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Bahir Dar University Journal of Law

ISSN 2306–224X

ቅጽ ፪ ቁጥር ፪		ግንቦት ፪ሺ፬
Vol. 2 No. 2		May 2012

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A bi–annual law journal published by the Bahir Dar University School of Law

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Established in 2010

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Message from the Editorial Committee

Let us carry it forward!

The Editorial Committee of *Bahir Dar University Journal of Law* is delighted to present you the second issue of the second volume of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude for those who made it happen.

At this stage the Editorial Committee would like to make its continued undisguised appeal for sustained contribution of manuscripts. It is essential that the community of legal professionals and public and private institutions be supplied with research outputs on matters related to law. For those of us in the academia doing it is our destiny. It is also essential that practicing legal professionals research and reflect on "the law in action". The scientific presentation and dissemination of ideas by individuals from within and outside the academic world is vital to nurture a developing culture of legal discourse, enhance the creation of new knowledge and help to develop the legal system. It is only then that we will be able to scale up the heights of quality justice. In this regard the continued publication of *Bahir Dar University Journal of Law* is an invaluable forum. Let us carry forward the humble beginning!

The Editorial Committee, thus, calls upon members of the academia and the legal profession in general to submit contributions on various legal issues pertaining to Ethiopian laws. The *Journal* welcomes research articles, comments on cases which standout for any important reason, reflections on current legal issues and book reviews.

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Bahir Dar University Journal of Law

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Vol. 2 No. 2	May 2012

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Law and Development in Ethiopia: A Historical Overview

Firehiwot Wujira*

Abstract

Law and Development has been a field of academic study for almost half a century. Internationally, the law and development movement got momentum in 1960's and 70's. Despite contention on the nature of laws, the successive law and development movements have emphasized the significant role law plays in economic development. It is underlined that efficient and effective legal and judicial system is among the pillars which support economic development in developing countries.

This article attempts to explore the historical evolution of the relationship of law and development in Ethiopia. It gives highlight on how the international law and development paradigms shaped the law and development relationship in Ethiopia. It pinpoints how the different economic policies which prevailed in the country were able to shape the role of law in development.

Introduction

Law and Development has been a field of academic study for almost half a century. Internationally, the law and development movement got momentum in 1960's and 70's. Despite contention on the nature of laws, the successive law and development movements have emphasized the significant role law plays in economic development. It is underlined that efficient and effective legal and judicial system is among the pillars which support economic development in developing countries.

This article attempts to explore the historical evolution of the relationship of law and development in Ethiopia. It gives highlight on how the international law and development paradigms shaped the law and development relationship in Ethiopia. It pinpoints how the different economic policies which prevailed in the country were able to shape the role of law in development. It also canvasses the nature of the Ethiopian legal system before the era of codification and how it relates with economic development. It argues that the existence of diverse,

unsystematic traditional, customary and religious rules and edicts created legal uncertainty and hence contributed little to economic development. It also examines the era of codification and how for the first time explicit link started to be made between law and economic development in Ethiopia. The failure of the socialist era laws to kick start economic development is also discussed before finally arguing the legal reform projects undergoing in 21st century Ethiopia seem to show the existence of conscious recognition of the link between formal law and economic development.

1. Law and Development Paradigms: A General Overview

Academic and scholarly interest in the relationship of Law and Development has a very long history dating as far back as the 18th century. Montesquieu, Maine and Weber were among the leading names interested in various aspects of the relationship between law and development.[1] Nonetheless, it was only since after World War II – around the 1960s – that systematized study of the subject matter and activities which targeted reform of legal institutions became part of international development practice. Law and Development as an academic field of study began in the US in the 1940s, reached its climax in the middle to late 1960 and was "declared to be dead and reached an impasse in late 1970s".[2] The activity and effort of the 20th century American legal scholars to study the role

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[1] Davis, K & Treblicock, M., 'The Relationship between Law and Development: Optimists versus Skeptics', *American Journal of Comparative Law*, Vol.56 (4), 2008, p.899 [Hereinafter Davis & Treblicock]

[2] Cao, L., 'Book Review: Law and Economic Development: A New Beginning?', *Texas International Law Journal*, Vol.32, 1997, p.546.

of law in development is simply known as 'the law and development movement'.[3]

Law and Development as a discipline simply strives to study and figure out the role of law and its impact on a developing country development prospects. Trubek, a pioneer champion of the Law and Development Research Agenda with immense experience on the subject matter, argues "Law and Development" refers to the interaction and interface that exists between legal theory, economic development theory and international development practice and the potential of this interaction to promoting economic and social progress.[4]

Of course, a scholar's articulation of law and its role in development has been different depending on her conception of development. Some incline on the relationship of law and economic development (mainly due to their conception of development as economic growth) thereby suggesting legal reforms which are capable of bringing economic growth. Others on the contrary are interested on the role law plays in bringing social progresses including respect for human rights, gender equality and more generally distributive justice. Their idea of legal reform aims to achieve development which incorporates human development other than economic growth.[5]

The different role given to law by various law and development scholars is mainly due to the lack of universal consensus on the meaning of development. The idea of development has evolved through time and the contemporary

[3] Davis & Treblicock, p.899.

[4] Sherman, F., 'Law and Development Today: The New Developmentalism', 10 *German Law Journal* (2009), p.1260 [Hereinafter Sherman].

[5] Davis & Treblicock, p.898-9.

conception of development is different from the past. We are thus forced to canvass the wide contemporary perspectives on development and ask "what is development?"

Dubbed the central organizing concept of our time,[6] development and issues related to it concern national government agencies and different international organizations including the United Nations (UN) and World Bank (WB).[7] Citing Kathleen Staudt, Michael Cowen and Robert Shenton take development to mean:

> "a process of enlarging peoples' choices'; of enhancing participatory democratic processes and the 'ability of people to have a say in the decisions that shape their lives'; of providing 'human beings with the opportunity to develop their fullest potential' and of enabling the poor, women, and 'free independent peasants' to organize for themselves and work together. Simultaneously, development is defined as the means to 'carry out a nation's development goals' and to promote economic growth, equity and national self-reliance."[8]

Amartya Sen, a leading development thinker, defines development as a process of expanding the real freedoms that people enjoy.[9] Accordingly, development occurs when many "unfreedoms" like poverty, lack of public infrastructure, lack of educational and health opportunities, gender discrimination are removed.[10] Sen introduced a new concept that development

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[6] Cowen M. & Shenton R., 'The Invention of Development' *in* Crush, J. et al, *Power of Development*. Routledge, London, 1995, p.27 [Hereinafter Cowen & Shenton].

[7] *Ibid*.

[8] *Id*, 28.

[9] Chimni, B, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels', *The Law and Development Review*, Vol.1 (1), 2008, p.3 [Hereinafter Chimni].

[10] *Ibid*.

is more than economic growth, technology transfer, or raising standards of living.[11]This is a paradigm shift from the previous thinking of development and is synonymous with the idea of "alternative development".

Alternative development is a new notion of development which emphasized human development[12] in addition to economic growth.[13] It expands the concept of development to incorporate, among other things, the fulfillment of food self sufficiency, basic needs to citizens measured by "millennium development goals" (MDG).[14] Before the ascendance of these recent views of development, modernization and dependency theories dominated theoretical perspectives on the relationship between law and development.[15]

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[11] *Id.*

[12] Since the early 1990s, human development has been famously defined as "a process of enlarging people's choices." The core capacities for human development are now said to include enjoying a long and healthy life, being educated, access to resources that enable people to live in dignity, being able to participate in decisions that affect their community; see <http://hdr.undp.org/en/humandev/lets-talk-hd/2010-05/>.

[13] Pieterse, J., 'After post-development,' *Third World Quarterly*, Vol. 21, No. 2, 2000, p.181 [Hereinafter Pieterse].

[14] *Ibid*; as one of the anonymous reviewers noted, Sen's conception of development as freedom "is not far away from the idea of 'alternative development'. Sen's 'development as freedom' points that people should have the freedoms (capabilities) to lead the kind of lives they want to lead, to do what they want to do and be the person they want to be. Hence, his theory evaluates policies according to their impact on people's capabilities (freedoms) to live the kind of life they desire. The fulfillment of basic freedoms or capabilities, such as being healthy, well nourished, political participation, high quality education etc serves as inputs for people to live the kind of life they want to live. The author believes "development as freedom" covers the full terrain of human well being and hence relates to the idea of "alternative development."

[15] Tamanaha, B., 'The Lessons of Law and Development Studies,' *American Journal of International Law,* Vol. 89, No.2, p.470 [Hereinafter Tamanaha].

Modernization Theory

US President Harry Truman, in his inaugural speech before congress in 1949, attempted to address the condition of developing countries and for the first time he defined those poorer countries as "underdeveloped areas".[16] This judgment was made mainly based on the level of industrialization and economic development of the third world countries compared with their northern developed counterparts. The level of production was taken as the means of measuring nation's civilization.[17] Following this speech, modernization theories and praxis came out.

The Cold War era created conducive environment for the west and the third world to create friendly environment. Driven by close relationship and the interest of the western countries to expand their sales market, the west set itself the ambitious goal of promoting development in and modernizing the third world.[18] Different domestic and international donors handed down massive financial support to facilitate this project. The ideological thrust of this movement can be found in "Modernization Theory" – originally a model for political development which had its origins in the writings of Max Weber.[19]

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[16] Esayas, B., 'Development as a Background', SSRN Working Paper Series (Posted June 2005), Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=740527> [Last accessed 10th November 2011].

[17] *Ibid.*

[18] Merryman, J. 'Comparative Law and Social Change: on the Origins, Style, Decline & Revival of the Law and Development Movement,' *The American Journal of Comparative Law*, Vol.25, No.3, 1977, p.457 [Hereinafter Merryman].

[19] Schmidbauer, R., 'Law and Development: Dawn of a New Era?' SSRN Working Paper Series (Posted January 2006), Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899217>. [Last accessed 10th November, 2011].

Modernization theorists contended that a society's underdevelopment was both caused by and reflected in its traditional economic, political, social and cultural characteristics or structures.[20]They argued evolution from traditionalism to modernity is a must in order for developing countries to achieve economic growth and reach the level of development attained by developed countries. The modernization of the third world would be accomplished by the diffusion of capital, institutions and values from the first world.[21] Developing countries "were advised to adopt, mimic and import the development pattern of the 'west'".[22] Hence, modernization theory presented the western model of development (industrialization, liberal democracy etc) as indispensable in solving development problems of third world countries.

Relying on modernization theory, the first law and development movement proposed that diffusion of western law to the third world would serve the modernization process.[23] It is inevitable, it was argued, that through evolutionary progress the third world ultimately establish legal ideas and institutions similar to those in the west. Modern law, a tool to mold and alter human behavior, was taken as an essential prerequisite for an industrial economy.[24] Modernization of laws through transplantation of western legal cultures in third world countries was thus thought to be the first step in the development process. Accordingly, in the first law and development movement projects intended to transplant western laws and legal institutions to third world countries were designed and implemented. The early law and development

[20] Davis & Treblicock, *supra* note 1, p.900.

[21] *Ibid.*

[22] Esayas, *supra* note 16, p.2.

[23] Sherman, *supra* note 4, p.6.

[24] Merryman, *supra* note18, p.457.

movement was therefore marked by the concept of legal transplants, mainly of economic law; African, Asian and Latin American countries being subjects of this modernization projects.[25]

Now, the question is "what was the degree of success of these modernization projects?" Were they able to bring the desired economic growth in the third world countries?

The first law and development movement was doomed to failure due to its inability to take into account the real conditions of developing countries.[26] It took little account of forms of legal ordering widespread in several developing countries (e.g. customary laws) and assumed that American legal culture can easily be transplanted to developing countries. Besides, the attempt to educate the society and eliminate traditional social values originating from custom and religion failed. And, American legal advisers working on legal modernization projects abroad were criticized for being ethnocentric, naive and imperialistic.[27]

The first movement was concluded with the perception that law is not of primary importance for development. Also, the limitations of the modernization theory created a suitable condition for the emergence of another development perspective – the dependency perspective.[28]

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[25] Sherman, p.1262.

[26] Tamanaha, *supra* note 15, p.474.

[27] The advisers however argued that developing countries lacked the proper political or civic culture necessary for successful maintenance of western institutions; see Cao, *supra* note 3, p.547.

[28] Esayas, *supra* note 16, p.3.

Dependency Theory

Inspired by Marxism, dependency theory dominated development thinking in 1970s.[29] Contrary to the modernization theory which exclusively focused on factors internal to developing countries as the causes of underdevelopment, dependency theory explains the poverty of developing nations in terms of the history and structure of the global capitalist system.[30]

Dependency theorists held colonialism and the colonial structure responsible for the underdevelopment of the third world. This theory views development differently and rejects the idea that countries are expected to experience similar forms of development.[31] The theory also advocates the replacement of regimes dominated by foreign actors or relatively small local elite with more populist governments that would adopt socialist economic policies. The introduction of socialism inevitably leads, it is argued, to a series of institutional reforms designed to induce significant redistributions of wealth and power.[32]

Dependency theorists, who view law as an instrument for the enforcement of socialist reform agendas like redistributing real property and reforming oppressive land tenure regimes, promoting worker ownership and governance of private enterprises and constitutionally enshrining economic and social rights,[33] are nonetheless skeptical of transplantation of legal institutions transplanted from developed countries to developing ones.

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[29] Snyder, G., 'Law and Development in the Light of Dependency Theory', *Law and Society Review*, Vol.14, No.3, 1980, p.737.

[30] Tamanaha, *supra* note 15, p.478.

[31] *Ibid.*

[32] Davis, K. & Trebilcock, M., 'Legal Reforms and Development', *Third World Quarterly*, Vol.22, No.1, 2001, p. 23. [Hereinafter Davis & Trebilcock *supra* note 32].

[33] *Ibid*, p.22.

The Soviet split and the crisis in the socialist ideology – for it failed to bring the desired economic changes in most developing countries – left dependency theorists without a source of inspiration. Also, the success of the newly industrialized Asian countries through export led industrialization reduced the prestige enjoyed by dependency theory.[34]

After the death of the first law and development movement and the drying up of financial assistance for law specific development research, development activities during the 1980s and early 1990s concentrated on macroeconomic stabilization, privatization and prices, with the law out of the main focus.[35] Amidst this, another development theory inspired by the neo-liberal thinking emerged since mid 1990s, when interest in the relationship between law and development revived. Major international financial institutions started financing law and development researches underlying that law and legal institutions play an important role in facilitating the market system by fostering investment and exchange.[36]

The hegemonic neo-liberal perspective gave law a different role in development. This new theory of law and development posits economic growth and development are subject to the composition and functioning of the institutional environment. Accordingly, certain legal institutions are seen as being particularly important for economic growth and development.[37] Proponents of the new movement contend that property rights should be

[34] Tamanaha, *supra* note 15, p.478.

[35] Schmidbauer, *supra* note 19, p.6.

[36] *Ibid.*

[37] Ohnesorge, J., 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience', *University of Pennsylvania Journal of International Economic Law*, Vol.28, No.2, 2007, p.247.

private rather than common. They also advocate for proper contract law regime and good commercial and corporate laws that enhance capital investment by protecting investor rights. Bankruptcy law (that enables fast exits of inefficient firms) and credible tax regime are also sought.[38] In general, in the new movement law is given the task of stimulating the market system and the participation of the private investors.

The debate on the role of law in development generally revolves around issues like which form of legal system, what type of law, developed where and by whom, which enforcement mechanisms, might improve economic growth and for whom.[39] Although there is no concrete empirical evidence verifying laws positive role in development, long-established and contemporary movements stress that there is enough reason to believe that law definitely has a place in development.[40] Legal systems have both an intrinsic value and an instrumental role in either promoting or retarding development.[41]

2. The Relation between Law and Development in Ethiopia: Past

The emergence of modern legal system in Ethiopia is a relatively recent phenomenon which occurred in the first half of the 20th century. Melaku[42] posits that pre-codification Ethiopia's lack of formal legal system coupled with the existence of scattered and various traditional, customary and religious laws

[38] *Ibid.*

[39] Barr, M. & Avi-Yonah, R., 'Globalization, Law and Development: Introduction and Overview', *Michigan Journal of International Law*, Vol.26, No.1, p.1 [Hereinafter Barr & Avi-Yonah].

[40] Schmidbauer, *supra* note 19, p.6.

[41] Hereinafter Barr & Avi-Yonah, *supra* note 39, p.1.

[42] Melaku, G., *The law as an Instrument of Social Change with Particular Reference to the Condition of Marriage under the Civil Code of Ethiopia: Failure and Successes of the Code* (Addis Ababa University, Faculty of Law, 1993, Unpublished), p.20 [Hereinafter Melaku].

has contributed little to the country's economic development; the inconsistency, uncertainty, lack of structure and enforceability are some of the reasons why religious and customary laws of Ethiopia contributed little to the nation's development. Given Ethiopia is home to various ethnic groups with diverse customs and traditions – there is even a possibility that similar ethnic groups located in different location practice different customs and customary practices might also vary in time and treat similar subject matter differently – one may reckon with Melaku's assertion that customary laws of Ethiopia contributed little to the country's economic development. Of course, the diversity in customary laws and practices might entail uncertainty, arbitrariness and lack of uniformity in customary practices.[43]

René David, the drafter of the 1960 Ethiopian Civil Code, supports the view that the diverse customary laws of Ethiopia are inimical to development.[44] He particularly bemoans the instability and the lack of jurisprudence in pre-codification Ethiopia.[45] The low levels of economic development and the near marginal conditions by which people in the rural areas live have prompted suggestions that such customary systems of rules are inimical to economic progress. Some customary laws and institutions affecting the lives of millions are much more practical and more applicable than the state made laws. However, the critical problem inherent in oral customary law is its inability to govern modern and complex commercial transactions and public matters which are essential for development. Even if customary laws and practices can efficiently govern the daily private life of their respective community, it is difficult for these laws to cope up with complex economic and trade issues and administer sophisticated public matters that cosmopolitanism has brought. Thus, in this regard we might support Melaku's and Rene David's argument that customary

[43] David, R, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review*, Vol. 37,1962-3, p.188.

[44] *Ibid.*

[45] *Ibid.*

laws (if not modified and supported with modern formal state laws) can be hindrances to economic development. Nevertheless, we must not entirely deny the importance of customary laws in development.

Apart from customary law, religious laws played significant role in regulating the conduct of traditional Ethiopians. In particular, Christianity and Islam have provided material sources for religious *cum* secular rules. Religion also shaped the traditional Ethiopian conception of law as "the will of God".[46] Orthodox Christianity, a state religion until 1974,[47] through its strong relationship with the Church of Alexandria reinforced the tie between Ethiopian Kings and the Mediterranean world.[48] This relationship enabled the Christian community to get a historic and monumental compilation of religious and secular laws – the *Fetha Negest*.[49]

It is difficult to trace back the exact time when the *Fetha Negest* was introduced in Ethiopia. Some claim that it was brought to Ethiopia at the request of the mid fifteenth century Emperor Zara Yacob, seeking a written basis for law by which to govern its people.[50] No one also knows when it started to be cited as an authority in the process of adjudication of cases by courts. Yet, the *Fetha Negest* served as an important source of legal principles and a major source of law for the imperial courts.[51] The formal position of the *Fetha Negest* as the supreme ruling law of Ethiopia in civil and penal matters is confirmed by a law issued by Emperor Menelik II – the law states that "the minister of justice must make sure that every judgment is compatible with the

[46] Melaku, *supra* note 42, p.18.

[47] See Article 126, the Imperial Constitution of the Empire of Ethiopia (4th November, 1955)

[48] Melaku, *supra* note 42, p.23.

[49] Tzadua, A., The Fetha Nagast: the Law of the Kings, *in* Uhlig, S. (ed.), *Encyclopaedia Aethopica*, Durham, Carolina Academic Press, 1968, p.6 [Hereinafter Tzadua].

[50] *Ibid.*

[51] *Ibid.*

expression of the *Fetha Negest*."[52] This compiled transplanted written law was a major domestic material source during the codification of the 1930 and 1957 penal codes and the 1960 Civil Code as well.[53]

The secular part of the *Fetha Negest* contains rules on trade, donation, loan, pledge, guaranty, debt settlement, sales, purchase, partnerships, coercion and duress, lease and rent, commercial ventures, lost things and things without owner, judges and judicial procedure, and penal provisions for different crimes.[54] To what extent these detailed laws governed the daily routine relationships of Ethiopians remain elusive. However, there is argument that the *Fetha Negest* was never consistently applied in Ethiopia; the application of customary laws persisted despite its introduction. This was mainly, it is argued,[55] due to the availability of the code in Ge'ez language and its inaccessibility to the majority except the highly educated.

Ethiopia got on board on a politically motivated modernization of its laws with the coming to power of Emperor Haile Selassie I and the adoption of the 1931 Constitution.[56] The Constitution expresses the Emperor's ambition to replace the traditional, decentralized governance structure with more modern centralized state machinery.[57] It was politically motivated because it intended to reduce fragmentation of power and enhance centralization.[58] The constitution was doctored to meet imperial needs – to ensure that the throne will remain within the Emperor's family and not to put the law above him. Conversely,

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[52] *Ibid.*

[53] Murado, A., *Legal History and Traditions*, Part II, JLSRI, Addis Ababa, 2007, p.197.

[54] Tzadua, *supra* note 47, p.14.

[55] Van Doren, J., 'Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System', *Journal of Transnational Law & Policy*, Vol.3, No.1, 1994, p.172.

[56] Van Der Beken, C., 'Ethiopia: From A Centralized Monarchy to a Federal Republic', *Afrika Focus,* Vol. 20, 2007, p.22.

[57] *Ibid.*

[58] *Ibid.*

Bejirond Takla Hawaryat, the drafter of the constitution, is reported to have stated that the constitution had the central objective of restricting the powers of the hereditary aristocracy.[59] Despite the limitations and the wicked intentions of the constitution, it is possible to argue that the constitution served as a stepping stone for further legal developments in Ethiopia. In 1930's and 1940's, statutes on company, bankruptcy, business registration, banking and loan were legislated. These laws, which marked the introduction of modern commercial and business laws in Ethiopia, were however incomplete and unsystematic; hence, the decision to embark on the 1950's and 60's codification.[60]

3. The Relation between Law and Development in Ethiopia during Codification and Since

As briefly explained in the first section of this article, the first law and development movement singled out traditional social, cultural, economic and political institutions for the underdevelopment of most third world countries. The solution proposed was modernization. Legal transplantation was advocated by the first law and development movements of the 1960s and 1970s as a means to the modernization process and materialization of economic development through changing traditional values, institutions and social behaviors.[61] And comprehensive, centralized and top-down legislative reform aimed at modernizing public and private laws characterizes the legal history of many

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[59] Bahiru, Z., *Pioneers of Change in Ethiopia: the Reformist Intellectuals of the Early Twentieth Century*, Ohio University Press, Athens, p.182.

[60] Alemayehu, F., *Legal Pluralism in light of the Federal and State Constitutions of Ethiopia: A Critical Approach* (Addis Ababa University, Faculty of Law, Unpublished, 2004), p.98 [Hereinafter Alemayehu].

[61] Qing, Y., *Court Delay and Law Enforcement in China: Civil Process and Economic Perspective*, Deutscher Universitats-Verlag, Wiesbaden, 2006, p.15; Sherman, *supra* note4, p.1262.

developing countries who in 1960s and afterwards transplanted western laws and legal institutions to modernize their legal system. The 1950's-60's codification projects in Ethiopia belong to this legal history.

During Emperor Haile Selassie's reign, Ethiopia decided to depart from the diverse and incomplete customary laws so as to respond to international criticisms directed against her disorganized and incomplete legal system.[62] Modern legal codes, bearing little resemblance to local traditions, were enacted. The idea of the first law and development movement, the role of modern laws for economic development, seems to have been clearly understood. To quote René David:

> "Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitates the adoption of a 'ready-made' system: they force the reception of a foreign system of law in such a manner as to assure minimal security in legal relations."[63]

In the preambles of the 1960 Civil Code, the Emperor also states that "the civil code has been promulgated in order to modernize the legal framework of the country so as to keep pace with the changing circumstances of this world of today." It stresses that modern laws are so crucial in order to consolidate the progress already registered and also to enhance and facilitate further growth and economic development in Ethiopia.[64] On a similar note, the preamble of the 1960 Commercial Code reiterates the need for modern codified commercial laws to Ethiopia's progress.[65]

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[62] Alemayheu, *supra* note 60, p.90.

[63] David, *supra* note 43, p.189.

[64] Preamble, Civil Code of Ethiopia, 1960, *Negarit Gazeta,* Proclamation No. 165/1960, 19th Year, No.2.

[65] Commercial Code of Ethiopia, 1960, *Negarit Gazeta,* Proclamation No. 166/1960, 19th Year, No.3. Attention was given to the enactment of the commercial code believing that

The codes were written with the assumption that the country would head for the market economy. In a fully developed market economy, several legal disputes were expected to arise and the codes provisions were believed to easily address these issues and capture the future development of the country.[66]

Unfortunately, the legal transplantation was not as successful as it was originally planned. Some argue that the codes were still unable to get the acceptance of the addressees even after 40 years of its enactment.[67] The common causes for disappointment elsewhere were also responsible for the limited successes of legal transplantation in Ethiopia. Like many developing countries that adopted western laws, the situation on the ground was unhelpful. The main challenge of legal transplantation and of law reform, i.e. overcoming the difficulty of creating legal institutions that are able to achieve certain ends by mixing foreign laws with domestic, social, political, economic, cultural and legal circumstances,[68] was present in Ethiopia as well. The preparation of the codes was not supplemented by adequate capacity building of local courts and law enforcement organs which eventually failed to meaningfully enforce transplanted laws. Further, the codes faced substantial resistance as customary laws and institutions hold strong foot in Ethiopian society. Beckstrom[69] also contends that the high illiteracy rate of the population, the non existence of educated attorneys and lack of communication networks have contributed to paltry reception of the laws.[70] The fact that customary laws were not properly incorporated in the modern laws has also been identified to the poor

modern commercial laws are get ways to the existing and future economic evolution (see Murado, *supra* note 53, p.204).

[66] Murado, *supra* note 53, p. 218.

[67] *Ibid*, p. 205.

[68] Davis & Treblicock, *supra* note 1, p. 899.

[69] Beckstrome, J., 'Transplantation of Legal Systems: An Early Report on the Reception of Western Law in Ethiopia', *American Journal of Comparative Law*, Vol.21, 1973, pp.557 *et seq.*

[70] Van Doren, *supra* note 55, p.176.

implementation of the codified laws.[71] In sum, the above factors played their part in the poor implementation of transplanted laws and hence in the limited impact of imported laws in the nation's modernization and economic development.

The 1974 Ethiopian Revolution overthrew the pro-capitalist imperial regime. *Derg* – the military junta that seized political power for 17 years after the revolution – declared socialism as an ideological guiding principle for its policies.[72] Apparently, this was the result of the 1970's development thinking shaped by Marxist dependency ideology. As explained in the first section of this article, dependency theory promoted aggressive economic nationalism in developing countries emphasizing import substitution and protectionism.[73] The role of law in economic development was denied; law was rather seen as instrument which benefits few local elites at the expense of the mass.[74] The outlook on the role of transplanted western laws in fostering economic growth in developing nations was cold. The theory rather advocates the employment of law in redistribution of wealth. In line with this theoretical viewpoint, socialist Ethiopia used law as an instrument of wealth distribution. Hence, the government nationalized private banks, insurance companies, real property and all rural land.[75] Law was used to assist various socialist agenda, e.g. reforming oppressive land tenure regimes, promotion of workers' rights and consolidation of command economy. Also, the 1960 codes, which assumed capitalist *laissez fair* system,[76] were put on mute and were not thus widely applied.

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[71] Yet, René David posits that customary laws are incorporated in the Civil Code wherever it is not found to be against modernization and economic progress; David, *supra* note 43, p.196.

[72] Van der Beken, *supra* note 56, p.26.

[73] Tamanaha, *supra* note15, p.478.

[74] *Ibid.*

[75] Van der Beken, *supra* note 56, p.23.

[76] Murado, *supra* note 53, p.160.

4. Law and Development in Contemporary Ethiopia

The 1980's saw the gradual decline of communism and the rising hegemony of neo-liberal economic perspectives. International financial institutions blamed internal policy errors (than exogenous influences) to developing nation's economic problems.[77] Internal economic policy fixes and structural adjustment were recommended to address underdevelopment.[78] The development policy prescriptions championed free markets through privatization, deregulation, liberalization and micro economic stabilization; and, law was denied major attention.[79] Also, the law and development academic movement came "under withering critique and had largely dissipated."[80]

The revival of law and development in 1990s was facilitated by huge financial assistance from the World Bank. The Bank gave particular focus to the rule of law in development. Under the new law and development doctrine, the primary function of law reform was to dismantle command or authoritarian institutions and protect private rights against state intervention.[81] The orthodoxy, centered on promoting a market-oriented rule of law, considered law as the magic potion for third world economic ills.[82] Convinced that the law and legal institutions could be used as a tool to promote social and economic

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[77] Cornia, G. with Helleiner, G., *From Adjustment to Development in Africa: Conflict, Controversy, Convergence, Consensus?*, UNICEF ICDC, Florence, p.3.

[78] *Ibid.*

[79] Sherman, *supra* note 4, p.33.

[80] *Workshop Proposal*, Workshop on Role of Law in Developing and Transitional Countries, Lubar Commons, University of Wisconsin Law School, Dec 5-6, 2008, p.1. Available at: <http://www.law.wisc.edu/gls/rol.workshop.dec08.html>. [Hereinafter Workshop Proposal]

[81] Shermann, *supra* note 4, p.1260.

[82] Workshop Proposal, *supra* note 80, p.2.

development,[83] the World Bank attempted to introduce neoliberal rule of law[84] through legal and judicial reforms that foster free market, investment and exchange.[85] World Bank studies indicate that the judicial system is among the top significant constraints to private sector development.[86] It is also contended that the quality and availability of court services affect private investment decisions and economic behavior regarding, for example, domestic partnerships and foreign investment.[87]

Since the early 1990s Ethiopia partly endorsed the neo-liberal approach – it promoted macroeconomic stability, privatized a significant number of state-owned businesses, eased constraints on foreign investment, and enacted laws that helped restore free market.[88] Significant legal revisions to replace the socialist-era laws and re-establish a functioning legal system have also been undertaken.[89] Incidentally, the application of the 1960 Civil and Commercial Codes revived with the return of market economy.

Currently, there seems a conscious and clear recognition on the part of the Ethiopian government that legal and judicial reforms promote economic growth and poverty alleviation. This can easily be shown from the undergoing

[83] Barron, G., 'World Bank and Rule of Law Reforms', *London School of Economics Working Paper Series* (December 2005), p.3.

[84] Despite the universal consensus on the importance of rule of law, the meaning of the term is debated. As some posit, it appears to be "the proverbial blind man's elephant – a trunk to one person, a tail to another; see Trebilcock, M. & Daniels, R., *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Edward Elgar Publishing, Inc., Cheltenham, 2010, p.2.

[85] Schmidbauer, *supra* note 19, p.6.

[86] Qing, *supra* note 61, p.1264.

[87] *Ibid.*

[88] *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic* (USAID, January 2007), p.58 [Hereinafter Ethiopia Commercial Law].

[89] Barron, *supra* note 83, p.3.

justice sector reform efforts.[90] The need for improving the country's legal and justice system has also been clearly indicated in various national poverty reduction strategic papers.[91] The Growth and Transformation Plan (GTP)[92] renews the state's resolve to promote development through a mix of strategies including judicial reform.[93] Studies[94] reveal the registration of some positive results. For instance, the annual clearance rate of cases has been maintained at above 80 percent in federal and regional Supreme Courts.[95] This may help in facilitating domestic and foreign investment and hence development. It also changes the image of the Ethiopian justice system which has long been characterized by delays in dispensation and institutional incapacity.[96]

Despite arguments that western market economy is characterized by transactions between independent economic agents facilitated by the formal

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[90] See, e.g., *Comprehensive Justice System Reform Program: Baseline Study Report* (Ministry of Capacity Building, Addis Ababa, February 2005), p.11 [Hereinafter Comprehensive Justice System Reform Program]

[91] See, e.g., *Ethiopia: Building on Progress: A Plan for Accelerated and Sustained Development to End Poverty (PASDEP)*, Annual Progress Report 2006/07 (Ministry of Finance and Economic Development, December 2007, Addis Ababa), p.115.

[92] See, *የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ የዕድገትና የትራንስፎርሜሽን ዕቅድ 2003-2007* (የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር፣ ህዳር 2003፣ አዲስ አበባ) ፣ ገፅ 122-125; GTP is a medium term strategic framework for the five-year period (2010/11-2014-15).

[93] United Nations Development Assistance Framework Ethiopia 2012-2015, (United Nations Country Team, March 2011), p.30. Can be accessed at: http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.et.undp.org%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D123&ei=94fMUIncCsbOtAb4noGICQ&usg=AFQjCNEBSZ4A383gMGO6ghhDFBw-qq9tTA&bvm=bv.1355325884,d.Yms&cad=rja.

[94] See, e.g., Comprehensive Justice System Reform Program, *supra* note 90, p.250.

[95] *Reforming Ethiopia's Justice System –World Bank*, available at: <http://www.worldbank.org/en/country/ethiopia> [Last accessed on 15 November, 2011].

[96] *Ibid.*

legal system, capitalism in East Asia seems to function differently.[97] Informal legal systems have played significant role in East Asia's economic miracle.[98] For instance, China's astonishing economic development was scored under "low quality laws and legal institutions". Informal mechanisms that recognize and protect private property rights and ensure performance of contracts have often been effective substitutes.[99]

The recent Ethiopian experience however appears to show that informal and customary legal systems have been sidelined. The legal reform efforts primarily focused on the formal legal system. This is so despite the prevalence of informal legal institutions even in urban areas where, for example, commercial disputes are still resolved according to custom, moral, trust and reputation.[100] Attention must be paid to the relationship of economic development and customary legal systems.[101] This is mainly due to the active nature of customary practices[102] in the fabric of the Ethiopian society. Also, China's positive experience in embracing customary legal systems with development should be given more weight in Ethiopia as well. Efforts must

[97] Davis & Treblicock, *supra* note 1, p.993.

[98] *Ibid*.

[99] *Ibid*, p.49.

[100] In Ethiopia, commercial disputes are still resolved through informal mediation or arbitration. Businesspersons in Mercato, the largest open air market in Addis Ababa, as well as rural farmers usually prefer mediators to resolve dispute; see Ethiopia Commercial Law, p.1; see also Mintwab Zelelew & Mellese Madda, 'Alternative Dispute Resolution in Addis Ababa: the Case of Markato', *in* Alula, Pankhurst & Getachew Assefa, *Grass-roots Justice in Ethiopia: the Contribution of Customary Dispute Resolution,* Addis Ababa, CFEE, 2008, pp.250 *et seq*.

[101] For an emerging literature on the role of customary law in development (rather sustainable development), see, e.g., Ørebech, T. et al., *The Role of Customary Law in Sustainable Development*, Cambridge, Cambridge University Press, 2005.

[102] Although it might be difficult for customary dispute resolution mechanisms to squarely deal with complicated trade disputes, reform efforts must give due concern for the role of customary legal systems as they are pervasive in developing Ethiopia.

also be coiled to figure out how we can mingle the two legal systems (formal and informal) and address the development needs of our country.

Lately, neo-liberalism's failure to deliver on its developmental promises in the developing world coupled with the rejection of "one size fits all development strategy" helped an alternative concept – new developmentalism – to hold foot.[103] This model acknowledges the role of market and the private sector in economic development but rejects the neo-liberal prescription of minimalist state. The theory also posits that developing states must enable markets to grow.[104] The new developmental states seeks to empower the private sector through extensive collaboration and communication between public and private sectors in policy formulation, promotion of foreign direct investment towards growth sectors and pushing firms and industries towards competitiveness rather than shielding them with protection.[105] This new theory has not reached a full grown model. Rather, it is in the making.

Ethiopia's government favors the new development paradigm.[106] In his opening speech at the sixth African Economic Conference, the late Prime Minister Melese Zenawi reiterated his long held firm belief in the role of the state in development and relegated the neo-liberal ideology. He boldly underscored that Africa cannot alleviate poverty and underdevelopment by limiting the role of the state and leaving everything to the private sector.[107]

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[103] Trubek, D, 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law', p.2 (A paper presented at the Conference on Social Science in the Age of Globalization National Institute for Advanced Study on Social Science, Fudan University, Shanghai December, 2008). Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349163>.

[104] Sherman, supra note 4, p.1267.

[105] *Ibid*, p.1268.

[106] 'Emerging to BRICs' *Addis Fortune*, Vol.12, No.600, (Oct 30th 2011)

[107] *Ibid*; see also Meles, Z., 'States and Markets: Neoliberal Limitations and the Case for a Developmental State' *in* Noman, A. et al. (eds.), *Good Growth and Governance in Africa: Rethinking Development Strategies*, Oxford University Press, Oxford, 2012, pp. 140 *et seq.*

It seems that the role of law in the new developmental state has not yet been well constructed.[108] Nonetheless, it is generally believed that the new developmental state's legal regime would guide and direct public and private institutions in the implementation of development strategies. The law of the new developmental state is given the task of governing and regulating the hybrid state led and neoliberal economic policy. Legislators will of course find it challenging to enact laws that keep balance between flexibility (for the state to pursue its policy objectives) and firmness that limit state interference through predictable and stable legal regime.[109] Only time will tell if enacting such laws and facilitating growth through them is possible.

Conclusion

The paper has modestly attempted to highlight the relationship between law and development in Ethiopia. And, it is shown that the relationship has been highly influenced by the prevailing dominant economic theories and paradigms. Law and development movements generally guided efforts in most developing countries including Ethiopia to foster growth through legal reform.

Pre-codification period Ethiopia's legal system was characterized by scattered and various traditional, customary and religious laws that have contributed little to support the country's economic development. Among others, the codification of western-style laws during Haile Selassie's reign was meant to facilitate progress and modernization in the country. The codification was influenced by the contemporaneous law and development movement which prescribed modernization and modern legal systems to curb third world's development problems. For reasons seen earlier, the codified laws were

[108] Trubek, *supra* note 103, p.3.

[109] *Ibid.*

unable to be effectively implemented and hence contribute meaningfully to Ethiopia's development.

The Derg, a regime with Marxist inclinations, redefined the role of law in development. Law was primarily used to implement socialist agenda of wealth distribution and nationalization. Yet, socialist laws were not seen to deliver the promised economic development.

With the restoration of market economy in the 1990's, a new vigor for law and development emerged. Ethiopia embraced neo-liberal prescription that rule of law is a prerequisite for well functioning market system and hence economic development. Ethiopia has executed various reform projects including revision of substantive laws and capacity building of the judicial sector.

Despite the rebirth of legal reform programs in pursuit of development, there is a great doubt on the direct relationship between legal reforms and development. In particular, China's astonishing economic growth amidst "low quality laws and institutions" and active use of informal legal systems create doubt on the relevance of reforms on formal legal system. Ethiopia, where customary legal systems are still pervasive, may take some lesson from China's experience.

Finally, in numerous developing countries including Ethiopia there is a shift of development ideology from neo-liberalism to developmental state. The role of law in this new development paradigm is still under construction. That said, I must conclude by noting that law cannot be a panacea for all economic ills of developing countries notwithstanding anecdotal empirical findings on the positive role of law in development.

Enforcement of the Principle of Legality in Ethiopia after *Ethiopian Revenue & Customs Authority v Ato Daniel Mekonnen*[*]

Abebe Assefa[**] & Wendmagegn Gebre[***]

Abstract

The principle of legality, that safeguards the freedoms and liberties of individuals in the administration of criminal justice, is being challenged by the increasing tendencies of administrative agencies to attach criminal "teeth" to the myriads of administrative regulations and directives. The proliferation in Ethiopia of such administrative regulations and directives in the last few decades have been worrisome. This article posits that delegation of criminal law-making power to administrative organs counter the persuasive rationales for delegation of law making power for that would defy the principle of legality. Conceiving the principle of legality as primarily relating to notice and fair warning, the article shows that the principle of legality is not properly enforced in Ethiopia.

Introduction

Legality is a principle by which the justice or fairness of a state's positive law can be assessed. It is "a principle of justice by which to criticize positive law for falling short of doing what it ought to do and to commend positive law for achieving what it ought to achieve."[1] Scholars approach principle of legality in different ways. Some look for a single principle, i.e., the principle of legality.

