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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee of *Bahir Dar University Journal of Law* is delighted to present No.1 of Volume 3 of the Journal. As usual, the Editorial Committee extends its immense gratitude to those who made this humble beginning and journey viable and sustainable. We are particularly grateful to Hailegabriel Gedecho (Assistant Professor) for doing all the layout works.

On this occasion, the Editorial Committee would like to make it clear that the *Bahir Dar University Journal of Law* is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of the law and the practice of the country and to contribute towards the betterment of the legal system. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider regional, supranational and global perspectives are welcome.

The Editorial Committee reiterates its appeal to all members of the legal profession, both in the academia and in the world of the practice of the legal profession, to assist establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints in the legal and institutional reforms that are being undertaken across the country. We need to (re)visit whether the interplay between our profession and other disciplines is going well in the context of contemporary life. It is also commendable to pay a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. Many aspects of the life of our society seem to require that we in the legal profession do something today. The Bahir Dar University Journal of Law is here to serve us as a forum to do meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the *Bahir Dar University Journal of Law* will engender a culture of knowledge creation, acquisition and dissemination in the field of law and justice system of our beloved country.

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Granting and Using Annual Leave in Ethiopia: A Look at the Practice at the *Teklehaimanot* Plant of MOHA Soft Drinks S.C.

Dejene Girma Janka (PhD)[♣]

Abstract

The current Ethiopian Labor Proclamation provides for a number of stipulations to regulate the relationship between employers and employees. These stipulations deal, among other things, with how annual leave can (should) be granted by employers and used by employees. This article explores the position of the Labor Proclamation in respect of some vital issues pertaining to the granting and use of annual leave. It will also examine how these issues are dealt with in practice by using the experience of one company, MOHA Soft Drinks Industry S.C. at the *Teklehaimanot Plant*. Although the practice at this Company may not be used to make generalizations about how other employers deal with the above issues, it can serve as a real eye-opener. The article concludes that the stipulations of the Labor Proclamation are not implemented as they ought to be and there are some deviations in practice.

Key Terms: Annual Leave, Granting annual leave, Labour Proclamation, employment benefits

Introduction

Nowadays, it is not uncommon to find in employment laws the right of workers to annual leave.[1] Thus, workers can request and take annual leave after they have rendered service to their employers for some time. What then

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[1] For the practices annual leave in Israel see Benjamin W. Wolkinson and Richard N. Block, *Employment law: the workplace rights of employees and employers*, Blackwell Publishing, 1996, UK, p 126; in Greece, see Christina Vlachtsis, in Dennis Campbell (ed.), *Employment law*, Volume 28, Part 1, Kluwer Law International, 2007, p. 297; in Hong Kong, see Ng Sek Hong, *Labour Law in Hong Kong*, Kluwer Law International, 2010, BV, The Netherlands, p. 123-124; in China, see Christopher Hunter, Louisa Lam, Ketong Lin, *Employment law in China*, CCH Hong Kong Ltd, 2008, p. 118

is *annual leave*?[2] For the purpose of this article, we may understand annual leave as a temporary absence from a place of work with the intention to return while enjoying at least some employment benefits such as one's salary.[3] Thus, annual leave can be distinguished from other forms of temporary absence because, among other things, it is a paid absence. For instance, a worker on suspension is temporarily absent from her work but she does not get payment during her absence.

On the other hand, allowing a worker to be off their work temporarily and for some time can promote various interests. For instance, in some legal systems, the recognition of annual leave is premised on the conception that it forms part of health and safety issues.[4] Thus, workers will be saved from over-exhaustion and possible health and safety hazards they may be exposed to as a result of such over-exhaustion because annual leave, which is longer as opposed to for example weekly rest day, enables them to get both physical and psychological refreshment before they get back to their work. Workers who are back from annual leave will resume their work with renewed physical and psychological strength.[5]Of course, there is no guarantee that a worker will rest during her annual leave; instead, she may use her annual leave for various reasons such as doing personal businesses.[6]

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[2] *Annual leave* is sometimes called *annual vacations* or *annual holidays*. See, for example, Gorbacheva, *Labour Law in Russia*, Kluwer Law International, The Netherlands, 2011, p. 95; Richard Rudman, *New Zealand Employment Law Guide*, CCH New Zealand Limited, Auckland, 2009, p.142-145

[3] Thus, if a worker leaves her work with the intention of not coming back, we cannot say that she has taken an annual leave because the measure amounts to termination of employment relationship. Employment relationship refers to a relationship that is formed by an employer and a worker in accordance with article 4 of the Labour Proclamation.

