉዳይ ሲሆን ከዚያ ውሳኔ በኋላ ‘‘የውስጠ ታዋቂ ስምምነት’’ መርህ በተለይ በፈረንሳይ ፍርድ ቤቶች እና ግልግል ዳኞች ዘንድ እየተስፋፋ መጥቷል።[62] የዶው ኬሚካልስ ጉዳይ ፈር ቀዳጅ ከመሆኑም በላይ በአከራካሪነቱም ይታወቃል። የዶው ኬሚካል ጉዳይ አራት የዶው ኬሚካል ግሩፕ አባል ኩባንያዎችን (ዶው ኬሚካልስ ዩኤስኤ (ዋናው እናት ኩባንያ)፣ ዶው ኬሚካልስ ፍራንስ፣ ዶው ኬሚካልስ ዩሮፕ እና የእሱ እናት ኩባንያ ዶው ኬሚካልስ ኤ.ጂ.) በከሳሽነት እና አይሶቨር ሴይንት ጎቤይን (ISOVER Saint Gobain) የተባለ ተከሳሽን የሚመለከት ነበር።[63]

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[59] *Ibid.*, at 67-68.

[60] EMMANUEL GAILLARD, JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 24 (Kluwer Law International, 1999), S. I. Strong, *Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?* 31 VAND. J. TRANSNAT'L L 950-951 (1998).

[61] Bernard Hanotiau, *supra* note 24, at 285.

[62] *Ibid.*

[63] *See*, Dow Chemicals et al v. ISOVER Saint Gobian, *supra* note 25.

የክርክሩ መነሻዎች ሁለት እ.ኤ.አ. በ1965 እና በ1968 የተደረጉ ውሎች ናቸው። በ1965ቱ ውል ላይ አንዱ ተዋዋይ የቬኔዚዌላው ዶው ኬሚካልስ የግልግል ዳኝነት ስምምነት የያዘ ውል ከአንድ የፈረንሳይ ኩባንያ ጋር ይዋዋላል። በኋላም የቬኔዚዌላው ዶው ኬሚካልስ ውሉን ለዶው ኬሚካልስ ኤ.ጂ. ሲያስተላልፍ ተዋዋዩ የነበረው የፈረንሳይ ኩባንያ ደግሞ ለISOVER Saint Gobain ውሉን ያስተላልፋል። የ1968 ውልም የግልግል ዳኝነት ስምምነት የያዘ ሲሆን በመጀመሪያ የተደረገው በዶው ኬሚካልስ ዩሮፕ እና በሦስት የፈርንሳይ ኩባንያዎች መካከል ሲሆን ሦስቱም ተዋዋዮች በኋላ ውላቸውን ለISOVER Saint Gobain ያስተላልፋሉ። በሌላ በኩል ሁለቱም ውሎች ላይ ግዴታዎች የሚፈጸሙት በዶው ኬሚካልስ ፍራንስ ወይም በማንኛውም የዶው ኬሚካል አባል ኩባንያዎች እንደሚሆን ተደንግጓል።

በኋላ በውል አፈጻጸም ሂደት በተፈጠረ ያለመግባባት አራቱም ከሳሾች ISOVER Saint Gobainን በዓለም ዓቀፍ የንግድ ምክር ቤት (ICC) የግልግል ዳኝነት ክስ አቅርበውበት[64] ጉዳዩ ሲታይ የተከሳሹ አንዱ የመጀመሪያ ደረጃ መቃወሚያ የግልግል ዳኝነት ስምምነቱን ያልፈረሙት የዶው ኬሚካልስ ፍራንስ እና የዶው ኬሚካልስ ዩኤስኤ መክሰስ አይችሉም የሚለው ነበር። የICC የግልግል ዳኝነት ጉባኤ በዚህ የመጀመሪያ ደረጃ መቃወሚያው ላይ በሰጠው ብይን ሁለቱ ውሉን ያልፈረሙ ቢሆንም አንዱ እናት ኩባንያ፣ ሌላው ደግሞ በእሱ የተያዘ ከመሆናቸውም በላይ ውሉ በሚደረግበት እና በኋላም በውሉ አፈጻጸም፣ እንዲሁም ውሉን በሚቋረጥ ሂደት ቀጥተኛ ተሳታፊዎች ናቸው የሚል ምክንያት ሰጥቶ መቃወሚያውን ሳይቀበለው ቀርቷል። በተጨማሪም ሁሉም የዶው ኬሚካልስ አባል ኩባንያዎች የተለያየ የሕግ ሰውነት ቢኖራቸውም አንድ የኢኮኖሚ አካል ናቸው (One and the same economic reality)፤ እንዲሁም ከአጠቃላይ የነገሮቹ ሁኔታ ሁለቱም ተዋዋዮች ውሎቹን ቢፈርሙ ኖሮ የግልግል ዳኝነት ስምምነቱን እንደሚቀበሉ የማያጠራጥር ነው፤ በማለት የተከሳሹን የመጀመሪያ ደረጃ መቃወሚያ ውድቅ አድርጓል።

ጉዳዩ በይግባኝ የቀረበለት የፓሪስ የይግባኝ ፍርድ ቤትም ይህንኑ ወሳኔ በማጽናቱ ይህ የተቧደኑ ኩባንያዎች ሁኔታ ለ‘‘ውስጠ-ታዋቂ ስምምነት’’ መርህ አንድ መነሻ ሆኗል።[65] ይሁን እንጂ የተቧደኑ ኩባንያዎች መርህ ከፈረንሳይ ውጭ በብዙ አገሮች ሙሉ ተቀባይነት ሊያገኝ አልቻለም።[66]

ሌሎች የተዘዋዋሪ ስምምነት ምንጮች ለምሳሌ የውል መተላለፍ እና የዳረጎት ጉዳይ ላይ የፈረንሳይ ፍርድ ቤቶች እንደ ሁኔታው ጉዳዩ ዓለም አቀፍ የግልግል ዳኝነትን የሚመለከት ከሆነ በቀላሉ እንደሚፈቅዱ፤ ጉዳዩ የአገር ውስጥ የግልግል ዳኝነት ከሆነ ደግሞ ጠበቅ ያለ ቅድመ ሁኔታ እንደሚከተሉ የተለያዩ በዘርፉ የተደረጉ ጥናቶች ያሳያሉ። በዓለም ዓቀፍ የግልግል ዳኝነት የፈረንሳይ የሰበር ፍርድ ቤት (*Cour de Cassassion*) እንዲሁም የፓሪስ የይግባኝ ፍርድ ቤቶች በተለያዩ ጊዚያት ውል ሲተላለፍ በውስጡ ያለው የግልግል ዳኝነት ስምምነት ሳይሸራረፍ አብሮ

[64] *Ibid.*

[65] Bernard Hanotiau, *supra* note 24, at 282.

[66] *Ibid.*, at 285.

እንደሚተላለፍ ወስነዋል።[67] በአገር ውስጥ ግልግል ዳኝነትም ቢሆን በስምምነት ውል የተላለፈለት ሰው በውሉ ውስጥ ያለው የግልግል ዳኝነት ስምምነት እንደሚያስገድደው የፈረንሳይን የውል ሕግ መርሆች ጠቅሰው አማኑኤል ጋያ እና ጆን ሳቪጅ የተባሉ ስመ ጥር ምሁራን ጽፈዋል።[68] ውሉን ካስተላለፈው ውጭ ያለው ሌላኛው ተዋዋይ ውሉ ከተላለፈለት ሦስተኛ ወገን ጋር በግልግል አልዳኝም ሲል የሚያነሳውን ክርክር በተመለከተ እነዚሁ ጸሐፍት ሲያብራሩ "የግልግል ዳኝነት ስምምነቱን ለመፈረም ውሉን ያስተላለፈው የመጀመሪያው ተዋዋይ ግላዊ ማንነት ወሳኝ መሆኑን ካላስረዳ በቀር ስምምነቱን የመጀመሪያው ተዋዋይ ለሌላ ሰው እንደሚያስተላልፈው አስቀድሞ አውቆ እንደተቀበለ ይቆጠራል" ይላሉ።[69] ይህ የጸሀፍቶቹ ድምዳሜ ከፈርንሳይ ኩር ዲ ካሳሲዮን (የሰበር ፍርድ ቤት እንደማለት ነው) እና ከበታች ፍርድ ቤቶች ውሳኔዎች ጋር የሚስማማ ነው።[70]

የዳረጎትን ጉዳይ በተመለከተ ግን እንደ ሌሎቹ ሀገራት ፍርድ ቤቶች ሁሉ የፈረንሳይም ፍርድ ቤቶች የግልግል ዳኝነት ስምምነት ወደ ተተኪው መተላለፉን ይቀበላሉ። ለምሳሌ ለመድን ገቢው ካሳ የከፈለ የኢንሹራንስ ኩባንያ በከፈለው ካሳ ልክ በመድን ገቢው እግር ተተክቶ ሦስተኛ ወገንን ሲከስ መድን ገቢው ከሦስተኛ ወገን ጋር ባለው የግልግል ዳኝነት ስምምነት ይገደዳል።[71] በኢንሹራንስ ብቻም ሳይሆን በሌሎችም የዳረጎት ግንኙነትን በሚመለከቱ ጉዳዮች ላይ የፈረንሳይ ፍርድ ቤቶች ተመሳሳይ አቋም አላቸው።[72]

ይሁን እንጂ የሦስተኛ ወገኖች ጣልቃ መግባት ወይም ወደ ክርክር መግባት ላይ የፈረንሳይ ፍርድ ቤቶች ጥብቅ ከልካይ አቋም ነው ያላቸው። ይህም የግልግል ዳኝነት ስምምነት ሳይኖር ማንም ሊገደድ እንደማይችል እና የግልግል ዳኝነት አካልም በተዋዋዮች ከተሰጠው ስልጣን አልፎ በሦስተኛ ወገን የሚቀርብን የመብት ጥያቄ መወሰን አይችልም ከሚል መርህ የተነሳ ነው።[73] ይህ እንግዲህ ከላይ እንደተመለከተው የሦስተኛ ወገን ስምምነት አለ ለማለት የሚያበቃ ውስጠ-ታዋቂ ስምምነት ከሌለ ነው።

ሌላው ሦስተኛ ወገኖችን በግልግል ዳኝነት ለማስገባት የሚያገለግለው ለሦስተኛ ወገን ጥቅም ተብሎ የሚደረግ ውል ነው። ፈረንሳይ የሲቪል ሎው ስርዓት ተከታይ እንደመሆኗ ለሦስተኛ ወገን ጥቅም የሚደረግ ውል በፈረንሳይ የፍትሐ ብሔር ሕግ ቁጥር 1205 ላይ ተድንግጓል።[74]

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[67] Andrea Vincze, *supra* note 23, at 4.

[68] Philippe Fouchard, *supra* note 60, 708.

[69] James Hosking, *supra* note 1, at 498 (ትርጉም የጸሀፊው)

[70] *Ibid.*, 499.

[71] *Ibid.*, 507.

[72] *Ibid.*

[73] *S. Strong, supra* note 19, at 951.

[74] French Civil Code, Article 1205, The new provisions of the Code Civil created by Ordinance no. 2016-131 of 10 February 2016 translated into English by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker, http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf accessed on 10 May 2019.

ነገር ግን ሦስተኛ ወገን ተጠቃሚው ካልፈለገ በግልግል ዳኝነት ስምምነቱ አይገደድም የሚል አመለካከት ከፈረንሳይ ፍርድ ቤቶች ውሳኔዎች ውስጥ ይንጸባረቃል።[75] ነገር ግን ለሦስተኛ ወገን ጥቅም የሚደረግ ውል በግልጽ ወይም ከሁኔታዎች በመነሳት ሊወሰን ስለሚችል በዚህ ረገድ የፈረንሳይ ሕግ ላላ ያለ መስፈርት ይከተላል ለማለት ይቻላል።[76]

3. የሦስተኛ ወገኖች ተሳትፎ እና የሥነ-ስርዓት ሕግ መሠረቶች በኢትዮጵያ

3.1 ዋና ዋና የሥነ-ሥርዓት ሕግ መርሆዎች

የኢትዮጵያ ፍትሐ ብሔር ሥነ-ስርዓት ሕግ የአንድ ክርክር አድማስ እንዴት ሊሰፋ ወይም ሊጠብ እንደሚችል እና ክሱ ሲከፈት ከነበሩት ተከራካሪዎች ውጭ ሌሎች በተጨማሪነት ወይም በተተኪነት ስለሚገቡበት ሁኔታዎች በዝርዝር ይደነግጋል።[77] ከቁጥር 36 እስከ 43 ያሉት ድንጋጌዎች ከዚህ አኳያ አግባብነት ያላቸው ሲሆኑ ውሳኔን ስለመቃወም የተደነገገው የቁጥር 358 ድንጋጌም ከእነዚህ ድንጋጌዎች ጋር ተያያዥነት ያለው ነው። ከእነዚህ ድንጋዎች ውስጥ የተወሰኑት የክርክሮችን አመራር ምቹ፣ ቀልጣፋ እና ወጪ ቆጣቢ በሆነ መንገድ ለመምራት የተቀመጡ ሲሆኑ አስገዳጅ አይደሉም።[78] ስለሆነም በአንድ በኩል በቁጥር 35 እና 36 ላይ የተደነገጉት አስገዳጅ ያልሆኑ ከአንድ በላይ ከሳሾች እና ተከሳሾች የሚጣመሩበትን ሁኔታ (permissive joinder) የሚያመለክቱ ናቸው። በሌላ በኩል ደግሞ በቁጥር 40፣ 41 እና 43 ውስጥ የተቀመጡት ድንጋጌዎች በክርክሩ የተያዘው ጉዳይ እና ሊወሰን በሚችለው ውሳኔ መብቱ የሚነካበት 3ኛ ወገን ወደ ክርክር የሚገባበትን አግባብ የሚደነግጉ እና በቁጥር 35 እና 36 ከተቀመጡት የተለዩ ናቸው። ይህም ሲባል ክርክርን በተቀላጠፈ መንገድ እና በአነስተኛ ወጪ ከማስተናገድም በላይ የሌሎችን መብቶች ማስጠበቅን ታሳቢ ያደረጉ ድንጋጌዎች ናቸው።

ከዚህ አኳያ የሦስተኛ ወገንን ወደ ክርክር መግባት አስገዳጅ የሚያደርጉ አራት ሁኔታዎችን ብቻ መመልከቱ በዚህ ጽሁፍ ለተያዘው ጥያቄ በቂ ነው። እነዚህም በክርክሩ ሳይገባ መቅረት የሌለበት ሰው፣ ስለ ጣልቃ ገብ፣ በተከሳሽ ጥያቄ ስለሚገባ ሦስተኛ ወገን ተከሳሽ እና ፍርድን የመቃወም መብት ያለው ሰው ናቸው።

3.1.1 በክርክሩ ሳይገባ መቅረት የሌለበት ሰው /indispensable party/

በክርክሩ ሳይገባ መቅረት የሌለበት ሰው የሚባለው በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ቁጥር 39(1) እና 40(2) ጥምር ንባብ መሠረት በክሱ ባይሳተፍ የፍትህ መዛባት ሊያስከትል የሚችል

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[75] James Hosking, *supra* note 1, at 524.

[76] *Ibid.*

[77] የኢትዮጵያ የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ሁለተኛ መጽሐፍ ምዕራፍ አንድ በጠቅላላው የሚደነግገው በከሳሽነት ወይም በተከሳሽነት ክርክር ውስጥ ተካፋይ መሆን ስለሚችሉ አካላት ሲሆን ፍርድን ስለመቃወም የሚደነግገው የቁጥር 358 ድንጋጌ ከእነዚህ ድንጋጌዎች ጋር ግንኙነት ያለው ነው።

[78] Alan Sedler, *supra* note 11, at 96-97.

ሆኖ ሲገኝ ነው። ይህም ባልተሳተፈበት ክርክር የሚሰጠው ውሳኔ መብቱን፣ ጥቅሙን እና ግዴታውን የሚነካበት መሆኑ ከታወቀ ነው።[79] ለዚህ ዓይነተኛ ምሳሌ በአንድ ንብረት ላይ የጋራ ባለሀብትነት ያላቸው ሁለት ሰዎች ጉዳይ ነው። የጋራ ሀብቱን በተመለከተ አንዱ ብቻውን ከሳሽ ወይም ተከሳሽ ሊሆን አይችልም፤ ምክንያቱም የሚሰጠው ውሳኔ የሁለቱንም መብት የሚነካ ስለሆነ ነው።[80] በሌላም በኩል በክርክሩ ሳይገባ መቅረት የሌለበት ሰው በሥነ-ሥርዓት ሕግ አስተምሮ ትክክለኛው ባለጥቅም/real party in interest/ የሚባለው ሊሆን ይችላል። ለምሳሌ የጋራ ባለሀብት ባይሆንም መብቱ በውሳኔው በእርግጠኝነት የሚነካ ከሆነ በክርክሩ ሳይገባ መቅረት የሌለበት ሰው ነው ለማለት ይቻላል። ለምሳሌ አንድ ሰው ቤቱን ሽጦ ስመ ሀብቱን ከማስተላለፉ በፊት በቤቱ ላይ ሦስተኛ ወገን ላደረሰው ጉዳት ካሳ ለማስከፈል ክስ ቢከፍት፣ ወይም በቤቱ ላይ ሦስተኛ ወገን ላደረሰው ጉዳት ካሳ ለማስከፈል ክስ ከከፈተ በኋላ ቤቱን ቢሸጥ ገዢ በዚህ ክርክር ውስጥ ሳይገባ መቅረት የሌለበት ሰው ስለሆነ በቁጥር 39(1) እና በ40(2) መሠረት ወደ ክርክሩ ከሳሽን ተክቶ አሊያም በተጨማሪነት እንዲገባ ይደረጋል። ገዢው ሳያውቅ ክርክሩ ቢቀጥልና ለሻጭ ካሳው ቢወሰንለት፣ ካሣ ለከሳሹ ከመከፈሉ በፊት (ውሳኔው ከመፈጸሙ በፊት) ገዢው በቁጥር 358 መሠረት ውሳኔውን መቃወም ይችላል።

3.1.2 ስለ ጣልቃገብ

በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ቁጥር 41 መሠረት ከአንድ ክርክር ጋር በተያያዘ ከተከራካሪዎች የተለየ መብት ወይም ጥቅም ያለው እና በሚሰጠው ውሳኔ ይህ መብት/ጥቅም ሊጎዳበት የሚችል ማንኛውም ሰው በክርክሩ ጣልቃ ለመግባት ሲጠይቅ እና ሲፈቀድለት ወደ ክርክሩ መግባት ይችላል። በኢትዮጵያ የፍትሐ ብሔር ሥነ-ስርዓት ሕግ ላይ ድንቅ ማብራሪያ የጻፈው አለን ሴድለር በዚህ ነጥብ ላይ ሀሳቡን ሲገልጽ ጣልቃ ለመግባት ዋናው መረጋገጥ ያለበት ጣልቃ ገብ በሚወሰነው ውሳኔ ምክንያት የሚያጣው ወይም የሚያገኘው ጥቅም መኖሩ ነው ይላል።[81] ይህ ከተረጋገጠ ጣልቃ መግባት ይችላል። ጣልቃ ልግባ ባይ ወደ ክርክሩ እስቀድሞ በከሳሽነት ወይም በተከሳሽነት ተጣምሮ መግባት ይችል የነበረ በመሆኑ ብቻ ጣልቃ መግባት አይፈቀድለትም።

የጣልቃ ገብ አቤቱታ ራሱን የቻለ /independent/ መሆን ያለበት ሲሆን ራሱን የቻለ የመጀመሪያ ደረጃ መቃወሚያ እስከ ማቅረብ የሚያበቃ መሆኑን የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት በአንድ መዝገብ ወስኗል።[82] በክርክር ጣልቃ የሚገባ ሰው አለኝ የሚለውን የመጀመሪያ ደረጃ መቃወሚያ እና የፍሬ ነገር ክርክር ሲያቀርብ ነው ክርክርን በተሟላ ሁኔታ ነገር ግን በአጭር ጊዜ እና በአነስተኛ ወጪ መፍታት የሚቻለው።

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[79] *Ibid.*, at 82.

[80] *Ibid.*

[81] *Ibid.*

[82] አመልካች ወ/ሮ ወርቂቱ ገመዳ እና ተጠሪ ወ/ሮ ደመቀች ብርሃኑ፣ የፌዴራል ሰበር መዝገብ ቁ. 108647፣ ሕዳር 15 ቀን 2009፣ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 20፣ ገጽ. 99።

3.1.3 በተከሳሽ ጥያቄ ወደ ክርክር የሚገባ ሦስተኛ ወገን ተከሳሽ

በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ 43 መሠረት የሚደረገው የሦስተኛ ወገን ወደ ክርክር መግባት በተከሳሽ ጠያቂነት የሚፈጸም ነው። በክርክሩ ውስጥ በተከሳሽነት የተሰየመው ወገን ሌላ ሦስተኛ ወገን የተከሰሰበትን ካሳ ሊጋራኝ ይገባል ብሎ ያመለከተ እንደሆነ ሦስተኛ ወገን ወደ ክሱ እንዲገባ ሊደረግ ይችላል። እንደ አለን ሴድለር አገላለጽ የዚህ ድንጋጌ ዋናው ዓላማ አንድ ዐይነት የሕግና የፍሬ ነገር ክርክር ያለባቸውን ጉዳዮች አንድ ላይ መወሰን ነው።[83] በአንድ ጉዳይ ላይ ካሳ እንዲከፍል የተከሰሰ ሰው ተፈርዶበት ካሳውን ከከፈለ በኋላ፣ ኃላፊነቱን በጋራ መወጣት ያለበትን ሦስተኛ ወገን እንደ አዲስ ከሶ ድርሻውን ከማስከፈል ከጅምሩ ይህ ሦስተኛ ወገን ወደ ክሱ እንዲገባ ቢያስደርግ ክርክርን በአጭር እና በአነስተኛ ወጪ የመፍታት የሥነ-ሥርዓት ሕጉ ዓላማ የበለጠ ይሳካል። ይሁን እንጂ ጉዳዩ የሦስተኛ ወገንን መብትም የሚመለከት ስለሆነ የቅልጥፍና እና ወጪ የመቆጠብ ጉዳይ ብቻ አይደለም። በዚህ ጊዜ በተከሳሽ አመልካችነት ወደ ክርክሩ የገባው ሦስተኛ ወገን ድርሻውን ለከሳሽ በቀጥታ እንዲከፍል አይወሰንም። ምክንያቱም ከሳሽ ከዚህ ሦስተኛ ወገን ላይ የጠየቀው ዳኝነት የለምና።[84] ነገር ግን ይህ ሦስተኛ ወገን ወደ ክርክሩ ሳይገባ ቢቀር ወይ ባልተሳተፈበት ክርክር መብቱ ይወሰናል፤ አሊያም በዚህ ምክንያት ድርሻውን አልከፍልም ቢል የተከሳሽ ድርሻ ካሳውን የማስከፈል መብት አደጋ ላይ ይወድቃል።

3.1.4 ፍርድን ስለ መቃወም

ፍርድን መቃወም የሚችል ሦስተኛ ወገን በክርክሩ ተካፋይ መሆን የሚገባው ወይም በክርክሩ ውስጥ ለመግባት የሚችል እና ተካፋይ ባልሆነበት ክርክር የተሰጠው ውሳኔ መብቱን የሚጎዳበት ሰው መሆን አለበት።[85] በቁጥር 358 መሠረት ፍርድን መቃወም ፍርዱ ከመፈጸሙ በፊት መቅረብ አለበት። ፍርድን መቃወም የክርክር ሂደትን የሚያወሳስብ በመሆኑ ለፍርድ ቤትም ለማስተናገድ አስቸጋሪ ነው። በመሆኑም የሚፈቀድበት አግባብ ከበድ ያሉ ቅድመ ሁኔታዎችን የሚጠይቅ ነው።

በቁጥር 358 ላይ ፍርድን ስለመቃወም የተቀመጠው ድንጋጌ በከፊል በቁጥር 40፣ 41 እና 43 ላይ የተጠቀሱትን ሦስተኛ ወገኖች ታሳቢ ያደረገ ነው። እነዚህም በክርክሩ ሳይገባ መቅረት የሌለበት ሰው /indispensable party/፣ ትክክለኛው ባለጥቅም/real party in interest/፣ እና በቁጥር 43 መሠረት በክርክሩ ውስጥ በሚካፈለው ተከሳሽ ላይ በሚወሰን ካሳ ላይ ድርሻ እንዲያዋጣ ሊወሰንበት የሚችል ሰው ናቸው።[86] አንድ ሰው በክርክሩ ሳይገባ መቅረት ያልነበረበት መሆኑን እስካላረጋገጠ ድረስ እንዲሁ በከሳሽነት ወይም በተከሳሽነት ወደ ክርክሩ መግባት ይችል የነበረ በመሆኑ ብቻ ውሳኔን መቃወም አይችልም። ስለዚህ ሴድለር እንደሚለው በቁጥር 41 መሠረት ጣልቃ የመግባት መብት ኖሮት ሳይገባ የቀረ በሙሉ ውሳኔን መቃወም ይችላል ማለት

[83] Alan Sedler, *supra* note 11, at 87.

[84] *Ibid.*

[85] የኢትዮጵያ ንጉሰ ነገስት ፍትሓብሔር ሥነ-ሥርዓት ሕግ፣ 1957፣ አንቀጽ ቁ. 358።

[86] Alan Sedler, *supra* note 11, at 216.

ስህተት ነው። ተከሳሹ ላይ የተወሰነውን ካሣ የመጋራት ግዴታ ያለበት መሆን ይኖርበታል፤ አሊያም ውሳኔው ቢፈጸም መብቱን የሚያጣ መሆን አለበት።[87] በሌላ አገላለጽ ለቅልጥፍና እና ወጪ ለመቆጠብ ሲባል ብቻ በከሳሽነት ወይም በተከሳሽነት ወደ ክሱ መግባት የነበረበት፣ ነገር ግን ሳይገባ የቀረ 3ኛ ወገን በክርክሩ ሳይገባ መቅረት የሌለበት አይደለም፤ እናም ፍርድን መቃወም ሊፈቀድለት አይገባም።

3.2 የግልግል ዳኝነት በሦስተኛ ወገኖች ላይ ስላለው ተፈጻሚነት የተሰጡ የፍርድ ውሳኔዎች

በዚህ ክፍል የግልግል ዳኝነት ስምምነት በሦስተኛ ወገኖች ላይ ስላለው ተፈጻሚነት በፍርድ ቤቶች የተሠጡ ውሳኔዎችን መሠረት በማድረግ ከላይ ከቀረበው ንድፈ ሀሳባዊ ትንታኔ አንጻር ዋና ዋና ነጥቦች ይዳሰሳሉ። የፍርድ ውሳኔዎቹ በበታች ፍርድ ቤት የተሰጡ እንዲሁም በሰበር ፍርድ ቤቶች የተሰጡ ናቸው። የጽሁፉን አቀራረብ ለማቅለል እንዲረዳ የተለያዩ ሀሳቦችን በተወሰኑ ንዑሳን ርዕሶች በማሰባሰብ በሚከተለው መንገድ ይቀርባል። እነዚህም ንዑሳን ርዕሶች የግልግል ዳኝነት ስምምነት መተላለፍ፣ የግልግል ዳኝነት ስምምነትን ማስፋፋት፣ በግልግል ዳኝነት በተያዘ ጉዳይ ጣልቃ መግባት፣ በግልግል ዳኝነት ስምምነት ውስጥ የሌለ ወገን በከሳሽነት ወይም በተከሳሽነት መጣመር እና በግልግል ዳኝነት የተሰጠ ውሳኔን መቃወም የሚሉ ይሆናሉ።

3.2.1 የግልግል ዳኝነት ስምምነት መተላለፍ እና ዳረጎት

ከላይ በክፍል 1.3.2 ላይ እንደተመለከተው የኢትዮጵያ የፍትሐ ብሔር ሕግ አንቀጽ 1962 እና ተከታታይ ድንጋጌዎች የግልግል ዳኝነት ስምምነትን የያዘ የውል መብት ለሶስተኛ ወገን የተላለፈ እንደሆን የተላለፈለት ሰው የግልግል ዳኝነት መብቱን መጠቀም እንደሚችል ሕጉ ይደነግጋል። በዚህ በኩል በፍትሐ ብሔር ሕግ ቁጥር 1973 ላይ የማስተላለፍ ወይም የዳረጎት ውጤት በሚል ርዕስ ስር ‹‹የተዳረገው ባለገንዘብ ወይም የባለገንዘብነት መብት የተላለፈለት ሰው በዕዳው ላይ በተሰጡት ልዩ መብቶች፣ በዋስትናዎች እና በሌሎችም ተጨማሪ መብቶች ሊሰራባቸው ይችላል›› የሚለው ድንጋጌ በግልግል ዳኝነት ስምምነቱ የመጠቀም መብት እንደሚተላለፍ የሚገልጽ ነው።

በፍርድ ቤት በተጨባጭ የግልግል ዳኝነት ስምምነት የውል መብት በዳረጎት ለተላለፈለት 3ኛ ወገን የመተላለፍ ጉዳይ የተነሳበት እና እስከ ፌዴራል ሰበር የደረሰ አንድ መዝገብ ላይ የተሰጠ ውሳኔ በዚህ ጉዳይ የፍርድ ቤቶችን አቋም ሊያመላክት ይችላል። በአመልካች የኢትዮጵያ መድን ድርጅት እና ተጠሪ ወ/ሮ ብሬ ሞሲሳ[88] መካከል በነበረው መዝገብ አመልካች ለደንበኛው የኢትዮጵያ ነዳጅ ድርጅት በነዳጅ ትራንስፖርት ወቅት ለሚደርስ ጉዳት መድን ሰጥቷል። ተጠሪ የጣና ፈሳሽ ትራንስፖርት ባለንብረቶች አባል የኢትዮጵያ ነዳጅ ድርጅትን ነዳጅ እያጓጓዘ እያለ

[87] *Ibid.*

[88] አመልካች የኢትዮጵያ መድን ድርጅት እና ተጠሪ ወ/ሮ ብሬ ሞሲሳ መ.ቁ. 39902)፣ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 10፣ ገጽ 302-304።

ተሸከርካሪው ተገልብጦ ነዳጁ ይደፋል። አመልካች ለደንበኛው (ለኢትዮጵያ ነዳጅ ድርጅት) ለተደፋው ነዳጅ ካሳ ከከፈለ በኋላ በመብቱ በመዳረግ ተጠሪን ይከሳል። በተጠሪ እና በኢትዮጵያ ነዳጅ ድርጅት መካከል ያለመግባባትን በግልግል ዳኝነት የመፍታት ስምምነት ስለነበር ተጠሪ ክርክሩ መታየት ያለበት በግልግል ዳኝነት ነው ሲል የፍርድ ቤቱን ስልጣን ይቃወማል።

የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የተጠሪን ክርክር ባለመቀበል ለአመልካች ወስኗል። ጉዳዩን በይግባኝ የተመለከተው ከፍተኛው ፍርድ ቤት የተጠሪን ክርክር በመቀበል የመጀመሪያ ደረጃ ፍርድ ቤትን ውሳኔ በመሻር ተጠሪ በፍርድ ቤት ሊከሰሱ አይገደዱም ሲል ይወስናል። ፍርድ ቤቱ የውሳኔውን ምክንያት ሲያብራራ እንደገለጸው የግልግል ዳኝነት ስምምነት ያለበት የውል መብት በዳረጎት የተላለፈለት ሰው በግልግል ዳኝነቱ እንደሚገደድ አብራርቷል።

> *በኢት/ ነዳጅ ድርጅትና በጣና ፈሳሽ መጓጓዣ ባለንብረቶች ማህበር መካከል በተደረገው ውል አንቀጽ 18 መሰረት ከውሉ ትርጉምና አፈፃፀም ጋር ግንኙነት ባላቸው ምክንያቶች የሚነሳ አለመግባባት ሁሉቱ በመረጧቸው ገለጋይ ዳኞች አማካኝነት እንደ ሚታይ ስምምነት ተደርጓል። አመልካች በተጠሪ ላይ ክስ የመሰረተው በን/ህ/ቁ 683 መሰረት ባገኘው የመዳረግ መብት በመሆኑና ይህ የመዳረግ መብት የደንበኛው በሆነው መብት ልክ ስለሆነ በአመልካችና በተጠሪ መሃከል የሚነሳው ክርክር በስምምነት [በግልግል ዳኝነት] ማለቅ ስላለበት ፍ/ቤቱ ጉዳዩን ለማየት ስልጣን የለውም።*[89]

ጉዳዩ በይግባኝ የቀረበለት የፌዴራል ጠቅላይ ፍርድ ቤት የከፍተኛ ፍርድ ቤት ውሳኔን አጽንቷል። ያኔ ነበር ጉዳዩ ለፌዴራል ሰበር ሰሚ ችሎት የቀረበው። የሰበር ችሎቱም የግልግል ዳኝነት ስምምነቱ በአመልካችና በተጠሪ መሃከል ላለው ክርክር ተፈፃሚነት አለው ወይስ የለውም? የሚለውን ጭብጥ በመያዝ ጉዳዩን ከመረመረ በኋላ ግልግል ዳኝነቱ አመልካችን አይመለከትም ሲል ወስኗል። የሰበር ችሎት ለዚህ ውሳኔው የሰጠው ምክንያት በፍትሐ ብሔር ሕግ ቁጥር 1731 ላይ ያለውን ውሎች ተፈፃሚነታቸውና አስገዳጅነታቸው ውሉን ባቋቋሙ ተዋዋይ ወገኖች መሃከልብቻ ነው የሚለውን ነው። ነገር ግን ይህ መርህ ገደብ የሌለው (unqualified) አይደለም። የውል ሕግ ውሎች በሦስተኛ ወገኖች ላይ ተፈጻሚ ስለሚሆኑበት የተለያዩ ሁኔታዎች የሚደነግግ ሲሆን ከእነዚህ ሁኔታዎች አንዱ የውሎች መተላለፍ እና ዳረጎት እንደሆነ ከቁጥር 1962 ጀምሮ ያሉት ድንጋጌዎች ሰፍረው ይገኛሉ። የሰበር ችሎት የከፍተኛ ፍርድ ቤትን ውሳኔ ሲተች እንዲህ በማለት ነው፡-

> *ይግባኝ ሰሚው ፍ/ቤት ይህ ውል በአመልካችና በተጠሪ መሃከል ተፈፃሚነት አለው የሚለው መደምደሚያ ላይ የደረሰው አመልካች በተጠሪ ላይ ክስ ለማቅረብ የቻለው በደንበኛው መብት ተዳርጎ ስለሆነ የሚኖረው ደንበኛው ያለው መብት ነው በማለት ነው። በእርግጥ በን/ህ/ቁ 683(1) መድን ሰጪው ለደንበኛው በከፈለው የካሳ መጠን ልክ ለጉዳቱ ኃላፊ የሆነውን ሰው የሚጠይቀው በደንበኛው መብት ተዳርጎ ነው። ይህ ድንጋጌ ግን መድን ሰጪው የከፈለውን የካሳ መጠን በሚመለከት ብቻ እንጂ የደንበኛው*

[89] *Ibid.*, at 303.

ሌሎች መብቶችና ግዴታዎችን ሁሉ የሚመለከት ስላልሆነ በተያዘው ጉዳይ የአመልካች ደንበኛ ከጣና ፈሳሽ ማጓጓዣ ጋር ያደረገው ውል አመልካች በተጠሪ ላይ ለመሰረተው ክስ ተፈፃሚነት ሊኖረው አይችልም። ተጠሪ በዚህ ውል ተዋዋይ ወገን አልነበሩም።[90]

ሲል በፍትሐብሔር ሕግ ቁጥር 1973 ላይ የዳረጎት ውጤት ከዋናው መብት በተጨማሪ ተያያዥ መብቶችን፣ ዋስትናዎችን ወ.ዘ.ተ. እንደሚያስተላልፍ የተደነገገውን ሕግ እንደሌለ ቆጥሮ አልፎታል። የዚህ ውሳኔ አንድምታ አደገኛ ሊሆን ይችላል። ይህን ለማሳየት አንድ ምሳሌ በቂ ነው። እንበልና የኢትዮጵያ ነዳጅ ድርጅት የደረሰበት ጉዳት ከመድን ጣሪያው (sum insured) በላይ ነው እንበል። ይህ ከሆነ መድን ሰጪው የሚከፍለው ካሣ ጉዳቱን ሙሉ በሙሉ ስለማይክስ የኢትዮጵያ ነዳጅ ድርጅትም ለልዩነቱ ተጠሪን ይከሳል ብለን ብናስብ ተጠሪ የሚከሰው በግልግል ዳኝነት ነው ማለት ነው። እንግዲህ በሰበር ውሳኔ መሠረት አንድ ዓይነት የሕግና የፍሬ ነገር ክርክር ያለበት ክርክር በሁለት መድረኮች ይደረጋል ማለት ነው። አመልካች በፍርድ ቤት፤ የኢትዮጵያ ነዳጅ ድርጅት ደግሞ በግልግል ዳኝነት። የዚህ አደጋው ማንም ሊረዳው እንደሚችለው ተቃራኒ ውሳኔዎች የመሰጠት አድል መኖሩ ነው። በግልግል ዳኝነቱ ላይ ተጠሪ ጥፋተኛ አይደለም፣ ኃላፊነት የለበትም ተብሎ ቢወሰን እና በፍርድ ቤት ግን ተጠሪ ጥፋተኛ ነው እናም ኃላፊነት አለበት ቢባል ለአፈጻጸም አስቸጋሪ ይሆናል። የሰበር ፍርድ ቤቱ ሕጉንም በሚገባ ተርጉሟል ለማለት አያስደፍርም። የበለጠ ግን ችሎቱ የደረሰበት ድምዳሜ ያለውን አንድምታ አርቆ ያሰበበት አይመስልም።

ይህ ሲባል ግን ፍርድ ቤቶቻችን የግልግል ዳኝነት ስምምነት አይተላለፍም የሚል የጸና አቋም አላቸው ለማለት አይደለም። አዚህ ላይ ቢያንስ አንድ እስከ ሰበር በደረሰ መዝገብ ላይ የግልግል ዳኝነት ስምምነት ያለበት ውል ተላልፎልኛል የሚል ወገን የመጀመሪያው ተዋዋይ እየተቃወመ ክርክሩ በግልግል እንዲታይ አስደርጓል። አመልካች ዘውዲቱ ንጉሤ እና ተጠሪዎች 1ኛ. ጦላይ የከፍተኛ እና የበታች ሹማምንት ማሰልጠኛ ትምህርት ቤት እና 2ኛ. የመከላከያ ሠራዊት ፋውንዴሽን[91] ጉዳይ ውሉ የተደረገው በአመልካች እና በ1ኛ ተጠሪ መካከል ቢሆንም በስር ፍርድ ቤት 2ኛ ተጠሪ የግልግል ዳኝነት ስምምነቱን ጠቅሶ ጉዳዩ ከፍርድ ቤት ስልጣን ውጭ ነው በሚል ተከራክሯል። ይህ ክርክር እስከ ሰበር ደርሶ የሰበር ችሎት የስር ፍ/ቤት በጉዳዩ ላይ ስልጣን የለኝም በማለት የሰጠውን ውሳኔ አጽንቶታል።[92] በዚህ መዝገብ 2ኛ ተጠሪ የተላለፈለትን

[90] *Ibid.*, at 304.

[91] አመልካች ዘውዲቱ ንጉሤ እና ተጠሪዎች 1ኛ. ጦላይ የከፍተኛ እና የበታች ሹማምንት ማሰልጠኛ ት/ት ቤት እና 2ኛ. የመከላከያ ሠራዊት ፋውንዴሽን፣ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት፣ የሰበር መ.ቁ. 118452፣ የካቲት 27 ቀን 2009 ዓ.ም. ።

[92] *Ibid.* የሰበር ውሳኔ ከተሰጠ በኋላ አመልካች የግልግል ዳኛ ለማሾም በፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት በከፈቱት መዘገብ ላይ ፍ/ቤቱ 2ኛ ተጠሪ ‘‘የውሉ አካል ባይሆንም ለተፈጠረው አለመግባባት መነሻ የሆነውን የመሬት ይዞታ እና የውሉን አፈጻጸም ሲከታተል የነበረ መሆኑን ያልካደ በመሆኑ...’’ ጉዳዩን አይቶ የሚወስን የግልግል ዳኞች ጉባኤ እንዲቋቋም ወስኗል። ዘውዲቱ ንጉሤ እና ተጠሪዎች 1ኛ. ጦላይ የከፍተኛ እና የበታች ሹማምንት ማሰልጠኛ ት/ት ቤት እና 2ኛ. የመከላከያ ሠራዊት ፋውንዴሽን፣ ፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት፣ መ/ቁ. 257508፣ ጥር 25 ቀን 2010።

ውል መሠረት አድርጎ የግልግል ዳኝነት ስምምነቱን የመጠቀሙ አግባብነት በጭብጥነት ተይዞ ክርክር ባይደረግበትም በውስጠ ታዋቂነት ግን ተቀባይነት እንዳገኘ ከመዝገቡ መረዳት ይቻላል።

3.2.2 በግልግል ዳኝነት በተያዘ ጉዳይ ጣልቃ መግባት

በግልግል ዳኝነት ውስጥ 3ኛ ወገኖች ጣልቃ የገቡባቸው አያሌ የፍርድ መዛግብት ይገኛሉ። ነገር ግን የሦስተኛ ወገን በክርክር ጣልቃ የመግባት መብት እስከ ሰበር ድረስ ያከራከረበት ወይም ፍርድ ቤት አቋም የወሰደበትን መዝገብ ይህ ጸሐፊ ለማግኘት አልቻለም። ለዚህ ምክንያቱ የግልግል ዳኝነት የሚደረገው በዝግ በመሆኑ ሊሆን ይችላል። የሆነ ሆኖ በተለያዩ የግልግል ዳኝነት ጉባኤዎች የተሰጡ ወሳኔዎች ስላሉ እነርሱን እንመለከታለን።

በግልግል ዳኝነት የጣልቃ ገብ አቤቱታ የቀረበባቸው ሦስት መዝገቦችን ቀጥለን እንመልከት። እነዚህ መዝገቦች በአንጻራዊነት ቆየት ያሉ መዝገቦች ሲሆኑ ሁለቱ መዝገቦች በደርግ ዘመን የመንግስት የልማት ድርጅቶች በግልግል ዳኝነት ጉዳያቸውን እንዲፈቱ የሚያስገድድ መመሪያ ይሰራ በነበረበት ወቅት የተወሰኑ ናቸው።[93] መዝገቦቹ 1ኛ. አመልካች የኢትዮጵያ አስመጭ እና ላኪ ኮርፖሬሽን እና ተጠሪ የባቱ ኮንስትራክሽን ድርጅት እና ጣልቃ ገብ የገንዘብ ሚኒስቴር[94]፣ 2ኛ. አመልካች የኢትዮጵያ መድን ድርጅት እና ተጠሪ የባህር ትራንስፖርት ባለስልጣን እና ጣልቃ ገብ የባህር ትራንዚት አገልግሎት ኮርፖሬሽን[95]፣ እንዲሁም 3ኛ. ከሳሽ አልፋ ባለጭነት ተሸከርካሪዎች ማህበር እና ተከሳሽ የአደጋ መከላከልና ዝግጁነት ኮሚሽን፣ እና ጣልቃ ገብ የፌደራል ፍትሕ ሚኒስቴር[96] የሚሉ ናቸው።

በመጀመሪያዎቹ ሁለቱ ጉዳዮች ሁሉም የመንግስት ድርጅቶች ያለመግባባቶቻቸውን በመንግስት በተቋቋመ የግልግል ኮሚቴ እንዲፈቱ የሚያስገድድ የሚኒስትሮች ምክር ቤት መመሪያ ስለሚያስገድድ ዳኝነቱ የተመሰረተው በነጻ ፈቃድ ሳይሆን በአስገዳጅ መመሪያ ላይ ነው። የግልግል ኮሚቴውም ስልጣን እንደ ፍርድ ቤት ስልጣን እንደነበረ ከአብዛኞዎቹ በዚያ መመሪያ መሠረት ከተሰጡ ወሳኔዎች መገንዘብ ይቻላል። በዚህ ምክንያት ለያዝነው ጉዳይ ያን ያህል የሚረዳ አይሆንም። ሦስተኛው ጉዳይ ግን የታየው እና የተወሰነው ከ1987 ዓ.ም. በኋላ ስለሆነ በውል በተቋቋመ የግልግል ዳኝነት ውስጥ ጣልቃ ገብ የተሳተፈበት መዝገብ ነው። በዚህ መዝገብ አከራካሪ የነበረው ከሳሽ ከተከሳሽ ጋር የነበረው ውል ሲሆን ተከሳሽ ለከሳሽ ማህበር አባላት ተሸከርካሪዎችን በሽያጭ ለማስተላለፍ ካደረገው ስምምነት የመነጨ ነው።[97] ተከሳሽ

[93] ጸሐፊው መመሪያውን ለማግኘት ያደረገው ጥረት ባለመሳካቱ ቁጥሩን እና ዓመተ ምህረቱን ለመግለጽ አለተቻለም።

[94] የግልግል ዳኝነት ውሳኔዎች፣ 4ኛ መጽሐፍ፣ በኢትዮጵያ አርቢትሬሽን እና ኮንሲሊዬሽን ሴንተር የታተመ፣ ጎዳር 2005 ዓ.ም. ገጽ 79-86።

[95] የግልግል ዳኝነት ውሳኔዎች፣ 4ኛ መጽሐፍ፣ በኢትዮጵያ አርቢትሬሽን እና ኮንሲሊዬሽን ሴንተር የታተመ፣ ጎዳር 2005 ዓ.ም. ገጽ 197—203።

[96] የግልግል ዳኝነት ውሳኔዎች፣ 1ኛ መጽሐፍ፣ በኢትዮጵያ አርቢትሬሽን እና ኮንሲሊዬሽን ሴንተር የታተመ፣ ነሐሴ 2000 ዓ.ም. ገጽ 413—461።

[97] *Ibid.*

ተሽከርካሪዎቹን በእርዳታ ከውጭ ያገኛቸው ሲሆኑ በረጅም ጊዜ በሚከፈል ዋጋ 100 ለሚሆኑ የአመልካች ማህበር አባላት ለማስተላለፍ ከተስማማ በኋላ ወለድ እንዲሁም የቀረጥና ታክስ፣ የትራንስፖርት ወጪ ወ.ዘ.ተ. ከመታከሉ ጋር በተያያዘ ዋጋ ላይ የተነሳ ክርክር ሲሆን የያኔው ፍትህ ሚኒስቴር ጣልቃ የገባው የ13.5% ወለድ ጥያቄ ሕጋዊ አይደለም የሚል ክርክር በአመልካቾች በኩል ቀርቦ ስለነበር ያንን በመቃወም ነው። ቢሆንም በዚህ መዝገብ የፍትህ ሚኒስቴር ጣልቃ የገባው እንደ አቃቤ ሕግነቱ በፍ/ሥ/ሥ/ሕ/ቁጥር 42 መሠረት ነው። በዚህም ለያዝነው ጉዳይ ያለው ዋጋ አነስተኛ ስለሆነ እንዲሁ ለርኮርድ ብቻ አንስተን ማለፍ ይበቃናል።

3.2.3 በግልግል ዳኝነት ስምምነት ውስጥ የሌለ ወገን በከሳሽነት ወይም በተከሳሽነት መግባት

የሦስተኛ ወገን በክስ ውስጥ በከሳሽነት ወይም በተከሳሽነት መጣመር (third pary joinder) በፍትሐ ብሔር የክስ ሂደት የተለመደ ቢሆንም በግልግል ዳኝነት ግን እምብዛም የተለመደ አይደለም። የጽሁፉን አቀራረብ ለማቅለል እንዲያመች በክርክሩ ሳይገባ መቅረት የሌለበት ሰው /indispensable party/ እና በተከሳሽ ጥያቄ ወደ ክርክር የሚገባ ሦስተኛ ወገን ተከሳሽ (በፍ/ብ/ሥ/ሥ/ሕ/ ቁጥር 43 መሰረት) የሚሉትን ሁለቱን ሀሳቦች በአንድ ላይ ከዚህ በታች ይብራራሉ።

በቁጥር 43 መሠረት ወደ ግልግል ዳኝነት የመግባት ልማድ መኖሩን የሚያሳይ መዝገብ በብዛት ለማግኘት አልተቻለም። ለይስሙላም ቢሆንም በደርግ ዘመነ-መንግሰት የተወሰነ አንድ የግልግል ዳኝነት መዝገብ ለማሳያ ያህል መጥቀስ ይቻላል። ከሳሽ የኢትዮጵያ የንግድ መርከብ ድርጅት፣ ተከሳሽ የቡና ገበያ ኮርፖሬሽን እና 3ኛ ወገን ተከሳሽ የባህር ትራንዚት አገልግሎት ድርጅት ሲሆኑ፣ 3ኛ ወገን ተከሳሽ በተከሳሹ አመልካችነት ነበር ወደ ክሱ የገባው።[98] ተከሳሹ ጥያቄውን ሲያቀርብ የባህር ትራንዚት አገልግሎት ድርጅት በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ቁጥር 43(1) መሠረት ድርሻ ካሣውን ሊከፍል ይገባል በማለት ነበር ያመለከተው።[99] ጉባኤውም ማመልከቻውን መርምሮ የባህር ትራንዚት አገልግሎት ድርጅት በሦስተኛ ወገን ተከሳሽነት ወደ ክሱ እንዲገባ በማድረግ ክሱ ደርሶት ሙሉ መልሱን እንዲያቀርብ ካደረገ እና ክርክሩ ከተጠናቀቀ በኋላ በመጨረሻ ድርሻ ካሣውን እንዲከፍል ወስኖበታል።[100]

ሌሎች ከዚህ ንዑስ ርዕስ ጋር ግንኙነት ባለው መንገድ የተወሰኑ መዝገቦች በከሳሽ ተጣምረው የተከሰሱ 3ኛ ወገኖችን የሚመለከቱ ወይም ግልጽ ግልግል ዳኝነት ሥምምነት ሳይኖር ሦስተኛ ወገኖች የተከሰሱባቸው መዝገቦች ናቸው። ከዚህ አኳያ በፍርድ ቤት እና በግልግል ዳኝነት ጉባኤዎች የተወሰኑ መዝገቦች ለማግኘት ተችሏል። አመልካች የኢትዮጵያ ብዝሃ ሕይወት ኢንስቲቲዩት እና ተጠሪዎች 1ኛ. ኮባልት ኮንስትራክሽን፣ 2ኛ. ንብ ኢንሹራንስ ኩባንያ እና 3ኛ.

[98] የግልግል ዳኝነት ውሳኔዎች፣ 4ኛ መጽሐፍ፣ በኢትዮጵያ አርቢትሬሽን እና ኮንሲሊዬሽን ሴንተር የታተመ፣ ጎዳር 2005 ዓ.ም. ገጽ 137-156።

[99] *Ibid.*

[100] *Ibid.*

ንብ ባንክ አ.ማ.[101] በሆኑበት መዝገብ ክርክሩ በመጀመሪያ በፍርድ ቤት ሲሆን በሁለተኛ ደረጃ ደግሞ በግልግል ዳኝነት ላይ ነበር። የክሱ ምክንያት 1ኛ ተጠሪ ገንብቼ አስረክባለሁ ያለውን የጀኔቲክ ሀብት ማዕከል ገንብቶ አላስረከበም የሚል ሲሆን 2ኛ. ተጠሪ ለአንደኛ ተጠሪ የመልካም ሥራ አፈጻጸም እና የቅድመ ክፍያ ዋስትና በመስጠቱ ነበር። ሁለቱም ተጠሪዎች ከአመልካች ጋር በነበራቸው ስምምነት ውስጥ የግልግል ዳኝነት አንቀጽ ነበረበት። 3ኛ ተጠሪ አብሮ የተከሰሰበት ምክንያትም ከውሉ ጋር ግንኙነት ያለው ቢሆንም በአመልካች እና በ3ኛ ተጠሪ መካከል ግን የግልግል ዳኝነት ስምምነት አልነበረም። 3ኛ ተጠሪ የተከሰሰበት ምክንያት 1ኛ ተጠሪ የግንባታው አካል የሆነውን የማቀዝቀዣ ክፍል ከዱባይ ለማስመጣት አስፈላጊው ክፍያ በአመልካች በኩል በባንኩ በገዢ ሂሳብ እንዲቀመጥ እና ለማቀዝቀዣ ክፍሉ ዕቃ ግዥ ብቻ የሚውል የሌተር ኦፍ ክሬዲት ማረጋገጫ 3ኛው ተጠሪ ከሰጠ በኋላ ዕቃው ሳይገባ ክፍያውን ለ1ኛ ተከሳሽ በመልቀቁ ነበር። በመጀመሪያ ክሱ የቀረበበት ፌዴራል ከፍተኛ ፍርድ ቤት 1ኛ እና 2ኛ ተጠሪዎች የግልግል ዳኝነት ስምምነት ስላላቸው መቃወሚያቸውን ተቀብሎ ክሱን ለመዝጋቱ የሰጠው ማብራሪያ ግድፈት የሌለበት ቢሆንም 3ኛ ተጠሪን በተመለከተ የሰጠው ማብራሪያ ግን በአንድ ክስ ውስጥ ተነጥሎ መቅረት የሌለበት 3ኛ ወገን የሚፈጥረውን ችግር በግልጽ የሚያመለክት ነው።

> *3ኛ ተከሳሽን በተመለከተ ከሳሽ ክስ ያቀረበው ከ1ኛ እና ከ2ኛ ተከሳሾች ጋር በማጣመር በአንድነት እና በነጠላ ገንዘቡን እንዲከፍል እንዲወሰንለት በመሆኑ ይህም ማለት በ3ኛ ተከሳሽ ላይ የቀረበው ክስ ለብቻ ተለይቶ የቀረበ ወይም ለብቻ የሚታይ ሳይሆን በ1ኛ እና በ2ኛ ተከሳሾች ላይ የቀረበውን ክስ ፍ/ቤቱ ለመዳኘት ስልጣን የለውም ከተባለ ደግሞ በ3ኛ ተከሳሽ ላይ የቀረበውን ክስ አይቶ የመወሰን ስልጣን የሌለው በመሆኑ 3ኛ ተከሳሽ በጉዳዩ ሊከሰስ ይገባል ወይስ አይገባም የሚለው ጉዳይ መታየት እና መወሰን ያለበት ጉዳዩን አይቶ የመወሰን ስልጣን በተሰጠው የግልግል ዳኝነት ጉባኤ በመሆኑ ፍ/ቤቱ ይህን ጉዳይ ሳይመለከት ቀርቷል።*[102]

በዚህ መሠረት ጉዳዩ ከፍርድ ቤት ወጥቶ የቀረበለት የግልግል ዳኝነት ጉባኤ 3ኛ ተጠሪው የሚገደድበት የግልግል ዳኝነት ስምምነት ያለመኖሩን በመጥቀስ ያቀረበውን የመጀመሪያ ደረጃ መቃወሚያ ተመልክቶ ከክሱ አሰናብቶታል። ጉባኤው ጉዳዩን ያየበትን መንገድ የበለጠ ለመረዳት ትችቱን ቃል በቃል እንደሚከተለው እንመልከት።

> *የ3ኛ ተጠሪ መቃወሚያ በአመልካች እና በ3ኛ ተጠሪ መካከል የሚፈጠር አለመግባባት በግልግል ዳኝነት እንዲታይ ስምምነት የሌለ በመሆኑ እና የግልግል ተቋሙም ጉዳዩን ለማየት ስልጣን የሌለው መሆኑን፤ እንዲሁም በአመልካች እና በተጠሪ መካከል የተፈጠረው አለመግባባት ከግንባታ ውሉ አፈጻጸም ጋር ማይገናኝ የሌተር ኦፍ ክሬዲት ጉዳይ እንደመሆኑ በግንባታ ውሉ ውስጥ በተጠቀሰው የግልግል ዳኝነት ስምምነት ውስጥ የማይሸፈን መሆኑን በመግለጽ 3ኛ ተጠሪ ከክሱ እንዲወጣ የሚል ነው። የግልግል*

[101] አመልካች የኢትዮጵያ ብዝሃ ሕይወት ኢንስቲቱት እና ተጠሪዎች 1ኛ. ኮባልት ኮንስትራክሥን፣ 2ኛ. ንብ ኢንሹራንስ ኩባንያ እና 3ኛ. ተጠሪ ንብ ባንክ አ.ማ.፣ የፌዴራል ከፍተኛ ፍርድ ቤት፣ መዝገብ ቁጥር 175146፣ ጥቅምት 7 ቀን 2009 ዓ.ም. ።

[102] *Ibid.*, at 7.