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[*]The authors would like to thank Ato Worku Yaze (Assistant Professor, BDU), Kokebe Wolde (Head, Postgraduate Research & Community Service, Law School, BDU) and Hailegabriel Gedecho (Editor-in-Chief, Bahir Dar University Journal of Law) for facilitating the publication of this article.

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[1] Westen, P., 'Two Rules of Legality in Criminal Law', *Law and Philosophy*, Vol. 26, No.3, 2007, p. 233 [Hereinafter Westen].

But, "[t]here is no such thing as a single 'principle of legality'."[2] The principle is concerned with one or more of the following distinct rules:[3] (a) the rule against retroactive criminalization; (b) the rule that criminal statutes be construed narrowly; (c) the rule against the judicial creation of criminal offenses; and (d) the rule that vague criminal statutes are void.

In a democratic society, strict adherence to the principle of legality and separation of powers play paramount role to ensure that lawmaking, law-enforcement and law-interpretation be carried out by a distinct organ of a government.[4] In connection to this idea, John Locke proposed that the law making organ should not transfer its power to any other organ.[5] He argues the lawmaking organ itself is delegated the power of lawmaking from the people so that it cannot delegate such power over to others. Hence, the doctrine of non-delegation embraces that in a democratic system, in which separation of powers is recognized, one organ of a government may not delegate its power to another organ.[6]

The principle of legality, that safeguards the freedoms and liberties of individuals in the administration of criminal justice, is being challenged by the increasing tendencies of administrative agencies to attach criminal "teeth" to the myriads of administrative regulations and directives. The proliferation in Ethiopia of such administrative regulations and directives in the last few decades have been worrisome. This article posits that delegation of criminal law-making power to administrative organs counter the persuasive rationales for delegation of law making power for that would defy the principle of legality. Conceiving the principle of legality as primarily relating to notice and fair warning, the

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[2] *Ibid*, p. 229.

[3] *Ibid.*

[4] Taylor, J. & Samples, J., 'The Delegation of Legislative Powers' available at: < http://www.cato.org> (Accessed on 28 Dec. 2011) [Hereinafter Taylor & Samples].

[5] *Ibid.*

[6] *Ibid.*

article shows that the principle of legality is not properly enforced in Ethiopia. The immediately following section lays the ground for further discussion by introducing the doctrine of (non-)delegation of criminal law making. This would be followed by a review of the principle of legality in section two and Federal Supreme Court Cassation Bench decision in section three, respectively.

1. Authoritative Sources Of Criminal Law and the Doctrine of (Non-)Delegation of Criminal Lawmaking Power

In contemporary world, the doctrine of non-delegation of lawmaking power is losing its currency owing to the complexity of the modern life. "Administrative state" with abundant regulations and massive delegation of law-making power to the administrative organ of a government looks the fashion of the day.The decline of the doctrine of non-delegation and the birth of Chevron Regime, particularly in common law jurisdcitions, are supposed to be justified.[7] "Delegation is a good thing," Dan Kahan posits, "if we want a successful regulatory state."[8] The rationales, according to the chevron doctrine, for delegation of law-making power are related to agency expertise, nimbleness and flexibility of agency rule-making.

Notwithstanding the above rationales for delegation of law-making power to unelected agency, criminal law-making power remains controversial. It is argued criminal law should reflect and channel societies' moral judgment.[9] The creation of criminal law must therefore be preceded by the inherent social condemnation against its provisions making conducts or forbearances crime. According to Kristen E. Hickman, social condemnation suggests that "deciding that particular actions should be criminally punishable is an act of collective

[7] Myers, R., 'Complex Times Don't Call for Complex Crimes,' *North Carolina Law Review,* Vol. 89, 2011, p.1857 [Hereinafter Meyers].

[8] *Ibid*, p.1885.

[9] *Ibid*, p.1855.

moral judgment and condemnation."[10] As an avenue, *inter alia*, for social condemnation against a certain behavior, the democratic principle of checks and balance has paramount importance as it holds that there has to be a social consensus before a certain behavior is made crime.[11] Delegation, to the contrary, shifts the power of law making from a legislature – a representative of all the interests of a society – to the "sub-government" agency, which represents the whim and wish of a few having its disparate agenda.[12] This shows that social consensus, a prerequisite for crime creation, is said to be achieved where a criminal law is enacted by the elected representatives.

As noted before, one rationale for delegation of law making power is agency expertise in a particular field. It is assumed that regulators are better conversant with a particular subject matter than the legislature is. Despite that, some insist that delegation is not sound in criminal law context where the necessary and inherent prerequisite in the making of law is social condemnation which calls for social moral judgment instead of expertise. Moral judgment (which doesn't require expertise) is crucial in determining which behavior should be condemned as crime as well as in deciding on the form and extent of punishment prescribed in relation to the specified crime. Accordingly, Myers II argues that "crime is not the subject of expertise, or of elite views, but instead should be evidence of broadly and deeply held moral commitments."[13] This is to say that agencies may be expert in their spheres of fields but whatever their expertise may be they are not the appropriate body to reflect the moral fabric of a certain society. Criminal law, by nature, should reflect the moral judgment of a society rather than the moral judgment of expert agents.

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[10] *Ibid*, p.1864.

[11] *Ibid*, p.1860.

[12] Taylor & Samples, *supra* note 4.

[13] Myers, *supra* note 7, p. 1864.

The other justification for delegation of law-making power relates to the enhanced flexibility. As far as the principle of legality is concerned, a state is constitutionally limited to convict someone for an act which was only made crime at the time the act was performed. Hence, delegation for the sake of flexibility is unconstitutional in criminal matters.[14] Delegation for flexibility makes the principle of legality, which is however essential in criminal law, redundant.

The other concern with regard to delegation is the very nature of regulation. Regulation is an instrument mainly serving as regulating behavior than meting out condemnation and punishment.[15]A distinction between criminal charge and civil regulations is thus needed as their implication(s) is/are quite different. Irrespective of the peculiar features between the two concepts, criminal-civil distinction has been diminishing due to concentration of power within agencies and the reluctance of courts to keep watch over the distinction and the inclination to favor strict criminal liability.[16]Agencies have been accused of increasingly using overabundant criminal law, in matters to which civil regulations would have been proper, believing that labeling undesirable behavior as crime enhances deterrence.[17]According to Myers, "moral condemnation attaches to someone convicted of a crime in a different way and to a different degree than it does to a tortfeasor."[18] Similarly, Paul Robinson argues that adding criminal "teeth" to civil sanctions in cases merely civil weakens the moral force of a criminal law.[19] Sharing Robinson's idea, Erik Luna states:

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[14] *Ibid*, p. 1858.

[15] *Ibid*, p. 1851.

[16] *Ibid*, p. 1855.

[17] *Ibid*, p. 1864.

[18] *Ibid.*

[19] *Ibid.*

> "When the criminal sanction is used for conduct that is widely viewed as undeserving of the severest condemnation, the moral force of a criminal law is diminished, possibly to the point of near irrelevance among some individuals and groups."[20]

Such overuse of criminal law, overcriminalization, not only undermines the moral demand of a criminal law, but also reduces the efficacy of the law more generally.

The other justification for delegation is related to time constraint. Yet, it is rightly argued that:

> "a legislature has enough time to create fully articulated new crimes where they are truly warranted, but if a legislature cannot expend the time and energy required to make the moral judgments and to engage the political balancing inherent in creating crimes, it should be barred from farming out that responsibility".[21]

Generally, the weight of commentaries firmly suggests that crime creation and specifying corresponding penalties to it should always be a legislative work than a regulatory judgment. That is, criminal law making power should be the business of the legislative body if the moral force of criminal law is to be kept.

Coming to criminal law making power in Ethiopia, it is helpful to assess the FDRE Constitution first as it is the ultimate source of powers of all the government organs. In this regard, Article 55(5) of the Constitution clearly stipulates, in a mandatory fashion, that House of People's Representative (HPR) is vested with the power to enact a penal code. This constitutional provision takes into account the inherent social condemnation in the creation of crime which could be manifested through the device of elected representatives. Though the FDRE Constitution seems to keep criminal law-making within the power of the legislature, the 1957 Penal Code, under Article 3, stipulates that

[20] *Ibid*, p. 1865.

[21] *Ibid*, p. 1876.

other penal legislations having a "penal law nature" do have the force of applicability if the general principles embodied in the Code are adhered.

2. The Notion of Principle of Legality

As seen already, legality is a principle by which the justice or fairness of a state's positive law can be assessed. The principle relates to one or more of the following distinct rules:[22] (a) the rule against retroactive criminalization; (b) the rule that criminal statutes be construed narrowly; (c) the rule against the judicial creation of criminal offenses; and (d) the rule that vague criminal statutes are void.

All of the above elements of principle of legality, in one or another way, are related to the principle of fair warning and notice. The writers discuss the principle of fair warning and notice at some length for it has particular relevance to the thesis developed in this article.

Notice is the basic element of the principle of legality. It has also much to do with fairness. "Crimes must be defined in advance so that individuals have fair warning of what is forbidden: lack of notice poses a 'trap for the innocent' and 'violates the first essential of due process of law.'"[23]The kind of notice required is strictly formal. That is, a state is required to publicize criminal statutes in certain official document and in understandable language. Publication in some official document, no matter how inaccessible, is all that is strictly required. "Law as a guide to conduct," Benjamin Cardozo states, "is reduced to the level of mere futility if it is unknown and unknowable."[24]It is therefore "reasonable that a fair warning should be given in language that the common

[22] *Ibid*, p. 229.

[23] Jeffries, J., 'Legality, Vagueness, and the Construction of Penal Statutes,' *Virginia Law Review*, Vol.71, No.2, 1985, p. 205 [Hereinafter Jeffries].

[24] Myers, *supra* note 7, p.1865.

world [people] will understand, of what the law intends to do if a certain line is passed."[25]

Accordingly, laws are published in most democratic societies. Publication of laws is an intrinsic element of rule of law. Jeremy Bentham explains the need to promulgate laws: to promulgate a law is to implant it into the memories of members of a society on whom the law will be applicable; and providing the necessary facility for consulting or referring it, if there is any doubt regarding what it prescribes.[26] To quote:

> "That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed: all these means may be good, but they may be all employed without accomplishing the essential object. They may possess more of the appearance than the reality of promulgation. To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes."[27]

The means of notification of laws to the general public is somehow similar in various jurisdictions. Most states announce newly enacted laws to their

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[25] *Ibid*, at 206.

[26] Bentham, J., *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843). 11 vols. Vol. 1. Chapter: *I. Essay on the Promulgation of Laws.* Accessed from http://oll.libertyfund.org/title/2009/139530. (on 2012-08-23) [Hereinafter Bentham].

[27] *Ibid.*

people in their respective official gazette.[28] In Hungary, laws, after being promulgated by the President of the Republic, must be published in the Magyar Közlöny which is the national gazette. Similarly, in Hong Kong, all bills, after being signed and promulgated by the Chief Executive, have to be announced by the government by gazzetting.[29] The same holds true for Turkey where all bills must be published in the official gazette, Resmi Gazzete.[30]Practices have also shown us that even laws passed by administrative organs are to be published officially. For instance, in Belgium, Decrees and Ordinances passed by different administrative organs are published and promulgated in the Belgian official journal. For a regulation to be said formally promulgated and have legal effect in the United States, it must appear in the Federal Register after uncurbed public-comment period lapsed.[31]

The medium of announcement is as important as the very publication of laws to notify the public regarding the coming into effect of a new law. Publication has to be made in a language understandable to the political community, at least to the majority of the members. Publication of enacted laws in official instruments presupposes the text of the law is to be written in an official language of a given political community on whom that text of the law will be applicable. In this regard, Bentham points out that if a political community by whom the law ought to be obeyed speaks different languages, the authentic translation of the law should be made by each of the languages; but it is also proper to translate the law into the language the majority of the community can understand.[32] Hence, the mere existence of a criminal law in

[28] "Power to Enact Laws" available at < http://promulgate.askdefine.com/> [Accessed on 30 Dec. 2011]

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] Bentham, *supra* note 26.

written form is not sufficient in the adherence of the principle of legality unless it is publicized formally in a recognized means and understandable language(s).

The requirement of notice includes not only specification of crimes but also the full notification of the corresponding penalties. In the USA, for instance, "offences are not complete unless, in addition to specifying the conduct they mean to prohibit, they specify punishments or range of punishments for those who violate the prohibitions."[33]

Generally, notice of illegality of a criminal conduct, through publication using understandable language, is an essential requirement to the fairness of punishment. At this juncture, it may be asked what should happen to an individual who violates a law that does not fulfil the requirements of the principle of fair warning and notice. It can strongly be argued in this scenario that principle of legality "imposes on the state the obligation to give fair warning of what is forbidden."[34]Consequently, ignorance of the law is excuse if the government is responsible for misleading individuals that allegedly violated the law.[35] Conversely, ignorance of the law would be no excuse if the government is not at fault in properly notifiying criminal statutes to the people. The underlying assumption of the principle of legality must be that "what is not expressly prohibited is allowed – that the individual is presumptively free to do as he or she pleases, and that in doubtful cases the burden of proof lies on the government."[36]

[33] Myers, *supra* note 7, p. 1865.

[34] Jeffrie, *supra* note 23, p. 209.

[35] *Ibid*, p. 208.

[36] *Ibid*, p. 209.

2.1. The Principle of Legality under the FDRE Constitution and the 1957 Penal Code[37]

The Constitution of the Federal Decmocratic Republic of Ethiopia recognizes the principle of legality (with its various elements). Crucially, it recognizes the right to protection against retroactivity of criminal law.[38] No person shall thus be held criminally liable and punished unless a criminal conduct was made crime at the time when it was committed or omitted.[39] Under Article 17, the Constitition further provides that no one shall be deprived of his liberty unless that is made in accordance with established or pre-existing law; that is, a person can only be lawfully arrested or detained for an act that is prescribed by law as illegal.

The 1957 Penal Code also embraces the principle of legality. The Code expressly provides that "[c]riminal law specifies the various offences which are liable to punishment and the penalties and measures applicable to offenders."[40] It, in Article 77, further declares that "[a] person is not punishable for an act or omission not penalized by law… even though he acted intentionally in the mistaken belief that he was committing a criminal offence." It is, further, clearly stipulated that "[t]he court may not treat as a breach of the law and punish any

[37] The 1957 Penal Code, as opposed to the 2004 Revised Crminal Code, would be refered to in this article. This is because the court case analysed in section 3 involved the application/ interpretation of the 1957 Penal Code. Incidentally, it must be noted that the 1957 Penal Code's provisions on the principle of legality are identical with that of the 2004 Criminal Code.

[38] Article 22, the Constitution of Federal Democratic Republic of Ethiopia, 1995, *Federal Negarit Gazeta*, Proclamation No.1, 1st Year, No.1 [Hereinafter FDRE Constitution].

[39] *Ibid.*

[40] Article 2(1), Penal Code of the Empire of Ethiopia, 1957, *Negarit Gazeta*, Extraordinary Issue, Proclamation No.158, 16th Year, No.1.

act or omission which is not prohibited by law. It may not impose penalties or measures other than those prescribed by law."[41]

Now, the question is which law – primary or subsidiary – should specify crimes and penalties or measures? The Penal Code authorizes regulations and special laws, which are (to be) enacted by the executive branch of the government as subsidiary laws, to specify crimes and penalties or measures. That is, it authorizes subsidiary legislation to specify criminal offences, albeit such an approach to criminal legilation is not, as seen in section one, necessarily justified. Of course, the Penal Cod requires such legislation (subsidiary criminal laws) to manifest "penal nature" before considered part of the penal law. It is submitted subsidiary criminal laws acquire "penal nature"through adherence to the general principles embodied in the Penal Code,[42] including the principle of legality which requires any criminal law to specify the various crimes, penalties and measures that are to be applied to offenders.

The Penal Code has also given heed to fair notice. As stated under Article 1, a main objective of the Code is "to preserve order, peace and security of the state and its inhabitants for the public good." The Code further ascertains that the prior means of prevention of crime is through notice: "prevention of offences *by giving due notice of the offences and penalties* prescribed by law."[43] It is when "due notice" fails in preventing crimes that punishment as means of crime prevention follows. This can be inferred from the wording of Article 1 paragraph two which reads as: "…should [notice] be ineffective by providing for the punishment …to prevent the commission of further offences."

The notification of specified crimes and penalties serves as warning as to what would happen to anyone who behaved in contravention of the criminal law. That is, notice has a deterrence value as good as punishment. It is also

[41] *Ibid.*

[42] *Ibid*, Article 3.

[43] *Ibid*, Article 1.

stated above that notice is a basic element of principle of legality that fosters fairness or justice. Thus, citizens are supposed to be notified of what conduct is prohibited/required through specification of the type of criminal conducts and the form and extent of punishment. Government is generally duty-bound to make criminal law, governing citizens, accessible. This is not to say that it should give a copy of each and every criminal law document to the citizenry. The government's formal publication of criminal statutes may suffice in fulfilling the requirement of fair notice.

Though ignorance or mistake of law is no defense in principle, the Code allows the reduction of punishment for offenders who committed crime ignorantly or mistakenly.[44] It, under Article 78(2), even allows for no punishment to be imposed against an offender who committed crime owing to absolute and justifiable ignorance of the law provided that there was no criminal intent and bad faith in committing the crime. One circumstance for absolute and justifiable ignorance of the law can, for instance, be lack of fair notice due to non-publication of the law at issue.

Apart from the Penal Code, other legislations require publication of penal laws. The first law requiring publication of approved laws was *the Establishment of the Negarit Gazeta Proclamation No.1/1950*. Accordingly, this Proclamation had made the Negarit Gazetta a law reporter until 1995 when *the Federal Negarit Gazetta Establishment Proclamation No.3/1995* replaces its 1950 predecessor. The latter law, under Article 2, clearly states that "[a]ll laws[45] of the Federal Government shall be published in the Federal Negarit Gazeta".

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[44] *Ibid*, Article 78 (1) - (2).

[45] "Laws" refers to proclamations, regulations and directives. And, "laws of the Federal Government" include enactements by either directly by the HPR or other appropriate organs of the federal government; see generally Article 51, FDRE Constitution *cum* Article 2(1), Proclamation No. 14/1996.

Thus far, the literature as well as statutory provisions regarding the principle of legality is discussed. The pratical enforcement of this principle in Ethiopia is seen below in light of Federal Supreme Court Cassation Division ruling, which the authors believe is compelling.

3. The Case: *Ethiopian Revenue & Customs Authority v Ato Daniel Mekonnen*[46]

3.1. Synopsis

In 2004, Ethiopian Revenue and Customs Authority filed criminal charge against Ato Daniel Mekonen for possessing and transacting (for export to Djibouti) in 46.96 kg of gold before the Federal First Instance Court. The act of the accused was said violate the provisions of Articles 2(28) and 66(2) of *Revenue and Customs Authority's Proclamation No.60/1997*, as amended by *Proclamation No.368/2003*. Alternatively, the accused was accused for committing an offence on the national economy in violation of Articles 1 and 2 of *Directive No. CTG/001/97*, a directive issued by the National Bank of Ethiopia (NBE) for the control and transaction of gold in accordance with Article 59 (2) (b) of *the Monetary and Banking Proclamation No.83/1994*.

The Federal First Instance Court, to which the case was initially brought, acquitted the defendant for the first count (the offense of contraband) while convicting him for the alternative count. And, it imposed a punishment of five years imprisonment, forfeiture of the stated amount of gold, one million Ethiopian birr fine and deprivation of all civil and political rights for three years.

Dissatisfied by the ruling of the trial court on the alternative count, the accused appealed to the Federal High Court. The appellate court maintained

[46] *Ethiopian Revenue & Customs Authority Prosecution v Ato Daniel Mekonen*, Federal Supreme Court Cassation Division, File No.43781 (14 Hamle, 2002 E.C).

that Article 59 (2) (b) of Proclamation No. 83/1994 – based on which the lower court imposed the penalities – has nothing to do with the amount of gold (to be) possessed or transacted by individuals. Concerning the validity of Directive No.CTG/001/97, the Court argued that since the Directive does not have the status of law so as to entail criminal liability for it was neither published in the Federal Negarit Gazeta nor printed in Amharic as required by Proclamations No.3/1995 and 14/1994. The court thus reversed the decision of the Federal First Instance Court.

The prosecutor of the Authority appealed from the decision of the Federal High Court, albeit the Federal Supreme Court confirmed the latter's ruling for similar reasoning. Finally, the prosecutor sought cassation revision for fundamental error of law.

3.2. The Holding of the Federal Supreme Court Cassation Division

In its application for the cassation bench, the prosecutor argued publication (or non-publication) in the Negarit Gazetta does not affect the validity of the Directive; and the Amharic verison of the Directive is lacking only due to the working nature of NBE. The prosecutor then requested the Bench to reverse the decisions of the lower appellate Courts and confirm the decision of the trial court. The accused, on the other hand, argued that the Directive may not be given a legal effect as it lacks the legal requirements for valid law. Accordingly, criminal liability cannot result from such a "non-legal" document. The accused then prayed the Bench to confirm the decision of the appellate courts.

In answering the questions (1) whether publication of laws in *Federal Negarit Gazetta* is mandatorily required before laws issued by an organ other than the House of Peoples' Representative (HPR) become and (2) whether such laws are mandatorily required to be written in Amharic, the Bench first discussed the making of both primary and subsidiary laws and hierarchy of laws

as well. Convinced that subsidiary laws can be made by an appropriate executive organ through delegation, it also pointed out that Proclamation No.14/1994 specifies working procedures (in enacting laws) only for HPR. Thus, the Bench reasoned that although laws – including proclamations, regulations and directives – must be published in the *Federal Negarit Gazetta*, this is so if and only if they are authored by the HPR. As there is nothing mentioned in the proclamation about the law-making procedure of the subordinate organs when they issue regulations and directives, the Bench concluded that the publication of regulations and directives issued by an executive organ is not required by law to be published in *Federal Negarit Gazetta*. By the same token, it is concluded that the non-publication in Amharic of directives may not affect its validity. Hence, the validity of Directive No.CTG 001/97 is confirmed notwithstanding publication in Amharic in *the Federal Negarit Gazetta*. Accordingly, the Bench reversed the decisions of the lower appellate courts and confirmed that of the Federal First Instance Court for Articles 1 and 2 of the Directive prohibit the possession and transaction of gold exceeding 10 *Ounces* of gold without the authorization from NBE.

3.3. Comments

Based on the four issues framed hereunder, the writers would, in this section, reflect on the decision of the Cassation bench. The writers believe the following should have been framed as main issues by the bench before rendering its final decision:

a) Whether the legislature in the primary legislation (Proc. No. 83/1994) delegated any criminal law-making power to the NBE;
b) Whether Directive CTG/001/97, which is issued by NBE, not publicized in the *Federal Negarit Gazzeta* and not translated into Amharic, is "Penal Law" that can be invoked as establishing criminal conduct and entail punishment;

c) Whether the type and extent of punishment provided under Article 59 (2) (b) of Proclamation No. 83/1994 is applicable to conducts that violate any provision in the so-called Directive; and
d) Whether violation of any part of the Directive is punishable under Art.59 (1) (h) of Proc. No.83/1994.[47]

3.3.1. Whether NBE has been delegated criminal law-making power

Article 39(2) of Proclamation No.83/1994 stipulates that "[t]he Bank [NBE] may issue regulations and directives relating to gold." Clearly, the NBE is delegated power to issue regulations and directives in governing activities relating to gold. What is not clear from the terms of this provision, however, is whether such regulations and directives can specify crimes and entail criminal punishments. Of course, the Penal Code, under Article 3, allows regulations and special laws to specify crimes and penalties provided the requirements of principle of legality are fulfilled. Here, the phrase "special laws" can definitely include directives. But, as argued above, none of the different justifications for delegation of law making power works for delegation of penal law. Rather, the justifications for delegation of law making power counter all the purposes and general principles of penal law. Accordingly, regulations and directives (to be) issued by an agency should not specify crimes and penalties other than providing administrative regulations. Though the NBE, in the case at hand, is delegated to issue directives, such delegation, it is submitted, does not include criminal law-making power.

[47] The Cassation Bench reasoned punishement could also be passed as per Article 59(1) (h) of Proclamation No.83/1994.

3.3.2. Whether Directive CTG/001/97 is "Penal Law"

Even when one assumes that the NBE is delegated criminal –law making under Proclamation No.83/1994, it must be established whether or not the Directive, in the case at hand, can be considered as a "penal law" that can be invoked as establishing criminal conduct and entail punishment. The Directive, under Articles 1 and 2, simply prohibits the possession or transaction of gold beyond a certain amount without NBE's authorization. It thus deals with regulation of activities relating to the possession and transaction of gold which is fundamentally different from crime specification.[48]It follows that since the Directive does not specify crimes as such, it would not be "penal law" as an important requirement, i.e., crime specification, is missing.

Any criminal legislation, primary or subsidiary, must specify crimes as well as corresponding penalties and measures for it to have a penal nature. As pointed out earlier, the Penal Code, under Article 2 (1), requires subsidiary penal laws to specify the corresponding penalties in addition to specifying the criminal acts. However, Directive CTG/001/97 does not specify penalties and measures to be taken against a person possessing or transacting gold in excess of 10 ounces. As noted in the sysnopsis of the case, the Cassation bench penalized the alleged offender based on the provisions of Proclamation No. 83/1994, instead of the directive itself; the punishment for violation of the Directive is not comprehensively found in one instrument (the Directive). Consequently, in the absence of specification of punishments and measures, the Directive cannot be invoked for having "penal nature" as required by the Penal Code.

In determining whether laws passed by an executive organ of the federal government must be published in official law gazette, the pertinent provisions

[48] For more on the distinctions between the nature of criminal offenses and regulatory offenses, see Ashworth, A., 'Conceptions of Overcriminalization', *Ohio State Journal of Criminal Law*, Vol.5, 2007-2008, pp. 407 *et seq.*

of *Federal Negarit Gazetta Establishment Proclamation No. 3/1995* must be consulted. This proclamation requires "laws of the Federal Government" to be published in the *Federal Negarit Gazetta*. Since Directive CTG/001/97 was passed by the NBE, a federal executive body,[49] it is argued it forms part of the "laws of the Federal Government" for the purposes of Proclamation 3/1995. In the case at hand, however, the Federal First Instance Court and the Federal Supreme Court Cassation Division failed to identify and examine such laws on the basis of which both the Federal High and Supreme Courts justified their identical verdicts in favor of the defendant. The authors regret the courts failed to identify and examine penal laws subject to the principle of legality. Unnecessarily, they referred to Proclamation No.14/1996 which deals with the working procedure of the HPR and argued that this Proclamation does not require the same procedure, e.g. publication, as regards administrative organs enacting laws through delegation. Of course, Proclamation No.14/1996 does not deal with law-making procedures to be followed by government organs but the HPR. And, the publication requirement under this proclamation is only incidental, for the requirement of publication of laws (both primary and subsidiary) in the *Federal Negarit Gazetta* is primarily governed by the Federal Negarit Gazetta Establishment Proclamation No. 3/1995. Therefore, the conclusion of the Federal Supreme Court Cassation Division that there is no law governing the publication of subsidiary laws in the Negarit Gazetta is not legally persuasive.

It must also be emphasized that the publication has to be made in the language required by law. In this connection, the Federal Negarit Gazetta Establishment Proclamation No.3/1995, under Article 3, states that while laws are published in the Negarit Gazetta, the text of the law has to be written both in Amharic and English versions. It further goes to stipulate that where there is discrepancy between the two versions, the Amharic shall have a prevailing

[49] Article 77 (4), FDRE Constitution.

effect. In both requirements, the Proclamation employed the word "shall" to show the mandatory requirement of publication of laws in Amharic and English as well. The absence of publication of laws in either of these languages would fail the requirement of notice. Unless a law is published in the official law reporter, the *Federal Negarit Gazetta*, in a language understandable to the public, no one can access it and be able to take notice to behave according to the will of the law. The requirement of the text of the law to be written in Amharic language, in addition to English, is not a matter of formality; it is rather a requirement safeguarding the fundamental freedoms and liberties of citizens.

Seen in light of this, the Directive, written only in English and unpublished in the *Federal Negarit Gazetta*, do not fit with *Federal Negarit Gazetta Establishment Proclamation* and, crucially, the principle of legality.The Federal Supreme Court Cassation Division, in making reference to only Proclamation No.14/1996, failed to identify and apply the relevant law, the Proclamation No. 3/1995 which explicitly and mandatorily requires laws, primary or subsidiary, to be published in Amharic, the working language of the federal government.[50]

3.3.3. Whether the type and extent of punishment provided under Article 59 (2) (b) of Proclamation No. 83/1994 is applicable to conducts that violate the Directive

It is recalled that specification of crimes with corresponding penalties and measures applicable to criminals is an important nature of penal laws. Offences would not be complete unless the conduct prohibited or required is accompanied by clearly stipulated punishments or range of punishments.

Proclamation No. 83/1994, particularly under chapter three, deals with matters relating to import and export of valuable goods which include gold. However, it does not stipulate the legal amount of gold while possessing or transacting the same. As a result, the punishments stipulated under Article 59 (2)

[50] *Ibid*, Article 5 (2).

(b) of the Proclamation are only applicable to acts specified in the proclamation other than acts relating to the breach of the possession and transaction of gold beyond a certain amount. The type and extent of punishments provided under Art 59 (2) (b) of Proc. No. 83/1994 would not therefore apply vis-à-vis conducts that violate the provision of the Directive, albeit the Cassation Bench erroneously held to the contrary.

3.3.4. Whether violation of any provisions of the Directive is punishable under Article 59(1) (h) of Proclamation No. 83/1994.

Article 59(1) (h) of Proclamation No. 83/1994 stipulates that any violation of any directive (to be) issued under the authorization of the proclamation is punishable in accordance with the 1957 Penal Code. As seen already, the Directive regulates the legal limit of the amount of gold to be possessed or traded without the authorization of NBE. One may therefore arguably hold that this is crime specification. Nonetheless, the writers strongly mainatain this is not crime specification for reasons discussed earlier. The Directive, which perhaps specifies a penal act without however the corresponding punishments, is contrary to the principle of legality anyway. For that reason, it is not in accordance with the 1957 Penal Code. It is thus submitted any violation of any part of the Directive is not punishable under Article 59 (1) (h) of Proclamation No. 83/1994.

Conclusion

Government organs in Ethiopia must adhere to the principle of legality in enacting criminal laws through delegation. It is only when the principle of legality is ensured that the fundamental rights and liberties of individuals would be guaranteed.

It is unfortunate though that the supreme judicial authority in *Ethiopian Revenue & Customs Authority Prosecution v Ato Daniel Mekonen* set a precedent that subsidiary criminal laws may apply notwithstanding the requirement of the principle of legality that penal laws must be published in Amharic in *Federal Negarit Gazette.* The Directive, issued by NBE and applied by the court as valid criminal law, was neither published nor translated into Amharic from English; it was just put somewhere just like an ordinary literature. NBE that abandoned the Directive without concluding its publication tasks is similar to an "Ostrich among the most stupid birds that leaves its egg in the sand, heedless that the passage foot may crush them."[51] Is it fair to punish a passerby who crushed but never knew or should have known whether there is egg buried somewhere in the sand? The authors are afraid not.

Finally, the authors believe the holding of the Cassation Bench that unpublished directives are valid laws is made without due analysis of relevant laws and principles. It is however hoped that the bench would revisit its holding with the view to restore the enforcement of the principle of legality as recognized under the Consititution and criminal laws of the country.

[51] Bentham, *supra* note 26.

Evaluating the Concept of Minority in Corporate Group Context: A Specific Look at Minority Shareholders of the Subsidiary Company

Belayneh Ketsela*

Abstract

Despite the practical presence of corporate groups in Ethiopia for some decades now, the notion of minority in corporate group context has not been explicated in domestic literature. In this article, an attempt is made to evaluate the concept of minority with particular emphasis on minority shareholders of the subsidiary company. Section I of this article will provide some background on the Ethiopian law on minority shareholders in general. Section II will explain who the minority shareholder in the subsidiary is. Section III discusses the rationale for the protection of minority shareholders of subsidiary company. Finally, minority shareholder (of the subsidiary) rights are discussed from a comparative perspective.

Introduction

One can find in vain a universal definition for "groups of companies". Under Dutch law, group of companies are defined on economic basis, whereas in Germany the term is defined on a legal basis.[1] Control of one company (a parent company) over basic managerial decisions of other company/ companies (subsidiaries/sub-subsidiaries) is the bond that generally gives rise to group relationships. Thus, a group of companies may mean an entity/economic

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[1] Under Article 24b of Book II of the Duch Civil Code, corporate group is defined to mean "an economic unit in which legal persons and partnerships are united in one organization." For German law, such legal persons should however come together under a unified management for a group to be deemed formed; see Andenas, M. & Wooldridge, F., *European Comparative Company Law*, Cambridge University Press, Cambridge, 2009, p.479, [hereinafter Andenas & Wooldridge].

unit comprising of a parent (holding) company and one or more subsidiaries and sub-subsidiaries that are operating under the holding company's umbrella.[2]

No matter how a group relationship is established, the companies in the group structure retain their separate juridical personality and enjoy the resultant limited liability. Thus, legally speaking, the parent company – of even a wholly owned subsidiary – neither incurs additional liabilities (either vis-à-vis minority shareholders or creditors of the subsidiary) nor enjoys additional benefits emanating merely from the group relationship.[3] This is true despite the parent company's right of control which vests it with the power to freely dictate the internal management affairs of its subsidiaries. The parent company's managerial decisions over its subsidiaries or sub-subsidiaries are meant to promote the so called "corporate group policies" that are of course reflections of the financial interests of the parent. As such decisions are not legally required to be in line with the financial interests of the subsidiary, big enterprises (nationals or multi-nationals) prefer business operation via the group form to branches or divisions.[4] Of course, such economic integration absent legal integration in the sense that members to the corporate group retain their legal identity is considered as the most important incentive for an enterprise (holding company) to conduct business by establishing new subsidiaries or by holding shares in already established companies (subsidiaries).

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[2] Such relationship of control could emanate from the majority of voting rights of one company in the general meetings of the other or through contracts which entitle the holding company to express rights of control.

[3] This is true in jurisdictions that rely on traditional company law rules for the regulation of groups. But, in jurisdictions with separate separate regiems for corporate groups, e.g. Germany, there are express rights of control as well as duties on the holding company; see Andenas & Wooldridge, *supra* note 1, pp.455 and 480.

[4] Muscat, A., *The Liability of the Holding Company for the Debts of its Subsidiaries*, Dartmouth, Brookfield, 1996, p.4 [Hereinafter Muscat].

When one examines the other side of the coin, the parent company's management policies are likely to erode the financial interests of one or more of its subsidiaries in the guise of corporate group policy. Most often, the parent company is majority shareholder in the subsidiary company. However, the harm sustained by the subsidiary is not felt by such parent regardless of its shareholding in the subsidiary because this majority shareholder (the parent) generally benefits from the overall group strategy. The ultimate risk would therefore rest on the minorities and creditors of the subsidiary; hence the need for statutory protection of the subsidiary's minorities.

Company law generally looks after the subsidiary's minorities against the parent's abusive and unfair conducts as a corollary to the recognition of the group structure. In recognizing the group structure, the 1960 Commercial Code of Ethiopia contains few provisions that are said to exclusively protect minority shareholders of the subsidiary company. For example, the law has imposed an obligation on the parent company to prepare the accounts of its subsidiaries and to submit to the annual general meeting at the same time and in the same manner as its own accounts.[5] The law also states the possibility of extending expert investigations that are being held in a company to cover the affairs of its parent or subsidiary company under certain circumstances.[6]

By allocating special obligations on the parent company, these special rules of the Commercial Code were initially said to exclusively deal with the group arrangement with a view to protecting minority shareholders and creditors of subsidiary companies. However, the Code's recognition of the "group" form is

[5] Article 451 (1), Commercial Code of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 166/ 1960, 19th Year, No.3 [hereinafter Commercial Code]. Though it suffers from lots of exceptions, the rules in the Commercial Code entitle minority shareholders of a subsidiary company to get access to information regarding company management and structure. Note also that there are detailed rules of considerable importance to the group context.

[6] *Ibid*, Article 384.

not coupled with a stipulation on threshold or mode of control that a company should (potentially or factually) exercise over other company/companies for such entities to have control relationships. It is not clear who the subjects of the obligations and rights enshrined under the provisions discussed above really are.[7] Unless there are clearly defined rules on group formation, courts would find it hard to impose the special obligations of the parent company that the Code has clearly provided. The absence of a stipulation on threshold is thus likely to have serious repercussions on the interests of minority shareholders of subsidiary companies, but, even so, it is not uncommon to see in Ethiopia enterprises that are branded as "groups of companies" or "holding companies".

Right now, minority shareholders of the subsidiary company can only be protected by the rules that govern the majority[8]–minority relationship in the individual company. Though minority shareholders of the subsidiary company may seek protection via the provisions meant to protect minority shareholders in the individual company, the problems of the former [9] are quite different from

[7] Banking Business Proclamation No. 592/2008 uses the term "influential shareholder" to refer to a shareholder who directly or indirectly holds 2 % or more of the total subscribed capital of the company. Accordingly, among private persons a person holding 2 percent of the shares is likely to be an influential shareholder.This threshold seems too small to make a shareholder influential; but anyway the law restricts anyone –other than the government – from holding on his own or jointly with specified persons more than five percent of the shares of a bank (See Articles 1(11) *cum* 11(1), Banking Business Proclamation, 2008, *Federal Negarit Gazeta*, Proclamation No.592, Year 14, No.57). This threshold does not however serve as an authority in defining parent company for the purpose of the Commercial Code because it specifically addresses financial institutions who have recently been largely excluded from the scope of coverage of the company law provisions of the Commercial Code.

[8] Here, we can generally take the majority to mean the controlling company (parent company in the economic sense) in its shareholder capacity.

[9] This can simply be demonstrated by the risks minority shareholders of the subsidiary encounter by the conducts of the parent which is usually a majority shareholder in the subsidiary; see Section 2 *infra* for more.

the latter; hence a doubt on the effectiveness of the Commercial Code provisions in tackling the unique problems of the subsidiary's minorities.

However, this article is not interested in examining the effectiveness of the Commercial Code in protecting minority shareholders of the subsidiary company. Given the unique features of minority-majority relations in the individual company on the one hand and those in the group context on the other, the article rather attempts to surface how the concept of minority shareholder should be understood for the purpose of effective minority shareholder protection. The article tries to show who, among the diversified classes of shareholders of the subsidiary company, should qualify as minority shareholder for protection via minority rights. Before forwarding ideas on how minority rights should be understood in the context of group relationships, the article explains the possible justifications for special protections to minority shareholders in groups.

For comparative perspectives, the laws of England and Germany are consulted for they represent relatively rich jurisprudence in the regulation of groups.[10] Also, reference to laws of the United States and the Netherlands as well as the OECD Principles of Corporate Governance is made wherever appropriate.

In the Commercial Code, there are no rules that impose special obligations on groups having the private limited company (PLC) form. The relevant

[10] England follows the traditional approach to corporate group regulation. Under this approach, which is the dominant approach worldwide, regulation focuses on the individual entity (i.e. it treats the parent or subsidiary as a separate unit). This approach is also embraced by the Commercial Code of Ethiopia. Germany, on the other hand, has come up with special rules governing groups, and few countries are following this trend. Germany was the first European country to regulate the relationship between parent company and its subsidiaries through a special legal regime. Later, Portugal and Italy followed. Brazil is the only non-European country to adopt a special and systematic group regulation law. Under this approach, the group is treated as a single economic unit. See Andenas & Wooldridge, *supra* note 1, p.451.

provisions of the Code deal exclusively with groups of companies formed by the share company (SC). As a result, the article is confined to analyzing these provisions.

1. Some Background on the Status and Regulation of Corporate Groups in Ethiopia

As noted earlier, business enterprises having the suffixes "holding" or "group" in their names can be found in Ethiopia. A parent-subsidiary relationship may also be formed *de facto*, even though an economic unit formed thereof does not tag the words "holdings" and "groups" in its name. In economic terms, the economic unit is created when a centralized management is achieved between the companies. There are no legalization procedures for their formation. Procedures of registration, for example, are not required to create the group. Such business reality might not be felt by either the controlling company or the controlled company.