[4] See Jane Moffatt (ed.), *Employment Law*, 2nd ed., Oxford University Press, New York, 2007, p.77

[5] For example, the Civil Servants Proclamation states that the purpose of annual leave is to enable a civil servant to get rest and resume work with renewed strength and the same reason can apply to the recognition of annual leave in the Labour Proclamation. See article 36(1) Federal Civil Servants Proclamation, Proclamation No. 515/2007.

[6] It is said that, in reality, a worker may use her annual leave for vacations, rest and relaxation, and personal business or emergencies. See *Annual Leave*, US Office of Personnel Management, available at www.opm.gov/oca/leave/html/annual.asp, accessed 6 June 2011.

Moreover, employers can also get benefit if workers take and use their annual leave because workers who return to work with refreshed physical and psychological preparedness to resume their work can render better services. Further, the society will also be better off if annual leave is granted and used because labour can be saved for tomorrow. Thus, granting and using annual leave is capable of promoting the interests of various parties: the employee, employer and the society. As a result, workers can and should take and use annual leave after serving their employers for certain time which is usually a period of twelve months.[7]As we will see later on, this is true in Ethiopia, too.[8]

At this juncture, one must bear in mind that annual leave is a paid leave.[9] That is to say, employers grant their workers not only permission for temporary absence from their work but also payments to cover their cost during such absence. In Ethiopia, too, annual leave at the moment is a paid leave as provided under article 77(1) of the Labour Proclamation. In fact, the history of paid annual leave in Ethiopia goes as far back as the late 1950s and early 1960s. For instance, the 1958 Eritrean Employment Act and the 1960 Civil Code granted workers the right to get paid annual leave.[10]

Moreover, an employee who is entitled to paid annual leave is normally given payment for annual leave in advance of taking the leave, whereas the amount is equal to the amount she would get if she were working during normal hours of work.[11] This implies that the payment may include regular bonus or allowance that does not vary in relation to work but excludes

[7] This is true, for example, in Greece, China, Hong Kong and others. For more on this points, see contribution by Christina Vlachtsis, *supra* note 1, p. 297; Christopher Hunter, *supra* note 1, p. 118; Ng Sek Hong, *supra* note 1, p. 124.

[8] Civil servants can be entitled to annual leave only after serving for eleven months. See article 36(2), Federal Civil Servants Proclamation, Proclamation No. 515/2007.

[9] Payment to a worker during annual leave is regarded as a reward to the worker for the work done. Marco Guadagni, *Ethiopian Labor Law Handbook*, University of Asmara, Faculty of Law, 1972, p. 66. In countries like Hong Kong, it is a statutory entitlement provided by law. See *supra* note 1, p. 123-124.

[10] See Marco Guadagni, *supra* note 9, p. 65. Of course, the provisions of both laws on annual leave were later on repealed and replaced by the provisions of the 1964 Minimum Labour Conditions Regulations. Ibid.

[11] See Jane Moffatt *supra* note 4, p.91.

any payment for overtime work.[12] Thus, for instance, while house allowance is included because it is a regular payment in the payment to a worker during annual leave, transport allowance is not. In Ethiopia, the Labour Proclamation does not make such stipulations.[13] Thus, a worker on annual leave may take her payments at the time the other workers on duty take their payments or in accordance with the provision of a collective agreement, if any.[14]

The other important point worth discussing in relation to annual leave is its duration. It is true that granting annual leave is, as stated before, a common practice. However, this does not mean that all workers are entitled to the same annual leave. In fact, the duration of annual leave may vary in two ways. First, the length of annual leave a worker gets depends on her period of service with a minimum period required by law.[15] This means, although all workers start from the same minimum period stipulated by law, senior workers get longer annual leave than new workers. For example, under Ethiopian Labour Proclamation, the minimum annual leave period for workers covered by the Labour Proclamation is fourteen working days for a new worker and one additional working day for every addition year of service.[16] Thus, a worker who has seven years of service at a given undertaking will have the right to take 20 working days annual leave as compared to a new worker who gets 14 working days annual leave. Second, the minimum period of annual leave required by law may vary from one system to another.[17] For

[12] Ibid.