ዳኝነት ጉባኤው እንደመረመረውም 3ኛ ወገን ተጠሪ በዝግ ሂሳብ እንዲከፍት በተደረገበት ግንኙነት ውስጥ አለመግባባት ቢከሰት በግልግል ዳኝነት እንዲታይ ስምምነት የሌለ መሆኑን መረዳት ተችሏል። በመሆኑም 3ኛ ተጠሪ ከዚህ ክስ እንዲወጣ ብይን ተሰጥቷል።[103]

በዚህ ላይ ሁለት ነጥቦችን ብቻ አንስቶ ማለፍ ግድ ይላል። አንደኛ፥ 3ኛ ተጠሪን በተመለከተ ፍርድ ቤትም ጉባኤውም ስልጣን የለኝም እንዳሉ ስናይ በከሳሽ በኩል ፍትህ የማግኘት መብት መጣበብ አደጋ ሊከሰት እንደሚችል ልብ ማለት ያስፈልጋል። ሁለተኛ፥ ከግልግል ዳኝነት ጉባኤው ውሳኔ ይዘት አንጻር የ3ኛ ተጠሪ ውል ከግንባታ ውሉ ጋር ግንኙነት የለውም መባሉ የሚያሳምን አይደለም። የውሉ ዓይነት የኤል ሲ ውል (Letter of Credit Transaction) መሆኑ ግልጽ ነው። ነገር ግን ዓላማው ለአመልካች ዋስትና መስጠት ነው። የ2ኛ ተከሳሽ ውል የዋስትና ውል መሆኑ ከግንባታ ውሉ ጋር ያለውን ግንኙነት እንዳላጠፋው ሁሉ የ3ኛ ተጠሪም ውል የኤል ሲ መሆኑ ከግንባታ ውሉ ጋር ያለውን ትስስር ሚያስቀረው አይደለም። በመሆኑም ጉባኤው ከግንባታ ውሉ ጋር ትስስር የለውም በሚል ያቀረበውን ምክንያት መጥቀሱ ብዙ የሚያሳምን አይደለም። ለምክንያትነቱ "3ኛ ተጠሪው የግልግል ዳኝነት ስምምነት የለውም" የሚለው ብቻውን ጠንካራ ምክንያት ነው።

በዚህ ንዑስ ርዕስ ከያዝነው ነጥብ ጋር በተያያዘ ሊነሳ የሚችል አንድ ጉዳይ በግልግል ዳኝነት ስምምነት ውስጥ የሌለ ሰው በፍርድ ቤት ሲከሰስ ሌላ ግንኙነት ባለው ውል ውስጥ ያለውን የግልግል ስምምነት ጠቅሶ የመቃወም ጉዳይ ነው። አመልካች አቶ ኃይላይ ተክላይ፣ እና ተጠሪ ሙቁር የጨው አምራቾች ኃላ/የተ/የግ/ማህበር[104] በሚል ሰበር ድረስ በደረሰ መዝገብ የተሰጠው አስገዳጅ የሕግ ትርጉም በዚህ ነጥብ ላይ እንደ ማሳያ የሚወሰድ ነው። በዚህ ጉዳይ ላይ የግልግል ዳኝነት ስምምነት የተደረገው በኩባንያው ባለአክሲዮኖች መካከል ሲሆን፣ ስምምነቱ የሰፈረው በማህበሩ መተዳደሪያ ደንብ ውስጥ ነበር። ስምምነቱም የሚለው *"በማህበርተኞች መካከል የሚነሱ ማህበር ነክ አለመግባባቶች በኢትዮጵያ የፍትሐ ብሔር ሕግ እና የሥነ-ሰርዓት ሕግ ሰለ ግልግል በተመለከተው ደንብ መሠረት ይወሰናል። ውሳኔው አስገዳጅ እና የመጨረሻ ነው"*።

አመልካች የከሰሱት ማህበሩን ሲሆን አቤቱታቸውም "ማህበሩ በንግድ ሕግ ባለበት ኃላፊነት መሠረት የማህበሩን የሂሳብ ሚዛን ለአባላት አላቀረበም፤ ትርፍና ኪሳራም አላሳወቀም፤ በመሆኑም ማህበሩ ከተቋቋመበት ጊዜ ጀምሮ ያደረገውን እንቅስቃሴ የሚያሳይ የሂሳብ ሪፖርት እንዲያቀርብ፣ ትርፍና ኪሳራ ታይቶ ድርሻዬ ይሰጠኝ" የሚል ነበር።

የመጀመሪያ ደረጃ ፍ/ቤት ክርክሩ ለፍ/ቤት ሊቀርብ አይችልም ሲል ወደ ግልግል ዳኝነት እንዲሄዱ ወስኗል። ከፍተኛ ፍ/ቤትም ይህንን ውሳኔ አጽንቷል። ከዚህ በኋላ መዝገቡ የቀረበለት

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[103] አመልካች የኢትዮጵያ ብዝሃ ሕይወት ኢንስቲቱት እና ተጠሪዎች 1ኛ. ኮባልት ኮንስትራክሥን፣ 2ኛ. ንብ ኢንሹራንስ ኩባንያ እና 3ኛ. ተጠሪ ንብ ባንክ አ.ማ.፣ የአዲስ አበባ ንግድና ዘርፍ ማህበራት ምክር ቤት የግልግል ዳኝነት ተቋም፤ ብይን፣ ሰኔ 7 ቀን 2010 ዓ.ም. ።

[104] አመልካች አቶ ኃይላይ ተክላይ፣ እና ተጠሪ ሙቁር የጨው አምራቾች ኃላ/የተ/የግ/ማህበር የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 12፣ ሕዳር 2004 ዓ.ም. ገጽ 27-30።

የፌዴራል ሰበር ሰሚ ችሎት ጉዳዩን ከመረመረ በኋላ በማህበሩ መተዳደሪያ ደንብ ‹‹ማህበር ነክ ውዝግብ የሚለው አባባል በማህበሩ እና በአባላቱ መካከል ጭምር ሊነሳ የሚችልን ክርክር ሁሉ የሚያጠቃልል ሊሆን ይገባል....›› በማለት ምንም እንኳን ማህበሩ መተዳደሪያ ደንቡ በተፈረመበት ሰዓት ያልተቋቋመ እና የመተዳደሪያ ደንቡ ፈራሚ ባይሆንም የግልግል ዳኝነት ስምምነቱ ተጠቃሚ እንዲሆን ወስኗል።

በተለይ በስምምነቱ ላይ ‹‹በማህበርተኞች መካከል...›› የሚለውን ገዳቢ አገላለጽ ፍርድ ቤቱ የተመለከተበት መንገድ የሚያነጋግር ነው።

> ***ማህበር ነክ አለመግባባት የሚለው ጠቅላላ አነጋገር በዚሁ አንቀጽ ላይ ተጠቅሶ እያለ ከማህበሩ ሊመነጭ የሚችለውን የአለመግባባት ዓይነት ወሰን የሚያጠብ ‹‹በማህበርተኞች መካከል የሚል ቃል ቢገኝም ማህበርተኞቹ ማህበር ነክ አለመግባባት የሚለውን ቃል ሲጠቀሙ የነበራቸው ኃሳብ ምን ነበር? የሚለውን ሁሉ በፍ/ብ/ሕ/ቁ. 1735 ከተመለከተው አንፃር ማየት የሚያሰፈልግ በመሆኑ ይህ ክርክር ያስነሳው አንቀጽ ከነዚህ ማዕዘኖች አኳያ ታይቶ ሊተረጎም የሚገባው ሆኖ አግኝተነዋል።... እንዲሁም ከማህበሩ የሚመነጩት ውዝግቦች በማህበርተኞች መካከል ወይም በማህበሩና በአባላቱ መካከል ሊሆን እንደሚችል እየታወቀ የውዝግቡን ዓይነት በሁለት በመክፈል በማህበሩና በአባላት መካከል ከሆነ ግን ወደ ፍ/ቤ ትእንዲሄድ አስበው ነው ለማለት የተለዩ የማምት መነሻ የሆኑ ምክንያቶች ባለመገኘታቸው፣ በማህበሩ መተዳደሪያ ደንብ አንቀጽ 16 ላይ ማህበር ነክ ውዝግብ የሚለው አባባል በማህበሩና በአባላቱ መካከል ጭምር ሊነሳ የሚችልን ክርክር ሁሉ የሚያጠቃልል ሊሆን ይገባል በሚል የሥር ፍ/ቤቶች የሰጡት ዳኝነት በውል አተረጓጎም ረገድ መሰረታዊ የሕግ ስህተት የተፈፀመበት ሆኖ አልተገኘም።*[105]

በዚህ ጉዳይ ላይ ፍርድ ቤቱ በመጨረሻ የደረሰበት ድምዳሜ የሚያስነቅፍ ባይሆንም የሰጠው ምክንያት ግን በቂ አይደለም። ኩባንያው ከአባላቱ የተለየ ሰው እንደመሆኑ አባላቱ ያደረጉት የመተዳደሪያ ደንብ ውስጥ ያለው ስምምነት ሙሉ በሙሉ ይገዛዋል ወይ? የሚለው በሚገባ መተቸት ያለበት ነጥብ ነው።[106] **አባላቱ ኩባንያውን ወክለው እንዳልተስማሙ ከድንጋጌው መረዳት ይቻላል። ከዚህ ይልቅ ኩባንያው በግልግል ዳኝነት ስምምነት ለመገዛት መርጦ የፍርድ ቤቱን ዳኝነት መቃወሙ በግልግል ዳኝነት ስምምነቱ ውስጥ እንደገባ ሊያስቆጥር ይችላል። ይህን ምክንያት በመስጠት በአመልካች በኩል ‹‹ከኩባንያው ጋር አልተስማማሁም›› የሚለውን ክርክር ውድቅ ማድረግ ይቻል ነበር።**

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[105] Ibid., at 29.

[106] በኩባንያዎች መተዳደሪያ ደንብ ውስጥ የሚቀመጥ የግልግል ዳኝነት ስምምነት ተቀባይነት ላይ ጥያቄ የሚያነሱ ጸሐፍት አሉ። Ann Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 THE GEORGETOWN LAW JOURNAL 583-641 (2016).

3.2.4 በግልግል ዳኝነት የተሰጠ ውሳኔን 3ኛ ወገን መቃወም

ፍርድ ከተሰጠ በኋላ የመቃወም መብት ሌላው ስምምነት ሳይኖር ሦስተኛ ወገኖች ወደ ግልግል የሚገቡበት መንገድ ሊሆን እንደሚችል ከላይ ተገልጿል። በውሳኔው መብቱ የተነካበት ሦስተኛ ወገን በግልግል ዳኝነት የተሰጠ ፍርድን የመቃወም መብት ያለው መሆኑ ባያከራክርም ይህን መብቱን የሚጠይቀው በፍርድ ቤት ነው ወይስ ውሳኔውን በሰጠው የግልግል ዳኝነት ነው የሚለው አከራካሪ ሊሆን ይችላል። ጥቂት በዚህ ነጥብ ላይ የተሰጡ የፍርድ ውሳኔዎች ቢኖሩም ጥያቄው በሚገባ ተመልሷል ለማለት አይቻልም።

የፍትሐ ብሔር ሥነ-ስርዓት ሕግ ቁጥር 358 ውሳኔውን ለሰጠው ፍርድ ቤት ተቃውሞ እንደሚቀርብ ስለሚደነግግ በግልግል ዳኝነት የተሰጠን ውሳኔ የሚቃወም ሰው አቤቱታውን ማቅረብ ያለበት ለግልግል ዳኝነት ጉባኤው ነው የሚል አቋም መያዝ ተገቢ ነው። ነገር ግን ይህ አቋም የራሱ ድክመቶች እንዳሉት ሊካድ አይገባም። ውሳኔ ከተሰጠ በኋላ የግልግል ዳኝነት ጉባኤው ይበተናል፤ የግልግል ዳኞችም ላይኖሩ ይችላሉ (በህመም፣ በሞት፣ አድራሻ በመቀየር) ወዘተ። ከዚህ አኳያ ውሳኔን በግልግል ዳኝነት መቃወም ከባድ ሊሆን ይችላል። ውሳኔውን በፍርድ ቤት መቃወምም በተመሳሳይ አስቸጋሪ ነው። ይህም ውሳኔው በፍርድ ቤት በማይገኝበት ሁኔታ (የውሳኔው ግልባጭ፣ ቀን፣ የመዝገብ ቁጥር ወ.ዘ.ተ. ተለይቶ ካልታወቀ) ውሳኔውን መቃወምን አስቸጋሪ ያደርገዋል።

ቀጥለን የምንመለከታቸው ሦስት የፍርድ ጉዳዮች የመቃወም አመልካቾች አቤቱታቸውን ለግልግል ዳኝነት ጉባኤ ያቀረቡባቸው ሲሆኑ ሦስቱም በይግባኝ ለፍርድ ቤት ቀርበዋል። አንዱ ላይ የፌዴራል ጠቅላይ ፍርድ ቤት የወሰነበት ሲሆን ሁለቱ ለሰበር ቀርበው አንዱ እልባት አግኝቷል፤ ሌላው እየታየ ይገኛል። እነዚህ መዝገቦች 1ኛ. የመቃወም አመልካች ትርሲት ቶሎሳ፣ እና ሦስት ተጠሪዎች[107]፣ 2ኛ የመቃወም አመልካች ወ/ሮ ዳንሴ ጉርሙእና ተጠሪ አቶ ተመስገን ደምሴ[108] ሲሆኑ ሦስተኛው መዝገብ በ27/02/2011 ዓ.ም. የተወሰነ መዝገብ ሆኖ አሁን በሰበር እየታየ ሲሆን ለሚስጥራዊነት ሲባል የተከራካሪዎቹ ስም አልተገለጸም።[109]

ሦስቱንም ጉዳዮች በዝርዝር እንመልከታቸው። የእነ ትርሲት ቶሎሳ መዝገብ አጀማመር በሁለቱ ተጠሪዎች እና በሦስተኛው ተጠሪ መካከል የነበረ ቤት ገንብቶ በመሸጥ ውል መነሻነት የተጀመረ ነው። ጉዳዩ በግልግል ዳኝነት ተሰምቶ ከተወሰነ በኋላ የመቃወም አመልካች ለክርክሩ መነሻ የሆነው ቤት የእኔ ነው፤ የማስተዳድርውም የምኖርበትም እኔ ስለሆንኩ እኔ ሳላውቅ የተደረገ የግልግል ዳኝነት ውሳኔ እንዲሻርልኝ በማለት አቤቱታ ለግልግል ጉባኤው አቅርበዋል። ጉባኤው

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[107] አመልካች ወ/ሮ ትርሲት ቶሎሳ እና ተጠሪዎች አቶ ኪዳኔ ዮሐንስ፣ ወ/ሮ እምሯ አሰፋ እና አያት አክሲዮን ማህበር፣ የፌዴራል ጠቅላይ ፍርድ ቤት፣ መዝገብ ቁ. 126145፣ ታህሳስ 10 ቀን 2009 ዓ.ም. ።

[108] አመልካች ወ/ሮ ዳንሴ ጉርሙ እና ተጠሪአቶ ተመስገን ደምሴ፣ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት፣ የሰ/መ/ቁጥር 137302፣ ታህሳስ 26 ቀን 2010 ዓ.ም. ።

[109] የግልግል ዳኝነት ጉባኤው ሰብሳቢ መዝገቡን ለማመልከት የግልግል ዳኞቹን ስም እንድጠቀም ስለፈቀዱልኝ እያመሰገንኩ እነሱም አቶ በላይ ከተማ፣ አቶ ሺበሺ ይግዛው እና አቶ አበበ አሳመረ ናቸው። ጉባኤው ውሳኔውን የሰጠው በጥቅምት 27 ቀን 2011 ዓ.ም. ነው።

አቤቱታቸውን ተቀብሎ ከመረመረ በኋላ አቤቱታውን ውድቅ አድርጓል። ምክንያቱንም ሲያብራራ "የግልግል ጉባኤ የዳኝነቱን ሥራ የፍትሐ ብሔር ሥ/ሥ/ ሕግ ድንጋጌዎችን ተከትሎ ማከናወን እንደሚገባው የሕጉ ቁጥር 317(1) የሚደነግግ ቢሆንም ጉባኤው በተዋዋዮች የውል ስምምነት መሠረት የሚቋቋም በመሆኑ የዳኝነት ሥልጣኑ ውስን ነው፤ በተዋዋዮቹ ወገኖች መካከል የሚነሳ ክርክርን ከማየት ውጭ የዳኝነት ስልጣን አይኖረውም" ሲል አስቀምጧል። ይህ የጉባኤው ምክንያት የሚያሳምን ነው።

ይሁን እንጂ ጉባኤው በፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ መሠረት ያለውን ስልጣን ሲያብራራ ወደአልተገባ ምናልባትም የተሳሳተ ትንታኔ ውስጥ የገባ ይመስላል።

> *የግልግል ጉባኤ ውሳኔ ከሰጠ በኋላ በውሳኔው ላይ ጥያቄ ማንሳት የሚችሉት ተከራካሪ ወገኖች ብቻ እንደሆኑ ከ350 እስከ 357 የተመለከቱት የፍትሐ ብሔር ሥ/ሥ/ሕግ ድንጋጌዎች ያስረዳሉ። እንዲህ ዓይነት ጥያቄዎች ሊቀርቡ የሚችሉትም ውሳኔውን ለሰጠው ጉባኤ ሳይሆን ለይግባኝ ሰሚ ፍርድ ቤት ነው። የመቃወም አመልካች አቤቱታ ያቀረቡት በፍትሐ ብሔር ሥ/ሥ/ሕግ ቁጥር 358 የተደነገገውን በመጥቀስ...ነው። የመቃወም አመልካች ጥያቄ በግልግል ጉባኤ የተሰጠ ውሳኔን በሚመለከት ሕጉ ከደነገገው ውጭ በመሆኑ በጥንቃቄ ተመርምሯል።...የፍትሐ ብሔር ሥ/ሥ/ሕግ ከቁጥር 358 እስከ 360 የሚደነግገው ሲታይ የሕጉን ቁጥር 358 ድንጋጌ በመጥቀስ የሚቀርብ የመቃወሚያ አቤቱታን መሠረት አድርጎ ጉባኤው ውሳኔና ትዕዛዝ መስጠት እንዲችል በግልጽ ሥልጣን ሰለሳልተሰጠው የራሱን ውሳኔ መሠረዝ የሚችልበት የሕግ አግባብ ያለመኖሩን ተገንዝቧል።*

እዚህ ላይ ጉባኤው በቁጥር 358 መሠረት የሚቀርብ አቤቱታን መወሰን እንደሚችል በግልጽ አልተደነገገም የሚለው ተገቢነት የሌለው ሀተታ ነው። ፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ቁጥር 315-320 እና 350-357 ስለ ግልግል ዳኝነት ድንጋጌዎች መቀመጣቸው በሌሎች ድንጋጌዎች ለፍርድ ቤት የተሰጡ ስልጣኖችን የግልግል ዳኝነት ጉባኤ አይጠቀምም ወደ ሚል ድምዳሜ የሚያደርስ አይደለም። በተለይ በቁጥር 358 ላይ የመቃወም ማመልከቻ መቅረብ ያለበት ውሳኔውን ለሰጠው ፍርድ ቤት ነው የሚለውን ሀሳብ በበቂ ሳይተችበት ማለፉ ጉባኤው የደረሰበትን ድምዳሜ ከጥያቄ የሚያስገባ ነው።

በውሳኔው ቅር የተሰኙት የመቃወም አመልካች ለፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ አቅርበው ፍርድ ቤቱም የግልግል ጉባኤውን ብይን በመሻር አመልካችን ወደ ክርክሩ እንዲያስገባ እና ጉዳዩን ከእንደገና ሰምቶ እንዲወስን ጉባኤውን አዟል። ፍርድ ቤቱ የውሳኔውን ምክንያት ሲያብራራ የግልግል ዳኝነት መሠረቱ ውል ነው የሚለውን ሀሳብ ጨርሶ አላየውም። ይልቁንም ትኩረቱን ያደረገው በግልግል ዳኝነት የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ አፈጻጸም ላይ ነው።

> *የግልግል ዳኝነትን የክርክር አመራር አስመልክቶ በፍ/ብ/ሥ/ሥ/ ህግ አንቀጽ 317/1/ መርህ ተደንግጓል። ይሄውም የሥነ-ስርዓት ሕጉ ጋር በተመሳሳይ አኳኋን መመራት እንዳለበት ተመልክቷል። ከዚህም ባሻገር በፍ/ብ/ሕጉ አንቀጽ 3345 እንደተደነገገው*

የዘመድ ዳኝነት የክርክር አመራርም ሆነ የውሳኔው አፈጻጸም በፍ/ብ/ሥ/ሥ/ሕግ በተደነገገው አግባብ ስለመሆኑ ተመልክቷል። ...ስለሆነም የግልግል ዳኝነት አጠቃላይ የክርክሩ አመራር በፍ/ብ/ሥ/ሥ/ሕጉ መሠረት ስለመሆኑ በሕጉ በግልጽ ተደንግጎ እያለ የክርክር ተካፋይ ያልነበሩት ይግባኝ ባይ በውሳኔው መብቱ ተነክቷል ሲሉ በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 358 መሠረት ያቀረቡትን አቤቱታ ተቀብሎ የመመርመር እና ተገቢውን ውሳኔ የመስጠት ስልጣን እያለው አቤቱታውን አልቀበልም ማለቱ ሥነ-ሥርዓታዊ ባለመሆኑ ሊታረም ይገባል።

የፍርድ ቤቱ ምክንያት የሚያስነቅፍ ባይሆንም በግልግል ዳኝነት የተሰጠ ውሳኔን መቃወምን አስመልክቶ የሚነሳውን የክርክሩን ሌላኛውን ገጽታ አልነካውም። የግልግል ዳኝነት ከተዋዋዮች ስምምነት የሚመነጭ እንደመሆኑ ጉዳዩን ከዚህ አንጻር ማየት ነበረበት። በተለይ በጉባኤው በኩል የተነሳው ስልጣን የለኝም የሚል አቋም ከተዋዋዮቹ ውል ጋር የተያያዘ እንደመሆኑ ይህን ጉዳይ ፍርድ ቤቱ ሳይተችበት ማለፍ አልነበረበትም። እዚህ ላይ የመቃወም አመልካችዋ አቤቱታቸውን ለግልግል ዳኝነት ማቅረባቸው በአሳቸው በኩል የነበረውን የፈቃድ ጉድለት እንደሚቀርፍ መታመን አለበት። በሌላ በኩል ከመጀመሪያ ተከራካሪዋ ሊነሳ የሚችለው ከመቃወም አመልካች ጋር የግልግል ዳኝነት ስምምነት ስለሌለን የመቃወም ማመልከቻው በግልግል መታየት የለበትም የሚል ክርክር ውሃ የማያነሳ ክርክር ስለሆነ ሊታለፍ የሚገባው ነው ብሎ መከራከር ይቻላል። ነገር ግን ይህንን ነጥብ ፍርድ ቤቱ በግልጽ ቢጠቅሰውና ለውሳኔው አንዱ ምክንያት ቢያደርገው ኖሮ ውሳኔው የተሟላ ይሆን ነበር።

ወደ ሁለተኛው፣ ማለትም የእነ ወ/ሮ ዳንሴ ጉርሙ ጉዳይ ስንመጣ የክርክሩ መነሻ የሕንጻ ኪራይ ውል ጋር የተያያዘ ነው። በስር በግልግል ዳኝነት በነበረው ክርክር ተጠሪ ከሳሽ ሲሆኑ ተከሳሽ የነበሩት የተጠሪን ሕንጻ ተከራይተው የንግድ ሥራ ሲያካሂዱበት የነበሩ ግለሰብ ናቸው። ክርክሩም ተከሳሹ የተከራዩትን ሕንጻ የመለሱ ቢሆንም ለዕድሳት ከሳሽ ያወጣውን ወጪ እንዲተኩ፣ ያልከፈሉትን ውዝፍ ኪራይ እንዲከፍሉ እና የተከራዩት ሕንጻ ጠበበኝ በማለታቸው ከተከራዩት ሕንጻ በተጨማሪ ከሳሽ የሰራላቸውን ባለ 5 ክፍል ቤት እንዲያስረክቡ በሚል በከሳሽ የቀረበ ሲሆን ዋናው ክርክር በተጨማሪነት የተሰራው የ5 ክፍል ቤት የማን ነው የሚል ነበር። የግልግል ዳኝነት ጉባኤው ክርክሩን ሰምቶ እና ማስረጃ መዝኖ በተጨማሪነት የተሰሩ ቤቶችን ለከሳሽ ከወሰነ በኋላ የመቃወም አመልካች በቁጥር 358 መሠረት 5 ክፍሎች የተሰሩበት ቦታ የእሳቸው መሆኑን ገልጸው ጉባኤው ፍርዱን ሽሮ ወደ ክርክሩ እንዲያስገባቸው አመልክተዋል። ጉባኤው ‹‹በመቀጠልም ግራ ቀኞቸውን በማከራከር የቀረበውን የሰነድ ማስረጃ በመመዘን፣ አስቀድሞ የተሰሙትን የሰው ምስክሮች ቃል በመመርመር፣ በሰጠው ብይን ከሳሽ እነዚህን ቤቶች መስራታቸውን በምስክሮች ቃል ያስረዱ ሲሆን የመቃወም አመልካች ይህን የሚያስተባብል ማስረጃ ያላቀረቡ በመሆኑ የመቃወም አመልካች ክስ ባቀረቡበት አምስት ክፍል ቤቶች ላይ በውል ወይም በሕግ የተረጋገጠ መብትና ጥቅም የላቸውም በማለት ...አቤቱታቸውን ውድቅ

በማድረግ ወስኗል።''[110] የመቃወም አመልካች በዚህ ብይን ላይ ለፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ብለው ፍርድ ቤቱ የግልግል ጉባኤውን ውሳኔ በማጽናቱ የሰበር አቤቱታው ቀርቧል።

የሰበር ችሎት ጉዳዩን ሲመረምር በማመልከቻው ላይ ያልቀረበ አዲስ ጭብጥ በመያዝ ነበር። ይሄውም በተጨማሪነት የተሰሩትን 5 ክፍል ቤቶች በተመለከተ የግልግል ዳኝነት ጉባኤው ከመጀመሪያው አንስቶ የዳኝነት ስልጣን ነበረው ወይስ አልነበረውም የሚለውን ጥያቄ ነው። ችሎቱ መዝገቡን መርምሮ እንደደረሰበት የግልግል ዳኝነት ስምምነት የሰፈረበት

> *የሕንጻ ኪራይ ውሉ የተፈጻሚነት አድማስ በውሉ አንቀጽ 1 የተመለከተ እና የቤት ቁጥር 414 ሕንጻ ከነግቢ እና በጊዚያዊነት የተሰሩትን ተገጣጣሚ ግንባታዎችን እንደሚመለከት እና ይህን የሚያመለክት አባሪም የውሉ አካል እንደሆነ ያሳያል። በዚህ ውል የአከራይና የተከራይ መብትና ግዴታ በዝርዝር ተመልክቷል። በመሆኑም የግልግል ጉባኤው በዚህ ጉዳይ ስልጣን ሊኖረው የሚችለው በውሉ የተፈጻሚነት ወሰን ድረስ እንደሆነ የሚያከራክር አይደለም።*[111]

ችሎቱ ይህን ካለ በኋላ አቋሙን ከህጉ ጋር በትክክል በማዛመድ ''የግልግል ዳኝነት ስልጣን በጠባቡ መትርጎም እንዳለበት የፍ/ብ/ሕ/ቁ. 3329 ስር ተደንግጎ እናገኛለን፤ ....በመሆኑም ''በዚህ አግባብ የተቋቋመ የግልግል ጉባኤ ስልጣን ሊኖረው የሚችለው በዚህ አግባብ ተስማምተው ገላጋይ ዳኞችን መርጠው ስልጣን በሰጡት ወገኖች ብቻ ላይ እና በዚህ አግባብ እንዲታይላቸው በተስማሙበት ጉዳይ ወሰን ድረስ ብቻ እንደሆነ መገንዘብ ያስፈልጋል'' በማለት ጉዳዩን በጥልቀት እና በትክክል መርምሮታል። እዚህ ላይ ችሎቱ ''ስልጣን በሰጡት ወገኖች ብቻ ላይ'' ሲል የግላዊ የዳኝነት ስልጣንን (personal jurisdiction) እና ''በተስማሙበት ጉዳይ ወሰን'' ሲል የስረ-ነገር ስልጣንን (material jurisdiction) ለይቶ በማመልከት የጉባኤውን ስልጣን ከሁለት ጎን ማየቱ የሚያስደንቅ አይታ ነው።

ነገር ግን ችሎቱ የግልግል ዳኝነት ጉባኤ በ358 መሠረት የሚቀርብ የመቃወም አቤቱታን የማስተናገድ ስልጣን አለው ወይስ የለውም? የሚለው ወሳኝ ነጥብ ላይ ግልጽ መልስ አልሰጠበትም። በውሳኔው ገጽ 6 ላይ የሰፈረው ሀተታ ስልጣን አለው የሚል ይመስላል። እንዲህ ይነበባል፡-

> *የአሁን አመልካች እነዚህን የግልግል ዳኞች መርጠው ጉዳያቸው እንዲታይላቸው ስልጣን የሰጡት ነገር ባለመኖሩ የግልግል ጉባኤው የአመልካችን የዳኝነት ጥያቄ ለመዳኘት ስልጣን የለውም። ይህ ሲባል ግን የግልግል ጉባኤው የአመልካችን መቃወሚያ ከጅምሩ ስልጣን የለኝም በሚል ምክንያት ውድቅ እንዲያደርግ ሳይሆን አመልካች ያቀረቡትን የፍርድ መቃወሚያ ማመልከቻ መሠረት በማድረግ አስቀድሞ*

[110] አመልካች ወ/ሮ ዳንሴ ጉርሙ፣ ግርጌ ማስታወሻ ቁጥር 90፣ ገጽ 3።

[111] *Ibid.*

እነዚህ አምስት ክፍል ቤቶችን በተመለከተ የባለሀብትነት መብት ላይ የሰጠውን ውሳኔ ...ማንሳት ይገባው ነበር።[112]

ጉባኤው ስልጣን ከሌለው በፍ/ሥ/ሥ/ሕ/ቁ. 9 እና 231 መሠረት የመቃወም አመልካችን አቤቱታ መመለስ ነው ያለበት። በእነዚህ ድንጋጌዎች ላይ "አቤቱታን መመለስ" የሚለው አገላለጽ ስልጣን የሌለው ፍርድ ቤት ወይም የግልግል ጉባኤ ማመልከቻን ማስተናገድ እንደሌለበት አመላካች ነው። የሰበር ችሎቱ በማጠቃለያው ላይ ደግሞ "ሲጠቃለል የግልግል ጉባኤው የማይንቀሳቀስ ንብረት የባለሀብትነት የመፋለም ዳኝነት ጥያቄን ተቀብሎ ግራ ቀኞቸውን አከራክሮ የመወሰን ስልጣን ሳይኖረው ለክርክር ምክንያት የሆኑት አምስት ክፍል ቤቶች የአሁን ተጠሪ ንብረት ናቸው፤ አመልካች ግን መብትና ጥቅም የላቸውም በማለት የሰጡት ውሳኔ እና የፌዴራል ጠቅላይ ፍ/ቤት ይህን ውሳኔ ማጽናቱ መሠረታዊ የሕግ ስህተት የተፈጸመበት ስለሆነ" በማለት 5 ክፍል ቤቶቹን በሚመለከት የተሰጠውን የውሳውን ክፍል ብቻ ሽሮታል።[113]

ከላይ የተጠቀሱትን የውሳኔውን ሀተታዎች ስንመለከት ጉባኤው የመቃወም አቤቱታን የማስተናገድ ስልጣን አለው የሚል ይመስላል። ነገር ግን በሚቀጥለው ገጽ ላይ ችሎቱ ጉባኤው በማንኛውም ሁኔታ አመልካች ላይ ስልጣን የለውም ሲል ይገልጻል። "የአሁን አመልካች በበኩላቸው የራሴ ንብረት ናቸው የሚሏቸውን እነዚህን ቤቶች በተመለከተ በገላጋይ ዳኞች እንዲታይላቸው የተስማሙት ነገር የለም፤ የመረጡትም የገላጋይ ዳኛ አለመኖሩን የሥር ፍርድ ቤት ውሳኔ ግልባጭ ያመለክታል። ይህ ከሆነ ደግሞ የአሁን አመልካች በኢ.ፌ.ዲ.ሪ. ሕገ-መንግስት አንቀጽ 37 እና 78 መሠረት ነጻና ገለልተኛ በሆነ መደበኛ ፍ/ቤት ጉዳያቸው ታይቶ ውሳኔ እንዲሰጥበት ሕገ መንግስታዊ መብት አላቸው። ምክንያቱም በዚህ ጉዳይ ውሳኔ የሰጠው የግልግል ጉባኤ ለአመልካች ነጻና ገለልተኛ የዳኝነት አካል ነው ለማለት ስለማይቻል ነው።"[114]

ከጽሁፉ ርዕስ መራቅ እንዳይሆን እንጂ የመጨረሻው አረፍተ ነገር ብዙ የሚያነጋግር ነው። የግልግል ዳኝነት ተቋማዊ ስርዓትን ዋጋ የሚቀንስ በመሆኑ ብቻ ሳይሆን በንድፈ ሃሳብ ደረጃም ስህተት ነው። የግልግል ዳኝነት ጉባኤ ነጻና ገለልተኛ የዳኝነት አካል እንጂ የተከራካሪዎቹ ጥቅም አስከባሪ ብቻ ተደርጎ መወሰድ ያለበት አይደለም። የፍትሐ ብሔር ሕጉ በቁጥር 3340(2) ላይ የግልግል ዳኞች ከተከራካሪዎቹ ነጻና ገለልተኛ መሆን አለባቸው ሲል እንደማንኛውም ዳኝነት አካል ከየትኛውም አቅጣጫ ነጻና ገለልተኛ እንዲሆኑ በማሰብ ነው። ስለዚህ ከሦስተኛ ወገኖች አንጻር የግልግል ጉባኤ ነጻና ገለልተኛ አይደለም የሚለው አገላለጽ ሕግን የተከተለ አይደለም። ሀተታውም ለውሳኔው አስፈላጊ አልነበረም።

ዞሮ ዞሮ ከመነሻው የሰበር ችሎቱ ጥሩ እያብራራ የመጣ ቢሆንም በመጨረሻ ግን ሁለት ነጥቦችን ያምታታ ይመስላል። ይህም፡- 1) ችሎቱ ውሳኔውን በከፊል የሻረው የአምስት ክፍል ቤቶቹን ጉዳይ በተመለከተ ከጅምሩም የግልግል ዳኝነት ጉባኤ ስልጣን (የስረ-ነገር ዳኝነት ስልጣን)

[112] *Ibid.*, at 6፣ ሰረዝ የተጨመረ።
[113] *Ibid.*, at 7.
[114] *Ibid.*

የለውም በሚል ነው? ወይስ 2) ችሎቱ ውሳኔውን በከፊል የሻረው አመልካች ላይ ጉባኤው ስልጣን (ግላዊ የዳኝነት ስልጣን) የለውም በሚል ነው? ወይስ 3) ጉባኤው የስረ-ነገርም ግለዊም የዳኝነት ስልጣን የለውም በሚል ነው?

በዚህ ጸሐፊ እምነት ትክክለኛው ድምዳሜ ጉባኤው የስረ ነገር ዳኝነት ስልጣን የለውም የሚል ነው። በስረ-ነገር ረገድ ስልጣን እንደሌለው ችሎቱ በሚገባ አብራርቶታል። ይሄውም ከመጀመሪያው በተዋዋዮቹም መካከል ቢሆን የአምስት ክፍል ቤቱን በተመለከተ በውሉ ስላልተሸፈነ ጉባኤው የስረ-ነገር ስልጣን አልነበረውም። ስለዚህ በአንድ በኩል የስረ-ነገር ስልጣን እና ግላዊ ስልጣን ሁለቱም መሟላት ስላለባቸው አንዱ በመጉደሉ ብቻ ሌላኛውን ማጣራት እንደማያስፈልግ ገልጾ ውሳኔውን መሻር ውሳኔውን የተሻለ ግልጽ ያደርገው ነበር።

ግላዊ ስልጣን ላይ ስንመጣ ከላይ እንደተመለከትነው አመልካች ለጉባኤው ማመልከቻ ማቅረባቸው በጉባኤው የዳኝነት ስልጣን መስማማታቸው አይደለም ወይ? የሚለው መተቸት የሚገባው ነጥብ ነው። ጉባኤው የስረ-ነገር ስልጣን ቢኖረው ኖሮ የአመልካች አቤቱታ ጉባኤው በአመልካች ላይ ስልጣን እንዲኖረው ያስችል ነበር። ለምሳሌ የመቃወም አመልካች "ሕንጻው የእኔ ነው፣ ወይም ኪራይ መከፈል ያለበት ለእኔ ነው" ብለው የቀረቡ ቢሆን ኖሮ ክርክሩ ጉባኤው የዳኝነት ስልጣን በተዋዋዮቹ በተሰጠው ጉዳይ ላይ ስለሆነ ወደ ግልግል ዳኝነት ስምምነቱ ፈቅደው መግባት (accede ማድረግ) ይችላሉ። ማመልከቻን ወስኑልኝ ብሎ ከመጠየቅ በላይ የፈቃድ አመላካች ምን ሊሆን ይችላል? ነገር ግን አመልካች ወደው የሚገቡበት ተገቢነት ያለው የግልግል ዳኝነት ስምምነት የለም፤ ስለዚህ በዚህ ጉዳይ ላይ ጉባኤው የዳኝነት ስልጣን የለውም። ችሎቱ ጉዳዩን ከዚህ አንጻር በዝርዝር ምርምሮ ማየት ነበረበት። ከዚህ በተቀረ የሰበር ችሎቱ በዚህ መዝገብ የደረሰበት ውሳኔ ከውጤት አኳያ የሚያስነቅፈው አይደለም።

ወደ ሦስተኛው መዝገብ ስንመጣ ጉዳዩ በግልግል ዳኝነት ጉባኤ የታየ ነበር። ምንም እንኳን በአሁኑ ሰዓት በሰበር እየተመረመረ ያለ ቢሆንም ጉባኤው የስልጣንን ጉዳይ የመረመረበት አቅጣጫ ትምህርት ሰጪ ይሆናል በሚል እንደሚከተለው ይቀርባል። በዚህ መዝገብ የነበረው ክርክር በመጀመሪያው መዝገብ ሁሉ ቤት ገንብቶ ከመሸጥ ውል ጋር የተያያዘ ነው። የግልግል ጉባኤው በገዢ እና በሪል እስቴቱ መካከል ያለውን ያለመግባባት ውሳኔ ሰጥቶ መዝገቡን ከዘጋ በኋላ የመቃወም አመልካች በፍ/ሥ/ሥ/ሕ/ቁ. 358 መሠረት የመቃወም አቤቱታ ለጉባኤው አቅርበዋል።

ጉባኤው ከሳሽ እና ተከሳሽ ለነበሩት ወገኖች አስተያየት እንዲሰጡበት ያዘዛቸው ሲሆን ከሳሽ በውል በተቋቋመ የግልግል ዳኝነት ላይ ጉባኤው የመቃወም አመልካችን አቤቱታ ሊያስተናግድ አይገባም ሲል ተከሳሽ ለክርክሩ ተፈጻሚ የሚሆነው የፍ/ሥ/ሥ/ሕግ እንደመሆኑ የመቃወም አቤቱታውን ጉባኤው ለማስተናገድ ስልጣን እንዳለው ገልጾ ተከራክሯል። ጉባኤው የሁለቱንም አስተያየቶች ከመረመረ በኋላ የፍ/ሥ/ሥ/ሕ/ቁ. 358 ድንጋጌን በማገናዘብ ስልጣን የለኝም ወደሚል ድምዳሜ ደርሷል። በፍ/ሥ/ሥ/ሕ/ቁ. 358 የመቃወም አቤቱታ አቅራቢውን በቀድሞው ክርክር "...ተካፋይ መሆን የሚገባው..." ወይም "...በክርክሩ ውስጥ ለመግባት

የሚችል...›› የሚሉትን ሀረጎች አጽንዖት ሰጥቶ ተርጉሟቸዋል። እንደ ጉባኤው አተረጓጎም ‹‹በግልግል ጉባኤ ተካፋይ መሆን ይገባው የነበረ ማለት የግልግል ጉባኤውን ያቋቋመው ውል ወገን የሆነ ማለት ነው። በዚህ ጉዳይ የመቃወም አመልካች ግልግሉን ያቋቋመው ውል አካል ካልሆነ እንዴት የክርክሩ ተካፋይ ሊሆን ይችላል?›› በማለት የመቃወም አመልካችን አቤቱታ ሳይቀበለው ቀርቷል። በተጠሪ በኩል የቀረበውን በግልግል ዳኝነት የክርክር አመራር ተፈጻሚ የሚሆነው ሕግ በፍ/ሥ/ሥ/ሕግ ነው የሚለውን አስተያየት የግልግል ዳኝነት ሙሉ በሙሉ ሳይሆን በተቻለ መጠን ከፍርድ ቤት ሥነ-ስርዓት ጋር እንዲመሳሰል ማድረግ ነው የሚጠበቅበት፤ ‹‹ከዚህም በላይ ስለ ገላጋዩ ስልጣን የሚደረጉ የግልግል ቃሎች በጠባቡ መተርጎም እንዳለባቸው በፍ/ሕ/ቁ. 3329 በግልጽ የተደነገገ ነው›› ሲል ጉባኤው አልፎታል። በመጨረሻም ‹‹አንደኛው ተዋዋይ ከመቃወም አመልካች ጋር በግልግል ለመዳኘት አልፈቀድኩም እሱም በዚህ ለመዳኘት መብት የለውም በሚል ስለተቃወመ ጉባኤው የመቃወም አቤቱታውን ተቀብሎ ለማየት የሕግ መሠረት አለው ለማለት አልተቻለም።›› ሲል የመቃወም አመልካችን አቤቱታ ያልተቀበለበትን ምክንያቶች በዝርዝር አስቀምጧል።

በዚህ ጸሐፊ አተያይ የግልግል ዳኝነት ጉባኤ ስልጣን በጠባቡ መትርጎም አለበት የሚለውን በመጥቀስ ከቀረበው ውጭ ያሉት ምክንያቶች አሳማኝ አይደሉም። በመጀመሪያ በቁጥር 358 መሠረት *በቀድሞው ክርክር ‹‹...ተካፋይ መሆን የሚገባው...›› ወይም ‹‹...በክርክሩ ውሰጥ ለመግባት የሚችል...›› የሚሉትን ሀረጎች* ጉባኤው የተረጎመበትን መንገድ እንመልከት። ይህ ሀረግ ታሳቢ የሚያደርገው መብቱ የሚነካበትን ሰው እንጂ በግልግል ስምምነት ውስጥ ተዋዋይ የሆነ ወይም ያልሆነ ተፈልጎ ነው ለማለት ያስቸግራል። ድንጋጌው የሚያያዘው በፍ/ሥ/ሥ/ሕ/ቁ. 39፣ 40፣ 41 እና 43 በተደነገጉት መሠረት መብታቸው በመነካቱ ወይም ድርሻ ካጣ ለመክፈል ስለሚገደዱ በክርክር መግባት ስላለባቸው ሦስተኛ ወገኖችነው ብሎ ጸሐፊው ያምናል።[115]

ሌላው የፍትሐ ብሔር ሥነ-ስርዓት ሕግ በግልግል ዳኝነት ያለውን አፈጻጸም በተመለከተ ጉባኤው ያንጸባረቀው አቋም አከራካሪ ነው። የፍ/ሥ/ሥ/ሕ/ቁ. 317(1) በግልግል ዳኝነት ወቅት የሥነ-ስርዓት ጉዳዮች አፈጻጸም *‹‹ሁሉ በተቻለ መጠን በፍትሐ ብሔር ጉዳይ ከሚሰራበት ሥነ-ሥርዓት ጋር ተመሳሳይና ተስማሚ መሆን አለበት››* ሲል በተቻለ መጠን የሚለው የተወሰነ ልዩነት (departure) እንደሚኖረው እንደሚያመላክት አያጠራጥርም። ነገር ግን በምን ዓይነት ጉዳዮች ነው የሥነ-ሥርዓት ሕጉ ካስቀመጠው ጥብቅ መመሪያዎች መውጣት የሚቻለው የሚለው በጥንቃቄ መመርመር ያለበት ጉዳይ ነው። ድንጋጌው መተርጎም ያለበት የተከራካሪዎችንም ይሁን የሦስተኛ ወገኖችን መብት በሚነካ መንገድ የክርክርን አመራር ለማስተናገድ በሚፈቅድ መንገድ መሆን ግን አይኖርበትም። ከፍ/ብ/ሥ/ሥ/ሕጉ ድንጋጌዎች ውጭ ክርክሩን መምራት የሚቻለው ወይም የሚፈቀደው በመብቶች ላይ አሉታዊ ውጤት እስካላስከተለ ድረስ ብቻ ነው።

በመጨረሻም አንደኛው ወገን ከመቃወም አመልካች ጋር የግልግል ስምምነት የለንም በሚል መቃወሙ ጉባኤው ስልጣን የለኝም በሚል ለመወሰኑ አሳማኝ ምክንያት አይደለም። በመሠረቱ

[115] ከላይ የሦስተኛ ወገኖች ተሳትፎ እና የሥ-ነስርዓት ሕግ መሠረቶች በኢትዮጵያ በሚለው ርዕስ የተደረገውን ትንታኔ ይመልከቷል።

አንድ ተዋዋይ ከሌላው ጋር በግልግል ዳኝነት ያለመግባባትን ለመፍታት ከተስማማ በዚያው የግልግል መድረክ ሌላ 3ኛ ወገን መግባቱ የተለየ የመብት ወይም የጥቅም ጉዳት ሊያደርስበት ይችላል የሚለው ክርክር የሚያሳምን አይደለም። የግልግል ዳኝነት ስምምነት የሚፈጥረው መብትና ግዴታ ግላዊ ነው፤ አንድ ሰው ከመረጠው ሌላ ሰው ጋር ብቻ የሚገባበት ልዩ ግላዊ ትስስርን መሠረት ያደረገ በመሆኑ ማንኛውም 3ኛ ወገን የመጀመሪያዎቹ ተዋዋዮች ሳይፈቅዱለት ሊገባበት አይገባም ብሎ መከራከር ጉንጭ ማልፋት ነው ባይባልም በአንጻሩ መብቱን ከሚያጣው 3ኛ ወገን አኳያ ሲመዘን ግን ክብደት አይኖረውም። ትልቁ ሊተኮርበት የሚገባው ጉዳይ ፍትህን ማስፈን ነው። በመሆኑም ጉባኤው ይህንን ክርክር እንደ ምክንያት መውሰዱ ትክክል ነው ለማለት ያስቸግራል።

ማጠቃለያ እና ጥቂት የሕግ ማሻሻያ ሃሳቦች

በግልግል ዳኝነት አሰራር ውስጥ የሚቃረኑ መርሆች አሉ። እነዚህም የግልግል ዳኝነት ፈቃድ ላይ የተመሰረተ ነው የሚለው በአንድ ወገን እና የግልግል ዳኝነት ውጤታማ፣ ቀልጣፋ እና ወጪ ቆጣቢ መሆን አለበት የሚለው መርህ በሌላ በኩል ናቸው። ፈቃድ የግልግል ዳኝነት መሠረቱ ነው ሲባል ማንም ሰው ሳይስማማ መብቱ በግልግል ዳኝነት ሊወሰን አይችልም ማለት ነው።

ፈቃድን በተመለከተ መታየት ካለባቸው ነገሮች ዋናው ፈቃድ የሚገለጽበት መንገድ ነው። ከላይ እንደተገለፀው በግልግል ዳኝነት ለመዳኘት የሚሰጥ ፈቃድ በቀጥታ በጽሁፍ፣ አሊያም በውስጠ ታዋቂነት ሊገለጽ እንደሚችል የተለያዩ አገሮች ተሞክሮ ያሳያል። ዋና ዋና የውስጠ ታዋቂ ስምምነት መገለጫዎች የግልግል ስምምነት ያለበት ውል መተላለፍ፣ የግልግል ስምምነት ያለበት ለሦስተኛ ወገን ጥቅም የተደረገ ውል፣ ዳረጎት፣ እና በተባደኑ ኩባንያዎች አውድ ውስጥ የሚደረግ የግልግል ዳኝነት ስምምነት ናቸው። የግልግል ስምምነት ያለበት ውል ከጀመሪያው ተዋዋይ ወደ 3ኛ ወገን ሲተላለፍ ሌላኛው ተዋዋይም ሆነ ሦስተኛ ወገን በውስጠ ታዋቂነት በግልግል ዳኝነት እንደ ተስማሙ ሊቆጠር ይገባል። በዳረጎትም ጊዜ በሌላ ሰው መብት የተዳረገ 3ኛ ወገን የተዳረገበት መብት የሚወሰነው በግልግል ዳኝነት ከሆነ ያንን በውስጠ ታዋቂነት እንደተቀበለ ሊቆጠር ይገባል። በተመሳሳይ መንገድ ለሦስተኛ ወገን ጥቅም ተብለው የሚደረጉ ውሎች ለምሳሌ አንዱ ለሌላው ጥቅም ብሎ የሚገባበት መድን (የሕይወት ወይም የንብረት ሊሆን ይችላል) የግልግል ዳኝነት ስምምነት ካለበት ተጠቃሚ የሆነው ሦስተኛ ወገን በግልግል ዳኝነት እንደተስማማ ሊቆጠር ይገባል። የተባደኑ ኩባንያዎች ጉዳይ ትንሽ ለየት ሊል ይችላል። ነገር ግን አንድ እናት ኩባንያ ወይም ብዙ የተለያዩ ኩባንያዎችን የሚቆጣጠር ባለሀብት የግልግል ስምምነት ያለበትን ውል በመፈጸም ረገድ የተለያዩ ኩባንያዎቹን የሚያሳትፍ ከሆነ ባለሀብቱም ሆነ በእሱ ተቆጣጣሪነት የተያዙት ኩባንያዎች የግልግል ዳኝነቱን እንደሚያወቁት እና እንደሚስማሙበት መገመት ይቻላል። በእንደዚህ ዓይነት ጊዜ ‹‹የተጻፈ የግልግል ዳኝነት ስምምነት የለንም›› የሚል ክርክር ከተጠያቂነት ማምለጫ ሊሆን አይገባም። የኢትዮጵያ የግልግል ዳኝነት ሕግ የግልግል ውል በጽሑፍ እንዲሆን ያለማስገደዱ ከዚህ ሃሳብ ጋር የሚስማማ ነው። ስለዚህ እነዚህ ጉዳዮች የፈቃድን መርህም ሆነ የቅልጥፍናን እና ወጪ ቆጣቢነትን መርህ የሚጻረሩበት መንገድ የለም።

በሌላ በኩል ግልጽ ወይም ውስጠ ታዋቂ ስምምነት የሌለው ሦስተኛ ወገን ወደ ግልግል የሚገባበት አግባብ በቀጥታ ከላይ ያነሳናቸው መርሆች እንዲጣረሱ ያደርጋል። ይህ ሲባል በግልጽ ወይም በውስጠ ታዋቂነት ፈቃዱን ለመግለጽ ዕድል ያላገኘ 3ኛ ወገንን መብት የሚመለከት ጉዳይ በግልግል የሚታይ ከሆነ መብቱ የሚነካበት ሦስተኛ ወገን ወደ ግልግል ገብቶ መብቱን ማስጠበቅ መቻል አለበት። ይህ ዓይነቱ ሦስተኛ ወገን የሚመጣው በጣልቃ ገብነት፣ በተከሳሽ ጥያቄ እንደ 3ኛ ወገን ተከሳሽ ወይም በውሳኔ ተቃዋሚነት ሊሆን ይችላል። ይህ ምንም እንኳን የስምምነትን መርህ የሚጣረስ ቢሆንም በተስማሙ ሰዎች መካከል የሚደረግ የግልግል ዳኝነት በሦስተኛ ወገን መብት ላይ ተጽዕኖ ሊኖረው አይገባም። በሌላ በኩል ተጽዕኖ የሚኖረው ከሆነ መብቱ የሚነካበት ሦስተኛ ወገን በክርክሩ የሚሳተፍበት መንገድ መኖር አለበት። ሁለት ወዶ አይቻልምና ተዋዋዮች ወይ የሦስተኛ ወገንን መብት ሳይነኩ በመካከላቸው በተስማሙት መሠረት በግልግል ጉዳያቸውን መጨረስ፤ ያ ካልሆነ ግን መብቱ ይነካብኛል የሚል ሦስተኛ ወገን ወደ ክርክሩ መግባቱን መቀበል ይኖርባቸዋል። ከዚህ አኳያ የፍትሐ ብሔር ሥነ-ስርዓት ሕግ ስለ ሦስተኛ ወገን ወደ ክርክር መግባት የሚደነግጋቸው መንገዶች በግልግል ዳኝነት ተግባራዊ መሆን አለባቸው። በግልግል ዳኝነት የሥነ-ስርዓት ጉዳዮች የሚካሄዱት በፍትሐ ብሔር ሥነ-ስርዓት ሕግ መሠረት እስከሆነ ድረስ የሦስተኛ ወገኖች ተሳትፎ ሙሉ በሙሉ ከሕግ ያፈነገጠ ተደርጎ መወሰድ የለበትም።

ይሁን እንጂ የሥነ-ስርዓት ድንጋጌዎችን ከስምምነት መርህ ጋር ማስታረቅ ደግሞ ያስፈልጋል። ይህም ማለት ሦስተኛ ወገን ሳይፈልግ ተገድዶ ወደ ግልግል ዳኝነት ክርክር እንዲገባ ማድረግ የስምምነት መርህን ስለሚቃረን የሚመከር አይሆንም። በዚህ ጊዜ ቢያንስ ቢያንስ ውስጠ ታዋቂ ስምምነት መኖሩን ማስረዳት ያስፈልጋል። ነገር ግን አስቀድሞ ስምምነት ባይኖረውም መብቱ የሚነካበት ሦስተኛ ወገን ከፈለገ ወደ ክርክር እንዲገባ መፍቀድ የስምምነት መርህን አይጥስም። ምክንያቱም ወደ ክርክሩ ልግባ ብሎ መጠየቅ በራሱ የስምምነት መግለጫ ነው። በሌላ በኩል አንድ የግልግል ዳኝነት ስምምነት ያለው ወገን ‹‹ከሦስተኛ ወገን ጋር ስምምነት ስለሌለኝ ከሱ ጋር በግልግል ዳኝነት አልገደድም›› ብሎ መከራከር ተቀባይነት ያለው ክርክር አይደለም። መብቱን ከሚያጣው 3ኛ ወገን ጉዳት ጋር ሲነጻጸር አስቀድሞ ከአንደኛው ወገን ጋር በግልግል ዳኝነት የተስማማ ሰው ከ3ኛ ወገን ጋር በግልግል ጉዳዩ ቢታይ የተለየ ጉዳት ይደርስበታል ለማለት የሚያሳምን ምክንያት አይኖርም። ዋናው ነጥብ የሦስተኛ ወገን ፈቃደኝነት ነው።

በመጨረሻም የሦስተኛ ወገኖች ወደ ክርክር መግባት በክርክሩ ዋነኛ ተካፋዮች ወይም በአንዳቸው ፍላጎት እና ጥቅም ሊሆን ይችላል። በዚህም ጊዜ ቢሆን የሚመለከተው ሦስተኛ ወገን ካልተስማማ ሊገደድ አይገባም። ይህም የፈቃድ መርህን የሚጥስ አይደለም።

ከላይ የተመለከተው የመፍትሄ ሃሳብ በግልግል ዳኝነት የሦስተኛ ወገኖች ጉዳይ ለሚፈጥረው ችግር የተሟላ መፍትሄ እንዳልሆነ ግልጽ ነው። አንድ የማይፈታ ችግር ይቀራል። የዋናዎቹን የክርክሩን ተካፋዮች መብት ለማስጠበቅ አሊያም ትክክለኛ ፍትህ ለመስጠት እንኳን አስፈላጊ ቢሆን ያልተስማማን ሦስተኛ ወገን አስገድዶ ማስገባት አይቻልም። ይህን ለማድረግ የግልግል ዳኝነት አይቻለውም። ይህን ማድረግ የሚችለው በሕገ-መንግስቱ የዳኝነት ስልጣን የተሰጠው

ፍርድ ቤት ብቻ ነው። ተዋዋዮች በግልግል ዳኝነት ያለመግባባታቸውን ለመፍታት ሲወስኑ ይህን አውቀው እንደተቀበሉት መገመት አለበት። ሦስተኛ ወገንን በተመለከተ መብቱን የሚመለከት የግልግል ዳኝነት እየተካሄደ በግልግል ዳኝነት ቀርቦ መብቱን ለማስጠበቅ ፈቃደኛ ባይሆን በግልግል ዳኝነቱ የሚሰጠው ውሳኔ በእሱ ላይ ተፈጻሚ ሊሆን አይችልም። ይህ የግልግል ዳኝነት ውሳኔውን ሰንካላ ሊያደርገው ይችላል። ይህን በግልግል ዳኝነት ጉዳያቸውን ለመፍታት የሚስማሙ ሰዎች አውቀው የሚገቡበት ስለሆነ ብዙ ሊያሳስብ የሚገባ አይደለም።

በኢትዮጵያ የግልግል ዳኝነት ሕግ የሦስተኛ ወገኖችን ጉዳይ ከሚያወሳስቡ ምክንያቶች አንዱ የግልግል ዳኛ ስልጣን በጣም የተገደበ መሆኑ ነው። ከሦስተኛ ወገኖች መሳተፍ ጋር በተያያዘ ፍትሃዊ መፍትሄ ላይ ለመድረስ የግልግል ዳኛ የራሱን ስልጣን የመወሰን ስልጣን (komptenze-kompetenze) ሊኖረው ይገባል። ይሁን እንጂ በኢትዮጵያ ሕግ የግልግል ዳኛ ስልጣን እንደ እምቧይ ካብ ነው። ሦስተኛ ወገንን በተመለከተ ይቅርና በተዋዋዮች መካከል እንኳ አንደኛው ወገን የግልግል ጉባኤው የቀረበውን ጉዳይ ማየት ስልጣን የለውም የሚል መቃወሚያ ቢያቀርብ የግልግል ዳኛው/ጉባኤው በተቃውሞው ላይ መወሰን አይችልም። ስለዚህ በግልግል ዳኝነት የሦስተኛ ወገኖች የመሳተፍ ጉዳይ ላይ የተሟላ መፍትሄ ለማበጀት የግልግል ዳኛ የራሱን የዳኝነት ስልጣን የመወሰን ስልጣን በሕጉ ሊሰጠው ይገባል። ያ ሲሆን ብቻ ነው ጣልቃ የሚገባውን 3ኛ ወገን ተከራካሪዎቹ ቢቃወሙም የግልግል ዳኛ ሊያስተናግድ የሚችለው። ከዚህ አኳያ የፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ ወይም ይወጣል የሚባለው የግልግል ዳኝነት ሕግ በግልጽ የግልግል ዳኛ የራሱን የዳኝነት ስልጣን የመወሰን ስልጣን እንዳለው እንዲሁም የጣልቃ ገብ አቤቱታን ማስተናገድ እንደሚችል መደንገግ አለበት። የሕጉ ዋነኛ ዓላማ አማራጭ የፍትህ መድረኮች የዜጎችን መሠረታዊ መብት ሳይገድቡ ቀልጣፋ እና በአነስተኛ ወጪ ፍትህን ተደራሽ እንዲያደርጉ ማስቻል ነው። በጥቃቅን እና ተጨባጭ ትርጉም በሌላቸው የሥነ-ስርዓታዊ ድንጋጌዎች ፍትህ የማግኘት መበት መደናቀፍ የለበትም።

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The Applicability of Arbitration Agreement to Third Parties under Ethiopian Law: Contradictions between Contract Law and Civil Procedure Code Law

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Abstract

The purpose of this Article is to address the question of third party participation in arbitration proceedings arising out of the agreement of parties. The protection of rights of non-signatories in an arbitration proceeding the jurisdictional limits of which is defined by the parties to the agreement remains to be one of the contentious issues in the law and practice of arbitration. The Civil Procedure Code regulates in detail the modality of participation by third parties in proceedings where their rights are at stake. It also regulates the procedure of opposition against a judgement by a third party who was not able to take part in a proceeding that led to the judgement in so far as such a judgment harms his/her rights. The application of these rules in the courts of the state that derive their authority from the law has not been as problematic as their application in arbitration due to the contractual basis of the latter. Likewise, the transfer of a contract incorporating an arbitration clause triggers a similar question when the transferee wants to invoke the arbitration agreement, or when the transferee is required to submit to arbitration by virtue of such an arbitration clause. Is (not) the arbitration agreement transferable to the third-party transferee following transfer/assignment of the contract containing the clause? All these questions are problematic for arbitration tribunals whose authority emanates from the agreement of parties. The questions involve on the one hand, the interests of a third party whose rights will be jeopardized by an arbitration proceeding in his absence; and on the other hand, the interests of the original parties who will be required to arbitrate with 'a stranger' without a prior agreement to do so. This article suggests that adopting a flexible requirement for validity of arbitration agreement in respect to the third party will resolve part of the problem. Hence, the request to join an arbitration by the third party should be sufficient to establish an arbitration agreement with such third party and the original parties. No third party should, however, be compelled to submit to arbitration against his/her consent as this would violate the very consensual nature of arbitration.