In legal systems that stipulate some criteria for the formation of such economic unit, the group is deemed to be created upon the fulfillment of the same. Yet, Ethiopian law does not (1) provide for the factors that give rise to parent-subsidiary relationships and (2) and lay down clearly stipulated legal standards that govern parent-subsidiary relationship. It is not thus clear if a corporate group is (legally speaking) formed where a company holds majority shares of another and effectively exercises management control or where a company has the power to steer the decisions of board of directors of another company and is able to pursue its interests at the expense of the other company. This uncertainty may discourage corporate group formation. In an interview with *Forbes Global Magazine*, a general manager[11] of a big Ethiopian company

[11] *Interview with: Mr. Melaku Beza*, General Manager, National Mining Corporation (March 15th, 1999, World INvestment News). An electronic edition of the special country report on Ethiopia published in Forbes Global Magazine(July 26th, 1999).

explains how the absence of a law on corporate groups affects their invetsment decision:

> "We are establishing a corporate office...It will be a holding company when the law comes. So far, there is no law for holding companies. We are 100% autonomous, and we are a private limited company. We have got corporate guidelines which we respect, otherwise all our financial decisions, human resources decisions, are limitless independent, and 100% autonomous. We report to our corporate office, in budgeting, and accounting, so that they will be aware of what we are doing. Otherwise, all the companies are 100% autonomous. We are now establishing this holding company".

Far beyond the disincentive such uncertainty brings about on investors, we are still very much in the dark about how the interest of minority shareholders of the subsidiary (share)[12] company is protected. A 2008 study on corporate governance in Ethiopia reveals ownership concentration and pyramid structures were among the core problems of corporate governance in the country.[13] The Commercial Code does not impose a restriction on one's magnitude of shareholding in a company; hence the need for addressing the concern of minority shareholders in group context or otherwise.

Be that as it may, it is clear that group relationships having share companies as their ingredients are allowed in the Commercial Code. Article 451 imposes legal obligations on a holding company for accounting purposes. In addition, some other provisions[14] of the Code imply corporate groups are recognized

[12] Should the majority shareholders' prefer PLC instead of SC, further problems regarding appropriate protection of minority shareholders would loom. This is because: (1) minority shareholders are exposed to oppression due to the unregulated and autonomous management structure of PLC and (2) a minority shareholder that opts for exit may not effectively exercise his right since the shares issued by the company are not freely transferable.

[13] Minga, N., *Rethinking Corporate Governance in Ethiopia* (September 2008), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1264697&download=yes>.

[14] See, e.g., Articles 370, 379, 384, Commercial Code.

under Ethiopian law. Like Ethiopia, France and England[15] provide for some special obligations of a parent company, without however a separate group law in place. But unlike English and French law, Ethiopian law is silent on the factors or standards that trigger the formation of the relationship; hence, application of the obligations is intangible. This is a major source of legal uncertainty that should worry minority shareholders and creditors as well.

In general, group relationships materialize where a controlling company exploits the finance and assets of a subsidiary while the former is without additional legal duties or liabilities. Absent specific rules on the protection of minority shareholders in corporate group context, the ordinary rules on the protection of minority shareholders in an individual company apply for parent-subsidiary relationships.

Incidentally, corporate group laws of most continental legal systems including that of France ignore the doctrine of fiduciary duties of directors and replace it by a detailed regulation of directors' dealings with the company.[16] Uniquely, the Commercial Code of Ethiopia clearly recognizes the fiduciary duty of directors. In particular, Article 364 stipulates that directors owe their company a duty of care expected of an agent. Therefore, as an agent a director is duty bound not to place himself in a position where there is a likely for conflict between his own personal interest and his duties to the company.[17] The Code also regulates dealings between the company and an interested director in a detailed manner.[18] Accordingly, certain transactions are prohibited and are

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[15] See Pennington, R., *Pennington's Company Law*, 6th ed., Butterworths, London, 1990, p.749 [hereinafter, Pennington].

[16] See generally Tunc, A.,"The Fiduciary Duties of a Dominant Shareholder", *in* Schmitthoff, C. & Wooldridge, F., *Group of Companies*, Sweet & Maxwell Ltd, London, 1991, pp.1-119.

[17] See also Andenas & Wooldridge, p.273, for a discussion on English law.

[18] Article 356, Commercial Code.

automatically declared void. Certain transactions, on the other hand, are subject to the shareholders authorization procedure.

2. Who is a Minority Shareholder in the Subsidiary?

2.1. General Overview

Any attempt to define "minority shareholder" by specific reference to the subsidiary company would generally be informed by two separate trends in company laws worldwide. As seen already, groups of companies may be regulated either by traditional (general) company law or a special law for group structures. In Ethiopian and United Kingdom, group structures are subject to traditional company law provisions. Minority shareholders of the subsidiary company are not thus subject to special provisions. As a result, any meaning ascribed to minority shareholder of the individual company does not change due to the mere fact that such company has become a subsidiary of some other company.[19] The meaning of minority shareholder of the subsidiary company is simply sought from company law provisions pertaining to individual company.[20] The German *Aktiengesetz*,[21] on the other hand, has come up with special regulatory provisions for groups of companies – *konzern*. The rules regulating the individual company and its minority shareholders are not applicable once a group is legally formed.[22] Under German law, which recognizes special rights and obligations of the holding and subsidiary companies, minority shareholder of an affiliate/subsidiary is defined differently from minority in the individual company.[23] The nature of the applicable regime

[19] The same holds true as regards minority shareholders of the holding company.

[20] This is also the approach taken in this article.

[21] This is the German Stock Corporation Law [hereinafter cited as AktG].

[22] The general company law applies with regard to *de facto* groups, however.

[23] See section 2.4 *infra*.

for the regulation of group structures may therefore determine our conception of "minority shareholder".

Below, the concept of minority is discussed. In so doing, the writer does not rely more on statutory provisions than literature, as neither Ethiopian nor English laws define minority shareholder. Yet, a separate discussion on minority shareholder of an affiliate company as enshrined in the German AktG would, the author hopes, complement the dearth.

2.2. Minority Shareholder Defined: Shareholding or Control?

There is a tendency to qualify a shareholder as minority based on voting shares. For example, in the United Kingdom, even after the enactment of the 1985 Company Act, the amount of shares one holds was emphasized in distinguishing a majority shareholder from minority counterparts. Accordingly, a shareholder that holds more than fifty percent of the equity share capital of the company alone or acting in concert was considered a majority shareholder.[24] But, as seen below, such a shareholder may in fact be a minority shareholder unless he exercises control of the company.

Timmerman[25]defines a minority shareholder: "a shareholder who irrespective of his shareholding in the company is unable to exercise a significant control within the company". *Control* demarcates the boundary between the majority and the minority.[26] The magnitude of shareholding or capital investment of a shareholder has no place unless this is accompanied by control of the management of the company. Absent control within his company, a

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[24] Muscat, *supra* note 4, p.86.

[25] Timmerman, L. & Doorman, A., 'Rights of Minority Shareholders in the Netherlands' (2001), p.5; available at <http://www.ejcl.org/64/art64-12.pdf> [Hereinafter Timmerman & Doorman].

[26] However, as we will see it in detail below, it is hard to imagine a precise dichotomy between shareholders as majority and minority without investigating conflict of interest situations.

shareholder who holds fifty percent or more of the voting rights of the company may thus still qualify as a minority shareholder. This is especially the case where another shareholder can appoint or dismiss the majority of directors. On the other hand, a shareholder who is without majority shareholding may be deemed a majority shareholder as far as he is capable of exercising control of the company.

Since control may take various forms, any definition of minority shareholder must take into account the possible modes of control involved; hence, our definition of minority is likely to vary with companies involved. As Timmerman suggests in connection with the concept of minority under Dutch company law,[27]in a company where capital and control are dismembered as a result of control mechanisms such as priority shares, the issuance of preference shares, pyramid structures or the statutory two-tier regime, identification of the minority within a certain company must take into account any possible ways of influence (control) that a shareholder may have[28] because the underlying forces determining its direction and momentum are more important than the size of one's investment – a bit like being a heavyweight on account of muscle rather than fat.

In the absence of any one of the aforementioned structures of control, i.e. when capital and control are parallel, "minority shareholders are those who contribute a significantly smaller percentage of the company's capital than the largest shareholder"[29]

The very notion of parent-subsidiary relationship implies a company should have control of another company for it to be regarded as a parent. Logically, the parent company is thus automatically excluded from the class of minorities. But, this does not necessarily imply that all shareholders (with the exclusion of the

[27] Timmerman & Doorman, *supra* note 25, p.4.

[28] *Ibid.*

[29] *Id*, p.5.

parent company) are minority shareholders of the subsidiary. Even among the remaining shareholders, those who are connected with the parent company (e.g. a shareholder director of the subsidiary that is appointed by the parent) are generally excluded from the group of the minority.

2.3. Ethiopian conception of minority shareholder

Under Ethiopian company law, there is no clear definition of minority shareholder. Nevertheless, some provisions of the Commercial Code give us clue on the Ethiopian conception of minority. As one's decision-making power in general meetings is the common factor in determining the existence of holding-subsidiary relationships,[30] our discussion here revolves around rules pertaining to decision making power in the ordinary general meeting of shareholders. Alternatively, however, one's power – which may, for example, be contractual – to appoint or remove board members of the company may also bring about effective control even in the absence of decision power in the

[30] This is hardly surprising as shareholders' ordinary general meeting is vested with the power to oversee other management bodies including directors and auditors. It appoints and removes directors and auditors. It also sets their remuneration (see Article 419 (2), Commercial Code). The annual general meeting discusses the company's situation and prospects on the basis of documents and reports submitted by directors and auditors and it may approve, amend and approve or refuse to approve same. If the annual accounts are approved and profits are available for distribution, the meeting decides on the distribution based on directors' proposal (Article 419(1)). Ordinary general meeting can also decide on issues involving the issuance of non-convertible debentures. Generally, matters other than those reserved to extraordinary general meeting are within the scope of power of the general meeting. See also Gizachew Sileshi, *Law of Traders and Business Organizations Teaching Module*, Bahir Dar University, School of Law, Bahir Dar, 2008, p.156 [hereinafter, Gizachew].

general meeting; hence, additional emphasis on rules related to shareholder power in appointment and removal of board members.[31]

The Commercial Code confers control power on the shareholder contributing a bigger share of the capital of the company. As a rule, shareholders' ordinary general meeting passes binding resolutions by simple majority of the voting shares represented;[32] and every share carries at least one vote.[33] The total number of votes a share carries is in proportion to the amount of capital it represents;[34] hence, the principle that control should correspond with capital.[35] Under normal circumstances, a shareholder contributing significant portion of the capital of the company therefore possesses the majority of the voting rights (the majority vote) in the meeting. Simply put, such shareholder becomes a majority shareholder. So, minority shareholders are shareholders that possess less than fifty percent of the voting rights in the general meeting.[36]

Conversely, there are exceptions to the principle of "every share carries at least one vote" and hence to the rule "votes are proportional to amount of capital investment". As a result, a shareholder may control the company without holding a significant percentage of the capital.[37]

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[31] One's power to appoint or remove the majority of the board members can also be used as an alternative yardstick for control and hence parent-subsidiary relationships; see, e.g. United Kingdom Company Act, 2006, s 1159.

[32] Articles 421(1)-(3), Commercial Code.

[33] *Ibid*, Articles 345(3) and 407(2).

[34] *Id*, Article 407 (1).

[35] This principle has also been embraced by a report of a group of leading European company law experts. See *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, Brussels, 2002, p.3; available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf>.[herein after Report of High Level Group EU].

[36] This is simply because they contribute less than fifty percent of the capital of the company.

[37] Timmerman & Doorman, *supra* note 25, p.4.

An exception to the rule that every share shall carry at least one vote concerns preference shares. The voting right of preference shares, where they exist, may be restricted to matters which concern extraordinary general meetings.[38] Thus, their right to vote in annual general ordinary meeting may be withheld. Nevertheless, such restriction can only be made against preference shares giving priority over profits and/or distribution of capital upon dissolution of the company.[39] Therefore, voting rights of preference shares for preferred right of subscription in the event of future issues may not be restricted either in ordinary or extraordinary general meetings.

Pyramid structures represent another instance of control by shareholders who do not however provide a larger percentage of the company's capital.[40] As noted by the Report of the High Level Group of Company Law Experts of the EU[41]"pyramid structures in a different way achieve a similar disproportionality between [capital investment] and control rights to that which is, for example, achieved by multiple voting rights".[42] This happens when a person[43] exercises

[38] Article 336(3)-(4), Commercial Code; see also Gizachew, p.120.

[39] *Ibid*, Article 336(3).

[40] Timmerman & Doorman, *supra* note 25, p.4.

[41] Report of High Level Group EU, *supra* note 35, p.38.

[42]Nevertheless, in every holding company in the pyramid one may strictly maintain proportionality between capital and control. This may be achieved for instance by strict adherence to company law principles that guarantee proportionality between capital and control. Yet, by "just holding the minimum percentage required to retain control and by having minority shareholders in each holding company to finance the exercise of control by the ultimate owner," economic disproportionality may still be attained. See Report of High Level Group EU, pp.38-39.

[43] In some European jurisdictions, the controlling person need not necessarily be a company. For example, in the Netherlands the Heineken family that owns a holding company which in its turn controls another holding company (see note 46 and the accompanying texts) qualifies as person. By the same token, 'person' must as well refer to all business entities and persons such as sole propritors, parnerships and of course companies.

ultimate control over a company through a chain of holding companies each owning a controlling interest in the next one. There are non-controlling (minority shareholders) in every holding company in the chain. Under such an arrangement, the person who sits at the peak of the chain controls[44] the company at the bottom of the hierarchy through a relatively small capital investment therein,[45] that is to say the person at the pick exercises direct control on the first holding company which in turn controls the second holding company, the latter also controlling a third holding company and so on. An interesting example is the Dutch corporate group Heineken. As Timmerman & Doorman[46] illustrate:

> "The Heineken family owns the majority of the shares in a listed holding company, which in its turn holds the majority of the shares in Heineken NV, which is also listed. Through this construction, the Heineken family effectively controls Heineken NV, even though it only provides slightly more than 25% of the capital."

A similar scenario may occur in Ethiopia, where the Commercial Code does not prohibit the control of company by means of pyramid structure. With regard to participation of one company in another company, the only limitation the Code imposes involves cross-holding between companies.[47] Article 344(1) prohibits a company (say Company A) from holding any share in another company (say company B) if company B already holds shares representing ten

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[44] The control such person excercises over the company at the bottom may either be *de jure* (contractual) or *de facto*; see Report of High Level Group EU, *supra* note 35, p.38.

[45] *Ibid*; see also Timmerman & Doorman, *supra* note 25, p.4.

[46] Timmerman & Doorman, *supra* note 25, p.4.

[47] Article 344 (1), Commercial Code reads: Where ten percent or more of the capital of one company is held by a second company, the first company may not hold shares in the second company. Cross-holdings may also raise issues of capital and control even though cross holdings do not seem to be as popular as pyramid structures. See Report of High Level Group EU, *supra* note 35, p.38.

percent (10%) or more of the capital of company A. Otherwise, a company may hold any number of shares in the other company in so far as the second company does not hold shares in the first company or where cross holding by each is below 10%.[48] No prohibition is imposed on a company's right to hold majority shares in another company and further control others indirectly.

Meanwhile, as any person is in principle capable of acquiring shares under the law,[49] the person who stands at the peak of a cascade of holding companies and ultimately controls companies thereunder may include individual person, family, individual trader (sole proprietor), partnership, company and government agency.[50]

Furthermore, contractual arrangements between shareholders may create disproportionality between capital and control. This kind of contractual arrangement is used by shareholders with relatively smaller investment compared to that of the larger shareholder. For instance, in a company where

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[48] Gizachew, *supra* note 30, p.116.

[49] This is because the Constitution of the Federal Democratic Republic of Ethiopia under Article 40 recognizes the right to private property which can only be restricted under specified circumstances. Interests or claims contained in shares (shares other than bearer shares), are regarded as movable property by the fiction of the law. A cross reference to Articles 329,697 and 729 of the Commercial Code and Articles 1260, 2816, 2829, 2863-2874 of the Civil Code reinforces this view.

[50] However, some laws, e.g. Banking Business Proclamation, *supra* note 7, provide for restrictions on one's acquisition of shares in companies. The proclamation which prohibits foreigners from acquiring shares in Ethiopian banks does also limit a person's (other than the Federal Government of Ethiopia) right to "hold more than five percent of a bank's total shares either on his own or jointly with his spouse or with a person who is below the age of 18 related to him by consanguinity to the first degree." This kind of restriction on acquisition of shares is contemplated by Articles 11-27 of the Commercial Code that state "specific requirements as to age, qualifications, sex, nationality or license may be imposed by law in respect of particular trader". Such restrictions should not be confused with restrictions imposed on certain persons to run a business.

the largest shareholder contributes 40% of the capital, other shareholders each constituting 30 % of the capital may agree to act in concert in shareholders meetings. The largest shareholder who loses control power would in fact be a minority.

To sum up, Ethiopian law does not always require capital and control to go in line. In principle, a minority shareholder seems to be anyone who contributes less than 50 % of the capital. Nonetheless, there are possibilities for such a shareholder to exercise managerial control. In a company that issues preference shares or applies pyramid structure, "minority shareholders" must be defined by taking into account such realities. Besides, definitions should take in to account contractual arrangements concluded for the purpose of acting in concert. And, it is thus submitted that minority should be defined in terms of particular situations of the company. As a United States Court interestingly remarks:

> "The question of whether shareholders are 'minority' or 'majority' shareholders should not focus on mathematical calculations but, instead, should focus on whether they have the power to work their will on others and whether they have done so improperly."[51]

2.4. Minority Shareholder under German Akt G

German law is unique in the sense that parent and subsidiaries are taken as a single economic unit – *Konzern* – subject to special rules[52] distinct from

[51] Hollis v. Hill, 232 F.3d 460 - Court of Appeals 5th Circuit 2000.

[52] The rules are provided mainly in the German Stock Corporation Act (Aktiengesetz) which dates back to 1965. They apply in relation to joint stock corporations and partnerships limited by shares (see Akt G, ¶ 291). Partnerships limited by shares are rare and therefore excluded from the scope of this paper. Some rules of the AktG are also applied by analogy to companies with limited liability (GmbH) – whose closest Ethiopian equivalent would be private limited

company law provisions that generally apply vis-à-vis majority-minority conflicts in the independent company.[53] The irrelevance of rules governing majority-minority relations in the individual company to group situations speaks of the Germany's readiness to accept commercial reality and its consequences.

German AktG, which legitimizes a wider range of controlling powers of the parent company notwithstanding they are detrimental to the interests of the subsidiary company and others,[54] embraces safeguards for shareholders of the subsidiary who have abandoned their respective interests for the sake of successful group policy.[55] Accordingly, a clearer definition of minority is sought so as to identify the beneficiaries of the protective rules.

For the obvious reason that the regime for affiliated groups expressly shifts managerial power of the controlled companies to the controlling company, the ground for the characterization of a shareholder as a minority is not the absence of control within the company he belongs to. From the very outset, a shareholder of the controlled company does not have a legitimate right to control his company. Instead, following the conclusion of the contract of affiliation, every shareholder relinquishes and subsumes its respective interests to the interests of the controlling company. As a result, the regime itself brings to an end to the core principle of company law that "capital and control must go in line".

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company (PLC); see Andenas & Wooldridge, *supra* note 1, p.454; also Hoffmann, D., 'Germany' *International Business Lawyer*, pp.218 *et seq.*[Hereinafter Hoffmann].

[53] See generally, Walde, T., W., 'Parent-Subsidiary Relations in the Integrated Corporate System: A Comparison of American and German Law', *Journal of International Law and Economics,* Vol.9, 1974, pp.408 *et seq* [Hereinafter Walde].

[54] Hoffmann, *supra* note 52, pp.219-220.

[55] Immenga, U., 'Company Systems and Affiliation', *in* Conard, A.,et al. (eds.) *the International Encyclopedia of Comparative Law*, Martinus Nijhoff Publishers, The Hague, 1985, Vol. XIII, Chapter 7, Part II, p.73 [hereinafter Immenga].

The subjects of the protective rules of the law are what are known as *outside shareholders*.[56] According to Ulrich Immenga, these are shareholders of the controlled company who are participating at the side of the controlling company and whose interests are likely to be affected by the management decisions of the controlling company.[57] This group generally constitutes the minority.[58] The term outside shareholder is "derived from the relationship that exists between these holders and the controlling company".[59] Among shareholders of the controlled company, the controlling company can never be regarded as an outside shareholder.[60] Also, any party associated to the controlling company and thus participates for the latter's advantages by virtue of that association is not an outside shareholder. From members of the controlled company whose interests are not endangered as a result of the relationship and are not therefore covered by the protective rules include:[61]

- a shareholder-director that is appointed by the parent company[62] and
- a company that is allied with the controlling company through special contractual regime (as per German law) or otherwise *de facto* (as per an EEC Directive).[63]

Among from shareholders of the concerned subsidiary a shareholder who either controls or is controlled by the parent company by virtue of a contract of

[56] *Ibid.* This is also the term used in German AktG (see title of § 4).

[57] *Id.*

[58] *Id.* Immenga alternatively uses terms *external* or *free* shareholders. This is perhaps due to the fact that, though these members of the subsidiary have relinquished their control in favor of group interests, their individual interests are not necessarily in line with the interests of the group.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Such director is also refered to as nominee director.

[63] Immenga, *supra* note 55, p.73.

dominance or de facto may be assimilated to the class of outside shareholders. This class should however be distinguished from the one we saw above under the second category. That category consists of a company that may not be a shareholder in the subsidiary but which has alliance with the controlling company.

3. The Whys of the Protection of Minority Shareholders of the Subsidiary Company

Protection of the financial interests of minority shareholders of the subsidiary is a major objective of a law regulating parent-subsidiary relations.[64] Of course, company law protects minorities in individual companies as well. Both in the group structure and within the individual company, minority protection is meant to tackle conflict of interest problems. In group context, the conflict is between the economic interests of the parent company and that of the subsidiary. Whereas, in the individual company the conflict is between the financial interests of the minority shareholder and that of the majority, the later's interest being presumably indistinguishable from the interests of the company.[65]

Nevertheless, legal and practical issues of minority protection in an individual company and in a group relationship are basically different. In the independent company, only fraudulent practices must be addressed. On the other hand, in the group arrangement there is a group policy that subsumes the policies of its members. It is no more an individual action that affects the interests of minorities. It is rather the fact of integration that triggers the protection of minorities in corporate groups.[66] As Muscat posits:

> "At law the position of a minority shareholder in a subsidiary company should be no different from that of a minority in the single independent

[64] See also Walde, *supra* note 53, p.456.

[65] See *infra* Section 3.1 for more.

[66] Walde, *supra* note 53, p.456.

company. Yet, *in practice a minority shareholder in a subsidiary is company is potentially at greater risk.*"[67] [Italics added]

An assessment of a company law regime on minority shareholders' protection is basically an assessment of rules on conflict of interest. This section makes a general remark on some of the "greater" conflict of interest risks of minority shareholders of the subsidiary. First is however a brief summary of the tension between legal independence and economic unity.

3.1. The Tension between Legal Independence and Economic Unity

Independent legal personality of a company take as read its economic independence.[68] Such presumption is expressed in the term "corporate interest."[69] Corporate interest dictates all company law rules including those concerning internal management. Rules on directors' liabilities and validity of shareholders' resolutions are thus formulated to advance corporate interest.[70]

In the individual company, where the internal structure of corporate governance consists of a relatively independent board, pursuing corporate interest is easier. The residual corporate affairs reserved for shareholders participation are exercised through shareholders' general meetings.[71] Common to all shareholders is the desire to realize their financial interests through the continual generation of profit by their company.[72] Here, the interests of the minority are largely parallel to the interests of the majority and ultimately to that

[67] Muscat, *supra* note 4, p.17

[68] Immenga, *supra* note 55, p.6.

[69] *Ibid.*

[70] *Ibid.*

[71] Nonetheless, the scope of managerial power of the board and the shareholders' meetings differs from jurisdiction to jurisdiction; see Immenga, *supra* note 55, p.6.

[72] *Ibid.*

of the company. The interests of the company are determined on the basis of majority rule and any practical conflicts are resolved by majority voting.[73]

Nonetheless, this relative harmony in interests faces lots of problems when a company becomes a member of a corporate group and thereby surrenders its economic independence.[74] This loss of independence is usually factual instead of legal since the subsidiary is still a separate legal entity.[75] Here, the minority shareholders of a subsidiary company are in need of protection since there is a tension between the company's legal independence and economic unity within the group.[76] This tension emanates from the very attribute of groups which is characterized by the separation of economic independence from legal personality of the subsidiary company due to the control the parent exerts over its subsidiary. When we see the other side of the coin, the group is only an economic unit rather than a legal unit and company law does not usually treat the group as a legal person even though it consists of companies operating under a single economic policy.[77]

Under these circumstances, there is a shift in the management function of the organs of the subsidiary company as the management board is under outside control for all practical matters, although it is still legally unaffected. Furthermore, although the composition of board members is to be determined

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[73] *Ibid.*

[74] *Ibid.* When enterprises join together a larger economic unit is created. Such unit is assumed to be created when a certain level of centralized management is achieved. The prerequisite degree of management centralization and strength of the resultant economic unity could vary.

[75] Muscat, *supra* note 4, p.86.

[76] Timmerman & Doorman, *supra* note 25, pp.89-90.

[77] Despite the creation of economic of unit, the subsidiary still retains all the five characteristics of a business corporation: (1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a board structure, and (5) shared ownership by contributors of capital; see Kraakman R. et al., *the Anatomy of Corporate Law: A Comparative and Functional Approach*, Oxford University Press, Oxford, 2009, 2nd ed., p.5.

by shareholders meetings, the general meeting is exposed to the influence of an outside interest in the form of majority shareholder.[78] In short, due to the inherent conflict of interest between the parent and its subsidiary, all functions of the management organs of the company end up to be mere formalities which serve only legitimate interests of the group. In other words, group relationship and the resultant conflict of interest bring about a disruption of the legal structure of authority within the subsidiary company.[79]

Beyond disruption of the legal structure of authority within a company, the conflict of interest situation created thereby may erode the finance and assets of the subsidiary.[80] For it pursues an outside interest, which is the group's interest, instead of its own, the subsidiary's business is not conducted "with an eye single to its own interests".[81] At the same time, the policy of the group may not necessarily be compatible with that of the subsidiaries'.[82] Group profit maximization does not always mean profit maximization for an individual member[83] as the subsidiary may even be expected to act to its detriment for the overall group success.[84]

3.2. Conducts of the Parent Company that may harm the Subsidiary

Formation of corporate group brings with it "some risks of abuse and unfairness that could endanger the various interests,"[85] mainly the interests of minority shareholders of the subsidiary. Due to excessive intervention and

[78] Immenga, *supra* note 55, p.6.

[79] *Ibid*; see also Muscat, *supra* note 4, p.49.

[80] *Ibid*, p.7.

[81] Muscat, *supra* note 4, p.66.

[82] Timmerman & Doorman, *supra* note 25, p.89-90; see also Immenga, *supra* note 55, p.4.

[83] Immenga, *supra* note 55, p.6.

[84] Muscat, *supra* note 4, p.65.

[85] *Ibid*, p.47.

domination by the parent company, [86] the subsidiary is compelled to behave in a way that is detrimental to itself but beneficial to the group as a whole or for one or more other group members. While the organization of companies into a group form generally allows the parent to transfer profits and assets and to divert business opportunities, abusive corporate practices simply aimed at implementing the group's goal of profit maximization may not necessarily result from domination – even of the extreme type – by the parent. [87] Control power is a power that is almost by definition granted to every parent company[88] and under normal circumstances, it is applied for the overall success of the group as a whole without endangering the interests of minority shareholders of subsidiaries.[89]

Abusive corporate practices include profit transfer, transfer of assets and business opportunity diversion. Though economically rational and consistent with good business practice, these practices may at the same time be prejudicial to the interests of the subsidiary and its minorities.[90]

3.2.1. Profit Transfer

The parent company may tunnel profits that its subsidiaries earn through intra- group transactions including *transfer pricing*. Transfer prices are prices fixed by the parent and have no relation to market value.[91] Transfer pricing is

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[86] *Ibid*, pp.61-62. In terms of the degree of influence the parent exerts on them, subsidiaries could be autonomous, coordinated or dominated subsidiaries. The abusive conducts discussed in this article are observed in the dominated subsidiary; see generally Immenga, Company Systems, p.66.

[87] *Ibid*, p.61-62; Immenga, *supra* note 55, p.66.

[88] *Ibid*.

[89] *Ibid*, p.62; Immenga, *supra* note 55, p.66.

[90] *Ibid*, p.68.

[91] *Ibid*; Immenga, *supra* note 55, p.7.

commonly applied in sale transactions where the parent and its subsidiary have vertical relationships as customer and supplier.[92] Transfer prices are often set by the parent company without regard to the market value of the commodity involved.[93] The inadequate price paid by the parent or the excessive charge imposed on the subsidiary may bring about a reduction in income and perhaps eventually bankruptcy to the subsidiary.

Although transfer pricing is effective and thus frequently used in transferring profits, loans extended to the parent or other group members at less than the market interest rate may also be employed for similar end.[94] Likewise, payments made to the parent or other group members as a consideration for services such as research may in fact result in profit transfer.[95]

3.2.2. Transfer of Assets:

When parent-subsidiary dealings cross the red line of normal commercial transactions, transfer of profits becomes transfer of assets. Transfer of assets is the appropriation by parent company of the essentials of its subsidiary.[96] It occurs when, for instance, the parent company demands the conveyance of assets

[92] A steel producing parent company having an interest in a coal producing subsidiary may, for instance, fix a lower (than the actual value in the market) price for it wants to assure a sustainable supply of coal from the subsidiary. Similarly, "if this steel producing parent has an interest in another company that uses large quantities of steel, for example, a car manufacturer, the steel producing company fixes a higher price for long term basis for the steel it sells"; see Lutter M., 'The Konzern in German Company Law', *Journal of Business Law*, 1973, p.278.

[93] Immenga, *supra* note 55, p.7.

[94] *Ibid*, p.7; Muscat, *supra* note 4, p.69.

[95] *Ibid*; Muscat, Muscat, *supra* note 4, p.69.

[96] Immenga, *supra* note 4, p.7.

whose values do not have reliable market standards – intangible assets such as patent and know-how are typical examples.[97]

In the worst case scenario, the parent company may demand the sale of immovables or machineries owned by the subsidiary.[98] A continual payment a subsidiary makes in return for a long term deal with its parent (e.g. lease of an obsolete machine from the parent) can also lead to transfer of assets.[99]

3.2.3. Diversion of Business Opportunities

After undertaking feasibility and other important studies, the subsidiary company could make an agreement with a customer to perform a certain project which, after the deal, must often be reported to the headquarters of the group. Upon learning about the project, the parent company might divert this business opportunity to another group member, perhaps to give some incentive. In the meantime, the first subsidiary suffers loss of opportunities since prospective customers are likely to deal with that other group member. Loss of projects and the consequent absence of customers may diminish the subsidiary's income.[100]

4. Minority Shareholder Rights

A shareholder qualifying as a minority shareholder is entitled to some specific rights and actions.[101] This section discusses the nature of minority rights

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[97] *Ibid.*

[98] *Id*; Muscat, *supra* note 4, pp.76-78.

[99] *Id.*

[100] Muscat, *supra* note 4, p.73.

[101] For example under Article 381(1), Commercial Code, shareholders constituting 10% of the capital may request the Ministry of Trade and Industry to appoint one or more qualified inspectors and to make an investigation and report on the company's state of affairs. In the context of group companies, these shareholders may bring an action for investigation into

as distinguished from other shareholders' right. In doing so, it first elaborates on "the rights of shareholders" as recognized under the *OECD*[102] *Principles of Corporate Governance* (2004),[103] the 1960 Commercial Code of Ethiopia and the 2006 UK Company Act. Finally, we conclude that not all rights including some fundamental shareholder rights are truly minority rights.

4.1. Rights of Shareholders

The 2004 OECD Principles of Corporate Governance ideintifies some six basic shareholder rights. These are the right to: 1) secure methods of ownership registration; 2) convey or transfer shares; 3) obtain relevant and material information on the corporation on a timely and regular basis; 4) participate and vote in general shareholder meetings; 5) elect and remove members of the board; and 6) a share in the profits of the corporation.[104]

These rights may be categorized into pecuniary rights and control rights. Pecuniary rights primarily address how shareholders share in the profits during the life time of the company and the property upon dissolution. The right to control, on the other hand, deals with the manner and extent to which shareholders exercise voting in the affairs of a company.

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the affairs of their company (the subsidiary). Further, such an investigation may be extended to the affairs of holding companies and other subsidiaries (Article 384, Commercial Code).

[102]OECD stands for Organization for Economic and Co-operation and Development. It is an economic organization of over 30 nations that coordinate trade and economic policies of member states. Its principles are used as benchmarks by lawmakers of both member and non-member states; see <http://www.oecd.org/about/>.

[103]OECD Principles of Corporate Governance, 2004 [hereinafter as OECD Principles].

[104]OECD Principles, p.33. These rights are recognized in virtually all member states of OECD. As we will see below, the Commercial Code of Ethiopia also embraces these basic rights.

This classification is also reflected on the OECD basic principles of protection.[105]

With respect to the right to control, the OECD Principles consists of the shareholder's right to information and the right to influence the corporation, primarily by participating and voting in general meetings.[106] As a rule, shareholders' rights to control are inherent to one's membership in (investment) in the company. All shareholders, regardless of the number of shares they hold, are entitled to these rights. Moreover, without a shareholder's consent, the rights are not subject to decisions of all levels of management of the company.

Though capital investment in principle entitles every shareholder to influence his/her company's affairs, stretching one's hand into each and every business of the company is unrealistic. Pragmatism – the diversity of shareholders' interests and the resultant impossibility to manage the company by shareholders' referendum and the need for speedy management decisions[107] – limits shareholder's rights to influence the company only to certain core issues[108] related to, for example, the appointment of board members, approval of extraordinary transactions, and amendments of the company's articles or memorandum of association.

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[105] OECD Principles, p.32. Accordingly, an equity share in a publicly traded company can be bought, sold, or transferred. An equity share also entitles the investor to participate in the profits of the corporation, with liability limited to the amount of the investment. In addition, ownership of an equity share provides a right to information about the corporation and a right to influence the corporation, primarily by participation in general shareholder meetings and by voting.

[106] In addition to these rights that are recognized under the laws of all OECD member states, shareholder rights related to the approval or election of auditors, direct nomination of board members, pledging shares, the approval of profits, etc., can be found in various jurisdictions. See OECD Principles, p.32.

[107] *Ibid.*

[108] *Ibid.*

Also, though core issues of management are always subject to majority vote, right to control may not necessarily be exercised democratically – i.e. through the shareholders' general meeting.[109] Instead, the right may be exercised indirectly through the appointment or removal of members of the board of directors who pass decisions on day to day affairs of the company.[110]

4.2. Shareholders' Rights and Management

The supreme organ of corporate management is the shareholders' general meeting.[111] The ultimate power of management and control of the company resides with shareholders acting collectively in general meetings – which may be ordinary or extraordinary.[112] Shareholders meeting as an organ of management

[109]Though the six basic rights identified by OECD concern every shareholder including the minority, the ultimate decision maker is the majority shareholder through legitimately held general meetings. It is the majority's wills that are deemed to be the will of the company and of all of its members including the minority shareholders. This is also true in times of disagreement between the minority and the majority. Under Ethiopian law, a shareholders' general meeting properly established and conducting its business in accordance with the law, acts on behalf of all shareholders; its decisions bind all shareholders whether absent, dissenting, incapable or having no right to vote (see Articles 388(1) - (2), Commercial Code). This rule applies *mutatis mutandis* to special meetings as well.

[110]Even so, as will be seen next, the six basic shareholder rights cannot be set aside by any organ of the company as well as articles or memorandum of association.

[111]There are different categories of meetings, but generally the shareholders as a whole must meet at least once per annum to evaluate the performance of directors, managers, auditors and the overall state of affairs of the company. And whenever urgent and crucial matters that are beyond the scope of powers of board of directors arise, extraordinary meetings will be held.

[112]Ordinary and extraordinary meetings are general meetings because all shareholders are entitled to participate in them. On the other hand, special meetings refer to meetings of shareholders of a specific class. There might be several classes of shares; and matters that only affect specific class of shareholders need special meeting of concerned shareholders.

plays significant role by passing resolutions on top issues of management. It has powers to supervise the directors and to decide on the ultimate management issues including winding up. All other management organs including directors are accountable to shareholders meetings.[113] However, this privilege of shareholders is limited to cases where the company remains a going concern: in times of insolvency creditors will have their own say in decision making.[114]

Decisions of the general meeting of shareholders, which obviously reflect the will of the majority, bind all shareholders including the minority. Notwithstanding this, shareholders' fundamental rights reign supreme. Neither the general meeting of shareholders nor the board of directors may pass resolutions that compromise shareholder rights "inherent in membership." Similarly, neither the constitution of the company nor the articles of association should preclude a shareholder from enjoying fundamental rights: for example, right to vote in a general meeting[115] and right to a share in profits. Article 389(1), Commercial Code plainly states that "[any resolution by corporate management organs] *may not deprive a shareholder of his rights inherent in*

[113] Ethiopian law provides three organs of management: shareholders meetings, directors and auditors. Additionally, general manager who, while not an organ *per se*, plays crucial role in the management of the company. While shareholders meeting retain power as regards significant corporate matters, the board and the manager exercise residual powers of management.

[114] Wymeersch, E., 'Current Company Law Reform in the OECD Countries: Challenges and Opportunities', *Financial Law Institute Working Paper No. 2001-04*, Financial Law Institute, Universiteit Gent, 2001, p.1; . See also Articles 974 *et seq.,* Commercial Code.

[115] Exceptionally, a shareholder may be precluded from voting in a shareholders' meeting. Concerning legal prohibitions, an excellent example is the rule that prohibits a majority shareholder (for our purpose, a parent company) from casting its vote in resolutions pertaining to the approval of conflicted transactions(Article 409 (1), Commercial Code). Moreover, a shareholder who gets his investment back by way of dividend shares cannot vote in certain general meetings. Still, such restriction is consensual which follows one's entitlement to benefits.

membership". Rights inherent in membership, which consist of control and pecuniary rights, include:

> "rights which, under the law or the memorandum of association, do not depend upon decisions of the general meeting or board of directors or which are connected with *the right to take part in meetings, such as the right to be a member, to vote, to challenge the decisions of the company or to receive dividends and a share in winding up.*"[116] [Italics added]

4.3. What are Minority Rights?

In the protection of minority shareholders, both personal rights of the shareholder and rights of the company play important roles.[117] Personal rights are rights that emanate from the shareholder's personal capacity as a member to the company. The source of the rights may be the law, the articles of association or the memorandum of association.[118] Such rights may be protected by personal actions which in many cases are brought against the company itself; hence, their

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[116] Article 389(2), Commercial Code; the fundamental shareholder rights are also recognized elsewhere. For instance, the 2006 Company Act of the United Kingdom extends these rights to all shareholders, regardless of the number of shares they hold. Similarly, Dutch law recognizes rights identical to what under Article 389 of the Commercial Code termed as "rights inherent in membership". See generally United Kingdom Company Act, 2006 and also Timmerman & Doorman, *supra* note 25, p.5.

[117] Joffe, V. et al., *Minority Shareholders: Law, Practice, and Procedure,* 3rd ed., Oxford University Press, Oxford, 2008, p.2 [hereinafter Joffe].

[118] *Ibid*; this is true for the minority under UK and Ethiopian law. For the minority in the German contractual group, the source of the right is the contract of control. See below for more on this.

enforcement through personal suits.[119] The six basic shareholder rights discussed above are all personal rights.

Conversely, a shareholder may seek to enforce rights not vested in him, but rights vested in the company. For example, a shareholder may seek a remedy against directors for fraudulent misappropriation of the company's assets[120] via derivative action (if there is any).[121] In derivative action, the shareholder seeking protection raises the claim in the name of the company because the right to be enforced is of course the right of the company. Our discussion in this section (or article in general) is however limited to personal rights of minority shareholders.