[13] For civil servants, however, the Civil Servants Proclamation states that a civil servant is entitled to advance payment of his monthly salary at the time of taking his annual leave. See article 38(2), the Federal Civil Servants Proclamation, Proclamation No. 515/2007.

[14] Of course, some collective agreements may provide that a worker is entitled to advance payment for her annual leave. In this regard, one can mention the Collective Agreement of the Teklehaimanot Plant of MOHA Soft Drinks Industry S.C. and Its Workers which allows a worker to request and get his salary in advance. See article 25.2.4 of the Collective agreement of MOHA Soft Drinks Industry S.C. and its Workers, July 2007, Addis Ababa.

[15] See Benjamin W. Wolkinson and Richard N. Block, *supra* note 1, p.126.

[16] See article 77(1)

[17] This difference may exist even in one country depending on types of workers. For instance, in Ethiopia, civil servants get a minimum of 20 while workers covered by the labour Proclamation get a minimum of 14 working days. Compare article 37(1) and (2) of the

instance, in Hong Kong, the minimum leave period is seven days and the maximum is 14 days.[18] In Ethiopia, the Labour Proclamation provides that the minimum annual leave period is fourteen working days with no maximum limit provided.[19] Thus, any employer that falls under the regulation of the Labour Proclamation is obliged to grant a minimum of 14 working days for a new employee plus one working day for every year of service for workers who have served for more than a year. For workers covered by the Civil Servants' Proclamation, the minimum period of annual leave is 20 working days and a maximum of 30 working days.[20]

1. Annual Leave How Granted

First of all, annual leave cannot be waived or substituted by payment.[21] The Labour Proclamation also prohibits a worker from waiving her annual leave by agreement. In this regard, it stipulates that an agreement by a worker to waive in any manner her right to annual leave shall be null and void.[22] Consequently, a worker cannot agree not to use or request taking her annual leave. If such agreement is included in a contract of employment, that part of the contract will be ineffective. This, in turn, implies that a worker who has agreed not to take her annual leave can request and use it when it falls due in accordance with the law regardless of what is agreed upon in her contract of employment. Of course, a worker can always waive her annual leave after it has fallen due because the employer is not required to force its worker to take annual leave. Nevertheless, an employer may be obliged by a collective agreement to compel a worker to take and use her annual leave. In this case, the worker may find it difficult to waive her annual leave after it has fallen due.

Federal Civil Servants Proclamation, Proclamation No. 515/2007 and article 77(1) of the Labour Proclamation, Proclamation No.377/2003

[18] Ng Sek Hong, *supra* note 1, p. 124

[19] See article 77(1), Labour Proclamation, Proclamation No.377/2003.

[20] See article 37(1) and (2) Federal Civil Servants Proclamation, Proclamation No. 515/2007.

[21] See for example the practice in Hong Kong as discussed in Ng Sek Hong, *supra* note 1, p. 123-124.

[22] See Article 76(1), Labour Proclamation, Proclamation No.377/2003.

The other important point worth considering is the requirement that an employer must grant a worker her annual leave in the course of the calendar year in which it becomes due. It is said that annual leave becomes mature in the whole year and gradually, on day-by-day basis for that matter, even if a worker can enjoy it only at the end of the year in which it matures.[23] For example, every month gives birth to some period of annual leave which may be a day, two days, or more depending on the applicable law and collective agreement, if any. But the leave will not be used at the end of every month but at the end of the year in which it matures. In this regard, the employer has to first prepare a leave schedule by taking into account, as far as possible, the wishes of a worker and the needs of its undertaking and then grant his workers annual leave in accordance therewith.[24] Hence, while an employer must prepare a leave schedule in accordance with which his workers can be granted annual leave, the schedule has to be prepared in such a way that the interests of his workers are promoted without affecting the needs of the employer to maintain the normal functioning of his undertaking. For instance, if a worker is a college student and she wants to take her annual leave at the end of the first semester so that she will prepare for her examination, the employer must allow her to do so as long as he can maintain the normal functioning of his undertaking. Incidentally, any employer may choose to close down his business or part of it for the purpose of granting his employees paid annual leave if that is in his interest.[25]

[23]See Marco Guadagni, *supra* note 9, p. 66. Marsden writes that annual leave accrues to workers on day-by-day basis throughout the year. See Stephen J. Marsden, Australian Master Bookkeepers Guide, 3rd ed., CCH, Woltors Kluwer Business, 2010, p 682. The practice, however, shows that a worker can enjoy annual leave before the end of the year in which it matures. More importantly, annual leave may be used before it matures as some workers can be given annual leave in advance.