Key words:- Arbitration agreement, third parties, intervention, assignment, opposition

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Challenges and Implications of Using Suspect/Defendant-Turned Prosecution Witnesses in Ethiopia

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Abstract

Ethiopia has formally recognized evidence obtained from criminal participants in return for immunity and/or sentence reduction in the prosecution of some selected crimes, notably corruption, terrorism and trafficking in persons. However, in practice this prosecution tool pervades virtually all crimes. This article investigates the challenges and implications of relying on suspect/defendant-turned witnesses having regard to the contexts of the criminal justice system with a focus on the Federal Government. The article is informed by qualitative data drawn from court cases, in depth interviews and FGDs with justice actors: prosecutors, judges, and defense attorneys. I contend that although the use of such incentivized witnesses serves law enforcement purposes, it involves inherent as well as contextual challenges and implications to the criminal justice system. Exacerbated by frail fact-finding capacity, scant safeguards, and lack of enforceability, among others, it is prone to yield wrongful conviction, discrimination, impunity, and abuse and corruption.

Key terms: Incentivized witnesses, Justice collaborators, Informant witnesses, Suspect/defendant-turned witnesses, Evidence, Challenges, Ethiopia

Introduction

As crimes become more complex and sophisticated governments employ a myriad of evidence generating tools in order to prosecute criminals. The use of criminal participants or their evidence in return for a benefit takes substantial credit in this regard. In the USA, such witnesses are generally known as "informant witnesses"[1] or

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[1] Nicholas Fyfe and James Sheptycki, *International Trends in the Facilitation of Witness Cooperation in Organized Crimes*, 3(3) EUROPEAN JOURNAL OF CRIMINOLOGY, 336-38 (2006).

"cooperating witnesses"[2] and include jailhouse informants and "accomplice witnesses"—co-participants.[3] The concessions the prosecution offers to such "incentivized witnesses" include: agreement not to prosecute, recommendation for lenient sentence at trial, reduction of charges, agreement to stipulate mitigating circumstances at sentencing, etc.[4] These arrangements have their basis in the US Sentencing Guidelines ("substantial assistance motion" where a defendant receives sentence reduction in exchange for his "substantial assistance" in the prosecution of others)[5] and plea agreements and are often known as *cooperation agreements* or *witness inducement agreements*.[6] In Europe the arrangement made with persons facing

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[2] See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992) (discussing cooperation agreements involving the exchange of leniency for information or testimony); R. Michael Cassidy, *Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. L. REV. 1129 (2004); Michael A. Simons, *Retribution for Rats: Cooperation punishment and Atonement*, 56 VAND.L.REV. 1, 2, (2003).

[3] Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents*, 6 OHIO ST. J. CRIM. L. 519, 522, 554-57 (2009) (Informant includes those who receive benefits for their testimony and is of two broad types: jailhouse informants and other informants who are "co-participants in the crime or other members of the suspect's criminal group"); Jessica A. Roth, *Informant Witnesses and The Risk of Wrongful Convictions* 53 AMERICAN LAW REVIEW, 737,747-48 (2016) (making similar distinctions as Mosteller does); Michael Cassidy, *supra note* 2, at 1133-34(distinguishing four kinds of informants: a tipster (citizen informant), confidential informant, jailhouse informant, and accomplice witness); Markus Surratt, *Incentivized Informants, Brady, Ruiz, and Wrongful Imprisonment: Requiring Pre-plea Disclosure of Material Exculpatory Evidence*, 93 WASHINGITON LAW REVIEW 523, 538-45(2018)(classifying (incentivized) informants into five categories: the jailhouse snitch, the professional snitch, the accomplice, the calumniator — one who falsely accuses others — and the confidential informant.); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (OUP, 2011) at 123-141(where the author defines Criminal informant to include jailhouse informants, co-defendants, witnesses who were potential suspects themselves and some who sought reward money); Ariel Werner, *What`s in a Name? Challenging the citizen Informant Doctrine*, 89 NEWYORK UNIVERSITY LAW REVIEW, 2336, 2339 (2014); Michael L. Rich, *Coerced Informants and thirteenth Amendment Limitation on the Police–informant relationship*, 50 SANTA CLARA L.REV 681, 689-90 (2010); Ellen Yaroshefsky, *Introduction to the Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747,755-56 (2002) citing Rory K. Little, *The Cooperating Witness Conundrum: Is Justice Obtainable?* Cardozo School of Law Symposium (Nov. 30, 2000) (Proposing the replacement of "cooperating witness with criminal informant for those persons who are themselves involved in criminal activity and receiving some benefit from the government").

[4] R. Michael Cassidy, *supra* note 2, at 1142-43.

[5] See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245 (2000); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (New York University press, 2009) at 50.

[6] See H. Lloyd King, *Why Prosecutors are Permitted to Offer Witness Inducement Agreements: A matter of Constitutional Authority*, 29 *STETSON LAW REVIEW* 156(1999); James W. Haldin, *Toward a Level*

criminal charges or persons convicted of a crime whereby they provide information or evidence on others (notably on their associates) in return for a benefit are generally termed as "collaborators of justice" or "crown/state witnesses"[7] albeit, known with varied names across specific jurisdictions: Staatszeugen/State's witnesses (Germany), supergrasses (Northern Ireland), petiti (Italy), arrenpenditos (Spain).[8] The available benefits to collaborators of justice include: sentence reduction, immunity from prosecution, dropping of charges, and financial benefits.[9] Although these arrangements are often employed as a means to prevent and prosecute serious and complex crimes, notably organized ones,[10] in some jurisdictions such as Canada, USA and to some extent in Germany, they are also applied in less serious crimes.

Ethiopia has also formally embraced the analogous of this evidence generating tool—evidence/testimony obtained from criminal participants (suspects and defendants) in return for immunity from prosecution and sentence reduction — in some specific crimes including corruption, trafficking in persons and terrorism, but in practice it pervades almost all crimes.[11] This article investigates the challenges and implications of using suspect/defendant–turned witnesses having regard to the contexts of the Ethiopian criminal justice system. The article features some qualitative data drawn from experiences of the Federal Government using in-depth interviews and FGDs with representatives from justice sector actors and review of court cases, to the extent

Playing Field: Challenges to Accomplice Testimony in the Wake of United States v. Singleton, 57 WASH. & LEE L. REV. 515 (2000).

[7] See generally J.H. Crijns *et al*, COLLABORATION WITH JUSTICE IN THE NETHERLANDS, ITALY GERMANY AND CANADA: A COMPARATIVE STUDY ON THE PROVISION OF UNDERTAKINGS TO OFFENDERS WHO ARE WILLING TO GIVE EVIDENCE IN THE PROSECUTION OF OTHERS (2017) available at https://www.wodc.nl/binaries/2725_volledige_tekst_tcm28-324067.pdf visited on 05 oct.2020 ; see also a definition provided by the Council of Europe where it defines collaborators of justice as: "any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes." Council of Europe Committee of Minsters, Recommendation (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice *(Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies). Available at: https://www.coe.int/t/dg1/legalcooperation/economiccrime/organisedcrime/Rec%20_2005_9.pdf visited on 05 Oct. 2020.*

[8] Nicholas Fyfe and James Sheptycki, *supra* note 1, 336-38.

[9] J.H. Crijns *et al*, *supra* note 7, at 364-68.

[10] John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103–09 (1995); Nicholas Fyfe and James Sheptycki, *supra note* 1 at 336-38.

[11] Alemu Meheretu (2018), *Exploring Criminal Informant Use in Ethiopia: Some Experiences From the Federal Government and selected Oromia Zones*, (unpublished), at 48-49.

available. Extensive and systematic interviews and FGDs were held with 35 informants from the justice sector institutions including prosecutors (19), defense lawyers (7) and judges (9). This is particularly relevant to solicit information on the informal practice, which is not normally available on the records. Some of the court cases used in this article were obtained from the interviews and FGDs. Access problems means suspect/defendant–turned witnesses are not included. In order to ensure anonymity of the participants in the interviews and FGDs, codes combining their occupation with numbers (e.g. prosecutor 01, judge 07) have been used in citing them.

The article is structured in five sections. The first section following this introduction briefly explores the rationales of using informants/collaborators of justice while section two sketches the use of evidence obtained from suspect/defendant-turned witnesses in Ethiopia. The third section unveils the challenges and implications of using such evidence in Ethiopia focusing on the Federal Government. The final section concludes the article.

1. Why Informants /Justice Collaborators?

In the past informants were viewed as incompetent witnesses if they stood to directly gain some benefit from their testimony.[12] Through time, this has changed and now they are increasingly used as prosecution tools, particularly in organized and complex crimes.[13] Researches indicate that prosecuting organized crimes using ordinary method of investigation has been proved to be ineffective. The nature of organized crimes, in particular their extreme secrecy and intermediary features, necessitate an extraordinary means to investigate and prosecute them.[14] Informants/justice collaborators, who are part of an organization and are familiar with its structure and functioning,[15] provide the means to dismantle the organization and prevent such crimes. Such instrumentality of informant witnesses has been described as[16]: "without informants law enforcement

[12] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 112(2014).

[13] Peter J. Tak, *Deals with Criminals: Supergrasses, Crown witnesses and Pentiti*, 5(2) EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE, 5, 13(1997); John C. Jeffries & John Gleeson, *supra* note 10.

[14] Nicholas Fyfe and James Sheptycki, *supra* note 1, at 338; John C. Jeffries & Hon. John Gleeson, *supra* note 10, at 1104 (Nothing that without informant witnesses, prosecution of the "culpable and dangerous individuals" in criminal organizations would be impossible because such high-ranking individuals purposefully operate behind the scenes such that "their guilt usually cannot be proved by the testimony of victims or eyewitnesses or by forensic evidence," and they "never confess").

[15] Peter J. Tak (1997), *supra* note 13, at 2.

[16] Alexandra Natapoff, *Snitching: Institutional and Communal Consequences*, Legal studies paper No. 2004-24, 2004, at 661, citing *United States vs. Bernal–Obeso*, 989 F.2d 311, 335(9th cir.1993).

officials would be unable to penetrate and destroy organized crimes syndicates, drug trafficking cartels, bank frauds…public corruption, terrorist gangs, money launderers….". They also enable governments to prosecute politically powerful or otherwise insulated criminal actors.[17] Rewarding of informant witness /justice collaborators with attractive concessions is thus needed to encourage them to come forward enduring any possible retaliations from their crime mates.[18] Therefore, the major rationale for the use of such evidence relates to its instrumentality to prevent and prosecute serious and organized crimes.

Ethiopian policy makers seem to rely on this rationale to introduce "substantial evidence" rewards to cooperating suspects/defendants in crimes of corruption, terrorism, trafficking and smuggling in persons.[19] Likewise, the Criminal Justice Policy embraces this investigative and prosecution tactic in complex and serious crimes provided that ordinary means of investigation is unable to tackle such crimes.[20]

The other rationale for informant witnesses/justice collaborators relates to administrative efficiency gains. It offers efficiency advantages to the system by making investigation and prosecution activities easier and cheaper.[21] It is considered as the "most cost-effective investigative tool in organized crimes", compared to other techniques such as surveillances and undercover operations.[22] In this sense, it can enhance the efficiency of the law enforcement; a rationale upheld by Ethiopian justice actors.[23] It is important to note, however, that this efficiency gain comes with considerable costs of compromising fairness, accuracy and due process rights.[24]

The final and least advocated rational for defendant's cooperation with law enforcement has to do with repentance. It is proposed that cooperation gives defendants the opportunity to repent and pay back to society by providing

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[17] R. Michael Cassidy, *supra* note *2* at 1137 (2004) (noting that criminal informant use "makes possible the detection of crimes that may otherwise go unsolved, allows for the apprehension of more dangerous criminals, and minimizes the risk of acquittal that could adversely affect public safety").

[18] J.H. Crijns *et al, supra* note 7 at 26; Robert P. Mosteller, *supra* note 3 at 551.

[19] Alemu Meheretu, *The Law of Criminal Informants in Ethiopia*, 13(3) MLR, 442(2019), see the section on rationales.

[20] FDRE, The Criminal Justice Policy of Ethiopia (2011), section 3.17.5 (a&b), at 22.

[21] David Leimbach, *Minimizing the Risk of Injustice in Cooperation Agreements* 7 DARTMOUTH L.J. 173,176 (2009) (Discussing the efficiency advantages of cooperation agreements); Alexandra Natapoff (2009), *supra* note 5 at 31.

[22] Thomas Gobar et al, *Community Effects of Law Enforcement Countermeasures against Organized Crime: A retrospective Analysis*, Report No 006, (2010), at 6; J. ALBANESE, ORGANIZED CRIME IN OUR TIMES (5th Edition. Cincinnati: Anderson, 2007), at 262.

[23] Alemu Meheretu (2019), *Supra* note 19, at 446-47.

[24] See section 4 below.

incriminating information on others.[25] It is claimed that cooperation serves retributive purposes in two senses[26]: First it gives "…defendants an opportunity to undergo a process of expiation — remorse, apology, reparation, and punishment — that can lead to true atonement". Second, cooperation with law enforcement itself amounts to punishment for the criminal informant: the stern stigma and ostracism from crime mates and the community at large can be taken as an "extra punishment".

Nonetheless, this penological rationale is open to challenge since it is quite questionable whether a defendant cooperates out of pure repentance. Some researches indicate that such motivations are rare.[27] Instead, it is highly probable that suspects/defendants assist law enforcement in anticipation of the benefits attached to cooperation (i.e., immunity or charge or sentence concessions or other benefits) or with a view to shift blame to others and to misdirect the investigation. Others may cooperate due to some ulterior motives: revenge or other perverse ends. Therefore, it stands to reason to argue that cooperation could be more likely to be tactical than an expression of remorse.

2. Overview of Use of Evidence Obtained from Criminal Participants

In Ethiopia, the use of evidence obtained from criminal participants in exchange for a benefit operates in two ways: formally and informally. The first relates to instances where such evidence is expressly recognized by a piece of legislation governing selected crimes such as corruption, terrorism, and trafficking in persons. The second variant relates to the practice of using suspect/defendant-turned prosecution witnesses in crimes beyond those authorized by law. This section does not engage with detail analysis of the practice, rather it outlines the practice centering on suspect/defendant-turned witnesses with a view to set background for the investigation of challenges and implications accompanying its use in Ethiopia, with a focus on the Federal Government.

2.1. The formal use of evidence obtained from criminal participants

The anti-corruption laws permit the use of suspect-generated evidence in return for immunity under two conditions:[28] 1) where a person involved in corruption provides

[25] Michael A. Simons, *supra* note 2, at 2.

[26] *Ibid.*, at 3-4.

[27] See generally, J. MADINGER, CONFIDENTIAL INFORMANT: LAW ENFORCEMENT'S MOST VALUABLE TOOL, (Boca Raton, Fla.: CRC Press, 2000).

[28] Article 43(1), The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005 (herein after the Revised Anti-Corruption Special Procedure Proclamation);

"substantial evidence" against another participant; 2) the evidence is given before the institution of criminal charge. "Substantial evidence" connotes either of the following:[29] evidence "sufficient to bring conviction by itself"; or evidence which "serves as a basis to lead to other evidences"; or evidence when corroborated with other evidence "… is sufficient to bring conviction, and its absence makes conviction unlikely." From the language of the law the following general observations can be made: First, the degree of participation and the culpability of the suspect are not among the conditions for using such evidence. Thus, apparently so long as a suspect provides substantial evidence before charge is instituted, he can be immune from prosecution regardless of his degree of involvement in the crime. This does not align with the purpose of cooperation/immunity agreements — prosecuting more culpable defendants using less culpable ones. Second, the timing requirement for cooperation, which is "before the case is taken to court" and the targeted candidate for the deal: "a person who has been involved in corruption offence", limit the beneficiaries of the "substantial evidence" deal to suspects, plainly excluding defendant-turned witnesses. Third, the only concession recognized by law is immunity, thus other forms of concessions including sentence reduction and concessions related to the proceeds of the crime are apparently excluded. Fourth, although characterized by inherent unreliability, the law insists that the testimony of a suspect-turned witness has equal weight as that of ordinary witnesses.[30]

Likewise, the Anti-terrorism Proclamation upholds cooperation from criminal defendants but in a different fashion. First, it offers mitigation of sentence for those defendants who either plead guilty to their own crimes or disclose the identity of co-offenders.[31] Second, the concessions are limited to sentence reduction as opposed to immunity. Lastly, it provides no protection for cooperators against any possible renege by the government.

The use of evidence obtained from criminal participants has also found a place under the Anti-trafficking and Smuggling of Migrants Proclamation. The Proclamation sanctions the use of such evidence on three cumulative conditions[32]: where a suspect/defendant provides "substantial evidence" in a sense described under the anti-corruption law above; where such evidence is given before the case goes to court and

See also Article 8 (1) and (2) of the Crime of Corruption Proclamation No.881/2015(which recognize informant use and give cross-reference to the former).

[29] *Ibid.,* Article 43(2).

[30] *Ibid.,* Article 43(5).

[31] Article 33, The Anti-terrorism Proclamation No. 652/2009.

[32] See Article 23, the prevention and Suppression of Trafficking in persons and Smuggling of Migrants Proclamation No. 909/2015.

where the Attorney General authorizes it. The concessions available to suspect/defendant-turned witnesses in exchange for providing "substantial evidence" include sentence reduction and immunity[33], the implementation of which give rise to complex legal and practical issues.[34]

Finally, the witness protection proclamation recognizes immunity in exchange for cooperation/testimony – as a witness protection measure – provided that three cumulative conditions are satisfied[35]: the crime is so serious that it attracts a minimum of 10 years of rigorous imprisonment; and that the offence cannot be detected or prosecuted in the absence of such testimony; and that a threat of serious danger exists to the life, physical security, freedom or property of the suspect turned witness or his family.

The above laws regulate evidence obtained from criminal participants in return for a benefit, notably immunity and sentence concessions, mainly by stipulating general rules on the selection of eligible suspects and defendants, the available rewards and benefits due to them. Yet, the laws fall short of articulating clear, coherent and comprehensive standards as well as providing for sufficient protections and meaningful enforcement mechanisms on informant use.[36]

2.2. The informal use of evidence obtained from criminal participants

This concerns the use of suspect/defendant-turned witnesses in crimes not authorized by law – where a suspect or a defendant informally agrees to testify or provide evidence against a criminal participant in exchange for some concessions, notably exemption from prosecution. Interviews and FGDs with justice sector personnel, the investigation of available court cases and accessible police investigation files reveal that this variant is widely practiced. Asked whether and how often they use such witnesses, many prosecutors replied that they resort to it whenever triggered by evidence unavailability regardless of the nature of the crime, while judges and defense attorneys submit that they regularly encounter such witnesses.[37]

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[33] *Ibid.*

[34] Alemu Meheretu, *Supra* note 19, at 459-61.

[35] Articles 3(1) and 4(1) (f), Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010. For the discussion of such conditions, *Ibid.*, at 466-68.

[36] *Ibid.*, at 469-71.

[37] FGDs and interviews with judges, prosecutors and defense attorneys, April 04-20/2018; March 06-07/ 2018; where three-forth of them (out of 35) indicated flipping suspects/defendants into prosecution witnesses is a familiar practice. For a detail examination of the practice, See Alemu, *supra* note 11.

This informal practice covers any crime, including but not limited to, homicide, rape, willful injury, robbery, copyright and trademark violations, fraud, usury, theft, breach of trust, using cheque without cover, crimes against the constitutional order, and tax related crimes.[38] In one case of aggravated theft[39] of electronic devices carried out by a group of seven offenders during several nights, 'accomplices' who transported and bought the stolen devices were turned into witnesses in exchange for dropping of the charges against them. All the seven principal offenders were convicted and received 17 years of rigorous imprisonment each. In another aggravated theft case[40] involving five principal offenders, police managed to arrest only one of the main offenders. In an informal deal struck with the prosecution, this suspect led to the arrest of the remaining offenders and the recovery of the stolen property. The remaining four defendants were finally convicted based on his testimony. Moreover, in one fraud case[41] committed by three defendants, the main offender fraudulently agreed to sale to another a seized contraband material (sugar & cooking oil) presenting himself as a custom`s official. He then received birr 250,000. To facilitate the crime, he hired two assistants. The prosecution flipped the two assistants (defendants) into witnesses to have the main offender convicted. Prosecutors also rely on suspect/defendant-turned witness testimony in return for informal immunity in the prosecution of crimes of rioting, and crimes against the constitution and constitutional order.[42]

Further, judges observed that they often learn the use of suspect/defendant-turned witness during trial where the admissibility of such testimony is challenged by the defense; an objection commonly overruled:[43] "prosecutors use criminal defendants as witnesses and the defense`s challenge on admissibility of such witnesses is generally rejected for the court has no mandate to determine whom the prosecution should call as a witness." Indeed, in *Yordanos Abay vs. Prosecution*[44], the Federal Cassation Court simply rubberstamped such informal practice claiming that no law prohibits the prosecution from using defendants as prosecution witnesses. Here, the Court seems reluctant even to review the standards used to select such witnesses and set standards for their subsequent use.

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[38] *Ibid.*

[39] Interview with prosecutor 04, April 11, 2018.

[40] Interview with prosecutor 10, April 16, 2018.

[41] Interview with prosecutor 07, April 16, 2018.

[42] FGDs and interviews with judges, prosecutors and defense attorneys, April 04-05, 10-11 and 20/2018. My attempt to locate the court files on this was not successful.

[43] FGD with judges, April 04 &10, 2018 (translation mine).

[44] *Yordanos Abay vs. Public Prosecutor*, FEDERAL SUPREME COURT CASSATION DECISION, *Vol. 12, File No.57988*, 10/05/2003 E.C., p.196.

Likewise, defense attorneys submitted that they ordinarily experience the use of suspects and defendants as prosecution witnesses; a prosecutorial practice they usually object it on grounds of legality, fairness and reliability, but with no avail due to the passivity of the court.[45] Some went further to blame lower courts' approach on such testimony. One defense attorney noted[46]: "despite signs of clear motivations from suspect/defendant turned witnesses, many judges simply treat them as ordinary witnesses, attaching similar weight as that of ordinary witnesses." Indeed, judges seem to admit this with some caveats:[47]

> *The court does not take any presumption against a suspect/defendant-turned witness. He/she undergoes the ordinary examination process and the court attaches the weight the testimony deserves like that of ordinary witnesses. However, where the testimony raises some suspicion, the fact that a witness has received some leniency helps shape our decision.*

The following cases further illustrate major aspects of the practice. In *Federal prosecutor vs. Kiros Negash et al*[48] five defendants consisting of two police officers were charged for ordinary homicide and aggravated robbery. A suspect who was involved in the commission of the crime from its plotting to execution, among others, by transporting defendants to and from the crime scene was made to testify against the rest of the defendants to have them convicted; some of them in absentia. In return he benefited from the dismissal of the case against him. Indeed, as the only direct evidence available, his testimony was essential that without his testimony conviction would have been unlikely.

Although both ended up in acquittal, the prosecution employed suspect-turned witness testimony in two cases involving breach of trust and forgery. In *prosecutor vs. Yabibal Tesfaye et al* [49] two defendants were charged for the crime of breach of trust involving sale of a car worth 1.5 million which was delivered to the first defendant in trust. Another person suspected of the crime of *receiving* contrary to Article 682 of the Criminal Code for purchasing the car, was turned into a witness and testified against the two defendants in return for exemption from prosecution. The case of *Prosecutor vs. Yonatan Manjura et al* [50] involved three counts of forgery and misleading of justice, with one of the counts relating to the creation and use of a forged loan agreement worth

[45] FGD with defense attorneys, April 11 /2018.

[46] Interview with defense attorney 01, April 10, 2018 (translation mine).

[47] FGDs with Judges, April 10,2018 (translation mine).

[48] *Federal prosecutor vs. Kiros Negash et al*, Federal High Court, *File No.113062, 10/07/2006E.C.*

[49] *Federal Prosecutor vs. Yabibal Tesfaye et al*, Federal First Instance Court, *File No.150214, 06/10/2009 E.C.*

[50] *Federal prosecutor vs. Yonatan Manjura et al*, Federal First Instance Court, *File No.165453, 26/07/2010 E.C.*

5.5 million Birr by an heir and agent of the deceased with a view to snatch the shares of another heir. One of the suspects who claimed to have witnessed the conclusion of the forged loan agreement admitted wrong and testified against the main participants before court in exchange for dropping of her own case.

In another pending case of fraud[51] the prosecution flipped into a witness a suspect who allegedly participated in handing over "bribe money" to a fraudster who promises to secure the release of a defendant by bribing judges and prosecutors. It is interesting to see how this case would unfold as the suspect-turned witness is the spouse of the defendant. Apart from issues on the weight of her testimony spousal privilege could be a barrier.

Drawing from FGDs and interviews, and review of court files, it can be concluded that the informal practice exhibits the following salient features: First, it covers crimes ranging from economy related crimes such as theft to serious crimes against persons and against the state such as homicide and the so called crimes against constitutional order; Second, although diverse and inconsistent standards apply, the most frequently used standards to select witnesses from among participants are lack of evidence and degree of participation; Third, the concessions and benefits granted to such witnesses include informal immunity, withdrawal of charges, closure of a file, charge or sentence reduction, suspension of sentence, witness protection benefits, preferential treatment in prison condition, expunge of fingerprints, and returning of bail bonds/securities. Forth, both defendants and suspects are turned into prosecution witnesses. The arrangements are made in a subtle way – either during the investigation where confessions tendered as per 27(2) of CPC will ultimately give way to testimony reduced as per Article 30 of CPC or during the trial stage using the instrumentality of withdrawal or amendment of charges, areas where courts adopt a laissez-faire policy. To be sure, the timing of permissible withdrawal and amendment of charges prescribed by the law (which is *any time before judgment),* the absence of regulation on grounds of withdrawal, and the laxity of permissible grounds for charge amendment[52] are conducive for such tactics. Fifth, the practice is largely insulated both from internal and external review and, hence, it is not enforceable should the prosecutor renege, in particular. In practice while the prosecution has powerful leverages to enforce the

[51] *Public prosecutor vs. X* (As the case is pending full citation is withheld).

[52] See Articles 119-121 of CPC and The General Attorney Establishment Proclamation, Proclamation No. 943/2016.

informal deal through threats of prosecution, the cooperating defendant has none with the exception of internal administrative recourses, which are often not reliable.[53]

3. Challenges and Implications of Using Suspect/Defendant-turned Witnesses

Evidence obtained from criminal participants provides governments with essential law enforcement tool in terms of investigating and prosecuting crimes effectively and efficiently. However, they also entail challenges to any criminal justice system. In this section, the author argues based on available data drawn from fieldwork that such evidence in general and incentivized witnesses testimony - those who receive benefit for their testimony, in particular are met with two types of challenges as it applies to Ethiopia: a) challenges inherent to witness inducement; which are exacerbated by specific contexts of the Ethiopian criminal justice; b) challenges specific to the Ethiopian criminal justice.

3.1. Unreliability and wrongful conviction

Although ordinary witnesses are not immune from concerns of unreliability, the problem is much pronounced with incentivized witnesses. These witnesses could tender untrustworthy testimony simply to shift blame to their associates and receive the maximum leniency or immunity from the prosecution or due to some ulterior personal motives of revenge or bias against an innocent person.[54] Attractive and inducing concessions from the prosecution including the protection of anonymity and immunity or the promise of liberty are so powerful. In the circumstances, such witnesses have strong incentives to tender false testimony that can yield wrongful conviction. This has been proved to be true elsewhere, making incentivized witnesses one of the leading causes of wrongful conviction[55], which has not been even contained by traditional

[53] See section 3.6 below.

[54] Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996)(noting that their desire to avoid criminal liability or to obtain leniency is so strong that they could do or say anything which takes them to this end); Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990) ("It is in [their] interest not only to implicate others to minimize [their] own role and exaggerate the roles of their co-conspirators."); J.H. Crijns *et al* , *supra note* 7 (noting that the benefit attached to collaborating could undermine their reliability).

[55] This is the case for instance in the USA, accounting about 46 percent of capital wrongful convictions. See Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions, *Northwestern University School of Law*, 2004, *available at* <http://www.law.northwestern.edulwrongfulconvictions> last accessed 20 April 2019; see also

mechanisms of ensuring reliability of witness testimony such as cross-examination and oath.[56]

In Ethiopia, while comprehensive data/research on the subject matter is unavailable, piecemeal evidence suggests that the risk of false testimony among suspect/defendant-turned witnesses and thus wrongful conviction is a real cause for concern. FGDs and interviews reveal that the practice of using suspect/defendant-turned witnesses risks fabrications and perjury. One prosecutor notes[57]: while suspect/defendant-turned witnesses provide an effective means to investigate and prosecute crimes, they are equally problematic in a sense that they could be unreliable. That is why, in practice, they alone cannot sustain a valid conviction." Another prosecutor adds to make the concern more explicit[58]: "there are practices where some investigators and prosecutors threaten a potential witness (suspect) with serious charges. I fear that this might taint the credibility of his/her testimony.

Judges and defense attorneys made similar observations, both acknowledging the practical benefits of turning suspects and defendants into prosecution witnesses, expressed their doubts over the reliability of their testimony. Some of them suspect that innocents fall victims of false suspect/defendant-turned witness testimony in many politically motivated prosecutions. This is particularly true in crimes of rioting, crimes of terrorism, and crimes against the constitution and constitutional order.[59] Defense attorney 07 noted: "I really doubt suspect-turned witnesses where in many cases there are clear indications that their testimony is either motivated or coerced. Can you expect

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Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76, 87–88 (2008) (out of 200 DNA exonerations 18 percent are caused by false informant testimony); S. Greer, *Where the grass is greener? Supergrasses in comparative perspective.* In INFORMERS, POLICING, POLICY AND PRACTICE. (R. Billingsley *et al* eds., Devon: Willan Publishing, 2001); George H. Harris, *Testimony for sale: The law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1(2000); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN AMERICAN JUSTICE SYSTEM, 63-105(Praeger, 2002); Graham Hughes, *supra* note 2, at 7-12; Christine J. Saverda, *supra* note 54, at 786-87; Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. (2006).

[56] R. Michael Cassidy, *supra* note 2, at 1130; Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002); Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447,462-67 (2000).

[57] Interview with prosecutor 05, April 13, 2018 (translation mine).

[58] Interview with prosecutor 11, April 17, 2018 (translation mine).

[59] FGDs and interviews with judges, prosecutors and defense attorneys, April 04-05, 10-11 and 20/2018. During interviews two justice actors shared me this: *in one case, where an opposition figure was accused of terrorism, the prosecution used a criminal who claims to have witnessed the commission of the crime. The opposition figure was convicted as charged and sentenced to life. But it was revealed that the government organized false testimony against him.* Interview with defense attorney 06, and prosecutor 04, April 20, 2018.

credible testimony from a tortured witness/suspect? That is how it sometimes works …". Judges recount[60]: although a suspect-turned witness helps bring to justice offenders in group and complex crimes in respect of which evidence may not be available, criminals may abuse it simply to avoid conviction or for some other concessions.

On the other hand, some justice actors including prosecutors and judges seem to downplay the above risks. They opined that with the necessary guarantees put in place, the risks could be effectively controlled. For instance, Prosecutor 07 has to say this[61]: "given their firsthand knowledge suspect-turned witnesses could provide vital evidence in the prosecution of more culpable offenders. In practice these individuals pass through rigorous scrutiny from selection all the way to cross-examination during the trial." Judge 01 observes[62]: the credibility of such witness is tested against the statement he tenders at the police station. Nonetheless, as shown above, the efficacy of such traditional mechanisms is dubitable.

Apart from the observations made and experiences shared by justice actors, a review of specific contexts of the Ethiopian criminal justice suggest that false testimony from suspect and defendant-turned witnesses would pose a formidable challenge to the system. In what follows, I argue that such specific contexts as weak fact-finding capacity, scant safeguards, and preoccupation with efficiency would nurture unreliable witness testimony from such incentivized witnesses.

a) Weak Fact finding Capacity

The fact-finding capacity of the criminal process is so weak that false information from suspect/defendant-turned witnesses, who have firsthand knowledge about the details of the crime and thus possess positional advantage to maneuver facts, can be processed easily. Criminal investigations, inhibited by meager skilled personnel, resources and technology, utterly lack the required rigor and quality. For instance, scientific evidence, and forensics remain substandard, at times unavailable. Thus, sometimes it is possible that the main, if not, the sole source of evidence could be suspect or defendant-turned witnesses whose veracity cannot be properly tested using independent evidence. Ethiopian prosecutors and police may not be reliable gatekeepers against false testimony from such sources. Most of our prosecutors are young and less experienced; lack the training, experience, and resource to properly screen the reliability of such

[60] FGD with judges, April 04/2018.
[61] Interview with prosecutor 07, April 16,2018 (translation mine).
[62] Interview with judge 01, April 10, 2018.

witnesses. Inversely, the practice of witness coaching is laden with risks of promoting false and misleading testimony, inadvertent or otherwise.[63] Further, with prosecutors and police prone to confirmation bias[64], they may lack the objectivity to properly screen the accuracy of testimony from incentivized witnesses[65] and might be reluctant to look for independent evidence. Thus, reliance on such testimony in the event "where the prosecution controls the selection, preparation and compensation of cooperating witnesses, poses a significant risk of wrongful conviction, especially when combined with other risk factors". [66]

Worryingly, the practice of turning suspects into prosecution witnesses that involves, on top of luring concessions, a multitude of tactics to break any resistance from the former would militate against accurate testimony. Such tactics include threat with severe charges, overcharging, actual detentions, lying about the probative value of prosecution evidence, suggesting that a co-accused has confessed, approaching the suspect using intermediaries, including his loved ones.[67]

Furthermore, the court's fact-finding approach and rigor, in general and within the context of incentivized witnesses, in particular could tolerate unreliable testimony and thus inaccurate outcome. The defense often challenges the competence and admissibility of suspect/defendant-turned witnesses invoking prejudice, bias and unreliability; it also questions the standards used to flip suspects and defendants into witnesses.[68] However, sometimes judges are reluctant to review the practice of turning suspects/defendants into prosecution witnesses. In one theft case[69] before the Federal Cassation Bench where the turning of the first defendant into a witness against the second defendant in return for dropping of the charge against her was challenged, the court simply sanctioned the practice without inquiring into the standards used for flipping, reasoning that no law prohibits the prosecution from using such witnesses. As shown under section 3.6 below, prosecutors often successfully invoke this case to justify

[63] Alemu, *supra* note 11, p. 58.

[64] Jessica A. Roth, *supra* note 3, at 755 (`If the informant's version of events is consistent with the prosecutor's pre-existing view of the case, the prosecutor tends to become more certain of the veracity of that account and, hence, less skeptical of the informant`).

[65] David Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 528 (1999); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 943-44 (1999).

[66] *See* George C. Harris, *supra* note 55, at 58; DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT, AND ITS IMPACT ON THE INNOCENT (2012).

[67] FGDs with prosecutors and defense attorneys, April 04, 05 and 11 /2018.

[68] FGD with defense attorneys, April 11 /2018.

[69] *Yordanos Abay vs. Public Prosecutor*, *supra* note 44, at 196.

unrestrained and informal flipping of suspects and defendants into prosecution witnesses, which is worrying.

In another corruption case[70] involving five defendants, the prosecution moved to withdraw charges against two of the defendants after its witnesses have been heard with a view to use them as witnesses against the rest three defendants. The court endorsed by majority the withdrawal and later admitted the testimony of the two defendants reasoning that:[71] "The prosecutor has exclusive mandate to withdraw charges and there is no law which prohibits him from calling a defendant whose case has been withdrawn as an additional witness pursuant to Article 143(1) of Criminal Procedure Code." On top of reflecting the court's reluctance to scrutinize such testimony, this ruling contradicts a relevant and specific law: the Anti-corruption law that unequivocally limits the time for cooperation *before the institution of charge*, which plainly excludes defendants.[72] It also undermines the rights of the defense and principles of fairness, since the defendant-turned witness had attended the examination of prosecution witness and thus might have learnt the defense's strategy.

Even worse, at times judges limit defenses' opportunity to test the veracity of suspect/defendant-turned witnesses by construing the scope of cross examination very restrictively to cover only issues raised under examination-in-chief,[73] thereby prohibiting the probing of such witness based on his records, the benefits he collects from the prosecution, and other related factors. Still others restrict defenses' right to confrontation on grounds of the privilege against self-incrimination. In *Federal Prosecutor vs. Kiros Negash et al*[74], the defense's motion to cross-examine a suspect-turned witness, based on reasons of his arrest and how he ended up being a prosecution witness, was erroneously rejected on grounds of the privilege. Similarly in another terrorism case[75] the defense's attempt to cross-examine a suspect-turned witness using his degree of participation, was overruled in response to the prosecution's objection that such cross-examination infringes the witness's privilege against self-incrimination. These restrictions, which seem to overlook assurances of immunity the law or the

[70] *Federal Prosecutor vs. Abebe Birhane and others*, Federal High Court, File No. 203074, 30/06/2010 E.C.

[71] *Ibid.* (translation mine).

[72] See Article 43(1) of the Anti-corruption Proclamation, which explicitly limits the timing for criminal informant use at the period *before the charge is instituted.*

[73] The basis for such conservative interpretation is the language of Article 137(3) of the Criminal Procedure Code which defines the purpose of cross examination to showing to the court what is erroneous, doubtful and untrue in *the answers given in the examination in chief (Emphasis added).*

[74] *Federal Prosecutor vs. Kiros Negash et al*, Federal High Court, *File No. 113062,10/07/2006 E.C.*

[75] Interview with Defense attorney 05, April 10, 2018.

prosecution confers to such witness, are likely to impair accurate fact-finding and eventually the integrity of the outcome.

Added to this is the stance of some judges on the value of suspect/defendant-turned witness testimony. They simply treat it like any ordinary witness testimony, taking no precautions having regard to its inherent unreliability.[76] One judge captured this[77]: "there is no special procedure to handle a testimony from suspect/defendant-turned witnesses. No special examination applies to such witnesses. They are just examined the way other witnesses are examined." Admittedly, as shown below, the law demands courts to do so with respect to crimes of corruption. Yet, some judges seem to extend this to any crime involving flipped prosecution witnesses, i.e., to the informal practice. However, by giving undeserved weight to such testimony, this approach could undermine outcome accuracy.

b) Scanty safeguards against false testimony

In Ethiopia, such substantive and procedural safeguards against false evidence as vigorous cross-examination, duty of disclosure, effective legal representation, strong standards of proof and judicial review, are non-existent or remain scanty at best. With the bulk majority of deals with suspects /defendants operating underground without the knowledge of the court and the defense, the latter lack the information basis to test the credibility of suspect/defendant-turned witnesses. Even where the deal becomes public in one way or another, several factors would impair reliability screens to distort the ultimate outcome. It is a matter of fact that most defendants do not receive legal representation, thereby lacking the expertise to expose unreliable incentivized witnesses. The duty of disclosure, which is not fully recognized with effective enforcement mechanisms[78], is likely to handicap the defense as well as the court in testing or evaluating the reliability of such testimony. Nor are there detailed guidelines and standards that regulate the selection, handling and reward of suspect/defendant-turned witnesses. Added to this is courts' reluctance to cautiously review the practice of turning suspects/defendants into prosecution witnesses, which is already detailed above. Furthermore, the gaps in criminalizing and enforcing perjury could contribute

[76] FGDs with Judges, April 04, 10/2018.

[77] Interview with Judge 03, April 10, 2018 (translation mine).

[78] The Constitution simply guarantees the accused the right to have full access to evidence presented against him, leaving out exculpatory evidence. See Article 20(4), The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, (1995) (Herein after the FDRE Constitution). Moreover, so far no law provides for enforcement mechanism should the prosecution fails to disclose such evidence.

to the concern of unreliability. The proclivity of suspect and defendant-turned witnesses to perjury coupled with their rare effective prosecution largely owing to evidentiary problems could undermine deterrence thereby militating against the accuracy of verdicts.[79] Indeed, the likelihood of apprehension and conviction is believed to have the strongest deterrence effect. To a certain degree, the lenient treatment of perjury involving victims other than those wrongfully convicted due to perjury (i.e., the lower range of simple imprisonment prescribed as punishment which can go as low as ten days) could adversely impact suppression of perjury. Admittedly, the upper range of punishment for perjury, which reflects a more serious punishment and seems to adopt an eye for an eye principle of sentencing to witnesses responsible for wrongful conviction,[80] would fare better in this regard, albeit with its own flaws elsewhere.

Besides, the low standard of proof required and applied in criminal prosecution means incentivized witness driven wrongful conviction is a possibility. The FSC Cassation Division has lowered down the standard of proof for criminal cases to that of *clear and convincing*[81], a lower standard applied in some jurisdictions in civil cases of special nature such as child custody cases. There are unverified claims among some prosecutors and defense attorneys that in practice the standard is even lower than this, a mere balance of probabilities.[82] Such lower standards could easily be satisfied by incentivized witnesses, a piece of evidence that appears trustworthy, but in actuality is very deceptive and inherently unreliable.[83]

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[79] For more see Alemu, *supra* note 11, at 85-87.

[80] The article reads:

Article 453(1): Perjury

Whoever being a witness in judicial or quasi-judicial proceedings knowingly makes or gives a false statement…

Where, however, in a criminal case, the accused person has been wrongly convicted or has incurred rigorous imprisonment of more than ten years in consequence of the witness's act, the witness may himself be sentenced to the punishment which he has caused to be wrongfully inflicted.

[81] See *Ato Girma Tiku vs. Federal Ethics and Anti-corruption Commission*, Federal Supreme Court Cassation Bench Vol. 10, File No.51706, Hamle 21/2002E.C., p.210; *Tamirat Nigussie et al vs. Benshangul Gumuz Regional State Prosecutor*, FEDERAL SUPREME COURT CASSATION DECISIONS, Vol. 17, File No. 97203, Meskerem 30/2007E.C., p.147; W/ro *Abeba Arefayinie vs. Tigray Regional State Prosecutor*, Federal Supreme Court Cassation Bench, Vol.18, File No. 104923, Megabit 28/2007E.C. p.243; *Feyisa Mamo vs. Federal Prosecutor*, Federal Supreme Court Cassation Bench ,Vol. 19, File No.109441, Tir 17/2008E.C.

[82] This was incidentally raised in the FGDs with prosecutors and defense attorneys, April 05/2018; April 11/2018. Yet, it requires systematic study to arrive at such a conclusion.

[83] Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 *CARDOZO L. REV.* 829, 852-53 (2002); Stephen S. Trott, *supra note 54 at* 1383; Ellen Yaroshefsky, *supra* note 65, at 945.

c) Unabated Efficiency drives

The prevailing institutional preoccupation with efficiency and conviction rate among[84] coupled with the possibility of overrating testimony from suspects and defendants (party and insiders to the criminal participation) could militate against a thorough scrutiny of their testimony. For long, the focus of Ethiopian justice institutions, including the prosecution and the judiciary, tends to be on enhancing the efficiency of the process at any cost.[85] The use of suspects and defendants as prosecution witnesses, which is valued most in securing conviction and shortcutting procedural and evidentiary barriers of conviction, comports very well with such preoccupation to the disadvantage of accuracy and fairness.

These efficiency drives are even evident from the way the law treats the testimony of incentivized witnesses. While the anti-corruption proclamation requires the testimony of suspect-turned witnesses to have equal weight with that of the testimony of ordinary witnesses, the witness protection proclamation forecloses the invoking of a reward such a witness receives for discrediting his testimony.[86] Both stipulations discourage thorough scrutiny of reliability based on relevant factors having direct bearing on reliability, including the concessions exchanged, the antecedents of the witness/suspect, terms of the agreement, etc. This would taint the accuracy of verdicts.

All the above variables combined would create conducive environment for suspect and defendant-turned witnesses who retain firsthand knowledge about the details of the crime to create false testimony and get away with it to the detriment of innocents.

3.2. Adverse Effects on Investigation

While evidence obtained from incentivized witnesses serves an indispensable role to effectively investigate crimes, it can also turn out to be counterproductive. A confluence of factors could shape this undesired outcome in the context of Ethiopia. These encompass the easiness and high probability of conviction such evidence furnishes to prosecutors, vectored against the resource and time intensive nature of investigations (especially in complex crimes), the weakness of the investigation, the underground (informal) nature of the agreement with such suspects and defendants, absence of judicial review on the practice of flipping suspects /defendants into prosecution

[84] See Alemu Meheretu, *Introducing Plea bargaining in Ethiopia: Concerns and Prospects,* (PhD thesis, University of Warwick, UK, 2014).

[85] *Ibid.*

[86] See Article 43(5), The Revised Anti-Corruption Special Procedure Proclamation and Article 26, Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010.

witnesses, and lack of effective accountability systems. All combined have the potential to turn investigations into simple inducement of suspects with a benefit, which would culminate in heavy reliance on their testimony/evidence. This would encroach on the thoroughness and quality of the investigation, and ultimately the accuracy of verdicts. Put simply, where investigators heavily rely on such piece of evidence, cases may not be well investigated, thereby overlooking other independent sources of evidence that can augment outcome accuracy.

Of the problems, the relationship between weak investigation and the use of evidence obtained from criminal participants represent a kind of vicious circle. The two feed each other. Weakness of investigation could prompt the latter's use. Justice actors including prosecutors and defense attorneys point to the weakness of criminal investigation as a reason to resort to suspect and defendant-turned witnesses.[87] It is true that the use of such witnesses can fill in the deficiency of the investigation. However, it can also have negative implications at least in two senses.

First, the weakness of the investigation could adversely impact on the reliable use of suspect and defendant-turned witnesses, i.e., the thorough finding, selection and rewarding of such witnesses. For instance, because of lack of sufficient information on the degree of participation, more culpable defendants can be flipped into witnesses. In one contraband case[88], the suspect was promised immunity in exchange for leading evidence. While the suspect delivered his part, the prosecution declined the offer on grounds of the suspect's criminal record and subsequent discovery of another witness. Likewise, in one corruption case[89], a prosecutor who promised immunity to one of the suspects in exchange for information implicating other participants reneged later to ultimately have the suspect convicted. Perhaps, the prosecution might have tendered such promise without sufficiently investigating the case. Such practices may have their own backlashes not only on the rigor and quality of the investigation but also in securing future cooperation from suspects and defendants.

Secondly, there could be a tendency on the part of investigators to simply invest in evidence from criminal participants in disregard of other independent sources to the detriment of quality and effective investigation. This tendency is effectively incentivized by absence of judicial review on such evidence, which gives prosecutors a free hand to turn one of their defendants into a witness anytime before judgment, which is also common in practice.[90] The prosecution uses its withdrawal and charge amendment

[87] FGDs with prosecutors and defense attorneys, April 04, 2018, March 6, 2018 and April 11, 2018.
[88] Interview with prosecutor 12, April 17, 2018.
[89] Interview with defense attorney 07, April 12, 2018.
[90] Alemu Meheretu (2018), *supra* note 11, at 37-39.

powers as tactics to turn defendants into prosecution witness. For instance, in one tax evasion case[91] where the agent and the owner (principal) were charged, the prosecution sought adjournment for amendment of the charge immediately before the hearing of evidence had commenced. The court granted the motion and adjourned the case. Then the prosecution came with an amended charge that turned the agent into a prosecution witness. Sometimes the prosecution resorts to such tactics even after its evidence is heard where it learns that the chance of success is slim. This was the case in *Federal Prosecutor vs. Abebe Birhane and others*[92], for example, where the prosecution had withdrawn charges of corruption against two defendants at later stages of the trial (after prosecution witnesses were heard), displacing a clear law that requires to the contrary[93], with a view to turn them into witnesses against other co-offenders. This move sanctioned by the court without even inquiring into the reason(s) why the prosecution was not able to use such witnesses at the right time i.e., before the institution of the charge.

These common practices could have the effect of discouraging thorough and effective investigation and prudent charging decisions, whom to charge and whom to use as a witness. Investigators would lack the diligence and the incentive to look for independent sources of evidence. These would ultimately weaken the investigation. From the above discussion, one can conclude that weak investigation can be the cause as well as the effect of resorting to criminal participant-generated evidence.

3.3. Propensity to corruption and abuse

The notion of transparency, which is vital in ensuring accountability, demands that government's actions including the operation of the criminal process should be carried out in a transparent way. However, many studies reveal that the use of incentivized witnesses is largely arcane and consequently prone to corruption and abuse.[94] In Ethiopia, the context under which suspects and defendants are turned into prosecution witnesses would invite one to arrive at a similar conclusion. Epitomized by its secrecy (which can insulate any scrutiny), informal negotiation (off the record deal), broader discretion bestowed to investigative and prosecution organs with scanty

[91] Interview with judge 08, April 12,2018. For discussion of more cases, see Alemu, *supra* note 11, at 39-41 and at 46-49.

[92] *Federal Prosecutor vs Abebe Birhane and others*, *supra* note 70.

[93] Article 43(1), The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005.

[94] See R. Michael Cassidy, *supra* note 2, p.1130; Alexander J. Menza, *Witness Immunity: Unconstitutional, Unfair, Unconscionable*, 9 SETON HALL CONST.L.J. 505, (1999); Alexandra Natapoff (2004), *supra* note 16, at 663.

checks/procedural safeguards of the criminal process[95] and absence of legal representation, reliance on evidence from criminal participants is a suspect for corruption and abuses. This concern is more pronounced in the event where a reliable accountability system is absent and justice sector corruption is not uncommon.[96]

Deals with suspects and defendants can be simply used to further individual needs as opposed to institutional needs. Almost all justice actors who participated in this study express their concerns that turning suspects /defendants into prosecution witnesses is open to abuse and corruption. One prosecutor warns[97]: "The practice harbors broad propensity of vindictiveness and favoritism. One can use it to attack a 'foe' or favor a 'friend'." This is particularly troubling with regard to the informal practice, which is devoid of transparency, any sort of review and even enforceability in the event of breaches of the informal agreement between the prosecution and the defendant/suspect. Yet, in one case the Federal Cassation Court simply rubberstamped such practice without articulating sufficient safeguards against potential abuses noting that[98]: "the prosecution retains the discretion to determine whether to prosecute a defendant or withdraw a pending charge against such defendant and turn him into a witness. There is no law that prohibits such move."

It is also open to abuse and political corruption. Indeed, some justice actors revealed that suspect/defendant-turned witnesses had been used for politically motivated prosecutions and convictions involving crimes of rioting, crimes of terrorism, and crimes against the constitution and constitutional order.[99]

3.4. Undermines the purposes of punishment and public confidence

The effectiveness of a justice system depends on the trust, acceptance and cooperation of the people it governs.[100] Yet, relying on evidence obtained from criminal participants could compromise this in many senses. Suspects and defendants receive benefit

[95] For instance, pretrial judicial review of prosecutorial discretion does not apply. Even at the trial stage, cooperation agreements can be informally enforced without the court`s knowledge and thus without its scrutiny.

[96] Linn A. Hammergren, JUSTICE SECTOR CORRUPTION IN ETHIOPIA IN DIAGNOSING CORRUPTION IN ETHIOPIA: PERCEPTION, REALITIES AND THE WAY FORWARD FOR KEY SECTORS (Janelle Plummer(ed), Washington DC, The World Bank, 2012) at 183-4 and 214-17. See also Transparency International`s Corruption indexes.

[97] Interview with prosecutor 11, April 16, 2018.

[98] *Yordanos Abay vs. Federal Public Prosecutor, supra* note 44 (translation mine).

[99] *Supra* note 59.

[100] Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*?" *Columbia Public Law Research Paper* No. 06-99 (April 1, 2008), at 11–15.

including immunity not because they deserve it but simply because they assist law enforcement; which bears no rational connection with principles of sentence determination. Even worse, more culpable defendants can be treated lightly merely because they have more information/evidence to trade than their less culpable mates[101] creating what is called the `co-operation paradox'.[102] Further, where the state exempts one from criminal liability simply because he/she provides evidence, it signals a message to the public that the state is trading off its right to punish, which in turn undermines the credibility of criminal norms[103] and public confidence in the justice system. Many professionals are inimical to the very idea of the state dealing with `culprits` whom it has the duty to hold accountable.[104] One US court lamented (though subsequently recanted it)[105]: "If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."

In Ethiopia, although evidence from criminal participants serves law enforcement ends, it could undermine the purpose of punishment. Ethiopian criminal law demands that penalties and measures reflect the purposes of punishment, and that courts determine sentences appropriate for each case having regard to the degree of guilt, the gravity of the crime and the circumstances of its commission.[106] Yet, the reward of suspects and defendants in exchange for their information or testimony departs from these standards of sentencing. Instead it has the effect of promoting impunity and/or treating more culpable defendants leniently, which would further dent an already weakened public trust in the justice system. In one case[107] involving usury and drawing of cheque

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[101] Cynthia Kwei Yung Lee, *supra* note 5, at 139; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (criticizing cooperation paradox whereby more culpable defendants receive lesser sentences).

[102] "kingpins" many receive lower sentences than their underlings because they have more information to trade. See Nicholas Fyfe and James Sheptycki, *supra* note 1 at 347; Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, Federal Sentencing Reporter, 8(5) IMMIGRATION AND SENTENCING (Mar.-Apr., 1996), at 292-295; Stephen J. Schulhofer, *supra note* 101.

[103] Peter J. Tak (1997), *supra* note 13, at 13; Alexandra Natapoff (2004), *supra* note 16, at 683; Daniel C. Richman, Cooperating Defendants, *supra note* 102, at 293 (Noting that this "…conveys destructive and contradictory normative messages that may undermine the moral and expressive validity of the law its self").

[104] Cassidy, R. Michael, *supra* note 2, at 1129-1177; J.H. Crijns *et al*, *supra* note 7; See also A. Vercher, TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS. (Oxford: Oxford University Press, 1992).

[105] Frank O. Bowman, *Departing is Such Sweet Sorrow: A year of Judicial Revolt on 'Substantial Assistance' Departures Follows a Decade of Prosecutorial Indiscipline* 29 STETSON L. REV. 7 (1999).

[106] See Articles 87 and 88 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2004.

[107] Interview with prosecutor 09, April 16, 2018.

without cover, a person suspected of drawing of cheque was turned into a witness in order to prosecute the crime of usury, a less serious crime than the former.[108] This is contrary to the purpose of punishment as well as the very rationale of flipping suspects, i.e., "using a little fish to catch a bigger one."

Indeed, many justice actors share the risks of evidence obtained from criminal participants in undermining the purpose of punishment while some others simply emphasize on its enforcement arsenal.[109] It is generally true that sentencing practices and public confidence are directly correlated.[110] Thus, lenient treatment of criminals would be met with low public confidence in the justice system. This is equally valid in Ethiopia where there is strong tendency of correlating the deterrent effect of punishment with the severity of punishment among the society as well as the lawmaker.[111]

In addition to its inherent dissonance with the purposes of criminal law, lack of standards on the use of evidence obtained from criminal participants could exacerbate the problem. With few exceptions[112], the standard for selecting, evaluating and rewarding suspect/defendant-turned witnesses is left unregulated. Thus, prosecutors simply use such impressionistic expressions in picking witnesses from among criminal participants: "in order to ensure conviction it is rather better to use the suspect or the defendant as a witness than pursuing charges against him." As discussed elsewhere, prosecutors also turn defendants into witnesses even late at the trial stage using the instrumentality of amendment and withdrawal of charges. This opens a room for the prosecution to exercise unfettered discretion to pick and reward defendants simply based on practical considerations that have little or nothing to do with the purpose of criminal law. It could also send a wrong message to the public that something fishy is going on, thereby undercutting further the legitimacy of the justice system.

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[108] Compare Articles 693 & 712 of the Criminal Code of Ethiopia.

[109] FGD with defense attorneys, judges, and prosecutors held on April, 04- 05,10/2018 and March 06-07/ 2018.

[110] See Sara E. Benesh and Susan E. Howell, *Confidence in Courts: A Comparison of Users and Non-Users*, 19 BEHAV. SCI. LAW, 199,202 (2001); J. ROBERTS AND L. STALANS, PUBLIC OPINION, CRIME AND CRIMINAL JUSTICE (1997, Boulder CO: Westview); J. DOBLE, CRIME AND PUNISHMENT: THE PUBLIC`S VIEW (1987, CITY: public agenda Foundation).

[111] Alemu, *supra* note 84, at188.

[112] See for example the general standards provided for under Article 43(1) of the Anti-corruption proclamation.

3.5. Disparate Treatment /Discrimination

In general many scholars agree that the use of incentivized witnesses emasculates the principle of equality.[113] This problem would be all the more pronounced in Ethiopia whose criminal justice system is already riddled with lack of certainty, consistency and fairness. A confluence of general as well as specific variables could expound the problem of disparate treatment among criminal suspects/defendants. Although the FDRE Constitution and the Criminal Code guarantee the right to equality and proscribe differential treatment among similarly situated defendants[114], incentivizing witnesses for their testimony operates on disparity of treatment among equally culpable suspects/defendants or those having a comparable degree of blameworthiness. Thus, while those who cooperate to supply evidence may receive some form of sentence or charge concessions, or complete immunity, those who refuse to cooperate or have nothing to trade, may face harsh criminal charges.