As discussed earlier, the six basic shareholder rights –which are also personal rights – are inherent to membership and inalienable. They are equally enjoyed by all shareholders regardless of the number of shares they possess. Even a shareholder with a single share is vested with the rights. Yet, not all of these rights are truly minority rights. The right to participate or vote in general meetings, for example, usually does not qualify as a minority right. Although every shareholder has an inherent right of membership to participate in ordinary general meeting, some shares (e.g. dividend shares or preference shares) may be issued without voting right. Even where shares are issued with voting rights, the right to vote per se is not truly a minority right. For one thing, the right is not specifically destined to the minority. Second, the right does not play a significant role for the minority; since in times of disagreement they are the ones to be outvoted by the majority and to lose.[122] Put simply, even though the general meeting cannot preclude a minority shareholder from participating and

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[119] *Ibid.* p.71.

[120] *Ibid,* p.2.

[121] Derivative action is allowed under Ethiopian law. Shareholders representing 20% of the capital are allowed to enforce the company's right against directors where their company, after a vote for institution of action against directors for their liability to the company, takes no action within three months of the vote (Articles 364 – 365, Commercial Code).

[122] Timmerman & Doorman, *supra* note 25, p.5.

voting in the meeting, the right to participate or vote in itself does not normally let decisions otherwise than what the majority desires.

In group context, especially in simple parent-subsidiary relationships, minorities of the subsidiary company are vested with the right to participate and vote in their company's general meetings. Likewise, the parent company –as a shareholder of the subsidiary – is vested with the same rights. Because the parent company[123] more often than not exercises its majority vote in general meetings, these rights are of less significance for the minority of the subsidiary. By the same token, the right to receive a dividend per se is not a minority shareholder's right;[124] this is because the right does not normally allow reversion of a legitimately passed resolution on the destination of profits.[125]

In view of the foregoing, basic shareholder rights may be distinguished from minority shareholder rights. "For a right to be a true minority right," Timmerman and Doorman colourfully explain: absolute

> "it needs to possess the characteristic that it creates the possibility that an outcome can be reached that is different from the outcome that the majority of the shareholders wish. This means that the minority shareholder can interfere through a minority right in the affairs of the company, thereby correcting the policies of the majority shareholder."[126]

Therefore, a shareholder's right to qualify as a true minority right must:

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[123] Of course, it is the presence of this almighty as well as any others (which make a shareholder maker or breaker of the subsidiary's business) that accrue to such shareholder the status of a parent company.

[124] Ethiopian law confers on the shareholder a right to a share in annual net profits. But the ultimate decision on whether or not there will be distribution of profits and how much is made by annual general meeting of shareholders; hence, the right to share in net profits appears conditional than absolute (See Articles 419(1) *cum* 345(1), Commercial Code).

[125] Timmerman & Doorman, *supra* note 25, p.5.

[126] Timmerman & Doorman, *supra* note 25, p.6.

a. create the possibility for the minority to see a resolution other than the wish of the majority.
b. allow the minority to interfere in the affairs of the company; and, such interference, if there is any, must be by virtue of the right itself.

A true minority right is one that really enables minority shareholders beyond mere participation or voting in the general meeting. It must, for example, entitle the minority to challenge and rectify the policies as well as resolutions of the company – i.e. the majority. Mere possibility for the minority to see decisions otherwise doesn't make a right a minority right unless such interference of the minority is "by virtue of the right itself".

Take for example take the shareholder's right to get dividend. The majority shareholder cannot deny a minority shareholder of this right without the latter's consent. However, the power to declare dividend on annual basis belongs to the general meeting, i.e. the majority.[127] The minority shareholder cannot basically persuade the general meeting to declare dividend by invoking his right to get dividend. And, it is only where a decision for dividend precludes minorities from getting their share that the law renders such a resolution void.

Otherwise, the law protects minorities from only unreasonable or unfair decision to retain earnings (instead of distributing dividend). In the Netherlands, where the general meeting of shareholders is considered *bona fide* of (minority) shareholders,[128] there hase been a tendency to rely on "abuse of majority power doctrine" in protecting minorities – this is particularly the case since the 13 February 1942 Supreme Court judgment in *Baus v. De Koedoe*.[129] *Van Rees v. Smits*[130] an incisive example of the application of this principle. In setting aside a

[127] Article 419(1), Commercial Code.

[128] Timmerman & Doorman, *supra* note 25, p.6.

[129] *Ibid.*

[130] Court of Appeal, The Hague, 1 October 1982, NJ 1983, 393 cited in Timmerman & Doorman, *supra* note 25, p.6.

decision of the general meeting of shareholders to retain dividend, the court emphasized the importance of establishing whether "the general meeting of shareholders in the light of the mutual interests and arguments could have reasonably come to this decision". Accordingly, the Court declared the decision of the general meeting of shareholders void for it was unreasonable because of the large reserves, the profit in the year in question, the good performance in the next year and because it had been customary to declare a dividend of 50% of the profit.[131]

When we look into the relevant[132] Ethiopian laws, it is not clear whether the majority shareholder (parent) owes comparable duties to the minority. Of course, extraordinary transactions entered into by directors of the subsidiary are ultimately subject to general meeting authorization.[133] For the purpose of group relations, extraordinary transactions include dealings made between a subsidiary company and a parent director[134] and also dealings made between the subsidiary company and another concern.[135] Nonetheless, a dominant shareholder – for

[131] *Ibid*. In a similar fashion, UK company law protects minority shareholders from certain company decisions through "unfair prejudice remedy"; See Hollington, R., *Minority Shareholders' Rights*, 3rd ed., Sweet & Maxwell, London, 1999, p.1[hereinafter Hollington].

[132] As has just been noted, minority protection in group arrangements focuses on the regulation of intra-group transactions; and, shareholder's duty towards the subsidiary should therefore be seen mainly from the vantage point of the rules regulating shareholders' approval procedure regarding conflicted transactions.

[133] Once interested party transactions have been approved by the board of directors, the general meeting decides on the fate of such transaction by either approving (sometimes with modification) or disapproving it. See Articles 356(1)-(3), Commercial Code.

[134] This is applicable to dealings made directly or indirectly. For example, transactions entered into via an agent are subjected to the authorization procedure.

[135] Such concern may be a physical or legal person (e.g. another company) which is not acting as a director in the sense of Article 356(1). For the purpose of Article 356(2), it is enough that at least one of the directors of the subsidiary company is a director, manager, agent or

our purpose a *de facto* parent – usually imposes its will on the general meeting of shareholders that monitors extraordinary transactions. This is done by approving a transaction that is detrimental to the subsidiary company and its minority shareholders.[136] As a result, the Commercial Code protects the minority shareholders by restricting voting rights of some shareholders (e.g. the parent) whenever there is conflict between the interests of the shareholder and those of the company.[137] However, the parent's violation of this restriction does not in itself vitiate a resolution that approves extraordinary transactions. It is if and only if the violation results in approval of a transaction that is prejudicial to the subsidiary that the minority may seek the setting aside of the resolution.[138] On the other hand, Article 356(4) provides "dealings approved by the meeting may only be set aside on the ground of fraud". It thus appears that courts may not set aside the transaction on the sole ground of prejudice unless fraud (deceit) on the part of the majority is involved. It is thus suggested that fraud is the only restraint of majority power under Ethiopian law.

In the light of the foregoing, the majority shareholder's fiduciary duty to either the company or to its minority shareholders is not provided for in the Commercial Code. Had fiduciary duty – comparable with the fiduciary duty of directors recognized under the Commercial Code – been imposed on the parent, it would have been easier for courts to consider the interests of the

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shareholder of that other company. See Belayneh K. Zeleke, 'Protection of Minority Shareholders in Group Structures: the Case of Ethiopia, A Comparative Study' (University of Groningen, Faculty of Law, Department of International Economic and Business Law, August 2010, Unpublished), p.33. [Hereinafter Belayneh].

[136] This happens especially where the majority shareholder (the parent) has a personal interest in the transaction. The *North-West Transportation Co. Ltd. vs. Beatty* case (cited in Belayneh, *supra* note 136, p.33-34) where the majority shareholder managed to approve a transaction that it had already made in its director capacity is an illustrative example.

[137] Article 409(1), Commercial Code.

[138] *Ibid*, Articles 409(1)-(2) *cum* Article 416.

subsidiary company and its minority shareholders in reviewing general meeting decisions regarding extraordinary transactions. But now, it is only injuries caused by fraudulent conducts that trigger the parent company's liability. Minority shareholders of the subsidiary company cannot thus get court relief for injuries caused by negligent or unwise managerial decisions of the parent company. Therefore, it is submitted that the merits of extraordinary transactions approved by a general meeting resolution would not be reviewed in Ethiopia; and, it is only if such a resolution is an outcome of fraud that the courts would interfere in wills of the majority.

In contrast to Ethiopian law, the AktG provisions on outside (minority) shareholder protection seem to be more precise and clear. Though the duties imposed on a controlling company towards the controlled company and its minority shareholders differ depending on whether the group is contractual or de facto, the parent's main obligation towards the minority shareholders of the controlled company involves a pecuniary one: the controlling company is duty bound to compensate the minority shareholders on annual basis. The compensation is calculated on the basis of dividends paid in the past and of realistic future income expectations.[139] As regards *de facto* groups, the main obligation of a parent company is to refrain from any act which might be of any negative consequence to the dominated company. As opposed to contractual arrangements vis-à-vis which the law allows the controlling company to even take disadvantageous measures against minorities of the subsidiary, *de facto* groups are subject to rules which prohibit the controlling company from taking

[139] Akt G, ¶ 304(2); the protection accorded here must be distinguished from those recognized under Ethiopian and comparable UK laws. In Ethiopia and UK, minority shareholders may bring derivative action suits to enforce the rights of their company in order to indirectly protect their financial interests. Whereas, in Germany, the law affords minority protection in the form personal right directly enforceable against the parent company. This seems the reason why the controlling company has two lines of obligations as a rule: one owed to the controlled company itself and another owed to the latter's minority shareholders.

measures that disadvantage minorities.[140] Even so, disadvantageous acts may be taken upon the fulfillment of one condition. Pursuant to ¶ 311(1), Akt G, the controlling company can take measures of negative consequences provided they are reimbursed within a year time.

Conclusion

Control power the holding company exercises in shareholders meetings, the right to appoint or remove the board of directors of the subsidiary company, and limited liability are the main incentives for the parent company to do business in group structure. On the other hand, a subsidiary company's membership to a corporate group brings about a disruption in the legal structure of authority within the subsidiary; and, this paves the way for the parent to take measures that jeopardize the financial interests of the subsidiary's minority shareholders.

This paper reveals that the core target of the parent company is group success; and its policies are often tuned by this assumption. The measures it takes could generally benefit the group as a whole, or one or more members of the group. Yet, it may also adversely affect a particular subsidiary. Since the subsidiary's minority are basically interested in the solvency of their company, measures of this kind become sources of conflict. Thus, certain conducts of the parent company towards its subsidiaries call for special attention so as to protect the financial interests of the latter's minority shareholders.

To that end, some countries (e.g. Ethiopia, UK, and numerous European states) rely on traditional company law remedies. In some jurisdictions, like

[140] This obligation appears to flow from the principle set forth under ¶ 311(1), Akt G that all transactions within a factual group must be at arm's length. Note that the 'at arm's length' principle is not applicable as regards contractual groups. See generally Hoffmann, *supra* note 52.

Germany, Portugal and Brazil, special laws govern matters pertaining to groups of companies. In Ethiopia, where big companies doing business in the "group" form are mushrooming in response to the reintroduction of free market in the early 1990s,[141] the Commercial Code recognizes group relationships having share companies as their ingredients. Yet, the Code's recognition of the "group" form is not coupled with a provision stipulating the threshold or mode of control that a company should (potentially or factually) exercise over another company(ies) for such entities to have control relationships. One cannot thus easily identify the subjects of the obligations and rights provided in the Commercial Code vis-à-vis corporate group members.

Tough the Code purports to protect the minority shareholders of the subsidiary, it is difficult for courts to apply the special protective rules without first identifying who minority shareholders are. In the absence of express statutory rules defining minority, it is submitted that minority shareholder should be understood as a shareholder who irrespective of his shareholding in the company is unable to exercise a significant control within the company. By significant control, we mean one's decision making power in the shareholders general meeting or one's power to appoint or remove the majority of the subsidiary's board of directors. Therefore, in the absence of control within his company a shareholder who holds fifty percent or more of the voting rights of the company must qualify as a minority shareholder. In Ethiopia, where capital and control are not required by law to be in line, a definition of "minority shareholders" should also take into account instances where (1) a shareholder (who has contributed relatively small portion of the capital) exercises managerial control, and (2) a company issues preference shares or applies pyramid structure.

Finally, minority shareholder rights must be distinguished from fundamental shareholder rights. For a shareholder's right to qualify as a true minority right,

[141]Tilahun Teshome, 'Some Notes on Ethiopian Company Law', *Tiret: The MIDROC Ethiopia Group Magazine*, Vol.15, No.2 (March 2001), p.47.

two cumulative requirements should be met. First, such a right must create a possibility for the minority to see a resolution other than the wish of the majority. Second, the right itself should allow the minority to interfere in the affairs of the company; the existence of other grounds entitling the minority to see decisions otherwise than what the majority wishes does not make a right a minority right.

“ያልተመረመረ ሕይወት ትርጉም የለውም”፦ የስነ ምግባር መቅድም ለፍትህ ስርአት ባለሙያዎች

ጴጥሮስ ቶጃ*

ስነ ምግባር (Ethics) በኢትዮጵያ የሕግና ፍትህ፣ በሌሎችም ስነ ማኅበራዊና ልቡናዊ የእውቀት ምህዳር ውስጥ በስፋትና በጥልቀት ተገቢ ትኩረት የተሰጠው ክስተት አይደለም። የፍልስፍና አንድ ዘርፍ ቢሆንም ቅሉ፣ ጠቃሚና ሁለ ገብ የጥናትና የእውቀት ርዕስ እንደመሆኑ ለከፍተኛ ደረጃ ተማሪዎችና ለባለሙያዎች ትምህርትና ሥልጠና ውስጥ መመደብ የሚገባው ነው። የሰዎች የባህሪ እድገትና የልምድ በሳልነት በስነ ምግባር እውቀት ጭምር መታነፅ ይገባዋል። ስለዚህም፣ ስነ ምግባር በኢትዮጵያ ማኅበራዊና ባህላዊ ተጨባጭ ሁኔታዎች አኳያ ትኩረታዊ ጥናትና ምርምር ያስፈልገዋል።

ስነምግባር ምንድንነው? ከግብረ ገብነትስ (morality) እንዴት ይዛመዳል? ወይም ይለያል? ምግባረ ሰናይስ (virtue) ምን ማለት ነው? እነዚህ ጥያቄዎች የሚያነሱአቸው መሰረታዊ ፅንሰ ሃሳቦች ግልፅ መልስ የሚያስፈልጋቸው ናቸው።

ስነምግባር፣ የግል ወይም ማህበራዊ ወይም ሙያዊ ነክ ችግሮችን ለማስተዋል፣ ለመለየት፣ ለመመርመር፣ መፍትሄ ለመስጠት የምንችልበት ዕውቀት ነው።[1] ስነ ምግባር እውነትን ከውሸት አንጥሮ ለመለየት፣ ጎጂውን ከጠቃሚው ደንቃራውን ከቀናው ነገር በንቃት ለመመልከት የሚያስችለንና፤ ተገቢና ሚዛናዊ የውሳኔ አሰጣጥ መመሪያችንና ጥናታዊ እውቀት ነው። ስነ ምግባር ለባህሪያችን እድገትና እንፃት ማለትም በግልና በሙያዊ ሕይወታችን ውስጥ በጎ ምግባርንና በጎ ተግባርን የምንከተልበት፤ እንደ ሰብእ የምንነታችንና የማንነታችን መሠረት መገንዘቢያ የጥናት ማህደር ነው። ኢትዮጵያውያኑ ፈላስፋዎች ዘርኣ ያቆብና ወልደ ሕይወት በሐተታቸው እንደሚያትቱም ብርሃነ ልቡናና የሰላ ህሊና እንዲኖረንና የእውቀት ጥበብ እንድንጎናፀፍም ያስቸለናል።[2] ስነ ምግባር ከዚህ ቀደም የያዝናቸውን ግላዊ ሃሳቦችና ማህበራዊ እሴቶች(social values) እንደተጨባጭና ተለዋዋጭ ሁኔታዎች እንድንመረምር፣ እንድንገነዘብና እንድናርምም ያግዘናል። ምክንያቱም፣ ስለራሳችንም፣ ስለሙያችንም ሆነ ስለህብረተሰባችን ያለን እውቀት የተሟላ አይደለም። በአጭሩ ፍፁማዊ አይደለንም።

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*ፕሮፌሰር፣ በአሜሪካን ኩትዝታውን ዩኒቨርስቲ አፍ ፔንሲልቬንያ፤ ፀሃፊው የመጽሐቱን የአርትኦት ቡድን አባላት እንዲሁም ለሁለቱ የፅሁፉ ገምጋሚዎች ከፍተኛ ምስጋና ለማቅረብ ይወዳሉ።

[1] See generally Banks, C., *Criminal Justice Ethics: Theory and Practice*, Thousand Oaks, SAGE Publications, 3rd ed., 2013 [Hereinafter ባንክስ]; Williams, R. & Arrigo B., *Ethics, Crime and Criminal Justice,* Prentice Hall, New York, 2007[Hereinafter ዊልያምስና አሪጎ]; Souryal S., *Ethics in Criminal Justice: in Search of the Truth,* Anderson, Cincinnati, 1998; Albanese, J., *Professional Ethics in Criminal Justice: Being Ethical When No One is Looking*, Pearson, New York, 3rd ed., 2012[Hereinafter አልባኒስ].

[2] Sumner, C., *Ethiopian Philosphy: the Teatise of Zara Yakob and Wolde Selassie,* AAU Press, Addis Ababa, 1978, Vol.3, ገፅ 162-3.

ስለዚህም፣ ስነ ምግባር (Ethics) እንደ አንድ የፍልስፍና ጥናታዊ ምርምር ዘይቤ፣ እንዲሁም እንደእውቀት ማህደር ስለግብረ ገብነት (morality) ግብረ ገባዊ እሴቶች (moral values) ላይ ትኩረት የሚሰጥ ነው። ግብረ ገብነት (morality) የሰዎችን ባህሪይ፣ ድርጊትና ዝንባሌ የሚያካትት ነው። ለምሳሌ፣ ቅንነት፣ ደግነት፣ ታታሪነት፣ ተቆርቋሪነት፣ አከባሪነት፣ ርህሩህነት፣ ትሁትነት፣ ግልፅነት፤ ፍትሃዊነት፣ ታማኝነት፣ ቁርጠኛነት ወዘተ። እነዚህ የባህሪይ ገፅታዎች ደግሞ፣ ባብላጫው ግላዊ ሳይሆኑ፤ ማህበራዊ ይዘት አላቸው። የአንድ ሰው ቅንነት፣ ደግነት፣ ታታሪነት፣ ሃቀኝነት፣ ተቆርቋሪነት፣ ወይም ርህሩህነት፣ ወይም ትሁትነት፣ ግልፅነት፤ ወይም ፍትሃዊነት፣ ወይም ታማኝነት፣ ለራሱ ለግሉ የሚያሳየው ወይም የሚገልፀው አይደለም። ለግል ለራሴ ርህሩህ ነኝ ማለት ወይም ደግ ነኝ ማለት ትርጉም የሌለውና ፋይዳ ቢስ ብቻም ሳይሆን ጅልነት ነው፤ አስቂኝም ነው። እነዚህ ባህሪዎች ባብዛኛው የሚገለፁት፣ ሰዎች አብሮ በመኖርና በመስራት በማህበራዊ ህይወታቸው ውስጥ እርስ በርሳቸው ባላቸው የስራ ግንኙነት፣ ጉርብትናና ማህበራዊ ኑሮ ውስጥ ነው።

የስነ ምግባር ጥናት ጠቀሜታው

በተለይ ለፍትህ ስርአት ባለሙያዎች፣ የስነ ምግባር ጥናት (Ethics) ጠቀሜታው ምንድን ነው? በዚህስ ጥናትና እውቀት ዳኞች፣ ጠበቆች፣ አቃቤያነ ህግ፣ ፖሊሶች፣ የህግ አማካሪዎችና አስተዳዳሪዎች ምን ይጠቀማሉ? ከህብረተሰቡና ምንስ ይጠበቅባቸዋል? የተረከቡት ሃላፊነትስ ምንስ ያስገድዳቸዋል?

ስነ ምግባር ማጥናት፣ የግብረ ገብነትን ወይም የስነ ምግባርን ብልሹነት በራሱ አያሳይም ወይ? የሚል የቅሬታ ጥያቄ አለ። ስነ ምግባርን ማጥናት በቀጥታም ይሁን በአንደምታ የባህሪይ ብልሹነትን አያሳይም። ለምሳሌ፣ አንዳንድ የአሜሪካ ፖሊሶች ስነ ምግባርን በተመደበላቸው ሥልጠና ውስጥ አጥኑ ሲባሉ፣ ብልሹ ስነ ምግባር ተጠናውቶአቸኋል የማለት ያህል አይደለም ወይ? ብለው ይቆጣሉ። ሆኖም፣ ይህ ጤናማ (ትክክለኛ) አስተሳሰብ አይደለም፡፡ ይልቁንም አስተሳሰቡ ከስጋት የመነጨ ነው፡፡ እነሱ እንደሚያስቡት ስነ ምግባር ማጥናት የስነ ምግባር ብልሹነት ማስረጃ ሳይሆን፣ ባለሙያዎች በተሰማሩበት የስራ ዘርፍ ላይ መልካም ስነ ምግባር ኖሮአቸው፣ ፍትሃዊና ሰኪታማ ተግባሮቸን በማከናወን ህብረተሰቡን በትጋት ለማገልገል የሚያስችላቸው ነው። ለዚህም የማነፃፀሪያ ምሳሌ ለመስጠት፣ አንድ ሀኪም ህክምና የሚያጠናው ህመምተኛ ስለሆነ ወይም በሽታ ስለተጠናወተው አይደለም። ይልቁኑስ የህክምና እውቀትና ችሎታ ይዞ የጤና ምክር ለመስጠት፣ በሽተኞችን ለማከምና ከበሽታ ለመከላከል ነው።

በተመሳሳይ፣ የፍትህ ሥርአቱ ባለሙያዎችም፣ ዳኞች፣ ዓቃብያነ ህግ፣ ጠበቆች፣ ፖሊሶች፣ የማረሚያ ቤት አስተዳዳሪዎችና ሠራተኞች (ስታፍ) ከሙያ እውቀታቸውና ሥልጠናቸውና ጋር ስነ ምግባር ማጥናት የሚገባቸው፣ ለሕዝብ የተሻለ ማህበራዊ አገልግሎት ለመስጠትና የሙያ ኃላፊነታቸውን በአግባቡና ፍትሃዊ በሆነ መንገድ ለመወጣት እንዲችሉ ነው። ምን ጊዜም እውነትን እንዲሹ፤ አርቆ አሳቢ እንዲሆኑ፤ ሥኑይና እኩይ ጠባይና ተግባሮችን እንዲለዩ፤ ሥራቸው ስኬታማና ፍሬያማ እንዲሆን፤ ለሌሎች ተምሳሌ እንዲሆኑ፤ ለሕዝብ ተቆርቋሪና ተሟጋች እንዲሆኑ፤ በጥሩ ሥራቸውና በኃላፊነታቸው ተመስጋኝ እንዲሆኑ፣ ሲያጠፉ ደግሞ ተጠያቂ (accountability) ለመሆን እንዲችሉ፤ ለግልፅነት (transparency) ፈቃደኝነት እንዲያሳዩ፤ ተደራሽነትንና (accessibility)፣ በአገልግሎታቸው ከሕዝብ ተዓሚነትን (legitimacy) እንዲጎናፀፉ ነው።

"ያልተመረመረ ሕይወት ትርጉም የለውም"

ሶቅራጥስ፣ ጥፋተኛ ነህ ብለው ለፈረዱበት የሕዝብ ዳኞች (jury) ቅጣቱን እየተጠባበቀ ሳለ በሰጠው መልስ፣ "ያልተመረመረ ሕይወት ትርጉም የለውም" ይላል።[3] የጥቁር አሜሪካውያን መብት ተሟጋች ሆኖ በተቃዋሚዎቹ የተገደለው፤ ማልከም ኤክስ ደግሞ በ1960ዎች አያይዞ፣ "የተመረመረ ሕይወት መራር ጎምዛዛ ሊሆን ይችላል" ይላል። ጥንታዊው የግሪክ ፈላስፋ ሶቅራጥስና ጥቁር አሜሪካዊው ማልከም ኤክስ በ2300 አመታት ይራራቁ እንጂ የስነ ምግባር አስተያያታቸው ተደጋጋፊ ነው፤ ለፍትህና ለእውነት ያላቸው ፅናት ተምሳሌ ጠቢባን አድርጓቸዋል። ማልከም በትምህርቱም ሁለተኛ ደረጃን ያላጠናቀቀና አሜሪካን ውስጥ በሃያ አመቱ በተራ ወንጀሎች የአስር አመት እስራት ተፈርዶበት፣ ማንነቱን አገላብጦ መርምሮ ሕይወቱን ሙሉ በሙሉ ያስተካከለው፣ ትምህርታዊ ጥናት ያካሄደውና የጥቁሮች መብት ትግል ታዋቂ መሪ ለመሆን የበቃው ከእስር ቤት ውስጥ ነው።

ማልከም ኤክስ፣ በሕይወቱ ውጣ ውረድ ውስጥ ማንነቱን ባጠቃላይ ሲገመግም እንዲህ ይላል፣ "እኔነቴን እኔ ያሰኘኝ ምንድነው? ማንኛውንም ሰው በሚገባ ለማወቅ፣ ማንነቱን ከትውልዱ ዕለት ጀምሮ መመርመር ያስፈልጋል። በሕይወታችን ያጋጠሙን ልምዶች ሁሉ ባህሪአችን ውስጥ ዘልቀው ተዋህደዋል፤ ማንኛውም የኑሮ ገጠመኝ በማንነታችን ውስጥ ተቀርፆአል"።[4]

ሶቅራጥስ በሰባ አመት እድሜው በአቴናውያን ሁለት የወንጀል ክስ ተመስርቶበት የሞት ብያኔ ተፈረደበት። አንደኛው ክስ ለግሪክ አማልክት አክብሮት የለውም የሚልና ሁለተኛው ደግሞ ሶቅራጥስ የሚያስተምረው ትምህርት በመናፍቅነት የወጣቱን አእምሮ እየበከለ ነው የሚል ክስ ነው።[5] እነዚህ ክሶች የቀረቡበትና የሞት ቅጣቱ ደግሞ የተፈፀመው የዲሞክራሲ ሥርዓት በተፀነሰባት ታሪካዊ አቴንስ ከተማ ውስጥ ነው። ሶቅራጥስ የሞት ፍርዱን እየተጠባበቀ በእስር ላይ ሳለ፣ ወዳጆቹና ተማሪዎቹ ከእስር ሊያስመልጡት ቢሞክሩም አሻፈረኝ አላቸው። እምቢ ያለበትም ምክንያት፣ ከሕግ ፊት ማምለጥና ከፍርድ ብያኔ በመሸሽ መልካም ምሳሌ መሆን አይቻልም ሲል ነው። ከጠቢብነቱ በላይ ሶቅራጥስ በፅናቱና በድፍረቱ የምግባረ ሰናይ አርአያ ለመሆን ሕይወቱን አሳለፈ፤ የሞት ቅጣቱን በፀጋ ተቀብሎ መርዙን (ሄምሎክ) ጠጣ። አንድ ማለዳ ላይ ወዳጁ ክሪቶ እስር ቤት መጥቶ፣ ሕይወቱን ለማትረፍ ከሞት እንዲያመልጥ ሲያወያየው፤ የሶቅራጥስ መልስ፣ "ይበልጥ የሚያስቸግረው ከሞት መሸሽ ሳይሆን፣ ይልቁንስ አዳጋቹ ነገር ከእኩይ ተግባር መራቅ ነው"።[6]

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[3] Plato, *The Last Days of Socrates,* Penguin, Middlesex, 1959, ገፅ 72 [Hereinafter ፕላቶ].

[4] Malcolm X. & Haley, *The Autobiograhpy of Malcolm X*, Grove Press, New York, 1966፣ ገፅ 153 [Hereinafter ማልከም ኤክስና አሌክስ ሄሊ].

[5] ፕላቶ ፣ Maclntyre, A., *A Short History of Ethics*, Macmillan, New York, 1966 (Hereinafter ማክንታየር)፣ Lavine, T, *From Socrates to Sartre: the Philosophic Quest*, Bantam, New York, 1984 (Hereinafter ሌቪን) ይመለከቷል።

[6] ፕላቶ፣ ገፅ 73

ለሶቅራጥስ፣ መልካም ኑሮ (good life) ለመኖር የራስን ስነ ምግባር እውቅና (self-consciousness) ለዚህም “ምን አይነት ባህሪይ አለኝ?” ለሚለው ጥያቄ በራስ ላይ ሂሳዊ ግንዛቤን (critical reflection) ሳያቋርጡ ማድረግ አስፈላጊ ነው። ለሶቅራጥስ እውቀትና ጥበብ ተያያዥ ናቸው፤ እውቀትና ጥበብም የእውነት መፈለጊያ ቁልፍ ናቸው። እውቀትን መጎናፀፍ ማለት እውነትን መጎናፀፍ ነው። ምግባረ ሰናይነት የእውቀት ጥበብ ነው። የሚደንቀው ነገር፣ ከአቴናውያን ጠቢቦች ሁሉ ታላቅ ጠቢብ ለሚባለው ፈላስፋው ሶቅራጥስ፥ ለእርሱ ዐቢይ የግል እውቀትና “የእውቀት መነሻ መሠረቱ በበቂ አለማወቁን ማወቁ ነው”።[7]

ይህ የሚያስገነዝበን፣ አለማወቅን ማወቅ የአዋቂነት መመዘኛ ሆኖ መታየቱ ሶቅራጥሳዊ የስነ ምግባር ጥበብ እንደሆነ ነው። የሰው ልጆች በእውቀታቸው ፍፁማዊ አይደሉም። እንደ ፈሪሳውያን አዋቂዎች ነን ወይም ብፁአን ነን ብሎ መመፃደቅም ትዝብት ላይ ይጥላል። ሶቅራጥስ እንደሚያስገነዝበው፣ “ሰዎች የሚሳሳቱት ሆን ብለውና አውቀው ሳይሆን ካለማወቅ ከሚደርስ የስነምግባር ደካማነት ነው” ይላል።[8] ስለዚህም በእንደዚህ አይነት አላዋቂነት ምክንያትም ሰዎች በሚሉትና በሚሰሩት መካከል በሚከሰት ሰፊ ገደል ስር ግብረ ገባዊ መንሸራተት (moral lapse) ይታይባቸዋል።[9]

ስለዚህም ነው ሶቅራጥስ “ያልተመረመረ ሕይወት ትርጉም የለውም” ያለው። አንደኛ፣ የሰው ልጅ የግልና ሙያዊ ጠባይ እንደማህበራዊ ገጠመኙ ምንጊዜም ተለዋዋጭ በመሆኑ፤ ሁለተኛ፣ የሰው ልጅ በኑሮው በርካታ ፈተናዎችና ችግሮች ስለሚያጋጥሙት እነዚህን ለመፍታትና ውጤታቸውንም ለመገምገም አስፈላጊ በመሆኑ፤ ሦስተኛም ራስን ጠንቅቄ አውቃለሁ ብሎ ማለት እንደማይቻል፤ ይህ ቢሆንማና መልካችንና ቁመናችንን ያለጥርጣሬ ብናውቀው ኖሮ፣ ለምሳሌ ምን መስለን አደባባይ እንደምንወጣ መልካችንን በመስታወት ነጋ ጠባ ማየት ባይገባንም ነበር። ከመስታወት ትዩዩ ፊታችን ላይ የሚታይ ጉድፍ ለማንሳት፣ ፀጉራችንን ለማሰማመርና አለባበሳችንን ለማስተካከል በየእለቱ ባልተጨነቅንም ነበር።

በተነፃፃሪ ራሳችንን የምንመረምርበት የባህሪና የስነ ምግባር መስታወት ያስፈልገናል። ይህም ማህበራዊ መስታወት፣ የስነ ምግባር (Ethics) ጥናትና እውቀት ነው። ከባልንጀራ፣ ከቤተሰብ፣ ከሙያ ባልደረቦቻችንና ከዜጎች የሚቀርቡልንን ምክሮች፤ ማረሚያ ሃሳቦችና ትችቶች ሁሉ አዳምጠን በትጋት ማጤን ይኖርብናል። በመስታወት መልካችን ሸጋ ባይመስል ቅር የሚለንን ያህል ደግሞ፣ ምግባራችንን ስንመረምር ያልጠበቅነው ሆኖ ካገኘነው ደግሞ ሊከፋን ይችል ይሆናል። ለዚህም ነው በማልከም ኤክስ ግንዛቤ፣ “የተመረመረ ሕይወት መራራ ሊሆን የሚችለው” ያለው።

ምክንያቱም፣ ከሠሩ መሳሳት አለ፤ ፍፁማዊ አይደለንም። የግል ጥቅማችን ወይም የግል ፍላጎታችን ከሌሎች ሰዎች ፍላጎት ጋር ሊጋጭ ይችላል፤ ከማህበራዊ ግዴታችን ጋር ሊቃረን ይችላል። እንደሰብእ የግል ህይወታችን በማህበራዊ ሕይወት የተከደነ ነው።ስለዚህም በግል ሕይወታችንና በማህበራዊ ግዴታችን መካከል ሊኖር የሚገባውን ሚዛን መጠበቅ ይገባናል። ከግል ጥቅማችን ባሻገር ሁላችንም በግልና በጥቅል ለተረጋጋ ሰላማዊ ማህበራዊ ሥርዓት መጣጣር ይኖርብናል፣ የግል ጥቅምና ፍላጎት መኖሩና መከበሩ ደግሞ አጠያያቂ አይደለም። ፍጹም ግለኝነት

[7] ማክንታየር፣ ገፅ 19

[8] ዝኒ ከማሁ፣ ገፅ 23ን ይመልከቱ

[9] ዝኒ ከማሁ

ደግሞ አፅናፋዊ ሆኖ የግል ጥቅም መስመር ከያዘ ከማህበራዊ ሕይወት ጎዳና ውጭ ሊሆን ይችላል። በተጨማሪም፣ ከታች ዝቅ ብለን እንደምናየው፤ የጋራ ማህበራዊ ሥርዓታችን አለመረጋጋት የመጨረሻ የመጨረሻ የየግል ጥቅማችንን ጭምር ይንደዋል። የእኔነቴ ህልውና ማህበራዊ ነው፤ የማህበራዊነቴ ህልውና ደግሞ እኔነቴን ይገልጸዋል። የዚህ አያያዥ ውል ደግሞ ባብላጫው ማህበራዊ መሠረት ያለው ስነ ምግባር ነው።

በዚች፤ የስነ ምግባር አጭር ጥናታዊ መጣጥፍ ሆነ የአንድ ቀን ሴሚናር ደግሞ ስነ ምግባርን አንሳናፀፍም፤ ይልቁንም በዚች ምድር በሕይወት ዘመናችን ሁሉ ሳናሰልስ የምናዳብረው፣ የምንመረምረውና የምናስተካክለው ነው። የእያንዳንዳችን ያልተቋረጠ ምርምርና ግንዛቤ እንዲሁም ለመታረም ካለ ቅን ፍላጎት ላይ ተመስርተን ስነ ምግባራችንን ማጎለበት ይኖርብናል። ይህ ደግሞ ደካማነትን አያሳይም፤ እንዲያውም ብርቱነትን፣ ደፋርነትንና የባህሪን ጠንካራነት ነው የሚያሳየው። በተቃራኒው፣ ፍፁማዊ በሆነ ስሜት እርማት አያስፈልገኝም፤ ጉድለት አይኖረኝም ብሎ ማለት ግን ደካማነት ነው።

ስነ ምግባር (Ethics) ምን ድነ ው?

ኤቲክስ፣ ኤቶስ ወይም *ኤቲኮስ* ወይም *ኤቲካ* ከሚለው የግሪክ ቃል የመነጨ ሲሆን፣ ባህሪ ወይም ጠባይ ማለት ነው። ይህም ትኩረቱ በተለይ ስለሰዎች ባህሪ የሆነ የፍልስፍና ጥናት አንድ ዘርፍ ሲሆን፣ ሦስት ክፍሎች አሉት[10]፡- 1) *የቢሆን ስነ ምግባር* (Normative ethics) ምግባራችንና ተግባራችን ምን መሆን ይገባዋል? ምን ማድረግ ይገባኛል? ምን አይነት ባህሪ ሊኖረኝ ይገባል? እና ለመሳሰሉት ጥያቄዎች መልስ በመሻት በጎ ምግባርን እንድናንፅ፤ መልካም ተግባሮችን እንድናከናውን ያሳውቀናል። 2) *ልዕለ ስነ ምግባር* (Metaethics) – ሁለገብና ከፍተኛ ስነ ምግባራዊ ጥያቄዎችን እንድናነሳና ትንታኔ እንድናደርግ ይጠቅመናል። ስነ ምግባር ከየት መነጨ? ለውሳኔዎቻችን በርግጥ የግል ምርጫዎች አሉን? ስነ ምግባራዊ ይዘት በማህበራዊና በባህላዊ አስተሳሰብ ላይ ተመስርተው የታነፁ ናቸውን? ስነ ምግባራችን ከግል ጥቅም ጋር የተያያዙ ናቸውን? በግል ጥቅም ላይ ተመስርተዋልን? እና የመሳሰሉትን ሁለንተናዊ ጥያቄዎች አንስተን በልቡናችን እንድንመረምር ይረዳናል። 3ኛም፣ *ገቢራዊ ስነ ምግባር* (Applied ethics) - በተቀዳሚ ግብረ ገባዊ ጉዳዮች (ethical issues) እና በግብረ ገባዊ አጣብቂኞች (ethical dilemmas) ላይ፣ በግልና በሙያዊ ሕይወት የሚቃለሉና መፍትሄ የሚያስፈልጋቸው ችግሮች ላይ እንድናተኩርና መልስም እንድንፈልግላቸው አቅጣጫ ያሲዙናል።

በቀዳሚ ደረጃ የሚመደቡ ስነ ምግባራዊ ጉዳዮች (ethical issues) ከፍ ባለ ይዘታቸው ህብረተሰብን ወይም የማህበራዊ ክፍሎችን የሚመለከቱና በፖሊሲ ደረጃ መልስ የሚሰጥባቸው ናቸው።[11] ከነዚህም መካከል ለምሳሌ፣ የሞት ቅጣት ተገቢነት፣ የእስራት ቅጣት እንደጠባይ ማረሚያ ፍሬያማነት፣ በአመክሮ መልቀቅን በእስር ቤት አማራጭነት (parole and probation)፣ የወንጀለኛ

[10] ባንክስ 2013፣ ዊልያምስና አሪጎ 2007፣ በአጠቃላይ ክፍል ሁለትና ሶስት

[11] ባንክስ፣ ገፅ 11-2.