[24]See article 76(2) and (3), Labour Proclamation, Proclamation No.377/2003.

[25]Ng Sek Hong, *supra* note 1, p. 125. According to the employment law of Hong Kong, if an employer elects any period of 12 consecutive months as the common leave year for all his employees, as he is allowed to do so, he is obliged to give one month's notice either to each of his employees in writing or by posting a notice in a conspicuous place in the place of employment. See Id., p. 124-125

As far as the due date for annual leave is concerned, an employer is required to grant annual leave to a worker after she has served for a year.[26] Thus, although annual leave matures gradually and throughout the year, a worker is entitled to it only after the end of the year in which service is rendered. For example, a worker who has one year service will get her annual leave in the second calendar year, whereas a worker who has more than one year of service will get her annual leave in the calendar year that follows the year of service.

With regard to the duration of annual leave, as the pervious discussion has revealed, the Labour Proclamation requires fourteen (14) working days to be the minimum period of annual leave for the first year of service and one working day for every additional year of service.[27] Of course, the Proclamation allows increasing the duration of annual leave with pay through a collective agreement for workers engaged in a work which is particularly arduous or if the condition in which the work is done is unhealthy.[28] For example, a collective agreement may provide that workers who work in the production division of an undertaking get 20 working days annual leave for the first year of service and additional two working days for every additional year of service. This is acceptable because the Labour Proclamation simply provides for a minimum protection that a worker is entitled to and that an employer is required to grant his workers. Indeed, collective agreement may provide for greater annual leave even for workers not engaged in arduous works and that is acceptable in light of the Proclamation.[29] For example, the collective agreement of Ethiopian Telecommunication Corporation provides that workers are entitled to 15 working days, not 14 working days, for the first

[26] See article 76(1), Labour Proclamation, Proclamation No.377/2003.

[27] See article 77(1), Labour Proclamation, Proclamation No.377/2003. Article 77(3) states that the worker on annual leave receives a wage which is equal to the wage she receives when she was at work.

[28] See article 77(2), Labour Proclamation, Proclamation No.377/2003.

[29] This is so because article 134(2) of the Labour Proclamation allows collective agreement to prevail where it is more favorable to workers in similar matters than those provided for by law.

year of service and additional one working day for every additional year of service.[30]

At this juncture, one may wonder if a worker who has less than a year of service may be entitled to an annual leave. In Greece, for example, every employee from commencement of employment and up to completing twelve months of continued employment is entitled to a paid annual leave on a *pro rata* basis by reference to the duration of employment.[31] This means, a worker who has less than one year of service can get a paid annual leave that has matured proportional to the duration of her service.

In Hong Kong, too, where an employee has less than 12 months service, the employer should calculate her leave on a *pro rata* basis and any fraction of a day computed should be reckoned as a full day for annual leave calculation.[32] In our case, the Labour Proclamation stipulates that 26 days of service in an undertaking shall be deemed to be equivalent to one month of employment to qualify a worker for annual leave, if need be.[33] For example, if a worker is hired at the end of a calendar year and served only for 26 days in the old calendar year, she will have an annual leave proportionate to one month in the new calendar year. This means, a worker cannot be denied an annual leave because she has not served for a year in one given calendar year.[34] Similar stand is taken by some collective agreements as well. For example, the collective agreement of Ethiopian Telecommunication Corporation and its workers states that workers with less than one year of service get annual leave commensurate with the duration of their services.[35]

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[30]See article 16(1) of the *Collective Agreement of Ethiopian Telecommunication Corporation and Its Workers*, April 2007, Addis Ababa.

[31] See Christina Vlachtsis,*supra* note 1, p. 297.

[32] Ng Sek Hong, *supra* note 1, p. 124-125.

[33] See article 77(4), Labour Proclamation, Proclamation No.377/2003.

[34]In fact, article 77(6) stipulates that where the length of service of a worker does not qualify for an annual leave, that is, if it is less than a year in a given calendar year, the worker shall be entitled to an annual leave in proportion to the length of his service. Thus, a working is has six months service in an old calendar year will have 7 working days annual leave in a new calendar year is more favourable conditions are not provided in a collective agreement.