The decision of who to prosecute and who to immunize often is "based on impermissible considerations, bearing no rational relationship to a legitimate government purpose."[115] From the investigative archives the author managed to have access, the standard used to turn suspects or defendants into prosecution witnesses is unclear, or at least is not explicit; the relevant documents indicating the use of impressionistic statements to justify the practice.[116] Interestingly, the FGDs with prosecutors reveal some plausible standards[117]: degree of participation, lack of evidence, complexity of the crime, severity of the crime and the weight of information obtained from the witness.

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[113] See for example, Alexander J. Menza, *supra* note 94, at 531 (arguing that granting a witness immunity in exchange for testimony results in unequal enforcement of the laws); J.H. Crijns *et al*, *supra* note 7, at 27 (summarizing literature showing that arrangements with "justice collaborators" clashes with proportionality and equality principles); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 827–28 (2009); Christopher T. Robertson and D. Alex Winkelman, *Incentives, Lies, and Disclosure,* 20(1) JOURNAL OF CONSTITUTIONAL LAW, 32, 42 (2017); Stephen J. Schulhofer, *supra* note *101 at* 211-12(criticizing cooperation for causing paradoxical disproportionalities in sentences); S. Greer, Supra note 55; Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 206–07 (2002).

[114] See Art 25, FDRE Constitution and Art 4, The Criminal Code of Ethiopia 2004.

[115] Alexander J. Menza, *supra* note 94, at 532.

[116] Such expressions are employed: "mezigebun wutetama lemadireg yireda zend tekesash betekesashnet kemiketilu yilk miskir mehonachew yeteshale hono bemegegnetu";"tetertariwn kemasketate yilke wode miskirnet tekeyro kalun biset yeteshale hono silagegnenew"; literally to mean: *in order to ensure conviction it is rather better to use the suspect or the defendant as a witness than pursuing charges against him.*

[117] FGDs with prosecutors, April 04, and April 05 /2018.

However, this does not mean that prosecutors use the above standards consistently nor are they required to do so by law. Mixed with its inherent disparate treatment of like cases, absence of defined standards on the use of suspects/defendants as prosecution witnesses invites inconsistent and unpredictable decisions, if not discrimination. For instance, in one sexual outrage case involving two minor defendants of opposite sexes, both having `consented` to the intercourse, it is not clear why the female minor was used as a witness to prosecute the male minor.[118] Besides, in *Federal prosecutor vs. Yonatan Manjura et al*[119], of the three suspects who participated in the preparation of a forged loan agreement by attesting that a valid loan agreement has been concluded, only one of them was picked and turned into a prosecution witness while the rest were prosecuted. From the records, it is not clear how and why such a suspect was selected; perhaps her willingness to cooperate could explain this. Even worse, sometimes suspects with a higher degree of participation and guilt are converted into witnesses to prosecute co-offenders with similar or even lesser degree of guilt.[120] The above differential treatments, which could be simply based on suspect's decision or ability to cooperate or the prosecution's subjective considerations as opposed to established and principled factors of sentence determination (including the degree of guilt or the seriousness of the crime) could culminate in unequal treatment of similarly situated suspects or defendants — discrimination.

Furthermore, even within those suspects/defendants willing to cooperate, the types and the amount of concessions extended to them do not reflect the degree of individual guilt and the gravity of the crime, prominent factors in sentencing. Instead, it depends on factors extraneous to sentence determination such as the degree of cooperation, their bargaining power, the weight/value of the testimony given, own description of degree of participation in the crime which often downplays own role and exaggerates the role of others, the strength of the prosecution case, and other subjective considerations. Indeed unwittingly, while the value of evidence/testimony is a fundamental factor in trading "substantial evidence" for immunity under the law, the degree of participation and seriousness of the crime are not.[121]

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[118] Interview with defense attorney 01, April 10/2018.

[119] *Federal prosecutor vs. Yonatan Manjura et al, supra* note 50.

[120] Alemu, *supra* note 11, at 35-36.

[121] None of the laws that recognize the use of evidence obtained from criminal participants in return for immunity or other concessions consider degree of culpability or participation as a requirement for witness selection. See Alemu, *supra* note 19.

Finally, comparable cooperation/assistance of criminal participants may generate disparate concessions from the prosecution, deliberate or otherwise.[122] This could be the case at least in two situations. First, similar cases could be treated quite differently solely depending on the prosecutor's conception of her/his discretions and roles. For comparable cooperation while some prosecutors grant informal immunity others prefer charge or sentence reduction simply because they believe that they lack the power to extend informal immunity.[123] Second, leaving the prosecution with almost unbound discretion, with no comprehensive standards to select and reward 'cooperating' suspects/defendants coupled with lack of review mechanisms, is likely to invite differential treatment of similarly situated suspects/defendants based on some invidious grounds or motives.

Disparate treatments among criminal suspects /defendants have the potential to make the justice system unpredictable and unfair in terms of its outcome and sentences to ultimately erode its integrity and legitimacy further.

3.6. Lack of legal framework and enforceability

Evidence obtained from criminal participants is largely unregulated in Ethiopia. The exception could be crimes of corruption, terrorism, trafficking and smuggling in persons where its application is formally sanctioned, though in general terms. Even then there are no detailed standards and procedures to govern it. In all other cases, albeit some argue that the FSC Cassation Division in *Yordanos Abay vs. Federal prosecutor*[124] has authorized the use of suspect/defendant-turned prosecution witnesses and that some prosecutors successfully invoke this case as an authority, it remains unregulated. However, the authority of this case is contested for the court lacks the mandate to sanction such practice in the presence of a clear law to the contrary.[125] Further, it is uncertain whether the decision sets a precedent or it is just an obiter dictum. The available facts and issues from the case left this issue obscure.[126] That said, although prosecutors rarely invoke it to justify the entrenched practice, one could resort to the Witness Protection Proclamation No. 699/2010 that grants protection measures

[122] *Supra* note 113; Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 *S. CAL. L. REV.* 501, 560 (1992).

[123] FGDs with prosecutors, April 04 and April 05/ 2018.

[124] *Yordanos Abay vs. Federal Prosecutor*, *supra* note 44.

[125] For more, see section 3.7 below.

[126] While it appears that the defense challenges the conviction claiming fundamental error of law, it is unfortunate that the basis for such claim (the arguments made) is not summarized in the decision of the Court.

including immunity to witnesses, which also covers suspect/defendant-turned witnesses.[127] However, the strict conditions attached to the protection measures[128] shows that reliance on such witnesses in return for immunity is not envisaged in a scale it is practiced.

On the other hand, in the absence of any procedure that regulates decisions to discontinue/dismiss charges against "cooperating" suspects/defendants invites some prosecutors simply to rely on a variety of legal provisions. While some invoke the Federal Attorney General Establishment Proclamation No. 943/2016 (Article 6), others stretch the provisions of the 1961 Criminal Procedure Code by analogy (Articles 42 and 30) and some others simply discontinue charges without invoking any procedural law.[129]

The use of evidence procured from suspects/defendants in exchange for a benefit often operates informally. No formal agreement is concluded; nor is there any clear enforcement mechanism set forth by law. This holds true even in the circumstances where it is formally recognized as is in corruption cases. However, in practice prosecutors are in advantageous position. The threat to press charges of perjury or misleading justice[130] and the use of leading questions against hostile witnesses[131] provide them with strong arsenal against possible breaches from the defense. Prosecutor 01 observes[132]: "in most cases, once they appear to testify, suspect/defendant-turned witnesses do not renege and turn hostile for they know for sure that they will face prosecutions which usually commence with an immediate arrest." Another prosecutor added: "Often I warn them to testify as agreed or they will face multiple charges". Prosecutor 06 recounts[133]: "where flipped witnesses turn hostile, we employ two alternatives: attempt to rectify the problem using leading questions or remove their privilege and pursue perjury/misleading of justice charges against them." Thus those who dare to renege would do it under the pain of punishment. In one attempted homicide case[134] involving two spouses as defendants, the prosecution entered an informal agreement to drop charges against the wife on condition that she testifies against her husband. The prosecution failed as the witness turned hostile to

[127] Articles 3(1) and 4(1) (f), Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010.

[128] Alemu, *supra* note 19, at 466-68.

[129] FGD with prosecutors, April 05, 2018.

[130] See Article 446 of the Criminal Code of Ethiopia 2004.

[131] Article 44 of Proclamation No. 434/2005 authorizes prosecutors to use leading questions upon obtaining the permission of the court.

[132] Interview with prosecutor 01, April 4, 2018 (translation mine).

[133] Interview with prosecutor 06, April 13, 2018 (translation mine).

[134] Interview with prosecutor 03, April 11, 2018 (translation mine).

save her husband. Her husband was acquitted but she was convicted of *misleading of justice* and received six months of simple imprisonment.

The individual circumstances of most suspects and defendants (who are often unrepresented and uniformed), means such threats with multiple charges provide the prosecution a powerful tool to enforce the deal. Yet, another concern may emerge: by discouraging the flipped witnesses from rectifying his false testimony (who agrees to falsely testify first and wants to recant this latter), it could be counterproductive to result in a coerced false testimony.

For the prosecution the problem rests elsewhere, on the fact that some defendant/suspect-turned witnesses disappear upon their release on bail.[135] With a view to prevent this, such witnesses are sometimes detained for months or their surety/bail bond withheld until they testify before court.[136] The use of detentions and withholding of surety as enforcement tools is problematic. First, the practice infringes the accused right to bail since it does not fall within the circumstances[137] that justify denial of bail. Similarly, withholding surety beyond the release of the suspect contravenes the law and amounts to unlawful seizure of one's property.[138] Second, the practice could leave detrimental policy upshots to cooperation. By discouraging potential cooperators, it would militate against the smooth and continued use of suspect/defendant-turned witnesses.

In contrast to the above, the suspect or defendant-turned witness lacks meaningful enforcement mechanism should prosecutorial breach of promise occur. Having no guarantee on the delivery of concessions, he lives in a state of uncertainty; he entirely and blindly places his trust on the prosecutor. This starts with lack of clarity on the nature and effects of the deal struck with the prosecution – it can involve closure of the proceedings (as per Art 42(1) (a)) or withdrawal of charges or informal immunity. In principle, nothing prevents the prosecution from re-opening the case and pursuing a charge against the witness. If such breach occurs no court of law entertains it. The following case can illustrate a sense of the problem. In one case involving theft of gold, a woman who stole and sold gold to a man was made to testify against the man and later she was prosecuted of theft.[139] Apparently, the woman may have got some promise of immunity or lenient treatment from the prosecution, which was perhaps withdrawn

[135] FGD with prosecutors, April 04 & 05/2018.

[136] *Ibid.*

[137] Article 67, Criminal Procedure Code of Ethiopia, Negarit Gazeta, Extraordinary Issue No.1 of 1961, (1961) (Herein after CPC).

[138] *Ibid.*, Article 71.

[139] Interview with prosecutor 04, April 18, 2018.

later or alternatively honored in terms of maneuvering facts to result in sentence mitigation, although the prosecutor insisted that there was none.[140] It is worth noting that enforcement related problems are not limited to the informal practice. Sometimes suspect/defendant-turned witnesses face prosecutorial reneges even in its formal variant.[141]

In conclusion, in Ethiopia evidence obtained from criminal participants in exchange for a benefit/incentive is epitomized by the fact that it largely applies in ordinary crimes without a legal authorization and in those formally recognized cases, it lacks detailed procedures and guidelines. In the main, the practice is not subject to both internal and external review. This could encourage arbitrary use, if not abuse of such testimony. Nor is it immune from corruption as shown above under section 3.3.

3.7. Incompatibility with the criminal procedure law

The Criminal Procedure Code proscribes the offering of any inducement to a criminal suspect[142]: "No *police officer or person in authority* shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other improper method to *any person examined by the police*". Here the phrase "person in authority" can be interpreted to include prosecutors. Apparently, the turning of suspects into prosecution witnesses, which involves clear inducements and promises with a view to buy testimony or information, stands in clear contradiction with this provision. Ostensibly the language: "any person examined by the police" seems to suggest that this prohibition is limited to the investigation stage, excluding the offering of inducements afterwards by the prosecution. However, this is not the case as it contradicts the purpose of the prohibition, which is prevention of false confession/testimony regardless of the identity of the inducer. Further, the caption and the content of the Amharic version of the provision make this clear by proscribing inducement of testimony by police or person in authority, which includes the prosecutor.

Thus, while the use of such piece of evidence in crimes of corruption, terrorism and human trafficking can be taken as an exception or an amendment to the Criminal Procedure Code[143], its horizontal informal application to any crime utterly offends the law. The defense raised a similar argument in *Federal Prosecutor vs. Abebe Birhane and*

[140] *Ibid.* This could be verified from the investigative file but my attempt to locate it was not successful.
[141] Alemu, *supra* note 19, at 457.
[142] See Article 31 of the CPC, *supra* note 137.
[143] See the saving clauses/inapplicable law clause of each proclamation.

others[144] but regrettably the court simply overlooked the matter, or at least its ruling is not evident from the records.

Conclusion and Recommendations

The need to fight crimes, especially organized crimes prompted many jurisdictions to experiment various policy options, use of collaborators of justice/incentivized witnesses being one of them. Ethiopia has also sanctioned this policy option in selected crimes namely terrorism, corruption, and trafficking and smuggling in persons, albeit its regulation remains by and large patchy. However, in practice it is not just limited to the above few crimes. Informally, it permeates nearly all crimes ranging from less serious to complex ones. Thus, in the main it is a covert practice that lacks enforceability.

While it is true that the use of incentivized witnesses and their evidence can enhance the efficiency and effectiveness of criminal prosecutions, as shown in this article, it also entails plethora of challenges and undesirable implications (both potential and actual) in many ways. It is inherently a problematic institution characterized by uneven treatment of similarly situated defendants (discrimination), unreliability that can yield wrongful conviction, dissonance with the purpose of criminal punishment, and lack of transparency that invites abuses and corruption. The material, legal and institutional contexts of Ethiopia could sustain and nourish these defects. Such procedural and substantive safeguards against misuses and flaws of evidence from incentivized witnesses as, legal representation, robust cross examination, disclosure, pretrial review mechanisms, clear guidelines and standards, enforcement mechanisms and sanctions, and effective judicial review, are largely non-existent, or at best remain scanty. Weak prosecutorial and police accountability systems (both internal and external), weak investigation system, and lower standards of proof could aggravate the above problems further.

Against these milieus, two policy alternatives could emerge on the use of evidence obtained from incentivized witnesses in Ethiopia:

Option (1): Do away with evidence obtained from criminal participants in return for a benefit: Making such evidence categorically inadmissible as a matter of law. Although comprehensive empirical data on some of the blemishes relying on such piece of evidence, including wrongful conviction, is yet to be available in Ethiopia, the principled objections against incentivized witnesses presented above could warrant this

[144] *Federal Prosecutor vs. Abebe Birhane and others*, *supra* note 70.

option. Nonetheless, its utility in fighting the otherwise impenetrable organized crimes may be tempting for any government. Its instrumentality to fight organized and complex crimes means it will remain one feature of the justice system in the years to come. Indeed, with evidence obtained from incentivized witnesses holding a legislative footing in several laws including the anti-corruption and witness protection proclamations, and the criminal justice policy authorizing it, and justice actors embracing it by stressing on its importance, this would be the case for Ethiopia.

Option (2): Reforms on use of evidence obtained from incentivized witnesses: This calls for strict regulation of such evidence gathering tools having regard to its inherent flaws and specific contexts of the Ethiopian criminal justice system. Leaving the principled objections against it aside, and emphasizing up on its utility, this option sounds feasible. This option, which demands interventions directed at ameliorating the above challenges and implications, could include such policy and legal reforms as:

i) Tight regulation on the use of such evidence: it should be limited to organized and complex crimes whose investigation may not be effectively handled through ordinary means of investigation i.e., it should be an exceptional and last resort measure. This calls for banning of the entrenched informal practice and restricting the use of incentivized witnesses to those exceptional crimes authorized by law and the setting forth of detailed standards and guidelines on selection and reward of such witnesses.

ii) Instituting enhanced guarantees such as mandatory legal representation; liberal cross-examination enabling the defendant to effectively test the reliability of incentivized witness testimony; the requirement of corroboration to such testimony; and disclosure of the agreement struck with such witnesses and other related materials.

iii) Providing for meaningful enforcement mechanisms and sanctions. These could include, among others:

- The requirement of written agreement between the prosecution and the cooperating suspect/defendant detailing their respective obligations and benefits;
- Granting of "use immunity" to the potential witness (suspect/defendant-turned witness): Clauses which protect reneges to the effect that anything the witness says should not be used in evidence against him in a criminal prosecution, with the exception of perjury and misleading of justice; and that undisclosed evidence would be inadmissible;

- Internal reviews within the office of the prosecution and robust judicial oversight on the use of suspects /defendants as prosecution witnesses (on their selection, evaluation and reward).

iv) Enhancing the capacity of justice actors: familiarizing justice actors with the risks of incentivized witness testimony, the skills needed to detect unreliable witnesses and the precaution to be taken in order to mitigate the challenges.

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Power of Land Administration under the FDRE Constitution

Habtamu Sitotaw,[*] Muradu Abdo[♣] & Achamyeleh Gashu[*]

Abstract

This Article inquires whether there is federal interference against the constitutional power of regional states to administer land in the federal system of Ethiopia. It further scrutinizes underlying reasons for apportionment of power over land between the Federal Government and regional states under the present constitution of Ethiopia. The Article builds on primary and secondary data sources to find there are several existing federal land laws which allow the Federal Government to undertake land administration, which is constitutionally entrusted to regional states. It further concludes that relevant federal institutions mandated to defend the FDRE Constitution have failed to resist this upward flow of power in relation to land. It then recommends that federal laws unjustifiably empowering the Federal Government to entertain land administration issues shall be revised and such mandate shall be given back to the states. Also, it advises the Federal Government to refrain in the future from enacting legislation related to land administration in the interest of honoring the federal system. Moreover, it is counselled that upward flow of power over land administration should get proper scrutiny by relevant institutions.

Key terms: Federal Government, Ethiopia, States, Power Centralization, Land Administration, Land Utilization

Introduction

This Article interrogates the issue of whether there is federal interference against regional states' constitutional power to administer land in the contemporary federal system of Ethiopia, building on primary and secondary data sources.

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Pursuant to the Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution), the Federal Government has the authority to enact laws on land utilization and conservation while the power to administer land belongs to regional states.[1] The Federal Government has so far issued several land laws including Urban Landholding Registration Proclamation No. 818/2014, Urban Lands Lease Holding Proclamation No. 721/2011, Expropriation of Landholding for Public Purposes and Payment of Compensation Proclamation No. 455/2005 (now revised by Proclamation No. 1161/2019), Industrial Parks Proclamation No. 886/2015 and Rural Land Administration and Land Use Proclamation No. 456/2005. Analysis of these federal laws reveals that there is a substantial move to extend the mandate of the Federal Government to include the power to administer land and implement its laws that should otherwise fall within the competences of regional states.[2] Moreover, a study undertaken under the auspices of the Council of Constitutional Inquiry (CCI) indicated that some aspects of the above federal land laws encroach on land administration powers vested to the regional states under the FDRE Constitution.[3]

Despite the presence of upward flow of power over land administration contrary to the letter and spirit of the FDRE Constitution, such an affair has not been subject to scrutiny. There have been no instances whereby states openly challenged that kind of legislative tendency displayed by the Federal Government.[4] Also, institutions responsible to defend and protect the constitutional order and the federal system are not living up to expectations in this regard. The available scholarship has not given the deserved attention to the question either. The scanty available literature on the matter fails to consider the reasons why both orders of government possess authority over land under the FDRE Constitution, the notions of 'land administration` and 'land utilization' within the rubric of the FDRE Constitution and most importantly the constitutionality of aspects of the above mentioned federal rural and urban land laws that have allowed the Federal Government to play administrative role with respect to land. The present Article intends to fill this void. It finds that the Federal Government has acted beyond the powers vested in it under the FDRE Constitution in matters of land administration. The Article recommends that federal laws which empower the

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[1] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, 1st year No.1, Arts 51/5 and 52/2/e.

[2] Assefa Fiseha, *Federalism and Development: The Ethiopian Dilemma*, 25 INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 333, 356 (2018).

[3] *See* የኢ.ፌ.ዴ.ሪ. የሕገ-መንግስት ጉዳዮች አጣሪ ጉባኤ ፅ/ቤት, የጠቅ መሪት ይዞታ ስለሚተላለፍበት አግባብ ከኢ.ፌ.ዴ.ሪ. ሕገመንግስት አንፃር, 2011 E.C., Pp. 15 – 16.

[4] Adem Kassie, *Umpiring Federalism in Africa: Institutional Mosaic and Innovations*, 13(4) AFRICAN STUDIES QUARTERLY 59 (Winter 2013).

Federal Government to undertake land administration issues shall be revised and such mandate shall be left to regional states. It further suggests that the Federal Government shall refrain from enacting laws having provisions dealing with land administration.

The rest of the Article is organized as follows. Following this introduction, section one examines the power allocation in relation to land under the FDRE Constitution. This section further conceptualizes the essence of land utilization and land administration as they are the fundamentals to understand the relative powers of the federal and state governments over land. Section two investigates the rationales why both orders of government have authority over land. Section three assesses some of the indicators of federal interferences over states' mandate to administer land through different laws. The section is followed by a discussion on institutional responses to the growing centralization of power over land administration. The final section provides concluding remarks.

1. Constitutional Division of Power on Land in Ethiopian Federation

The FDRE Constitution apportions power between the federal and state governments, and the power sharing scheme can be seen in the following categories. The first group contains exclusive powers vested to the Federal Government.[5] The second group constitutes 'residual powers' that are neither exclusively given to the Federal Government nor concurrently to both, but they are regional states' mandates,[6] and some specific powers are assigned to states along with residual powers.[7] The third group takes concurrent power on taxation.[8] The fourth relates to the undesignated power of taxation whose fate shall be decided by a two-thirds majority vote upon the joint meeting of the House of Federation (HoF) and House of Peoples Representatives (HPR).[9] Still, some scholars argue that there is another group of power arrangement – they call it framework power.[10] In this arrangement, the Federal Government shall

[5] FDRE Constitution, Articles 51, 55, 62, 96 and other provisions that give express powers to the Federal Government.

[6] FDRE Constitution, Article 52(1).

[7] FDRE Constitution, Art 52/2 lists seven items as exclusive state competences, including adopting a state constitution, establishing state police, enacting legislation regulating state civil service, formulating and approving policies on state economic and social matters, and administering land and other natural resources.

[8] FDRE Constitution, Article 98.

[9] FDRE Constitution, Art 99.

[10] See, for instance, Assefa Fiseha and Zemelak Ayele. *Concurrent Powers in the Ethiopian Federal System, in* CONCURRENT POWERS IN FEDERAL SYSTEMS MEANING, MAKING AND MANAGING 241, 241 (F. Palermo, and J. Marko eds., Koninklijke Brill Nv, 2017).

adopt framework policies and issue framework legislation on certain functional areas, leaving the details to be regulated by states. The arrangement is to secure a certain measure of uniformity and in guiding states' efforts.[11]

There are three approaches to apportion power in relation to natural resources, which are also relevant to land: decentralized, centralized or middle way approaches.[12] In the decentralized approach, the authority on land and other natural resource governance belongs to the state and local level governments.[13] The decentralized approach is central to promoting sustainable management, participatory governance and equitable benefit sharing from local resources.[14] This approach requires the decentralization of decision making powers to "enhancing efficiency, equity and justice in the management and use of natural resources to support local development".[15]According to Daniel Esty,[16] the justifications for decentralized land and natural resource governance might be five: (a) to benefit out of diversity in a federation; (b) a counter for "Race-to-the-Bottom" justification; (c) "public choice argument"; (d) on account of moral grounds; and (e) "the insignificance of externalities".

The second approach to federal governance of land and other natural resources is centralized approach where power is concentrated and assigned only to the national level government with the view to enhancing uniformity of standards.[17] During the late 1960s and early 1970s, for example, natural resource governance in the United States was centralized. Three broad reasons were forwarded for such centralized resource governance. These were: - (a) interstate spillovers of pollution; (b) poor performance of states in regulating the resources; and (c) effects of interstate competitiveness as a result of divergent standards.[18] As land, in most cases, is a local endowment,[19] it is rare to get

[11] RONALD WATTS, COMPARING FEDERAL SYSTEMS 38, (Queen's University Press, 3rd ed., 2008); K.C. WHEARE, FEDERAL GOVERNMENT 9 (Oxford: Oxford University Press, 4th ed., 1963).

[12] Food and Agricultural Organization (FAO), *Compulsory acquisition of land and compensation*, 10 LAND TENURE STUDIES 13 (2008); Andrew Bauer, Natalie Kirk and Sebastian Sahla, *Natural Resource Federalism: Considerations for Myanmar*, POLICY PAPER SUMMARY 5 (Natural Resource Governance Institute, 2018).

[13] FAO, *supra* note 12, at 13.

[14] United Nations Development Program (UNDP), *Decentralized Governance of Natural Resources: Part 1 - Manual and Guidelines for Practitioners* 1 (UNDP Drylands Development Centre, 2006).

[15] *Ibid.*, at 2.

[16] Daniel Esty, *Revitalizing Environmental Federalism*, 95 MICHIGAN LAW REVIEW 570, 606-613 (1996).

[17] Brightman Gebremichael, *The Power of Lad Expropriation in the Federation of Ethiopia: The Approach, Manner, Source and Implications*, 7(1) BAHIR DAR UNIVERSITY JOURNAL OF LAW 1 – 36, 13 (2016),

[18] Daniel Esty, *supra* note 16, at 601 – 602.

[19] The reasons for this could be three-fold, as Marci Hamilton states. First, as land is immovable, its uses will be more relevant to those who are nearby than those who are far away. Second, the manner land resource

experiences of states with a power allocation that excludes state governments from land affairs.

In the third approach – the middle approach –, both national and local governments are entitled to administer and manage land and other natural resources. There is concurrency of power between the two orders of government.[20] In this case, the national government supervises local authorities while governing land and other natural resources.[21] This is especially common when broad-based support is important.[22] This approach is best reflected in the Russian federation in which power over use and disposal of land, subsoil, water and other natural resources fall within the purview of concurrent jurisdiction.[23] In Germany as well, transfer of land, natural resources and means of production to public ownership or other forms of public enterprise are the joint mandate of the two orders of government.[24] In Canada, differences in resource endowments among the provinces have resulted in increased concurrency of federal and provincial powers.[25]

In Ethiopia, the roles of the federal and state governments vary from one natural resource to the other – meaning Ethiopia has not subscribed to any one of the three approaches. It is possible to see the variations in three settings. With regard to some natural resources, states have the authority to administer natural resources without sharing it with the Federal Government provided that the particular natural resource is found exclusively in the territory of states. The ideal example here is the power on land in which states have broader power of managing it as they are entitled to administer land and issue land administration laws. The only role of the Federal Government in

is used is vital for communities to develop their character and pursue shared purposes. Land use laws enable people to come together to set priorities, establish their character, and meet fiscal, aesthetic, and lifestyle needs. Third, by making land use law local, citizens will be in a position to directly access their representatives and their voices in the land use process that directly affects them will likely be heard. This is to say, as land use laws are enacted at state and local level and implemented by local authorities elected at the local level, this paves the room for the local communities to be active participants both in altering the law and in applying it [Marci Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 (1) INDIANA LAW JOURNAL 335 (2003)].

[20] Bauer, Kirk and Sahla, *supra* note 12, at 5.

[21] FAO, supra note 12, at 13.

[22] Andrew Bauer, Natalie Kirk and Sebastian Sahla, *supra* note 12, at 5.

[23] Hao Bin, *Distribution of Powers between Central Governments and Sub-National Governments*, (Conference Paper Presented to Committee of Experts on Public Administration, Eleventh Session New York, 16-20 April 2011).

[24] Germany Basic Law, Article 74(15).

[25] Canadian Constitutional Act, Section 109 and 117.

this case is enacting laws over the utilization and conservation of land, and the mandate to administer land belongs to the states.[26]

In some other natural resources, which include rivers, forests, and lakes linking two or more regions, the power of management is shared between the two orders of government. In these natural resources, the power of issuance of laws is in the hands of the Federal Government. For instance, regarding the management of natural forests, the Federal Government legislates on the development, conservation and utilization of forest resources but regional states shall administer same in accordance with federal laws.[27] In other category of natural resources, the management is exclusively left to the Federal Government. This government level has both legislative and administrative authority over the resources. States play no role in these natural resources.[28] This way of resource management is centralized, and its importance seems to avoid conflict of interest among states that are sharing the resources.

The manner in which power over land is apportioned between the two orders of government is a little bit blurred though. Although the language used in the FDRE Constitution does not imply the federal law should be framework legislation, in practice, states are considering federal legislation as framework while adopting their land administration laws.[29] The FDRE Constitution, in the presence of residual power clause, lists state governments' power to administer land in accordance to federal laws.[30]

The actual mandates of the federal and state governments over land lies, *inter alia*, in the following scenarios: (a) in the general approach to division of powers and functions in the FDRE Constitution; (b) the contextual meaning of 'utilization' 'conservation' and

[26] FDRE Constitution, Arts 51/5 & 52/2/d.

[27] This can be inferred from Articles 52/2/d and 55/2/a of the FDRE Constitution, as the phrase "other natural resources" can be interpreted to include natural forests as well. With this, on forest resources, the legislative mandate is vested to the Federal Government through the HPR and administrative mandate shall be left to the states.

[28] FDRE Constitution, Art 51(11), which states that the Federal Government shall determine and administer the utilization of the waters or rivers and lakes linking two or more States or crossing the boundaries of the national territorial jurisdiction.

[29] Gedion Hessebon and Abduletif Idris, *The Supreme Court of Ethiopia: Federalism's Bystander, in*, COURTS IN FEDERAL COUNTRIES 176 (Nicholas Aroney and John Kincaid eds., University of Toronto Press, 2017).

[30] FDRE Constitution, Article 52(2(d)).

'administration' of land; (c) the constitution makers' deliberations on the prevailing land policy;[31] and (d) a case presented to the CCI.

One way to understand the precise role of the federal and state governments is by looking at the general power arrangement in the FDRE Constitution. Under the same Constitution, regional states have the mandate to administer land while the Federal Government has the prerogative to enact laws on the utilization and conservation of land. Having this, what is missing in this general power sharing scheme is the legislative power in relation to matters of land administration. The residual clause in the FDRE Constitution can be of an important clue here. On this basis, regional states' constitutionally grounded legislative power over land can be inferred from the residual clause in the FDRE Constitution. The relevant provision reads that, "all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States".[32] From this, of powers relating to land that is not openly vested to either or both orders of government is related to the legislative power on land administration. In view of this residual clause, the legislative mandate on the administration of land shall belong to regional states.

The deliberations made during the making of Proclamation No. 456/2005 further ascertain regional states' legislative mandate over land. One of the debates focused on Article 17 of the proclamation. The Minute of the Proclamation states that the Federal Government's legislative role under Article 51 of the FDRE Constitution is restricted to the utilization and conservation of land only. A member of the drafting committee stressed that Article 51 of the FDRE Constitution allows the Federal Government to legislate on the use of land and natural resources, and Article 52(d) empowers regional states to enact laws concerning land administration. However, the power to formulate land use policy shall be vested in the Federal Government.[33] This observation is important to further understand the legislative mandate of regional states over land administration.

However, given the lack of definitional clause in the FDRE Constitution for the phrases 'utilization', 'conservation' and 'administration' of land, it appears difficult to have a clear boundary of federal and state powers with respect to land. To determine what

[31] Brightman Gebremichael, *The Post-1991 Rural Land Tenure System in Ethiopia: Scrutinizing the Legislative Framework in View of Land Tenure Security of Peasants and Pastoralists* 366 (LLD Dissertation, University of Pretoria, 2018).

[32] See the FDRE Constitution, Article 52(1).

[33] **በኢትዮጵያ ፌደራላዊ ዲሞክራሳዊ ሪፐብሊክ፥ 2ኛው የህ/ተ/ም/ቤ/ት 5ኛው አመት የስራ ዘመን** (1997 ዓ.ም.) **የጸደቁ አዋጆች የህዝብ ይፋ ዉይይቶች እና የዉሳኔ ሃሳቦች፥** 1997 **ዓ.ም. ስለ** 455/2005 **የተደረገ ዉይይት**, Volume 2, p. 20.

these phrases mean, it is good to consider available definitions for the terms. Subsidiary land laws have defined land administration without however defining the term 'land utilization'. Even the literature seems to neglect the articulation of this later term despite the evident significance of doing so. Given the absence of definition of the term 'land utilization', one mechanism to determine issues to be included in it may be by way of exclusion.[34] The exclusion approach to pin down the contents of land utilization means that if a definition of land administration can be ascertained, activities out of the domain of land administration shall fall within the legislative competence of the Federal Government – land utilization.

The federal and regional rural land laws have determined elements of 'land administration'. Accordingly, the Federal Rural Land Administration and Land Use Proclamation No. 456/2005 defines the term under consideration as,

> a process whereby rural landholding security is provided, land use planning is implemented, disputes between rural landholders are resolved and the rights and obligations of any rural landholder are enforced, and information on farm plots and grazing landholders are gathered, analyzed and supplied to users.[35]

The Amhara National Regional State (ANRS) Rural Land Use and Administration Proclamation defines land administration in the following manner,

> The process whereby rural landholding right is provided, guarantee is secured, the rent and lease value of land is estimated, the land use plan is implemented, disputes arising between land users are resolved and obligations are enforced as well as data is distributed to users being collected and analyzed concerning the above indicated issues.[36]

Also, the Benshangul Gumuz Regional State rural land use and administration defines the term land administration as follows,

> rules and procedures on rural land and this proclamation by which agreements between land users and any rights and duties of them, system of land distribution by the proper procedure, protection of land, giving guarantee on

[34] Brightman, *supra* note 31, at 366.

[35] FDRE Rural Land Proc. No 456/2005, Art. 2(2).

[36] ANRS Proclamation No. 252/2017, Article 2(2).

possession of land, land use plan implementation and conflict resolution among users is executed.[37]

From the definitions above, the following elements in land administration can be identified,

a) Right on rural land is provided and secured
b) Enforcement of rights and obligations over land
c) Gathering, handling and make available information on land to users
d) Determination of lease and rent values
e) Resolution of disputes in relation to the use of land
f) Land use plan implementation
g) Agreements between land users and any rights and duties of them
h) System of land distribution

The definition of land administration under the federal rural land law appears narrower in the sense that it does not incorporate land valuation. The definition of land administration under the ANRS rural land law incorporates land valuation. The differences can be taken as evidence of "federal-state governments' power conflict as the federal law seems to limit the regional states' constitutional power and gives some aspect to the Federal Government."[38] Yet, both definitions fail to incorporate the issue of land taxation that is commonly mentioned as a core element in land administration. Under the FDRE Constitution, state governments have the authority "to determine and collect fees for land usufractuary [sic] rights".[39] This issue is an aspect of land administration that should have been boldly stated in the above definitions. Moreover, the definition of land administration under the Benishangul Gumuz Regional state land administration and use proclamation does not include land valuation, land information system and that of land taxation. Relying on the definition given by this regional state's rural land law means the above three core issues in land administration would not be counted in the purview of land administration.

Since constitutional division of power over land hinges on determination of the metes and bounds of the phrases 'land administration', 'land utilization' and 'land conservation', a formal constitutional interpretation of these terms would be more

[37] Benishangul Gumuz Regional state Land Administration and use Proclamation No. 85/2010, Article 2(2).

[38] Brightman, *supra* note 17, at 24.

[39] FDRE Constitution, Art 97(3).

instructive.[40] So far, there is no such authoritative interpretation to that effect. Relying on these domestic subsidiary laws' definitions on land administration could mean that we are missing the elements that should have been incorporated in land administration and this further frustrates and diminishes regional states' constitutional mandate to administer land.[41] This is not a theoretical issue. As briefly highlighted in the definition of the concept given under Proclamation No. 456/2005, the Federal Government defined the term restrictively to narrow the elements of land administration by leaving out land valuation. All the federal, ANRS and Benshangul Gumuz rural land laws do not include land taxation in their respective definitions for land administration. Moreover, under the definitions in these rural land laws, some specific activities to be performed in land administration are not mentioned in detail. For instance, whether land allocation to investment purpose[42] and establishing land administration institutions fall under land administration in Ethiopian context is not clear from the definitions in the above federal and regional rural land laws.

In the absence of clear constitutional and legislative guidance on this, the determination of the actual constitutional mandate of the two levels of government with respect to land forces us to resort to other available insightful and instructive definitions and clues. Of the several definitions given to the notion of land administration, the following one adopted by the United Nations Food and Agriculture Organization (FAO) offers elaborate elements and appears comprehensive,

> the way in which the rules of land tenure are applied and made operational; and it includes an element of enforcement to ensure that people comply with

[40] Brightman, *supra* note 31, at 367.

[41] *Ibid.*, at 367.

[42] The issue of land allocation for investment purpose is included under a definition given by the Council of Ministers for land administration in the context of agricultural investment land. Accordingly, "land administration" is "an act of identification of agricultural investment lands on the basis of study and demarcating, entrusting, transferring, supervising and controlling same" [Ethiopian Agriculture Investment Land Administration Agency Establishment Council of Ministers Regulation, Regulation No. 283/2013, 19th year No. 32 Addis Ababa 4th March 2013]. In this definition, various elements that should have been included in land administration are missing. While the definition simply provides identifying an agricultural land in respect of investment purpose and demarcate, entrust, transfer, supervise and control on the land as aspects of land administration, it failed to incorporate the other major elements in land administration like planning, land valuation as well as taxation issues and other specific details.

In fact, this definition of land administration is relevant for the Federal Government since the concern is to empower this level of government to allocate lands above 5000 hectares to investors taking the power of regional states through delegation. But, in this definition one thing appears clear: that land allocation for investors is an aspect of land administration, which is lacking in the definitions on land administration in the regional and federal rural land laws observed above.

the rules of land tenure. It comprises an extensive range of systems and processes to administer:

1. land rights: the allocation of rights in land; the delimitation of boundaries of parcels for which the rights are allocated; the transfer from one party to another through sale, lease, loan, gift or inheritance; and the adjudication of doubts and disputes regarding rights and parcel boundaries;
2. land use regulation: land use planning and enforcement, and the adjudication of land use conflicts;
3. land valuation and taxation: the determination of values of land and buildings; the gathering of tax revenues on land and buildings, and the adjudication of disputes over land valuation and taxation.[43]

This definition contains several elements of land administration: land rights, land use regulation and land valuation. The definition takes enforcement of rules of land tenure as key component of land administration. The definition does not include the determination and specification of land tenure issues under the realm of land administration. Rules of land tenure, according to FAO, define "how property rights to land are to be allocated... how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints…who can use what resources for how long, and under what conditions."[44] In effect, the specification and determination of "land rights, the manner to acquire rights over land, the scope of these rights, the manner they operate in the holding, transfer and inheritance of land, and when and how rights over land shall extinct" are elements of land utilization.[45]

[43] FAO, *Access to Rural Land and Land Administration after Violent Conflicts*, 8 LAND TENURE STUDIES 23 – 24 (2005). Land administration encompasses the following elements: land tenure, land use, land valuation, land development and these four shall be integrated through information management system. Moreover, land registration is considered one component of land administration [See Ian Williamson, Stig Enemark, Jude Wallace and Abbas Rajabifard, LAND ADMINISTRATION FOR SUSTAINABLE DEVELOPMENT 119 (Esri Press, 2010); FAO, *supra* note 43, at 23; Daniel Steudler, *A Framework for the Evaluation of Land Administration Systems* 17 (PhD Thesis, The University of Melbourne, 2004); Enemark, S. *et al.*, *Fit-For-Purpose Land Administration*, 60 FIG PUBLICATION 13-14; Land Tenure and Development Technical Committee, *Land Governance and Security of Tenure in Developing Countries* 109 (White Paper: French Development Cooperation), available at: http://www.agter.asso.fr/IMG/pdf/land-governance-and-security-of-tenure-in-developing-countries.pdf], (Last accessed on 14/03/2020).

[44] FAO, *Land Tenure and Rural Development*, 3 LAND TENURE STUDIES 7 (2002). Available at, http://www.fao.org/3/a-y4307e.pdf, (Last accessed on 24/08/2020).

[45] Brightman, *supra* note 31, at 368.

Based on this, determination of issues of land tenure is the mandate of the Federal Government in its legislative power over land utilization whereas enforcement of rights over land, administering the acquisition of land, transfer and inheritance of land based on federal laws shall fall under states' jurisdiction to administer land. Likewise, if one follows the FAO approach, states' power to administer land includes the following activities: delimiting parcel boundaries; adjudicating disputes over land use, valuation, taxation and parcel boundaries; and determining and undertaking land valuation for the purpose of compensation, taxation and similar activities. It also includes gathering revenue from land related taxes; registration of land rights and issuance of certificates; and allocation of land for investment purpose. Moreover, land administration encompasses gathering and administering information on land; making information on land available for its users; determination of the amount of land to be mortgaged, leased, and rented and the period of time. Moreover, establishing and administering land administration institutions would fall under states' mandate to administer land. These are different from land utilization and conservation issues and may not necessarily require uniformity in their regulation and application.

As indicated in the forgoing, even if the Ethiopian land laws do not define the terms 'land utilization' and 'land conservation', such land laws use the kindred concept of land use. For example, the Federal Rural Land Administration and Land Use Proclamation No 456/2005 defines 'land use' as "a process whereby rural land is conserved and sustainably used in a manner that gives better output".[46] This definition appears to equate land utilization with land use and further it seems to state that the expected role of the Federal Government is to determine how land shall sustainably be used and conserved. With this inference is palatable, federal laws are expected to identify the areas that can suitably and productively be used for each land. For instance, the land utilization laws shall locate the areas that shall be designated for agriculture, built-up areas, sports fields, grazing, greenings, and determine land use plan at the national level. However, this definition does not properly indicate the very essence of land utilization.

The other important clue to appreciate the precise mandates of both orders of government in relation to land is by looking into the Minutes of the FDRE Constitution. This best tells us the nature of federal power in relation to determining land utilization. As can be read from the Minute of the FDRE Constitution, one of the justifications to reject the proposal to adopt private ownership of land was due to the difficulty to achieve uniform land tenure system throughout the country. In a country

[46] FDRE Rural Land Proc. No. 456/2005, Art 2(3).

where diverse landholding systems co-exist, achieving uniform tenure system appears difficult.[47] The Ethiopian land tenure system fundamentally constitutes the tenure of pastoralists and semi-pastoralists in addition to peasants, urban dwellers, investors and communal land tenure systems. Of these, the issue of pastoralists and in some cases semi-pastoralists is not suitable to adopt and maintain private ownership of land. The movable nature of pastoralists and the nature of land possession thereof are difficult to adopt private ownership of land. The designers of the FDRE Constitution reportedly held that uniformity in land tenure can be achieved by maintaining state ownership of land and enactment of a coherent national land policy.[48] This requires, *inter alia,* empowering an organ with legislative mandate to define land tenure issues to achieve a certain level of uniformity – the Federal Government is given this task.

Moreover, one can mention the decision of the CCI in a practical case presented to it several years ago to further elaborate regional states' legislative mandate over land administration. In the case between *Biyadglegn Meles, et al vs. the ANRS,*[49] the applicants claimed that the ANRS rural land law[50] on land allocation and redistribution contravenes the FDRE Constitution and demanded the declaration of unconstitutionality of the state law. However, through another development, the HPR has enacted the Federal Rural Land Administration Proclamation No 89/1997,[51] which permitted states to proclaim laws on rural land based on federal baselines. The CCI passed its verdict on the matter upholding the constitutionality of the law on two grounds: (a) it is part of the residual power of the states; and (b) it has been retroactively endorsed by the federal proclamation. Nevertheless, it is doubtful why the HPR can retroactively endorse the state law if it falls within the residual power of the states. In relation to this, Assefa inquires, "…as to whether the mandate of the states extends to include enacting laws and if so whether administering implies the setting of norms".[52] From this, the decision of the CCI seems to indicate that states have constitutional base to enact laws on matters pertaining to land administration. The decision particularly indicated that legislative power on land allocation and redistribution falls under regional states residual power in the FDRE Constitution.

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[47] The Constitutional Minutes Vol. 4, *Deliberation on Article 40.*

[48] Brightman, *supra* note 31, at 368.

[49] *Biyadglegn Meles et al.* v. *the Amhara Regional State*, petition, Miazia 30, 1989 E.C. (unpublished), as cited in Assefa Fiseha, *Constitutional Adjudication through Second Chamber in Ethiopia*, 16 ETHNOPOLITICS 295, 313 (2017). DOI: 10.1080/17449057.2016.1254407

[50] Amhara Regional State, 1996, Proclamation No. 17/1996, A Proclamation to Provide for the Amendment of Proclamation No. 16/1996. Bahir Dar.

[51] Proclamation No. 89/1997, Federal Rural Land Administration, *Federal Negarit Gazetta*

[52] Assefa, *supra* note 49, at 299.

Apart from their inherent constitutional legislative power over land administration, states are also authorized by federal land laws to enact rural and urban land laws on matters that fall under federal jurisdiction. So far, states have enacted their rural land administration and use laws routinely citing federal authorization as authoritative source. However, confining states' legislative power on this federal authorization appears to diminish their roles over land administration and this raises, at least, the following issues. Firstly, the Federal Government, if it thinks that its transfer of power to regional states to enact detailed laws to what is regulated by federal land laws is no more relevant, can take back this transferred legislative power. This makes regional states current legislative power over land uncertain and contingent upon the willingness of the Federal Government. Secondly, it makes states to behave only to the extent of the terms they are dictated by the federal laws. This is to say, state laws shall not contradict with the delegating laws: if there is contradiction, state laws will be void. Finally, since the delegation is up to the wish of the Federal Government, there are areas where the Federal Government fails to explicitly delegate states to enact laws. Cases in point are Proclamation No. 818/2014, Proclamation No. 721/2011 and Proclamation No.1161/2019. The former law has totally denied law-making power over urban land registration to states while the latter two laws have delegated to the regional states the mandate to enact laws meant to implement land proclamations passed by the federal legislature.[53]

2. Justifications for Relative Federal and State Authority over Land

This section considers reasons for vesting authority in the Federal Government to enact laws on the utilization and conservation of land as well as the rationales for bestowing upon regional states the power of land administration.

a) Maintaining uniform nationwide regulation of land

One of the hallmarks of a federal system is vertical power division between orders of government.[54] Most federations intend to stand united for certain purposes while retaining autonomy for other motives. Some powers are almost always assigned to the federal government and others to subunits.[55] The federal government is often

[53] *See* A Proclamation to Provide for Lease Holding of Urban Lands, Proclamation No. 721/2011, Art 33/2; Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People Proclamation No. 1161/2019, Art 26/2.

[54] Wheare, *supra* note 11, at 10-11.

[55] G. ANDERSON, FEDERALISM: AN INTRODUCTION 24 (Oxford University Press, 2008).

empowered with those powers that are shared in common and have national implications.[56] These are matters requiring nationwide regulation and hence to be left for the national government to help maintain uniformity of standards throughout the federation. Likewise, subunits usually retain authorities vital for the full exercise of regional autonomy and self-governance. On this basis, regional units shall entertain functions that are not primarily in the list of common interests to the general nation.[57]

In the Ethiopian federation, some matters deemed to have national importance and require uniform regulation are entrusted to the Federal Government.[58] Specific to land, the FDRE Constitution authorizes the Federal Government to "enact laws for the utilization and conservation of land and other natural resources…".[59] Laws on the utilization and conservation of land require uniform regulation as evidenced by the Minutes of the FDRE Constitution. The Minutes of the FDRE Constitution in relation to Article 40 states that state ownership of land as well as national governance of some dimensions of land is desired to maintain uniformity in land governance and tenure.[60] This requires, *inter alia*, empowering an organ with legislative mandate to define land tenure issues to achieve a certain level of uniformity. On this basis, it can be established that the nature of powers vested to the Federal Government with respect to the utilization and conservation of land is to maintain uniformity on those issues. The main point here is that makers of the Constitution left it clear that uniform regulation on certain issues can evidence the nature of federal mandates in relation to land.

The Federal Government's involvement in determining land utilization and conservation has to do with nationwide uniform land tenure issues. Particularly, the Federal Government shall determine the right to access land by the vulnerable group of the society. Considering their disadvantaged position in a state, uniform standards and protection concerning land should be in place. For this, the Federal Government's legislative mandate on land utilization and conservation is to assure such uniform protection to land rights. In addition (as discussed in detail in Section 4) the decision of the HoF on the draft rendition of the Urban Landholding Registration Proclamation No. 818/2014 was justified and maintained fundamentally due to its relevance to create

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[56] Thomas Hueglin, and Alan Fenna, Comparative Federalism: A Systematic Inquiry 147-148 (Broadview Press, 2006).

[57] *Ibid.*, at 147-148.

[58] See, for instance, the provisions of Arts 51/2, Art 51/3, 51/20, Art 51/11, 51/8 and 51/9. According to the FDRE Constitution, these issues entail federal regulation in the interest of uniformity.

[59] FDRE Constitution, Art 51/5.

[60] The Constitutional Minutes, *Deliberation on Article 40*, House of Peoples Representatives Library, Addis Ababa.

uniformity in urban land and real property registration. Likewise, this Proclamation itself has specified this as its purpose is ensuring uniform protection of landholding rights.[61]

b) Incorporating local contexts in land administration

The need to inject local context into land administration is keenly related to decentralized governance. Local communities have particular needs; some of which may well and ought to be beyond the purview of national policy.[62] By decentralizing government functions, it is possible to respond to such particular local needs. Particularly, federalism offers an institutional means of recognizing community needs and the chance to reflect their opinions in government policies and strategies affecting their interests.[63] Federalism enables local people to monitor issues that are properly under local control[64], while it places those issues that must be governed at a federal level in the hands of more distant representatives.[65]

Anwar Shah[66] stated different theoretical underpinnings in favor of strong rationales for decentralized decision-making and strong roles for local governments on account of four grounds: efficiency, accountability, manageability, and autonomy. For the purpose of this Article, Shah`s three justifications of local governance and central-local relations are considered. The first is 'Stigler's menu' which identifies two principles of jurisdictional design: "(a) the closer a representative government is to the people, the better it works; and (b) people should have the right to vote for the kind and amount of public services they want".[67] In this case, decision-making should befall at the lowest level of government.

The second justification articulated by Shah for local decision-making is 'the decentralization theorem'. It states that, "each public service should be provided by the jurisdiction having control over the minimum geographic area that would internalize

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[61] See Art 4/1 of Proc no 818/2014.

[62] Scott Bennett, *The Politics of the Australian Federal System*, 4 RESEARCH BRIEF 20 (2006), available at, https://www.aph.gov.au/binaries/library/pubs/rb/2006-07/07rb04.pdf, (Last accessed on 13/02/2020).

[63] Ibid., at 20.

[64] Hamilton, *supra* note 19, at 321.

[65] Ibid., at 321.

[66] Anwar Shah (ed.), *Local Governance in Developing Countries*, PUBLIC SECTOR GOVERNANCE AND ACCOUNTABILITY SERIES, (The World Bank, 2006), Pp. 3 – 4.

[67] George Stigler, *The Tenable Range of Functions of Local Government*, *in* FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH AND STABILITY 213–19 (Joint Economic Committee, Subcommittee on Fiscal Policy ed., U.S. Congress, 1957), as cited in Anwar, *supra* note 66, at 3.

benefits and costs of such provision."[68] This is justified because local governments better understand the concerns of the local community, and local decision-making is receptive to the intended people. This, in turn, encourages fiscal responsibility and efficiency; eliminates unnecessary layers of jurisdiction; and enhances competition among governments and stimulates innovation.

The third justification is 'the subsidiarity principle', which provides that unless a convincing case can be presented for assigning them to higher orders of government, taxation, spending, and regulatory functions should be exercised by the local governments. This principle empowers local governments to undertake activities which are local in their nature. Moreover, according to Marci Hamilton, among several functions that shall preferably be undertaken at the local level, land use is the central one. His analysis shows that "[t]he smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy".[69]

The FDRE Constitution allows states to administer land in their locality as this allows them to undertake matters of land administration by taking their local contexts into account. Since states have relative access to the local community, this helps to have feasible and desirable executions of land policies and laws. The issue then is states' constitutional mandate to administer land can be justified on the basis of incorporating local contexts and realize decentralized administration in the process of land administration. These are issues that do not require uniform regulation and execution throughout the country. For example, the manner of resolving disputes over land may vary across states. As uniformity may not be the desired end, regional variations in this regard may not worry the federation so long as due process of law is adhered to in the process of land dispute resolution. This means diversity in this regard is to be tolerated and even actively sought after provided parties in dispute are summoned timely; they got equal chance to be heard; they are allowed to produce their evidence; appeal opportunities are availed; and the decisions can be enforced equally.

c) Contributing to realization of the right to self-determination

The right to self-determination is a fundamental and inalienable right gaining recognition in different human rights documents.[70] It is keenly related to the protection

[68] Anwar, *supra* note 66.

[69] Hamilton, *supra* note 19, at 321.

[70] Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 773 (1998).

of the cultural, religious, linguistic, and ethnic identity of individuals and groups; and the right to participate effectively in economic and political spheres.[71] Of these issues, the right to self-determination's close linkage to the right to participation on economic spheres can be central to this particular issue. As land has central importance in the economic sector apart from its diverse implications, empowering the concerned group can help to realize the right to self-determination in its best. Yet, in the absence of genuine empowerment on this fundamental economic resource, one cannot confidently talk about the full realization of the right to self-determination in a particular state.

The fact that Ethiopia gives recognition to ethnic diversity and displays willingness to accommodate such group diversity through the right to self-determination, which opens room for regional states to exercise functional autonomy in their jurisdiction basically on resource control. As land has important place in the social, political, cultural, and economic lives of ethnic groups in Ethiopia, in the absence of power over it, it would be vain to fully exercise right to self-determination. This makes regional states' partaking in land administration central to maximize the exercise of their right to (economic) self-determination.[72] Assefa observes that,

> Given that the [FDRE] Constitution gives emphasis to the right to self-rule to ethno-national groups, it is hardly possible to think of the right to self-rule without a defined territory and control over land at constituent state level. This conception of land and its strong links with the right to self-rule provides a broad constitutional safeguard to nationalities as joint owners of land with the state.[73]

The right to self-determination may not necessarily give states sole ownership of land under their territorial administration as land is jointly owned by the nations, nationalities and peoples (NNPs) and the state.[74] Instead, the right to self-determination shall allow regional states to administer their lands. Regional states' mandate to administer land, as it is discussed in section 1, shall include valuation, registration, and taxation on land; enforcement of land rights; resolution of disputes

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[71] *Ibid.*, at 777.

[72] FDRE Constitution, Art 39; Fasil A. Zewdie, *Right to Self Determination and Land Rights in Ethiopia: Analysis of the Adequacy of the Legal Framework to Address Dispossession*', 2013(1) LAW, SOCIAL JUSTICE & GLOBAL DEVELOPMENT JOURNAL (LGD). Available at: http://www.go.warwick.ac.uk/elj/lgd/2013_1/zewdie, (Last accessed on 26/12/2019); WUBSHET MULAT, ARTICLE 39: THE RIGHT TO SELF-DETERMINATION IN ETHIOPIA (2015) (published in Amharic).

[73] Assefa, *supra* note 2, at 355.

[74] FDRE Constitution, Art 40/3.

between landholders; allocation of land; and issuance of land holding certificate for landholders. This land administration power also includes legislative power over matters pertaining to land administration. In effect, regional states' involvement in land affairs (through administration of land) is justified to fully realize their (economic) self-determination.

3. Indicators of Federal Interferences in States' Affairs over Land

This section examines some indicators of federal interferences into states' mandates to administer land. The discussion reveals that some federal land laws empower the Federal Government to exercise administrative power with respect to land. Three federal laws are selected and examined in this section. The Industrial Parks Proclamation No. 886/2015 is indirectly related to the use and administration of land while two of them are purely land laws (Proclamation No. 818/2014 and Proclamation No. 456/2005).

3.1. Land administration in federal industrial parks

Ethiopia aspires for the construction of industrial parks by the government, private sector and/or jointly by the government and private investors. The plan is to make land and finance available for the construction of these parks.[75] In partnership with the private sector, the government shall engage in the establishment and development of such industrial parks thought to have far-reaching positive externalities in the wider economy.[76] The plan is to make medium and large-scale manufacturing industries export-oriented thereby alleviating foreign exchange shortages and contribute to technology transfer.[77] The aim is to make Ethiopia a leading manufacturing hub in Africa and globally intended to transform the Country into a lower middle-income economy by 2025.[78]

To institutionally support industrial parks, the Council of Ministers established Industrial Parks Development Corporation (IPDC) in 2014.[79] Also, the normative

[75] The Federal Democratic Republic of Ethiopia, *Growth and Transformation Plan II (GTP II) (2015/16-2019/20), Volume I: Main Text* 144 (National Planning Commission, 2016).

[76] GTP II, P. 136

[77] Bayisa Tesfaye, *Prospects and Challenges of Industrial Zones Development*, 2(1) ACJTB 3 (2016).

[78] GTP II, *supra* note 75, at 136.

[79] Regulation No. 326/2014, Industrial Parks Development Corporation Establishment Council of Ministers Regulation, *Federal Negarit Gazette*.

framework is put in place to further lay the legal and regulatory foundations for the development and operation of industrial parks. With this, the HPR enacted Industrial Parks Proclamation No. 886/2015 and Regulation No. 417/2017 is promulgated by the Council of Ministers. The laws permit different ways of developing industrial parks: (a) fully developed by the Federal Government or regional governments; (b) developed by public-private partnership with the IPDC; and (c) fully developed by the private sector.[80]

The IPDC has the mandate to facilitate land bank and provide infrastructure for private industrial park developers if they decide to invest in such area of investment. The IPDC is mandated to prepare a detailed national industrial parks master plan based on the national master plan of states or federal city administrations. It is also empowered to serve as industrial land bank in accordance with the agreement concluded with states and the city administrations.[81]

The establishment and operation of industrial parks require land; access to land is central in the realization of such parks. Article 22 of the Industrial Parks Proclamation No. 886/2015 regulates access to land for industrial parks. Accordingly, the industrial park developer may possess industrial park land through lease system and sub-lease is possible for developed industrial parks.[82] The industrial park operator may possess and administer the industrial park land which he has acquired via agreement from industrial park developer.[83]

The Industrial Parks Regulation No. 417/2017 stipulates that the IPDC is responsible to keep the lands it gets from regions through agreement in its land bank and develop it or transfer to other developers.[84] It is responsible to develop the land itself, secure leasehold certificate that enables it to do so from an appropriate regional institution.[85] Also, it shall transfer land in leasehold from the land bank to another industrial park developer(s) having secured investment permit. Following the conclusion of such leasehold, the industrial park developer shall get leasehold certificate from the Ethiopian Investment Commission.[86] In all these cases, it is the Federal Government

[80] Arts 5 – 8 of Regulation No. 417/2017; Arts 5 and 25 of Proc. No. 818/2014.