ቅጣቶች እንደወንጀሉ ክብደት ተመጣጣኝነት (priniciple of proportionality)፣ የገንዘብና የሕግ እውቀት ችግር ላላቸው ዜጎች የፍትህ ተደራሽነት (access to justice)፣ ወዘተ።

ስነ ምግባራዊ አጣብቂኞች (ethical dilemmas) ደግሞ በሙያ ኃላፊነት ምድብ፣ እንደ ዳኛ፣ አስተዳዳሪ፣ ጠበቃ፣ የፖሊስ መኮንን በግል የሚያጋጥሙና የሚደርሱ ውሳኔዎች ወይም ችግር አፈታቶችን የሚጠቀልሉ ናቸው።[12] በወንጀል ፍትህ ባለሙያዎች የእለት ተእለት ውሳኔዎችና እርምጃዎች የሚያጋጥሙ ናቸው። ለምሳሌ፤ ተጠርጣሪን አስሮ ፖሊስ ጣቢያ መውሰድ ወይም እንዳይለመድህ ብሎ በማስጠንቀቂያ መልቀቅ፤ መፈተሽ ወይም አለመፈተሽ፤ ኃይል መጠቀም ወይም አለመጠቀም፤ ዓቃቤ ሕግ ክስ መመስረትና ማስቀጣት፤ ዳኞች የጥፋተኝነት ፍርድ መበየን አለመበየን፤ የማረሚያ ቤት አስተዳዳሪዎች በተግሳፅ የዲሲፕሊን እርምጃ መውሰድ ወይም የታራሚውን ቀና ባህሪ ማበረታታት የመሳሰሉትን ውሳኔዎችንና እርምጃዎችን ይመለከታል። ከእነዚህ ስነ ምግባራዊ አጣብቂኞች ከስነ ምግባራዊ ንድፈ ሃሳቦች አኳያ ለመወጣት ባጠቃላይ የሚረዱ የመፍትሄ ስልቶችን ዝቅ ብለን እናያለን።

ግብረገባዊ ባህሪዎች ሁለንተናዊ (ethical universalism) እና አንፃራዊ (ethical relativism) ተብለው ይፈረጃሉ።[13] በአንድ በኩል የሰዎች ግብረገባዊ ባህሪዎች ሁለንተናዊ (universal) ሆነው ይታያሉ። ለምሳሌ፣ ለሰው ልጅ ሕይወት ክብር መስጠት፣ ለሕፃናት እንክብካቤ ማድረግ ወዘተ። በሌላ በኩል ግን፣ የሰዎች ግብረገባዊ ባህሪዎች ታሪካዊና ባህላዊ ቅኝት አላቸው የሚል አስተያየት አለ። በዚህም ምክንያት ሁለንተናዊ ከመሆን ይልቅ በቦታና በጊዜ አንፃራዊ ገፅታ ይኖራቸዋል። ለምሳሌ፣ በታሪክ ‘ድፍረት’ (courage) ለሚለው ምግባር (በግሪክኛ ‘ኣጋቶስ’)ከጥንታዊ ግሪክ ህብረተሰብ ጀምሮ ከዘመን ዘመን ትርጉሙ፣ ጀግንነት፣ ጦረኛ፣ ችሎታ፣ ቀና ባህሪ፣ ወዘተ በሚል ስነ ምግባራዊ መመዘኛነት ሲለዋወጥ ተመዝግቧል።[14] ከዚህም ሌላ፣ በታሪክ እንደማህበራዊ ሥርዓት ለውጥ የትርጉም ተለዋዋጭነት ብቻ ሳይሆን፤ እንደየባህሉ ልዩነት በአንድም ወቅት ደግሞ ስነ ምግባሮች አንፃራዊ ሊሆኑ ይችላሉ። ለምሳሌ፣ ታዳጊ ህፃናትን በለጋ እድሜያቸው በሥራ መስክ ማሰማራት፣ ለአቅመ ሔዋን ያልደረሱ ሴቶችን ለትዳር መዳረግ፣ ነፍሰ ገዳይ ወንጀለኞችን በሞት ፍርድ መቅጣት ወዘተ። በዚህም ምክንያት አንፃራዊ ተግባሮች ከሁለንተናዊ ስነ ምግባር ይዘቶች ጋር የሚመሳሰሉትን ያህል በግልፅ ይጋጫሉ።

ለፍትህ ሥርዓት ባለሙያዎች፣ ገቢራዊ ስነ ምግባር እነዚህን የመሳሰሉ ተግባራዊ ችግሮችን ለማቃለል የሚያስችሉ እውቀትና ልምድ እንድናካብት ይረዱናል። ይሁንና መልሶቻችን አከራካሪም ስለሚሆኑ ከስሜታዊ ውሳኔ መቆጠብ ደግሞ የግድ ነው። ለዚህ ተግባራዊ ስነ ምግባር ደግሞ፣ የቢሆን(ኖርማቲቭ) ስነ ምግባርና ላዕላይ ስነ ምግባር መንገድ ቀያሾች ናቸው። ከዚህም ላይ በመነሳት፣ የስነ ምግባር እውቀትና ምርምር አስፈላጊ ነው። አለበለዚያ፦ በአንድ በኩል፣ አንድ የህክምና ተማሪ የሰው አካላት ልዩ ልዩ ክፍሎችንና አሠራራቸውን ሳያውቅ በሽታ ለማዳን ተሽቀዳድሞ ቀዶ ጥገና ለማድረግ እንደሚሞክር ያህል ነው። በሌላ በኩል፣ የስነ ምግባር እውቀትና ስልጠና ሁልጊዜም የሚተኮርበት እንጂ፣ ስህተት ከተሠራ በኋላ እንደ መፈወሻ መድኃኒት እንክብል የሚዋጥ አይደለም። ጤናማ ሆኖ ለመኖር፣ ሲታመሙ ብቻ መድኃኒት በመውሰድ ብቻ አይደለም

[12] ዝኒ ከማሁ

[13] ዝኒ ከማሁ፣ገፅ 6–8.

[14] ማክአንታየር፣ገፅ 5–9.

መፍትሄ የሚገኘው። የአመጋገብን፣ እረፍትንና የስፖርት እንቅስቃሴን ዘይቤ በመከተል አስቀድሞ ከአንዳንድ አይነት ህመም ለመከላከል እንደሚቻለው ሁሉ፣ የስነ ምግባራዊም ንቁ ጎሊና ከአንዳንድ የስራ ነክ ስህተቶች አስቀድሞ ለመጠንቀቅና ለመከላከል ያስችላል።

የስነ ልቡና ተመራማሪ የሆነው ሎረንስ ኮኽልበርግ[15]፣ የጃ ፕያዤን ስነ ልቡናዊ የእድገት ደረጃዎች ላይ ተመስርቶና አስፋፍቶ (ወንድ ወጣቶች ላይ ባደረገው ጥናት) የግብረገባዊ (ሞራላዊ) እድገት ደረጃዎችን በስድስት ከፍሎ እንደሚከተለው ያስቀምጣቸዋል፦

አንደኛ፣ የደመ ነፍስ ስነ ምግባር የሚለው በለጋ ልጅነት እድሜ ስነ ምግባር በቅጣት ወይም በግሳፄ ፍርሃት የሚቀረፅ ነው። ይሁንና፣ ልጁ የቀጭውን ኃይልና ቁጣ እንጂ መስተካከል የሚገባውን ጠባይ ምን እንደሆነ አይረዳውም። በዚህ ደረጃ፣ በፍርሃትና በጭፍን ትእዛዝ ይቀበላል። ለእዚህ ምሳሌ፣ አንድ የቅርብ ወዳጄ ልጅ የሁለት ዓመት ህፃን ሳለ፣ በጣቱ ግድግዳ ላይ ያለ የኤሌክትሪክ ሶኬት (power outlet) ሲጎረጉር፤ አባቱ ተው ብሎ እጁን ይመተዋል። ሕፃኑም እጁን ወደኋላ አሸሽቶ፣ እንደገና ሶኬቱን በምላሱ ለመነካካት ይሞክራል። ይህ ሕፃን በደመ ነፍስ ግንዛቤው የጥፋቱ መንስኤ ከኮረጎቲ መንካት አለመቆጠብ መሆኑን አለመረዳቱ ላይ ነው።

ሁለተኛው፣ ግለኝነትና የግል ጥቅም የሚዳብርበት የሞራል ደረጃ ሲሆን ግለሰቦች ድርጊቱ ለራሳቸውና ለሌሎች ሊያስከትል የሚችለውን ጥቅምና ጉዳት (ደስታ ወይም ስቃይ) (hedonistic calculus) ማመዛዘን ይጀምራሉ። ሦስተኛም፣ ግለሰቦች ማህበራዊ ማበረታቻ (ከቤተሰብ፣ መምህራን ወዘተ.) ሲያገኙ የሚጠበቅባቸውን ምግባር ያሳያሉ፤ የሚያስመሰግናቸውን ተግባር ይፈፅማሉ፤ የሚያስነቅፋቸውን ይተዋሉ። አራተኛው ደረጃ የህግና ሥርዓት ግንዛቤ ደረጃ ሲሆን፣ የህግንና ህጋዊ ባለሥልጣንን መፍራትና ማክበርንና (ለምሳሌ፣ የንብረት ስርቆት የሚያስቀጣ ህግን የመጣስ ድርጊት ስለመሆኑ) መገንዘብን ያሳያል። አምስተኛው፣ በማህበራዊ ውል (social contract) የላቀ ግንዛቤ ላይ የተመሠረተ እንደዜጋ መብትና ማህበራዊ ግዴታን ማወቅ ይጠቀልላል። ስነ ምግባራዊ አስተሳሰብን ረቀቅ ባለ መልኩ መገንዘብ ይቻላል፤ መብት፣ ፍትህ፣ ርትዕ ወዘተን ይለያሉ፤ ህጎችን፣ ደንቦችንና መመሪያዎችን ያውቃሉ፤ እነዚህ የተመሠረቱባቸውን መርሆዎች ምንነትና ጠቀሜታ ይረዳሉ።

በመጨረሻም፣ ስድስተኛው ላቅ ባለ ደረጃና መልኩ የፍትህንና ርትዕን እንዲሁም የመብትን ሰብዓዊነትን ጉዳዮች ይገነዘባሉ፤ ስነ ምግባርን በጥልቀት ይረዳሉ፣ ይተነትናሉ። ለምሳሌ፦ በፍርድ ለወንጀል ጥፋተኝነት በህጋዊ እውነት (judicial truth) እና ሞራላዊ እውነት (moral truth) ያለውን መሠረታዊ ልዩነት ለመተንተን ይበቃሉ። ህጋዊ እውነት በፍርድ ቤት ችሎት ሂደት በሚቀርቡት ማስረጃዎችና የሕግ ምስክሮች እንዲሁም የጠበቆች ሙግት የተከሳሹ ጥፋት፣ ወንጀለኛ መሆን አለመሆኑ የሚረጋገጥበት "እውነት" ነው። ወንጀለኛው ተበይኖበት ጥፋተኝነቱ ቢረጋገጥበትም፣ ከወንጀሉ ነፃ ሊሆን ይችላሰል። ባንፃሩም፣ ጥፋተኛ አይደለም የሚል ፍርድ (ህጋዊ እውነት) ቢበየን፣ ተከሳሹ ራሱ በውስጠ ህሊናው በርግጥ ልቡ ከሚያውቀው ጥፋተኝነቱ (ሞራላዊ እውነት) ጋር የማይመሳሰልና የሚጋጭ ነው። በዚህም ምክንያት በፍርድ ሥርዓት ውስጥ አንዳንድ ጊዜ፣ ሞራላዊ እውነት በሕጋዊ እውነት ሽፋን ይጋረዳል። ይህ ሊሆን መቻሉን መገንዘብና መቀበል ደግሞ የላቀ ስነ ምግባራዊ እውቀትና ሚዛናዊነት ችሎታ ይመሰክራል።

[15] Kohlberg, L. 'The Claim to Moral Adequacy of a Highest Stage of Moral Judgment' *Journal of Philosophy*, Vol. 70, No. 18, 1973, pp. 630–646

የፍትህ ባለሙያዎች ያካበቱት እውቀትና የሥራ ልምድ በአምስተኛውና በስድስተኛው ደረጃ ክልል ውስጥ ያስመድባቸዋል። ስለዚህም ነው ከታች ዝቅ ብለን እንደምናየው፤ ከዚሁ ጋር ተደርቦ ከፍ ባለና በላቀ የስነ ምግባር መመዘኛዎች ሊታዩ ወይም ሊመዘኑ የሚገባቸው። ሆኖም፣ ካሮል ጊሊጋን "ለየት ባለ ድምፅ"[16] በሚለው መፅሐፏ፣ በአንስታይ (feminist) አመለካከት፣ የኮኽልበርግን ንድፈ ሃሳብ በወንድ ወጣቶች ብቻ የጥናት ናሙና (ሳምፕል) ላይ የተመሠረተና ውሱን ተባዕታዊ አመለካከት ያለው ነው ትላለች። በተለይ ኮኽልበርግ፣ የሴቶች አጠቃላይ የሞራል እድገት፤ ሴቶች ካዳበሩት የርኅራሄ ስነ ልቡናዊና ማህበራዊ ልምድ አንፃር፣ ከላይ ከተዘረዘሩት ሁለተኛና ሶስተኛ ደረጃ እድገት ከፍ አይልም ስላለው፤ በጠነከረ ትችቷ፣ አንስታይ የሞራል አመለካከት ለየት ባለ መልክ፤ በሴቶች ልዩ ማህበራዊ ልምድና እውቀት አኳያ የተንከባካቢነት ስነ ምግባርን (ethic of care) ይገልፃል እንጂ ዝቅተኛ አይደለም ትላለች።

የሕግና ስነ ምግባር ዝምድናና ግጭቶች

ሕግ እስካለ ስነ ምግባር ለምን አስፈላጊ ሆነ? ሕግ ስነ ምግባርን አያጠቃልልም ወይ?

ለእነዚህ ተዛማጅ ጥያቄዎች፤ ኸርበርት ሀርት እጅግ አጠር ባለች "ሕግ፣ ነፃነትና ሞራሊቲ"[17] መፅሐፉ ውስጥ አጠናቅሮ መልስ ሰጥቶባቸዋል። ግብረ ገብነት (ሞራሊቲ) በርግጥም በሕግ ላይ ተፅእኖ አለው። በወንጀል ሕግ ኢግብረ ገባዊ ባህሪዎችን መቅጣትን ሕጋዊ ግብረ ገብነት (legal moralism) ይለዋል።[18] የራሴን ምሳሌ ለመስጠት፤ በተለያዩ ጊዜያትና ህብረተሰቦች የአልኮሆል መጠጥ እገዳ፣ ሕብረ ትዳር (ፖሊጋሚ)፣ ዝሙትነት፣ ፅንስ ማስወረድ፣ መናፍቅነት፣ የሴት ግርዛት፣ አመንዝራነት፤ ጥንቆላንና የመሰሰሉት ተግባሮች በሕግ እንደወንጀል ተደንግገው ያስቀጡ ነበር፤ በአንዳንድ ቦታ አሁንም ያስቀጣሉ። በግልባጩም፣ ሕግ በማስፈራሪያነትና በቅጣት ጭምር ግብረ ገባዊ ጉዳዮችን ይጠቀልላል። በዚህም ምክንያት ሞራሊቲና ሕግ የሰዎችን ባህሪይ፣ መብትና ግዴታዎች ስለሚመለከቱ ተመሳሳይ መዝገበ ቃላትም ሊጋሩ ይችላሉ)።[19] ለዚህም ምሳሌ የሚሆኑት በኢትዮጵያ ቀደም ሲል፣ ወንጀል የሠራ እንደ ኃጢአት የሠራ ሆኖ ይገለጽ እንደነበር፤ በምርመራና ፍርድ ሂደት የቃል አጠቃቀሞችም፤ እንደኑዛዜ፣ የእምነት ክህደት ቃል፣ መሃላ፣ ወዘተና በአሜሪካም እንዲሁ፤ ማረሚያ (የእስር) ቤቶች penitent ከሚለው ትርጉሙ 'ከኃጢአት ያስተሰርያል' በሚለው ቃል ተመሳስለው penitentiary በሚል እስካሁን ይጠራሉ።

ባንድ ገፅታው፣ ግብረ ገብነት (ሞራሊቲ) ሕግ ላይ ተፅእኖ ያለውና በሌላ ገፅታው ሕግም ግብረ ገብነትን ለማስፈፀም መጠቀሚያ መሆኑን አንዳንድ ፈላስፋዎች ይደግፉታል። ለምሳሌ፣ ጆን ስቱዋርት ሚል "ስለነፃነት" (On Liberty) በፃፈው መፅሓፉ ውስጥ፣ የሕግ መቅጫ አግባብነቱ

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[16] Gilligan, C., *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, Cambridge, 1982, ገፅ 19-20 ይመለከቷል።

[17] Hart, H. L. A., *Law, Liberty, and Morallity*, Stanford University Press, Stanford, 1962 [Hereinafter ሀርት]

[18] ሀርት፣ ገፅ 6.

[19] ዝኒ ከማሁ፣ ገፅ 2

የተወሰነውን የህብረተሰብ ክፍል ከጉዳት እስከተከላከለና እስካልጎዳ ድረስ[20] ከሚል ማዘጋጃ ወይም መመዘኛ አንፃር ነው። በሌላ በኩል እንዲሁም፣ የህብረተሰቡን ሰላምና መረጋጋት እስከጠበቀም ጭምር የህግ አስፈፃሚነት ይደገፋል ።[21]

ይህ ሁሉ ሆኖም ደግሞ፣ ሕግን የሚደነግጉት ሰዎች ስለሆኑ፣ አንዳንድ ጊዜም በታሪክ እንደታየው ሕጎች ከስነ ምግባር ጋር ከመደጋገፍ ይልቅ በቀጥታ ይጋጫሉ። በታሪክ እንደዚህ አይነት የሕግና የሞራሊቲ የከረረ ግጭት ለምሳሌ በሕግ ከተደነገጉት ኢ-ግብረ ገባዊ ድንጋጌዎች መካከል በዘረኛው የአፍሪካነር አፓርታይድ ሥርዓት በደቡብ አፍሪካ፣ የአፍሪካውያን ባርነትና በጥቁሮች ላይ የዘር አድልዎ ጂም ክሮው ሥርአት በአሜሪካ፣ የአርያን ነጭ ዘረኝነት በናዚ ጀርመን፣ የአውሮፓውያን ቅኝ ገዢነት፣ በሴቶች እኩልነት ጉዳይ የመምረጥ መብትን የመንፈግና ግልጽ የፆታ አድልዎ ወዘተ ጥቂቶች ናቸው። እነዚህን ግጭቶች ግብረ ገባዊ በሆነ አቅጣጫ ለመፍታት መቃወም ማለት የተደነገጉትን ህጎች መጣስ ተገቢ ሊሆን ነው። ይህ ሲሆን ደግሞ ቅጣትና እስራት ወይም ሞት ሊያስከትል ይችላል። በዚህም ስነ ምግባራዊ አቋማቸው የተደነገጉ ህግጋት ጥሳችኋል ተብለው እነኔልሰን ማንዴላ፣ ማህተመ ጋንዲ፣ ኢትዮጵያዊው አቡነ ጴጥሮስ፣ ፍሬድሪክ ዳግላስ፣ ማርቲን ሉተር ኪንግ ጁኒየር፣ ሮዛ ፓርክ፣ ማለከም ኤክስ ወዘተ የተንገላቱት፤ ተንገላተዋል፤ ታስረዋል፤ ሞተዋል።

በተጨማሪም በሞራል ኃላፊነት (moral duty)ና በህጋዊ ተጠያቂነት (criminal responsibility) መካከል ትልቅ ልዩነት ደግሞ አለ። እንደወንጀል በመሳሰለና በአደጋ ጊዜ ድረሱልኝ ለሚል የግለሰብ ጥሪ እየሰሙ ወይም እያወቁ፣ አለመድረስ በህግ ኃላፊነት አያስጠይቅም፤ አያስቀጣምም። በ1970ዎቹ ውስጥ ኒው ዮርክ ከተማ በወንጀለኛ እጅ ተወግታና ተደብድባ፣ ድረሱልኝ እያለች በምሽት መንገድ ላይ ስትጣራ 12 ያህል ጎረቤቶቿ ሰምተው ሳይደርሱላት ለተገደለችው ወጣት አሜሪካዊ ኪቲ ጂኖቬዜ በህግ የተጠየቀ ሰው የለም። እነዚህ ሰዎች ለሌላ ሰብእ እርዳታ ባለመድረሳቸው በሞራል ኃላፊነት (moral duty) ሊያስጠይቃቸው ቢችልም ቅሉ ህግ ተጠያቂ (criminal responsibility) አያደርጋቸውም። የአሜሪካን ሕግ ለሰው በእርዳታ ባለመድረስ ህጋዊ ተጠያቂነትን እንደፖሊስ፣ የሕክምናና ሶሻል ዎርከርስ ወዘተ ባለሙያዎች ሌላ፣ አንዱ/ዲቱ ለሌላዋ/ው በህግ ጋብቻ ትዳር (contractual status) በተሳሰሩትና ለህፃናት ተንከባካቢ ለሆኑት ወላጆች (parental responsibility) ላይ ይጥላል። በአደጋ ጊዜ (ለምሳሌ መኪና አደጋ ወይም በወንጀል) ለተጎጂዎች ደራሽ የሆነ ቅን ሰው፤ ተጎጂው ዞሮ እርዳታው እንዲያውም ይበልጥ አካሌን ጎድቶኛል ብሎ በፍትሐብሔር ሕግ እንዳይከሰው፤ በአሜሪካን ውስጥ የሳምራዊ ህግጋት (Good Samartian Laws) የሚባል ተከላካይ ህግ አለ። የዚህም ህግ ዓላማ፣ እርዳታ ሰጭዎች የህግ ክስ በመፍራት ተረጂን ከመርዳት ዘወር እንዳይሉና በሉቃስ ወንጌል እንደተጠቀሰው እንደደጉ ሳምራዊ፣ ሰብአዊ ወይም ምግባረ ሰናይ ግዴታቸውን እንዲወጡ ነው። ዋና ጥያቄው እንግዲህ፣ ምግባራችን እንደሌዋዊው ልበ ደንዳና ወይስ እንደሳምራዊው ባህሪ ምንጊዜም ተቆርቋሪ ይሆናል? ነው።

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[20] Mill, J., *On Liberty*, Penguin, New York, 1987, ገፅ 68.

[21] ሎርድ ዴቭሊን ከዚህ አንጻር የሰጡትን አስተያየት እንዲሁም የሀርትን ትንተና በሀርት፣ ገፅ 18-9 ይመልከቱ።

ለፍትህ ባለሙያዎች ከፍ ያሉ የስነ ምግባር መመዘኛና መመሪያዎች

ከፍ ያለ የስነ ምግባር መመዘኛና መመሪያዎች ለምን ያስፈልጉናል? የሚለው ሌላው አቢይ ጥያቄ ነው። በፍትህ ሙያ ኃላፊነትና ሥልጣን ዘርፍ የሚቀረፁ ውሳኔዎች ወይም የሚወሰዱ እርምጃዎች ለሕዝብ ሰላምና ደህንነት ሲባሉ ሲባሉየሚከናወኑ ናቸው። ይሁንና፣ እነዚህ ውሳኔዎች ደግሞ ያልተጠበቁ መዘዞች ሊኖራቸው ይችላል። ለምሳሌ፣ በፍርድ ሥርአት ውስጥ ንፁሃን እንደጥፋተኞች ሊቀጡ ይችላሉ (wrongful convictions)፤ ወንጀለኞች በነጻ ሊለቀቁ ይችላሉ። ይህም ሲሆን የአሳሪንንና የመርማሪን ፖሊስ እንዲሁም የከሳሽ አቃቤ ህግንና የፈራጅ ዳኛን ውሳኔ በጥቅል ከሞራል ችሎት ፊት ለዳኝነት ያቀርባል። የወንጀል ፍትህ ባለሙያዎች እንደዚህ አይነት የእለት ተእለት ውሳኔዎችና እርምጃዎችን የመውሰድ ሥልጣንና ኃላፊነት አላቸው፤ ይህም አማርጦ የመወሰን ስልጣን (discretion)የሚባለው ነው። እንዲህ አይነቱ በሀላፊነት አማርጦ የመወሰን ስልጣን፣ ህጋዊ ሥልጣንን ሲገልፅ፣ ከአሉት አማራጮች መካከል (ለምሳሌ፣ ማሰር ወይም አለማሰር፣ መቅጣት ወይም አለመቅጣት ወዘተ) ውስጥ አንደኛው እንደውሳኔ መውሰድ የሚያስችል ነው።

በተጨማሪም፣ በግል ኃላፊነት የሚወሰድ ውሳኔ ከማህበራዊ ኃላፊነት (ማለትም ፍትሃዊነት፣ ግልፅነት፣ ተጠያቂነት፣ ሚዛናዊነት፣ ያለአድልዎ መሥራት ወዘተ) ጋር በጥቅም የስውር ግጭቶች (hidden conflicts) ሊያስከትል ይችላል።ለምሳሌ፣ የዘመድ ሥራ (nepotism) ፣ እጅ መንሻ ተቀብሎ ጉዳይ የማስፈፀም ሙስና፣ ሥልጣንን ያላግባብ መጠቀም፣ በግል ባለመጣጣም ወይም በግል ጥላቻ የአድልዎ ሥራ መፈፀም ወዘተ።

ስለዚህም ነው እንግዲህ፣ አንደኛ፣ በሙያችን ሁልጊዜም በንቃት፣ በአስተዋይነት፣ በተመራማሪነት ስነ ምግባራዊ ትልም ሊኖረን የሚገባው። እንደፈላስፋው ዘርዓ ያቆብ አገላለፅ፣ ብርሃነ ጎሊና ሊኖረን የሚገባው። ሁለተኛም፣ የመንግሥት ተሿሚዎችና ተመራጮች በተለይም የወንጀል ፍትህ ባለሙያዎች ከሌላው ሕዝብ በተለየ ከፍ ባለ የስነ ምግባር መመዘኛ ወይም መለኪያ አንፃር (ሙያዊ የስነ ምግባር ደንብ) ይመዘናሉ። ምክንያቱም፣ ከሌላው ተራ ዜጋ የተለየ ህጋዊ ሥልጣን ወይም ኃይል ስላላቸው ነው፤ ውሳኔያቸውና እርምጃቸው በግለሰቦች ሕይወትና በህብረተሰቡ ላይ ቀና ውጤትም ሆነ የከፋ መዘዝ ስለሚኖረው ነው። ይህንንም ደግሞ የላቀ መመዘኛ መቀበል ወይም ስነ ምግባራዊ ምሳሌነትን መሸከም እንደፈተና ሳይሆን እንደክብርም ማየት መቻል አለባቸው።

የወንጀል ፍትህ ሥርዓት ሙያተኞች ስነ ምግባር መመሪያዎች፣ በብዙ የመንግሥት መሥሪያ ቤቶች፣ የትምህርትና የግል ተቋሞች ውስጥም ማስታወቂያ ሰሌዳዎች እነዚህን ደንቦች አካትተው ያስገነዝባሉ። በርግጥም እንደሚጠበቀው የዚህ ሁሉ መጨረሻ ግብ እነዚህን አጪኖ በተግባር የማዋሉጉዳይ ነው፤ ባህሪአችን ውስጥ እንዲሰርፁና የእለት ግብረ ገባዊ ገፅታዎቻችን እንዲሆኑ በትጋት ዘወትር የማሰቡ ጉዳይ ነው። የሙያተኞች ስነ ምግባር ደንቦች በየንዑስ ዘርፎቻቸው እንደየሙያ ከፍላቸው እንደኢትዮጵያ ሁሉ በሌሎችም አገሮች ተጽፈው ተደንግገዋል። ለዳኞች፣ ለፖሊሶች፣ ለዓቃቤ ህጎች፣ ለጠበቆችና ለማረሚያ ቤት አስተዳደርና ስታፍ፣ በሃገር በአህጉርና በአለም አቀፍ ደረጃዎች ተረቀዋል። እነዚህም ባጠቃላይ ሰብአዊ ክብርን፣ ፍትሃዊነትን፣ ተጠያቂነትን፣ ግልፅነትንና ተደራሽነትን ያካትታሉ። ከብዙዎቹ በጥቂቱ ሲዘረዘሩ፦ የሰው ልጅ ሰብአዊ ክብርን መንከባከብ፣ አስፈላጊ ኃይል ብቻ በአግባቡ መጠቀም፣ ተገቢ ምሥጢር መጠበቅ (confidentiality)፣ የአካልና የአእምሮ ሥቃይ ከሚያደርሱ እርምጃዎች (torture) መታቀብ፣ በቁጥጥር ስር ያሉ ተጠርጣሪዎች ተከሳሾችንና የፍርድ እስረኞችን ደህንነት መንከባከብ፣ ከሙስና መፅዳት፣ የህግ የበላይነትን ማክበርና እነዚህን ስነ ምግባራዊ ደንቦች መከተልና ሙስናን በይፋ ማጋለጥ ናቸው።

ለፌዴራል ዐቃቢያነ ሕግ መተዳደሪያ የወጣው ደንብ፣[22] ስለሃቀኝነትና ቅንነት፤ "የሰዎችን ክብርና ሰብአዊ መብት" ስለመንከባከብ፤ ስለሙያ ክብርና ምስጢርን መጠብቅ ይዘረዝራል። እንዲሁም፣ ለፌዴራል ፍርድ ቤቶች ጠበቆች የስነ ምግባር ደንብም፣[23] "የሙያ ሃላፊነትን በቅንነት፣ በታማኝነት እና በእውነተኛነት መወጣት" እንደሚያስፈለግ ያስገነዝባል። በተመሳሳይም፣ የክልል አስተዳደሮች የዳኞች ስነ ምግባርና ዲሲፕሊን ደንብ፤ ሙያዊ ንፅሕናን፣ ግልፅነትን፣ ታማኝነትን፣ ቅንነትን፣ተጠያቂነትን፣ ኡድልዎ አለመፈፀምንና የሕዝብ አገልጋይነትን ያስገነዝባል።[24] እነዚህና ሌሎች ተመሳሳይ ደንቦች፣ ለሚፈፀሙ የስነ ምግባር ጥፋቶችና ወንጀሎች የዲሲፕሊን እርምጃዎችና ቅጣቶችን ዘርዝረው ያስጠነቅቃሉ።[25] የስነ ምግባር መሰረታዊ መርሆዎችንም በዝርዝርና በግልፅ ያትታሉ።[26]

አነዚህን የስነ ምግባር ደንቦች በየዘርፉ በህግ ለማስፈፀም አዳጋች ነው። ይሁንና ሙስናን ለመቋቋም የፌዴራል ስነ ምግባርና የፀረ ሙስና ኮሚሽን ማቋቋሚያና የስነ ሥርዓትና የማስረጃ ሕግ (1997 ዓ.ም.)፣ እንዲሁም የስነ ምግባር መከታተያ ክፍሎች አሠራርን ለመወሰን የወጣ ደንብ (2000 ዓ.ም.) ለዚሁ ችግር በህግ አስፈጻሚነት የታቀዱ መልካም ጅምሮች ናቸው። ከዚሁም ጋር ለፌዴራል ባለሙያተኞች የተዘጋጀው የስነ ምግባር ማሰልጠኛ ፕሮግራምም አለ። እነዚህ ሁሉ ጥረቶች የሚደገፉ ናቸው። በአንድ በኩል፣ ቢያንስ ሙያተኞችን ስለስነምግባርና ኃላፊነታቸው እንዲሰማቸው (sensitize) ያደርጋቸዋል። በሌላው ጎን፣ ይህ ለቋሚና ዘለቄታዊ ትኩረት መልካም ጅማሪም ነው።

የስነ ምግባር ምህዳር

በሙያዊ ኃላፊነታችን የምርምራችን ትኩረት፣ በድርጊቶቻችን ትክክለኛነትና ስህተት፣ በድርጊቶቻችን መልካም ውጤቶችና ጎጂ መዘዞችን፣ በሰብዓዊ ባህሪና በጎ ምግባር፣ በዝንባሌ ወይም አዝማሚያና በጎ ፈቃደኝነት (good will)፣ ውሳኔያቸንን በስሜት ላይ ሳይሆን በተገቢ ልቡናዊ ግንዛቤ(good reason) ላይ እንዲያርፍ ማስቻል ነው። በዚህም አኳያ፣ አመለካከታችን እንዳይጠብ፣ የማንስማማባቸው የሚመስሉንን ሃሳቦችንም እንኳን መመርምር ተገቢ ነው። ምክንያቱም የሃሳባችንን ውሱንነት ብዙ ጊዜ ለራሳችን ግልፅ ላይሆኑ ይችላሉና። ማየት የምንችላቸው ጉዳዮች ሊሰወሩብን ይችላሉ። በአንፃሩ ሌሎች በቀላሉ ይገነዘቡታል። ቀኖናዊ ባለመሆን

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[22] "ስለፌዴራል ዐቃቢያነ ሕግ መተዳደሪያ የወጣ የሚኒስትሮች ምክር ቤት ደንብ"፣ ቁጥር 44/1991፤ *ፌዴራል ነጋሪት ጋዜጣ*፣ 5ኛ አመት፣ ቁ.8፡ አዲስ አበባ፣ ህዳር 11 ቀን፣ 1991 ዓ.ም.

[23] "ስለ ፌዴራል ፍርድ ቤቶች ጠበቆች የስነምግባር ደንብ" የሚኒስትሮች ምክር ቤት ደንብ፣ ቁጥር 57/1992፤ *ፌዴራል ነጋሪት ጋዜጣ*፣ 5ኛ አመት፣ ቁ.8፡ አዲስአበባ፣ ህዳር 11ቀን፣ 1991 ዓ.ም.

[24] "የአማራ ክልል ፍርድ ቤት ዳኞች ስነ ምግባርና ዲሲፕሊን ደንብ"፤ የአማራ ብሔራዊ ክልል ምክር ቤት፤ *ዝክረ ሕግ*፤ 7ኛ አመት፣ ቁጥር 24፤ ባሕር ዳር ነሐሴ 5፣ 1994 ዓ.ም.

[25] *ስነ ምግባር እና ሙስና (የግንዛቤ ማስጨበጫ ጽሁፍ)* ፤ የፌዴራል የስነ ምግባር እና የፀረ ሙስና ኮሚሽን፤ 2001.

[26] ዝኒ ከማሁ፣ ገፅ 99-103.

አእምሮቻችንን ለእርማትና ለአዲስ እውቀት ክፍት እናድርግ። ቆምና መለስ እያልን ምግባራችንና ተግባራችንን እናጢን። በስራችንና ውሳኔአችን ላይ ሁሉ ጤናማ ጥርጣሬ ይኑረን። ለእርማት ይመቸናልና። ስራችንንና ውሳኔያችንን በጥናትና በመረጃ ከመደገፍ ይልቅ በግምትና በመላ ምት አናካሂድ። ሃሳባችንን የማይደግፉ የሚመስሉንን ነገር ግን ጠቃሚ መረጃዎች አናጣጥል። ሰዎችን በማንነታቸው (በፆታ፣ በብሔር፣ በማህበራዊ መደብ፣ በእድሜ) መሠረት በሌለው ጥላቻ አይን አንመልከት። ሁለት ስህተቶች አንድ ትክክለኛ ነገር እንደማያስከትሉ እንገንዘብ።

ስነ ምግባራችን በፀና ውሳጣዊ ግብረ ገባዊ እሴት (intrinsic values) ላይ ይቁም። ጀይ አልባኒስ[27]፣ "ሌሎች አዩን አላዩን፤ ተከታተሉን አልተከታተሉን በጎ ምግባር ሊኖረን ብቁ ነን ወይ?" ያለው ይህንኑ ከራስ የፈለቀ ስነ ምግባራዊ ብቃት የሚያስረዳ ነው። ለየሁኔታው አግባብ ያለው ፍትሃዊ ውሳኔ ለመስጠት ዝግጁ ነን ወይስ አይደለንም? በሃላፊነታችን የሚጠበቅብን ስነ ምግባራዊ ገዴታ ምንድን ን ነው? ህጉና የፖሊሲ መመሪያዎች የሚጠይቁት ምንድን ነው? ለዚህ ሁሉ ዝግጅታችን ደግሞ፣በውጫዊ ቅጣት ፍርሃት ወይም ማበረታቻ ሽልማት (extrinsic values) ብቻ የቆመ ስነ ምግባር ፅኑ መሠረት አይኖረውም። በቅጣት ፍርሃት ብቻ የሚታነፅ በጎ ምግባር ጽናትና ዘለቄታ የለውም። እንዲያውም ተደረሰብኝ፤ አልተደረሰብኝም አይነት የድመትና አይጥ ድብብቆሽ ጨዋታ ነው የሚሆነው። እራሳችንን (ምግባራችንን) በቅጡ እናውቃለን ብለን አንሳሳ፣ ስለዚህም ያልተቋረጠ የግል ምርምር እናድርግ። የግብረ ገባዊ የግል ምርምር ስናደርግ ደግሞ፣ የስነ ምግባር ንድፈ ሃሳቦች (ethical theories) ፈለግ ያሲዙናል።

የስነ ምግባር ዋና ዋና ንድፈ ሃሳባዊ አመለካከቶች

የስነ ምግባራችን ምርምር *መመዘኛ* ወይም *መለኪያ* ከሆኑት መካከል ስድስቱን የስነ ምግባር ክፍሎች ያካደኑት ንድፈ ሃሳቦች፡- 1) ማህበራዊ ውል (Social Contractualism)፣ 2) የተጠቃሚነት ምግባርና ገቢር (Utilitarian Ethics)፣ 3) ግዴታዊ ስነ ምግባር (Deontology)፣ 4) ምግባረ ሰናይ (Ethics of Virtue)፣ 5) አንስታይ ስነ ምግባር (feminist ethics) እና 6) ፍትሃዊ ህሊና(Sense of Justice) ናቸው። እነዚህም ንድፈ ሃሳቦች፣ ከላይ በተዘረዘሩት *በቢሆን ሰነ ምግባር* (Normative ethics) እና *በልዕለ ሰነ ምግባር* (Metaethics) ውስጥ ይጠቃለላሉ።

1ኛ፣ ማህበራዊ ውል (Social Contractualism)

ከፍፁም ግላዊ ጥቅም ይልቅ ለጋራ ጥቅምና ለማህበራዊ ኑሮ ትኩረት የሚሰጥ ንድፈ ሃሳብ ነው። ይህም ማለት ግን የግል ፍላጎትንና ጥቅምን ፈጽሞ መሻር ማለት አይደለም። ወይም ደግሞ እንደ ስቶይኪስቶች "ምን ቸገረኝነት" ወይም ስነ ምግባራዊ ግለኝነት (ethical egoism)፣ "ከራስ በላይ ነፋስ" አይነት አፅናፋዊ ግለኝነትም በማህበራዊ ሕይወት ውስጥ ሥፍራ የለውም። የማህበራዊ ውል አስተሳሰብ ግለሰቦች ተሰባስበው፣ ተከባብረውና ተቻችለው ለራሳቸው የግል ጥቅምና ደህንነት ጭምር፣ በጥቅል እንደህብረተሰብ በአንድ መንግሥትና በጋራ ሕግ ስር የሚኖሩበት ስርዓት ነው።

[27] አልባኒስ፣ ገፅ 139.