[35]See article 16(1) of the *Collective Agreement of Ethiopian Telecommunication Corporation and Its Workers*, April 2007, Addis Ababa.

The Collective agreement of the *Teklehaimanot* Plant of MOHA Soft Drinks Industry S.C. and its Workers also contains the same stipulation.[36]

2. Use, Division, Interruption and Conversion to Money of Annual Leave

As stated above, a worker is entitled to a certain amount of annual leave depending on the year of service she has at a given undertaking.[37] Moreover, we have seen that a worker cannot waive, at least in advance, the right to get and use her annual leave. Thus, when annual leave falls due, any worker can demand and use it while any employer is obliged to grant it. Of course, the demand to take annual leave by a worker has to be in accordance with the leave schedule that is prepared by an employer taking into account the interests of the workers and of his undertaking. However, issues like postponement, division or fragmentation, interruption and conversion to money of annual leave need special discussions.

2.1. Use of Annual Leave

A worker whose annual leave has fallen due and is ready to be used may want to postpone it for various reasons. Nonetheless, annual leave is as a rule said to be non-transferrable to another year.[38] Consequently, a worker should use her annual leave at the time it can be used in accordance with her employer's leave schedule. This is sensible in particular when it is viewed in

[36]See article 26.2.3 of the Collective agreement of the *Teklehaimanot* Plant of MOHA Soft Drinks Industry S.C. and its Workers, April 2011, Addis Ababa.

[37]One may raise a question as to whether or not experiences at other undertakings may be considered to calculate annual leave because an employer who employs an experienced worker gets benefits from the experience of his employer which is gained while working for another employer. This seems a legitimate query because according to the collective agreements of some undertakings such as the collective agreement of Ethiopian Telecommunication Corporation, service rendered at public enterprise or government organs is taken into account to determine the length of annual leave a worker may be entitled to. See article 16(1) of the *Collective Agreement of Ethiopian Telecommunication Corporation and Its Workers*, April 2007, Addis Ababa. Nevertheless, there is nothing in the Labour Proclamation that shows that employers should consider experience or service rendered to other employer(s) as a factor to determine the duration of annual leave.

[38] See, for example, Marco Guadagni, *supra* note 9, p. 66.

light of the rationales behind granting annual leave. Of course, if postponement is, in principle, not allowed, workers themselves will be encouraged to use their annual leaves at the appropriate time. On the other hand, annual leave may be postponed under exceptional circumstances.[39] For instance, we may think of a possibility to postpone a worker's annual leave if she is on sick leave at the time she can use her annual leave in accordance with a leave schedule because the two leaves cannot be enjoyed simultaneously.

When we see the Labour Proclamation, the position is somewhat different because it does not prohibit postponement of annual leave. In fact, it allows postponement of annual leave if a worker requests to use her annual leave at some other time which is different from the time provided in a leave schedule provided that her employer agrees thereto.[40] This is in line with the practice in some countries.[41] With regard to the duration of postponement, however, the Proclamation imposes a limitation because it allows postponement of annual leave only for two years.[42] Accordingly, workers who are governed by the Labour Proclamation cannot postpone their annual leave indefinitely. If they do so, the leave will expire after two years thereby extinguishing their rights to claim it and their employers' obligations to grant it.[43] On the other hand, such limitation on the postponement of annual leave can facilitate the use of annual leave by workers.

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[39] Ibid.

[40] See article 79(2), Labour Proclamation, Proclamation No.377/2003.

[41] For example, there are countries where annual leave must be given and must be taken in the leave year except where the employee consents to taking his leave in six months following the leave year. Any leave not taken in that leave year will be considered forfeited by the employee and can only accrue for the six months in the following leave year. An employee has no cause of action against an employer for compensation for any leave untaken in previous years. See Jane Moffatt, *supra* note 4, p.92.

[42] See article 79(5), Labour Proclamation, Proclamation No.377/2003. At the beginning, that is, under the 1964 Minimum Labour conditions Regulations, postponement was possible only for one year. See Marco Guadagni, *supra* note 9,p. 65.

[43] Although one may wonder why postponement of annual leave for longer period is not allowed, it seems that the law tries to keep the rationale behind recognizing annual leave intact; that is enabling a worker to take rest for longer period so that she can resume her job with renewed physical and physiological conditions.