[81] Reg. No. 417/2017, Art 10 and Art 5 of Regulation No. 326/2014.

[82] Art 22(1).

[83] Art 22(2).

[84] Reg. No. 417/2017, Art 10(1).

[85] Reg. No. 417/2017, Art 10(2).

[86] Ibid, Art 10(3).

through the IPDC that administers the lands leaving no room for the states to allocate land, issue certificates, and lease the lands in their territorial jurisdiction.

The Industrial Parks Proclamation No. 886/2015 leaves powers to issue regulation and directives to the Council of Ministers and the Ethiopian Investment Board,[87] respectively.[88] This takes the power to determine the manner land shall be transferred both to the IPDC and investors through lease out from states' jurisdiction. This diminishes states' constitutional power to administer land in their territory, which includes the transfer of land to investors or any other through lease.

The other important thing worth consideration is the fact that delegation is explicitly sought for the IPDC to acquire land from the states. However, such delegation of regional mandates to a federal agency runs counter to both the FDRE Constitution and the federal system.[89] In effect, in relation to federal industrial parks, the claimed delegation of power to acquire land in regional territories by the Federal Government shall be in a shaky constitutional basis. This can be taken as a strategy to centralize matters of land administration by taking away local decision making in relation to the lands to a central organ.

3.2. Registration of urban landholding

Over the years, urban land registration has been at lower stages. Corrupt practices in the urban land governance were considered the major sources of rent-seeking. One of the solutions to tackle such practices, according to Ethiopia`s Growth and Transformation Plan II (GTP II), is technology-based registration of urban land and real properties with the view to encouraging long-term development and economic transformation.[90] To create uniformity in urban lands registration and facilitating the total registration of real properties in urban areas, the Federal Government passed Proclamation No. 818/2014. The need to realize real property rights of individuals;

[87] Under Art 2(18) of the Proclamation, the "Board" is defined as the Board established under the Ethiopian Investment Board Establishment Council of Ministers Regulation No. 313/2014.

[88] Art 32 of the Proclamation.

[89] As discussed in section 5, the FDRE Constitution does not clearly regulate upward delegation of power. The Minute of the Constitution prohibits the practice for upward delegation of power. Hence, the practice of upward delegation of power does not have a steady constitutional basis.

[90] GTP II, *supra* note 75, at 199.

providing reliable land information to the public; minimizing land-related disputes and modernizing the Country's real property registration system justify the proclamation.[91]

Also, the need to establish transparent and accountable working system and making government services efficient and enabling the possessor to enjoy the property he develops further justify the proclamation.[92]Article 4 of Proclamation No. 818/2014 provides the objectives of urban land registration in two broad themes. Its first sub-article states: ensuring uniform protection of landholding rights of different groups by enabling urban centers know the land available at their disposal through inventory. Its second sub-article provides that accelerating the economic, social and environmental development of urban centers by ensuring security of landholders and recognition of title to immovable property through certification.

Proclamation No. 818/2014 further demands the creation of urban land 'registering institutions' at a regional level and defines the powers and responsibilities of these institutions and makes them directly accountable to a federal agency – the Federal Urban Real Property Registration Information Authority.[93]As real property registration laws of the Country are scattered in different laws, it is believed that passing a law containing issues for uniform land registration is desirable.

However, the fact that Proclamation No. 818/2014 deals with elements of land administration and authorizes federal institutions to undertake land administration matters raises an issue of constitutionality. Assefa and Zemelak correctly remarked that some of the provisions in the Proclamation allowed the Federal Government to play administrative roles in urban land registration.[94]

Proclamation No. 818/2014 gives adequate coverage to the issue of urban land registration. It, *inter alia,* determines rules on prerequisites for landholding adjudication;[95] the manner how unique parcel identification code is made;[96] detailed rules about the principles on landholding adjudication system.[97] It also regulates implementation of landholding adjudication system;[98] matters to be suspended during

[91] FDRE Urban Land Registration Proc No 818/2014, Preamble.

[92] See Proc. No. 818/2014, Preamble, paragraph 3.

[93] Assefa and Zemelak, *supra* note 10, at 253.

[94] *Ibid.*, at 253.

[95] Proc. No. 818/2014, Art 5.

[96] *Ibid.*, Art 8.

[97] *Ibid.*, Art 10.

[98] *Ibid.*, Art 11.

landholding adjudication;[99] the expected obligations during adjudication.[100] Moreover, the manner in which grievance procedure and decision-making should be handled;[101] about surveying and surveying equipment;[102] cadastral survey control points and boundary marks;[103] application for landholding registration;[104] and other rules that are elements of land administration are regulated in the Proclamation.

By virtue of this Proclamation, it seems that the Federal Government in detail determined matters of urban land and property registration issues. The Proclamation leaves no room for states to enact laws in relation to urban land and real property registration. According to the Proclamation, the Council of Ministers may issue regulations necessary for the implementation of this Proclamation[105] and issue directives to implement the regulations.[106] The Proclamation does not allow states to exercise any legislative role on matters covered in it. Moreover, while matters pertaining to land administration shall be undertaken by the states, this law has established a central institution to undertake matters of land administration.[107]

Furthermore, the Federal Government, using this Proclamation, defined the powers and duties of regional governments regarding registration of urban lands. Accordingly, states have several duties in relation to urban land and property registration. In view of that, the first obligation is related to establishing or designating an appropriate body at regional level and landholding registration and information institution at urban level. States shall also ensure the proper enforcement of regulations and directives issued in accordance to the Proclamation. They also shall direct and coordinate the entire activities in accordance to the Proclamation and regulations, directives and standards to be issued. Besides, they have to determine, step-by-step, urban centers in which landholding registration may start in accordance to this Proclamation; and they shall fix the appropriate service fees chargeable for registration and other services it provides.[108]

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[99] *Ibid.*, Art 13.

[100] *Ibid.*, Art 15.

[101] *Ibid.*, Art 17.

[102] *Ibid.*, Art 22.

[103] *Ibid.*, Art 23.

[104] *Ibid.*, Art 27.

[105] See *Ibid.*, Art 54/1.

[106] See *Ibid.*, Art 54/2.

[107] Assefa, *supra* note 49, at 299.

[108] Generally, see FDRE Urban Lands Registration Proc. No. 818/2014, Art 50.

These mandates assigned to regional states have a far-reaching contribution to aid the enforcement of the Proclamation. This helps to safeguard the land tenure of urban dwellers and creates opportunity for the government to expand tax bases to collect revenues from land and other real properties.[109] This being fine, the determination of regional powers and functions through a proclamation should be seen with serious scrutiny. Under the FDRE Constitution, there are no working procedures to empower the Federal Government to instruct states to behave in a certain way in relation to urban lands registration. Moreover, to assign its mandates to the states, the Federal Government shall have legal authority in those powers. In the assignment of authorities to regional governments with respect to urban land and property registration appears self-contradictory since such tasks can be covered under the land administration responsibility of states under the FDRE Constitution. This is really debatable and at times surprising for the Federal Government to do so as if a primary power holder of the menus assigned to the states.

3.3. Regulation on rural land administration and use

Proclamation No. 456/2005 regulates the manner in which land shall be acquired; about rural land measurement, registration, and holding certificate; the duration of rural land rights; the transfer and expiry of land rights; and distribution of rural land. It also stipulates the obligation of rural land rights; determining minimum rural landholding size and about land consolidation; dispute resolution; and restrictions on rural land use.[110] The Proclamation allows regional councils to enact rural land administration and land use laws based on federal guideline.[111] It also proclaims that "no law, regulation, directive or practice shall, in so far as it is inconsistent with this proclamation, be applicable with respect of matters provided for in this proclamation".[112] The Proclamation has recognized free access to land right of peasants, pastoralists and semi-pastoralists. Any citizen who wants to engage in agriculture for living shall have the right to access rural land for free.[113]

The Proclamation, furthermore, deals with rural land dispute resolution. There is a constitutional base to take justiciable matters in a court of law.[114] Principally, judicial

[109] Interview with Solomon Kebede, Director, Federal Urban Land and Land Related Property Registration and Information Agency, at Bahir Dar, May 17, 2019.

[110] *See* FDRE Rural Land Administration and Use Proc. No. 456/2005, Arts 5 – 13.

[111] *Ibid.*, Art 17(1).

[112] *Ibid.*, Art 20/2.

[113] *Ibid.*, Art.5(1)(a).

[114] FDRE Constitution, Art 37.

power is vested in the courts.[115] However, for various practical necessities, this power could be given to other legally-established entities.[116] As a result, taking cases to a court of law and/or any competent body with judicial authority is constitutionally guaranteed. With this possibility, disputes relating to rural land could be presented to a court of law or to other competent organs. Dispute resolution is an aspect of land administration, and this mandate has to be the authority of the regional states. The federal proclamation deals with the issue of dispute resolution under its Article 12. This provision does not engage itself in determining the manner disputes concerning rural land shall be resolved. It rather leaves the determination of the mechanisms to resolve disputes regarding rural land to the regional states themselves.

Federal interferences into regional matters with respect to rural land administration can be evidenced if one looks at the draft proclamation to amend Proclamation No. 456/2005.[117] This draft proclamation contains several provisions that in detail govern matters of rural land administration, use, registration, and measurement. It brings on several additions to the existing proclamation. Details of land use plan are demonstrated in consecutive provisions of its chapter six.[118] Under chapter seven, the draft allows states to determine, by law, communal land administration and use of pastoralists and semi-pastoralists.[119]

The draft also stipulates the establishment of rural land registration office and rural land surveying office at regional level – leaving their establishment to regional laws. It further provides the manner rural lands shall be registered, the adjudication process, issuance of certificates[120] and many other issues that should otherwise are matters of land administration. Identification of parcels; unique parcel identification number; the details of landholding certificate; updating registration information; the effects of registering rural land and failure to register; the right to access to information; payment issues upon registration of rural land; and others are governed in the draft. Advanced to Article 12 of Proclamation No. 456/2005, this draft law provides detail rules regarding dispute settlement on rural land use. It also offers states to determine land dispute resolution mechanisms based on their contexts. Yet, at any cost, land related dispute resolutions cannot be handled out of arbitration and the court system.[121] It seems that

[115] *Ibid.*, Art 79 (1).

[116] *Ibid.*, Art 78(5).

[117] Federal Draft Rural Land Administration and Use Proclamation (2015).

[118] *Ibid.*, Arts 28 – 34.

[119] *Ibid.*, Art 35.

[120] *Ibid.*, Art 20.

[121] *Ibid.*, Art 40.

even if states could have other devises to resolve disputes over rural land, they cannot resort to them other than arbitration and the court system.

The draft also deals with information exchange between the federal and state governments. Accordingly, states are required to continually send updated information regarding rural land to the Federal Government. Also, the Federal Government has the authority to determine the type and nature of information to be sent. The draft urges the establishment of a national information archive by the Federal Government.[122] The specific federal organ entrusted with the establishment and administration of such information archive is the Ministry of Agriculture.[123] States shall establish information system that shall be compatible to the national one.

This law, though still in a draft stage, follows the approach of the Urban Lands Registration Proclamation No. 818/2014 and a similar criticism can be forwarded to the draft Federal Rural Land Administration and Use Proclamation as well. The draft proclamation expresses an intention to deepen interference in states' mandate to administer land. The title of the draft proclamation tells that administration of land is its center. As can be read from the law, many of the provisions in it are addressing elements of land administration. Even if states are allowed to enact their land laws pursuant to this federal law, one wonders to what extent it is possible to achieve that in a condition where the federal law governs land administration matters in rather detail fashion. In general, the degree of federal regulation over rural land by this draft law shall be seriously corrected towards an effective federal-state relationship. It can be said that, in paradox to the constitutional power allocation, the Federal Government has continued to regulate matters of land administration without any contest from the side of states.

4. Institutional Responses to Centralized Land Administration

Considering the series of federal interferences against states' land administration power analyzed in the preceding sections of this Article, it is evident that the Federal Government is going well beyond powers vested in it under the FDRE Constitution. This, in turn, diminishes states' constitutional competence to administer land. Having said this, it is also important to raise an issue as to whether such centralized land administration has gained deserved scrutiny and response by relevant institutions. This section finds that pertinent federal institutions responsible to defend the FDRE

[122] *Ibid.*, Art 68.

[123] *Ibid.*, Art 72.

Constitution are not living up to expectations, despite the presence of laws having the effect of centralizing some aspects of land administration.

According to the FDRE Constitution,

> Federal and State powers are defined by this Constitution. The States shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States.[124]

These provisions reiterate the need for mutual respect of the federal and state governments in respect to the powers assigned to each other. The FDRE Constitution provides the way federal powers and functions can be transferred to state governments.[125] Moreover, under this same constitution, the HoF may require the HPR to enact civil laws which it "deems necessary to establish and sustain one economic community".[126] The core in these provisions is that if the HoF deems it can establish and sustain one economic community, it may order the HPR to enact laws. Civil law matters are basically left for states to legislate but that ceases if the HoF makes a determination that national level regulation is necessary for creation of one economic community. Except this possibility, the FDRE Constitution nowhere states that regional states can transfer their constitutional powers and functions upward to the Federal Government. Even the Minutes of the FDRE Constitution has openly rejected the proposal for upward transfer of power.[127] The final version of the Constitution does not contain a statement permitting the possibility of transferring regional mandates upward to the Federal Government.

Actually, defending the FDRE Constitution is an obligation imposed on several institutions, which urges all citizens, organs of state, political organizations, government officials have the duty to obey and ensure its observance.[128] Among the different institutions responsible to defend it, the HPR, the HoF, and the judiciary can be mentioned.

The HPR is expected to make all its laws consistent with the FDRE Constitution. If it makes laws that contradict the FDRE Constitution, the laws will remain void.[129] Apart from checking whether its laws do not violate the Constitution, the HPR is also

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[124] FDRE Constitution, Art 50(8).

[125] *Ibid.*, Art 50(9).

[126] *Ibid.*, Art 55(6).

[127] Minute of the FDRE Constitution, deliberations made on Article 50/9, HPR Library.

[128] FDRE Constitution, Art 12.

[129] *Ibid.*, Art 9(1).

expected to call and question the overall performance of the executive and the judiciary organs.[130] The HPR has thus the opportunity and responsibility to defend the FDRE Constitution from any unconstitutional legislative practice, decisions, customary practices and similar kind. The HPR has nevertheless remained silent in the face of enactment by itself of different laws that give land administration power to the Federal Government examined in Section 3 of this Article.[131] Even though such laws have gone through scrutiny of the HPR, it has failed to defend the FDRE Constitution basically from upward flow of power over land administration.

The other relevant organ responsible to defend the Constitution is the HoF. This house is composed of representatives of different ethnic groups and plays pivotal role in the prevention and management of conflicts.[132] Contrary to other federal systems having a second chamber – which actively involve in federal law making – the HoF barely has any legislative power.[133] The primary role of the HoF is interpreting the Constitution. In federations, disputes that require interpretation are likely to occur basically where conflicting or contradictory laws are passed by different orders of government.[134] For this, federations have to find a way to resolve these contradictions in advance. In most cases, the referee is the judiciary whose authority extends to declare a statute that violates the constitutional power allocation invalid on federalism grounds.[135] On top of this, the last word in settling disputes over constitutional matters must not rest either within a Federal Government or with constituting states alone:[136] it shall be entrusted to an independent organ constitutionally established for that purpose.

Under the FDRE Constitution, the power to interpret the Constitution is openly vested within the HoF.[137] The HoF gets advises/recommendations from the CCI in dealing with constitutional matters. The procedure is that when there are alleged interferences over provisions in the Constitution, claims will be presented to the CCI. The latter shall

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[130] *Ibid.*, Arts 55(16), 79 & 81.

[131] Interview with Zewdu Kebede, Member of the HPR and chair of Trade Affairs Sub-committee, Addis Ababa, on 19/11/2019.

[132] FDRE Constitution, Art 61.

[133] Adem, *supra* note 4, 65.

[134] Felix Knuepling, *Federal Governance and Weak States*, *in* FEDERALISM AND DECENTRALIZATION: PERCEPTIONS FOR POLITICAL AND INSTITUTIONAL REFORMS: PERCEPTIONS FOR POLITICAL AND INSTITUTIONAL REFORMS 15 (Wilhelm Hofmeister and Edmund Tayao eds., Local Government Development Foundation, 2016).

[135] *Ibid.*, 15.

[136] Assefa Fiseha, *Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HoF)*, 1(1) MIZAN LAW REVIEW 1, 4 (2007).

[137] FDRE Constitution, Art 62.

critically consider whether the matter calls for constitutional interpretation. If so, the CCI will present its findings on the matter to the HoF.[138] All the time, the role of the CCI is recommendation: it is not a decision by itself since the HoF has the authority to accept, modify, reject or call the CCI for further elucidations regarding the recommendations.[139]

As stated in Section 3, there are indicators for centralized land administration in the country. Nevertheless, the different indicators of upward flow of power over land administration did not get deserved scrutiny by the HoF. While the Constitution provides the forum for alleged unconstitutional legislation and practices to be entertained by the HoF, the practice does not cope with it. Considering the form of government we have, i.e. parliamentary one, confusions between the executive and the legislature at the central or regional level on whether to submit federalism disputes to the constitutional adjudicators are unlikely to arise.[140] Due to this, there is no authoritative declaration on the constitutionality of federal administration of lands.[141] Interviewees both in the HoF[142] and CCI[143] told these researchers that they are not receiving cases about the constitutionality of federal encroachment over regional states' mandate to administer land. .

In general terms, several reasons hinder the flow of cases to the HoF including (a) the perception that challenging the constitutionality of a government act before this House would be a futile effort; (b) the broad nature of federal powers makes the chances of any constitutionality claims on the basis of federalism slimmer; and (c) the lack of real political plurality among the parties that control the orders of government.[144] The dominant party system has been seriously hindering both states and private individuals from bringing matters requiring constitutional remedy. The dominant party system did not allow states particularly to openly oppose upward flow of their mandates.

Likewise, as almost all of the seats in the federal and regional parliaments across all the national elections have been dominated by a single party – the Ethiopian People's

[138] See Art 84(1) of FDRE Constitution; Interview with Getachew Gudina, Director, Research Directorate in CCI on 12/11/2019.

[139] *Ibid.*

[140] Adem, *supra* note 4, at 66.

[141] Gedion and Abduletif, *supra* note 29, at 68.

[142] Interview, *supra* note 138.

[143] Interview with Mustefa Nasir, Conflict Resolution and Peace Building Team Leader, HoF, on 14/11/2019; interview with Aschalew Teklie, Director of Peace Building, Research and Constitutional Studies Directorate, HoF on 14/11/2019.

[144] Gedion and Abduletif, *supra* note 29, at 190 – 191.

Revolutionary Democratic Front (presently predominately by the Prosperity Party) –, has been practically witnessed that representatives both at the state and federal levels were not opposing the free transfers of state powers to the center.[145] This, in turn, created chance for both orders of government to end the controversies before getting any public attention.[146] In effect, there have been unfavorable conditions for upward flow of power over land to be resisted within and outside the state and party structures.

Given this, it is less likely for the HoF to rule against the Federal Government when adjudicating sensitive constitutional matters.[147] Actually, allowing a political institution to have a final say on constitutional (particularly federalism) disputes may be challenging in federations that exhibit a vanguard single party system. The worry then is being dictated by strict party system, people may fail to oppose or make it in the agenda when it is evident that the Federal Government interferes into regional states' constitutional competences.[148] The constitutional adjudication system does not significantly contribute to bring matters of upward flow of power over land in the table and get proper constitutional interpretation. Adem Kassie's observation tells that constitutional adjudication scheme in Ethiopia is not contributing to develop a culture of constitutionalism,

> …the constitutional adjudication system is the most potent mechanism to ensure that unconstitutional measures are purged and to contribute to the entrenchment of a culture of constitutionalism. Unfortunately, the constitutional adjudication system in Ethiopia is designed to avoid mishaps to any government of the day and does not guarantee effective mechanisms to quash illiberal laws and other unconstitutional measures.[149]

In the same vein, Assefa Fisseha further comments on the serious issues challenging the system of constitutional adjudication in the country. He basically pinpointed that the system's alignment to the political structures is affecting the development of rule of law as "it failed to set limits on power reducing the rule of law merely serving as instrument

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[145] Interview with Namsy Alka, Communication Affairs Officer at HPR, Member of the HPR in the last three election terms, Addis Ababa (Dashen Building), on 15/11/2019.

[146] *Ibid.*

[147] Chi Mgbako *et al.*, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights*, 32(1) FORDHAM INTERNATIONAL LAW JOURNAL 259, 285 (2008).

[148] Interview, *supra* note 138.

[149] Adem Kassie Abebe, *From The 'TPLF Constitution' to the 'Constitution of the People of Ethiopia': Constitutionalism and Proposals for Constitutional Reform*, *in* CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA: CONTEMPORARY PERSPECTIVES FROM SUB-SAHARAN AFRICA 51, 75 (Pretoria University Law Press, 2013).

of power".[150] Moreover, "constitutional design that provides majoritarian body to be a judge on its own case is partly the explanation for this state of situation. It is also partly the result of one party controlling all political institutions including the HoF".[151]

There is a rare exception in this regard, though. It is about one case which has gained the attention of HoF regarding the constitutionality of centralized land administration; it is in connection with the draft phase of the Urban Landholding Registration Proclamation No. 818/2014. This is the first and only legislative matter relating to land administration that has raised issues of constitutionality by the HPR in recent years.[152] Even the members of HPR, after receiving the draft of this proclamation, were in doubt whether it was consistent with the FDRE Constitution. In other words, the issue was whether the draft proclamation is in line with states' power to administer land.[153] They were particularly claiming that the draft proclamation encroaches into states' legislative mandate over the administration of land, as several provisions in the draft deal with matters of land administration. Also, the fact that this law directed the establishment of a federal agency and authorized to undertake matters of land administration at the federal level runs counter to states' mandates in relation to land administration.[154]

The HPR referred the matter to the HoF for further clarification. The case was scrutinized by the CCI, which recommended the draft proclamation does not interfere in the power of states to administer land; the CCI argued that even if some of the provisions encroach into states' competences such encroachment was necessary for sustaining the economic union of the Country as envisaged under Article 55(6) of the FDRE Constitution.[155] Following this recommendation the HoF decided that the draft legislation was consistent with the FDRE Constitution.[156]

The decision of the HoF on the draft proclamation in question may not be relied, at least, on the following grounds. Article 55/6 can be mentioned as one mechanism of power transfer upward to the Federal Government so long as a decision to that effect is made by the HoF. The arrangement is that the HoF shall be convinced that allowing the

[150] Assefa, *supra* note 49, at 306.

[151] *Ibid.*

[152] Interview with Zewdu, *supra* note 10.

[153] *Ibid.*

[154] See Assefa and Zemelak, *supra* note 10, at 253.

[155] FDRE HoF First Emergency Meeting (Tahisas 24, 2006, E.C.), as cited in Assefa and Zemelak, *supra* note 10, at 254; Interview with Solomon Kebede, Director, Federal Urban Land and Land Related Property Registration and Information Agency, at Bahir Dar, May 17, 2019.

[156] Interview with Solomon Kebede, Director, Federal Urban Land and Land Related Property registration and Information Agency, at Bahir Dar, May 17, 2019.

HPR to enact matters of civil laws is important for the creation and sustenance of one economic community throughout the country. This cannot be interpreted to seek the HoF to decide on the constitutionality of a particular civil matter after the HPR has enacted a law on it. It is the later kind that happened in relation to the Urban Lands and Property Registration Proclamation. It is not when the HPR enacted a law and referred it to the HoF to rule on its constitutionality. Hence, procedural irregularity can be mentioned against the manner Article 55/6 is sought to justify the constitutionality of the Proclamation. The situation may also call another approach of looking the matter. It could be argued that in the absence of any normative framework that says the HoF shall make such determination only in its own motion, procedural irregularity shall not be mentioned against this decision. If we follow this line, the permission on enactment on civil matters may come from any party so long as the matter helps to create and sustain one economic community.

The authors appreciate this later way of looking at the issue and this Article maintains that the HPR can seek the HoF to allow it enact laws on certain civil matters. However, Article 55/6 does not seem to envisage the case where a law on civil matters is drafted by the HPR without the knowledge of the HoF and the former seeks the latter to determine the constitutionality of the law. One thing relevant to this decision is that the HoF is contacted for the determination of the constitutionality of the draft law. In other words, had it not been opposed by members in the HPR, the draft may not get the attention of the HoF, meaning that there could be a chance for the law to be publicized without this HoF's knowledge.

Second, Article 55(2) (a) of the FDRE Constitution is cited as a source of authority to enact the Proclamation.[157] If the Proclamation was enacted based on the direction of the HoF, the authority should have been Article 55/6 of the FDRE Constitution. The motive rather seems to be to broaden the authority of the Federal Government in relation to land administration. Third, it is possible to contribute to the creation and sustenance of one economic community, in respect to this proclamation, by having effective decentralization on matters of urban land and real property registration to states and local level governments. While the HoF could dictate the HPR to enact civil laws that help for economic unity, this may end affecting regional states' constitutional authority. The creation and sustenance of one economic community shall not make the Federal Government a sole responsible organ to that end. States should also be given a fair share contribution in the process. In effect, "the constitutional aspiration of one economic community shall be viewed as an outcome rather than having any bearing on

[157] *See* Proc. No. 818/2014, Preamble, paragraph 6.

the process".[158] This should remind the government to further localize important decisions rather than centralizing states' mandates on the justification of creating one economic community. It is possible to achieve this desire through genuine decentralization of power and making states part of it rather than putting the central government as the sole responsible entity.

Fourth, this decision has the effect of broadening the authority of the Federal Government in relation to land and the impartiality of the forum is doubtful. Even such decision of the HoF could mean it is serving as an instrument of centralization of power at the detriment of states in matters of land administration. It is noted that "the political practice of centralization and the HoF's latest decision indicate the HoF is likely to fall into the influence of the party that wields power at the center and become an instrument of centralization".[159] From this, although the HoF has constitutional mandate to dictate the HPR to enact civil laws with the view to create and sustain common economic community, this particular decision is serving as an instrument to centralize regional mandates over land administration. This may negatively affect the prospect of building "a federalist jurisprudence".[160]

The other relevant institution in relation to protecting the constitutional order from possible intrusions is the judiciary. The judiciary assumes a key role in the process of ensuring democracy and rule of law. Due to the absence of "judicial review" in the Country's administrative practice, the judiciary is unable to review decisions of especially the executive.[161] While there are instances for centralized land administration and this is an alleged breach of the FDRE Constitution, the judiciary has not been entertaining the matter. An interviewee in the Federal Supreme Court replied that the courts cannot fully enforce human and democratic rights and freedoms since the power to judicial review is withheld.[162]

Whether courts can adjudicate constitutional disputes is still debatable.[163] The practice is that the judiciary is now entertaining the constitutionality of laws having a status below proclamations. The constitutionality of laws at the level of proclamations and

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[158] Belachew Mekuria, *Op-Ed: The Virtues of True Decentralization*, ADDIS STANDARD NEWSPAPER, https://addisstandard.com/oped-the-virtues-of-true-decentralization/ June 18/2019.

[159] Assefa, *supra* note 49, at 299.

[160] Gedion and Abduletif, *supra* note 29, at 191 – 192.

[161] Interview with Melaku Kassaye, Judge, Federal Supreme Court, Addis Ababa, on 18/11/2019.

[162] Interview with Kifletsion Mamo, Judge, Federal Supreme Court, Addis Ababa, on 18/11/2019.

[163] Gebremeskel Hailu and Teguada Alebachew, *Increasing Constitutional Complaints in Ethiopia: Exploring the Challenge*, 2 HAWASSA UNIVERSITY JOURNAL OF LAW 39, 54-55 (2018).

above cannot be entertained by the courts.[164] Adem Kassie observes that, "judicial safeguards should generally be used as a final resort and courts should encourage and facilitate negotiated political settlements to resolve disputes between the different levels of government …"[165] Getahun Kassa further said that, the HoF's empowerment to interpret the Constitution shall not be construed to prevent the judiciary from applying the Constitution in the day-to-day exercise of their duties and responsibilities.[166] This is further supported by Donovan who noted that the Constitutional Drafting Committee did not intend to take the power to invalidate primary federal or regional legislation away from ordinary courts.[167]

In contrast, other scholars argue that the FDRE Constitution does not empower the judiciary to umpire constitutional disputes. For instance, Getachew Assefa has concluded that based on the deliberations made on Articles 62(1), 83 and 84 of the FDRE Constitution; the power to interpret the Constitution belongs to the HoF and not to the judiciary.[168] In addition, Yonatan Tesfaye holds the same argument and concludes that courts do not have the power to interpret the Constitution.[169]

While such debate is going on, the clear case is that the judiciary has not been entertaining constitutional matters. The judiciary has remained silent when various acts of power centralization over land were undertaken by the Federal Government; in fact, even when cases reach its dockets, the judiciary has been avoiding politically sensitive matters and transferring them to the CCI; this constitutes "judicial violation of the courts' constitutional mandate of adjudicating justiciable matters".[170] Having this in mind, it is not promising the judiciary, in the current framework, will entertain issues pertaining to unconstitutional upward flow of power in relation to land administration.

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[164] Interview with Melaku, *supra* note 161. He stated that when a particular legislation is below the status of proclamation, the Federal Supreme Court has the mandate to check the constitutionality of such laws once a case reaches the court.

[165] Adem, *supra* note 149, at 67.

[166] Getahun Kassa, *Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System*, 20 AFRIKA FOCUS 75, 81 (2007). DOI https://doi.org/10.21825/af.v20i1-2.5069

[167] D. Donovan, Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented by Counsel, 1 ETHIOPIAN LAW REVIEW 31 (2002).

[168] Getachew Assefa, *All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, 24 JOURNAL OF ETHIOPIAN LAW 150 (2010).

[169] Yonatan Tesfaye, *The Courts and Constitutional Interpretation in Ethiopia: Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review*, 14(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 134 (2006).

[170] Takele Soboka, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, 19(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 99, 118 (2011).

Concluding Remarks

The Article analyzed the power of land administration in Ethiopia. It particularly tried to sort out the elements in land administration and land utilization by analyzing the general power sharing arrangement under the FDRE Constitution, the deliberations made during the making of the same Constitution, subsidiary land laws and the literature. It is hinted that determining issues of land tenure is the mandate of the Federal Government in its legislative power over land utilization. On this basis, the specification and determination of land rights, the manner to acquire rights over land, the scope of these rights, the manner they operate in the holding, transfer and inheritance of land and when and how rights over land shall extinct are elements of land utilization and fall under federal legislative authority.

The Article further identified and analyzed some indicators for federal interferences into regional states mandate to administer land. Federal land laws empower the Federal Government with the power to administer land. Through federal land laws, it is apparent that there is a considerable move to extend the mandate of the Federal Government to include the power of administering land and implementing land legislation. The laws expand the mandate of the Federal Government to comprise even mandates of urban and rural land administration that should otherwise fall to regional states.[171] The laws are meddling into regional states' constitutional competence to administer land since they plainly vested the power to administer land to the Federal Government.

Moreover, the Article demonstrated the absence of institutional responses on the centralizing tendency in land administration in general. The analysis elaborates that the supreme institutions entrusted to defend the FDRE Constitution from possible intrusions are not living up to expectations. In this regard, the HoF/CCI, the HPR, and the judiciary are not entertaining matters relating to upward flow of power over land. Despite the existence of indications for centralization of power in land administration having the effect of overriding both the FDRE Constitution and the federal system, they did not get proper attention of these forums. The HPR does not consider the matter so far; even it has been enacting rural and urban land laws having overtaken the legislative mandate of regional states over land administration. Besides, the judiciary is not entertaining matters pertaining to vertical transfers of power. Even whether it has constitutional ground to consider such kind of matters is debatable. Both the HoF and the CCI are not actively entertaining matters pertaining to upward flow of power over

[171] Assefa, *supra* note 2, at 356.

land administration. The only exception is the Urban Lands Registration Proclamation No 818/2014 where the HoF/CCI gave determination on its constitutionality.

While a number of reasons could be considered for this, the fact that the Country's politics has been led by strict centralized party system is hindering cases to get public attention. For this, private individuals, regional states and other stakeholders alleging the interference of the federal system by the Federal Government are unable to bring their cases to the forums. Although the different institutions are established to chiefly defend the FDRE Constitution, the manner they are established (their structures) and the manner they are practically operating appears limited in constitutionally regulating centralization of power especially over land.

The continuation of the Ethiopian federation requires, *inter alia*, non-interference in the powers assigned to each order of government. Increased centralization of state mandates implies the existence of federal interference against states' affairs that might weaken their contribution to the federation. This Article has revealed that the Federal Government is acting beyond the powers vested to it under the FDRE Constitution in matters of land. In a federal context, this is a violation of constitutional principles. For a federation to operate successfully, among other things, it requires a particular kind of "political environment", with the necessary traditions of political cooperation and self-restraint.[172] The absence of this kind of political environment has been the critical challenge facing the Ethiopian federal system. The nature of the political system in place has hindered people to participate in the decision-making of important matters.

The center-state relationship in Ethiopia is usually dominated by the Federal Government. States have been subordinated in policymaking and agenda settings.[173] The reluctance of states to be assertive and the coercive federal-state relationship over the years have contributed for them to remain silent and led the Federal Government to keep on arrogating to itself matters pertaining to land administration. This is evidence of constitutional violation by the central government without formal complaint from state governments.

The nature of the federal system at work may change over time and states may reclaim their taken powers. One might surmise that recent developments in the country are turning points to have strong state governments than they were in the past decades. This opportunity might pave the room for states to assert their powers taken by the

[172] DANIEL J. ELAZAR, FEDERALISM: AN OVERVIEW 35 – 36, (HSRC Publishers, 1995).

[173] Kalkidan Kassaye, *Center - State Relations in the Ethiopian Federal Setup: Towards Coercive Federalism? A view from the Practice* 139, (LLM Thesis, School of Law, Addis Ababa University, 2010).

Federal Government. This Article counsels the Federal Government not to interfere into states' mandates over land administration. Regional states shall be the sole seat of power to administer land in their jurisdiction and issue legislation on matters of land administration.

This Article did not cover all essential matters surrounding land administration and land utilization. It has attempted to travel a long way to clarify the mandates of the federal and state governments in relation to land. However, the matter is not a settled subject. Federal Government interferences in land matter in Ethiopia go well beyond legislative intrusions considered in this Article. For instance, states' potential abuse of their delegated legislative power in relation to land utilization and conservation by the Federal Government merits a separate investigation.

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Reflections on Ethiopia's Reservations and Interpretive Declarations to the Maputo Protocol

Alebachew Birhanu[*]

Abstract

Ethiopia has ratified the Maputo Protocol with several reservations and interpretive declarations. It has entered reservations regarding polygamy, registration of marriage, the right of a married woman to retain and use her maiden name along with her husband's surname or separately, the requirement of judicial order for separation, reduction of military budget significantly in favor of promoting women's rights, the right of a widow to inherit her deceased husband, and the interpretive mandate of the African Court on Human and Peoples' Rights. It has also made interpretive declarations in relation to the prohibition of unwanted sex occurring in the public or private spheres, minimum marriageable age, the right of a married woman to acquire and administer property during marriage, equitable sharing of common property during divorce, the secondary responsibility of private sector for the upbringing of children, and the right of a married woman to decide whether to have children. This Article is thus intended to explore Ethiopia's reservations and declarations, and analyze their implications on women's rights guaranteed in the Maputo Protocol.

Key words: Ethiopia, Maputo Protocol, women's rights, reservations, declaration, limitation, derogation.

Introduction

Ethiopia is a party to the major global human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Rights of Children (CRC), and the Convention on the Elimination of All forms of Discrimination against Women (CEDAW).[1] It has also ratified regional human rights instruments such as the

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[1] United Nations Office of High Commissioner for Human Rights, Treaty Body Database, Ratification Status for Ethiopia, available at:

African Charter on Human and Peoples' Rights (African Charter), the African Charter on Rights and Welfare of Children, and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).[2]

With regard to the Maputo Protocol, Ethiopia made unprecedentedly several reservations and interpretive declarations upon ratification. It entered reservations on seven provisions of the Protocol dealing with monogamy as a preferred form of marriage (Article 6(c)), the validity requirement of marriage registration (Article 6(d)), the right of a married woman to retain and use her maiden name along with her husband's surname (Article 6(f)), the requirement of judicial order for separation of spouses (Article 7(a)), the reduction of military expenditure in favor of promoting women's rights (Article 10(3)), the right of a widow to inherit her diseased husband (Article 21(1)), and the interpretive mandate of the African Court on Human and Peoples' Rights (Article 27).[3]

Similarly, it entered interpretive declarations on six provisions of the Protocol that deal with the prohibition of all forms of violence including unwanted sex (Article 4(2) (a)), a minimum marriageable age (Article 6(b)), the right of a woman to acquire and administer personal property during marriage (Article 6(j)), the right to equitable share of common property during divorce (Article 7(d)), the secondary responsibility of private sector for the upbringing of children (Article 13(l)), and the right of a married woman to decide whether to have children (Article 14(1) (b)).[4]

The aim of this Article is to explore the implications of Ethiopia's reservations and interpretive declarations to the Maputo Protocol on the implementation of the rights contained therein. In order to meet this objective, this Article first (in Section 1) highlights the Maputo Protocol. Section 2 is devoted to discuss how States can lawfully restrict their human rights obligations. Section 3 analyzes Ethiopia's reservations and interpretive declarations and explores their implications on the protection of women's rights in Ethiopia. The final section draws the conclusion.

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https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN, (Last accessed on 8 February 2019).

2 OAU/AU Treaties, Conventions, Protocols and Charters, available at: https://au.int/treaties, (accessed on 8 February 2019).

3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Ratification Proclamation No. 1082/2018, *Federal Negarit Gezeta*, 2018, Article 3 (1) (a-g), [hereinafter Proclamation No. 1082/2018].

4 *Ibid*., Article 3(2) (a-f).

1. The Maputo Protocol: An Overview

The main normative instrument for the protection and promotion of human rights in Africa is the African Charter. Unlike any other human rights instruments, the African Charter introduced an integrated approach to human rights by combining all types of rights in one document.[5] Specifically, the African Charter guarantees both individuals and peoples a broad range of rights: civil and political rights, socio-economic and cultural rights, the right to development, and the right to a generally satisfactory environment.[6]

Although the African Charter contains a wide range of rights, it has been criticized for giving inadequate attention to women and not considering the issue of gender seriously.[7] With regard to women's rights, the flaws of the African Charter are its failure to explicitly define discrimination against women; its lack of guarantees to the rights to consent to marriage and equality in marriage; and its emphasis on traditional values and practices that have long impeded the advancement of women's rights in Africa.[8] Apart from the general provisions regarding non-discrimination[9] and the right to equality,[10] the African Charter devotes only one specific provision referring to women. This provision of the African Charter proclaims that States parties should ensure the protection of the rights of the woman and the elimination of discrimination against women as stipulated in international declarations and conventions.[11] It is thus submitted that the African Charter does not grant a comprehensive protection to the rights of women.

In response to the failure of the African Charter to provide comprehensive protection to women's rights, an additional protocol to the African Charter was drafted in

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[5] RHONA SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 139 (Oxford University Press, 6th ed., 2014).

[6] Stéphanie Vig, *Indigenous Women's Rights and the African Human Rights System: A Toolkit on Mechanisms* 1, (Forest Peoples Programme, Moreton-in-Marsh, 2011).

[7] FAREDA BANDA, WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE 66 (Hart Publishing, 2005).

[8] Center for Reproductive Rights, *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights* 3, BRIEFING PAPER (2006).

[9] The African Charter on Human and Peoples' Rights under Article 2 provides that the rights and freedoms enshrined in the Charter shall be enjoyed by all, irrespective of race, ethnic group, color, sex, language, national and social origin, economic status, birth or other status.

[10] The African Charter on Human and Peoples' Rights under Article 3 states that every individual shall be equal before the law and shall be entitled to equal protection of the law.

[11] African Charter on Human and Peoples' Rights, OAU Doc. CM/1149 (XXXVII) (Annex II) (1981), Article 18(3), available at: https://au.int/en/treaties/african-charter-human-and-peoples-rights, (accessed on 17 February 2019).

accordance with the Charter itself.[12] In the end, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in Maputo, Mozambique, in 2003 and entered into force in 2005.[13] Suggesting to its place of adoption, it is referred as Maputo Protocol.[14]

The Maputo Protocol seeks to address the omissions of the African Charter with regard to women's special circumstance and complements the rights envisaged therein. It is a supplementary instrument to the foundational document, i.e., the African Charter. Different reasons were submitted for having a separate legally binding women's protocol in Africa. The reasons for having the Maputo Protocol were to address women's rights compressively, consolidate the existing human rights standards, and introduce a strong enforcement mechanism for the existing obligations of States with respect to women's rights.[15]

In relation to women's rights, the Maputo Protocol is praised as the most comprehensive and progressive human rights instruments in the world.[16] In terms of content, it recognizes a wide spectrum of women's civil and political rights as well as economic, social and cultural rights.[17] It goes even beyond the existing international human rights instruments in order to address the unique human rights challenges faced by women and girls in the African context.[18] It contains several innovative provisions to curb violations of women's rights. For instance, it is the first treaty to provide for the right to a medical abortion, the right to be protected against sexually transmitted

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[12] The African Charter on Human and Peoples' Rights under Article 66 proclaims that Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

[13] Assembly/AU/Dec.19 (II), Decision on the Draft Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women, available at: https://au.int/sites/default/files/decisions/9548-assembly_en_10_12_july_2003_auc_the_second_ordinary_session_0.pdf, (accessed on 17 February 2019). *See also* Smith, *supra* note 5, at 142.

[14] Frans Viljoen, *An Introduction to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 16(11) WASHINGTON AND LEE JOURNAL OF CIVIL RIGHTS AND SOCIAL JUSTICE 12 (2009), available at: https://scholarlycommons.law.wlu.edu/crsj/vol16/iss1/4/, (accessed on 8 February 2019).

[15] Mizanie Abate Tadesse, *The African Women Protocol as Supplemental to the African Charter and Other Human Rights Instruments: A Brief Analysis*, 5 BAHIR DAR UNIVERSITY JOURNAL OF LAW 10 (2014).

[16] Leslye Amede Obiora and Crystal Whalen, *What is Right with Africa: The Promise of the Protocol on Women's Rights in Africa*, 2 THE TRANSNATIONAL HUMAN RIGHTS REVIEW 153 (2015).

[17] Anthony Kuria Njoroge, *The Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights (The Maputo Protocol)*, (A paper Presented at Thematic Session II during the Sub Regional Conference on Female Genital Mutilation (FGM) held in Djibouti between 2nd-3rd February, 2005) p. 2.

[18] RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION 151 (Cambridge University Press, 2004).

diseases including HIV/AIDS, and the right to be protected from harmful practices including female gentile mutilation.[19]

The Maputo Protocol has a preamble and 32 Articles which specifically focus on the protection of women. The preamble proclaims that the Maputo Protocol is adopted in order to "ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights."[20] The preamble also reaffirms the universality, indivisibility and interdependence of all internationally recognized human rights of women.[21] The preamble further stipulates that State parties are "firmly convinced that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated."[22]

The Maputo Protocol starts with the definition of some terminologies, including discrimination against women, harmful practices, and violence against women.[23] The Protocol under Article 1(f) defines the term 'discrimination against women' as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life." The Protocol under Article 1(g) further defines the expression "harmful practices" as "all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education, and physical integrity." Article 1(j) of the Protocol also defines the term 'violence against women' as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war."

As mentioned above, the Maputo Protocol guarantees a wide range of rights. These include: prohibition against discrimination (Article 2), the right to dignity (Article 3), the right to life, integrity and security of the person (Article 4), protection from harmful

[19] Viljoen, supra note 14, at 22.

[20] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, preamble para. 14, available at: https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa, (accessed on 26 February 2019), (hereinafter the Maputo Protocol).

[21] *Ibid.*, preamble para.5.

[22] *Ibid.*, preamble paragraph 13.

[23] *Ibid.*, Article 1(f), (g) and (j).

traditional practices (Article 5), rights relating to marriage and divorce (Articles 6 and 7), access to justice and equal protection before the law (Article 8), right to participation in the political and decision making process (Article 9), the right to a peaceful existence and to security (Article 10), the right to education (Article 12), the right to equal conditions of work (Article 13), the right to health and reproductive rights (Article 14), the right to food security (Article 15), the right to adequate housing (Article 16), the right to participate in cultural life (Article 17), the right to a safe and sustainable environment (Article 18), the right to sustainable development (Article 19), and the right to inheritance (Article 21). Furthermore, it gives special protection to vulnerable women such as women in armed conflict (Article 11), widows (Article 20), elderly women (Article 22), women with disabilities (Article 23), and women in distress (Article 24).

In relation to its implementation, the Protocol obliges States Parties to ensure the enforcement of the rights at national level and adopt all necessary measures including providing the necessary resources.[24] As a monitoring mechanism, Article 26 of the Protocol requires States Parties to submit periodic reports to the African Commission on Human and Peoples' Rights (African Commission) in accordance with Article 62 of the African Charter, and periodic reports should indicate the legislative and other measures undertaken for the full realization of the rights enumerated therein. Besides, the Protocol has mandated the African Court on Human and Peoples' Rights (African Court) with matters of interpretation arising from its application and implementation.[25]

In the event of breach of rights, victims of human rights violations can be remedied through regional and national judicial and quasi-judicial decisions. In this regard, Article 25 of the Maputo Protocol requires States Parties to provide appropriate remedies, through competent judicial or other authority provided for by law, to any woman whose rights have been violated. After remedies for women's rights violations are exhausted at national level, the Protocol, as a supplemental treaty to African Charter, will have a final recourse to the African Commission and the African Court.[26]

In sum, human rights contained in the Maputo Protocol are far-reaching. In addition to embodying numerous women's rights, the Protocol has set out in detail the duties of States in various areas specific to women. However, these duties are subject to the reservations and interpretive declarations entered by States parties to the Protocol. By

[24] *Ibid.*, Article 26 (1) and (2).
[25] *Ibid.*, Article 27.
[26] Njoroge, supra note 17, at 5.

October 16, 2019, only 42 countries out of a total of 54 African countries have ratified the Protocol[27] even if the AU members States pledged in the AU Gender Policy to achieve the full ratification and enforcement of the Maputo Protocol by 2015 and its domestication by 2020.[28] Of which, a few countries ratified the Maputo Protocol with reservations, implying that reserving States restrict the scope of its obligations towards the Protocol.[29] In the next section, the different instances where States can lawfully restrict human rights obligations are discussed.

2. When States May Restrict their Human Rights Obligations?

According to international human rights law, human rights are the primary responsibility of States. By becoming parties to international and regional human rights treaties, States assume three obligations: the duty to respect, the duty to protect and the duty to fulfill.[30] However, States can lawfully restrict the scope of their obligations towards human rights through different ways. The ways by which States may restrict the scope of their obligations can be expressed in terms of express limitations to the rights, derogations from the rights, reservations to treaties, and declarations.[31] States may use any of these mechanisms to strike a balance between the rights of individuals and other competing interests, or concerns. Whilst the focus of this Article is on reservations and interpretive declarations, a brief discussion will be incidentally made on each mechanism by which States may restrict the enjoyment of human rights for justifiable reasons.

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[27] List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, available at: https://au.int/sites/default/files/treaties/37077-sl PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf, (accessed on 8 February 2019).

[28] Justice Lucy Asuagbor, *Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (Special Rapporteur on the Rights of Women in Africa, 60th Meeting Commission on the Status of Women, 18 March 2016), p. 2.

[29] *Ibid.*

[30] HUMAN RIGHTS: A HANDBOOK FOR PARLIAMENTARIANS 31 (The Inter-Parliamentary Union and the Office of the High Commissioner for Human Rights, 2016), p.31.

[31] *Ibid.*, at 47.

2.1 Limitations

Human rights with few exceptions, such as the prohibition of torture and slavery, are not absolute under international human rights law.[32] In fact, rights and freedoms of individuals contained under human rights treaties are often subject to limitation clauses. The rationale for limiting human rights is to balance rights of individual with the rights of other individual, and with the reasonable demands of a society.[33] Sometime, a right of an individual may conflict with a right of other individual, or individual rights may hugely impinge upon public interests.[34] In such a case, there is a necessity for harmonizing conflicting interests. This can be attained through express limitation clauses embodied in international and regional human rights treaties.

Different international and regional human rights treaties provide for limitation of rights in certain ways. Some human rights treaties take the form of general limitation clauses that can be applicable to all rights therein. The general limitation clauses are contained in separate provisions of human rights treaties. The rights guaranteed by human rights treaties may then be subject to limitations in accordance with the general limitation clauses. The inclusion of a general limitation clause implies that there may be limitations on any right recognized in a particular instrument so long as the prerequisite caveats are fulfilled.[35] For instance, the Universal Declaration of Human Rights (UDHR) contains a general limitation clause in a separate provision which reads:

> *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*[36]

Similarly, the ICESCR under Article 4 provides:

> *The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the*

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[32] ALEX CONTE AND RICHARD BURCHILL, DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 40 (Ashgate Publishing Company, 2nd ed, 2009).

[33] Mohamed Elewa Badar, *Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Treaties*, 47(3) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 63 (2003).

[34] LOUIS HENKKIN *et al.*, HUMAN RIGHTS, UNIVERSITY CASEBOOK SERIES 324 (Foundation Press, 1999).

[35] Adem Kassie Abebe, *Limiting Limitations of Human Rights under the FDRE and Regional Constitutions*, 4 ETHIOPIAN CONSTITUTIONAL LAW SERIES 85 (2011).

[36] Universal Declaration of Human Rights, UNGA Res. 217 A (III), 1948, Article 29(2).

> *State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.*

Some other human rights treaties take the form of built-in-limitation clause into a provision that contains a right. A provision that recognizes rights may also contain a respective specific limitation clause. This form of limitations makes permissible limitations explicit only in relation to particular rights. For instance, the ICCPR principally allows State Parties to accommodate competing interests, or rights through limitation clauses of individual rights, as articulated within each provision of the Covenant.

A limitation clause is clearly an exception to the general rule.[37] The general rule is the protection of the right whereas the exception is its restriction.[38] As exceptions should be understood restrictively, limitation clauses are subject to rigorous scrutiny for their validity and acceptance.[39] In this regard, the jurisprudence of major human rights bodies has introduced three requirements for legitimate limitation of rights. The first is that any interference must be prescribed by the law, and the law authorizing the restriction of the right must be clear, reasonable and accessible to everyone.[40] The second requirement pertains to the presence of legitimate aims to override the rights, and any interference must serve a certain pressing social need.[41] The last requirement pertains to the necessity of interference in furtherance of specified overriding legitimate aims, and the interference must be appropriate to achieve the legitimate aim.[42] States may thus restrict rights proportionally for certain legitimate aim in accordance with the law.

2.2 Derogation

Derogation from human rights is described as "the act of a State suspending the application and enjoyment of certain human rights upon its declaration of a state of

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[37] NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 184 (Cambridge University Press, 2002).

[38] *Ibid.*

[39] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4, 1984, para.2-3.

[40] *Ibid.*, para.16-17.

[41] Conte and Burchill, *supra* note 32, at 48.

[42] *Ibid.*

public emergency affecting the life of a whole nation."[43] Put differently, derogation refers to a temporary moratorium of the rights and freedoms of individuals during emergency situations.[44] In time of public emergency threatening the life of the nation, some human rights treaties allow States to take measures derogating from their obligations.[45] According to the view of the Human Rights Committee, derogating measures must be of an exceptional and temporary nature.[46]

The rationale for derogation provisions is to strike a balance between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the rights of the individual from abuse by the state.[47] As emergency refers to a situation beyond the normal course of event, the purpose of derogation is to restore normalcy.[48] In order to restore normalcy, States are thus allowed to take temporarily and exceptionally derogating measures without facing accusation of violating human rights.

Yet, there are rights and freedoms that may not be subject to derogation even in times of public emergency which threatens the life of the nation.[49] These rights are usually dubbed as non-derogable rights. Even in relation to rights and freedoms that are subject to derogation, States are expected to comply with conditions against any abuse of derogation. The conditions for States to derogate from their obligations comprise: (a) there must be war, natural disasters or other public emergencies threatening the life of state, (b) state of emergency must be declared, (c) the measures must not go beyond the extent strictly required by the situation, (d) measures must not be inconsistent with

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[43] H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 64 (University of Nebraska Press, 2nd ed., 2004).

[44] Abdi Jibril Ali, *Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case*, 1(2) HARAMAYA LAW REVIEW 1, 12 (2012).

[45] Smith, *supra* note 5, at 184. *See also* Article 4(1) of International Covenant on Civil and Political Rights; Article 15 of European Convention on the Protection of Human Rights and Fundamental Freedoms; and Article 27 of American Convention on Human Rights.

[46] General Comment 5, in Report of the Human Rights Committee, UN Human Rights Committee, 36th Session, Annex VII, UN Doc. A/36/40, 1981, para.110.

[47] Icelandic Human Rights Centre, Alteration of Human Rights Treaty Obligations, available at http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/alteration-of-human-rights-treaty-obligations, (accessed on 8 February 2019).

[48] Belay Frenesh Tessema, *A Critical Analysis of Non-Derogable Rights in a State of Emergency under the African System: The Case of Ethiopia and Mozambique* 12 (Master's Thesis, Center for Human Rights, Faculty of Law, University of Pretoria, 2005).

[49] *See also* Article 4(1) of International Covenant on Civil and Political Rights, Article 15 of European Convention on the Protection of Human Rights and Fundamental Freedoms, and Article 27 of American Convention on Human Rights.

other obligations under international law, and (e) measures should not be discriminatory solely on grounds of race, color, sex, language.[50]

2.3 Reservation

The Vienna Convention on the Law of Treaties (VCLT) defines the term reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[51] It is clear from the above definition that the 'unilateral statement' may be termed a declaration, interpretive statement or something else, but it still amounts to reservation as long as its purported effect is to exclude or to modify the legal effect of certain provisions of the convention in their application to that State.[52] It is the content not the form of the statement which is important. At the time of becoming a party to human rights treaties, a State may exclude or modify the legal effect of certain provisions of the convention in their application to that State. Reservation is thus another way by which States may narrow down the scope of their obligations towards human rights.

Nevertheless, reservation to treaties is not without any condition. In this regard, the VCLT proclaims that a State may make a reservation when signing, ratifying or acceding to a convention if: (a) it is not prohibited by the treaty, or (b) the treaty provides that only specified reservations may be made, and (c) the reservation is not incompatible with the object and purpose of the treaty.[53] A State wishing to formulate a reservation to a human right treaty should first make sure that the treaty does not expressly stipulate to the contrary. The State should also ensure that the intended reservation should fall within the ambit of the specified reservations that the treaty provides. Finally, that State should ensure that the intended reservation is not incompatible with the object and purpose of the treaty. The compatibility test is also decisive to resolve whether or not a reservation is permitted. However, determining the

[50] International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, (entered into force 23 March, 1976), Article 4.

[51] The Vienna Convention on the Law of Treaties, 1969, Article 2(1) (d). *See also* Article 2(1) (d) of the Vienna Convention on the Law of Treaties between States and International Organizations of 1986, which provides a very similar definition of the term "reservation".

[52] Max du Plessis and Stephen Peté, Handbook on Ratification of Human rights treaties 37 (Commonwealth Secretariat, 2006).

[53] According to Article 19 of the Vienna Convention on the Law of Treaties 1969, not all multilateral treaties permit reservation. In fact, some hold a provision that prohibits any reservation to them, and some others allow reservations only to certain of their provisions.

compatibility or otherwise of a reservation with the object and purpose of a treaty is a daunting task since the VCLT does not give a workable definition to the term 'object and purpose of the treaty.'

States may sometimes face a problem of approach-avoidance conflict when signing, ratifying, or acceding human rights treaties. They may wish to become a party to a human rights treaty, but at the same time may wish to exclude the legal effect of certain provisions that are deemed to be against their interests, or inconsistent with a national law, or with a certain tradition or religious belief, or cultural practice.[54] In such a case, subject to important conditions discussed above, they can enter reservations to certain provisions of the treaty. In short, if a state accepts most of the provisions of a treaty, but objects to other provisions of that treaty for various reasons, it can make a reservation.[55] A reservation may thus enable a State to participate in a multilateral treaty that it would otherwise be unable or unwilling to become a party.[56] The rationale for reservation to human rights treaties is to include the greater number of States in the treaties. After all, it might be better to have a State ratifying a treaty with reservation than a State not ratifying the treaty at all.

In respect of human rights treaties, different actors have viewed reservations differently. For instance, whilst States consider reservations as an extension of State sovereignty and an instrument to comply with international law without essentially altering national law, human rights advocates view reservations as threat to the protection of human right, the effectiveness of the treaty in question and the universality of human rights in general.[57] For the potential victim of a violation, reservation can also mean the act of removing a right that the treaty purports to protect.[58]

2.4 Declaration

Declaration could be either interpretive declaration, or optional declaration. Although, the VCLT is mute about interpretive declaration, the Guide to Practice on Reservations to Treaties defines 'interpretative declaration' as a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State

[54] Richard W. Edwards Jr., *Reservations to Treaties*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 362, 363 (1989), available at: https://repository.law.umich.edu/mjil/vol10/iss2/3, (accessed on 10 January 2019)

[55] Niina Anderson, *Reservations and Objections to Multilateral Treaties on Human Rights* 13 (Master's thesis, Faculty of Law, University of Lund, 2001).

[56] Plessis and Peté, supra note 52, at 57.

[57] Smith, *supra* note 5, at 186.