የማህበራዊ ውል፣ ሰዎች በግለኝነት ማለቂያ በሌለው የግለሰብ ጎጂ ግጭት (ቶማስ ሀብስ፣ የተፈጥሮዊ ሁነት - state of nature የሚለው) ግለሰቦችን እንደ አንድ አካል (body politic) የሚያዋህድ ፖለቲካዊ ዘይቤ ነው። በዚህም ማህበራዊ ውል ፅንሰ ሀሳብ የተነሳ፣ ወንጀል ሲሰራ ተጎጂው ግለሰቡ ወይም የቅርብ ቤተሰቡ ብቻ ሳይሆን ባጠቃላይ ህብረተሰቡ በመሆኑ መንግሥት አጥፊውን ከሶ ያስቀጣዋል። ከዚህ በሚመነጨው ህጋዊ ፍልስፍና፣ ወንጀለኛውም በህብረተሰቡ ስም በመንግሥት የሚቀጣው፣ ከሌሎች ዜጎች ጋር በሰላም ተቻችሎ ለመኖር የገባውን ማህበራዊ ውል በመጣሱ ነው።

2ኛ፣ በተጠቃሚነት ምግባርና ገቢር (Utilitarian Ethics) ንድፈ ሃሳብ

እንደመንደርደርያ የሰው ልጆች ወይ ደስታን ወይ ስቃይን ሊያስከትሉ የሚችሉ ምርጫዎችን አመዛዝነው መፈፀም የሚያስችል አእምሮአዊ ብቃት (rationality) አላቸው ብሎ ይነሳል። አያይዞም፣ ማንኛውም በግል የሚወሰን ውሳኔና የሚፈፀም ተግባር፣ ውጤቱ በአመዛኙ ደስታንና ፍላጎትን የሚያረካ መሆን አለመሆኑ፣ ውጤት ለብዙኃኑ ደስታ ማምጣት አለማምጣቱ፤ እስካመጣ ድረስ ደግሞ ይህንኑ በቀዳሚነት መሻት ተገቢ የስነ ምግባር መለኪያ እንደሆነ ያረጋግጣል። ሰዎች በመሠረቱ በባህሪአቸው ደስታን ፈላጊዎች እንደሆኑና ስቃይን የማይሹ መሆናቸውን ይገልፃል። የዚህ ሃሳብ አመንጭ ከሆኑት መካከል እንግሊዛዊውያኑ ፈላስፋዎች ጀረሚ ቤንታም ና ጃን ስቱዋርት ሚል፣የተጠቃሚነት መርህ (priniciple of utility) አንድ ውሳኔ ወይም ድርጊት፣ "ባብላጫው ደስታን ለአብዛኛው ለሚመለከተው ሕዝብ ጥቅም መሻት ተገቢ ነው" ይላሉ።[28]

በዚህም አስተሳሰብ የአንድ ድርጊት ወይም ውሳኔ መልካም ስነ ምግባራዊነት የሚለካው በሚያስከትለው የተጠቃሚነት ውጤት ነው። ለሌሎች በርካታ ሰዎች ጥቅምና ደስታ ሲባል የአንድ ወይም የጥቂቶች መብት ቢጣስ ይመረጣል። ለምሳሌ፣ በሕዝብ ላይ አደጋ ለማድረስ በተደረገ የምሥጢር ሴራ ላይ የተሳተፈ ተጠርጣሪ ቢያዝና ምስጢሩን እንዲያወጣ በአካል ስቃይ (torture) ቢመረመር፤ ውጤቱ ሕዝብን ከጥቃት ለመጠበቅ እስከሆነ ድረስ (በተለይ ገቢራዊ ተጠቃሚነት - አክት ዩቲሊቴርያን ንድፈ ሀሳብ አንፃር) ድርጊቱ የሚደገፍ ይሆናል። ሌላም ምሳሌ ለማንሳት፤ አንድ ሰው ላይ የሕይወት አደጋ እንዳይደርስ ሰውየውን ደብቆ፣ አላየሁትም ብሎ መዋሸትና እንደዚህ አይነት ውሸት በዚህ ንድፈ ሃሳብ ተደጋፊ ይሆናል። ባጭሩ ውጤቱ ጠቀሜታ እስካለው፤ መንስኤው (መነሻው) አጠያያቂ አይሆንም። ይህም በእንግሊዝኛ፣ "the end justifies the means" የሚለው አገላለጥ ነው። በአገራችን፣ "የትም ፍጭው ዱቄቱን አምጭው" እንደሚለው አባባል አይነት።

3ኛ፣ ግዴታዊ ስነ ምግባር (Deontology)

በ18ኛው ክፍለ ዘመን የጀርመን ፈላስፋ ኢማኑኤል ካንት እንደ ስነ ምግባራዊ ንድፈ ሃሳብ፣ "የግብረ ገብነት መንደርደሪያ" (Groundwork of the metaphysics of morals) በሚል ርእስ የነደፈው ነው። ከዚህ ንድፈ ሃሳብ አንፃር፣ ግብረ ሠናይ ስራዎችን ከላቀና ሁለንተናዊ መርሆ አኳያ

[28] ባንክስ፣ ገፅ 274.

ብቻ መሥራት ግዴታ እንደሆነና ተገቢነት እንዳለው በአፅናኦት የሚያስገነዝብ ነው። ዲኦንቶሎጂ የሚለው ቃል ከግሪክ ዲኦን ከሚለው የመነጨና ትርጉሙም ግዴታ ማለት ነው።

ለካንት፣ የአንድ ግለሰብ ውሳኔ ወይም እርምጃ በጎነት የሚለካው ከሚያመጣው የደስታ ውጤት አኳያ ሳይሆን መርህን ተከትሎ በመሥራቱ ብቻ ነው። ሰዎች በሕይወታቸው ውስጥ ማንኛውንም አይነት መልካም ነገር ለማድረግ፣ በቅድሚያ በጎ ፈቃድ (good will) ሊኖራቸው ይገባል፤ የድርጊታቸውም በጎነት መመዘኛም ከዚሁ በጎ ፈቃዳቸው ይመነጫል።[29] የባህሪ ጥንካሬ፣ ታታሪነት፣ ድፍረት፣ ፅናትና ታማኝነት የመሳሰሉት በራሳቸው (ያለበጎ ፈቃድ) ለብቻቸው ምግባረ ሰናይነትን አይገልፁም። እንዲያውም፣ ያለበጎ ፈቃድ ጠንክረው፣ በድፍረትና በፅናት የሠሩት ስራ ጎጂም ሊሆን ይችላል፤ የከፋ ጉዳትና መዘዝ ሊያስከትል ይችላል።[30] ስለዚህም፣ ጥንካሬያችን፣ ድፍረታችን፣ ፅናታችን፣ ታታሪነታችንና ታማኝነታችን ሁሉ በበጎ ፈቃድ መገራት አለባቸው። በጎ ፈቃድ ደግሞ፣ በሚያስከትለው ውጤት ወይም ጠቀሜታ አይደለም ሰናይነቱ የሚለካው፤ ስለራሱ በራሱ የላቀ እሴት እንዳለው ሆኖ እንጂ።[31] እንዴት ያለፍሬያማ ውጤት የሚሠራ ሥራ በጎነቱ ይለካል? ይህ ሃሳብ የማይጨበጥ ብቻ ሳይሆን እንደቅዠትም ሆኖ ሊታይ ይችላል። ይሁንና የሰው ልጆች ድርጊት ለጥቅም እንደሆነ ብቻ አድርጎ ማሰብና ከዚህም ጥቅማ ጥቅም ብቻ ደስታ እንደሚገኝ አድርጎ ማሰብ፤ (እንደካንት አገላለፅ) ትልቅ ክብር የሚሰጠውን የሰብአዊ ጎሊናዊ ብቃት ግምት ውስጥ ያስገባል።[32] (ከፍትፍቱ ፊቱ የሚለው የሀገራችን አባባል በመጠኑም ይህንን ሊያስገነዝብ ይችላል) ። ካንት አያይዞም፣ የሰው ልጆች የደስታ ምንጭ በበጎ ፈቃድ መሠረት ላይ በላቀ ስነ ምግባራዊ መርሆ ሕይወታቸውን መምራት ነው ይላል።[33] የዚህም በጎ ፈቃድ መርሆ ግዴታ (duty) ነው።

ሥራችንን ሁል ጊዜ በበጎ ፈቃድ ለመሥራት ግዴታዊ (from duty) መሆን የሚገባው እንጂ፤ ከግዴታ ጋር እንደሚጣጣም (in conformity with duty) ሆኖ አይደለም።[34] ለዚህ ካንት የሰጠው ቀላል ምሳሌ፣ “ጎረቤትህን እንደራስህ አፍቅር” የሚለውን የመፅሐፍ ቅዱስ ግብረ ገባዊ ቃል ነው። ይህንን ቃል ለመቀበልና ለማከበር፣ እንደግዴታዊ መርሆ ሆኖ እንጂ፣ በስሜታዊ መልኩ አይደለም። ይህንን የካንት ምሳሌያዊ ሃሳብ ላብራራ። በአንድ በኩል፣ ስሜታችን ተለዋዋጭ የመሆኑን ያህል፤ ደስ ያለን ቀን ጎረቤት አፍቃሪዎች፤ የከፋን ቀን ደግሞ ለጎረቤት ጥላቻ ልናሳይ ነው። በሌላ በኩል ደግሞ፣ ይህ ጎረቤትን የማፍቀር ግዴታዊ መርሆ፣ በጎረቤቶቻችን ጠባይ ምንነት የሚወሰን አይደለም። ክፋት ሲያሳዩን ክፉ ከሆንን፤ ምግባራችን በራሳችን ፅኑና የላቀ መርሆ ላይ ከመቆም ይልቅ በሌሎች ጠባይ ሊዋልል ነው። እንዲያውም፣ የእኛ ፅኑና የላቀ ግዴታዊ መርሆ ለጎረቤቶቻችን ምግባር አርአያ ቢሆን ይመረጣል።

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[29] Kant, I., *Groundwork of the Metaphysics of Morals*, Cambridge University Press, Cambridge, 1998 ፣ ገፅ 7[Hereinafter ካንት].

[30] ዝኒ ከማሁ፣ ገፅ 7.

[31] ዝኒ ከማሁ፣ ገፅ 8.

[32] ዝኒ ከማሁ

[33] ዝኒ ከማሁ

[34] ዝኒ ከማሁ፣ ገፅ 11.

የአንድ ሰው የዕለት ተዕለት ተግባርና ውሳኔ ሁለንተናዊ ሕግ (universal law) ሆኖ መታየት ይገባዋል።[35] ለምሳሌ፣ የገቡትን ቃልን መጠበቅ ማለት ለሌሎች ሁሉንተናዊ አርአያ መሆን ማለት ነው። አለበለዚያ፣ የገባሁትን ቃል ግዴታዬ ነው ብዬ ካልጠበቅሁ፣ ሌሎችም እንደዚሁ ቃላቸውን የማይጠብቁ ይሆናሉ። ውሸት ያዋጣል፤ ይጠቅማል ካልንም፣ ሁለንተናዊ የዋሾዎች ማኅበረሰብ ልንቆረቁር ነው። ሌላው ምሳሌ፣ የራስን ህይወት ማጥፋት (suicide) ማለት በአሉታዊ አርአያነት ከቡር የሆነውን የሰውን ልጅ ህይወት ማጣጣልና ለሌሎችም አጉል አርአያ መሆን ማለት ነው። ስለዚህም ነው ካንት፤ በአንድ በኩል፣ ማንም ግለሰብ ድርጊቴ ወይም ውሳኔየ ይህ ይሆናል ሲል፤ ይህ በአርአያነት ለሌችም ሁለንተናዊ ህግ (universal law) እንደሚሆን መገንዘብ ግዴታው ነው ያለው።[36] በተመሳሳይም፣ አድራጊው ግለሰብ ራሱን ሁለንተናዊ ህግ አርቃቂ (universal law-giver) አድርጎ መቁጠር አለበት። በዚህም አይነት ግዴታዊ መርሆ ደግሞ፣ ካንት እንደሚያስገነዝበው፣ ሰዎች "የጋራ ሰብአዊ ልቡና" (common human reason) ይጎናፀፋሉ።[37]

የካንት ቀዳሚና ሁለንተናዊ መርሆ ደግሞ፣ የማያሻማ የልቡና መመሪያ ወይም ቀመር (categorical imperative) የሚላቸው ናቸው።[38] በዚህም መመሪያ መሠረት፣ ድርጊቶቻችን ወይም ውሳኔዎቻችን ሁሉ ለሚያስከትሉት ጥቅም ሳይሆን፤ ለስነ ምግባራዊ መርሆ ሲባል ብቻ መፈጸማቸው የግድ ነው። ለምሳሌ፣ ለተቸገረ ሰው ችሮታ ስንሰጥ ለመርዳት ካለን ሰብአዊ ግዴታ ነው። የመንፈስ ደስታ እንዲሰጠን ከሆነ፣ ካንት እንደምግባረ ሰናይ አይቀበለውም። በተመሳሳይ፣ እንደፍትህ ባለሙያ ኃላፊዎችየወንጀል ተጎጂዎችን መርዳት ካለብን ከግዴታዊ መርሆ አንፃር እንጂ ለሹመት ወይም ለምስጋና ከሆነ፤ ይህንን የግዴታዊ ስነ ምግባር መመዘኛ አያሟሉም። ይህም የካንት ግዴታዊ ስነ ምግባር፣ ከፍ ብለን ከተመለከትነው ቤንታማይት የጠቀሜታ ስነ ምግባር (utilitarian ethics) ጋር መለየት ብቻ ሳይሆን ይጋጫልም። ለሆነ ውጤት ወይም ጥቅም ፍለጋ የሚሠራ ሥራን፣ ካንት መላ ምታዊ መመሪያ (hypothetical imperative) ይለዋል። ለምሳሌ፣ ውሸት ፍሬያማ ውጤት ቢያስከትልም እንኳን በጎ ምግባር አይደለም። ለካንት፣ አለመዋሸትን በራሱ (ምን ውጤት ይኑረው አይኑረው) እንደስነ ምግባር ደንብ መከተል የሁሉም ሰው ግዴታ ነው። በተመሳሳይ፣ ለብዙኃኑ ደህንነት ወይም ጥቅም አንድን ግለሰብ ወይም ጥቂቶችን መስዋእት ወይም መጠቀሚያ (ለህዝብ ደህንነት ሲባል በወንጀል ተጠርጣሪ ላይ የአካል ስቃይ ምርመራ) ማድረግ ተገቢ አይደለም። ካንት ለእያንዳንዱ ግለሰብ የላቀ ሰብአዊ ክብር ወይም ሉዓላዊነት ያረጋግጣል፤ ይህንንም kingdom of ends ይለዋል።[39]

[35] ዝኒ ከማሁ፣ ገፅ 15.

[36] ዝኒ ከማሁ፣ ገፅ 30.

[37] ዝኒ ከማሁ፣ ገፅ 18.

[38] ዝኒ ከማሁ፣ገፅ 25.

[39] ዝኒ ከማሁ፣ ገፅ 41-2.

4ኛ፣ የአሪስጣጣሊስ ምግባረ ሰናይ (Ethics of Virtue)

ምን አይነት ሰው ነው መሆን ያለብኝ? ምንስ አይነት በጎ ምግባር ሊኖረኝ ይገባል? ለመሳሰሉት ዋና ዋና ስነ ምግባራዊ ጥያቄዎች መልስ ይሰጣል። ከክርስቶስ ልደት በፊት በአራት መቶ አመት የኖረው የጥንታዊ ግሪክ ፈላስፋ አሪስጣጣሊስ በልጁ ስም የሰየመው የስነ ምግባር ፍልስፍና "ኒቆሜቀሳዊ ስነ ምግባር" (Nocomachean ethics) በሚል ርእስ ተፅፏል። ለአሪስጣጣሊስ፣ የሰው ልጅ በሕይወቱ ቀዳሚውና የላቀው ዓላማ ደስታን መሻትና መልካም ኑሮን መኖር ነው።[40] ከዚሁ ጋር ተያይዞም ደስተኛ ሰው በግብሩ ቀልጣፋ የሆነና መልካም ኑሮን የሚኖር ነው። ለአሪስጣጣሊስ፣ የምግባረ ሰናይነት መመዘኛው ድርጊትና ልማድ ነው።[41] በጎ ምግባርን በየእለቱ በተግባርና በልምድ ማዳበር ይቻላል ባይ ነው። እንደእርሱ አባባል የተሟላ ምግባረ ሰናይ ለመንናፀፍ ቋሚ ጥረትን ይጠይቃል። ግብር ምግባርን ይገልጣል፤ ያንፃል። ለማንኛውም የሰው ልጅ፣ የሚያስመሰግነው ወይም የሚያስነቅፈው መመዘኛ ግብሩ ነው፤ አውቆ የሚሠራው ሥራ ነው።[42]

ከስነ ምግባር ምሳሌዎች መካከል ጥቂቶቹ፥ ብልህነት፣ አስተዋይነት፣ ለጋስነት፣ ድፍረት፣ ቁጥብነት፣ ታማኝነት፣ ታታሪነት፣ ቅንነት፣ ደግነት፣ ርኅሩህነት፣ ሃቀኝነት፤ ፍትሃዊነት፣ ራስ-ገዝነት ወዘተ ናቸው። ፍትሃዊ ድርጊት የምግባረ ሰናይ አንድ ዘርፍ ሳይሆን፤ በጥቅሉ እንዳለ ምግባረ ሰናይ ነው።[43] ለአሪስጣጣሊስ፣ ፍትሕ ማለት ለሕግ በግዳጅ ሳይሆን በፈቃደኝነት ታዛዥ ሲሆንና ሚዛናዊ ባህሪ ሲኖር ነው።[44]

ይሁንና፣ ውሳኔያቸንና ድርጊታችን ሁልጊዜም ወርቃማውን ሚዛን (Golden Mean) መጠበቅ አለበት።[45] ለምሳሌ፦ በፈሪነትና በጀብደኝነት መካከል ደፋርነትን፤ በስስታምነትና በአባካኝነት መካከል ደግነትን፤ በሰፍሳፋነትና በግዴለሽነት መካከል ጠንቃቃነትን፤ በችኩልነትና በአዝጋሚነት መካከል ቀልጣፋነትን፤ በስንፍናና በቀዝቃዣነት መካከል ታታሪነትን፤ በከሀዲነትና በተለማማጭነት መካከል ታማኝነትን፤ በጉረኛነትና በፈዛዛነት መካከል ትሁትነትን፤ በጅልነትና በመመፃደቅ መካከል አስተዋይነትን፤ በግልፍተኝነትና በቀለስላሳነት መካከል ቁጥብነትን፤ ወዘተ በጥቂቱ በአስረጅነት የሚቀርቡ ሚዛናዊ በጎ ምግባሮች ናቸው።

5ኛ፣ አንስታይ ስነ ምግባር (Feminist ethics)

የሴቶችን በፆታዊ ማንነታቸውና ልዩ ማህበራዊ ልምዶቻቸው ያካበቱትን እውቀትና ችሎታ በማጥናት፤ ከግለኝነት ወደ ኃላፊነት መውሰድ፣ በጎ ምግባር ማለት የግል መስዋእትነትን መክፈል

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[40] Aristotle, 'Nicomachean ethics' *in* Aristotle: On man in the universe, Walter Black, New York, 1943, pp.85-243፣ ገፅ 92.

[41] ዝኒ ከማሁ፣ ገፅ 101.

[42] ዝኒ ከማሁ፣ ገፅ 113.

[43] ዝኒ ከማሁ፣ገፅ 158.

[44] ዝኒ ከማሁ፣ገፅ 156.

[45] ዝኒ ከማሁ፣ ገፅ 110 – 13.

እንደሆነና ለራስና ለሌሎች ማሰብን የመሳሰሉ ባህሪያዊ ገፅታዎች የሚያካትት ነው።[46] ይህም አንስታይ ስነ ምግባር ጠቅለል ባለ ይዘቱ፣ የእንክብካቤ ስነ ምግባር (ethic of care) ይባላል።[47] የእንክብካቤ ስነ ምግባር፣ ለልጆች፣ ለቤተሰብና ለወዳጆች ሴቶች ባላቸው የቅርብ ግንኙነት የዳበረ መተሳሰብን ይገልፃል። ማህበራዊ ግንኙነቶች በመተሳሰብና በመፈቃቀር ጠበቅ እንዲሉ ይረዳል። ቤተሰብ የማህበራዊ አስኳል የሆነውን ያህል፣ የሴቶች ድርሻና ሃላፊነት በየትኛውም ህብረተሰብ ውስጥ እጅግ ከፍተኛ መሆኑ አያጠያይቅም። በእናትነት፣ በአክስትነት፣ በአያትነትና በእህትነት ሴቶች ለህፃናት እድገትና እንክብካቤ አቢይ አስተዋፃኦና ቀዳሚ ድርሻ አላቸው። የአንስታይ ስነ ምግባር ንድፈ ሃሳብ፣ በሌሎቹ ንድፈ ሃሳቦች ላይ ያላት ሂስ፣ እውቀት በረቂቅ ፅንሰ ሃሳቦች ብቻ እንደሚገለጡ አድርገው ማቅረባቸውንናበአንድምታ ሴቶች ("ስሜታዊ" እንጂ) ለዚህ አይነት ጥልቅ ፍልስፍናዊ እውቀት እንደወንዶች "ብቃት" የላቸውም በሚል የተሳሳተና የተዛባ አስተሳሰብ ላይ የተመሰረተ ነው። እንዲያውም፣ በአንድ በኩል፣ ሴቶች በተመደበላቸውና በያዙት ማህበራዊ ሰፍራ፣ ከራሳቸው የግል ጥቅም አልፈው ሌሎችን ማሰብናመንከባከብ አጠቃላይ ባህሪአቸው ነው። በተጨማሪም፣ በታሪካዊና ማህበራዊ የፆታ አድልዎ ስር በመኖራቸው፣ ከማንም በላይ ስለፍትህ፣ ርትእና እኩልነት ተቆርቋሪ ናቸው። በዚህም የበለፀገ ማህበራዊ ልምዳቸው ለየትና ላቅ ያለ የተንከባካቢነት ስነ ምግባር ተጎናፅፈዋል።

6ኛ፣ የጃን ራውልስ ፍትሃዊ ህሊና (Sense of Justice)

ፍትሃዊነትን በየእለት እለት ህይወታችን ውስጥ በጎሊናችን ውስጥ መቅረፅ ወይም ማዋሃድ አለብን ከሚል መንደርደሪያ ሃሳብ ላይ በመነሳት፣ ራውልስ "የፍትህ ንድፈ ሃሳብ" (theory of Justice) በሚለው መፅሐፉ ውስጥ፤ "የዴሞክራቲክ ህብረተሰብ መዋቅራዊ መሠረቱ ፍትህ (justice) ነው" ይላል።[48] አያይዞም፣ ፍትህ ዋናና ቀዳሚ የማኅበራዊ ተቋሞች ፀጋ ነው ይላል።[49] የፍትህ ጥንድ መርሆዎችየሚባሉት፤ አንደኛ፣ የሰዎች የእኩልነት መብትና ነፃነት መከበርና፤ ሁለተኛ፣ የሀብትና የገቢ ምንጮች (primary social goods) ለሁሉም የመዳረስ ጉዳይ ነው።[50] እነዚህ ማኅበራዊ ሀብቶች እንደ የስራ፤ ትምህርት፣ ጤና አገልግሎት፣ ወዘተ ናቸው። ይሁንና፣ በአንድ ህብረተሰብ ውስጥ ማህበራዊ እኩልነት የተዛባ ቢሆን እንኳን እጅግ የተጎዱ ማህበራዊ ክፍሎችን እስከተንከባከበ ድረስ የሚደገፍ ማኅበራዊ ሥራዓት ነው ይላል።[51]

እኩልነትም የፍትህ ዋነኛው መመዘኛ ወይም መለኪያ ሲሆን፤ የማኅበራዊ ፍትህ መርሆም ዜጎች የሚጎናፀፏቸው መብቶችና ግዴታዎች ነው።[52] በግልባጩም፣ መልካም ህብረተሰብ የተዛባ

[46] ጊሊጋን ፣ ገፅ 19.

[47] ባንክስ፣ ገፅ 324.

[48] Rawls, J., *A Theory of Justice*, Harvard University Press, Cambridge, 1971፣ ገፅ viii.

[49] ዝኒ ከማሁ፣ ገፅ 3.

[50] ዝኒ ከማሁ፣ ገፅ 60-1.

[51] ዝኒ ከማሁ፣ ገፅ 75)

[52] ዝኒ ከማሁ፣ ገፅ 4.

እኩልነትን መግታት የሚችል ነው። ማኅበራዊ ተቋሞችም ፍትሃዊ የሚያሰኛቸው ለማህበረሰቡ በጎ ህልውና በሚያደርጉት እንከብካቤና አገልግሎት ነው።[53] ራውልስ፣ ደጋግሞ የሚያነሳቸው ጥያቄዎቹ፦ ፍትሃዊና ሚዛናዊ ህጎች አሉ ወይ? በእኩልነት ላይ የቆመ ፍትሃዊ ሥርዓት አለ ወይ? ፍትህና ርትዕ በቀዳሚ ሥፍራ ላይ (original position) ሰዎች ለተሟላ እኩልነት ሲሉ (ለጥቅማቸው እንዳያዳሉ ማኅበራዊ ማንነታቸውንና የሀብት ይዞታቸውን ሳያውቁ ተጋርደው - veil of ignorance) የሚነናፀፉት ነው በሚል በማይዳሰስ መላ ምታዊ (hypothetical) ሃሳብ ያቀርባል።[54] የጃን ራውልስ ንድፈ ሃሳብ ከፍ ባለ ደረጃ ማኅበራዊና መንግሥታዊ ፖሊሲዎችን ስለሚመለከት፤ ባማዛኙ የስነ ምግባራዊ ጉዳዮች (ethical issues) ለመፍታት የሚጠቅም ነው።

እነዚህን ከላይ የተዘረዘሩትን የስነ ምግባር ንድፈ ሃሳቦች መሠረት አድርጎ በእለት ኑሮም ውስጥ ሆነ በሙያ ኃላፊነት ላይ፤ የሚያጋጥሙ የስነ ምግባር አጣብቂኞችን (ethical dilemmas) ለመፍታት የሚያስችል የገቢራዊ ስነ ምግባር (applied ethics) ቀመር የሚከተለውን ይመስላል[55]፦

1) አጣብቂኙ በምን መልክ ተከሰቷል?
2) የተከሰተበት ሁኔታና የመረጃ ዝርዝሮች የትኞቹ ናቸው?
3) ለመፍትሄ የሚቀርበው ውሳኔ በምን መረጃ ላይ ይደገፋል?
4) መፍትሄ ለመሻት የትኛው አማራጭ ከላይ ከተዘረዘሩት የስነ ምግባር ንድፈ ሃሳቦች ውስጥ የትኛው/የትኞቹ አግባብነት አለው/አላቸው?
5) የተመረጠውን የስነ ምግባር ንድፈ ሃሳብ (ሃሳቦች) ለመጠቀም የምናነሳቸው አቢይ ጥያቄዎች የትኞቹ ናቸው?
6) ለሚቀርቡት ጥያቄዎች የሚሰጡ መልሶች ምንድን ናቸው?
7) ከቀረቡት መፍትሄ ሃሳቦች ውስጥ የትኛው/የትኞቹ በስነ ምግባር መመዘኛ ሲታዩ የተሻሉ ናቸው?

ማጠቃለያ፦ የተመረመረ ሕይወት

ስነ ምግባር እውነትን ከውሸት አንጥሮ ለመለየት፤ ጎጂውን ከጠቃሚው ነገር በትጋት ለመመልከት የሚያስችለንና ተገቢና ሚዛናዊ የውሳኔ አሰጣጥ መመሪያና ጥናታዊ እውቀት ነው። ስነ ምግባር ለባህሪያችን እድገትና እንፃት ማለትም በግልና በሙያዊ ሕይወታችን ውስጥ በጎ ምግባርንና በጎ ተግባርን የምንከተልበት፤ እንደ ሰብእ የምንነታችንና የማንነታችን መሠረት መገንዘቢያ የጥናት ማህደር ነው።

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[53] ዝኒ ከማሁ፣ ገፅ 30.

[54] ዝኒ ከማሁ፣ ገፅ 12.

[55] ባንክስ፣ ገፅ 269.

የፍትህ ሥርአቱ ባለሙያዎችም፣ ዳኞች፣ ዓቃብያነ ህግ፣ ጠበቆች፣ ፖሊሶች፣ የማረሚያ ቤት አስተዳዳሪዎችና ሠራተኞች (ስታፍ) ከሙያ እውቀታቸውና ሥልጠናቸው ጋር ስነ ምግባር ማጥናት የሚገባቸው፣ ለሕዝብ የተሻለ ማህበራዊና አስተዳደራዊ አገልግሎት ለመስጠትና የሙያ ኃላፊነታቸውን በአግባቡና ፍትሃዊ በሆነ መንገድ ለመወጣት እንዲችሉ ነው።

የስነ ምግባራችን ምርምር መመዘኛ ወይም መለኪያ ከሆኑት መካከል ስድስቱን የስነ ምግባር ክፍሎች ያካደኑት ንድፈ ሃሳቦች፡- 1) ማህበራዊ ውል (Social Contractualism)፣ 2) የተጠቃሚነት ምግባርና ገቢር (Utilitarian Ethics)፣ 3) ግዴታዊ ስነ ምግባር (Deontology)፣ 4) ምግባረ ሰናይ (Ethics of Virtue)፣ 5) አንስታይ ስነ ምግባር (feminist ethics) እና 6) ፍትሃዊ ህሊና(Sense of Justice) ናቸው። እነዚህም ንድፈ ሃሳቦች ከላይ በተዘረዘሩት በቢሆን ስነ ምግባር (Normative ethics) እና በልዕለ ስነ ምግባር (Metaethics) ውስጥ ይጠቃለላሉ። እነዚህን የስነ ምግባር ንድፈ ሃሳቦች መሠረት አድርጎ በእለት ኑሮም ውስጥ ሆነ በሙያ ኃላፊነት ላይ፤ የሚያጋጥሙ የስነ ምግባር አጣብቂኞችን (ethical dilemmas) ለመፍታት የሚያስችል የገቢራዊ ስነ ምግባር (applied ethics) ቀመር ደግሞ ለምግባራችን እድገትና እንፃት ያስፈልጉናል።

Tax Foreclosure and Tax Liens: Where Lies the Line?–A Case Comment

Kinfe Micheal Yilma*

'Judicial judgment must take [d]eep account of the day before yesterday in order that yesterday may not paralyze today'

Felix Frankfurter, *National Observer*, 1st March 1965

Background

Whilst the Ethiopian tax system undergone a series of piecemeal reforms over decades,[1] a major overhaul occurred only in 2002. The 2002 tax law reform broadened tax bases, introduced new varieties of taxes, self-assessment procedures, and newer modalities of enforcing delinquent taxes. Of the later, incorporation of self-executing tax enforcement mechanisms was among the grand shifts in the country's tax system. Previously, the only means of collecting delinquent taxes[2] was through the costly and rather time consuming judicial execution. Alike ordinary creditors, the tax authority had just to queue before the office of judicial execution to have delinquent taxes enforced.[3] The

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[1] For a brief overview of tax reforms in Ethiopia, see generally, Alemayehu Geda and Abebe Shimeles, 'Taxes and Tax Reform in Ethiopia: 1993-2003,' UNU-WIDER and World Institute for Development Economics Research, *Research Paper No. 2005/65*, 2005.

[2] Delinquent taxes are taxes already due but not yet paid by the taxpayer; the defaulting taxpayer is referred to as a delinquent taxpayer.

[3] Articles 62-63, A Proclamation To Provide for Payment of Income Tax, 1963; Proc. No.173/1963, *Negarit Gazeta*, 20th Year, No. 13; see also, Bekelle Haileselassie, 'Salient Features of the Major Ethiopian Income Tax Laws', *Journal of Ethiopian Law*, Vol. 15, 1992, p.53.

disapproved judicial enforcement of delinquent taxes is now replaced by a set of self-executing enforcement schemes, namely 'tax foreclosure' and 'tax liens'.[4]

Tax foreclosure is an out of court means of recovering delinquent taxes by seizing and selling the assets of delinquent taxpayers. It is "a public authority's seizure and sale of the property for non-payment of taxes."[5] It involves a series of procedures, e.g. notification, attachment, and seizure to sale.[6] Tax liens, on the other hand, represent a scheme of charging the asset of delinquent taxpayers until the tax already due is paid. Established by law, tax liens are simply securities the tax collector may avail himself of where taxpayers default.[7] Liens may also be established following procedures of notification and later registration of the security interest of the tax authority. Tax foreclosure and tax lien are uniformly recognized in almost all of Ethiopia's tax legislations.[8] Despite

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[4] As shall be seen later, tax liens under Ethiopian law are however treated as legal mortgages which are enforced through judicial execution anyway; and this works against the original aim of the overall tax reform to eschew away all inefficiencies and inexpediencies court procedure entails in enforcing delinquent taxes.

[5] Garner, B. (ed.), *Black's Law Dictionary*, 8th ed., West Publishing Co., St. Paul, 2004, *s.v.* "tax foreclosure" [Hereinafter Black's Law Dictionary].

[6] Tax foreclosure may be compared with power of sale foreclosure that banks in Ethiopia are vested with since 1998. See, Property Pledged/Mortgaged with Banks Proclamation, 1998, Proclamation No.97/98, *Federal Negarit Gazeta*, 4th Year, No.16. For more on the Ethiopian tax foreclosure regime, see generally, Kinfe Micheal, *An Introduction to the Ethiopian Law of Tax Foreclosure: A Commentary*, 2009, available at: <http://www.abyssinialaw.com/uploads/The_Ethiopian_Tax_Foreclosure_Regime__3_.pdf>.

[7] *Words and Phrases*, Vol. 41, Permanent Edition, West Publishing Co., St. Paul, 1965, p. 321. Black's Law Dictionary, *supra* note 5 (p.2940), further defines tax liens as "liens on property, and all rights to property, imposed by the government for unpaid taxes."

[8] See, for instance, Articles 77-80, Income Tax Proclamation, Proclamation No. 286/2002, *Federal Negarit Gazeta*, 8th Year, No.34 [Hereinafter ITP]; Articles 31-32, Value Added Tax Proclamation, Proclamation No.285/2002, *Federal Negarit Gazeta*, 8th Year, No.33; Article 17, the Value Added Tax Regulation, Regulation No.79/2002, *Federal Negarit Gazeta*, 9th Year, No.19; Articles 10-11 of the Excise Tax Proclamation, Proclamation No.307/2002,

the inclusion of these enforcement tools into our tax law statute book, a recent decision of the cassation bench of the Federal Supreme Court appears to mystify them.

This short critique comments on the decision of Cassation Division of the Federal Supreme Court in *Ethiopian Revenues & Customs Authority (ERCA) Jimma Branch v. Adale Seid and Firomsis Plc*[9] with a view to unravel how the court confused tax foreclosure with tax lien – two separate schemes of tax enforcement under the Ethiopian law. For the purposes of this piece, all references are to the Income Tax Proclamation No. 286/2002(ITP).

Federal Negarit Gazeta, 9th Year, No.20; and Articles 13-14, Turnover Tax Proclamation, Proclamation No. 308/2002, *Federal Negarit Gazeta*, 9th Year, No.21; see also Articles 16(2(3)) and 18(2(h)), A Proclamation to Provide for the Establishment of the Ethiopian Revenues and Customs Authority, Proclamation No.587/2008, *Federal Negarit Gazeta*, 14th Year, No.44. Among regional laws, see for instance, Articles 14-15, the Southern Nations, Nationalities and Peoples Regional State Turnover Tax Proclamation, Proc. no. 57/2003, *Debub Negarit Gazeta*, 8th Year, No.6. Subsidiary legislations issued by the Ministry of Finance and Economic Development and the Ethiopian Revenues and Customs Authority further elaborate on tax foreclosure; see, "ግብር የመክፈል ግዴታቸውን ያልተወጡ ግብር ከፋዮችን ሀብት በመያዝና በመሸጥ የግብር አሰባሰብ የሚከናወንበትን ስርዓት ለመወሰን የወጣ መመሪያ"(የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር፣1996E.C),"የግብር አሰባሰብ እና ክትትል የስራ ሂደት ማንዋል" (የኢትዮጵያ ገቢዎች እና ጉምሩክ ባለስልጣን፣ ሐምሌ 2000 E.C). Disparate seizure rules are also included in Ethiopian customs law. Custom officers are empowered to detain a means of transport and [s]eize goods loaded where they have reasonable suspicion that cusoms formalities have not been met. Although not clearly articulated, such seizures would result in the ultimate sale of the goods where the owner of the good doesn't report to the tax authority or fails to bring the case to court in 30 days from the notice of seizure. See Articles 82, 2(49), and 109 , Customs Proclamation, Proclamation No.622/2009, *Federal Negarit Gazeta*, 15th Year, No. 27.

[9] *Ethiopian Revenues & Customs Authority (ERCA) Jimma Branch v. Adale Seid and Firomsis Plc* , Federal Supreme Court Cassation File Number 57100 [Ginbot 30/2003 E.C].

1. Facts and Issues of the Case

Mr. Adal Seid lodged an execution proceeding against a clinic owned by Firomsis PLC, where he was a shareholder. The High Court of Jimma Zone in Oromia Regional State ordered the sale of the clinic so that Mr. Adal be paid his share in the plc. Nevertheless, bidders didn't appear in two consecutive auctions. As a result, the judgment creditor (Mr. Adal) requested to take possession of the assets of the plc.

Meanwhile, ERCA (Jimma Branch) intervened in the proceeding claiming that the plc owed it 508, 564.67 Birr in unpaid taxes and that the authority has *preferential claim to assets* under Article 80(1) of ITP. Nonetheless, the High Court declined ERCA's claim for seizure of delinquent taxpayer's property is allowed, as per Art 78(1) of the ITP, only when it is not subject to attachment or judicial execution and the assets of the plc are already under judicial execution proceedings. On appeal, the Supreme Court of Oromia Regional State agreed with the decision of the High Court.

Disagreeing with this decision, ERCA petitioned the Federal Supreme Court Cassation Division to review the decision of the lower courts for basic error of law. And the tax authority argued it enjoys preferential claim to assets next to other secured creditors such as banks under Article 80(1) of ITP, yet the regional courts denied its claims by relying on Article 78(1) instead. It maintained Article 78(1), which regulates surrender of property in the hands of third parties during tax seizures, is irrelevant to the circumstances of the case at hand.

The Cassation bench received the written responses of the respondents (Mr. Adal and Firomsis PLC) after identifying the existence of fundamental error law qualifying for cassation review.[10] The first respondent (Mr. Adal) stated in his

[10] Before cassation review, decisions of lower courts appealed from would first be screened out by a panel of three judges; and, it is only when the panel is satisfied with existence of

submission that the appellant was very late in seeking enforcement for unpaid taxes against the property of the second respondent. Also, he generally argued that the appellant is not entitled to preferential claim on the assets (of the second respondent) over which he received temporary administration after failed attempts to auction off the same. Though not clearly articulated in the case report, the responses of the second respondent seemed to support the claims of the appellant. The appellant had also submitted a counter-reply, albeit its contents are not summarized in the case report.

The Bench framed the issue: does the appellant enjoy preferential claim to assets of the second respondent over which the first respondent received temporary administration? From the outset, the court also established the uncontested fact that the first respondent didn't have a secured right against the property of the second respondent.

2. Decision of the Bench

In defining the ambit of Article 80(1) of ITP, the court noted that a claim would precede the claims of the tax authority only where it is *secured*. As to whether Article78 (1) of ITP is relevant to the case under consideration, the court ruled that the provision doesn't bar the preferential claim to assets of the tax authority. The main aim of the provision, according to the Bench, is just to regulate the procedure through which the property of the delinquent taxpayer could be collected or received by the tax authority should it become necessary.

Accordingly, the court reasoned the judgments of the regional courts rendered based on Article 78(1) constitute fundamental error of law. Consequently, they are quashed and the priority of the appellant's claim to the claims of the first respondent is upheld.

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fundamental error that application for cassation review is allowed. See Article 22(1), Federal Courts Proclamation, Proclamation No.25/1996, *Federal Negarit Gazeta*, 2nd Year, No.13.

3. Tax Foreclosure and Tax Liens – Drawing the Lines

As noted above, the two important questions the Bench dealt with are: (1) "when does the tax authority enjoy preferential claim to assets of delinquent taxpayers under Article 80(1) of ITP?"[11] and (2) "what is the correlation between Article 78(1) and Article 80(1) of ITP?" In what follows, I shall treat these two issues separately and examine their disposition by the court. In doing so, an attempt is made to draw a line between foreclosure and lien under Ethiopian tax law.

In disposing the first issue the court held that no claim, unless secured, precedes the tax claims of the tax authority under Article 80(1). In other words, all creditors but secured creditors (e.g. banks, mortgagees or pledges) are ordinary creditors next in priority to the tax authority. Apparently, the tax authority becomes a secured creditor with senior lien rights as against all subsequent creditors from the day the tax becomes due and payable.[12] It is not however clear from the decision of the court if a secured creditor, say a bank, which becomes a mortgagee vis-à-vis the taxpayer on the morrow of the day the tax becomes due and payable on the same taxpayer would still be subordinate to the tax authority. According to a doctrine of property security, *first in time first in right,* one that registers the property of a debtor first is entitled to priority against all subsequent claims.

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[11] Article 80(1) reads as follows:

"From the date on which tax becomes due and payable under this Proclamation, subject to the prior secured claims of creditors, the Authority has a preferential claim over all other claims upon the assets of the person liable to pay the tax until the tax is paid."

[12] Of course, this should not come as a surprise as it is generally recommend that tax law should provide for a charge or lien that constitutes a security interest in the taxpayer's property in favor of the government. See, Gordon, R., Law of Tax Administration and Procedure, *in* Thuronyi, V. (ed.), *Tax Law Design and Drafting,* Kluwer Law International, the Hague, 2000, p.108.

The logical way of reading Article 80(1) would be that the tax claims of the tax authority would be superior as against all claims regardless of whether they are secured. Given the peculiar feature of tax liens in Ethiopia, this construction is nonetheless difficult to swallow. Though Article 80(1) appears *prima facie* to grant preferential claim to asset from the day the tax becomes due and payable, a closer look at subsequent sub-articles reveals that other requirements need to be met before the claims of the tax authority take priority. It can be argued that all what is provided under Article 80(1) is just the principle, and that other conditions stipulated under sub-articles 80(2)-(3) are still required to make the tax authority a complete secured creditor.[13]

As per the rules laid down in sub-article 80(2)-(3), where the taxpayer defaults on his payment of taxes,[14] the tax authority has to give a written notice to the delinquent taxpayer stating its intention to register a *security interest* on the assets of the defaulting taxpayer.[15] Secondly, where the taxpayer fails to pay up taxes due within 30 days of notice, the tax authority may direct the relevant authority to register its security interest for unpaid taxes on the property of the taxpayer.[16]

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[13] It is not uncommon to find similar sequencing of provisions in other pieces of legislation. Either the first provision in a given section of legislation or the first sub-article would be captioned as 'general' or 'principle' and the details are set out in subsequent articles or sub-articles.