2.2. Division of Annual Leave

A worker may want to use her annual leave at the time it is due but she may not wish to use it all at the same time. This raises the question of division or fragmentation of annual leave into parts. However, the general trend is to require workers to use their annual leave consecutively.[44] This means, although some exceptions may be found,[45] annual leave is required to have an element of continuity.[46] The Labour Proclamation has also adopted similar stand as it stipulates that every worker is entitled to an uninterrupted annual leave.[47] Accordingly, if a worker deserves 20 working days of annual leave, she can and has to use them all without any division.

However, the Proclamation does not contain a blanket prohibition of dividing annual leave. Although it wants workers to use their annual leave uninterruptedly, it at the same time allows them to request division into two parts if their employers consent thereto.[48] Accordingly, if a request is made by a worker and her employer agrees thereto, annual leave can be taken at two different times. All the same, division of an annual leave into various parts is not allowed. This is understandable because if annual leave is granted and used in a fragmented way, the purpose for which it is recognized will not be served.

At this juncture, it must be borne in mind that the Proclamation does not allow employers to divide their employees' annual leaves. So, the only time they can do so is when their employees request such division. This implies that what an employer can do, if it is necessary, is postponing his workers' annual leaves and not dividing them into parts.

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[44] Marco Guadagni, *supra* note 9, p. 66.

[45] For example, in Hong Kong, if a worker has ten or less days of annual leave, she can take a seven consecutive days leave and the remaining days together; however, if her annual leave exceeds ten days, she can fragment it into many parts provided that seven consecutive days are used as annual leave. For more, see generally, Ng Sek Hong, *supra* note 1, p. 124.

[46] See Id., p. 123-124.

[47] See article 77(1), Labour Proclamation, Proclamation No.377/2003.

[48] Id., article 79(1).

2.3. Interruption of Annual Leave

Situations may arise demanding the interruption of a worker's annual leave that is being used. The principle is, however, the same; that is, annual leave should be enjoyed uninterruptedly. As a result, a worker should not, for example, be recalled if she is on annual leave. Nonetheless, there are certain circumstances under which annual leave may be interrupted. For example, the Proclamation states that if a worker who is on annual leave falls sick, her illness will interrupt the annual leave.[49] In this case, the worker will be on sick leave and she will resume using her annual leave when her sick leave expires. Moreover, an employer may also recall a worker who is on annual leave where unforeseen circumstances require her presence at her post.[50] This means, if two requirements are fulfilled, an employer can interrupt the annual leave of his worker. First, it is necessary that an *unforeseen* circumstance happens. This implies that something which is foreseeable does not justify interrupting a worker's annual leave. Second, the unforeseen circumstance that happens *must require the presence* of the worker on leave at her post. If another worker can fill the post and deal with the situation, there is no right to recall a worker.

2.4. Conversion of Annual Leave to Money

There is no doubt that some workers may wish to have their annual leaves converted to money as there may be some employers who are willing to pay money in lieu of annual leave because they need their workers to stay at work. The question then is whether or not they are at liberty to do so. In this regard, we may think of three possible positions taken by the law. First, workers may be allowed to convert their annual leave to money whenever they wish to although such permission may not be compatible with the rationale behind the

[49] See Id., articles 79(4), 85 and 86.

[50] See Id., article 8(1). Emphasis added. In this case, the worker is entitled to a payment covering the remainder of her leave, excluding the time lost for the trip, and reimbursement of transport expenses incurred as direct consequences of her being recalled and per-diem. Id., article 80(2) and (3).

recognition of annual leave[51] However, this position does not seem compatible with the rationale behind the recognition of annual leave. Second, a worker may be allowed to convert part of her annual leave to money. For instance, in Honk Kong, a worker can waive her annual leave and substitute it by money if it exceeds ten days or if employment relationship is terminated before annual leave is used.[52] Thus, annual leave which is less than ten days is not convertible to money so long as employment relationship subsists while annual leave earned in excess of ten days can be converted to money if a worker so wishes. The third possible position is prohibiting the conversion of annual leave to money when it can be granted and used, that is, so long as employment relationship exists.