[58] *Ibid.*

or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.[59] In other words, interpretive declaration means "a declaration of a State as to its understanding of some matter covered by a convention or its interpretation of a particular provision."[60]

As the name suggests declaration is essentially interpretive in nature. States may formulate a statement as to its understanding about the scope, meaning and application of a particular right.[61] The statement simply clarifies the position of a State as to the meaning or scope of the treaty provisions. This is to say that an interpretive declaration, as opposed to reservation, does not purport to exclude or modify the legal effect of any provision of the treaty concerned. Thus, a declaration of a State relating to understanding of the interpretation to be attached to a specific provision in a treaty, or a specific aspect of a treaty must be distinguished from reservations.[62] Yet, an interpretive declaration may be another way for States to restrict the scope of their human rights obligations.

Some human rights treaties provide for States to make optional declarations that are legally binding upon them.[63] An optional declaration is binding upon a State that makes it. In most cases, optional declaration relates to the competence of human rights commissions or committees.[64] Unlike interpretive declaration, optional declaration concerns with expanding, instead of restricting the scope of human rights obligations of States.

3. Ethiopia's Reservations and Declarations to the Maputo Protocol

Ethiopia signed the Maputo Protocol on June 1, 2004,[65] but had to wait for the passage of nearly 15 years to ratify it. The Constitution of the Federal Democratic Republic of

[59] Guide to Practice on Reservations to Treaties, adopted by UNILC at its sixty-third session, 2011, Guideline 1.2.

[60] Plessis and Peté, *supra* note 52, at 40.

[61] Smith, *supra* note 5, at 188.

[62] GM Ferreira and MP Ferreira-Snyman, *The Impact of Treaty Reservations on the Establishment of an International Human Rights Regime*, 38(2) THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA 151 (2005).

[63] Plessis and Peté, *supra* note 52, at 40.

[64] For example, Article 41 of the ICCPR provides that "A State Party to the present Covenant may at any time declare under this Article that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."

[65] Proclamation No.1082/2018, *supra* note 3, Preamble para.2.

Ethiopia (FDRE Constitution) entrusted the House of People's Representative (HoPR) to ratify international agreements.[66] Accordingly, in 2018, the HoPR promulgated a Proclamation that provides for the ratification of the Maputo Protocol.[67] Pursuant to the FDRE Constitution, the Maputo Protocol has, upon ratification, become "an integral part of the law of the land."[68] However, the Protocol is made subject to a number of reservations and interpretive declarations to narrow down the scope of the country's obligations to the Protocol. The following subsections present specifics of the reservations and declarations and analyze their implications on women's rights.

3.1 Reservations to the Maputo Protocol

As discussed under Section 2.3, a State may make a reservation as long as a reservation is not prohibited by the treaty or falls within the specified categories, and is not incompatible with the object and purpose of the treaty. The Maputo Protocol does not expressly prohibit entering reservations during signature, or ratification/accession. Nor does it provide a catalogue of provisions allowed for reservation. We can thus argue that reservation to the Protocol is admissible subject to relevant international rules in this regard. This being so, Ethiopia has made 7 reservations. These reservations relate to form of marriage, registration of marriage, a married woman's right to assert her surname, judicial order for separation of marriage, widow's right to inheritance, reduction of military budget and jurisdiction.

3.1.1 Marriage related reservations

In its first reservation, Ethiopia states that it does not consider itself to be bound by Article 6(c) of the Maputo Protocol.[69] Article 6(c) of the Maputo Protocol requires States Parties to take legislative measures to guarantee that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected." Article 6(c) of the Protocol expressly recognizes monogamy as a preferred form of marriage. Yet, the provision does not reject the practice of polygamy outright. In fact, one can argue that polygamy is impliedly endorsed in the Protocol as a least preferred form of marriage. It is submitted that the provision is the outcome of a compromise between a

[66] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gezeta*, 1995, Article 55 (2) (12), [hereinafter Proclamation No. 1/1995].

[67] Proclamation No.1082/2018, *supra* note 3, Preamble para.3 and Article 5.

[68] Proclamation No.1/1995, *supra* note 66, Article 9(4).

[69] Proclamation No.1082/2018, *supra* note 3, Article 3(1) (a).

group supporting the practice of polygamy and others denouncing it.[70] The compromise permits the Protocol to recognize women's rights and embrace culture through implicit endorsement of polygamy.

Nevertheless, the provision becomes a source of some problems. First, there is a growing concern that polygamous marriage makes women socialize into subservient roles that inhibit their full and meaningful participation in family and public life.[71] Human rights advocates view cultural practices such as levirate, sororate marriages and polygamy as considerable forms of gender inequalities, stereotypes and prejudices.[72] In this regard, the UN Human Rights Committee noted that polygamy should be abolished as it violates the dignity of women and is inadmissible discrimination against women.[73] In similar terms, the Committee on the Elimination of Discrimination against Women stated that polygamous marriage ought to be discouraged and prohibited, for it contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents.[74] It also contends that polygamy has significant ramifications for the economic well-being of women and their children.[75] Thus, the tacit endorsement of polygamy under Article 6(c) of the Protocol is in a direct conflict with the very object and purpose of the instrument, which is to eradicate discrimination against women and promote equality between sexes.[76] Secondly, the provision has also suffered from an internal conflict with Article 8(f) of the Protocol, which enjoins States to "reform of existing discriminatory laws and practices in order to promote and protect the rights of women."[77] Moreover, the provision could contradict with Article 14(1) (d) of the Protocol guaranteeing the right to be protected against sexually transmitted infections, including HIV/AIDS, as the

[70] Obonye Jonas, *The Practice of Polygamy under the Scheme of the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa: A Critical Appraisal*, 4(5) JOURNAL OF AFRICAN STUDIES AND DEVELOPMENT 144 (2012).

[71] Rebecca Cook and Lisa Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* 2 (Family, Children and Youth Section Research Report, Department of Justice of Canada, 2006).

[72] Obonye Jonas, *supra* note 70, at 144.

[73] UN HRC General Comment 28: Article 3 (The Equality of Rights between Men and Women), 68th sess., CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 24.

[74] UN CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 13th sess., A/49/38, 1994, para. 14.

[75] UN CEDAW General Recommendation No. 29: Article 16 of the Convention (Economic Consequences of Marriage, Family Relations and their Dissolution), CEDAW/C/GC/29, 2013, para. 27.

[76] Fareda Banda, *supra* note 7, at 117.

[77] *Ibid.*

practice of polygamy may expose women to the risk of contracting sexually transmitted diseases.[78]

With regard to marital and family rights, the FDRE Constitution proclaims that men and women have equal rights at time of entering into marriage, during marriage and at the time of divorce.[79] Once formed in accordance with the FDRE Constitution, family is protected by the society and the State, as it is the natural and fundamental unit of society.[80] The FDRE Constitution under Article 35(4) has also prohibited laws, customs and practices that oppress, or cause bodily or mental harm to women. Other than these general provisions, the FDRE Constitution does not clearly address the practice of polygamous marriage.[81] As a result, the legal regime governing polygamy falls within ambit of subsidiary laws: family laws and criminal law.

The FDRE Constitution has created federal system of government in which both the federal government and regional states have the legislative, executive and judicial powers.[82] In accordance with such allocation of power, the federal government promulgated the Federal Revised Family Code for the federally administered cities of Addis Ababa and Dire Dawa.[83] All regional states except Afar and Somali also enacted their respective family laws applicable within their own jurisdiction.[84] The Federal Revised Family Code enunciates that one cannot conclude marriage as long as s/he is bound by bonds of a preceding marriage.[85] The prohibition of polygamy is one of essential conditions of marriage. Non-observance of this essential condition of marriage results in the dissolution of marriage.[86] In relation to polygamy, the regional

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[78] UN CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 20th sess., A/54/38/Rev.1, 1999, para.18.

[79] Proclamation No.1/1995, supra note 66, Article 34(1) and Article 35(2).

[80] *Ibid.*, Article 34(3).

[81] The conclusion of a polygamous marriage is a long-standing practice and quite common in various regions of Ethiopia. According to the 2016 Ethiopia Demographic and Health Survey (EDHS) Report, 11% of Ethiopian women age 15-49 are in a polygamous union.

[82] Proclamation No.1/1995, *supra* note 66, Article 50(1) & (2).

[83] The Revised Family Code, Proclamation No. 213/2000, *Federal Negarit Gezeta*, 2000, [hereinafter Proclamation No. 213/2000].

[84] Amhara Regional State Family Code, Proclamation No.79/2003, Benishangul Gumuz Regional State Revised Family Law, Proclamation No.63/2006, Gambella Regional State's Family Law, Proclamation No.68/2008, Harari Regional State Family Code, Proclamation No. 80/2008, Oromia Regional State Family Code, Proclamation No. 83/2004, Southern Nations, Nationalities and Peoples Regional State Family Law, Proclamation No.75/2004, and Tigray Regional State Revised Family Law, Proclamation No.116/2007. At the time of writing this piece the author found out that Afar and Somali regional states have developed their own draft family laws.

[85] The Revised Family Code, Proclamation No. 213/2000, *supra* note 83, Article 11.

[86] *Ibid.*, Article 33 and Article 75(b).

states family codes have taken similar positions except the Harari Regional State Family Code.[87] As a rule, the Harari Family Code prohibits polygamy, but the prohibition may not be applicable to the conclusion of marriage as permitted by religion.[88]

In addition to the federal and regional states family laws, the criminal law is pertinent to the issue of polygamy. In this regard, the Criminal Code of Ethiopia states that any person, being tied by the bond of a valid marriage, intentionally concludes a contract of marriage before the first union was dissolved will be held criminally liable.[89] The Criminal Code has also set out a criminal sanction on any unmarried person who marries another, knowing that latter is tied by the bond of an existing marriage.[90] However, as an exception to this rule, Article 651 of the Criminal Code proclaims that criminal sanctions cannot be applicable if bigamy[91] is committed in conformity with religious or traditional practices recognized by law.

Both the Criminal Code and the Harari Regional State Family Code are cautious in recognizing bigamous marriage. Perusal of relevant provisions of these laws reveals that polygamy is permitted exceptionally on the grounds of religious or customary practice, the operation of which is subject to explicit recognition by the relevant family law.[92] In sum, in Ethiopia polygamy is a crime punishable under the Criminal Code unless permitted on religious or cultural grounds by the relevant family laws.[93] Right now, polygamous marriage is exceptionally permitted only in Harari Regional State.

By reservation, Ethiopia avoided the legal effect of Article 6(c) of the Maputo Protocol that encourages monogamy as a preferred form of marriage, but fails to expressly recognize polygamy. The reservation implies that Ethiopia would not be obliged to uphold monogamous marriage as a preferred form marriage. This in turn allows the country to maintain its national law that expressly acknowledges polygamy to some

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[87] Dureti Abate Fulas, *The Legal Framework Regulating Polygamy in Ethiopia: An Assessment in Light of Liberal Feminist Legal Theory and International Human Rights Law* 56 (Master's Thesis, Lund University, 2018).

[88] Harari Regional State Family Code, Proclamation No. 80/2008, *Harar Negari Gezeta*, 2008, Article 11.

[89] The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No.414/2004, *Federal Negarit Gazeta*, 2004, Article 650 (1), [hereinafter Proclamation No.414/2004].

[90] *Ibid.*, Article 650 (2).

[91] For the purpose of this Article, regardless of their technical differences, bigamy could also mean polygamy in which a man has more than one woman as spouse.

[92] Sileshi Bedasie Hirko, *The Disputed Constitutionality of the Precedential Practice of the Federal Supreme Court and Its Implications for Oromia Family Law: The Case of Bigamous Marriage in Ethiopia*, 63(2) JOURNAL OF AFRICAN LAW 198 (2019).

[93] Jetu E. Chewaka, *Bigamous Marriage and the Division of Common Property under the Ethiopian Law: Regulatory Challenges and Options*, 13(1) OROMIA LAW JOURNAL 98 (2013).

extent. Therefore, the reservation is made to ensure consistency with the Criminal Code and the Harari Regional State Family Code that explicitly permit polygamous marriage in order to accommodate cultural and religious diversity.

What does this imply for women's rights? As pointed out earlier, polygamy contravenes women's right to be free from all forms of discrimination and right to be protected against sexually transmitted diseases, including HIV/AIDS. As discussed above, the seeming reluctance of the Protocol to prohibit polygamy has been viewed as a threat to women's rights in marriage and family life, let alone the express recognition of polygamous marriage. Thus, it is difficult to ensure the equality between sexes as guaranteed under the FDRE Constitution and human rights instruments while explicitly endorsing polygamous marriage. In short, the reservation to Article 6(c) of the Maputo Protocol that encourages monogamy would undermine a range of women's rights.[94]

In its other reservation, Ethiopia declared that it does not consider itself to be bound by marriage registration as legally recognized by Article 6(d) of the Protocol.[95] According to the FDRE Constitution and the Federal Revised Family Code, marriage may be concluded under the systems of civil, religious or customary rules.[96] The Federal Revised Family Code provides for essential conditions for the conclusion of a valid marriage.[97] These essential conditions pertain to attaining the marriageable age, consent sustainable in law, prohibition of bigamy, observing period of widowhood, and absence of relationship by consanguinity or affinity between the would be couple. All kinds of marriage (civil, customary or religious marriage) are required to meet these essential conditions.[98] The non-observance of one of the essential conditions except the condition of period of widowhood could cause the dissolution of marriage.[99]

Concomitantly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Ethiopia is a party, makes registration of marriage compulsory.[100] Similarly, the Federal Revised Family Code requires all kinds of

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[94] Gebremeskel Hailu Tesfay, *Note on the Adverse Effects of Polygamy on the Rights of Women: A Case Study in Gedeo and Sidama Zones*, 6 HARAMAYA LAW REVIEW 104-108 (2017).

[95] Proclamation No.1082/2018, *supra* note 3, Article 3(1) (c).

[96] Proclamation No.1/1995, *supra* note 66, Article 34(4), and Proclamation No.213/2000, *supra* note 83, Article 1.

[97] Proclamation No. 213/2000, *supra* note 83, Articles 6 - 9, 11, 15 and 16.

[98] *Ibid.,* Article 26(2), Article 27(2).

[99] *Ibid.,* Articles 31 – 37.

[100] Convention on the Elimination of All Forms of Discrimination against Women, UNGA Res.34/180, 18 December 1979, Article 16(2).

marriage to be registered by a competent officer of civil status.[101] The Registration of Vital Events Proclamation also stipulates that marriage should be registered with necessary details.[102] It is thus clear that registration of marriage is mandatory, but not a validity requirement for marriage. This is precisely because Article 28(3) of the Federal Revised Family Code declares that "any marriage shall have effect from the date of its conclusion." This suggests that the effect of marriage begins at the time of its conclusion, not at the time of its registration. The Federal Revised Family Code under Article 30 requires the record of marriage to show the full names, dates and places of birth, and addresses of each of the spouses and their witnesses, form of the marriage, date of its conclusion and date of its registration. The particulars of the record of marriage suggest that the purposes of marriage registration are to control the fulfillment of essential conditions, prove the existence of marriage (evidentiary purpose), and protect the institution of family.

Conversely, Article 6(d) of the Protocol obliges States parties to guarantee that every marriage is registered in accordance with national laws in order to be legally recognized. According to the Protocol, marriage cannot legally exist unless registered. No registration means absence of legally recognized marriage. Ethiopia entered reservation on this provision for the possible reason that the provision is inconsistent with the national law and the reality on the ground. In a country where most of its population lives in a rural area and most marriages conclude under customary or religious systems without the practice of registration, it does not seem feasible at least for now to make the registration of marriage a validity requirement. The reservation reflects a pragmatic decision of the Ethiopian government to protect the interests of women married under customary or religious rules.

The requirement of registration for validity of marriage may disadvantage women themselves, for women who concluded their marriage in accordance with religious or customary rules cannot prove their marriage due to lack of marriage certificate.[103] By this reservation, Ethiopia avoids the risks of dissolution of unregistered marriage on the ground of non-registration. Consequently, by making marriage registration compulsory, it would forestall problems such as early marriage. It is thus clear that the position taken in relation to marriage registration would protect women's rights. In sum, the domestic legal system accords better protection to women. This is permissible under Article 31 of the Maputo Protocol declaring that the provisions of the Protocol

[101] Proclamation No. 213/2000, *supra* note 83, Article 28.

[102] Registration of Vital Events and National Identity Card Proclamation No. 760/2012, Federal *Negarit Gezeta*, 2012, Articles 17 and 31.

[103] Mizanie Abate Tadesse, *supra* note 15, at 26.

cannot affect more favorable protections envisaged in the national legislation of State Parties for the realization of women's rights.

Ethiopia has also made a reservation on Article 6(f) of the Maputo Protocol.[104] Article 6(f) of the Protocol imposes an obligation on States Parties to guarantee a married woman's right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname. In this connection, the Civil Code of Ethiopia stipulates that a married woman should normally retain her own family name.[105] However, she may apply to the court for the change of her family name into the name of her husband for duration of her marriage.[106] According to the Civil Code, there is a possibility for a married woman to use her husband's name in lieu of her own family name. For many feminists, a law which requires wives but not husbands to adopt a surname other than that given at birth may be violating the principle of equal protection.[107] The requirement to adopt the surname of their husbands is "a shackle which symbolizes ownership and dependence."[108]

Nonetheless, the practice of changing a wife's family name in marriage is not common in Ethiopia. In fact, the practice suggests that a married woman has no name other than that of her first name, patronymic and grandfather's name. The possibility for a wife to acquire her husband's name upon her marriage is a foreign concept that the Civil Code has attempted to introduce without taking the Ethiopian traditions into account. Considering the objective realty, Ethiopia excluded the legal effect of Article 6(f) of the Protocol. A name of a person is an integral part of his/her identity. In this respect, the Committee on the Elimination of Discrimination against Women stated that each spouse has the right to choose her/his name in order to preserve individuality and identity in the community.[109] This being so, Ethiopia's reservation represents the recognition of married women's right to assert their own surnames at all times, and is thus important as a symbolic statement of equality of rights under the law.

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[104] Proclamation No.1082/2018, *supra* note *3*, Article 3(1) (c).

[105] Civil Code of the Empire of Ethiopia Proclamation No. 165/1960, *Negarit Gezeta*, 1960, Article 40(1)

[106] *Ibid.*, Article 40(2) and Article 42.

[107] Roslyn G. Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 UNIVERSITY OF MICHIGAN JOURNAL OF LAW 63, 66 (1974).

[108] *Ibid.*

[109] UN CEDAW General Recommendation No. 21, *supra* note 74, para. 24.

3.1.2 Judicial separation of marriage

According to the Federal Revised Family Code, a conclusion of marriage produces effects on personal and pecuniary relation of the spouses. While personal effects of the marriage pertains to the personal relationship between the spouses, pecuniary effects have to do with the property belonging to each spouse privately and to both of them in common.[110] The personal effects of marriage consist of the duty of mutual respect, support and assistance; joint management of the family; joint determination of common residence; the duty of cohabitation; and the duty of fidelity.[111] The spouses should observe these obligations resulting from their status.

Cohabitation is one of the fundamental obligations of spouses, which involves the duty to live together and to have normal sexual relations with one another.[112] In this regard, Article 53(1) of the Federal Revised Family Code stipulates that the spouses are bound to live together in order to establish and lead life in common. However, under exceptional circumstances, the spouses can agree to live separately for a definite or indefinite period of time.[113] An agreement to live separately allows spouses to live apart without juridical effect while the marriage still subsists. Nevertheless, the Federal Revised Family Code does not provide for specific rules governing living separately by agreement.

In relation to separation of marriage, the Maputo Protocol under Article 7(a) obliges State Parties to ensure that separation, divorce or annulment of a marriage should be effected by judicial order. Against this stipulation, Ethiopia entered a reservation on Article 7(a) of the Protocol that specifically requires separation of spouses to be decided by judicial organs.[114] The reservation implies that a decision of the judiciary is not necessary for separation of spouses. A couple, who chooses to live apart, can agree to that effect without seeking judicial order. As indicated above, the Federal Revised Family Code does not contemplate judicial separation; rather it enables the parties to live separately by agreement. Therefore, the reservation was made to maintain the national law that permits spouses to live separate by agreement. As long as spouses enter into an agreement for separation without any vitiation of consent, the reservation

[110] William Buhagiar, *Marriage under the Civil Code of Ethiopia*, 1(1) JOURNAL OF ETHIOPIAN LAW 82 (1964).

[111] Proclamation No.213/2000, *supra* note 83, Articles 49 – 56.

[112] *Ibid.*, Article 53(1) & (2).

[113] *Ibid.*, Article 55(1).

[114] Proclamation No.1082/2018, *supra* note 3, Article 3(1) (d).

would not undermine women's rights. In fact, such an agreement avoids the trouble of seeking judicial order for spouses who choose to live separately.

3.1.3 The Right of widows to inheritance

The FDRE Constitution under Article 35(7) provides for women's right to enjoy equal treatment in the inheritance of property. According to the Civil Code of Ethiopia, succession of the deceased may be either intestate or testate, or both.[115] If a person dies without valid will, the property of the deceased will devolve upon the deceased's heirs by the operation of the law. The Ethiopian rules of intestate succession are based on the existence of consanguineal relationship between the heir(s) and the deceased.[116] As there is no consanguinity between spouses, there is no heirship between spouses unless there is testamentary will by the deceased in favor of the surviving spouse. In the absence of relatives by blood, the inheritance of the deceased would devolve upon the State.[117] This means that the surviving spouse would not be considered even where there are no personas having consanguineal relationship with the deceased. The surviving spouse is entitled only to payment of pension, as pension cannot form part of the inheritance of the deceased.[118] According to the Ethiopian pension law, if an employee dies, the widow or widower would be entitled to receive 50% of the pension to which the deceased was or would have been entitled.[119] The purpose is to support a widow or widower who was maintained by the pensioner during his/her life time.

In relation to inheritance, Article 21(1) of the Maputo Protocol stipulates that a widow should have the right to an equitable share in the inheritance of the property of her husband. Conversely, spouses cannot inherit each other under the Ethiopian law of succession unless s/he is designated as a legatee by a will. Owing to this, Ethiopia entered a reservation on Article 21(l) of the Protocol.[120] By this reservation, Ethiopia attempts to meet the requirement of its law of succession. As discussed above, the Ethiopian law of succession accords the same rights to widows and widowers. But, it can be argued that widows could be more gravely disadvantaged than widowers in cases

[115] Proclamation No. 165/1960, *supra* note 105, Article 829.
[116] *Ibid.*, Article 842 – 856.
[117] *Ibid.*, Article 852.
[118] *Ibid.*, Article 828.
[119] Public Servants' Pension Proclamation No.714/201, *Federal Negarit Gezeta*, Article 40(3) (a) and Article 41(1), and Private Organization Employees' Pension Proclamation No. 715/201, *Federal Negarit Gezeta*, Article 39(3) (a) and Article 40(1).
[120] Proclamation No.1082/2018, *supra* note 3, Article 3(1) (f).

of intestacy.[121] In this regard, the Committee on the Elimination Discrimination against women highlighted that many women usually experience a substantial decline in household income after divorce while men experience smaller income losses.[122] This being so, the Committee requires States Parties to ensure that disinheritance of the surviving spouse is prohibited.[123] By the same token, although Ethiopian law of succession treats widows and widowers equally, its application may affect women's interests disproportionately. As a result, the reservation that maintains the rules governing intestate succession would certainly undermine widows' rights.

3.1.4 Reduction of military expenditure

The Maputo Protocol under Article 10(3) imposes an obligation on States Parties to "take the necessary measures to reduce military expenditure significantly in favor of spending on social development in general, and the promotion of women in particular." According to the provision, States Parties undertake to reduce military expenditure significantly in order to promote women's rights. Instead of investing in military, States Parties should reorient their budget priorities towards socio-economic development and promotion of women. This provision has introduced an essential point of departure of the Protocol from the existing human rights treaties.[124]

Depending on its available resources, a State Party is duty bound to provide sufficient budgetary resources to realize women's rights.[125] For fear of being bound by the provision which obliges States Parties to reduce military expenditure significantly, Ethiopia entered a reservation on Article 10(3) of the Protocol.[126] Given the geopolitics of the Horn of Africa and the protracted negotiation among riparian States regarding the Grand Ethiopian Renaissance Dam on the Nile River, Ethiopia would be compelled to strengthen and modernize its defence forces in the years to come. The situation

[121] This could be an indirect discrimination that occurs when an apparently neutral practice or condition has a disproportionate and negative effect on one of the groups against whom it is unlawful to discriminate, and the practice or condition cannot be justified objectively. *See also*, David M. Dzidzornu, *Human Rights and the Widow's Material Security: The Case of the Intestate Ghanaian Widow*, 28(4) LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 494 (1995).

[122] UN CEDAW General Recommendation No. 29, supria note 75, para. 4.

[123] *Ibid.*, para.53.

[124] Ashwanee Budoo, *Gender Budgeting as a Means to Implement the Maputo Protocol's Obligations to Provide Budgetary Resources to Realize Women's Human Rights in Africa*, 9 AFRICAN JOURNAL OF LEGAL STUDIES 206 (2016).

[125] The Maputo Protocol, *supra* note 20, Preamble para.5. See also Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

[126] Proclamation No.1082/2018, *supra* note 3, Article 3(1) (e).

would not allow the country to make a significant reduction of military budget. Ethiopia made this reservation in order to maintain its national interests. However, entering reservation for indefinite period may allow the country to invest on defence forces and consume the limited resources that would serve other prioritized purposes including promoting gender equality. This concern is genuine if it is viewed along with the building up of militia and special forces by regional states in Ethiopia. In the long run, the reservation would undermine the enforcement of women's rights unless it is withdrawn.[127]

3.1.5 Jurisdiction

Regarding enforcement mechanism, the Maputo Protocol does not establish a separate monitoring body. It rather extends the substantive basis of the existing regional human rights institutions: the African Commission and the African Court. Article 26 of the Maputo Protocol requires States parties to ensure the implementation of the Protocol at national level through the submission of periodic reports in accordance with Article 62 of the African Charter. Accordingly, the African Commission would inspect the observance of States parties to the Protocol. Article 27 of the Maputo Protocol also entrusts the African Court with matters of interpretation arising from the application and implementation of the Protocol.

The African Court on Human and Peoples' Rights was established to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.[128] The African Court has assumed jurisdiction over all cases and disputes concerning the interpretation and application of the African Charter and other related human rights instruments.[129] The following entities are entitled to file and submit applications to the Court: the African Commission, African Inter-governmental Organizations, States Parties to the Protocol, individuals, and NGOs with observer status before the Commission.[130] In stark contrast to the African Commission, the African Court is bestowed to offer remedies to victims of human rights violations and to seek

[127] Articles 22 and 23 of the Vienna Convention on the Law of Treaties, 1969: Unless the convention provides otherwise, a State is entitled to withdraw its reservation or objection to a reservation completely or partially at any stage.

[128] Practical Guide, The African Court on Human and Peoples' Rights: Towards the African Court of Justice and Human Rights, International Federation For Human Rights, 2010, P. 49-53.

[129] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU, 1998, Article 3.

[130] *Ibid.*, Article 5.

enforcement of its judgments against States.[131] The judgment of the Court is legally binding upon member States which are parties to the case.[132] The AU Council of Ministers is required to monitor the execution of judgments.[133]

Ethiopia's final reservation to the Maputo Protocol relates to the interpretive mandate of the African Court.[134] As noted above, Article 27 of the Protocol provides that the African Court is tasked with interpretation of the application and implementation of the protocol. Ethiopia has signed, but not ratified the Protocol to the African Charter on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights.[135] As a non-party to the Protocol to the African Court, it is not surprising that Ethiopia entered a reservation to Article 27 of the Maputo Protocol. Whilst the promotional, protective and interpretive mandates of the African Commission remain effective in respect of the enforcement of the Maputo Protocol,[136] the reservation excludes the jurisdiction of the Court. The reservation would obviously undermine the enforcement of women's rights.

At this juncture, one may wonder if the reservation that evades the interpretive mandate of the African Court is compatible with the Maputo Protocol's object and purpose. In relation to compatibility test, the International Law Commission (ILC) argued that a reservation is contrary to the object and purpose of the treaty if the reservation affects the essential element of the treaty that is necessary for its general tenor.[137] The ILC further noted that a reservation to a treaty provision concerning the monitoring mechanism of the treaty is not, in itself, contrary to the object and purpose of the treaty unless it purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*.[138] The Maputo Protocol has made reference to the African Court since the Protocol establishing the African Court, which had been adopted before the Maputo Protocol, does not explicitly include the Maputo Protocol as part of the Court's substantive jurisdiction.[139] This suggests that the Maputo Protocol

[131] *Ibid.*, Article 27.

[132] *Ibid.*, Articles 28 and 30.

[133] *Ibid.*, Articles 29(2).

[134] Proclamation No.1082/2018, *supra* note 3, Article 3(1) (g).

[135] List of Countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, available at: https://au.int/sites/default/files/treaties/36393-sl protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf,(accessed on 24 February 2019).

[136] African Charter on Human and Peoples' Rights, *supra* note 11, Article 45.

[137] Guide to Practice on Reservations to Treaties, *supra* note 59, Guideline 3.1.5.

[138] *Ibid.*, Guideline 3.1.5.7.

[139] Frans Viljeon, *supra* note 14, at 40.

attempts to clarify that the Court has jurisdiction over complaints arising from the Protocol.[140] It can thus be argued that the reservation does not appear contrary to the object and purpose of the Protocol.

3.2 Interpretive Declarations to the Maputo Protocol

As pointed out earlier, States may formulate a unilateral statement to clarify meaning or scope of application of specific provision/s of a multilateral treaty. Accordingly, Ethiopia has made interpretive declarations relating to its understanding of the interpretation of some specific provisions of the Maputo Protocol. These interpretative declarations are discussed below.

In its first declaration, Ethiopia states that Article 4(2) (a) of the Protocol should be understood and applicable in conformity with Article 620 of the Criminal Code of Ethiopia.[141] Article 4(2) (a) of the Protocol requires States Parties "to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public." By this provision, the Protocol attempts to address all forms of violence including sexual violence. Besides, the provision implies that unwanted or forced sex, be it committed in marriage or outside marriage, should be prohibited. By doing so, the Protocol implicitly requires States to criminalize marital rape committed in the private sphere.[142]

To the contrary, the Criminal Code of Ethiopia defines rape as an act of compelling a woman to submit to sexual intercourse outside wedlock by the use of violence or grave intimidation or after having rendered her unconscious or incapable of resistance.[143] According to this definition, unwanted or forced sex can be labeled as rape only if it is committed outside wedlock. This suggests that unwanted or forced sex occurring within wedlock cannot be considered as a crime. The Criminal Code has thus excluded marital rape from criminal responsibility.[144] Ethiopia's understanding of Article 4(2) (a) of the Protocol is declared to be in accordance with Article 620 of the Criminal Code: defining rape as a forced sexual intercourse occurring outside wedlock. As a result, the problem of marital rape remains unresolved in Ethiopia. Recognizing this, the UN

[140] *Ibid.*

[141] Proclamation No.1082/2018, *supra* note 3, Article 3(2) (a).

[142] Frans Viljeon, *supra* note 14, at 22.

[143] Proclamation No.414/2004, *supra* note 89, Article 620(1).

[144] Hiwot Demissew Meshesha, *Analysis of Marital Rape in Ethiopia in the Context of International Human Rights* 40 (Master's Thesis, University of South Africa, 2014).

Human Rights Council recommended Ethiopia to criminalize marital rape.[145] However, Ethiopia noted the recommendation, but did not accept it.[146] Hence, the declaration would undermine the protection of women against sexual violence in marital relation.

Ethiopia's second interpretive declaration pertains to the minimum marriageable age. According to Article 6(b) of the Maputo Protocol, the minimum age of marriage for women should be 18 years. The Maputo Protocol prohibits any exception below the minimum age of marriage with a view to accord better protection to women. In this connection, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, in their joint General Comment, recommended that whilst a minimum legal age of marriage is 18 years, the absolute minimum age should not be below 16 years.[147] In similar terms, the Revised Family Code of Ethiopia envisages that the minimum marriageable age for both sexes is 18 years.[148] However, upon the application of the future spouses or parents or guardian of one of them, the Federal General Attorney may exceptionally grant a dispensation of not more than two years where there exists serious cause justifying the dispensation.[149] If there is dispensation for serious cause, the minimum marriageable age could be lowered up to 16 years. In order to maintain this exception, Ethiopia declared that Article 6(b) of the Protocol should be applicable in accordance with its family law that allows dispensation from the minimum marriageable age, i.e., 18 years.[150] By allowing an exception below the minimum age of marriage, Ethiopia's declaration would thus reduce the degree of protection accorded to women by the Maputo Protocol.

The third Ethiopia's declaration pertains to the acquisition and administration of property during marriage. In most African customs, women could not acquire any property in their name since they are regarded as having no separate identity from their husband.[151] To address this, Article 6(j) of the Maputo Protocol obliges States to ensure

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[145] UN Human Rights Council: Report of the Working Group on the Universal Periodic Review of Ethiopia, 42nd sess., A/HRC/42/14, 9 – 27 September, 2019, para. 163.82 and 163.84.

[146] *Ibid.*, addendum 1.

[147] Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18, 2014, para. 20.

[148] Proclamation No. 213/2000, *supra* note 83, Article 7(1). *See also* Meskerem Geset Techane, *The Impact of the African Charter and the Maputo Protocol in Ethiopia, in* THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN SELECTED AFRICAN STATES (Victor Oluwasina Ayen ed., Pretoria University Law Press (PULP), 2016).

[149] *Ibid.*, Article 7(2).

[150] Proclamation No.1082/2018, *supra* note 3, Article 3(2) (b).

[151] Kaniye S.A. Ebeku, *A New Hope for African Women: Overview of Africa's Protocol on Women's Rights*, 13(3) NORDIC JOURNAL OF AFRICAN STUDIES 267 (2004).

that a woman has, during her marriage, the right to acquire her own property and to administer and manage it freely.

According to the FDRE Constitution, women have the right to acquire, administer, control, use and transfer property.[152] Properties acquired on the date of marriage, or after marriage through succession or donation remain her personal property.[153] However, after the formation of marriage, any income derived from the personal efforts of the spouses and their common or personal property should be common property.[154] Irrespective of its source, any income should become common property over which the spouses have equal administrative rights.[155] A common property must be administered jointly unless they agreed otherwise.[156] This being so, Ethiopia entered a clarifying statement saying that Article 6(j) should be applicable in accordance with its family law that considers income acquired during marriage as common property of spouses and to be administered by their common decision.[157] The declaration is in conformity with the principle of equality in marriage and family life.

The fourth declaration concerns with the partition of common property. Article 7(d) of the Maputo Protocol requires States "to ensure that in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage." Some argue that the ambiguous nature of the term 'equitable share' may disfavor women during partition of common property on dissolution of marriage.[158] This is mainly because the term equitable is very subjective and does not necessarily imply equal shares in property partition on dissolution of marriage.[159] In this regard, the Revised Family Code of Ethiopia guarantees a robust protection of women's rights, for it envisages that common property must be divided equally between spouses.[160] As a result, Ethiopia entered a declaration to interpret the term 'equitable share' as 'equal share' of common property

[152] Proclamation No.1/1995, *supra* note 66, Article 35(7).

[153] Proclamation No. 213/2000, *supra* note 83, Article 57.

[154] *Ibid.*, Article 62(1).

[155] Michal Girma Yimer, *Women's Rights in Ethiopia: A Review of National Policies and Laws*, *in* PROTECTION OF WOMEN'S RIGHTS IN THE JUSTICE SYSTEMS OF ETHIOPIA 14 (Kjetil Tronvoll ed., International Law and Policy Institute, 2016).

[156] Proclamation No. 213/2000, *supra* note 83, Article 66(2).

[157] Proclamation No.1082/2018, *supra* note 3, Article 3(2) (c).

[158] Mizanie Abate Tadesse, *supra* note 15, at 24.

[159] Fareda Banda, *Protocol to the African Charter on the Rights of Women in Africa*, *in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986 -2006 463 (Malcolm and Rachel Murray eds., Cambridge University Press, 2nd edition, 2008).

[160] Proclamation No. 213/2000, *supra* note 83, Article 90

in light of its family law.[161] This interpretive declaration has addressed the shortcoming of the Protocol.

The fifth declaration has to do with the secondary responsibility of private sector for the upbringing of children. Article 13(l) of the Maputo Protocol obliges States "to recognize that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility." This provision makes upbringing and development of children the primary responsibility of parents. It also imposes a sort of secondary responsibility upon the State and private sector. In connection with primary responsibility, the Revised Family Code states that the spouses should "in all cases cooperate to protect the security and interests of the family to bring up and ensure the good behavior and education of their children to make them responsible citizens."[162] With regard to secondary responsibility, Ethiopia declared that the contribution of private sector to the upbringing and development of children should be applicable in accordance with its domestic law.[163] But, there is no clear law holding private sectors responsible for the upbringing of children. The legal provisions dealing with obligation to supply maintenance allowance does not even make private sectors responsible for the upbringing of children.[164]

Ethiopia's final interpretive declaration has to do with the right of a married woman to decide whether to have children, which is defined as one of the health and reproductive rights of women. According to Article 14 of the Maputo Protocol, women's rights to sexual and reproductive health include: the right to control their fertility; the right to decide whether to have children, number of children and the spacing of children; the right to choose any method of contraception; and the right to have family planning education. In its General Comment No. 2, the African Commission noted that Article 14 of the Protocol must be read and interpreted in light of other provisions of the Protocol on cross-cutting issues of women's rights, including the right to dignity, the right to integrity and security.[165] This suggests that women's rights to sexual reproductive health involve women's rights to dignity, integrity and privacy.

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[161] Proclamation No.1082/2018, *supra* note 3, Article 3(2) (d).

[162] Proclamation No.213/2000, *supra* note 83, article 50(2).

[163] Proclamation No.1082/2018, *supra* note 3, Article 3(2) (e).

[164] Proclamation No.213/2000, *supra* note 83, Articles 197-214.

[165] The African Commission on Human and Peoples' Rights: General Comment No.2 on Article 14.1 (a), (b), (c) and (f), and Article 14 (2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 55th sess., 2014, para. 11.

Article 14(1) (b) of the Maputo Protocol requires States to ensure that women's right to decide whether to have children, the number of children and the spacing of children is respected and promoted. In its interpretive declaration to Article 14(1) (b) of the Protocol, Ethiopia declared that choice of whether to have a child, regarding married women, should be decided in accordance with the agreement of spouses.[166] Although women bear the major cost of having children, including the physical cost of pregnancy, it can be argued that woman cannot unilaterally decide on whether or not to have children. Rather, it should be the right of the couple to decide freely and responsibly whether to have a child or not. The declaration upholds the principle of equality of spouses in family life.

In closing, it is important to note that some of the interpretive declarations appear to modify the legal effects of the respective provisions in their application. These include the declarations on the minimum age of marriage, the prohibition of unwanted or forced sexual intercourses, and women's right to decide whether or not to have children. It is not always easy to make a distinction between reservation and interpretive declaration. It is, however, worth noting that any declaration purporting to exclude or modify the legal effect of a provision in its application to the State constitutes a reservation and should be treated as such. As discussed earlier, interpretive declaration merely offers a State's understanding of a provision. Therefore, regardless of its name or title in Proclamation No. 1082/2018, an interpretive declaration excluding or modifying the legal effect of a provision in its application should be treated as a reservation.

Conclusion

Ethiopia has restricted the scope of its obligations towards the Maputo Protocol through reservations and interpretive declarations. Based on their possible implications for the protection of women's rights, Ethiopia's reservations to the Protocol could be expressed in terms of three categories: a) reservations having positive implications on women's rights, b) reservation with no adverse implications, and c) reservations undermining the promotion of women's rights.

In the first category, we can mention reservations regarding registration of marriage for legal recognition and right of a married woman to retain and use her maiden name jointly with her husband's surname. By excluding the legal effect of Article 6(d) of the Protocol that requires every marriage to be registered in order to be legally recognized,

[166] Proclamation No.1082/2018, *supra* note 3, Article 3(2) (f).

Ethiopia attempts to protect women's rights. If marriage is dissolved on the ground of lack of registration, this would be detrimental to women themselves, as most marriages are concluded in accordance with customs, or religion. Similarly, by excluding the legal effect of Article 6(f) of the Protocol that guarantees the right of married woman to retain her maiden name and use it jointly with her husband's surname, Ethiopia avoids the possibility of the use of a married woman's maiden name jointly with her husband's surname. This in turn allows women to assert their own identity.

The second category covers reservation regarding the requirement of judicial decision for separation of marriage. Ethiopia entered reservation on Article 7(a) of the Protocol that requires separation of marriage to be decided by courts. This is mainly because the domestic law permits spouses to agree to live apart. Thus, spouses who choose to live separately can enter into an agreement to that effect. Non-judicial separation would not undermine the promotion of women's rights.

In the last category, we can raise reservations pertaining to polygamy, widow's right to inheritance, reduction of military expenditure to increase resource allocation for the protection of women's rights and the interpretive mandate of the African Court. By excluding the legal effect of Article 6(c) of the protocol that encourages monogamous marriage, Ethiopia maintains polygamy as one form of marriage. This position would allow the adverse effects of polygamy on women's rights to subsist. The reservation on the right of a widow to inherit her deceased husband guaranteed under Article 21(1) of the Protocol could also be unfair and viewed as indirect discrimination against widows. Similarly, the reservation on the obligation of States to reduce military expenditure envisaged under Article 10(3) of the Protocol may in the long run compromise the promotion of women's rights. The competition of regional states in building up special forces would worsen the situation. Furthermore, Ethiopia's reservation to exclude the mandate of the African Court would undermine the enforcement of women's rights. In relation to the Maputo Protocol, the core mandate of the Court is to act as an enforcement mechanism for the rights. It complements and reinforces the functions of the African Commission.[167] Hence, the author recommends that the reservations under this category should be withdrawn for the effective implementation of women's rights.

By the same fashion, we need to test the interpretive declarations for their effect on women's rights. In one of its interpretive declaration, Ethiopia understood the term 'equitable share' of common property in the Protocol to mean 'equal share' during

[167] Scholastica Omondi, Esther Waweru, and Divya Srinivasan, BREATHING LIFE INTO THE MAPUTO PROTOCOL: JURISPRUDENCE ON THE RIGHTS OF WOMEN AND GIRLS IN AFRICA, A CASE DIGEST 10 (2018).

partition of common property. This declaration provides a better protection for women since it avoids the very subjective term i.e., equitable share. Conversely, Ethiopia's interpretive declaration made regarding sexual violence may arguably expose woman to sexual abuse in the private sphere, as it disregards marital rape from being characterized as a crime. The interpretive declaration on the minimum marriageable age could also make girls less protected. In sum, the Maputo Protocol accords better protection to women and girls in relation to sexual violence and minimum age of marriage. Thus, the author suggests that interpretive declarations concerning sexual violence and minimum age of marriage should be withdrawn for advancement of women's rights.

The other interpretive declarations cover declarations regarding the right of a married woman to decide whether to have children, the right of a married woman to acquire property during marriage, and the responsibility of private sector for the upbringing of children. The first two declarations are meant to meet the principle of equality of men and women in marriage and family life. These declarations would not thus undermine the protection of women's rights.

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Subnational Constitutions in the Ethiopian Federal System in Light of the '*Demos*, the Federalists and Deliberative Democracy' Models of Subnational Constitutionalism

Zemelak Ayitenew Ayele[*]

Abstract

Constituent units of most federations are constitutionally empowered to endorse state constitutions and many of them have done so. So much so 'sub-national constituent power' is considered 'as one of the defining features of federal systems'. The cases in favour state constitutions are based on the notion that subnational communities in a federation are political communities (demos) with the power to determine how they are constituted, the need to protect individual liberties by instituting checks and balances and through additional bill of rights, and the need to enhance deliberative democracy. This article argues state constitutions in Ethiopia serve as institutional mechanism for ethnic communities of the country to self-determine. There is however barely any case to make in their favor in terms of protecting individual rights and enhancing deliberative democracy.

Introduction

After ousting from power the *Derg*, the military junta that ruled Ethiopia for almost two decades, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) sponsored the 1995 Constitution which formally reconstituted Ethiopia, once a centralized unitary state, on federal basis.The federation is composed of a federal government and a subnational sphere of government which is comprised of nine states and a federal city.[1] It is also a dual federal system in that each level of government has the power to exercise

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[1] The Nine states are Amhara, Afar, Oromia, Tigray, Hareri, Somali, Gambella, South Ethiopian Nations Nationalities and Peoples (SNNP), and Benishangul-Gumuz. The federal cities are Addis Ababa, the capital of the federal government and the only city with constitutional recognition, and Dire Dawa which is put under the federal government since both the Somali and Oromia states lay claim on the city.

legislative, executive and judicial powers in relation to functions within its competences.[2] The federal government has exclusive competences on what are commonly considered to be exclusive national functions, including foreign affairs, currency, military and the like. The states are in turn authorised to exercise policy making power over social matters concurrently with the federal government while retaining exclusive competences in the areas of culture and language.[3] Importantly, they have the power to adopt, revise and amend their own constitutions.[4] Accordingly, the states adopted their first constitutions immediately after the promulgation of the federal Constitution and revised them in the early 2000s.[5]

Comparative studies suggest that subnational constitutions in general serve three important purposes: First, they serve as an institutional mechanism in which a subnational community determines how it is constituted. This is based on the notion that subnational communities in a federation are political communities (*demos*) with the right to self-determination. Secondly, subnational constitutions provide enhanced protection to individual rights and liberties by instituting checks and balances and providing additional bills of rights. This is what is referred to as the federalist case for state constitutions. Thirdly, they enhance 'deliberative democracy' by creating an institutional mechanism for deliberation on 'popular constitutional opinions'. This paper examines whether the Ethiopian state constitutions serve the above three purposes.[6]

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[2] Art 50 (2)(5)(6) & (7), Constitution of Federal Democratic Republic Ethiopia.

[3] Art 5(2). For more on the issue of concurrent powers, see Assefa Fiseha & Zemelak Ayele, *Concurrent powers in the Ethiopian federal system,* in CONCURRENT POWERS IN FEDERAL SYSTEMS: MEANING MAKING AND MANAGING 241-260 (N Steytler ed., Leiden: Koninklijke Brill NW, 2017).

[4] Art 50(5), FDRE Constitution.

[5] Ethiopia, having been a unitary state for over a century, had little previous experience of sub-national constitutionalism. The only experience it has in this regard was the ten years period between 1952 and 1962 during which Eritrea joined Ethiopia on federal basis. At the time Eritrea had its own constitution which was drafted by a commission that the United Nations General Assembly formed and adopted by Eritrean Constituent Assembly. The Eritrean Constitution of 1952 established a state council, an executive, a civil service, a judiciary, a flag, two official language (Tigregna and Arabic) and a bill of rights. It was so progressive that it prompted the revision in 1955 of the 1931 Ethiopian Constitution. The Eritrean Constitution, which had a life span of only 10 years, can be viewed as the first subnational constitution in the Ethiopian history. It was scrapped when the federation was dissolved in 1962 and Eritrea became one of the administrative units of the country until it seceded in 1994 to become an independent state. TEKESTE NEGASH, ERITREA AND ETHIOPIA: THE FEDERAL EXPERIENCE, (Transaction Publishers, 1997); The Constitution of Eritrea, Adopted by the Eritrean Constituent Assembly on 15 July 1952.

[6] J. L. Marshfield, *Models of Subnational Constitutionalism* 115(4) PENN STATE LAW REVIEW 1151-1198 (2011).

The paper argues subnational constitutions in Ethiopia to some degree serve as institutional mechanism of self-determination for ethnic communities of the country. There is however barely any case to make in their favor in terms of enhancing individual rights and enhancing deliberative democracy. The paper begins with a discussion on what state constitutions are, why they are necessary and under what conditions. It then examines the Ethiopian state constitutions in light of the demos, federalist and deliberative democracy models.

1. The *Demos*, the Federalist and the Deliberative Democracy Cases for State Constitutions

A state (subnational) constitution is, as all constitutions are, 'a set of rules' that binds all political actors in a state, defines the political and judicial institutions of the state and how they function.[7] In general, a state constitution is considered to be superior to ordinary state statutes. It is entrenched in a sense that it is (directly or indirectly) 'endorsed' by the relevant subnational community and that amending or revising it, in full or in part, is relatively difficult as so doing requires a special procedure.[8]

Constituent units of most federations are constitutionally empowered to endorse state constitutions and many of them have done so. Among federations with subnational constitutions are 'Argentina, Australia, Austria, Brazil, Germany, Malaysia, Mexico, Russia, South Africa, Sudan, Switzerland, the United States, and Venezuela. Provinces in Canada have constitutional statutes'.[9] Aspiring federations such as the Solomon Islands, Yemen, and Libya are also seriously considering empowering states to adopt their own constitutions.[10] Only a few federations, such as Belgium, Nigeria and India, stand as an

[7] *Ibid*, 1157.

[8] *Ibid*, 1158.

[9] J Dinan, *Patterns and Developments in Subnational Constitutional Amendment Processes*, 39 RUTGERS LAW JOURNAL 837-861 (2008).

[10] Article 180 of the Draft Constitution of the Solomon Islands provides that each state may adopt a state constitution to 'provide for and structure the government and administration' the state, to 'determine the number of Community Governments within the State' and to 'determine the criteria for qualification as a Community Government within the State'. The Solomon Islands Joint Constitutional Congress Second 2014 Draft for Proposed Constitution of the Federal Democratic Republic of Solomon Islands, (2014). < http://www.sicr.gov.sb/2nd%202014%20SI%20Constitution%20Draft%20(R)%20pdf%20-%208%205%2014.pdf> accessed on 06 February 2018.

exception in this regard. So much so 'sub-national constituent power' is considered 'as one of the defining features of federal systems'.[11]

In general, three major theoretical justifications are proffered in favor of subnational constitutions and subnational constitutionalism. The first justification is based on the conception of subnational units as *demos* or political polities. This justification conceives subnational units as previously independent political polities, which, having given up their independence and some of their political powers to join a larger political entity through a federal arrangement, without however completely losing their right to self-determination.[12] The assumption here is that the right to self-determination of subnational communities becomes restricted as soon as they join a federal arrangement. It is not however completely lost to them. The right to self-determination that they still retain is not also simply a right to self-govern as per national statutes through devolution or other similar mechanisms. It goes beyond that. It includes the power to 'determine how they will govern themselves; to determine, to a degree, how they will be constituted as political communities'.[13]

The power of a state to adopt a state constitution thus symbolizes that the people within it constitutes a political community with 'a degree of political self-determination' and that the state is a 'political unit' as opposed to a mere administrative unit.[14] State constitutions also serve as institutional mechanism through which the states determine how they exercise self-government. As an aspect of the exercise of their right to self-determination, states use their constitutions to define their political and judicial organs and disperse political powers among different political institutions. In this regard they may decide whether to establish republican or monarchical form of government, bi-cameral or unicameral legislature, presidential or parliamentary executive and the like. They also decide on symbolic matters including state flag, coat of arms and the like. This indeed depends on the 'subnational constitutional space' that the states have in terms of

[11] P Popelier, *The Need for Sub-National Constitutions in Federal Theory and Practice: The Belgian Case*, 6(2) PERSPECTIVE ON FEDERALISM 36-58, at 38 (2014). Sub-national units of unitary states in general do not have the power to adopt their own constitutions since they constitute mere administrative structures. Even autonomous regions in unitary states do not seem to enjoy the power to adopt their own constitutions. For instance, the autonomous regions of the Nordic states, such as Greenland, Aaland Island and the like, do not have their own constitutions. Eritrea had nonetheless its own constitution when it joined Ethiopia, then a unitary country, on federal basis.

[12] Marshfield, *supra* note 7, at 1169.

[13] *Ibid.*

[14] *Ibid.*

determining how they are constituted.[15] In federations such as the US, Australia, states have broad constitutional space to define their political, judicial and administrative structure while in states with quasi-federal systems, such as, South African, states have extremely narrow constitutional space regarding how they can self-constitute.[16]

The second justification is what is referred to as the 'federalist' argument.[17] This argument considers a federal system as principally a mechanism of protecting individuals' liberties and rights by dispersing government powers among 'institutions and levels of government' thereby preventing the concertation of power in any one level or branch of government so as to avert abuse of power.[18] Subnational constitutions in federal system, according to the federalist model, serve the purpose of protecting individual liberty by organising state government institutions in a manner that institutes separation of powers and checks and balances.[19] State constitutions also serve this purpose by providing more rights than the federal constitution does. As is the case in Australia, state constitutions sometimes are the only constitutional documents containing bill of rights.[20]

In addition, bill of rights in state constitutions serve as an important constitutional framework that state courts could use for protecting individuals' liberties. This is based on the assumption that a state court applies a provision in a state constitution principally driven by the welfare of the state and its citizens and not necessarily concerned about how a federal court or a court in other states would interpret a similar provision in a federal or state constitution. For instance, state courts in the US are autonomous in terms of interpreting state constitutions. They are not, hence, bound by precedents set by the federal Supreme Court based on a similar or even identical provision in the US Constitution.[21] Moreover, the US Federal Supreme Court often avoids critiquing state courts decisions so long as they are rendered exclusively based on a state constitution and/or statutes and that the US 'Constitution or federal treaties or statutes are [not]

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15 G.A. Tarr, *Explaining Sub-National Constitutional Space*, 115(4) PENN STATE LAW REVIEW 1113-1149, 1133 (2011).

16 In fact, the national constitution contains a default chapter on provincial government making provincial constitutions less than necessary. Hence, only the Province of Western Cape has adopted a provincial constitution.

17 Marshfield, *supra* note 7, at 1172.

18 *Ibid.*

19 *Ibid.*

20 Dinan, *supra* note 10, at 6.

21 R. Armstrong, *State Court Federalism*, 30(2) VALPARAISO UNIVERSITY LAW REVIEW 493-508, 496 (1996). See also Marshfield, *supra* note 7, at 1173.

drawn into question'.[22] By applying state constitution not only do state courts protect individual liberties but also contribute for the development of a constitutional jurisprudence at state level, an important 'benefits that flow from federalism'.[23]

Marshfield puts forward a third justification for subnational constitution which is based on the notion of 'deliberative democracy'.[24] Simply put, this argument is based on two premises. The first premise is that 'civic republicanism' requires deliberation by members of a political community so as to reach a 'reasoned consensus' regarding what the common good is or/and the institutional mechanism for achieving it.[25] Here deliberation itself is viewed as an 'ideal'. The second premise is that national constitution provides little opportunity for deliberation since it is, and needs to be, characteristically general, incomplete, and static.[26] Changing it is costly and introducing an erroneous change to it poses a grave danger and is not easily rectifiable for there is no 'enforcement mechanism operating above [it]'.[27]

Subnational constitutions on the other hand provide an ample room for the inclusion of 'popular constitutional opinion' that found no room in the federal constitution.[28] This is because first, state constitutions, though entrenched, could be changed relatively easily and with little cost.[29] Introducing changes to state constitutions also pose little danger since they operate within a national constitutional framework. Second, the revision or amendment of state constitutions often involve the public in form of proposing and/or ratifying constitutional amendments.[30] According to Dinan 'the vast majority of federations' allow either initiation of constitutional amendment by citizens or changes to state constitutions to be ratified by citizens of the states through a referendum or both. This is the case in several states of Argentina, Germany, Austria, Russia and the like. For

[22] D. A. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59(5) NOTRE DAME LAW REVIEW 1079 -1117, 1082 (1984).

[23] Armstrong, *supra* note 22, at 496.

[24] Marshfield, *supra* note 7, at 1175.

[25] 'Civic republicanism' is contrasted with 'liberalism' which is simply focused on 'aggregating individual expressions of self-interests'. *Ibid*, at 1182.

[26] Tarr, *supra* note 16, at 11.

[27] Marshfield, *supra* note 7, at 1183.

[28] *Ibid*, at 1196.

[29] J. Dinan, *supra* note 10, having compared the state constitutions in over ten federations, concluded that state constitutions are as rigid as, or less rigid than national constitutions within which they operate. Dinan found no instance where a subnational constitution is more rigid that its national counterpart.

[30] Marshfield, *supra* note 7, at 3.

instance, forty nine of the 50 states in the US require popular ratification for amendment of state constitutions.[31]

A state constitution, though a supreme state law, is required to comply with a federal (national) constitution which is by definition the most supreme law of the federation. States have to make use of their power to adopt subnational constitutions within the 'parameters' that the federal constitution sets since 'the content of subnational constitutions is contingent on the rules of the particular federal regime within which they reside'.[32] Hence, state constitutions must be restricted to filling the constitutional spaces left to them by a federal constitution and they cannot cover matters that have already been covered by the former. State constitutions cannot also contain provisions that are inconsistent with the latter as so doing leads to the invalidation of offending provisions.

2. The Ethiopian State Constitutions in Light of the Demos, the Federalist and the Deliberative Democracy Models

2.1. The Ethiopian state constitutions and the *demos* case

As stated above, the *demos* model views subnational units as political communities and state constitutions as institutional mechanisms in which the former exercise the right to self-determination in a sense of determining how they govern themselves. This case or model seems, to some degree, applicable in the Ethiopian federation. The Ethiopian federation is conceptualized as a 'federation of ethnic groups', in which the various ethnic communities are 'joined together in a federal union'.[33] Under the federal dispensation Ethiopia is seen as a state 'founded by and belongs to all ethnic groups'.[34] The right to self-determination of all ethnic communities of the country is thus the foundational principle of the federal system.[35] Under the federal system, therefore, each ethnic community of the country is considered as a political community.[36] However, under the 1995 Constitution the ethnic communities do not have the power to adopt subnational constitutions. The states do. Moreover, not each ethnic community has its own state. Yet, as a rule, each community has the option to be within a multiethnic state or, as will be

[31] Dinan, *supra* note 10.

[32] Marshfield, *supra* note 7, at 1159.

[33] N.B. Herther–Spiro, *Can Ethnic Federalism Prevent "Recourse to Rebellion?" – A Comparative Analysis of Ethiopian and Iraqi Constitutional Structures*, 21 EMORY INTERNATIONAL LAW REVIEW 321-372 (2007).

[34] Alemante Gebre-Sellasie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE JOURNAL OF INTERNATIONAL LAW 51-107, 55 (2003).

[35] Preamble & Art 39, FDRE Constitution.

[36] Art 39 (3).

discussed below in section 3, to establish its own separate state. Therefore, currently, the states of Amhara, Oromia, Tigray, Afar and Somali each is in general viewed as a state belonging to a single dominant ethnic community whose names each of these states bears.[37] In the other states no single ethnic community is in the majority and the states are considered as commonly belonging to the endogenous ethnic communities of the states. A state constitution, hence, symbolizes that an ethnic community, or two or more ethnic communities collectively, constitute a political community of the relevant state.