[14] There are generally three conditions under which a taxpayer may be deemed to have defaulted under Article 73(2) of ITP. These are: "Where the taxpayer fails to pay the tax due within 30 days from the receipt of the assessment notice or from the date of the decision of the review committee; or where the period for lodging appeal on the decision of the tax appeal commission has expired; or where the court of appeal renders its final decision."

[15] Article 80(2), ITP.

[16] *Ibid*, Article 80(3); on another note, the notice that the tax authority may give to the property registering authority is literarily a direction ordering registration of its security interests. The registering authority doesn't have a power to investigate the titles or the interests of the registrant. This approach seems to be guided by a view that 'tax liens are liens of sovereignty

It seems, therefore, cogent to state that though lien right of the tax authority arises from the moment taxes become due and payable, registration has to be sought before the registering authority enjoys preferential claim. *First in time first in right* rule ought to be read into the provisions of the law. This line of argument finds support from the very terms used in the provisions of the law. The terms *security interest* and *mortgage* under Articles 80(2)-(4) evince that the status of a secured creditor could only be secured in so far as the conditions thereunder are complied with; or else, the tax authority would be treated like an ordinary creditor.

In view of the foregoing, ERCA was bound to issue notice and seek registration of its security interest for it to raise preferential claim over the assets of Firomsis Plc. And, since it didn't, ERCA shouldn't have been given preferential claim to assets of the Plc. The Cassation Becnh should have simply treated ERCA as an ordinary creditor for it did not comply with the statutory requirements of notice and registration. What is more, if the claims of Mr. Adal as against Firomsis Plc were to be regarded as secured,[17] the tax claims of ERCA would be next to the claims of the former in the hierarchy of claims notwithstanding the registration of the tax authority's security interest. It is thus unfortunate that the Bench subordinated Mr. Adal's security right to that of the tax authority's for the utter reason that ERCA has invoked Article 80(1).

Logic also accords with the above interpretation of the provisions of Articles 80 (1)-(3), ITP. If lien right of the tax authority were to be considered established from the moment taxes become due and payable without further steps of notification and registration, other secured creditors' rights would become redundant. This would particularly be true where sale proceeds of the

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and a sovereign can do no wrong'. See, Wolson, B., 'Federal Tax Liens-A Study in Confusion and Confiscation', *Marquette Law Review*, Vol. 43, 1959/60, pp.181-182.

[17] Whether a shareholder in private limited company has a secured claim to the extent of his share in the company is of itself an interesting topic separately.

taxpayer's assets are insufficient to cover the claims of all other creditors after having satisfied the tax claims.

In answering the question regarding the relationship between Articles 78(1) and 80(1) of ITP, the court seemed to hold that the former comes into play only where seizure of the taxpayer's property is deemed necessary under the provisions of the later. It is here that the court apparently conflated two separate schemes of tax enforcement, tax foreclosure (Articles 77-79) and tax liens (Article 80).[18]

Articles 77-79 of ITP generally deal with tax foreclosure – a procedure whereby the tax authority enforces unpaid taxes through unilateral seiziure and sale of delinquent taxpayer's property. Particularly, Article 78 governs the situation where properties of the delinquent taxpayer are in the hands of third parties once a tax foreclosure process begins. It sets out the obligation (and rights) of these third parties vis-à-vis the tax authority and delinquent taxpayers. Article 80, on the other hand, deals with tax lien – a distinct notion in tax law. As noted earlier, tax foreclosure is essentially an out of court procedure carried out by the tax authority itself. Of course, tax liens are also theoretically self-executing procedures that do not directly involve courts. Nevertheless, as the Ethiopian law uniquely contemplates tax liens as legal mortgage, recourse to court is not avoided altogether.[19] As provided under Article 80(4) of the ITP,

[18] The writer believes both the trial and appellate courts of Oromia Regional State were wrong in answering a question primarily related to tax liens based on Article 78, a provision dealing with tax foreclosure.

[19] Legal mortgage is a variant of mortgage. It is created by the operation of the *law* (as opposed to agreement). The most common instances under which a legal mortgage may arise includes, a legal mortgage that minors, interdicted persons and absentees have on the property of their tutors and curators as a security under the laws of some jurisdictions; see, Black's Law Dictionary, *supra* note 5, *s.v.* "legal mortgage". Ethiopian law sets forth four major instances of legal mortgage, namely, legal mortgage of co-partitioners (Article 3043, Civil Code), legal mortgage of sellers of an immovable (Article 3042, Civil Code), legal mortgage of a seller of a

"notice served to the property registering authority ordering the registration of the interest of the tax authority will serve *as an instrument of mortgage,* and such a registration *shall operate as a legal mortgage in all respects.*" This stipulation apparently defines tax liens as legal mortgage. And, legal mortgage, along with judicial mortgage and contractual mortgage, is a security device enforceable only through judicial execution.[20] In this sense, therefore, tax liens as legal mortgages are not self-executing under Ethiopian law.[21] Given this feature of tax liens, one would find hard to swallow the reasoning of the Cassation Bench that fixation of lien under Article 80 may necessarily lead to unilateral seizure of property of the taxpayer by the tax authority under Article 78.

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business and creditors of a bankrupt trader (Article 172, Commercial Code), and legal mortgage of the tax authority on the delinquent taxpayers property (Article 80(4), ITP). The fourth instance under which a legal mortgage arises is probably peculiar to the Ethiopian law for it deviates from comparable foreign laws on tax lien.

[20] Article 3058 (1), Civil Code. It is to be noted that ITP, under Article 2 mandates the cross-reference of terms defined in other laws of Ethiopia (including the Civil Code) save where different meanings are expressly provided in ITP itself. Absent any specific definition of *legal mortgage* in ITP, referring to the relevant provisions of the Civil Code for an understanding of legal mortgage appears appropriate.

[21] Indeed, there is a clear resemblance between 'lien' and 'mortgage'. According to a common law theory of lien, what mortgagees acquire is a lien on the property, and the mortgagor retains the legal title over the same property up until foreclosure ultimately happens. Unlike tax foreclosure that enables direct seizure of property, (tax) liens and (legal) mortgages only encumber the tax payer's property and give the tax authority priority if it properly complies with statutory requirements of lien or mortgage creation. And, the property, including legal titles to it, remains in the hands (and names) of the taxpayer until final judicial sale eventuates; see generally, Lloyd, W., 'Mortgages – The Genesis of The Lien Theory', *Yale Law Journal,* Vol. 32, 1923, p.233 *et seq.* See also, Gavit, B., 'Under the Lien Theory of Mortgages Is the Mortgage Only a Power of Sale?', *Minnesota Law Review*, Vol. 15, No. 2, 1931, p.147 *et seq.*

Should a taxpayer fail to discharge his duties, what could happen under Article 80 is that the tax authority files a claim before a court of law as a creditor or a secured creditor if the requirements under Article 80(2)-(3) are fulfilled. Fixation of lien only helps to lift the authority to the status of a secured creditor. Still, claims secured by tax lien are subject to other prior secured claims; also, and more importantly, they are basically enforced judicially.

The writer believes the Bench's attempt to correlate provisions of Article 78(1) with Article 80(1) misses the salient feature of the Ethiopian tax lien regime. The provisions of Section VII (Collection Enforcement) do not only deal with tax foreclosure involving unilateral seizure and later sale of taxpayer's property. Some deal with tax lien. And, tax foreclosure and tax lien are twin enforcement tools, albeit they employ slightly different trajectories in achieving the same objective of recovering delinquent taxes. Put simply, tax lien is legal alternate to tax foreclosure under Ethiopian tax law.

Given that tax liens are just alternative means of enforcement, the tax authority may not nevertheless need to go through the procedure of tax lien creation in all instances. It can proceed with the unilateral tax foreclosure procedure – which also involves a series of procedures before property of the taxpayer is subjected to sale – where, for instance, the authority emerges as a lone creditor vis-à-vis non-registered properties of the delinquent taxpayer.

Concluding Remarks

In the foregoing, we pointed out that the highest court has run into another error in rectifying an alleged fundamental error of law. The cassation bench mistakenly confused two separate schemes of tax enforcement and assumed the provisions of Article 80 generally deal with tax foreclosure. This piece underscores that tax foreclosure and tax lien are two separate schemes of tax enforcement under Ethiopian law. Although recovering delinquent taxes is

their shared ultimate goal, they follow different tracks in enforcing delinquent taxes; while tax foreclosure is self-executing and unilateral, tax liens are enforceable through judicial execution.[22] Considering tax lien as self-executing and unilateral procedure (as the Bench did in *ERCA vs Mr. Adal and Firomsis Plc*) would make Article 80 of ITP redundant. Also, it might seriously limit the rights and interests of other (than the tax authority) creditors' of the delinquent taxpayer.

[22] No matter how inexpedient and costly judicial proceedings are, the involvement of courts in handling delicate matters like selling alleged debtors property adds sense of trust to the whole system. That being said, one may ask why the judiciary is brought back through tax lien while the initial goal was to eschew away the time consuming and inexpedient judicial enforcement. In this regard, I elsewhere put forward my hunch that this may have resulted from drafting problems. See generally, Kinfe Micheal, *The Basic Features of the Ethiopian Tax Lien Regime*, 2010 (Unpublished), available at: <http://www.academia.edu/862727/The_Basic_Features_of_the_Ethiopian_Tax_Lien_Regime.>.

Case Reports

Note

The case reports part contains selected decisions of Ethiopia's Federal Supreme Court Cassastion Bench. The purpose of reporting the cases is to make them knwon to members of the legal profession. In this issue, three interesting decisions (i.e. *Ethiopian Mineral Development SC v GTT Trading*, *Dragados J & P Joint Venture v Saba Construction PLC*, and *National Mineral Corporation PLC v Dani Drilling PLC*) shaping the jurisprudence of Ethiopian law on arbitration are included.

In selecting a particular judgment for publication the Editorial Committee is not implying that the judgments are defective on any proposition or that it contains erroneous propositions. The cases are chosen for the interesting issue(s) of law they raise.

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ዓሊ መሐመድ
ሡልጣን አባተማም

አመልካች፡-ብሔራዊ ማዕድን ኮርፖሬሽን ኃላ.የተ. የግል ኩባንያ

ተጠሪ፡- ዲኒ ድሪሊንግ ኃላ.የተ.የግል ኩባንያ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሠጥቷል፡፡

ፍርድ

ጉዳዩ የወርቅ ማዕድን ፍለጋ የጉድጓድ ቁፋሮ ሥራ ውል ስምምነትን መሠረት ያደረገ ሲሆን ክርክሩ የተጀመረው በግልግል ዳኝነት ጉባኤ ነው፡፡ በአመልካችና በተጠሪ የተቋቋመው የግልግል ዳኝነት ጉባኤ ግራ ቀኙን ካከራከረ በኋላ ሰኔ 10 ቀን 2000 ዓ/ም በሠጠው ውሣኔ አመልካች ለተጠሪ ብር 579,450.35(አምስት መቶ ሰባ ዘጠኝ ሺህ አራት መቶ ሃምሳ ብር ከሠላሣ አምስት ሣንቲም) እንዲከፍል ወስኗል፡፡ ይህንኑ ውሳኔ አመልካች በመቃወም በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 351 መሠረት ይግባኙን ለፌዴራሉ ጠቅላይ ፍርድ ቤት አቅርቦ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 337 መሠረት ተሠርዞበታል፡፡ የአሁኑ የሠበር አቤቱታ የቀረበውም በዚሁ ውሣኔ መሠረታዊ የሆነ የሕግ ስህተት ተፈፅሟል በማለት ለማስቀየር ነው፡፡

የአመልካች ጠበቃ ታኅሣስ 17 ቀን 2001 ዓ/ም በፃፉት አራት ገፅ የሠበር አቤቱታ በጉዳዩ ላይ በተሠጠው ውሣኔ በፍሬ ነገር እና በሕግ ረገድ ተፈፀሙ የሚሏቸውን ስህተቶች ዘርዝረው አቅርበዋል፡፡ ይዘቱም ባጭሩ፡- ተጠሪ በራሱ አነሳሽነት ውሉን ባቋረጠበትና ዉሉን ለማቋረጥ በቂ ምክንያት በሌለበት ሁኔታ ተጠሪ ስራ ለፈታበት ሰላሳ አምስት ቀናት ብር 700,000. 00 ቅጣት አመልካች እንዲከፍል መወሰኑ የውልም ሆነ የሕግ መሠረት የሌለው መሆኑን፣የግልግል ጉባኤ ዳኝነቱን የመራው በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 317(1) ስር በተመለከተው ሣይሆን ከዚህ ውጪ ተገቢውን ጭብጥ ሣይዝ መሆኑን፣ውሣኔው በፍትሐ ብሔር ሕጉ የተመለከቱትን የውል አተረጓጎም ድንጋጌዎች ግንዛቤ ውስጥ ያላስገባ መሆኑን፣ተጠሪ በወቅቱ ማስጠንቀቂያ ባልሰጠበት ሁኔታም ቅጣት መጠየቅ እንደማይችል፣ተጠሪ ውል አልተፈፀመልኝም የሚል እንደመሆኑ መጠን ሊደርስ የሚችለውን ኪሣራ ለመቀነስ በሕጉ ግዴታ ያለበት ሲሆን ጉዳት ሳይደርስበት ቅጣት እንዲከፈለው መጠየቁ ያላግባብ መሆኑንና በውሉ ላይ ዓይነተኛ መጣስ የሌለ ስለሆነ ውል እንዲፈርስ ዳኞች ውሣኔ ማሳለፍ እንደማይችሉ፣እንዲሁም በጉዳዩ የተሠጠው ውሣኔ የቀረቡትን ማስረጃዎች በሚገባ

ያልመዘነ መሆኑን በሰፊው በመዘርዘር የግልግል ዳኞችና ፌዴራል ጠቅላይ ፍርድ ቤት በጉዳዩ ላይ የሠጡት ውሣኔ በማስረጃ ምዘናም ሆነ በህጉ አተረጓገም እንዲሁም አፈጻጸም ረገድ መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ነው ተብሎ ሊሻር ይገባዋል በማለት ዳኝነት መጠየቃቸውን የሚያሳይ ነው::

የአመልካች የሠበር አቤቱታ ተመርምሮም ተጠሪን ያስቀርባል ተብሎ ጠበቃው መጋቢት 01 ቀን 2001 ዓ/ም በተፃፈ አራት ገፅ ማመልከቻ መልሣቸውን ሠጥተዋል:: የመልሱ ይዘትም የጉባኤው ውሳኔ የመጨረሻ መሆኑን 23-05-1998 ዓ/ም ግራ ቀኙ በፈፀሙት ውል የተስማሙ መሆኑን ገልፀው ለሠበር ችሎቱ የሠበር አቤቱታ ለማቅረብ የማይቻል ስለሆነ በዚህ ምክንያት ችሎቱ የአመልካችን አቤቱታ ውድቅ እንዲያደርግ፣ይህን የሚያልፍ ከሆነም ለአቤቱታው መሠረት የሆኑት የፍሬ ነገርም ሆነ የሕግ ክርክሮች ተቀባይነት የሌላቸው በመሆኑ ውድቅ ሊደረጉ ይገባል በማለት መከራከራቸውን የሚያሳይ ነው:: የአመልካች ጠበቃ በበኩላቸው የሠበር ችልቱ ጉዳዩን ለማየት ሕገ-መንግስታዊ ሥልጣን ያለው መሆኑን በመዘርዘር የተጠሪ ጠበቃ መቃወሚያ የሕግ መሠረት የለውም በማለት የተቃወሙ ሲሆን ሌሎች ነጥቦችን በተመለከተም የሠበር አቤቱታቸውን በማጠናከር መጋቢት 18 ቀን 2001 ዓ/ም በተፃፈ የመሌስ መሌስ ማመሌከቻ ተከራክረዋሌ::

የጉዲዩ አመጣጥ አጠር ባሇመሌኩ ከሊይ የተመሇከተው ሲሆን ይህ ችልትም የግራ ቀኙን ክርክር የሠበር አቤቱታ ከቀረበበት ውሣኔ እና አግባብነት ካሊቸው የሔግ ዴንጋጌዎች ጋር በማገናዘብ በሚከተሇው መሌኩ መርምሮታሌ:: እንዯመረመረውም የችልቱን ምሊሽ የሚያስፇሌጉት አበይት ጭብጦች፡-

1ኛ/ ግራ ቀኙ ባደረጉት ስምምነት መሠረት አመልካች ቅሬታውን ለሠበር ችሎት ለማቅረብ ይችላሉ? ወይስ አይችሉም?፣

2ኛ/ አመልካች ለሰላሳ አምስት ቀናት የጉዳት ካሳ ለተጠሪ እንዲከፍል ተብሎ የተወሰነው የውሳኔ ክፍል በግራ ቀኙ መካከሌ በተደረገው ውል መሰረት አመልካች ግዴታውን ስለአለመወጣቱ ተጠሪ አስረድቶ ነው ወይስ አይደለም? የሚሉት ሲሆን ሌሎች ነጥቦች በዚሁ ጭብጥ ስር እልባት ሊያገኙ የሚችሉ ሆነው ተገኝተዋል::

1.የመጀመሪያውን ጭብጥ በተመለከተ፡-

ይህን ጭብጥ ለመመለስ በአገራችን ውስጥ የሰበር ስርአት እና ስለአማራጭ ሙግት መፍቻ ዘዴዎች አላማና በሕጉ ያላቸውን ማእቀፍ መመልከቱ ተገቢ ነው::

የሰበር ስርዓት አይነተኛ አላማ ከሆኑት አንዱ በአንድ ሀገር ውስጥ ወጥ የሆነ የሕግ አተረጓጎም እና አፈጻጸም(Uniform interpretation and application of the law) መኖሩን ማረጋገጥ መሆኑ እሙን ነው:: በዚህም መሰረት የሰበር ሥርዓት የሕግ የበላይነት ማረጋገጫ ዘዴ ነው ተብሎም ሊታሰብ የሚችል ነው:: የሕግ የበላይነት በሰበር ሥርዓት ሊከበር ወይም ሊረጋገጥ የሚችለው ደግሞ ጥራት፣ወጥነት ያለው ፍርዴ/ውሳኔ ለመስጠት ሥልጣን በተሰጣቸው አካላት በሰጡት ውሳኔ ላይ የዳኝነት አካሉ በራሱ ዳኝነታዊ ቁጥጥር(Judicial Control) ሲኖረው መሆኑ ግልፅ ነው:: ከዚህም በተጨማሪ ተመሳሳይ ጉዳዮች በተመሳሳይ መንገድና ሁኔታ ማየትን የፍትሕ አሰጣጥ ሥርዓት የግድ የሚለው ጉዳይ ነው:: በሌላ አገላለጽ የፍትሕ መሰረቱ ተመሳሳይ ጉዳዮችን በተመሳሳይ መንገድ ማስተናገድ ነው ተብሎም ይታሰባል:: ይህ የሚተገበረውም አዋጆች፣ደንቦችና መመሪያዎች እንዲሁም ፖሊሲዎች በትክክልና በወጥነት ሲተረጎሙና ሲፈጸሙ ነው:: ወጥነትና

ትክክለኛነት ያለው የሕጎች አተረጓጎምና አፈፃፀም መኖሩ የሚረጋገጠው ደግሞ በዳኝነት አካለ በመጨረሻ ደረጃ በሚገኝ በሰበር ተቋም ነው።

ሌላው ጉዳይ የሕጎች ወጥነት ያለው አተረጓጎምና አፈፃፀም መኖር የዜጎችን በሕግ ፊት እኩል የመሆን መብት የሚጠብቅ መሆኑ የሚታመን ሲሆን የዳኝነት አካሉ የዜጎችን በሕግ ፊት እኩል የመሆን መብት የማክበርና የማስከበር ሕገ-መንግስታዊ ግዴታ የመወጣት ኃላፊነት ያለበት መሆኑን ደግሞ የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት አንቀፅ 13(1)፣ 25 እና 85(1) ድንጋጌዎች ስር ከአሰፈረው ሁኔታ የምንገነዘበው ጉዳይ ነው። የሰበር ሥርዓት ይህንኑ ግዴታ የዳኝነት አካሉ የመወጣቱን ሁኔታ የሚቆጣጠርበት መሆኑም የሚታመን ነው። ሌላው በፅንሰ ሀሳብ ደረጃ ተቀባይት ያለው ጉዳይ የሕግ ስህተት ያለበት ውሳኔ ፀንቶ ሊቆይ የማይገባው ጉዳይ መሆኑ ነው። የሕግ ስህተት ያለበት ውሳኔ ፀንቶ እንዲቆይ ማድረግ በዳኝነት አካሉ የራሱ የሆነ አሉታዊ ተጽእኖ ያስከትላል። ምክንያቱም የሕግ ስህተት ያለበትን ውሳኔ ጸንቶ እንዲቆይ ማድረግ ሕብረተሰቡ በዳኝነት አካሉ እምነት እንዳይኖረው የሚያደርግ ነውና። በመሆኑም የሰበር ሥርአት የሕግ ስህተት ያለበት ውሳኔ ፀንቶ እንዲይቆይ በማድረግ የዳኝነት አካሉ በሕብረተሰቡ ዘንድ የሚታመን፤ከበሬታ የተቸረው እንዲሆን ያደርጋል።

ከዚህ ሁሉ መገንዘብ የሚቻለው የሰበር ሥርአት ለሕግ ስርዓቱ፣ለዳኝነት አካሉና ለሕግ የበላይነት መረጋገጥ ተብሎ የሚቋቋም መሆኑን ነው። ይህ ስርአት በኢትዮጵያ የህግ ስርዓት ውስጥ ተካቶ ለረዥም ጊዜያት ሲሰራበት የቆየ ሲሆን በ1987 ዓ/ም የኢ.ፌ.ዴ.ሪ ህገ-መንግስት በአንቀፅ 83 ስር ተመልክቶ ከመገኘቱም በላይ ዝርዝሩ በአዋጅ ቁጥር 25/1988 እና አዋጅ ቁጥር 454/97 የተደነገገለት ሥርዓት ነው። የኢ.ፌ.ዴ.ሪፐብሊክ ህገ መንግስት በአንቀፅ 80 ንዑስ ቁጥር አንድ ድንጋጌ ስር የፌዴራሉ ጠቅላይ ፍርድ ቤት በፌዴራል ጉዳዮች ላይ የበላይና የመጨረሻ የዳኝነት ሥልጣን እንዳለው ሲደነግግ በንዑስ ቁጥር ሁለት ድንጋጌ ስር ደግሞ የክልል ጠቅላይ ፍርድ ቤት በክልል ጉዳይ ላይ የበላይና የመጨረሻ የዳኝነት ስልጣን ይኖረዋል ሲል ደንግጓል። ህገ-መንግስቱ በፌዴራልና በክልል ጉዳዮች የመጨረሻ የዳኝነት ስልጣን ያላቸውን ፍርድ ቤቶች ለይቶ ካስቀመጠ በኋላ መሰረታዊ የሆነ የህግ ስህተት ያለበትን ማናቸውንም የመጨረሻ ውሳኔ ለማረም የፌዴራሉ ጠቅላይ ፍርድ ቤት ሰበር ችሎት ስልጣን ያለው መሆኑን በአንቀጽ 80(3(ሀ)) ስር ደንግጓል። ሰበር ችሎት ይህ ስልጣን የተሰጠው ከላይ የተመለከቱትን አላማዎች ለማሳካት መሆኑ የሚታመን ነው። በተለይ አዋጅ ቁጥር 454/1997 ሲታይ ከአምስት ያላነሱት ዳኞች በተሰየሙበት ችሎት የሚሰጥ የህግ ትርጉም ይኸው ችሎት ራሱ በሌላ ጊዜ እስካልለወጠው ድረስ በየትኛውም እርከን የሚገኝ ፍርድ ቤት ላይ የአስገዳጅኘነት ኃይል(Precedence) ያለው ስለመሆኑ በአንቀፅ 2(4) ስር አስቀምጧል። ይህም የሰበር ስርዓት በዳኝነት ስልጣን ተዋረድ በመጨረሻ እርከን ላይ ሆኖ ህጎች በትክክልና በወጥነት መተርጎማቸውንና መፈጸማቸውን ለማረጋገጥ የሚያስችል፣ለተከራካሪ ወገኖች ጥቅም ወይም መብት ብቻ ሳይሆን ለዜጎች ጥቅም ተብሎ የተዘረጋ ሥርአት ወይም አሰራር መሆኑን ነው። በመሆኑም ሰበር ህጋዊ ያልሆኑ ውሳኔዎች የሚሰበሩበት ወይም ጸንተው እንዲይቆዩ የሚደረግበት ሥርአት ነው። በሌላ አገላለፅ ሰበር መደበኛ የይግባኝ ማቅረቢያ አሰራር ሳይሆን ፍርድ ቤቶች በውሳኔዎቻቸው ላይ መሰረታዊ የሆነ የህግ ስህተት ፈጽመዋል በሚባልበት ልዩ ሁኔታ ብቻ የህጉ አተረጓጎም ወይም አተገባበር የሚቃናበት ወይም የሚታረምበት ሥርዓት ነው። በዚህም ሥርአት የህግ አንድ ወጥ አተረጓጎምና አፈፃፀም በፍርድ ቤቶች ሁሉ ይረጋገጣል።

ወደ አማራጭ የሙግት መፍቻ ዘዴዎች አላማ ስንመለስ ደግሞ ተከራካሪ ወገኖች ጉዳያቸውን ከፍርድ ቤት ውጪ በግልግል ዳኝነት ለመጨረስ የመስማማት መብት ያላቸው መሆኑን ያሳዩናል።

የግልግል ዳኝነት የሚቋቋምበት አይነተኛ አላማ ተካራካሪ ወገኖች ወደ መደበኛ ፍርድ ቤት በመሄድ የሚያጠፉትን ጊዜና ገንዘብ ለማስቀረት መሆኑ የሚታመን ነው፡፡ ጉባኤው የሚቋቋመውም በተካራካሪ ወገኖች ስምምነት ሲሆን ተካራካሪዎቹ ባላቸው የመዋዋል ነፃነት ጉዳያቸውን ከፍርድ ቤት ውጪ በግልግል ዳኝነት ለመጨረስ የሚስማሙት ሁኔታ መኖሩ በራሳቸው ፍላጎትና ምርጫ የተቋቋመው ጉባኤ በተገቢው ጊዜና በአነስተኛ ወጪ ጉዳያቸውን ለመወሰን ይችላል የሚል እምነት ኑሯቸው ነው ተብሎ ይታሰባል፡፡ በፍ/ብ/ሕጉ ከቁጥር 3325 እስከ 3346 ድረስ የተመለከቱት ድንጋጌዎች እንዲሁም በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ከቁጥር 315-319 ድረስ የተመለከቱት ድንጋጌዎች ይህንኑ የሚያስገነዝቡን ሲሆኑ የፍ/ብ/ሥ/ሥ/ህ/ቁጥር 350(2) በተለይ ሲታይ ደግሞ ተከራካሪ ወገኖች የግልግል ዳኝነት ጉባኤ የሚሰጠው ውሳኔ የመጨረሻ ይሆናል በሚሌ ለመስማማት መብት ያላቸው ስለመሆኑ ያስረዳናል፡፡ በዚህ ሁኔታ ስምምነት ከተደረሰም በፍ/ብ/ሥ/ሥ/ህ/ቁጥር 356 ስር በተመለከቱት ሁኔታዎች በስተቀር የጉባኤው ውሳኔ በፍርድ እንዲሻርላቸው ለመጠየቅ እንደማይችሉ ተደንግጓል፡፡ ይህ ተከራካሪ ወገኖች የግልግል ጉባኤው የሚሰጠው ውሳኔ የመጨረሻ ስለመሆኑ ስምምነት ያላቸው ከሆነ የሚፈፀም ስነ ስርዓት ሲሆን ስምምነት ባይኖርም ይግባኝ የሚቻለው በፍ/ብ/ሥ/ሥ/ህ/ቁጥር 351 ስር በተመለከቱት ውስን ምክንያቶች ብቻ ነው፡፡ የፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 351ም ሆነ 356 ድንጋጌዎች ይዘትና መንፈስ ሲታይ መሰረታዊ የሕግ ስህተት ያለው የግልግል ጉባኤ ውሳኔ በሰበር ስርዓት የሚታይበት አግባብ ስለመኖሩ አይጠቁምም፡፡ በሌላ አገላለፅ ድንጋጌዎቹ የሚያወሱት በግልግል ታይቶ የተወሰነ ጉዳይ በይግባኝ የሚታይበትን ሥርዓት ብቻ ነው፡፡ በፍ/ብ/ሕጉ ከቁጥር 3325 እስከ 3346 ድረስ በተመለከቱት ዴንጋጌዎችና በፍትሐ ብሔር ሥነ ሥርዓት ሕጉ ተከራካሪ ወገኖች ጉዳያቸውን በግልግል ለመጨረስ መሰረቱ ሕጋዊ ውል መኖሩ ሲሆን ውል ደግሞ የተከራካሪ ወገኖች መብትና ጥቅም ማስገኛ ምንጭ ነው፡፡ በሌላ አገላለፅ ውል መብትና ጥቅም የሚሰጠው ለተዋዋይ ወገኖች ወይም መብትና ጥቅሙ በሕጉ አግባብ ለተላለፈላቸው ለሌሎች ሶስተኛ ወገኖች ነው(የፍ/ህ/ቁጥር 1731 እና 1957 ይመለከል)፡፡ እንዲሁም ተዋዋይ ወገኖች ጉዳያቸውን ከፍርድ ቤት ውጪ ለመጨረስ መብት ያላቸው መሆኑ በሕጉ ተቀባይነት ያለው ሲሆን ሕጉ ፍርድ ቤቶች በዚህ ረገድ ያላቸውን ሚናም ደንግጓል፡፡

እነዚህ ድንጋጌዎች በ1952ቱ የፍትሐ ብሔር ሕግና በ1958ቱ የፍትሐ ብሔር ሥነ-ሥርአት ሕጋችን ውስጥ ያሉት ሲሆኑ ከእነዚህ ሕግጋት በኋላ የወጡት የኢ.ፌ.ዴ.ሪ ሕገ መንግስትና አዋጅ ቁጥር 25/1988 እንዲሁም አዋጅ ቁጥር 454/97 ስለሰበር ሥርዓት ደንግገው እናገኛለን፡፡

የፌዴራሉ ጠቅላይ ፍርድ ቤት ሰበር ችሎት በማናቸውም የመጨረሻ ውሳኔ ላይ ስልጣን ያለውና የሚሰጠው የሕግ ትርጉምም በሕጉ በተዘረጋው ሥርዓት መሰረት እስካልተለወጠ ድረስ የፌዴራሉንም ሆነ የክልል ፍርድ ቤቶችን የሚያስገድድ መሆኑ በሕጉ የተቀመጠና አላማው በአገሪቱ ወጥ የሆነ የሕግ አተረጓጎምና አፈጻጸም እንዲኖር ማረጋገጥ ነው ከተባለ ተከትሎ ሊነሳ የሚችለው ጥያቄ በአማራጭ የሙግት መፍቻ ዘዴዎች ከሆኑት አንዱ በሆነው በግልግል ዳኝነት (arbitration) ጉዳዩ ቢታይና ይኸው አካል በጉዳዩ ላይ የሚሰጠው ውሳኔ ይግባኝ የሌለው የመጨረሻ ስለመሆኑ (Arbitration Finality Clause) ተከራካሪ ወገኖቸ ገልፀው ስምምነት ቢያደርጉ ጉዳዩ በሰበር ሊታይ ይገባል? ወይስ አይገባም? የሚለው ነው፡፡ ይኸው ጥያቄም ስለሰበር ሥርዓት አላማና ከሕጎቹ አወጣጥ ቅደም ተከተል እንዲሁም በኢትዮጵያ የሕግ ሥርዓት ውስጥ ፍርድ ቤቶች በአማራጭ የሙግት መፍቻ ዘዴዎች ላይ ካላቸው ሚና አንፃር ታይቶ ምላሽ የሚሰጠው ነው፡፡ በዚህም መሰረት

ከላይ እንደተመለከተው የሰበር ሥርዓት ዓላማ ወጥ ለሆነ የሕግ ትርጉም እና አፈፃጸም ከፍተኛ ሚና መጫወት ሲሆን ይህንንም በ1987ቱ ሕገ-መንግስትም ሆነ ይህንኑ ተከትለው ከወጡ አዋጆች(25/1988 እና 454/97) የምንገነዘበው ነጥብ ነው፡፡ እነዚህ አዋጆች ከ1958ቱ የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ በኋላ የወጡ ሲሆን ተቀባይነት ባለው የሕግ አተረጓጎም ደንብ መሰረትም ከ1958ቱ የሥነ-ሥርዓት ሕግ ቅድሚያ ተፈጻሚነት ያላቸው ናቸው፡፡ አማራጭ የሙግት መፍቻ ዘዴዎች በኢትዮጵያ የሕግ ስርዓት ውስጥ ተካተው የሚገኙ ሲሆን እነዚህን የሙግት መፈቻ ዘዴዎች ፍርድ ቤቶች የሚያበረታቱበት ሁኔታ እንዳለ ሁሉ የሚቆጣጠሩበት አጋጣሚም ያለ መሆኑን ከላይ የተመለከቱት የፍትሐ ብሔር ሕጉም ሆነ የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ድንጋጌዎች ይዘትና መንፈስ ያሳያል፡፡ በመሆኑም የአንድ ጉዳይ ለሰበር የመቅረብ ሁኔታ በሕገ መንግስቱ ለፌዴራል ጠቅላይ ፍርድ ቤት የተሰጠ በመሆኑ ሥርዓቱ ሊጫወተው ከተፈለገው አቢይ አላማ አንፃር ሲታይ ጉዳያቸው በግልግል ዳኝነት እንዲታይላቸው የተስማሙ ወገኖች የግልግል ዳኝነቱ የሚሰጠው ውሳኔ የመጨረሻ ነው በማለት ስለተስማሙ ብቻ ጉዳዩ በሰበር ሥርዓቱ እንዳይታይ ፍላጎት አሳይተዋል ተብሎ መሰረታዊውን የሕግ ስህተት ላለማረም ምክንያት ሊሆን የሚችል አይደለም፡፡ በዚህም ምክንያት ይህ ሰበር ችሎት በሰ/መ/ቁጥር 21849 በቀረበው ጉዳይ ሁለት ተከራካሪ ወገኖች ጉዳያቸውን በግልግል ዳኝነት(Arbitration) ለመጨረስ ከተዋዋለና የግልግል ዳኝነት ጉባኤው የሚሰጠው ውሳኔ የመጨረሻ ይሆናል በማለት በውላቸው ላይ ከተስማሙ የግልግል ዳኝነት ጉባኤ ውሳኔ ለሰበር ችሎት ቀርቦ ሊታይ አይገባም በማለት የሠጠው ውሳኔ የፌዴራል ፍርድ ቤቶችን አዋጅ እንደገና ለማሻሻል በወጣው አዋጅ ቁጥር 454/1997 አንቀፅ 2(4) መሰረት መለወጥ ያለበት ሁኖ ተገኝቷል፡፡ ስለሆነም ተጠሪ የአመልካች አቤቱታ በሰበር ችልት ሊቀርብና ሊታይ የሚገባ አይደለም በማለት ያቀረቡት ክርክር ተቀባይነት የለውም ብለናል፡፡

2.ሁለተኛውን ጭብጥ በተመለከተ፡-

ተጠሪ ውሉን ማቋረጡን ሳይክድ የሰላሳ አምስት ቀናት ቅጣት አመልካች እንዲከፍለው ዳኝነት የጠየቀውንና የግልግል ዳኝነት ጉባኤ ብር 700,000.00(ሰባት መቶ ሺህ) አመልካች ለተጠሪ እንዲከፍል ውሳኔ ያሳረፈው በአመልካችና በተጠሪ መካከል በጥር 23 ቀን 1998 ዓ/ም የወርቅ ጉድጓድ ቁፋሮ ውል ተፈፅሞ፣ቅድሚያ ክፍያ በየካቲት 09 ቀን 1998 ዓ/ም ተከፍሎ ስራው መጀመር ከሚገባበት ቀን ሰላሳ አምስት ቀናት በመዘግየት በ30-7-1998 ዓ/ም ለመጀመሩ ምክንያት አመልካች ስለመሆኑ ተረጋግጧል በሚል ነው፡፡ አመልካች በዚህ ረገድ ኃላፊነት የሌለበት መሆኑን ገልፆ የሚከራከረው የማዕድን ፍለጋ ጉድጓድ ቁፋሮ ወደሚካሄድበት ቦታ የሚያደርሰውን ለተሽከርካሪ እንቅስቃሴ አመቺ የሆነ መዳረሻ መንገድ የማዘጋጀት ኃላፊነት የራሱ መሆኑ በውሉ መገለጹን ሳይክድ ይህንኑ ግዴታ ለመወጣት ቡልዶዘሩን ከተጠሪ መኪራየቱን፣ሆኖም በሁለት ቀናት ውስጥ ቡልዶዘሩን ወደ መቀሌ ለማጓጓዝ የሚያስችል መኪና አዘጋጅቶ ለማስጫን በሚሄድበት ጊዜ የቀረበው ቡልዶዘር ለታቀደው ስራ ብቃት የሌለው መሆኑ በአመልካች ኤክስፐርት በመረጋገጡና ይህ ሁሉ ሲደረግ ተጠሪ የወሰዱት አንዳችም እርምጃ የለም በሚል ነው፡፡ ተጠሪ በዚህ ሰበር ችሎት ባቀረበው ክርክር የአመልካች ክርክር በስር የግልግል ዳኝነት ያልተነሳ ነው በማለት ከመከራከር ውጪ ከላይ የተመለከተው ግዳታ በግራ ቀኙ መካከል መገባቱን በግልፅ አይክድም፡፡ ይሁን እንጂ

አመልካች በስር የግልግል ዳኝነት ጉባኤው ከላይ የተመለከተውን ክርክር ያነሳ መሆኑን የግልግል ጉባኤ ውሳኔ ግሌባጭ በገጽ 3 እና 4 ያስፈረው በመሆኑ ተጠሪ የፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 329(1)መሰረት በማድረግ ያነሳው ተቃውሞ ተቀባይነት የሌለው ሆኖ ተገኝቷል፡፡

በዚህ ረገድ የቀረበው የአመልካች ክርክር ውድቅ ሆኖ ለሰላሳ አምስት ቀናት የቅጣት ገንዘብ እንዲከፍል የመወሰኑን አግባብነት ስንመለከተው ደግሞ ምላሹ ከግራ ቀኙ ውል፣ክርክርና ስለውሎች አተረጓጎም በጠቅላላው በተመለከቱት ድንጋጌዎች መሰረት መታየት ያለበት ጉዳይ ነው፡፡