As was indicated above the constituent power of a subnational political community is manifested in the latter's ability to determine its political goals, government structure and processes of governance using its state constitution. A perusal of the nine state constitutions shows that they have been used exactly for these purposes. The preamble of each state constitution describes the political goals and aspiration of the endogenous community (communities) of the relevant state.[38] The state constitutions contain sections dealing with political, economic, social and other 'fundamental' principles that are supposed to underpin their implementation and interpretation.[39]

The state constitutions have also established political (state council and executive organs) and judicial organs.[40] Each state constitution has established a state council. The federal Constitution does not have a prescription regarding whether a state council should be unicameral or bicameral leaving this for the states to determine in their constitutions by considering their internal contexts. The state constitutions, with exception of that of Hareri and SNNP, provide for unicameral state council. The Hareri and SNNP constitutions provide for a bicameral state council for the ethnic composition of the people and other political exigencies in these regions necessitated doing so.[41] The state

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[37] The state of Hareri bears the name of the Hareri community. Yet, the community is in the minority in the state. Moreover, the Hareri state is run on the basis of consociational arrangement in which the Oromo and the Hareri communities are equitably represented in representative councils and the executive. The state is also bi-lingual in that it uses both *Hareri* and *Afaan-Oromo* as its working language. Assefa Fiseha *Intra-unit minorities in the context of ethno-national federation in Ethiopia*, 13(1) UTRECH LAW REVIEW 178 (2017).

[38] See for instance Paragraph 5, Amhara State Constitution; Paragraph 4, Benishangul-Gumuz State Constitution (2002).

[39] See for instance Chapter 10, Afar State Constitution (2002); Chapter 11, Amhara State Constitution (2001).

[40] For detailed discussion on this see C. VAN DER BEKEN, COMPLETING THE CONSTITUTIONAL ARCHITECTURE: A COMPARATIVE ANALYSIS OF SUBNATIONAL CONSTITUTIONS IN ETHIOPIA (Addis Ababa University Press, 2017).

[41] Having over 50 ethnic communities within its jurisdiction, the SNNP is the most ethnically diverse state in Ethiopia. The state thus had to create an institutional mechanism that ensures the representation of all the ethnic communities of the region. The state constitution thus established the Council of Nationalities (CoN) along the line of the House of Federation, the second chamber of the federal Parliament. Each ethnic

constitutions define the process of law making in state councils including the minimum number of members of a state council that should be in attendance for a state council to proceed with its deliberation, how many times a year it should hold regular meetings, and when, how and by whom extraordinary meetings of a state council are called.

The state constitutions also define the process of forming a state executive. Indeed, the federal Constitution already prescribes for the states a parliamentary form of government and that the states do not have the option of creating a different executive (for instance, a presidential) system.[42] Yet, the federal Constitution is silent on the procedure of selecting state chief administrators. The state constitutions fill this constitutional gap by providing that a state chief administrator would be elected by and from among members of a state council representing the party or a coalition of parties that controls the majority seats in the state council.[43] The state constitutions also provide for the office of a deputy state chief administrator which is not mentioned in the federal Constitution. They further provide a procedure of nomination and appointment for other members of a state executive council.

community of the state has one representative in the CoN. An ethnic community having a population in excess of one million has an additional representative. On the other hand, the state of Hareri is considered as the homeland of the Hareri community which - with a population that makes only 10 percent of the population of the state - is in the minority. The state had to ensure the representation of other communities without compromising the right to self-determination of the Hareri community. The state constitution has hence created two houses called Peoples Representatives Assembly (PRA) and Hareri National Assembly (HNA). The PRA has 22 seats while the NHA has 14 seats. The two houses together constitute the Hareri State Council. The 14 seats in the HNA are exclusively controlled by Hareris through elections in which only ethnic Hareris take part both as voters and candidates. Other communities, including Hareris, are supposed to be represented in the PRA. In the 2015 regional elections, the Hareri National League and the Oromo Peoples Democratic Organization, representing the Hareri and Oromo communities, respectively, 'won' equal number of seats in the Hareri State Council. This means other communities, such as the Amhara which make up 20 percent of the population in the state, are completely excluded from any kind of representation in the Hareri state structure. C. Van der Beken, *Subnational Constitutional Autonomy and Institutional Autonomy in Ethiopia*, 2(2) ETHIOPIAN JOURNAL OF FEDERAL STUDIES 17- 44, 23 (2015).

[42] Article 45, which is within the chapter that deals with 'state structure' provides that '[t]he Federal Democratic Republic of Ethiopia shall have a parliamentarian form of government'. First, the chapter under which Article 45 is found is not simply about a single level of government but about the entire federal structure. Second, Article 45 does not simply refer to the federal government. It refers to the 'Federal Democratic Republic of Ethiopia' which, according to Article 50, is made up of both the states and the federal government. It is thus maintained that the constitution requires both the states and the federal government to adopt a parliamentary form of government. Under the current Constitution, the states do not have the option of choosing a presidential system.

[43] See for example Art 49(3)(5), Benishangul-Gumuz State Constitution; 51(3)(6), Gambella State Constitution.

The federal Constitution provides that the states could establish their own supreme, high and first-instance courts without defining the criteria and procedure for appointing judges for these courts; a constitutional lacuna that state constitutions filled.[44] Moreover, the state constitutions have established quasi-judicial bodies which are in charge of interpreting state constitutions. The states other than the SNNP provide for the establishment of a constitution interpretation commission[45] which, assisted by a constitutional inquiry committee,[46] is charged with resolving constitutional disputes that are based on the relevant state constitution.[47] In SNNP, the Council of Nationalities (CoN), the second chamber of the state council, is authorized to resolve constitutional disputes.[48]

Each state has the power and duty to create its own local government system on the condition that the latter is adequately empowered. Determining the number of tiers and units of local government and the specific functional competences that they exercise are hence matters that are left to be regulated in state constitutions.[49] Accordingly, the states have recognized local government in their constitutions which have established a rural local government composed of districts, in Amharic known as *woredas*. They have also defined the political (*woreda* council and executive) and administrative institutions of the *woredas*, how they would be composed, terms of *woreda* councils, procedure of decision making in *woreda* councils and the like.[50] The state constitutions further regulate the manner in which the states exercise supervision (regulation, oversight and intervention) over *woredas*.[51] They do not, however, in detail deal with urban local

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44 Art 78(3), FDRE Constitution.

45 Constitutional interpretations commissions are formed differently in different states. In Oromia and Somali, the CICs are composed of members of *woreda* councils. In Amhara, members of the three ethnic local governments (Awi, Oromo, Argoba and Himra) are represented in the state CIC. In Gambella and Benishangul-Gumuz, the CIC are composed of representatives of the endogenous communities of the regions. In any case a few of the CICs are actually operational. *Ibid.*

46 This is composed of a president and deputy president of a state supreme court, six practicing lawyers who are appointed by a state president, three members of a state council who are selected by a speaker of the state council.

47 Under the 1995 state constitutions, state councils had the power to resolve constitutional disputes. C. Van der Beken, *supra* note 42.

48 Art 58, SNNP constitution.

49 SOLOMON NEGUSSIE, FISCAL FEDERALISM IN THE ETHIOPIAN ETHNIC BASED FEDERAL SYSTEM 79 (Wolf Legal Publisher, 2006).

50 Chapter 9, Amhara State Constitution; Chapter 9, Benishangul-Gumuz State Constitution; Chapter 8, Afar State Constitution.

51 For more on this see ZEMELAK AYELE, LOCAL GOVERNMENT IN ETHIOPIA: ADVANCING DEVELOPMENT AND ACCOMMODATING ETHNIC MINORITIES 211-230 (Baden-Baden-Nomos Verlagsges, 2014).

government such as cities and municipalities. They simply authorize state councils to regulate urban local government through ordinary state statutes.

Finally, as was mentioned above, each state has ethnically heterogeneous population. Yet, there are remarkable differences in the degree of ethnic heterogeneity that the inhabitants of the nine states exhibit. The states of Amhara, Oromia, Tigray, Afar and Somali each has a dominant ethnic community and bear the name of its dominant ethnic community, but in the other states no single ethnic community is in the majority; this is especially true of the SNNP, Ethiopia's most diverse state. It is the responsibility of each state to determine how best to accommodate such ethnically diverse population within its jurisdiction. The states of Amhara, Gambella, Afar, Benishangul-Gumuz, and SNNP have thus constitutionally established ethnic local government called special zones and special *woredas* for territorially structured intra-state ethnic minorities[52] and devolved to the former functional competences in the areas of language, culture and social matters such as education.

From the above discussion it is clear that the Ethiopian state constitution serve as institutional mechanism through which the ethnic communities of the country, which are considered to be the subnational *demos* of the Ethiopian federation, could exercise the right to self-determination.

It should be noted though that, after having put the different government institutions of the states, the state constitutions have largely been relegated into the state of insignificance. They are not made relevant in the day-to-day activities of the states. Many state authorities barely know the existence of state constitutions, leave alone gauging their actions, decisions and statements against the state constitutions. For instance, a

[52] The Afar state constitution explicitly provides for the establishment of a *special woreda* for the Argoba ethnic community. The Amhara state Constitution establishes a special zone for each of the Himra, Awi, and Oromo ethnic communities that are found within the state. A *special woreda* has also been established for the Argoba ethnic community in this state though not by the state constitution. The Gambella state constitution specifically provides that the Anywaa (or Anuak), Nuer and Mejenger ethnic communities would have their own special zones. In SNNP there are 14 special zones and four *special woredas*. The nationality zones are: Hadya, Gurage, Kaffa, Sheka, Sidama, Silte, Wolayita, Dawro, Gedeo, Bench-Maji, Debub (South) Omo, Gamo-Gofa, and Kembata-Tembaro. The *special woredas* are the Alaba, Basketo, Konta, and Yem. Initially there were eight special *woredas*, which included Amaro, Burji, Derashe, and Konso special *woredas*. These four special *woredas* merged in 2011 to form Segen Zone, a decision that led to inter-ethnic conflicts. Zemelak Ayele, *The Politics of Local Government and Subnational Constitution*, 6(2) PERSPECTIVE ON FEDERALISM 89-115, 102 (2014).

study by Getachew Dissasa shows that the state presidents of the Oromia state not even once referred to state constitutions in their speeches.[53]

In addition, the states constitutions consider as political communities only territorially structured communities which are also viewed as endogenous to a certain state. Members of different ethnic communities which are considered as exogenous to a state had thus received barely any recognition in the state constitution. Quite the contrary some state constitutions, for example that of the Benishangul-Gumze, make distinctions between 'owners' of the relevant states and other communities that live within the states. Those in the latter category, which are not considered to form part of the subnational *demo*, are often excluded from any form of political representation and are considered as second-class citizens in the states.[54]

2.2. The Ethiopian state constitutions and the federalist case

As was discussed above, the federalist approach views state constitutions as a mechanism of protecting individual liberties. A state constitution is expected to do so by dispersing powers among levels of government (state and local government) and by introducing checks and balances among institutions (legislative, executive and judiciary) of a state government and by providing a bill of rights that serves as an additional mechanism for state courts to enforce individual rights. As was briefly mentioned in the introduction, the nine state constitutions of Ethiopia were revised in the early 2000. The revision was supposedly meant to serve two purposes. The first was to introduce separation of powers and checks and balances in the manner the state governments were structured, which was not the case previously. Under the 1995 state constitutions the executive branch of a state government was extremely powerful since a state president also acted as a speaker of a state council, an arrangement that ignored separation of power and failed to provide a mechanism of checks and balances between the two branches of a state government. It was found necessary to rectify this problem.[55]

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[53] Getachew Dissasa, *The role and relevance of subnational constitutions in the Ethiopian federal system in promoting effective self-rule and regional autonomy: The case of Oromia Regional State's Constitution* (Unpublished MA thesis: Centre for Federalism and Governance Studies: Addis Ababa University, 2018).

[54] The main source of this problem is indeed the federal Constitution which makes ethnicity the sole factor of political organization. The state constitutions simply reinforced the problem created by the federal constitution

[55] Van der Beken, *supra* note 42, at 37.

The 1995 state constitutions did not also devolve state powers to local government as required in the federal Constitution.[56] Local government was treated as an administrative structure rather than as an autonomous level of government, its functional competences were not clearly defined and it did not have revenue raising and expenditure autonomy and its budget needed the approval of a state government. The 2000 revision of state constitutions was meant to devolve political and financial powers from the states to local governments.

The inclusion of checks and balances and the devolution of power to local government were not nevertheless underpinned by a commitment to the protection of individual rights. First, the Ethiopian federal system is established principally for the purpose of protecting group rights (the right of ethnic communities) as opposed to individual rights. The Ethiopian federal Constitution and the constitutional practice are inclined towards giving precedence to group rights rather than individual liberties. Second, it is often alleged that less than altruistic political motives, that were linked to the division within the ruling party that occurred in the early 2000s, prompted the revision of the state constitutions.[57] The state constitutional revision was allegedly intended to weaken the political opponents of the late Prime Minister Meles Zenawi.

In any case in the past the checks and balances that are instituted in the state constitutions and the devolution of power to local government served little purpose in terms of averting abuse of power and ensuring the protection of individual rights. This was partly because all levels and institutions of government were controlled by a single political party; EPRDF. And, along with the democratic centralism principles based on which the party operated, the state branches of the party were required to act in line with the decision of the centre. The principle of checks and balances that are instituted by the state constitutions and the devolution of power to local government, the federal system itself for that matter, were, hence, undercut by concentration of power in the highest decision-making structure of the party.[58]

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[56] Art 50(4).

[57] The political division began within the TPLF and later spread to the other members of the EPRDF. The true reason for the division remains unclear. Some claim it has to do with the manner the Ethio-Eritrean war was managed while others argue the dispute relates to the growing corruption and nepotism in the party. In any case some members of the TPLF stood against the late Prime Minister Meles Zenawi. Some of those who opposed him were heads of state governments. The argument is thus the 2000 revision of state constitutions, which was undertaken at the initiative of the federal authorities, was meant to weaken the position of heads of state government who challenged Meles. See Zemelak, *supra* note 52.

[58] EPRDF is a coalition of four regional parties; the Tigray People Liberation Front (TPLF), Amhara National Democratic Movement (ANDM), Oromo People Democratic Organisation (OPDO) and Southern

The state constitutions have replicated the entire Bill of Rights of the federal Constitution providing barely any additional right to those that are in the federal Constitutions.[59] This is not however the biggest problem in this respect. As Van der Beken argues, even without having any additional rights, the bill of rights in the state constitution could lead to 'the materialization of one of the advantages of regional constitutions: the possibility for a better human rights protection at regional level'.[60] Moreover, some of the state constitutions, for instance, seek to expand human right protections by including the right to life in the list of non-derogable rights during a state of emergency that is declared by the state government.[61] The problem is that state courts are barred from judicially enforcing state constitutions and the bill of rights in them. As was mentioned above, state CICs are in charge of interpreting state constitutions. As a consequence, state courts cannot use the bills of rights in the state constitutions as additional constitutional mechanism for protecting individual liberties. The reason why state courts were barred from exercising this important judicial power is unclear. One possible reason could be that the states simply copied the federal model of constitutional interpretation without giving much thought to the matter.[62] The other possible reason is that the framers of state constitutions, like the framers of the federal Constitution, consider state constitutions as more of political documents than legal ones that they gave the power to interpret them to *ad hoc* political institutions.[63]

One may argue that the bill of rights in the state constitutions are still relevant for they guide the actions and decisions of the legislative and executive branches of a state government. Indeed, a state's residents, its government organs and those in charge of them, and political parties and party leaders are enjoined to respect its constitution.[64]

Ethiopian Peoples' Democratic Movement (SEPDM). The TPLF, ANDM, OPDO and SEPDM control the Tigray, Amhara, Oromia and SNNP states, respectively. The party has been operating on the basis of democratic centralism in which the state branches of the party are required to act in line with the decision of the centre. This arrangement is recently facing challenges since ANDM and OPDO refusing to be bound by decisions made by EPRDF's central structure and showing some degree of independence.

59 C. Van der Beken, *Sub-national Constitutional Autonomy in Ethiopia: On the Road to Distinctive Regional Constitutions*, at13, (*Paper* Submitted to Workshop 2: Sub-national Constitutions in Federal and Quasi-Federal Constitutional States World Congers of Constitutional Law, Oslo, 16-20 June 2014), 13.

60 *Ibid*, at 9.

61 See for instance Art 114(4), Amhara State Constitution, Art 106 (4), Afar State Constitution.

62 The House of Federation, the second chamber of Parliament, has the power to resolve constitutional disputes. Art 62(1), FDRE Constitution.

63 Gedion T. Hessebon and Abduletif K. Idris, *The Supreme Court of Ethiopia: Federalism's Bystander?* in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? 183 (N. Aroney and J. Kincaid eds., University of Toronto Press, 2017).

64 See for example Art 9(2), Oromia constitution.

However, in the absence of judicial review of the actions and decisions of state officials, the relevance of the bill of rights in this respect is gravelly diminished.

One still may argue that state constitutions are interpreted by state CICs and the latter can use the bill of rights for protecting individual liberties and expand the rights enjoyed by citizens of the states. This argument, however, ignores the fact that almost two decades after the adoption of the state constitutions, state CICs are established only in the Tigray, Oromia, SNNP and Amhara states. State laws that were supposed to establish these institutions are not even enacted in the rest of the states.[65] On the other hand the state courts have been in existence since the establishment of the federal system. Moreover, the CICs are more political organs than judicial ones whose interpretation of a state constitution is likely to be influenced by political exigencies rather than by a commitment to constitutionalism and the enforcement of the rights in the bill of rights of the state constitution.[66] Furthermore, in the states such as Oromia, there is even a legal requirement to the effect that the interpretation of the bills of rights in a state constitution conforms to the interpretation that the HoF gives with respect to a similar provision in the federal Constitution.[67] A CIC cannot be, therefore, expected to expand the rights that citizens of a state enjoy by giving expansive interpretation to the rights contained in the bill of rights of the state constitutions. This leaves the bills of rights in the state constitutions with little relevance.

It is maintained here that state courts should be empowered to resolve legal disputes by referring to state constitutions if the bill of rights in the state constitutions are to be of any relevance in terms of protecting individual liberties and rights. Three reasons are proffered in this respect. First, the states have the power to enact civil laws, including family laws, which state courts routinely apply for resolving legal disputes. The correct judicial enforcement of these laws necessarily requires state courts to refer to the bills of rights in the state constitutions. Else, the state courts are likely to make incorrect decisions. This is not a mere conjecture. The decisions of the state courts on family and other civil matters were quashed on several occasions by the Federal Supreme Court precisely because the state courts did not and could not take into consideration the implications of their decisions on certain fundamental rights of the parties involved in the cases.[68] The problems in the decisions of the state courts that the Federal Supreme

[65] Van der Beken, 23.

[66] Van der Beken, *supra* note 60, at 12.

[67] *Ibid.*

[68] For instance, the issue in *Tsedale Demissie vs Kifle Demissie* was whether Kifle should be awarded custody of his biological son, Benyam, whom he abandoned for over 12 years during which time Tsedale, Benyam's aunt, raised the child. Apparently motivated by the inheritance that Benyam's deceased mother left to her

Court reversed could have thus been easily rectified had the state courts have the power to refer to the bills of rights in the state constitutions. The rights, including the right of the child, women's right, family rights, cultural rights and the like, that the Federal Supreme Court invoked from the federal Constitution to reverse the decisions of the state courts are also found in the bills of rights of all state constitutions. Second, the interpretation by state courts of the rights in the bill of rights of state constitutions would help build a constitutional jurisprudence that could even be used as an important input in the interpretation by the HoF of some of the rights in the Bill of Rights of the Federal Constitution. Third, federal courts were barred from interpreting the federal Constitution principally because of the fear that judges would be tempted to embark on judicial adventurism and endanger the Ethiopian federal system. State courts could pose no such danger by interpreting state constitutions since state constitutions operate within the framework set by the federal Constitutions.

2.3. The Ethiopian state constitutions and 'deliberative democracy'

The ideal of deliberative democracy entails civic engagement when state constitutions are adopted, revised and amended, including on the very issues of whether there is a need to be adopt, amend or revise state constitutions. In Ethiopia, the federal Constitution simply authorizes state councils to draft, adopt and amend state constitutions.[69] It does not require state councils to involve the public in the process of adopting state constitutions. The state constitutions contain indeed a stringent procedure for their amendment which requires the approval of an amending bill by a two-thirds majority in a regional council and by a simple majority in the majority of the local councils in the states. The amendment of a state constitution also requires the assent of the councils of special zones in the states where they are found. Still the procedure does not provide for public deliberation. However, there is no mechanism for the public to initiate amendment nor

child, Kifle sought the custody of the latter. The SNNP *woreda*, high and supreme courts explicitly mentioned their thoughts that Kifle indeed seemed interested in Benyam's inheritance than the welfare of the child. Yet they decided, based on the state family law that, as the biological father of the child, he was legally entitled to the custody of the child. When the matter was brought to it, the Federal Supreme Court, after having agreed with the interpretation of the state supreme court of the state family law, reversed the decision by invoking the principle of 'the best interest of the child' from Article 32 of the FDRE Constitution and Article 3(1) of the Convention on the Rights of the Child. Similarly, the issue in *Zweditu Getachew vs Temesgen Desallegn* was whether a marriage contract in which Zewditu agreed, in case of divorce, to receive only 120 Birr per year and not to make any claim on other properties, was made based on equality of the two parties to the contract. The Federal Supreme Court annulled a marriage contract entered between the two parties to the case by merely referring to Article 34(1) of the Constitution which provides that a man and a woman 'have equal rights while entering into, during marriage and at the time of divorce'.

[69] Art 50(5).

is there a procedure for public referendum on an amendment on a state constitution endorsed by state and local councils. In any case, in practice the state constitutions are amended without the state councils paying strict heed even to the procedures the constitutions set out for this. For instance, the revision of the early 2000 was driven by the central government and state councils were reportedly asked to adopt the revised constitutions, without even following the amendment procedures provided in the 1995 state constitutions.[70] This was partly because of the hitherto hegemony of the EPRDF (which controlled all levels of government) and the political culture and the centralised decision-making process that was practiced in the Party. The Party left little political space to, and constrained the constitutional space of, the sub-national units of the Ethiopian federation.

The absence of deliberation on the content of state constitutions seems to have resulted in some 'popular constitutional opinions' being excluded from the state constitutions. The barring of state courts from resolving disputes based on state constitutions could be because of the lack of public deliberation on the contents of state constitution. Another popular constitutional opinion that found no room in the state constitutions seemingly because of the lack of public deliberation relates to traditional leaders and institutions. Traditional leaders and institutions in African societies are so important that several African countries have provided recognition to them in their national constitutions.[71] The South African Constitution, for instance, has a full chapter on traditional leaders.[72] The Ethiopian federal Constitution is on the other hand silent on traditional leaders and institutions despite imposing on the federal and state governments the 'duty to support… the growth and enrichment of cultures and traditions' that are not contrary to basic human rights and democratic norms.[73] The Afar and Somali state constitutions recognize, though inadequately, traditional leaders and institutions.[74] On the other hand,

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[70] Tsegaye Regassa, *Sub-national Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level*, 3(1) MIZAN LAW REVIEW 33-69, 55 (2009); Solomon Negussie, *supra* note 38, at 239.

[71] See C. Logan, *The Roots of Resilience: Exploring Popular Support for African Traditional Authorities*, 112(448) AFRICAN AFFAIRS 353–376 (2013); L. Bank and R. Southall, *Traditional Leaders in South Africa's New Democracy* 28 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW 407- 430 (1996).

[72] See Chapter 12, the Constitution of the Republic of South Africa (1996).

[73] *Ibid*, Art 91.

[74] Article 63 of the Afar state constitution provides that a council of elders would be established. It is however silent on how this council is to be formed, the role it plays, and the place and status it has within the state government structure. Likewise, Article 56 of the Somali state constitution provides that there would be a council of elders and clan leaders without providing further detail. The two state constitutions should, indeed could, have gone further in terms of defining the composition and the role of traditional institutions and how they interact with the formal government structure. This is especially important considering how revered traditional institutions are in the Afar and Somali communities and that the federal system is

the constitution of the state of Oromia is conspicuously silent on the *Gada* institution, a highly esteemed traditional institution of the Oromo people.[75] Perhaps the only indirect reference to the *Gada* in the state constitution is the inclusion in the state's flag of the Oda, 'a symbol that refers to the tree' under which *Aba Gadas* (leaders of the *Gada* system) hold their meetings.[76] Otherwise the word *Gada* is not even mentioned in the state constitution. One can safely assume that the Gada system would have received recognition in the Oromia state constitution had there been democratic deliberation on this specific matter.[77]

3. Emerging Trends

EPRDF and its affiliates had enjoyed an exclusive control over federal, state and local governments. This, along with the centralized decision making process on the basis of which the party operated, restricted the relevance of state constitutions in terms of effectively serving the three purposes that are considered above. Now there is a good chance that Prosperity Party (PP), successor to EPRDF, might not continue to enjoy an exclusive dominance of the Ethiopian political land scape. This is mainly because the public protests that were staged in Oromia and Amhara states for close to three years (2015-2018) had forced the party to open up the political space of the country. If things continue as they currently are, it is not likely that the next elections, unlike the previous one, will be simply PP's affair. Other political parties will also have representation both in national and state representative councils. The representation in state councils of new parties will certainly allow the representation of hitherto excluded popular constitutional opinions which may require the revision of state constitutions.

predicated on providing a constitutional space for the development of the traditions and culture of each community.

[75] For more on the *Gada*, see MOHAMMED HASSAN, THE OROMO OF ETHIOPIA: A HISTORY 1570-1860 (Cambridge University Press, 1994).

[76] Van der Beken, *supra* note 42.

[77] The non-recognition of the Gada system in the Oromia state constitution is indeed strange considering how the federal government and the Oromia governments clamoured to have this institution registered by the UNESCO as 'intangible cultural heritage'.[77] Even more so when one takes into account that the government had to call on the Abba *Gedas* (heads of the *Gada*) to calm down angry protesters and prevent inter-ethnic violence when the state was seized with public protests beginning from mid-2015. The non-recognition in the Oromia constitution of the institution of *Gada,* hence, manifests the exclusion of a 'popular constitutional opinion'. Federal Democratic Republic of Ethiopia Ministry of Foreign Affairs, *Efforts to Inscribe Gada System on UNESCO World Heritage List Moving on the Right Track <http://www.mfa.gov.et/newsdisplay/-/asset_publisher/OTLO09lVyEXz/content/efforts-to-inscribe-gada-system-on-unesco-world-heritage-list-moving-on-the-right-track> accessed on 05 February 2018* .

Moreover, PP has regional and local structures. Of course, the regional and local structures of the party, unlike the former members of EPRDF, do not have distinct legal existence. Detractors of the new party have been claiming that PP is 'bad news' for the Ethiopian federal system since it is structured along a unitary principle.[78] However, it seems that the regional and local structures of the PP will not be encumbered by the principle of democratic centralism since the new party has moved away from the revolutionary democracy ideology of its predecessor.[79] This may allow the states to enjoy an enhanced autonomy and to use their state constitutions to the same effect.

In addition, for the first time since the establishment of the federation, the provision of the federal Constitution which allows an ethnic community to secede from a state within which it is found and establish its own state has been given effect. Members of the Sidama ethnic community overwhelmingly voted in favor of seceding from the SNNP and establishing their own state. Moreover, the Sidama state does not seem to be the last state to be created. Over ten communities have already demanded their own state and it is likely that at least few more states will be created. On a positive note, these developments provide an ample opportunity for experimentation with subnational constitutions. The establishment of new states is likely to lead to the adoption of new subnational constitutions which are drafted in a process that is unconstrained by EPRDF's centralist tendencies. This should give states the necessary political space to make use of their constitutional space and, thus, their constitutions. Both the existing and the newly created ones will thus be able to use their subnational constitutions to introduce (within the constitutional space available for them) different institutional design in the manner they structure their governments.

The new trend is not without a problem, though. The downside is that the states may use state constitutions to continue discriminating against ethnic minorities and so-called exogenous communities. As mentioned above, states, such as, Benishangul-Gumuz have already used their state constitutions to make distinctions between 'owners' of the state and others. Indeed, such discriminations could be challenged based on the federal constitution. However, the constitutional adjudication mechanism at the federal level has not been effective in terms of ensuring laws and executive decisions are consistent with the federal constitution.

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[78] Awol Kassim 'Why Abiy Ahmed's Prosperity Party could be bad news for Ethiopia' (Aljazeera, 5 December 2019) <https://www.aljazeera.com/indepth/opinion/abiy-ahmed-prosperity-party-bad-news-ethiopia-191204130133790.html> accessed on 13 December 2019.

[79] See **የብልፅግና ፓርቲ ፕሮግራም** available at <https://addisstandard.com/wp-content/uploads/2019/11/AS-Exclusive-Prosperity-Party-Program-.pdf> accessed on 13 December 2019.

Conclusion

State constitutions in Ethiopia play an important role of serving the ethnic communities of the country (subnational units of the Ethiopian federation) as institutional mechanisms in which the latter could determine how they are constituted. In this respect they define state government structures and processes of governance, establish a local government system and provide territorial and non-territorial mechanisms for managing intra-state ethnic diversity. They, however, serve little purpose in terms of providing additional protections to individual liberties. They fail to provide additional rights to those that the federal Constitution provides. Importantly, state courts are barred from using state constitutions as additional constitutional mechanism for judicially protecting individual rights. The state constitutions leave a lot to be desired in terms of enhancing deliberative democracy. The public is not involved in their adoption and revision. The constitutions also provide nothing by way of requiring the involvement of the public in terms of initiating and or ratifying amendments to them. In practice they were adopted in 1995 and revised in the early 2000s in a rushed, centrally driven, and politically motivated drafting and adoption processes which did not involve the public that the state constitutions are supposed to govern. There is, however, an emerging trend which is likely to lead to enhanced multiparty democracy and reduced centralization which may provide the states the necessary motive and space to use their constitutions more creatively.

* * *

የማስረጃ ምዘናና የመሠረታዊ ሕግ ስህተት ልየታ:- የፍርድ ትችት

መሐሪ ረዳኢ(ዶ/ር)[*]

መግቢያ

በኢትዮጵያ የህግ ሥርዓት አንድ ለፍርድ ቤት የቀረበ የክርክር ጭብጥ በማስረጃ ምዘና ሥር የሚወድቅ ነው ወይስ መሠረታዊ የህግ ስህተት የተፈጸመበት ነው የሚለው ጥያቄ ቁልፍ የህግ ጥያቄ ነው። በተለይም በሰበር ሰሚ ችሎት ፊት ይህ ጉዳይ ወሳኝ ነው። ምክንያቱም ጉዳዩ የማስረጃ ምዘና ነው ከተባለ በሰበር አይመረመርም፤ መሠረታዊ የህግ ስህተት ጥያቄ ያስነሳል ከተባለ ግን ሰበር ችሎት ጉዳዩን ሊመረምረው እንደሚገባ ህገ መንግስቱ ደንግጓል። ይህ ጭብጥ የወሳኝነቱን ያህል የማስረጃ ምዘናና መሠረታዊ የህግ ስህተት ድንበሩ የት ነው፤ እንዴትስ ይለያል በሚለው ላይ በህግ ሙያ በተሰለፉት አካባቢ የጠራ አቋም አይታይም። በዳኞች አካባቢም ሁኔታው ከዚህ የተለየ አይደለም።

ከዚህ የተነሳም መሠረታዊ የህግ ስህተት የተፈጸመበትና በሰበር መመርመርና መታረም የነበረበት ጉዳይ የማስረጃ ምዘና ነው ተብሎ ሲታለፍ፤ በሌላ በኩል ደግሞ የማስረጃ ምዘና ነው በሰበር መመርመር አይገባውም መባል ሲገባው መሠረታዊ የህግ ስህተት የተፈጸመበት ነው እየተባለ በሰበር ተመርምሮ ሲሻር ይስተዋላል።

ይህ የፍርድ ትችት አንድ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ውሳኔ[1] ለማሳያነት አቅርቦ በዚህ ርዕሰ ጉዳይ ላይ የሚያጠነጥን ሲሆን ቀጣይና ተከታታይ ሙያዊ ውይይት ለመጫር ያለመ ነው።

1. የጉዳዩ ሥነ-ሥርዓታዊ ጉዞ

ጉዳዩ የአሠሪና ሠራተኛ የግል ሥራ ክርክር ሲሆን ክርክሩ የተጀመረው በፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት ሥራ ክርክር ችሎት ነበር። ከሳሽ የተከሳሽ ሠራተኛ የነበረ ሲሆን በህገ ወጥ መንገድ የቅጥር ውሌ ስለተቋረጠ ውዝፍ ደመወዜ ተከፍሎኝ ወደ ሥራ እንድመለስ ይወሰንልኝ፤ ወደ ሥራ የማልመለስበት ህጋዊ ምክንያት ካለም በአማራጭ የተለያዩ ክፍያዎች ተከፍለውኝ ልስናበት የሚል አቤቱታ አቀረበ።

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[*] በአዲስ አበባ የኒቨርሲቲ (ህግ ትምህርት ቤት) የህግ ተባባሪ ፕሮፌሰር።

[1] ፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፤ ሰበር መዝገብ ቁጥር 177983፤ ጥር 27ቀን 2012 ተወሰነ (ያልታተመ)።

ተከሳሽ መልስ እንዲሰጥበት ታዞ በሰጠው መልስ፤ ስንብቱ የተከናወነው ህግን በተከተለ መንገድ በመሆኑ መዝገቡ ተዘግቶ ልስናበት የሚል ነበር።

ጉዳዩን በመጀመሪያ ደረጃ ያስተናገደው ችሎት ክርክሩን፤ ህጉንና የጽሁፍ ማስረጃውን መርምሮ እንዲሁም ምስክሮችም አዳምጦ በተከሳሽ የተወሰደው እርምጃ ህጋዊ ነው ብሎ የከሳሽን አቤቱታ ውድቅ አደረገ።

ከሳሽ ጉዳዩን በይግባኝ ወደ ፌዴራል ከፍተኛ ፍርድ ቤት ወሰደው። ይግባኝ ሰሚው ፍርድ ቤት የይግባኝ አቤቱታውን መርምሮ ያስቀርባል የሚል አቋም ስለያዘ የሥር ተከሳሽ ቀርቦ የቃል መልስ እንዲሰጥበት መጥሪያ ተላከለት። መልስ ሰጭም የሥር ፍርድ ቤት የሰጠው ውሳኔ መጽናት እንዳለበት አስረግጦ ተከራከረ። ይግባኝ ሰሚው ፍርድ ቤት ግን መዝገቡን መርምሮ፤ የሥር ፍርድ ቤትን ውሳኔ ሽሮና ይግባኝ ባይ የስድስት ወር ውዝፍ ደመወዝ ተከፍሎት ወደ ሥራ እንዲመለስ ወሰነለት።

በዚህ ውሳኔ ላይ መሠረታዊ የህግ ስህተት አለበት ብሎ ያመነው ተከሳሽ የሰበር አቤቱታውን ለፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አቀረበ። አቤቱታው ያስቀርባል ወይም አያስቀርብም ብሎ የመረመረው ሦስት ዳኞች የተካተቱበት የሰበር አጣሪ ችሎት የፌዴራል ከፍተኛ ፍርድ ቤት ውሳኔ መጣራት ያለበት መሠረታዊ የህግ ስህተት አለበት ብሎ ስላመነ መጥሪያና የሰበር አቤቱታው ለሰበር መልስ ሰጭ እንዲደርሰውና መልስ እንዲሰጥበት አዘዘ።

የሰበር መልስ ሰጭ (የሥር ከሳሽ) የጽሁፍ መልስ ሰጠ። የሰበር አመልካችም የመልስ መልስ አያያዘ። አምስት ዳኞች የተሰየሙበት የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት መዝገቡን መርምሮ ጉዳዩ መሠረታዊ የህግ ስህተት የተፈጸመበት ሳይሆን የማስረጃ ምዘና ስለሆነና ከሰበር ችሎቱ ሥልጣን ውጪ በመሆኑ ለሰበር መቅረብ የነበረበት አይደለም በሚል የከፍተኛው ፍርድ ቤት ውሳኔን አጸና፤ መዝገቡም በዚሁ ተቋጨ።

ከዚህ በላይ ጉዳዩ የተጓዘበት የችሎቶች እርከን ሥነ-ሥርዓታዊ ሂደት አብራርተናል። ከዚህ በመቀጠል የክርክሩ የፍሬ ጉዳይና የህግ ይዘት እንመረምራለን።

2. የክርክሩ ሂደት

እላይ እንደተገለጸው ጉዳዩ የግል ሥራ ክርክር ነው። ከሳሽ የተከሳሽ ሠራተኛ የነበረ ሲሆን ተከሳሹ የአልኮል መጠጥ ፋብሪካ ነው። ከሳሹ በሥራ ቦታ ሠክሮ በመገኘቱ ተከሳሽ (አሠሪ) ድርጊቱን የሠራተኛ ማህበር ተወካይ በተካተተበት የዲስፕሊን ኮሚቴ አጣርቶ፤ የማጣራት ውጤቱም ከሳሽ በሥራ ቦታ ሠክሮ መገኘቱ በሙሉ ድምጽ አረጋገጠ። ቅጣቱን በተመለከተ ግን የሠራተኛ ማህበሩ ተወካይ ሠራተኛው ከሚሰናበት ይልቅ የመጨረሻ የጽሁፍ ማስጠንቀቂያ ይድረሰው ብሎ በድምጽ ሲለይ፤ የአብዛኛው የዲስፕሊን ኮሚቴው አባላት ግን በህጉ በተመለከተው መሠረት ያለ ማስጠንቀቂያ የቅጥር ውሉ እንዲቋረጥ ሲል የውሳኔ ሃሳብ አቀረበ። የተከሳሽ ሥራ አስኪያጅም የውሳኔ ሃሳቡን አጸደቀና ለክሱ መነሻ የሆነው ስንብት ተወሰነ።

ከሳሽ የተከሳሽ እርምጃን በመቃወም በሥራ ቦታ ሠክሬ አልተገኘሁም፤ እንዲያውም ከነጭራሹም መጠጥ አልጠጣሁም። ጠጥቼ እንኳ ብገኝ በህብረት ስምምነቱ[2] መሠረት "በሥራ ቦታ መጠጥ ጠጥቶ የተገኘ" በሚል ሥር የመጀመሪያ ደረጃ ጽሁፍ ማስጠንቀቂያና የአምስት ቀናት ደመወዝ ልቀጣ ይገባል እንጂ ከሥራ እንድሰናበት መደረግ አልነበረበትም ብሎ ክስ መሠረተ።

ተከሳሽ ለክሱ በሰጠው መልስ ከሳሽ በሥራ ቦታ ሰክረው ስለመገኘታቸው ጉዳዩን ባጣራው የዲስፕሊን ኮሚቴ የተረጋገጠ ነው። በሥራ ቦታ ሠክሮ መገኘት ደግሞ በህጉም ሆነ በህብረት ስምምነቱ መሠረት የቅጥር ውሉ ያለማስጠንቀቂያ ማቋረጥ የሚያስችል ጥፋት ነው።

በህብረት ስምምነቱ በሥራ ቦታ መጠጥ ስለመጠጣት የተመለከተው በስካር ደረጃ ያልደረሰውን መጠጥ መጠጣትን ለመከልከል ያለመ ነው። እንደሚታወቀው በአሠሪና ሠራተኛ ጉዳይ አዋጅ አንቀጽ 27(1) ሥር ያለማስጠንቀቂያ የሥራ ውልን የሚያቋርጡ ጥፋቶች ከዘረዘረ በኋላ፤ ከእነዚህ በተጨማሪ ሌሎች ጥፋቶች በህብረት ስምምነት ሊወሰኑ እንደሚችሉ በአሠሪና ሠራተኛ ጉዳይ አዋጅ አንቀጽ 27(1 (ተ)) ተመልክቶ ይገኛል። በዚህ መሠረት ነው በሥራ ቦታ መጠጣትን እንደተጨማሪ ጥፋት በህብረት ስምምነቱ እንዲካተት የተደረገው። ምክንያቱም ተከሳሽ የአልኮል መጠጥ አምራች ድርጅት በመሆኑና አንዳንድ ሠራተኞቹ በሥራቸው አጋጣሚ ለመጠጥ ቅርብ ስለሆኑ አጋጣሚውን እንዳይጠቀሙበት ለመከላከል ታስቦ ነው እንጂ ስካርን ህጉ ካስቀመጠለት ቅጣት በታች ለመቅጣት አይደለም።[3]

አልኮል በባህርዩ ሱስ የሚያስይዝና ደጋግሞ ለመጠጣት በመገፋፋት ወደ ስካር የሚያመራ ሲሆን ስካር ደግሞ በአሠሪና ሠራተኛ ጉዳይ አዋጁ አንቀጽ 13(4) ከሠራተኛው የሚጠበቀውን በብቁ አእምሮ ሥራ ላይ የመገኘትን ግዴታ የሚጻረር ተግባር በመሆኑ በህብረት ስምምነቱ መጠጣት መከልከሉ መሠረቱ ህጋዊ ከመሆኑም በላይ ዓላማውም ዞሮ ዞሮ ስካርን ለመከላከል መሆኑ ግልጽ ነው።

ተከሳሽ የህጉንና የህብረት ስምምነቱን ዓላማዎች በመግለጽና ክርክሩን በማጠናከር መጠጣትና መስከር የተለያዩ ናቸው። የተለያዩ በመሆናቸውም በህብረት ስምምነቱ በተለያየ ቦታ ተቀምጠዋል። ህጋዊ ውጤታቸውም የተለያየ ነው። የከሳሽ ጉዳይ መስከር ስለመሆኑ እስከተረጋገጠ ድረስ በመጠጣት ድንጋጌዎች ሥር የሚስተናገድበት ሁኔታ አይኖርም ያለ ሲሆን ምስክሮችም አስቀርቦ አስመክሯል። በግንባር ቀርበውና በመሐላ ሥር ሆነው ምስክርነት የሰጡት ሰዎች ከሳሽ

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[2] በድርጅቱ ውስጥ በወቅቱ ጸንቶ የነበረው የህብረት ስምምነት በአዋጁ ውስጥ የቅጥር ውልን ያለማስጠንቀቂያ የሚያቋርጡ ጥፋቶች እንደተጠበቁ ሆነው፤ ተጨማሪ ጥፋቶችና ቅጣቶች በአባሪነት አያይዟል። በአባሪ 8 ሠንጠረዥ 32 ሥር *"ማንኛውም ሠራተኛ ወደ ሥራ ቦታ መጠጥ ጠጥቶ መግባት ወይም በሥራ ሰዓት ጠጥቶ መገኘት፤ የመጀመሪያ ጥፋት ሲሆን የመጀመሪያ የጽሁፍ ማስጠንቀቂያ ከአምስት ቀናት ደመወዝ ቅጣት ጋር፤ ሁለተኛ ጥፋት ሲሆን የመጨረሻ የጽሁፍ ማስጠንቀቂያ ከአስር ቀናት ደመወዝ ቅጣት ጋር፤ ሦስተኛ ጥፋት ሲሆን ከሥራ ማሰናበት"* የሚል ተደንግጎ ይገኛል።

[3] በርግጥ አንዳንድ ወገኖች ህብረት ስምምነቱ ከህጉ ይልቅ ለሠራተኛው የተሻለ ጥበቃ የሰጠው ነው ተብሎ ሊተረጎም አይገባም ወይ? የሚል ጥያቄ ሊያነሱ ይችላሉ። ነገር ግን የአሠሪና ሠራተኛ ጉዳይ አዋጁ በጥንቃቄ ሲታይ በጥፋትና በጥቅም መካከል ልዩነት ያደርጋል። ጥፋት ሲሆን ከህጉ በላይ ተጨማሪ ጥፋቶች በህብረት ስምምነት መወሰን ይቻላል (አንቀጽ 27(1)(ተ)። በሌላ በኩል ግን በጥቅም ጉዳይ ከሆነ ህብረት ስምምነቱ ከህግ በታች ጥቅም ሊሰጥ አይችልም (አንቀጽ 134(2)። የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎትም አሁን በተገለጸው መልኩ ትርጉም ሰጥቶበታል *(ባሌ ክፍለ ከተማ እና አቶ ማሸረሻ ሁሴን፤ ሰበር መዝገብ ቁጥር 49750፤ ቅጽ 9፤ መጋቢት 30 ቀን 2002)።*

በተጠቀሰው እለት "አፉ ጋን ጋን ይሸት እንደነበር"፤ "ምላሱ ተሳስሮ ይንተባተብ እንደነበር"፤ ይህንን የተገነዘቡ የቅርብ አለቃው "አንተ ስክረሃል እንዴ?" ሲሉት፤ "አዎን! ምን አገባህ?" ብሎ እንደጮህባቸው መስክረዋል።

ጉዳዩን በመጀመሪያ ደረጃ ያስተናገደው የሥራ ክርክር ችሎትም ፍሬነገሩን፤ ህጉንና ማስረጃዎቹን አገናዝቦ "በተከሳሽ የቀረቡት ምስክሮች ከሳሽ በሥራ ቦታ ስክረው እንደነበረ፤ በኃላፊያቸው ላይ ኃይለ ቃል የተናገሩ መሆናቸው ስለተረጋገጠ ተከሳሽ የወሰደው እርምጃ ህጋዊ ነው" ሲል ወሰነ። ነገር ግን ከላይ እንደተገለጸው ከሳሽ ይግባኝ በማቅረቡ ይግባኝ ሰሚው ፍርድ ቤት ክርክሩን ከሰማ በኋላ ስካር ምንድን ነው? የሚል ጭብጥ ይዞ በሚከተለው መንገድ እልባት ሰጠው።

ይግባኝ ሰሚው ፍርድ ቤት ስካር ምን እንደሆነ በህግ ትርጉም እንዳልተሰጠው በማስገንዘብ ነገር ግን "በተለምዶ የሰከረ ሰው ይንገዳገዳል፤ ይወድቃል፤ ይጮሃል፤ አካባቢን ይረብሻል" ካለ በኋላ በተያዘው ጉዳይ ግን ይግባኝ ባይ እነዚህን ባህሪያት ስለማሳየቱ አልተመሰከረም። የተመሰከረው አፉ አልኮል ይሸት ነበር፤ ይንተባተብ ነበር የሚል ነው። ይህ ደግሞ "ሞቅታ" ከሚባል በስተቀር ስካር ሊባል የሚቻል አይደለም፤ በመሆኑም ይግባኝ ባይ "በሥራ ቦታ መጠጣት" በሚል ሥር ህብረት ስምምነቱ ያስቀመጠው የመጀመሪያ ደረጃ የጽሁፍ ማስጠንቀቂያና የአምስት ቀናት ደመወዝ መቀጣት ሲገባው እንዲሰናበት መወሰኑ ተገቢ አልነበረም። ስለዚህ ይግባኝ ባይ ከስድስት ወር ውዝፍ ደመወዝ ጋር ወደ ሥራ ይመለስ፤ የመጀመሪያ ደረጃ የጽሁፍ ማስጠንቀቂያና የአምስት ቀናት ደመወዝ ቅጣት ይድረሰው ብሎ የሥር ፍርድ ቤት ውሳኔን ሽሯል።

እንደሚታወቀው በመደበኛው የፍትሐ ብሄር ሥነ-ሥርዓት ህግ መሠረት የሥር ፍርድ ቤት ውሳኔ በይግባኝ ሰሚ ፍርድ ቤት ከተሻረ ሁለተኛ ይግባኝ የሚፈቀድ ቢሆንም በይግባኝ ሰሚው ፍርድ ቤት ከጸና ግን የመጨረሻ ነው። በአሠሪና ሠራተኛ ጉዳይ አዋጅ መሠረት ግን ይግባኝ ሰሚው ፍርድ ቤት የሥር ፍርድ ቤት ውሳኔን ቢያጸናም ሆነ ቢሽር፤ ይግባኝ የማይባልበትና የመጨረሻ ነው።[4] ስለሆነም በዚህ ጉዳይ ሌላ የይግባኝ እድል ስለሌለ ያለው ብቸኛ አማራጭ የሰበር አቤቱታ ማቅረብ ነው።

የሰበር አቤቱታ አቅርቦ ተቀባይነት ለማግኘት ግን በይግባኝ ሰሚው ፍርድ ቤት ውሳኔ ቅር ተሰኝቻለሁ ማለት ብቻ በቂ አይደለም። ከዚህ በተጨማሪ የይግባኝ ሰሚው ፍርድ ቤት ውሳኔ መሠረታዊ የህግ ስህተት የተፈጸመበት መሆኑን ማስረዳት የግድ ይላል። በዚህም መሠረት የሰበር አመልካች የሰበር አቤቱታውን ሲያቀርብ የፌዴራሉ ከፍተኛ ፍርድ ቤት በተያዘው ጉዳይ ላይ ውሳኔ ሲሰጥ መሠረታዊ የህግ ስህተት ፈጽሟል፤ ምክንያቱም ስካርን ሲተነትን የቀረጸው ትርጓሜ መሠረታዊ ችግር ያለበት ነው፤ አንድ ሰው ጠጥቶ ካልተንገዳገደ፤ ካልወደቀ፤ ካልጮኸና አካባቢውን ካልረበሸ ሰከረ አይባልም የሚለው የፍርድ ቤቱ ትንተና መሠረታዊ የሕግ ስህተት የሚንጸባረቅበት ነው' ብሎ መከራከር አለበት።

በርግጥ ፍርድ ቤቱ ስካርን የገለፀበት መንገድ በጎዳና ለሚንቀሳቀስ ሰው ሊያገለግል ይችል ይሆናል። ነገር ግን ከሳሽና ተከሳሽ በአውራ ጎዳና የተገናኙ አይደሉም። በውል ታስረው፤ መብትና

[4] የአሠሪና ሠራተኛ አዋጅ ቁጥር 1156/2011 አንቀጽ 140(2)።

ግዴታ አቋቁመው ግንኙነት የፈጠሩ ናቸው። ከሳሽ ለሥራ ብቁ በሆነ የአካልና የአእምሮ ሁኔታ በሥራ ላይ በመገኘት፤ ሙሉ እውቀቱንና ጊዜውን ተጠቅሞ ለተከሳሽ አገልግሎት ሊያበረክት፤ ተከሳሽ ደግሞ ለተበረከተለት አገልግሎት ደመወዝ ሊከፍል የገቡበት ግዴታ በአሠሪና ሠራተኛ ግንኙነት ዘርፍ ስካር ሲተረጎም ለዚህ በውል ለተቋቋመ ግብ ከሚኖረው እንድምታ አንጻር መሆን ይኖርበታል። የከፍተኛው ፍርድ ቤት ግን በዚህ መነጽር አልቃኘውምና መሠረታዊ የህግ ስህተት ፈጽሟል የሚል ይዘት ያለው የሰበር አቤቱታ ለፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቅርቧል።

አቤቱታው በሰበር አቤቱታ አጣሪው ችሎት ተመርምሮ "ከፍተኛው ፍርድ ቤት ጉዳዩን ሲመረምር በሥር ፍርድ ቤት የአሁን ተጠሪ መጠጥ ጠጥቶ ሥራ ላይ መገኘቱ፤ እየተንተባተበ እንደነበር መመስከሩ ቢገለጽም ከዚህ ውጪ የሆኑት የስካር ምልክቶች ማለትም ወድቆ መገኘትን፤ መንገዳገድንና መጮህን ባለማሳየቱ በህብረት ስምምነቱ ሠንጠረዥ የጽሁፍ ማስጠንቀቂያ እና የአምስት ቀን ደመወዝ የሚያስቀጣ እንጂ ሊሰናበት አይገባም ሲል የሰጠው ውሳኔ መጣራት ያለበት መሆኑ ስለታመነበት ጉዳዩ ለሰበር ችሎት ይቅረብ፤ መልስ ሰጪ መልስ ይስጥበት ብለናል" የሚል ብይን ተሰጥቶበታል።

የሰበር መልስ ሰጭ የፌዴራል ከፍተኛ ፍርድ ቤት ያስተላለፈው ውሳኔ መሠረታዊ የህግ ስህተት ስለሌለበት ሊጸና ይገባል፤ ስካር አለ ለማለት መለካት ያለበት በውጤቱ ነው። ከስካሩ በመነጨ በሌላ ሰው ላይ ጉዳት ስለመድረሱ ማስረጃ ባልቀረበበት ሁኔታ ስካር አለ ሊባል አይገባም የሚል ከህጉ ዓላማና ግብ ጋር የማይገናኝ ክርክር አቅርቧል።

ምንም እንኳ ሦስት ዳኞች የተሰየሙበት የሰበር አጣሪ ችሎት ጉዳዩ መሠረታዊ የህግ ክርክር የሚያስነሳ መሆኑን አምኖ ያስቀርባል ብሎ ብይን ቢሰጥም፤ ጉዳዩን በመጨረሻ የመረመረው አምስት ዳኞች የተሰየሙበት ሰበር ሰሚ ችሎት ግን "የሰበር አቤቱታው የቀረበው ድርጊቱ ስካርን ያሳያል በሚል ሲሆን የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በህገ መንግስቱ አንቀጽ 80(3) ሆነ በየፌዴራል ፍርድ ቤቶች አዋጅ ቁጥር 25/1988 አንቀጽ 10 ላይ በመጨረሻ ውሳኔ ላይ በተፈጸመ መሰረታዊ የህግ ስህተት እንጂ ማስረጃው ተመዝኖ የተደረሰበትን የፍሬ ነገር ድምዳሜ ላይ እንዲመለከት ሥልጣን አልተሰጠውም" በማለት የጉዳዩን ጭብጥ ወደ ማስረጃ ምዘና ቀይሮ "እኔን የሚመለከት አይደለም፤ ማስረጃውን የተቀበለው ፍርድ ቤት ማስረጃውን መዝኖ ስካርን አያመለክትም የሚል አቋም ከያዘ በሰበር የሚመረምርበት ህጋዊ መሠረት የለም" በማለት የፌዴራል ከፍተኛ ፍርድ ቤት ውሳኔን በማጽናት ፋይሉን ዘግቶታል።

3. ትችት

ለመሆኑ ይህ መዝገብ ያስነሳው ጭብጥ የማስረጃ ጉዳይ ነው ወይስ መሠረታዊ የህግ ስህተት? የሚል ጥያቄ በጥሞና መመርመር ይገባል። በዚህ ረገድ የሰበር አጣሪው ሦስቱም ዳኞች ጉዳዩ መሠረታዊ የህግ ስህተት ነው ብለው ስላመኑ በሙሉ ድምጽ ያስቀርባል ብለው ለተጨማሪ ምርመራ ወደ መደበኛው ሰበር ሰሚ ችሎት መርተውታል። በሌላ በኩል ደግሞ የሰበር ሰሚ

ችሎቱ አምስት ዳኞች ጉዳዩ የማስረጃ ምዘና ነው ብለው ስላመኑ የሰበር አቤቱታውን በሙሉ ድምጽ ውድቅ አድርገውታል።

እንግዲህ የማስረጃ ምዘና ሲባል ውሳኔ ሰጪው አካል ለጉዳዩ የቀረቡትን ማስረጃዎች ተገቢነታቸውን፤ ተቀባይነታቸውንና ክብደታቸውን መዝኖና የሚገባቸውን ዋጋ ሰጥቶ ለውሳኔው መሰረት የሚያደርግበት አግባብ ነው። ከዚህ አንጻር በተያዘው ጉዳይ የፌዴራሉ ከፍተኛ ፍርድ ቤት የፈጸመው ተግባር የማስረጃ ምዘና ብቻ ነው ወይ?

በዚህ ፀሃፊ ግንዛቤ የከፍተኛ ፍርድ ቤቱ ጉዳዩን ለመፍታት ሁለት እርምጃዎችን ወስዷል። አንደኛ ለስካር ትርጉም ሰጥቷል። ምክንያቱም ፍርድ ቤቱ ስካር ምን እንደሆነ የህግ ትርጉም እንዳልተሰጠው በማስገንዘብ በተለምዶ ግን የሰከረ ሰው ይንገዳገዳል፤ ይወድቃል፤ ይጮሃል፤ አካባቢን ይረብሻል የሚል የራሱ ትርጉም ሰጥቷል። ሁለተኛ ራሱ ምስክሮችን ባይሰማም በሥር ፍርድ ቤት የተደመጡት ምስክሮች የሰጡት የምስክርነት ቃል ከመዝገቡ አይቶ ለስካር ከሰጠው ትርጉም አንጻር መዝኗል። ስለዚህ የከፍተኛው ፍርድ ቤት በተያዘው ጉዳይ ያከናወነው ተግባር የማስረጃ ምዘና ብቻ ነው ሊባል የሚቻል አይደለም።

የሰበር አጣሪው ችሎት የከፍተኛ ፍርድ ቤቱ ለስካር የሰጠው ትርጉም አግባብነትና ህጋዊነት መመርመር ይገባዋል ብሎ ስላመነ ያስቀርባል ብሎ ወሰነ። መደበኛው የሰበር ችሎት በበኩሉ የመጀመሪያው ከፍተኛው ፍርድ ቤት ተግባር ግምት ውስጥ ሳያስገባ ትኩረቱን በሁለተኛው ተግባር ላይ በማሳረፍ ከፍተኛው ፍርድ ቤት ያከናወነው የማስረጃ ምዘና ነው የሚል አቋም አራመደ። እንግዲህ ቁልፉ ልዩነትና ችግር እዚህ ላይ ነው። የሰበር አጣሪው ችሎት "ነገርን ከስሩ፤ ውሃን ከጥሩ" እንዲሉ ጉዳዩን ከሥረ መሰረቱ ጀምሮ ይዞት ነበር።

መደበኛው የሰበር ችሎት ግን ጉዳዩን ከሥሩ የመረመረው አይመስልም። ሰበር ሰሚ ችሎቱ በውሳኔው መንደርደሪያ "የሰበር አቤቱታው የቀረበው ድርጊቱ ስካርን ያሳያል በሚል ነው" ብሎ መነሳቱ የሰበር አቤቱታውን ይዘት በአግባቡ አለመገንዘቡን ያሳያል። ምክንያቱም የሰበር አቤቱታው ከፍተኛው ፍርድ ቤት ለስካር የሰጠው የህግ ትርጉም መሰረታዊ የህግ ስህተት አለበትና መታረም ይገባዋል በሚል እንጂ ድርጊቱ ስካርን ያሳያልና ስካር ነው ይባልልን የሚል የማስረጃ ምዘና ጉዳይ አልነበረም። በተጨማሪም የከፍተኛው ፍርድ ቤት ማስረጃ ከመመዘኑ በፊት ለስካር የራሱ ትርጉም መስጠቱ እየታወቀ የዚህ ትርጉም ተገቢነትና ህጋዊነት መመርመር ሲገባው ሰበር ችሎቱ ትኩረት አልሰጠውም።

የፌዴራሉ ከፍተኛ ፍርድ ቤት ስካርን በጠባቡ በመተርጎም "ሰው ካልተንገዳገደ፤ ካልወደቀና ጮሆ አካባቢውን ካልረበሸ ሰከረ አይባልም" ብሏል። ይህ በትርጉምነት የተጠቀመበት መንደርደሪያ ተገቢ ነው ወይ? በተለይም ጉዳዩ ከተነሳበት ከአሠሪና ሠራተኛ ግንኙነት እንዲሁም ሠራተኛው ከሚሠራበት የአልኮል መጠጥ ፋብሪካና የህብረት ስምምነቱ ዓላማ እንጻር ከፍተኛው ፍርድ ቤት ስካርን የተረጎመበት መንገድ ምን ያህል ያስኬዳል ብሎ መመርመር ይገባ ነበር።

እንደሚታወቀው በአሠሪና ሠራተኛ ህጉ አንቀጽ 14(2) መሠረት ሠራተኛ በሥራ ቦታ ሠክሮ መገኘት ህገ ወጥ ድርጊት ነው። ይህ ክልከላ የተቀመጠው ሠራተኛው ተንገዳግዶ እንዳይወድቅና

እንዳይጎዳ ለመጠበቅ፤ እንዲሁም ጮሆ አካባቢን እንዳይረብሽ ጸጥታ ለማስከበር ብቻ ነው ወይ? ሌላ ተጨማሪ ዓላማና ግብ የለውም ወይ? ብሎ መመርመር ይገባ ነበር።

እላይ ለመግለጽ እንደተሞከረው የአሠሪና ሠራተኛ ግንኙነት ሠራተኛው አገልግሎት እንዲያበረክት፤ አሠሪው ደግሞ ለተበረከተለት አገልግሎት ደመወዝ መክፈል የሚገደድበት ስርዓት ነው። ሠራተኛው አገልግሎቱን የሚያበረክተውም በአሠሪው መሪነት ነው። የአሠሪው መሪነት ለማስፈጸም ያመች ዘንድ ደግሞ ሠራተኛው በአዋጁ አንቀጽ 13 መሰረት ብቁ በሆነ የአካልና የአእምሮ ሁኔታ በሥራ ቦታ የመገኘት ግዴታ በህግ ተጥሎበታል። ስካር ደግሞ መንገዳገድና መውደቅ ባያስከትልም ብቁ በሆነ የአካልና የአእምሮ ሁኔታ የመገኘት እድልን ያጓድላል።

በርግጥ በጎዳና ለሚንቀሳቀስ መንገደኛ ሰከረ ለማለት መንገዳገድ፤ መውደቅና ጮሆ አካባቢን መረበሽ መለያ ምልክቶች ሊሆኑ ይችላሉ። የጎዳናው የስካር ትርጉም ግን በአሠሪና ሠራተኛ ግንኙነት ለተሳሰሩ ወገኖች የሚያገለግል አይሆንም። ምክንያቱም አሠሪና ሠራተኛ ግንኙነታቸው የጎዳናና የእግረ መንገድ ሳይሆን የውል ነው። ስካር የሚለው ቃል በአሠሪና ሠራተኛ ህጉ ውስጥ ሲካተትና ሲከለከል የተለምዶ ቋንቋ ሳይሆን የህግ ቋንቋ ሆኗል ማለት ነው። በመሆኑም ህግ ትርጉም ያልሰጠባቸው የህግ ቃላትና ሀረጎች ሲያጋጥሙና ህግ ተርጓሚው አካል ትርጉም እንዲሰጣቸው አስፈላጊ ሆኖ ሲገኝ ከዓላማቸው አንጻር ሊመለከታቸው ይገባል። ከዚህ አኳያ ሲታይ የፌዴራል ከፍተኛ ፍርድ ቤቱ ትንተና ግድፈት አለበት።

እላይ እንደተገለጸው የሰበር አጣሪው ችሎት ክርክሩን በአግባቡ ተገንዝቦ ያስቀርባል ብሎ ወሰነ። በአንጻሩ መደበኛው ሰበር ችሎት ጉዳዩን መርምሮ የማስረጃ ምዘና ነው፤ የማስረጃ ምዘና ጉዳይ ደግሞ ምስክሮቹን ላዳመጠ ፍርድ ቤት መተው ያለበት እንጂ መሠረታዊ የህግ ስህተት ተብሎ በሰበር የሚመረመርበት የህግ መሰረት የለም ብሎ በሙሉ ድምጽ ወሰነ። መደበኛ ሰበር ችሎቱ ያልተገነዘበው ጉዳይ ግን የከፍተኛው ፍርድ ቤትም ቢሆን ምስክሮች አስቀርቦ አላዳመጠም። ምስክሮች ቀርበው የተደመጡት በዲስፕሊን ኮሚቴ ፊትና በመጀመሪያው ደረጃ ፍርድ ቤት ፊት ብቻ ነው። እነዚህ ሁለት መድረኮች ደግሞ እላይ እንደተገለጸው ሁኔታው ስካር እንደነበር አረጋግጠው መዝግበዋል። ስለዚህ የከፍተኛው ፍርድ ቤት ያላዳመጠውን የምስክሮች ቃል በሥር ፍርድ ቤት መዝገብ ተመስርቶ ነው የመዘነው።

ለነገሩ የሥር ፍርድ ቤት ከመዘገበው የምስክሮቹ ቃልም ቢሆን ከፍተኛው ፍርድ ቤት ለራሱ የሚጠቅመውን ብቻ መርጦ ነው ለውሳኔው መሠረት ያደረገው። ለምሳሌ በመዝገቡ የሠፈረው የምስክሮች ቃል "ከሳሽ አፉ ጋን ጋን ይሸት ነበር፤ ይተባተብ ነበር፤ የቅርብ አለቃው ሰክረሃል እንዴ ብሎ ሲጠይቀው አዎን ሰክሬአለሁ ምን አገባህ ብሎ ጮሆበታል" ይላል። ከፍተኛው ፍርድ ግን ከሳሽ አለቃው ላይ ጮሆበታል የሚለው የምስክርነት ቃል ለስካር ለሰጠው ትርጉምና ለመደምደሚያው የሚመች ሆኖ ስላላገኘው ከፍርድ ትንተናው ውስጥ አላካተተውም። ከተመዘገበው የምስክርነት ቃል ለራሱ የሚጠቅመውን ብቻ ለይቶ መውሰድም ተገቢ የዳኝነት አሠራር አይደለም። እንግዲህ እንዲህ ያለ ክፍተት ያለውን የማስረጃ ምዘና ነው ሰበር ሰሚው ችሎት እንዲጸና እድል የሰጠው።

ማጠቃለያ

የሰበር ሰሚ ችሎቱ የተዛነፈውን የከፍተኛ ፍርድ ቤት ውሳኔ እንዳለ ከማጽደቅ ይልቅ ፍርድ ቤቱ ለስካር የሰጠውን ትርጉም መርምሮ ለወደፊቱ ቢያንስ ለአሠሪና ሠራተኛ ግንኙነት የሚመጥን የስካር ትርጉም ሰጥቶ ከሳሹ አልሰከረምና ከሥራ ሊሰናበት አይገባም ብሎ ውሳኔውን ማጽናት በቻለ ነበር። በዚህ ፀሃፊ እምነት የሰበር ሰሚ ችሎቱ ችግር የከፍተኛውን ፍርድ ቤት የተዛባውን የስካር ትርጉም እንዳለ መቀበሉና ማለፉ እንጂ የበታች ፍርድ ቤቱን ፍርድ ማጽደቁ አይደለም።

ይህ እንዳለ ሆኖ ከዚህ በላይ ለማሳየት እንደሞከርነው አንድ ጉዳይ የሚያስነሳው ጭብጥ የማስረጃ ምዘና ነው ወይስ የመሠረታዊ የህግ ስህተት የሚለውን ለመወሰን ነገሩን ከሥረ መሰረቱ ካልተመረመረ በቀር መለየት አስቸጋሪ ነው። አሁን ባለን የህግ ሥርዓት የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የመጨረሻው የፍትህ ምንጭ ነው። የመጨረሻነቱን ያህል ባለጉዳዮችም የመጨረሻ እድላቸው በመሆኑ ከሰበር ችሎቱ ብዙ ይጠብቃሉ። ጠበቅ ያለ ጉዳዩን ከሥረ መሠረቱ አንስቶ ምርመራ የሚያከናውን ሰፊ ትእግስት ያለው፤ በሰል ያለ የህግ ትንተናና ከህጉ ቃላት ይልቅ የህጉን መንፈስ የሚረዳና ጥልቅ ማህበረሰባዊ ግንዛቤ ላይ የተመሰረተ እንዲሆን ይጠበቃል። አልፎ አልፎ ግን የተጠበቀውን ያህል እያገኘን ነው ወይ የሚለው የሚያወያይ ነው።

ሌላው በሰበሩ አሠራር የተገነዘብነው ጉዳይ የሰበር አቤቱታ የሚጣራው ሦስት ዳኞች በያዘ ችሎት ሲሆን፤ ያስቀርባል ተብሎ ከተወሰነ በኋላ ደግሞ ጉዳዩ የሚመረመረው ካጣሩት ውጪ በሆኑ አምስት ዳኞች ነው። አጣሪው ችሎት የሰበር አቤቱታውን አጥንቶና መርምሮ ነው ለሰበር ያስቀርባል ወይም አያስቀርብም ብሎ የሚወስነው። ይህ ሁሉ ሲያደርግ አጣሪው ችሎት ጉዳዩን ከሌላው በተሻለ በቅርበትና በጥልቀት የመመርመር እድል አለው ተብሎ ይታመናል። በዚህ ሂደት ጉዳዩን በቅርበት የተረዳው ሦስት አባላት ያሉት አጣሪ ችሎት ሌሎች ሁለት ዳኞች ተጨምረውለት ለጉዳዩ እልባት እንዲሰጥ ማድረግ ሲገባ፤ ወደ ሌሎች አምስት ዳኞች ተመርቶ እንዲወሰን ማድረግ ነገሩን ‘‘አድሮ ቃሪያ’’ እንዲሆን ሊያደርገው ይችላል።

በእርግጥ አልፎ አልፎ የሚደመጠው አጣሪው ችሎት አንድ መድረክ፤ መርምሮ ውሳኔ የሚያሳርፍ ደግሞ ሌላ አድርጎ መመደብ ለሥልጣን ገደብና ቁጥጥር (check and balance) ጠቀሜታ አለው የሚል ነው። ለነገሩ የሥልጣን ገደብና ቁጥጥር ጽንሰ ሃሳብ የመጣው በሦስቱ መንግስታዊ አካላት ማለትም በህግ አውጪው፤ በአስፈጻሚውና በዳኝነት አካሉ መካከል የሚኖረው መስተጋብር ለመለየት የተደራጀ አሰራር ነው። በመሆኑም ይህንኑ ለተለየ ዓላማ የተደራጀ ጽንሰ ሃሳብ በዳኝነት የውስጥ አሠራር እንዲሠራበት የማድረጉ ተገቢነት አጠያያቂ ነው። የዳኝነት አካሉ ለአፈጣጠሩ የሚያመች የራሱ የሥልጣን ገደብና ቁጥጥር ሥርዓት እንዳለው ሊታመን ይገባል። ለሥልጣን ገደብና ቁጥጥር ተብሎ አንዱ ዳኛ ምስክር ያዳምጥ፤ ሌላ ዳኛ ደግሞ በመዝገቡ ላይ ውሳኔ ይስጥ ቢባል ምስክር ያላዳመጠ ዳኛ ‘‘ነገር በዓይን ይገባልና’’ ምን ያህል ለመወሰን እንደሚቸገር መገንዘብ አያዳግትም። የአሁኑ የሰበሩ አሠራር ከዚህ ጋር የሚመሳሰል ነው፤ መርማሪ አጣሪው ችሎት ሆኖ ውሳኔ የሚሰጠው ደግሞ መደበኛው ሰበር ችሎት ነው።

ከዚህም በተጨማሪ እንዲህ ዓይነት አሠራር ሰበር ችሎቱ ካለው የፋይል ብዛትና የሥራ ጫናም ጋር የሚጣጣም አይደለም። ለአንድ የሰበር መዝገብ መጀመሪያ በሦስት የአጣሪ ችሎት ዳኞች ያስቀርባል ወይም አያስቀርብም ተመርምሮ፤ ያስቀርባል ከተባለ ደግሞ በሌሎች አምስት ዳኞች በአጠቃላይ በስምንት ዳኞች የሚስተናገድ ይሆናል ማለት ነው። ሰበሩ ባለው የሥራ ብዛትና የፋይል ጫና እንዲህ ብሎ የሚዘለቅና የሚያዛልቅ አይመስልም።

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Is Serving Notice a Mandatory Requirement to Terminate Indeterminate Period Residential Lease? A Case Comment

Mihret Alemayehu Zeleke[♣]

1. The Facts of the Case

The case, *Agency for Rented Houses v. Ato Tadele Abebe*,[1] was first filed in the Federal First Instance Court in Addis Ababa by the Agency for Rented Houses (Agency/lessor) against Tadele Abebe (lessee) who rented house no. 292/14 in the then Woreda 21 Kebele 01 from the Agency (Civil File No. 20941).[2] The Agency pleaded for the termination of the lease and eviction of the lessee on the ground that the lessee has not paid rent arrears and water bills, and has constructed his own house. The Agency further argued that even if the defendant did not build his own house the lessor could unilaterally terminate a residential lease according to Article 2966(1) of the Civil Code. Tadele on his part argued that the lease should not be terminated because a notice of termination was not served to him and defaulting on his obligation should only result in his transfer to another house of the Agency. The Federal First Instance Court made its decision on the case on 27 May 2003. It held that, since the lease agreement between the parties is an indeterminate period lease, the Agency cannot terminate it without

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1 *The Agency for Rented Houses vs. Tadele Abebe*, Cassation File No. 28025, 7 DECISIONS OF THE FEDERAL SUPREME COURT CASSATION BENCH 71-73 (2009) [**የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፤ ቅፅ 7፤ የሰበር መ.ቁ. 28025፤ 2001 ዓ.ም. ፤ ገፅ 71-73**].

2 The Cassation Bench has entertained two other cases relating to residential indeterminate period lease. These cases are: *Agency for Rented Houses vs. Debritu Woldehana* and *Agency for Rented Houses vs. Asegedech Kasahun*. However, the requirement of notice to terminate lease for indeterminate period was not the central issue in those two cases and, hence, are not of interest here. On a different note, all of the residential lease cases entertained by Cassation Bench involve the institutional renter, the Agency for Rented Houses. It may be fascinating to see why cases involving individual lessors do not appear in the Cassations Bench's decision. *See The Agency for Rented Houses vs. Debritu Woldehena*, File No. 34456, 7 DECISIONS OF THE FEDERAL SUPREME COURT CASSATION BENCH 99-102 (2009) [**የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፤ ቅፅ 7፤ የሰበር መ.ቁ. 34456፤ 2001 ዓ.ም፤ ገፅ 99-102**] and *The Agency for Rented Houses vs. The Successor of W/ro Asegedech Kassahun, Henok Samuel*, Cassation File No. 40336, 7 DECISIONS OF THE FEDERAL SUPREME COURT CASSATION BENCH 143-144 (2002) [**የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፤ ቅፅ 10፤ የሰበር መ.ቁ. 40336፤ 2002 ዓ.ም፤ ገፅ 143-144**].

giving two months advance notice to Tadele and rejected the petition of the Agency to terminate the lease. The Court, however, ordered the lessee to pay unpaid arrears of birr 442.20 to the Agency.

As the Agency was aggrieved by the decision, it appealed to the Federal High Court (Civil File No. 22378). However, the Federal High Court affirmed the decision of the lower court in its session held on 01 November 2006.

2. The Decision of the Federal Supreme Court Cassation Bench

The Agency, dissatisfied by the decision of the lower courts, then submitted a petition to the Federal Supreme Court Cassation Bench[3] for the reversal of the decision on the ground that the lower courts have made basic error of law in their decisions. The main issue framed by the Cassation Bench regarding the case was whether serving notice by the lessor (the Agency) to the lessee (Tadele) is a mandatory requirement for the termination of the indeterminate period residential lease between the parties. After appraising the arguments of the parties, the Cassation Bench, in its session held on 29 January 2008, ruled as follows:

> *The Court understood that the lease between the parties is made for an indeterminate period. A lease for an indeterminate period can be terminated at any time by giving notice according to Article 2966(1). The lessor has the right to terminate the lease at any time by giving notice. As stated above, even if the lessor has to give notice to the lessee to terminate the lease, serving notice to the lessee is not, however, a mandatory requirement to terminate the lease. If the lessee suffers damage or loss [due to termination] without advance notice, compensation may be requested; otherwise, not receiving a notice does not entitle the lessee to object termination of the lease.*
>
> *… Nearly a year has passed since the respondent was sued to leave the house and until only the First Instance Court made a decision on the case. Hence, the argument of the respondent that he should not be evicted because he was not given advance notice is not acceptable. … Generally, the decision of the lower*

[3] Note that interpretation of a law by the Cassation Bench are binding on both federal and regional courts at all levels including state cassation benches. *See* Federal Courts Proclamation Re-Amendment Proclamation No. 454/2005, *Federal Negarit Gazeta*, Year 11, No. 42, Article 2(4). Article 2(4) reads: "Interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges shall be binding by federal or regional [courts] at all levels. The Cassation Division may, however, render a different interpretation some other time."

> court that the lease should not be terminated for notice was not served is erroneous when examined in light of Article 2966(1).[4] (Author's translation)

Accordingly, the Cassation Bench reversed the decisions of the Federal First Instance Court and Federal High Court. It then ruled that the lease agreement between the parties is terminated and ordered the lessee to vacate the house.[5]

3. Comment

The case raised an important question of whether serving advance notice to the lessee by the lessor is a mandatory requirement for the termination of a lease for an indeterminate period. As summarized in the previous section, the Cassation Bench held that pursuant to Article 2966(1) of the Civil Code, serving notice by the lessor is not a mandatory requirement to terminate a lease for an indeterminate period. The Cassation Bench also maintained that the lessee who suffers damage due to termination of an indeterminate period lease without notice can only claim damage and cannot oppose the termination of the lease.

This writer argues that the Cassation Bench's interpretation of Article 2966 is erroneous. The arguments are based on the ground (just cause) and procedure (notice) of termination of a lease for an indeterminate period, with more emphasis on the latter, and the issue of compensation decided by the Cassation Bench as the right of lessees.

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[4] The Amharic version of the excerpts reads as follows:
በአመልካችና በተጠሪ መሃከል የተደረገው የኪራይ ውል ላልተወሰነ ጊዜ የተደረገ መሆኑን ተገንዝበናል። ላልተወሰነ ጊዜ የተደረገ የኪራይ ውል ደግሞ ለተከራዩ በሚሰጥ ማስታወቂያ በማንኛውም ጊዜ ሊቋረጥ የሚችል መሆኑ በፍ/ሕ/ቁ. 2966(1) ሥር ተመልክቷል። አከራዩ በፈለገ ጊዜ ለተከራዩ ማስታወቂያ በመስጠት የኪራይ ውሉን ሊያፈርስ መብት አለው። ከፍ ሲል እንደተገለው አከራዩ ውሉን ለማፍረስ ማስታወቂያ ለተከራዩ መስጠት እንደሚያስፈልገው የተመለከተ ቢሆንም ማስታወቂያ መስጠት ግን ውሉን ለማፍረስ አስገዳጅ የሆነ ቅድመ ሁኔታ አይደለም። ተከራዩ ማስጠንቀቂያ ባለማግኘቱ የደረሰበት ጉዳት ወይ ኪሣራ ካለ ይህንኑ ከመጠየቅ በቀር ውሉ ሊፈርስ አይችልም በማለት ለመከራከር መብት አይሰጠውም።
... ተጠሪውም በክሱ ቤቱን እንዲለቁ ከተጠየቁበት ጊዜ ጀምሮ የፈ/መ/ደ/ፍ/ቤት ውሣኔ እስኪሰጥበት ጊዜ ድረስ እንኳን ወደ አንድ ዓመት የሚጠጋ ጊዜ አልፏል። በመሆኑም ቤቱን ለመልቀቅ እንድችል ቅድሚያ ማስጠንቀቂያ ስላልተሰጠኝ ልለቅ አይገባም በማለት ያቀረቡት ክርክር ተቀባይነት የለውም። ... በአጠቃላይ የሥር ፍ/ቤት ማስጠንቀቂያ ባለመስጠቱ የኪራይ ውሉ ሊፈርስ አይገባም በማለት የደረሰበት መደምደሚያ የፍ/ሕ/ቁ. 2966(1) አኳያ ሲመረመር ስህተት የተፈፀመበት ነው። See Para. 6 & 7 of the Decision.

[5] See the operative part of the Decision; translation by the author.

Besides employing the textual interpretation method[6] to analyze the relevant provisions of the Civil Code,[7] relevant experience of other jurisdictions is explored to draw lessons.

3.1 Termination of a lease for an indeterminate period

A lease for an indeterminate period, also called non-fixed term lease or open-ended lease, is a type of lease that is made for an undetermined or undefined period.[8] It specifies only the starting date and does not specify the end date or duration for the lease.[9] Besides, a determinate or fixed-term lease turns into an indeterminate or non-fixed term lease when the lessee continues to enjoy the lease unopposed by the lessor after the expiry of the fixed term.[10]

Indeterminate or non-fixed term lease is recognized in many jurisdictions across the world irrespective of the legal system they follow.[11] In western and northern Europe, a non-fixed term lease is the default regime.[12] These jurisdictions include the Netherlands, Germany, Austria, Norway, Sweden and Denmark.[13] Other jurisdictions including Japan,[14] states in the U.S.A. like Michigan,[15] and provinces in Canada like Alberta also recognize such lease.[16]

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[6] Regarding interpretation theories and tools of statutes, *see* Congressional Research Service, *Statutory Interpretation: Theories, Tools, and Trends*, CRS Report, (2018), https://fas.org/sgp/crs/misc/R45153.pdf (last visited Aug. 10, 2020).

[7] As the meaning of the relevant provisions of the Civil Code, Articles 2966, 2965, 1821 and 1822, is unambiguous and logical, pursuant to the cardinal rule of statutory interpretation, there is no need to resort to other methods of interpretation. Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, Extraordinary Issue, year 6, no. 1, (1960). [Hereinafter Civil Code]

[8] *Ibid.*, Art. 2927 (1) *cum.* Arts. 2965 and 2966.

[9] For more on this see Mihret Alemayehu, *Protection of Tenure Security in Private Renting under Ethiopian Residential Lease Law: A Comparative Study, 8(1(* BAHIR DAR UNIVERSITY JOURNAL OF LAW 1-34 (2017).18 The literature on Ethiopian Residential Lease Law is scant.

[10] Civil Code, Art. 2968(1). In such cases, the law considers the lease tacitly renewed and the lease becomes an indeterminate period lease.

[11] CHRISTINE WHITEHEAD, SARAH MONK, KATH SCANLON, SANNA MARKKANEN & CONNIE TANG, THE PRIVATE RENTED SECTOR IN THE NEW CENTURY: A COMPARATIVE APPROACH 31 (University of Cambridge, 2012) available at: https://www.cchpr.landecon.cam.ac.uk/Research/Start-Year/2010/Private-Rented-Sector-New-Century-Comparative-Approach/Project-Report (last visited May 15, 2020)

[12] Schmid, Christoph. U., *Tenancy Law: General Report*, p. 35, https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGeneralReport.pdf (last visited Apr. 10, 2020)

[13] *Ibid.* Some countries like France and Italy do not recognize indeterminate period lease agreements. *Ibid.*

[14] Wakabayashi, Tsubasa, *Tenant's Rights Brochure in Japan, in*, MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 431 (Schmid, Christoph. U., and Dinse,

The open-ended nature of an indeterminate period lease raises the question of how it terminates. While serving notice by the lessor to terminate an indeterminate period lease is the norm, many pro-tenant states also require showing just cause.[17] The requirement of notice is procedural protection whereas good cause is a substantive one.[18] These requirements aim to protect tenants, generally considered the weaker party in the relationship, by ensuring sufficiently stable conditions or secure tenure.[19] Generally, tenancy law aims to achieve this objective without creating an unbearable burden on landlords so that the market can still be attractive to landlords and investors.[20] Thus, the aim is to create socially desirable and economically efficient outcomes by balancing the interests of tenants and landlords.[21] The social objective is to make affordable housing accessible to those who have no means to obtain it by themselves.

Unlike termination by the landlord, the requirements for termination of an indeterminate period lease by the lessee are generally not stringent in many jurisdictions. Usually, showing cause is not required and the period of notice is shorter.

Jason, R. eds., 2014), https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf. (last visited May 12, 2019).

15 *See* the Michigan Truth in Renting Act (Act 454 of 1978, MCL 554.631 to 554.641), http://www.legislature.mi.gov/documents/mcl/pdf/mcl-act-454-of-1978.pdf. (last visited Mar. 29, 2019).

16 Alberta Government, *Residential Tenancies Act Handbook for Landlords and Tenants, Residential Tenancies Act and Regulations*, (2018), pp. 27-28, https://open.alberta.ca/dataset/a2767396-099f-43d0-932e-1ec75bf458f3/resource/15cc7bf1-89c6-4baf-9393-ce82d28f3850/download/rta-handbook-bw.pdf. (last visited May 05, 2020).

17 Florence W. Roisman, *The Right to Remain: Common Law Protections for Security of Tenure - An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 831 (2008), available at: http://scholarship.law.unc.edu/nclr/vol86/iss3/9 (last visited May 20, 2020) *See also* Schmid, *supra* note 12, pp. 10-14; SCHMID, CHRISTOPH. U., AND DINSE, JASON, R., EDS., MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE (2014),, available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf. (last visited Mar. 30, 2020)

18 *Ibid.*

19 Schmid, *supra* note 12, at 10-11, 18. For more on this see *also* Yee, Gary, *Rationales for Tenant Protection and Security of Tenure*, 5 JOURNAL OF LAW AND SOCIAL POLICY 35-60, 48 (1989), available at: https://digitalcommons.osgoode.yorku.ca/jlsp/vol5/iss1/3. (last visited May 19, 2020); Haffner, Marietta; Elsinga, Marja & Hoekstra, Joris, Rent Regulation: *The Balance between Private Landlords and Tenants in Six European Countries*, 8(2) INTERNATIONAL JOURNAL OF HOUSING POLICY 217-233, 220 (2008), available at: https://www.researchgate.net/publication/263652684_Balance_between_landlord_and_tenant_A_comparison_of_the_rent_regulation_in_the_private_rental_sector_in_five_countries/download. (last visited Mar. 29, 2020).

20 Schmid, *supra* note 12, at 10-11, 18.

21 *Ibid.*

The rationale is the recognition of the position of the lessee as the weaker party who needs protection. Termination by the lessee is, however, out of the scope of this paper as the case at hand involved termination by the lessor.

3.1.1 Just cause

In pro-tenant jurisdictions, showing just cause is the first requirement to terminate an indeterminate period lease by the lessor.[22] Just cause is a legal ground for termination of a tenancy. Usually, just cause is established when the lessee defaults on his obligations which include failure to pay rent, anti-social behavior, and damaging the leased house.[23] Causes that are not attributable to the tenant such as own or close family dwelling and change of purpose of the dwelling also constitute just cause in some jurisdictions.[24] Many European countries including Germany, Norway, Sweden, Denmark, Finland, and the Netherlands,[25] and some states in the U.S.A. such as New Jersey and the District of Colombia[26] fall in this category. In those jurisdictions, termination of a lease by the lessor is permitted only if there is just cause. Ensuring higher security of tenure is the priority in those jurisdictions.[27]

However, in many jurisdictions, showing just cause is not required to terminate a periodic tenancy.[28] A periodic tenancy is a type of tenancy that continues after the expiry of the fixed term lease or after the expiry of the statutory minimum lease term.[29]

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[22] Shelter UK, *Time for Reform: How Our Neigbours with Mature Private Renting Markets Guarantee Stability for Renters*, (2016), p. 14, https://england.shelter.org.uk/__data/assets/pdf_file/0005/1289615/Time_for_reform_FINAL.pdf. (last visited Feb. 10, 2020).

[23] *Ibid.*

[24] For instance, in Germany, use of the premises for himself, members of his family or of his household and inability of the landlord to make appropriate commercial use of the premises due to the tenancy contract is considered as just cause. *See* Cornelius, Julia, *Tenant's Rights Brochure in Germany, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 323 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf. (last visited Mar. 30, 2020).

[25] Shelter UK, *supra* note 22, at 7. In those European countries, a lease is normally made for an indefinite period (for life) and termination is permitted only if there is just cause. *Ibid.* European countries that do not recognize contracts unlimited in time include Portugal, Spain, Italy, Austria, France and Belgium. *See* Schmid, *supra* note 12, at 39.

[26] Florence, *supra* note 17, at 834-835.

[27] Schmid, *supra* note 12, at 10-11.

[28] Many countries in Europe and States in the USA like Michigan and Provinces in Canada like Alberta have those types of tenancies recognized in their law. See generally Schmid and Dinse, *supra* note 17; The Michigan Truth in Renting Act, *supra* note 15; and Alberta Government, *supra* note 16, at 27.

In contrast, in jurisdictions like South Africa,[30] China,[31] Hong Kong,[32] Japan,[33] the State of Michigan in the U.S.A.[34] and the Province of Alberta in Canada[35] showing cause is not required to terminate an indeterminate period lease. Accordingly, the lessor can terminate the lease at any time and for no cause. Freedom of contract is prioritized in those jurisdictions.

Ethiopian residential lease law on private renting follows the latter approach in that cause is not required to terminate an indeterminate period lease. This is certainly true under the Civil Code.[36] Accordingly, the lessor can terminate an indeterminate period lease anytime and for no cause. However, certain aspects of government-owned houses, which were administered by the then Agency for Rented Houses, whose rights are now transferred to the Federal Housing Corporation, are governed by special laws.[37] The principal laws are the Agency for Government Houses Dissolution Proclamation No. 1022/2017[38] and the Federal Housing Corporation Establishment Council of Ministers Regulation No. 398/2017.[39] These laws contain certain rules that differ from the Civil

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[29] 'Periodic tenancy' is renewed automatically with no fixed end date. It can be 'month to month' or 'week to week' tenancy depending on the frequency of rent payment. *Ibid.*

[30] Socio-Economic Rights Institute of South Africa, *A Tenant's Guide to Rental Housing* (30 Sep 2013), available at: https://www.wits.ac.za/media/wits-university/faculties-and-schools/-engineering-and-the-built-nvironment/research-entities/cubes/documents/A%20Tenants%20Guide%20to%20Rental%20Housing.pdf. (last visited Mar. 02, 2020).

[31] Chinese rental market is unregulated following the 1998 reform and is led by the market. *See* Stein, G. M.. Commercial leasing in China: An overview,8 CORNELL REAL ESTATE REVIEW 26-33, at 7 & 30 (2010).

[32] Research Office of the Legislative Council Secretariat, *Tenancy Control in Selected Places*, IN16/16-17, (2017), p. 2, https://www.legco.gov.hk/research-publications/english/1617in16-tenancy-control-in-selected-places-20170707-e.pdf. (last visited May 15, 2020).

[33] Wakabayashi, *supra* note 14, at 422.

[34] Michigan Truth in Renting Act, *supra* note 15.

[35] Alberta Government, *supra* note 16, at 27.

[36] Civil Code, Art. 2966. The section of the Code on lease of houses (Arts. 2945-2974) governs private renting as well as many aspects of renting of public houses.

[37] The Agency was established by the Agency for the Administration of Rented Houses Establishment Proclamation No. 59/1975 as amended by Agency for the Administration of Rented Houses Establishment Proclamation No. 133/1998. Proclamation No. 59/1975 as amended by Proclamation No. 133/1998 was applicable at the time the suit was initiated. It was, however, repealed, a few weeks before the Supreme Court rendered its decision, by Agency for Government Houses Establishment Proclamation No. 555/2007. Proclamation No. 555/2007 was in turn repealed by the Agency for Government Houses Dissolution Proclamation No. 1022/2017, which is the relevant law today.

[38] Agency for Government Houses Dissolution Proclamation No. 1022/2017, *Federal Negarit Gazetta*, Year 23, No. 54, 2017.

[39] Federal Housing Corporation Establishment Council of Ministers Regulation No. 398/2017, *Federal Negarit Gazetta*, Year 23, No. 19, 2017.

Code. An example of such a rule is the one on fixing the rent amount. Rent is generally fixed by the Corporation and not negotiable unlike in the private sector.[40] Another is on who rents these houses. These houses are rented out for government officials and employees per the decision of the government.[41] Except for such aspects, the Civil Code regulates renting in government-owned houses including the issue of notice. The Cassation Bench and the lower courts rightly based their decision on the issue of notice on Article 2966 of the Civil Code.

In the case at hand, the Agency raised grounds to justify termination of the lease. The grounds were building of own house and non-payment of rent and water bills by the lessee. The lower courts ruled on the issue and ordered the lessee to pay arrears.[42] By the time the Cassation Bench entertained the petition, the lessee had paid the arrears. Nonetheless, the Agency raised it as one of its arguments and the lessee never disputed it. Failure to pay rent by the lessee is a breach of duty. Unfortunately, the Cassation Bench did not entertain the issue of whether failure to pay rent constitutes sufficient ground to terminate the lease. In some jurisdictions, including those that are strongly pro-tenant, failure to pay rent is a sufficient ground to terminate the lease with immediate effect, without observing a period of notice. For instance, in Germany, default by the lessee to pay two months' or more rent entitles the lessor to terminate the lease by giving extraordinary notice with immediate effect.[43] Had the Cassation Bench grounded its decision to terminate the lease in the absence of notice on the failure of the lessee to pay rent, it may have been a better conclusion.[44] The Cassation Bench did not do so and hence it missed the point.

3.1.2 Notice

Unlike just cause, serving notice of termination is nearly universally required for the termination of an indeterminate period lease by the lessor. Notice (to quit) is defined by

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[40] *Ibid.*, Art. 5(8).

[41] *Ibid.*, Art. 5(2 & 7).

[42] Para. 2 of the Decision; translation by the author.

[43] Cornelius, Julia and Rzeznik, Joanna, *Tenancy Law and Housing Policy in Multi-level Europe*, National Report for Germany, pp. 129 & 166, https://www.academia.edu/29211165/National_Report_for_GERMANY_TENLAW_Tenancy_Law_and_Housing_Policy_in_Multi-level_Europe (last visited June 10, 2020). However, if the landlord's demand is satisfied termination is not allowed. Moreover, the tenant has one to two weeks' time to vacate the house. *Ibid.*

[44] However, Art. 2952 of the Civil Code states that a period of notice of 30 days' should be given by the lessor to the lessee when the lease is made for a year or more and two weeks' notice when it is made for a shorter period. This suggests that it is applicable for fixed term leases and not to non- fixed term lease.

Black's Law Dictionary as "[a] landlord's written notice demanding that a tenant surrender and vacate the leased property, thereby terminating the tenancy."[45] Notice is not defined in the residential lease law section[46] as well as in the section on the lease of immovables in general[47] of the Civil Code. It is, however, possible to deduce some meaning from Article 1773(1) of general contract law. Article 1773(1), which deals with the form of notice, states: "[n]otice shall be by written demand or by any other act denoting the creditor's intention to obtain performance of the contract'.[48] Notice can thus be written or oral communication. Whatever its form, a notice contains demand or request of the person serving it. From the cumulative reading of Articles 2966 and 1773(1) of the Civil Code, we can deduce that notice for termination of a lease by the lessor contains demand of the lessor for the termination of the lease and vacation of the rented house by the lessee.[49]

The primary purpose of notice is the protection of lessees.[50] Notice and the ensuing notice period inform and enable the lessee to get ready about the eventualities of termination. Typically, it will enable the lessee to find a suitable new home and move out in time.[51] Besides, notice serves a crucial purpose in case of termination of an indeterminate period lease. Since the duration of the lease is non-fixed, any party who wishes to terminate the lease has to communicate this fact through notice. Thus, the decision to terminate the lease and the date intended for termination are communicated to the other party through notice.[52]

Because of its importance, jurisdictions make serving notice period by the lessor mandatory to terminate an indeterminate period lease. The difference is concerning the

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45 BLACK'S LAW DICTIONARY, 8th ed., 2004, p. 3376.

46 *See* Civil Code, Arts. 2945-2974.

47 *See Ibid.*, Arts. 2896-2944.

48 The Amharic version uses the terms '**በማስታወቂያ ወይም በሌላ አድራጎት**'.

49 The lessee has also similar rights to terminate the lease. In fact, Ethiopian residential lease law can be categorized as liberal as it contains no meaningful protection to lessees. It does not recognize the unique disadvantages of lessees as it treats the lessor and the lessee in the same manner, as equals, who are able to reach optimum agreements through negotiation. For more on this *see* Mihret, *supra* note 9.

50 Florence, *supra* note 17, at 829-831. *See also* Malkawi, H., Bashar, *Regulating Tenancy Relationships in Jordan: Pro-Landlord, Neutral, and Pro-Tenant*, 25(1) ARAB LAW QUARTERLY 19 (2011), available at: http://www.jstor.com/stable/23025221 (last visited May 12, 2020).

51 The lessor has also an interest to obtain possession of his house without undue frustration. Hence, the notice period should not be too long. *See* Victoria State Government, *Security of Tenure – Issues Paper: Residential Tenancies Act 1997 Review – Fairer Safer Housing,* November 2015, p. 15, https://www.westjustice.org.au/cms_uploads/docs/westjustice-rta-review-security-of-tenure-submission.pdf. (last visited June 10, 2019).

52 The Private Rented Sector in the New Century, *supra* note 11, at 32.

duration of the notice period. Usually, the period of notice ranges from two to six months. For instance, in Austria, the minimum notice period is one month where rent is paid monthly or shorter and three months for tenancies where rent is paid longer than one month.[53] In England and Wales, the minimum notice period to terminate a periodic tenancy is two months.[54] In Sweden, the minimum notice period is three months.[55] In the Netherlands, the minimum notice period is three months.[56] However, the notice period increases by a month for every additional year the lease has been in place until it reaches the maximum period of six months.[57] In Japan, the notice period is six months.[58] In Germany, the minimum notice period is three months while the maximum can be up to nine months based on the length of the tenancy.[59] Accordingly, after five and eight years of occupation, the notice period becomes six and nine months respectively.[60]

The importance attached to notice can be seen from the effect of its non-observance. In many jurisdictions, if notice is not served, if the notice period is shorter than what the law requires or if its form differs from what the law prescribes, termination cannot take effect. In such cases, the lessee will continue to live in the leased house. For instance, in

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[53] Hofmann, Raimund, *Tenant's Rights Brochure in Auatria, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 32-33 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf. (last visited Feb. 16, 2020).

[54] *See* Sparkes, Peter, Tenant's Rights Brochure in England, *in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 217 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf. (last visited Feb. 12, 2020). In England and Wales, indeterminate lease terms are not recognized in their laws. There is instead periodic tenancy, which exists when assured short-hold tenancy that has statutory fixed end date of minimum six months is continued after the minimum or agreed period. *Ibid.*

[55] Bååth, Olivia, *Tenant's Rights Brochure in Sweden, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 816-817 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf (last visited Mar. 16, 2020).

[56] *See* Hafida, Bounjouh & van Veen, Menno, *Tenant's Rights Brochure in the Netherlands, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 589 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf (last visited Feb. 16, 2020).

[57] *Ibid.*

[58] Wakabayashi, *supra* note 14, at 446.

[59] Cornelius, *supra* note 24, at 324. However, if the landlord lives in the same dwelling with the tenant, the minimum notice period is twelve months. *Ibid. See also* Davies, Bill, *et al, Lessons from Germany: Tenant Power in the Renal Market,* Institute for Public Policy Research (IPPR) Report, (2017), pp. 14-15, https://www.ippr.org/files/publications/pdf/lessons-from-germany-jan17.pdf (last visited May 22, 2020).

[60] *Ibid.*

Ireland, an invalid notice of termination results in turning the tenancy into Part 4 Tenancy, which has a life of three and a half years renewable every four years.[61] Further, proceeding on an invalid notice carries criminal liability for the landlord.[62] In France, if the notice to quit is not made as per the requirements of the law, it becomes void and the lease is renewed for the same period (3 or 6 years).[63] In Switzerland, when the requirements of serving notice are not met, termination becomes void.[64] The rationale behind such robust rules on notice is the protection of tenure security to tenants.[65]

In Ethiopia, the pertinent provision of the Civil Code on notice reads as follows:

> *Art. 2966. Termination of lease for indeterminate period*
>
> *(1) Where the contract of lease has not been made for a determinate period, notice may be given by the lessor to the lessee or by the lessee to the lessor.*
>
> *(2) In such case, the contract shall terminate on the day when, under the contact or the law, the second term of rent becomes or would have become exigible, had notice of termination not been given.*[66]

Pursuant to Article 2966(1), the lessor who wishes to terminate an indeterminate period lease has the right to do so by serving notice to the lessee. It is also true that notice of termination can be served anytime irrespective of the duration of the lease. In other words, whether the lease has been in place for a month, six months or more is

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61 Jordan, Mark, *Tenant's Rights Brochure in Ireland, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 379 & 389 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf (last visited May 26, 2020)

62 *Ibid.*

63 Cornette, Fanny, *Tenant's Rights Brochure in France, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 293 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf (last visited Apr. 15, 2020).

64 Wehrmüller, Anna, *Tenant's Rights Brochure in Switzerland, in* MY RIGHTS AS TENANT IN EUROPE: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 838 (Schmid, Christoph. U., and Dinse, Jason, R. eds., 2014), available at: https://www.tenlaw.uni-bremen.de/My%20Rights%20as%20Tenant%20in%20Europe.pdf (last visited May 26, 2020)

65 *See* Schmid, *supra* note 12, at 10-11, 18. See *also* Yee, *supra* note 19, at 48.

66 The authoritative Amharic version of Article 2966 reads as follows:
ላልተወሰነ ጊዜ የተደረገ የኪራይ ውል ስለ ማለቅ
1) **የኪራይ ውል የተደረገው ላልተወሰነ ጊዜ እንደሆነ አከራዩ ተከራይን ለማስታወቅ ወይም ተከራዩ አከራይን ለማስታወቅ ይችላል።**
2) **አንዲህ በሆነ ጊዜ ውሉ አለቀ የሚባለው በኪራዩ ውል ወይም በሕጉ መሰረት ተከታዩ የኪራይ ዘመን ዋጋ በሚከፈልበት ቀን ወይም ውል ስለ ማለቅ ማስታወቁን ባይሰጥ ኑሮ ኪራይ ሊከፈልበት ይገባው በነበረበት ቀን ነው።**

irrelevant.[67] Further, showing any cause, let alone just cause, is not required under the Civil Code unlike in many jurisdictions.

Article 2966(2) sets some subtle rules. The important rule is the one on the duration of the notice period, which is set in an obscure manner. The phrase in Article 2966(2): "… the contract *shall terminate on the day when … the second term of rent … would have become exigible*, had notice of termination not been given" determines the day the lease terminates. (Emphasis added). Here, the phrase 'the second term of rent' refers to the next term of rent or the next rent due date.[68] Accordingly, an indeterminate period lease terminates on the day when the next rent becomes due. The question then is when does the next rent become due? Article 2966(2) does not tell when the next rent becomes due and hence it does not provide the exact date on which the lease terminates. Rather, Article 2966(2) aligns the date of termination with the rent due date which is governed by Article 2951. Under Article 2951(1), the rent due date is determined by the agreement of the parties or by the law in the absence of an agreement. In this regard, the law prioritizes the principle of freedom of contract. Accordingly, the parties can agree for rent to be paid weekly, monthly or quarterly.[69] If, for instance, the parties agreed for rent to be paid weekly, pursuant to Article 2966(2), the lease terminates at the next rent due date which is a week after. If rent is paid at the beginning of each month, then the lease terminates at the beginning of the next month if notice of termination is served. However, if an indeterminate period lease agreement fails to fix the rent due date, the law determines it to be paid at the end of each month.[70] In this case, the lease terminates at the end of the next month when notice of termination is served. This rule implies there is a period of time the lessor has to wait before the lease terminates. This period is tied to the rent due date, i.e., to the time the rent is paid.[71] If rent is paid weekly, the lessor has to wait for a week for the lease to terminate, and if rent is paid monthly, the lessor has to respect a month to terminate the lease.

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[67] Ethiopian residential law does not thus provide minimum lease duration.

[68] The prevailing Amharic version uses the term **"ተከታዩ የኪራይ ዘመን ዋጋ የሚከፈልበት ቀን".**

[69] Ethiopia does not have specialized institution to gather detailed data on rental housing. However, from personal observation it is possible to conclude that rent is commonly agreed to be paid monthly.

[70] Civil Code, Art. 2951(2).

[71] Still, Article 2966(2) is not clear as to when notice should be served. If for instance rent is paid at the beginning of each month, can the lessor give notice at the middle of the month or on the last week of the month or should it always be served at the beginning of the month so that the lease can terminate at the beginning of the next month? In some jurisdictions, the notice period is counted from the day notice is served irrespective of the rent due date. However, in Germany, notice must be given within the third working day of each month. The position of our law seems that notice must be given at the rent due date so that it can terminate at the next rent due date. This would, however, make the lessor to wait until the rent due date to serve notice.

The period the lessor has to observe before the lease terminates is what is commonly called a period of notice. Although it is implicit, Article 2966(2) talks about a period of notice. The use of the word 'shall' in Article 2966(2) means that observing a period of notice is a mandatory requirement to terminate an indeterminate period lease. Accordingly, the lessor cannot terminate an indeterminate period lease without serving notice period to the lessee. As discussed above, the duration of the mandatory period of notice is equivalent in duration to the rent due date.

This line of interpretation is also supported by Article 2967(1 & 2). It states that the new acquirer of a leased house who has the right to terminate the lease "…*shall observe the period laid down in Article 2966(2)* … [a]ny stipulation to the contrary shall be of no effect." (Emphasis added). The period Article 2967 states unambiguously is the period of notice the new acquirer has to wait before he terminates the lease of the newly acquired house. As discussed above, the notice period is equal in duration to the rent due date, i.e., if rent is due monthly, then the period of notice is one month. Therefore, Article 2966(2) deals with a mandatory period of notice for the termination of an indeterminate period lease.

Under general contract law, there is a similar rule regarding contracts for an undefined period. Article 1821 states: "[w]here a contract is made for an undefined period of time, both parties may terminate it on notice." One can note the similarity in wording between Article 1821 and Article 2966(1), particularly, in the use of the word 'may'. However, contract law is clearer on the period of notice and its mandatory nature. Article 1822, which is captioned as 'period of notice' states:

> *(1) The party who terminates a contract shall comply with legal or customary periods of notice.*
>
> *(2) Where the period of notice is not fixed by the law or by custom, it shall be reasonable having regard to the circumstances.*

In both sub-articles, the word 'shall' is used, which signifies that serving a period of notice is a mandatory requirement or a prerequisite to terminate a contract made for an undefined period. It also states that when no law or custom fixes a period of notice, a reasonable period of notice must be served having the circumstances into account to terminate a contract of an undefined period. In any case, a notice period is a prerequisite to terminate a contract of an undefined period. Although Article 2966 is not explicit regarding the period of notice as Article 1822, the thorough reading of the provision reveals that notice period is a mandatory requirement too.

In the case at hand, the Cassation Bench ruled to terminate the indeterminate period lease between the parties in the absence of notice. The Cassation Bench clearly stated that serving notice is a right but not a mandatory requirement for the termination of such a lease. The Cassation Bench seems to have reached this ruling by taking the phrase in Article 2966 (1) "... notice *may* be given by the lessor to the lessee ..." on its face.[72] It is true that in legal language, the word 'may' does not imply a mandatory requirement or a precondition; it rather shows an option for the doer. The Cassation Bench seems to have taken this literally to conclude that serving notice is not a mandatory requirement to terminate the indeterminate period lease.

This writer, however, argues that the word 'may' in the phrase "*... notice may be given by the lessor to the lessee ...*" in Article 2966(1) is understood by the Cassation Bench out of context. The contextual and logical reading of Article 2966(1) shows that what is put as an option or choice by the use of the word 'may' is not whether or not to serve notice to terminate an indeterminate period lease. The choice is whether to continue with the indeterminate period lease or to terminate it. As a lease for an indeterminate period does not have a fixed end date, the law gives the lessor (or the lessee) the right to decide on the end date of the lease. The word 'may' signifies only this option. Once the lessor opts to terminate it, then serving notice is not an option. In other words, serving notice to the lessee after the lessor exercised the right to terminate the lease is not a choice left for him to make; it is a mandatory requirement that cannot be escaped.

The expression used in Article 2966 can be contrasted with that in Article 2965 which deals with termination of a lease for a determinate period. Article 2965 states: "[a] contract of lease made for a determinate period shall terminate as of right on the expiration of the period agreed upon without the necessity of giving notice." Accordingly, a determinate lease terminates out rightly at the end of the agreed term without the need to serve notice. Article 2965 explicitly spells out that notice is not necessary to terminate a fixed-term lease. Similarly, if notice were not considered as a necessary precondition in Article 2966 too, it would be put in such an explicit manner as in Article 2965. The wording in Article 2966 is rather different and does not state that notice is not necessary or mandatory to terminate an indeterminate period lease.

Furthermore, while interpreting Article 2966, the Cassation Bench should have taken into account the nature of an indeterminate period lease itself. As discussed above, an indeterminate term lease is a type of lease that has no fixed end date the parties knew in advance. Hence, the decision of the lessor to end the lease and the date on which it has

[72] Note that the Cassation Bench has not sufficiently reasoned out why serving notice is not a mandatory requirement.

to be ended has to be communicated to the lessee by giving advance notice. In the absence of such notice, the lessee cannot know the decision of the lessor to terminate the lease and the date to vacate the house. The nature of indeterminate term lease makes serving notice to have no substitute to terminate the lease.[73] The decision of the Cassation Bench to terminate the indeterminate period lease without notice has thus failed to consider this fact.

The Cassation Bench should have taken into account the purpose of serving advance notice as well. Advance notice enables the lessee to prepare for the eventuality of moving out of the rented home.[74] The lessee needs adequate time to find a suitable replacement home and to pack and move out.[75] Thus, the lessor should not only be required to give notice but also to give notice period that is adequate in duration to do all those activities. The requirement of a period of notice is a safeguard to lessees from arbitrary removal by the lessor. It aims to provide some degree of tenure security to lessees who are considered as the weaker party in the relationship.[76] The Cassation Bench's interpretation of Article 2966(1) that notice is not mandatory to terminate an indeterminate period lease and evict the lessee is against this purpose of notice.

A related issue is how the Cassation Bench understood notice. In rejecting Tadele Abebe's argument that he should not be evicted without notice, the Cassation Bench reasoned: "nearly a year has passed since the respondent was sued to leave the house and until only the First Instance Court made its decision on the case. Hence, the argument of the respondent that he should not leave the house because he was not given advance notice is not acceptable". This means due to the length of time the lawsuit for termination of the lease has taken, the lessee cannot object termination on the absence of notice from the lessor. This implies that the lessee was informed of the decision of the lessor to terminate the lease via the lawsuit. This begs the question of what constitutes notice and how notice should be served.

As discussed above, the cumulative reading of Articles 2966 and 1773(1) imply that notice of termination by the lessor can be written or oral communication containing demands of the lessor for termination of the lease. What is not clear from Article 2966 is how notice should be served. The special section on the lease of houses, the general section on the lease of immovable and the general contract law section of the Civil Code are devoid of rules on the issue. In other jurisdictions, such notice may be given

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[73] The Private Rented Sector in the New Century, *supra* note 11, at 32.

[74] Victoria State Government, *supra* note 51, at 15.

[75] *Ibid.*

[76] For more on the rationale of tenant protection, *see* Yee, *supra* note 19. *See also Id.*, at 27.

through certified mail, by state agents or process servers, or hand-delivered.[77] Although Ethiopian residential lease law does not provide the manner of serving notice, the lessor can serve notice either in person or via registered mail.[78] It is, however, hard to conceive of a lawsuit as a means of serving notice to the lessee to terminate the lessee. A lawsuit is a petition to a court of law for the determination of one's legal rights.[79] Notice, on the other hand, is a demand of the lessor served to the lessee, not to the court, for the termination of lease and eviction of the lessee. Normally, a petition to enforce one's right through court is taken after the required procedures including serving advance notice are taken. As discussed above, serving notice is a mandatory requirement in the absence of which indeterminate period lease cannot be terminated. Hence, the decision of the Cassation Bench to terminate the lease in the absence of notice based on the length of time the lawsuit brought for its termination has taken is erroneous and contrary to the concept and purpose of notice.

3.2 The Issue of Compensation

The second point worth commenting on is the issue of compensation decided by the Cassation Bench as the right of lessees. The Cassation Bench held that the lessee could only request compensation for the damage suffered because of termination of an indeterminate period lease without being given notice.[80] This conclusion of the Cassation Bench is however unfounded. Neither the special section on lease of house nor the section on lease in general of the Civil Code provides compensation as a remedy for termination made by the lessor without notice.[81] In contract law, compensation is provided as a remedy for breach or non-performance of a contract.[82] Termination of a contract is not a breach or non-performance of a contract. It is one means of extinguishing contractual duties.[83] Hence, the issue of damage cannot arise in case of

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[77] Most countries in Europe and the Americas follow this approach. *See,* for instance, Cornette, *supra* note 63, at 293. In the U.S.A., there is what is called "process servers" who serve legal documents including notice to quit.

[78] To the writer's knowledge, there is no state agent or institution to serve notice in civil matters in Ethiopia. Under the Criminal Procedure Code, the police serve summon to suspects. Under Art. 364(1) of the Civil Procedure Code, notice can be served by affixing the same in some conspicuous place and by publication in newspapers.

[79] Black's Law defines a lawsuit as "[a]ny proceeding by a party or parties against another in a court of law." BLACK'S LAW DICTIONARY, *supra* note 45, at 4499.

[80] Para. 6 of the Decision; translation by the author.

[81] *See* Civil Code Arts. 2945-2974 and Arts. 2896-2944, respectively.

[82] *See* Civil Code Arts. 1771 & 1790 *cum.* Arts. 1821 & 1822. Generally, Arts. 1771-1805 talks about non-performance while Arts. 1819-1824 deals about termination.

[83] *See* Civil Code Arts. 1806-1856.

termination when done as per the requirements of the law. The procedure required to terminate contracts for an undefined period is to provide a period of notice, which may be set by the law, custom or set reasonably in the absence of both.[84] A party can thus lawfully terminate a contractual relationship by providing the required period of notice with no duty to compensate whatever loss the other party may face due to discontinuation of the relationship. Now, the Cassation Bench interpreted Article 2966 that the lessor can terminate an indeterminate term lease without notice. If, according to the interpretation of the Cassation Bench, the law allows termination without notice, there is no reason for the lessor to compensate the lessee for any damage incurred because of a lawful act.

The Cassation Bench might have made this decision to protect lessees. However, lessees are better protected when arbitrary termination of a lease is prohibited by entrenching the right of lessees to a period of notice. The requirement of a period of notice is a procedural due process right widely employed to protect tenants in many jurisdictions.[85] Accordingly, the lessor must serve advance notice of termination to the lessee before a proceeding in a court of law for termination of the lease and eviction of the lessee is initiated.[86] Otherwise, the lease cannot be terminated and the lessee continues to live in the rented house.[87]

Further, requiring lessees to prove damage suffered due to termination of the lease by the lessor without notice is burdensome for the lessees. It is costly, time-taking and gives the lessor more power over lessees.[88] Hence, it will not be effective protection. Moreover, compensation is requested after moving out, i.e., after the lessee suffered all the ordeals of removal from their rented home and after all the insecurity suffered. Pecuniary compensation may not always adequately compensate for the loss in this type of relationship. Some scholars argue that loss of a home can cause harm beyond economic harm for a home "represents things that money itself can't buy place, position, relationship, roots, community, solidarity, status."[89] Thus, the decision of the

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[84] Civil Code, Arts. 1821 & 1822.

[85] For instance, in the Netherlands, although compensation for termination is provided as a remedy in some cases, it does not include when termination is made by the lessor without notice. *See* Hafida & van Veen, *supra* note 56, at 589. For further reading on the issue, *see* Schmid and Dinse, *supra* note 17. It details tenant and landlord laws of European countries. *See also* Florence, *supra* note 17, at 831.

[86] *Ibid.*

[87] *Ibid. see also* text accompanying notes 61-65.

[88] Yee, *supra* note 19, at. 40-41.

[89] Bell, H., Deborah, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 530 (1985).

Cassation Bench, which inappropriately sought to replace the requirement of notice with compensation,[90] weakens the protection afforded to lessees by the law.

4. Conclusion

In *Agency for Rented Houses v. Tadele Abebe,* the Cassation Bench ruled, by interpreting Article 2966(1), that serving advance notice by the lessor is not a mandatory requirement to terminate an indeterminate period lease. This is, however, a flawed judgment reached based on a wrong understanding of the provision. The contextual reading of Article 2966, the nature of the lease and the purpose of advance notice dictates that serving notice is a mandatory requirement to terminate an indeterminate period lease. Since an indeterminate term lease does not have an agreed end date, the end date has to be communicated via notice. What is optional under Article 2966(1) is whether to continue with the lease or to terminate it. Once the lessor decides to terminate the lease, serving notice is a mandatory requirement. Further, the duration of the notice period is fixed by Article 2966(2) to be equivalent to the rent due date which may be determined by the agreement of the parties or by the law. The requirement of notice is a procedural due process right that aims to protect lessees. It enables the lessee to prepare for the consequences of termination. However, the interpretation of Article 2966(1) by the Cassation Bench, which is binding on lower courts,[91] erodes this right. Hence, reinstating the right of lessees to a period of notice through revision of the decision[92] or legislation is of paramount importance.

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[90] *See* Para. 6 & 7 of the Decision; translation by the author.

[91] *See* Federal Courts Proclamation Re-Amendment Proclamation No.454/2005, *supra* note 3, Article 2(4).

[92] *Ibid.*