በአመልካችና በተጠሪ መካከል ጥር 23 ቀን 1998 ዓ/ም የተደረገው ውል አመልካችን ለባከነ ጊዜ ክፍያ ኃላፍነት ያለበት ስለመሆኑ በአንቀጽ 4፣3.11 እና 9.1 ስር ከተቀመጡት ድንጋጌዎች እንገነዘባለን፡፡ በእነዚህ ድንጋጌዎች መሰረት አመልካች ለተጠሪ ኃላፊነት የሚኖረው የመቆፈሪያው መሳሪያ ከአመልካች ጋር በተያያዘ ኃላፊነት ያለስራ ቢቀመጥ ስለመሆኑ ተቀምጧል፡፡ ድንጋጌዎቹ በግልፅ እንደሚያሳዩት የባከነ ጊዜ ክፍያ(Idle time Payment) የመቆፈርያው መሳሪያ በስራ ላይ እያለ ውል ሰጪ በሆነው አመልካች ምክንያት ቢቆም፤መሳሪያው ስራ ለመስራት እየቻለ ቁሞ ያላግባብ ለጠፋው ጊዜ፣አመልካች ኃላፊ የሚሆንበትን ሁኔታ የሚያሳዩ ናቸው፡፡ በሌላ አገላፅ የመቆፈርያ ማሽን(Rig) በስራው ቦታ ላይ ተገኝቶ በአመልካች ምክንያት ስራ ቢፈታ አመልካች ኃላፊነቱን የሚወስድ መሆኑን ያስገነዝባል፡፡ በተያዘው ጉዳይ ተጠሪ ለሰላሳ አምስት ቀናት ስራ ፈታሁ ይበል እንጂ በአመልካች ምክንያት ስራ መፈታቱን በፍሬ ነገር ደረጃ አልተረጋገጠም፡፡ ተጠሪ ስራውን የፈታሁ በአመልካች ምክንያት ነው ብሎ እስከተከራከረ እና አመልካችም ለመሳሪያው መቆም ምክንያት የሆነው ድርጊት በራሱ በኩል የተፈጸመ አለመሆኑን ገልፆ እስከተከራከረ ድረስ ክሱን የማስረዳት ሸክም ከሳሽ የሆነው ወገን የተጠሪ ግዴታ ነው፡፡ የመቆፈሪያው መሳሪያ ከስራ ቦታ አለመድረሱ የተረጋገጠ ጉዳይ ነው፡፡ የግልግል ጉባኤው አመልካችን መሳሪያው ስራውን ለፈታበት ጊዜ ኃላፊነት አለበት በማለት ውሳኔ ላይ የደረሰው ከላይ የተጠቀሱትን የውሉን ድንጋጌዎች በመጥቀስና መቆፈርያ መሳሪያ ወደ ስራ ቦታ ተጓጉዞ የሚሄድበትን መንገድ አመልካች ሊያዘጋጅ አልቻለም፣የዶዘር ኪራይ ውሉን መሰረት በማድረግ ክስ አልመሰረተም በሚል ነው፡፡ ሆኖም ተጠሪ ስራውን ከሚያዚያ 01 ቀን 1998 ዓ/ም ጀምሮ መስራት እንደሚችል በፀሁፍ ተነግሮት ሚያዚያ 12 ቀን 1998 ዓ/ም ስራው መጀመሩ፣የሰላሳ አምስት ቀናት ጊዜ ባክኗል የተባለው ደግሞ ከየካቲት 24 ቀን 1998 ዓ/ም ጀምሮ እስከ መጋቢት 30 ቀን 1998 ዓ/ም ድረስ ስለመሆኑ በስር ክርክር የተረጋገጡ ፍሬ ጉዳዮች ናቸው፡፡ ከዚህም መገንዘብ የሚቻለው የመቆፈሪያ ማሽኑ ወደ ስራ ቦታው በመሄድ በአመልካች ምክንያት ስራውን መስራት ያልቻለ መሆኑን ሳይሆን ከመነሻውም መቆፈሪያ ማሽኑ ወደ ስራ ቦታ ያልተጓጓዘ መሆኑን ነው፡፡በግራ ቀኙ ውል አንቀፅ 3.11 ስር የተቀመጠው ድንጋጌ የመቆፈሪያ መሳሪያ ከአሰሪው ጋር በተያያዘ ኃላፊነት ያለስራ ቢቆም....በሚል ሐረግ የተቀመጠ ሲሆን ይህም ድንጋጌ በግልጽ መሳሪያው ከስራ ቦታ መድረሱንና ደርሶ ስራ መስራት እየቻለ በአመልካች ምክንያት ስራውን ሳይሰራ ቢቀር አመልካች ኃላፊነት ያለበት መሆኑን የሚያሳይ ነው፡፡ግልፅ ውል ሊተረጎም የማይገባ መሆኑን ደግሞ የፍ/ብ/ሔ/ቁጥር 1733 ድንጋጌ ያስረዳል፡፡ የግልግል ጉባኤ ውል ግልፅ ሆኖ እያለ እና ተጠሪ አመልካች ለባከነው ጊዜ ምክንያት መሆኑን ባላስረዳበት ሁኔታ የተጠሪን የማስረዳት ሸክም ወደ አመልካች በማዞር አመልካች ከአቅም በላይ የሆነ ምክንያት የደረሰበት መሆኑን አላስረዳም በማለት ለባከነ ጊዜ ቅጣት እንዲከፍሉ ሲል የሠጠው የውሳኔ ክፍል የግራ ቀኙን ክርክርና የውል ይዘት በፍትሐ ብሔር ሥነ-ሥርዓት ድንጋጌዎች

ስለማስረዳት ሽክም የተቀመጡትን ሥርዓቶች፣በፍ/ብ/ሕጉ ከቁጥር 1732 እስከ 1738 ድረስ ስለውሎች አተረጓጎም ከተመለከቱት ደንቦች ጋር ያላገናዘበና መሰረታዊ የሆነ የህግ ስህተት ያለበት ሁኖ አግኝተናል፡፡ ስለሆነም አመልካች መቆፈሪያ ማሽኑ ስራ ሳይሰራ በመቆሙ ምክንያት ባከነ ለተባለው ለሰላሳ አምስት ቀናት ብር 700,000.00(ሰባት መቶ ሺህ ብር የሚከፈልበት ሕጋዊ ምክንያት ስለሌለ በዚህ ረገድ የተሰሠጠው የውሳኔ ክፍል ሊለወጥ የሚገባው ሆኖ ተገኝቷል፡፡

በሌላ በኩል አመልካች ለተጠሪ በውሉ መሰረት ለተከናወኑ ስራዎች መከፈል አለባቸው ተብለው የታሰቡት፤ የሞቪላይዜሽን ሂሳብ(ብር 90,000.00)፣ ለ661.77 ሜትር ጥልቀት ጉድጓድ ቁፋሮ ሂሳብ(ብር 704,124.00)፣ ለኬዚንግ ስራ(ብር 138,000430.00)፣ ለቁፋሮ ስራ ከጉድጓድ ወደ ጉድጓድ ለተደረገ እንቅስቃሴ የሚታሰብ(ብር 4,150.00)፣ስራ ላይ ለዋለ አምስት ከረጢት ሲሚንቶ የሚታሰብ(ብር 750.00)፣ከውሃ ቦቴ ኪራይ የሚታሰብ(50,000.00)እና የዶዘር ኪራይ(ብር 3,818.40) በጠቅላላ ድምር ብር 991,272.40(ዘጠኝ መቶ ዘጠና አንድ ሺህ ሁለት መቶ ሰባ ሁለት ብር ከአርባ ሳንቲም) ተጨማሪ እሴት ታክስ ተጨምሮበት ብር 1,139,962.86 (አንድ ሚሊዮን አንድ መቶ ሰላሳ ዘጠኝ ሺህ ዘጠኝ መቶ ስላሳ ሁለት ብር ከሰማኒያ ስድስት ሳንቲም)እንዲከፍል የተወሰነውን የውሳኔ ክፍል ስንመለከተው በግራ ቀኙ መካከል የተደረገውን ውል፣ ክርክርና ማስረጃ መሰረት አድርጎ የተሰጠ ውሳኔ በመሆኑ መሰረታዊ የሆነ የሕግ ስህተት ያለበት ነው ለማለት አልተቻለም፡፡ በመሆኑም በዚህ ረገድ የቀረበው የአመልካች የሰበር ቅሬታ ተቀባይነት የሌለው ሆኖ ተገኝቷል፡፡ ከዚህም በተጨማሪ አመልካች ክፍያ ለዘገዩበት ብር 40,321.60(አርባ ሺህ ሶስት መቶ ሃያ አንድ ብር ከሰላሳ ሳንቲም) ለተጠሪ እንዲከፈል መወሰኑም ፍሬ ነገርን መሰረት ያደረገ በመሆኑ በዚህ ችሎት ሊታይ የሚገባው ባለመሆኑ በዚህ ረገድ አመልካች ያቀረበውን ቅሬታ አልተቀበልነውም፡፡

ሌላው አመልካች ተጠሪ ውሉን በራሱ ጊዜ አቋርጦ መሄዱ ያላግባብ ነው በማለት በተከሳሽ ከሻስነት በግልግል ጉባኤው ያቀረበው ክርክር የታለፈው ባግባቡ አይደለም በማለት የሚከራከርበትን ነጥብ ስንመለከተውም ከፍ/ብ/ሕ/ቁጥር 1786 እና 1788 ድንጋጌዎች አንጻር ተቀባይነት ያለው ሁኖ አልተገኘም፡፡

በአጠቃላይ በግልግል ጉባኤ ታይቶ በሚሰጠው ውሳኔ የመጨረሻ መሆኑን አንድ ተከራካሪ ወገን ቢስማማም ጉባኤው በሰጠው ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት አለበት የሚል ወገን ቅሬታውን ለሰበር ችሎቱ ከማቅረብ የሚከለከል ባለመሆኑና ጉባኤው አመልካች የሰላሳ አምስት ቀናት መቆፈሪያው ያለስራ ለቆመበት አመልካችን ተጠያቂ ያደረገበት አግባብ መሰረታዊ የሕግ ስህተት ያለበት ሆኖ በመገኘቱ፣ እንዲሁም ጉባኤው ወጪና ኪሳራ ያሰላበት አግባብ ይህ ችሎት ለአመልካች የሚቀንሰውን የገንዘብ መጠን መሰረት ባደረገ መንገድ የሚሰራ ሆኖ በሌሎች ነጥቦች ጉባኤው የሰጠው ውሳኔ ተገቢ ሆኖ ስላገኘነው ተከታዩን ወስነናል፡፡

ውሣኔ

1. ይህ ሰበር ችሎት በሰ/መ/ቁጥር 21849 በቀረበው ጉዳይ ሁለት ተከራካሪ ወገኖች ጉዳያቸውን በግልግል ዳኝነት (Arbitration) ለመጨረስ ከተዋዋለና የግልግል ዳኝነት

ጉባኤው የሚሰጠው ውሳኔ የመጨረሻ ይሆናል በማለት በውላቸው ላይ ከተስማሙ የግልግል ዳኝነት ጉባኤ ውሳኔ ለሰበር ችሎት ቀርቦ ሊታይ አይገባም በማለት የሠጠው ውሳኔ የፌዴራል ፍርድ ቤቶችን አዋጅ እንደገና ለማሻሻል በወጣው አዋጅ ቁጥር 454/1997 አንቀፅ 2(4)መሰረት ተለውጧል፡፡

2. ሁለት ተከራካሪ ወገኖች ጉዳያቸውን በግልግል ዳኝነት(Arbitration) ለመጨረስ ከተዋዋለና የግልግል ዳኝነት ጉባኤው የሚሰጠው ውሳኔ የመጨረሻ ይሆናል በማለት በውላቸው ላይ ከተስማሙ የግልግል ዳኝነት ጉባኤ ውሳኔ ለሰበር ችሎት ቀርቦ ሊታይ የሚችል ነው ብለናል፡፡
3. አመልካች ለተጠሪ የሰላሳ አምስት ቀናት ቅጣት የተባለውን ብር 700,000.00(ሰባት መቶ ሺህ ብር) ለተጠሪ ለመክፈል የሚገደድበት ሕጋዊ ምክንያት የለም በማለት በዚህ ረገድ የግልግል ጉባኤ የሰጠውን ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348(1)መሰረት ሽረነዋል፡፡
4. ወጪና ኪሳራን በተመለከተ የግልግል ጉባኤው የሰጠው የውሳኔ ክፍል አመልካች ብር 700,000.00(ሰባት መቶ ሺህ ብር) ለተጠሪ ሊከፍል አይገባም ተብሎ በዚህ ችሎት የተሰጠውን ውሳኔ ግንዛቤ ባስገባና በጉባኤው ስሌት መሰረት የሚሰራ ሁኖ በወጪና ኪሳራ፣በጠበቃ አበል እንዲሁም በሌሎች ነጥቦች ላይ የግልግል ጉባኤው የሰጠው ውሳኔ ጸንቷል፡፡
5. በዚህ ችሎት ለተደረገው ክርክር የወጣው ወጪና ኪሳራ የየራሳቸውን ይቻሉ ብለናል፡፡

መዝገቡ ተዘግቷል፤ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የሰባት ዳኞች ፊርማ አለበት፡፡

የሰ/መ/ቁ. 37678

ጎንደር 18 ቀን 2001 ዓ.ም

ዳኞች፡- ዓብድልቃድር መሃመድ
ሂሩት መለሠ
ታፈሰ ይርጋ
ፀጋዬ አስማማው
ዒሊ መሃመድ

አመልካች፡- ድራጋዶስ ጀ ኤንዴ ፒ. ጆየንት ቬንቸር - ጠበቃ አቶ ዱቸ ፈለቀ ቀረቡ

ተጠሪ፡- ሳባ ኮንስትራክሽን ኃ/የተ/የግል ማኅበር ጠበቆች
1. ሲራጅ አብደላ
2. ድልነሣው ታደሰ አቶ ኒቆድሞስ ጌታሁን ቀረቡ

መዝገቡ ተመርምሮ ቀጥል የተመለከተው ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ይህ ጉዳይ በግልግል ዳኝነት ጉባዔ ከተሰጠ ውሣኔ ጋር በተያያዘ የይግባኝ አቀራረብን የሚመለከት ነው፡፡

የጉዳዩ አመጣጥን እንደተመለከትነው አመልካች ከኢትዮጵያ መንገዶች ባለሥልጣን ጋር ከአዲስ አበባ እስከ ጅማ ድረስ ያለውን አውራ መንገድ የማሻሻያና መልሶ ጥገና ሥራ ለመሥራት ውል ተዋውሎ ከመንገድ ሥራ የተወሰነውን በንዑስ ሥራ ተቋራጭ /sub- contract/ ውል ለማሰራት በነበረው ፍላጎት ከተጠሪ ጋር የካቲት 25 ቀን 1996 ዓ.ም የንዑስ ሥራ ተቋራጭነት ውል እንደተዋዋለ በዚህም የንዑስ ሥራ ተቋራጭነት ውል አንቀጽ 17 ላይ በውሉ አፈፃፀም ረገድ በሁለቱ ተዋዋይ ወገኖች መካከል አለመግባባት ቢፈጠር በአዲስ አበባ የንግድና የዘርፍ ማኅበራት ምክር ቤት ሥር በተቋቋመው የግልግል ተቋም ታይቶ እንድሚወሰን በተስማሙት መሠረት በክፍያ አፈፃፀም ረገድ በመካከላቸው አለመግባባት በመፈጠሩ ተጠሪ አቤቱታውን ግራ ቀኙ ለመረጡት የግልግል ተቋም አቅርቦ ተቋሙም በሚሰራበት የግልግል ደንብ /rules of procedure/ መሠረት ግራ ቀኙን አከራክሮ የካቲት 3 ቀን 1999 ዒ.ም ውሣኔ መስጠቱን ተገንዝበናል፡፡

ከዚህ በኋላም የሥር ተከሣሽ የአሁን አመልካች የግልግል ጉባዔው በሰጠው ውሣኔ ቅሬታ አድሮበት የይግባኝ ቅሬታውን ለፌዴራሉ ጠቅላይ ፍ/ቤት አቅርቦ ፍ/ቤቱም ግራ ቀኙን አከራክሮ ይግባኝ ባይ ይግባኝ ያቀረበው ይግባኝ ሊቀርብበት በሚችል ምክንያት ነው ወይንስ አይደለም? የሚለውን ጭብጥ መሥርቶ ጉዳዩን በመመርመር አለመግባባቱ በግልግል ዳኝነት እንዲታይ አስቀድሞ ግራ ቀኙ እንደተስማሙ፣ጉዳዩን በግልግል ዳኝነት የተመለከተውም ተቋም በአዋጅ ቁጥር 341/95 መሠረት ሥልጣን በተሰጠው አካል እንደተቋቋመ፣ ይግባኝ ባይ ጉባዔው ጉዳዩን እንዲመለከት ከፈቀደ በኋላም በክርክሩ ሂደት ሙለ በሙሉ እንተካፈለ፣ የግልግል ጉባዔው የሚሰጠው ውሣኔ ይግባኝ እንደሌለውም የግልግል ጉባዔው በሚመራበት ደንብ ላይ እንደተመለከተና ይግባኝ ባይ ይህ የደንቡ ድንጋጌ ተፈፃሚነት የለውም በማለት ቢከራከርም ግራ

ቀኙ ወገኖች ወደ ግልግል ተቋሙ ሲሄዱ ተቋሙ ክርክሩን የሚመራበት የእራሱ ሥርዓት እንዳለው ስለሚታወቅ ይግባኝ ባይ በተቋሙ በመዳኘት እስከመረጠ ድረስ በተቋሙ አሠራር የማይገዛበት ምክንያት ስለሌለ በዚሁ መሠረት በግልግል ውሣኔው ላይ ይግባኝ አይባልበትም ተብሎ በግልግል ደንቡ ላይ የተቀመጠውን እንደተቀበለው ስለሚቆጠር በዚህ ረገድ ያቀረበው የይግባኝ ቅሬታ የይግባኝ መብቱን ቀሪ ባደረገበት ሁኔታ ስለሆነ አግባብነት የለውም በማለት ይግባኙን ሣይቀበለው ቀርቷል፡፡

የሰበር አቤቱታውም የቀረበው ይህንኑ በመቃወም ሲሆን ሰበር ችሎቱ የቀረበውን አቤቱታ መርምሮ የግልግል ተቋሙ የሰጠው ውሣኔ ይግባኝ የማይባልበት ነው መባሉ ተጠሪ ባለበት ለሰበር ቀርቦ ሊወሰን እንደሚገባው በማመኑ ተጠሪን በመጥራት ግራ ቀኙን በጽሁፍና በቃል አከራክሯል፡፡ ከዚህም በተጨማሪ የግልግል ተቋሙ የሚመራበትን የሥነ-ሥርዓት ደንብ /rules of procedure/ እና እንደዚሁም በግራ ቀኙ ወገኖች የተደረጉ የተለያዩ መፃፃፎችን ለጉዳዩ አወሳሰን እንደሚረዳ በማመኑ ችሎቱ አስቀርቦ ተመልክቷቸዋል፡፡

የከርክሩ ይዘት ከፍ ብሎ የተመለከተው ሲሆን ይህ ሰበር ችሎትም ጉዳዩን እንደሚከተለው መርምሮታል፡፡

በዚህ ችሎት ምላሽ ማግኘት የሚገባው የጉዳዩ ጭብጥም አመልካች ለፌዴራል ጠቅላይ ፍ/ቤት ያቀረበው የይግባኝ አቤቱታ ይግባኝ የሚባልበት ነው ወይንስ አይደለም? የሚለው ነው፡፡

አመልካችና ተጠሪ የካቲት 25 ቀን 1996 ዓ.ም የንዑስ ሥራ ተቋራጭነት ውል ሲዋዋል በውሉ አፈፃፀም ረገድ አለመግባባት ሲፈጠር ይሄው አለመግባባት በአዲስ አበባ የንግድና የዘርፍ ማኅበራት ምክር ቤት ሥር በተቋቋመው የግልግል ተቋም ታይቶ እልባት እንደሚያገኝ መስማማታቸውን የተገነዘብን ሲሆን ይህን ተቋም /forum/ በመምረጥ ረገድ ስምምነት ስለመድረሱ ግራ ቀኙን አላከራከረም፡፡

አመልካች አጥብቆ የሚከራከረው የግልግል ተቋሙን በመምረጥ ረገድ በመካከላችን ስምምነት ቢኖርም የግልግል ተቋሙ በሚሰጠው ውሣኔ ላይ ይግባኝ የማይባልበት ስለመሆኑ ግራ ቀኛችን አልተስማማንም፡፡ የግልግል ተቋሙ የሚመራበት የግልግል ደንብ ላይ የጉባዔው ውሣኔ ይግባኝ እንደማይባልበት ቢጠቀስም ይህ የደንቡ ቃል በሕገ መንግሥት የተረጋገጠን የይግባኝ መብትን የሚፃረር ከመሆኑም በላይ የግልግል ዳኞች በሚሰጡት ውሣኔ ላይ ከፍ/ቤት ይግባኝ ለማቅረብ ይቻላል ተብሎ በፍ/ብ//ሥ/ሥ/ሕ. ቁ. 350/1/ ላይ የተመለከተውንም የሚጋፋ ስለሆነ ተፈፃሚነት የለውም በማለት ነው፡፡

ተጠሪም በበኩሉ በንዑስ ሥራ ተቋራጭነት ውሉ መሠረት የተፈጠረውን አለመግባባት በአዲስ አበባ ንግድና ዘርፍ ማኅበራት ም/ቤት ሥር ለተቋቋመው የግልግል ዳኝነት ተቋም አቤቱታው ሲቀርብ ጉባዔው የተጠሪን ክስ እንደዚሁም የግልግል ተቋሙ የሚመራበትን ደንብ ለአመልካች በሸኚ ደብዳቤ እንዲላክና አመልካችም ስለደንቡ አንዳንድ ማከራከሪያ ከጠየቀ በኋላ ተቀብሎ የግልግል ጉባዔውን የተለያዩ ድንጋጌዎች በመጥቀስ የተከራከረ ሲሆን ይህም አመልካች ደንቡን ተቀብሎ ሙግቱን መቀጠልን የሚያሣይ ነው፡፡

ስለሆነም የፌዴራል ጠቅላይ ፍ/ቤት አመልካች በደንቡ ለመግዛት ሙሉ ፈቃድን ስለሰጠ የጉባዔው ውሣኔ ይግባኝ አይባልበትም ተብሎም በዚሁ ደንብ ላይ የተጠቀሰውንም እንደተቀበለው ይቆጠራል በማለት ይግባኙን ሣይቀበል መቅረቱ መሠረታዊ የሕግ ስህተት ያልተፈፀመበት ስለሆነ ሊፀና ይገባል በማለት ተከራክሯል፡፡

አመልካችና ተጠሪ አለመግባባትን በግልግል ለመፍታት በውል የመረጡት የአዲስ አበባ ንግድ ምክር ቤት የግልግል ተቋም የሚመራበት የግልግል ደንብ የውል ክርክርን ለግልግል ስለማቅረብ

በሚደነግገው አንቀጽ 1/1/ ሥር ተዋዋይ ወገኖች ውላቸውን በሚመለከት ለሚነሱ ማናቸውም አለመግባባቶችና ክርክሮች በአዲስ አበባ ንግድ ም/ቤት የግልግል ተቋም የግልግል ደንብ ውሣኔ እንዲያገኝ በጽሁፋቸው ሲስማሙ በዚሁ መሠረት እነዚህ አለመግባባቶች በተቋሙ የግልግል ደንብ ውሣኔ እንደሚሰጣቸው መደንገጉን ተገንዝበናል፡፡

በዚህ የግልግል ደንብ አንቀጽ 1/1/ ላይ እንደተመለከተው ሁለቱ ተከራካሪ ወገኖች ወደዚህ የግልግል ተቋም ሲሄድ የግልግል ተቋሙ ግራ ቀኙን ማከራከር ከመጀመሩ በፊት ተከራካሪ ወገኖች በዚህ የሥነ-ሥርዓት ደንብ የሚይዙ ስለመሆኑ የጽሁፍ ስምምነት መቀበሌ እንደሚገባው አከራካሪ አይሆንም፡፡

በእርግጥ የግልግል ጉባዔው ተጠሪ ያቀረበውን ክስና የግልግል ተቋሙም የሚመራበትን ይህንኑ የግልግል ደንብ አያይዞ ለአመልካች እንደላከበና አመልካችም ይህንኑ ደንብ መሠረት አድርጎ ክርክሩን መምራቱን መገንዘብ ቢቻልም ሁኔታው ደንቡን ካወጣው ተቋም ሃሣብ /intention/ አንፃር ሲታይ ደንቡን ጠቅላላ ድንጋጌ ተከራካሪ ወገኖች ተገንዝበው በዚሁ መሠረት ለመገዛት ወስነዋል ለማለት የሚቻለው በደንቡ አንቀጽ 1/1/ ላይ እንደተመለከተው ግልጽ የሆነ የጽሁፌ ስምምነት ሲኖር ነው፡

በሌላ በኩልም አመልካች ደንቡ ደርሶት የደንቡንም የተለያዩ ድንጋጌዎች በመጥቀስ ሙግቱን የቀጠለ ስለሆነ ደንቡን እንደተቀበለውና በዚሁ ደንብ አንቀጽ 20/2/ መሠረትም የይግባኝ መብቱን እንደተወ ይቆጠራል ቢባል እንኳን ይግባኝ መሠረታዊ መብት እንደመሆኑ መጠን ይህንኑ መሠረታዊ መብት ተፋላሚ ወገኖች አስቀርተዋል ለማለት የሚቻለው የነገሩን አካባቢ ሁኔታ በሚገባ በተገነዘቡ ጊዜ እንደሆነ ከፍ/ብ/ሕ/ሥ/ሥ/ቁ. 350/2/ ድንጋጌ መገንዘብ ይቻላል፡፡ ከዚህ ጋር በተያያዘም ተከራካሪ ወገኖች የይግባኝ መብታቸውን አስቀርተዋል ወይንም ትተዋል ለማለት የሚቻለው የነገሩን አካባቢ ሁኔታ በሙሉ በተረዱበት ደረጃ እርስ በርሣቸው በሚያደርጉት ስምምነት ሲሆን ነገር ግን አለመግባባቱ በግልግል ተቋሙ አማካይነት እንዲታይ ጥያቄው በቀረበ ጊዜ /at the stage of submission/ የነገሩን አካባቢ ሁኔታ በሚገባ ተገንዝበዋል ለማለት የሚቻልበት ደረጃ ላይ ናቸው ስለማይባል በዚህ ሁኔታ ይግባኙን ለማስቀረት የሚሰጡት ፈቃድ በሕጉ ላይ እንደተቀመጠው የነገሩን አካባቢ ሁኔታ በሚገባ በመገንዘብ እንዳደረጉት የሚቆጠር አይሆንም፡፡

በኢትዮጵያ የፍትሐ ብሔር ሕግ ሥነ-ሥርዓት ላይ ተመሥርተው ማብራሪያ የፃፉትም ፕሮፌሰር አለን ሴድለር ይህንኑ በማብራሪያቸው ላይ አንፀባርቀውታል፡፡

አመልካች የይግባኝ መብቱን ለመተው አድርጎታል የተባለው ስምምነት የነገሮችን አካባቢ ሁኔታዎች በሚገባ ካለመገንዘብ ነው ከተባለ ደግሞ በተጠቀሰው የፍ/ብ/ሕ/ሥ/ሥ/ቁ. 350/2/ ድንጋጌ መሠረት ይግባኝ የማቅረብ መብት አለው ማለት ነው፡፡

ስለሆነም የፌዴራል ጠቅላይ ፍ/ቤት አመልካች የይግባኝ መብቱን ያስቀረ ስለሆነ ያቀረበው የይግባኝ ቅሬታ ተገቢነት የሌለው ነው በማለት ሣይቀበለው መቅረቱ መሠረታዊ የሕግ ስህተት የተፈፀመበት ሆኖ ተገኝቷል፡፡

ው ሣ ኔ

1. የፌዴራል ጠ/ፍ/ቤት በመ.ቁ. 29612 ሚያዝያ 10 ቀን 2000 ዓ.ም የሰጠው ፍርድ በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 348/1/ መሠረት ተሽሯል፡፡
2. አመልካች የይግባኝ መብቱን ቀሪ ያላደረገ ስለሆነ የፌዴራል ጠቅላይ ፍ/ቤት ይግባኙን መርምሮ የበኩሉን እንዲወስን ጉዳዩ ተመልሶለታል፡፡
3. ግራ ቀኙ ወጭና ኪሣራ ይቻቻሉ፡፡
4. መዝገቡ ተዘግቶ ወደ መ/ቤት ተመልሷል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰ/መ/ቁ. 30727

ግንቦት 19 ቀን 2000 ዓ.ም

ዳኞች፡- ዓብዱልቃድር መሐመድ
ሐጐስ ወልዱ
ታፈሰ ይርጋ
መድኅን ኪሮስ
አልማው ወሌ

አመልካች ፡- የኢትዮጵያ ማዕድን ልማት አ/ማኅበር ነ/ፈጅ ወንድአንተ ነጋሽ

ተጠሪ ፡- ጄቲቲ ትሬዲንግ ሥራ አስኪያጅ ቀረቡ

መዝገቡን መርምረን ቀጥሎ የተመለከተውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ይህ ጉዳይ የተጀመረው በፌ/መ/ደ/ፍ/ቤት ሲሆን የአሁን ተጠሪ በአመልካች ላይ ባቀረበው ክስ ግራ ቀኞችን ሰኔ 30 ቀን 1997 ዓ.ም ባደረግነው ውል ከከሳሽ ጋር 10 ኢንች የማይዝግ የብረት ቧንቧ ለማቅረብ ስምምነት የተደረሰ ቢሆንም ተከሳሽ ውሉን በማፍረሱ ያለመግባባት በመፈጠሩ ምክንያት ችግሩን ለመፍታት ከሳሽ የበኩሉን ጥረት ቢያደርግም በተከሳሽ በኩል አዎንታዊ ምላሽ ባለመገኘቱ በውሉ አንቀጽ 10/4/ /2/ መሠረት ጉዳዩን በግልግል ለማየት ተጠሪ የግልግል ዳኛ በ10 ቀን ውስጥ መርጦ እንዲያሳውቀን በጽሁፍ ያሳወቅነው ቢሆንም ፈቃደኛ ያልሆነ ስለሆነ ፍ/ቤቱ በተከሳሽ ምትክ በሕግና በውላችን መሠረት የግልግል ዳኛ እንዲመርጥልን በማለት ጠይቋል፡፡

የከሳሽ አቤቱታም ለተከሳሽ ደርሶ በሰጠው መልስ በሕግም ሆነ በኩባንያው የመመስረቻ ጽሁፍ፤ በመተዳደሪያ ደንቡ እንደዚሁም በሥነ ሥርዓትና በፍ/ብሔር ሕጉ የተቀመጠው የችሎታ መስፈርት ለተጠሪው ወይንም ለእንደራሴው አልተሰጠም ብለዋል፡፡ ከዚህም ሌላ ተከሳሽ የግልግል ስምምነት ተዋዋይ ወገኖች በእራሳቸው የግል ችሎታ ሳይሆን በሌሎች
የተፈጥሮ ወይም የሕግ ሰዎች ስም የሆነ እንደሆነ ጉዳዩን በግልግል ለመጨረስ እንዲስማሙ የሚያስችላቸው ልዩ የውክልና ስልት እንዲኖራቸው ይገባል ያሉ ሲሆን አመልካች ወደ ግልግል ዳኝነት እንግባ የሚልበት ጉዳይ በግልግል ስምምነቱ አይሸፈንም እንጂ የሚሸፈን ነው ቢባል እንኳ ወደ ግልግል ዳኝነት ከመግባቱ በፊት በእራሳቸው በተዋዋዮች ድርድር ተጀምሮ በሂደት ላይ ያለው ስምምነት ገና ያልተጠናቀቀ ስለሆነና ይህንንም ለማድረግ ውሉ ስለሚያስገድድ በዚህ ሁኔታ የቀረበው አቤቱታ ውድቅ ሊደረግ ይገባል በማለት ተከራክሯል፡፡ የግራ ቀኙ ክርክር በዚህ መልኩ የቀረበለትም የፌ/መ/ደ/ፍ/ቤት ተገቢነት ያለውን የክርክሩን ጭብጥ ከያዘ በኋላ ተጠሪ የአክሲዮን ማኅበር ሲሆን ተጠሪና አመልካች ሰኔ 30 ቀን 1997 ዓ.ም በተዋዋሉት መሠረት ያለመግባባቶችን በስምምነት ለመጨረስ ጥረት ተደርጐ ካልተቻለ የግልግል ዳኛ
በመምረጥ ጉዳዩ እንደሚታይ የተስማሙ ስለሆነ አክሲዮን ማኅበር ያለመግባባቶችን በግልግል ለመፍታት እንደማይችል የሚያመለክት የሕግ ድንጋጌ በሌለበት ሁኔታ ተጠሪ ጉዳዩን በግልግል መጨረስ አልችልም በማለት ያቀረበው ክርክር አግባብነት የሌለው ነው ካለ በኋላ የተፈጠረውን ያለመግባባት በውሉ መሠረት በስምምነት ለመፍታት ከሳሽ /አመልካች/ ተገቢውን ጥረት ስለማድረጉ ካቀረበው ማስረጃ የተረጋገጠ ስለሆነ ግራ ቀኙ ያለመግባባታቸውን በስምምነት

መጨረስ ስላልቻሉ ጉዳያቸው በግልግል ዳኛ አማካይነት መታየት ስላለበት የየበኩላቸውን የግልግል ዳኛ መርጠው ይቅረቡ በማለት ውሣኔ ሰጥቷል፡፡

የሥር ተከሳሽ በዚህ ውሣኔ ቅሬታ አድሮበት የይግባኝ ቅሬታውን ለፌዴራል ከፍተኛ ፍ/ቤት አቅርቦ ፍ/ቤቱም በበኩሉ ግራ ቀኙን አከራክሮ የሥር ፍ/ቤት ውሣኔ ጉድለት የለበትም በማለት አጽንቶታል፡፡

የሰበር አቤቱታውም የቀረበው ይህንኑ ለማስለወጥ ሲሆን ይህ ችሎት የቀረበውን አቤቱታ መርምሮ በግራ ቀኙ መካከል የተፈጠረው አለመግባባት በግልግል ዳኛ እንዲታይ በበታች ፍ/ቤቶች መወሰኑ አግባብነቱ ተጠሪ ባለበት ታይቶ ሊወሰን እንደሚገባው በማመኑ ተጠሪን በመጥራት ግራ ቀኙን አከራክሯል፡፡

የዚህን ችሎች ምላሽ ማግኘት የሚገባው የጉዳዩ ጭብጥ በአመልካችና በተጠሪ መካከል ተፈጥሯል የተባለው አለመግባባት በግልግል ዳኛ አማካይነት ሊታይ ይችላል ወይንስ አይችልም የሚለው በመሆኑ ይህንኑ ጭብጥ ይዘን አቤቱታውን መርምረናል፡፡

በቅድሚያም አመልካች ምን ዓይነት የሕግ ሰውነት (legal personality) እንዳለው መመልከት ለጉዳዩ አወሳሰን ጠቃሚ በመሆኑ በዚሁ መሠረት ሲታይ አመልካች የአክሲዮን ማኅበር እንደሆነ ከክርክሩና ከቀረበው ማስረጃ ለመገንዘብ የተቻለ ሲሆን ይህንንም የሕግ ሰውነት ማግኘት የቻለው አስቀድሞ የመንግሥት የልማት ድርጅት እንደነበረና የመንግስት የልማት ድርጅቶችን ወደ ግል ስለማዛወር በወጣው አዋጅ ቁጥር 146/91 መሠረት የኢትዮጵያ ፕራይቬታይዜሽን ኤጀንሲ ለፕራይቬታይዜሽን ዝግጅት አስፈላጊ ሆኖ ሲያገኘው አንድን የልማት ድርጅት ወደ አክሲዮን ማኅበርነት እንዲለወጥ ማድረግ እንደሚችል በአዋጁ አንቀጽ 5/1/ ላይ የተመለከተ በመሆኑ በዚሁ መሠረት አመልካች ወደ አክሲዮን ማኅበርነት የተቀየረ መሆኑን ለመገንዘብ ተችሏል፡፡ በዚህ መልኩ የሚቋቋሙና በንግድ ሕጉ መሠረት የሚቋቋሙ የአክስዮን ማኅበራት በአክሲዮን ባለቤትነት በሥልጣንና በመሳሰሉ ጉዳዮች ላይ አንድ ዓይነት እንዳልሆኑ ከተጠቀሰው አዋጅ መገንዘብ የሚቻል ከመሆኑም በላይ የንግድ ሕግ ቁጥር 307/1/፣ 311፣ 312/1/ለ/፣ 315፣ 347/1/ እና 349 ከመንግሥት የልማት ድርጅት ወደ አክሲዮን ማኅበርነት በተለወጡት ላይ ተፈፃሚነት እንደሌላቸው ነገር ግን ሌሎች የንግድ ሕጉ ድንጋጌዎች እንደየአግባብነታቸው ተፈፃሚ ሊሆኑ እንደሚችሉ በአዋጁ ላይ ተመልክቷል፡፡

በዚህም መሠረት የአክሲዮን ማኅበር ዋና ሥራ አስኪያጅ ሊኖረው እንደሚችል በንግድ ሕጉ አንቀጽ 348/3/ ላይ የተመለከተ ሲሆን በተያዘውም ጉዳይ አመልካች አንድ ዋና ሥራ አስኪያጅ ያለው ስለመሆኑ በአክሲዮን ማኅበሩ የመመሥረቻ ጽሑፍ ላይ የተመለከተ መሆኑን ተገንዝበናል፡፡

በሌላ በኩልም የአመልካች አክሲዮን ማኅበር ዋና ሥራ አስኪያጅ ሥልጣንና ተግባር በማኅበሩ መተዳደሪያ ደንብ አንቀጽ 12 ሥር የተዘረዘሩ ሲሆን ተጠሪም በዚሁ የመተዳደሪያ ደንብ አንቀጽ 12/2/ ሥር ዋና ሥራ አስኪያጁ የኩባንያውን የእለት ተእለት ሥራ ያከናውናል ተብሎ የተመለከተው ከሌሎች ወገኖች ጋር ውል መዋዋልን በውሉ አፈፃፀም ረገድ ያለመግባባት ቢከሰት ጉዳዩን በግልግል ለማየት መስማማት እንደሚችልም ስለሚያስገነዝብ በዚሁ መሠረት ውሉ የተፈረመ ስለሆነ ጉዳዩ በግልግል እንዲታይ መወሰኑ አግባብነት አለው በማለት ተከራክሯል፡፡

ይሁንና ዋናው ሥራ አስኪያጅ የኩባንያውን የእለት ተእለት ሥራዎች ያከናውናል ተብሎ ሥልጣንና ተግባሩን በሚዘረዝረው የማኅበሩ መተዳደሪያ ደንብ አንቀጽ ላይ የተጠቀሰ ቢሆንም አክሲዮን ማኅበሩ ከተቋቋመበት ዓላማ አኳያ ሲታይ ሙሉ በሙሉ በንግድ ሕጉ መሠረት ያልተቋቋመ ስለሆነና ዋናው ሥራ አስኪያጁ ኩባንያውን በመወከል ውል የመዋዋል ሥልጣን እንዳለው መገንዘብ ቢቻልም ከዚህ አልፎ በውሉ አፈፃፀም ረገድ ያለመግባባት ቢከሰት ጉዳዩ

በግልግል ዳኛ አማካይነት እልባት እንዲያገኝ ለመስማማት እንደሚችል ሥልጣን ያልተሰጠው መሆኑን መገንዘብ የተቻለ በመሆኑ የሥር ፍ/ቤቶች ጉዳዩ በግልግል ዳኝነት መታየት ይችላል በማለት የሰጡት ውሣኔ ከአዋጅ ቁጥር 146/91 እና ከማኅበሩ መተዳደሪያ ደንብ ጋር ያልተጣጣመ በመሆኑ የሕግ ስህተት የተፈፀመበት ሆኖ ተገኝቷል፡፡

ው ሣ ኔ

1. የፌዴራል መ/ደ/ፍ/ቤት በመ.ቁ. 59068 በየካቲት 17 ቀን 1998 ዓ.ም የሰጠው ውሣኔ እንደዚሁም የፌዴራል ከ/ፍ/ቤት በመ.ቁ. 46254 በየካቲት 29 ቀን 1999 ዓ.ም የሰጠው ፍርድ መሠረታዊ የሕግ ስህተት የተፈፀመበት ስለሆነ በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 348/1 መሠረት ተሽሯል፡፡
2. አመልካች ከተቋቋመበት ሕግ አኳያና በመተዳደሪያ ደንቡ መሠረት ዋናው ሥራ አስኪያጅ በውል አፈፃፀም ረገድ የሚፈጠርን ያለመግባባት በግልግል ዳኛ አማካይነት እልባት እንዲያገኝ ለመስማማት ሥልጣን ያልተሰጠው ስለሆነ በአመልካችና በተጠሪ መካከል ተፈጥሯል የተባለው ያለመግባባት በግልግል ዳኛ አማካይነት ሊታይ አይችልም ተብሎ ተወስኗል፡፡
3. ግራ ቀኙ ወጭና ኪሣራ ይቻቻሉ፡፡
4. መዝገቡ ተዘግቶ ወደ መ/ቤት ተመልሷል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