The Labour Proclamation has adopted the third position berceuse it prohibits, in principle, paying money in lieu of annual leave.[53] This is justified in light of the rationales behind the recognition of annual leave. However, it provides for circumstances under which annual leave may be converted to money. First, if there is a worker whose contract of employment is terminated her unused annual leave will be converted to money.[54] This is justified because granting and using annual leave under such circumstance is simply not possible. However, it must be borne in mind that the annual leave that can be converted to money under such circumstance is the one that has not expired. Hence, if a worker has, for example, annual leave that is postponed for five years, she will get payment only for the annual leave that is postponed for the last two years as the annual leave for the other years will expire.

The second circumstance under which conversion of annual leave to money is possible is when a worker who is on annual leave is recalled. In this

[51]For example, in the case of a civil servant, although payment of money in lieu of annual leave is prohibited, a worker whose annual leave is postponed due to compelling reasons for two years can claim, if she wishes, payment for the first year of accumulated annual leave and the concerned government institution is obliged to pay her in lieu of such leave. See articles 36(3) and 39(2), the Federal Civil Servants Proclamation, Proclamation No. 515/2007. Thus, she will use annual leave for two years, one postponed and the other not, while she will get payment for the first postponed annual leave.

[52] Ng Sek Hong, *supra* note 1, p. 123-125.

[53] See article 76(2), Labour Proclamation, Proclamation No.377/2003.

[54] Id., article 77(5).

case, the Labour Proclamation permits an employer to effect payment to his employee an amount that covers the remainder of her annual leave, excluding the time lost for the trip.[55] For example, if a worker is recalled while she is yet to use 10 working days and she spends two working days on her way back to work place, the Proclamation allows her to be paid for ten working days by disregarding the time she spends on her way back to her job because a worker on journey is not a worker on leave.

3. Consequences of not Observing the Stipulations of the Labour Proclamation

Granting paid annual leave is required by the law. Thus, failure to do so will entail sanctions. For instance, in some countries, failure on the part of the employer to grant paid annual leave to worker constitutes an offence punishable by criminal sanctions.[56] In Ethiopia, too, failure by the employer to grant annual leave is regarded as a criminal offence. In this respect, article 184(1) (b) of the Labour Proclamation stipulates that any employer who contravenes its provisions on leaves commits an offence publishable under the law. Thus, if more serious penalty is not recognized in the Criminal Code, the employer will be required to pay fine not exceeding 500 birr. Of course, the amount of the stipulated fine is very small. But the issue here is not about the money but the reputation of the employer that will be affected by negative publicity. It is, however, important to note that article 187 of the Proclamation prohibits instituting a criminal proceeding of any kind under the Proclamation where one year has elapsed from the date on which the offence was committed.

Therefore, as the previous discussions have shown, granting annual leave to a worker is necessary and the trend is that every worker is entitled to such leave. Moreover, granting annual leave benefits not only the worker and the employer but also the society at large. As a result, employers must grant annual and employees must use them in accordance with the law and leave

[55] Id., article 80(2).
[56] See, for example, *supra* note 1, p. 126.

schedules. Hence, annual leave should not in principle be postponed, divided into various parts, interrupted, or converted to money. We have also succinctly seen that failure to observe regulations on annual leave entails criminal sanction.

With this in mind, we will now see what the practice is like by considering how issues relating to annual leave, as discussed in this article, are dealt with at the *Teklehaimanot Plant* of MOHA Soft Drinks S.C. as a case in point. It should be noted, at the beginning, that the information included in this article in relation to the practice of granting and using annual leave by the workers of the *Teklehaimanot Plant* of MOHA Soft Drinks Industry S.C. (*the Plant* hereinafter) was obtained from Ato Endalkachew Tibabu, Personnel Supervisor at the Plant, on 8 and 9 February 2012, one senior employee at the Plant, who demanded anonymity, on 5 December 2012, and the 2011 collective agreement of the Plant and its workers. Hence, all analyses made in the following section are based mainly on the information obtained from these sources.

4. Practice at the Teklehaimanot Plant of MOHA Soft Drinks S.C.

4.1. Introduction

MOHA soft drinks Industry S.C was established on May 15, 1996 by acquiring *Nifas Silk Plant*, *Teklehaimanot Plant*, *Gondar Plant*, and *Dessie Plant* from the Ethiopian Privatization Agency. Currently, the Company has seven operating units including *Summit Plant*, *Bure Plant*, and the *Hawassa Plant*.[57]The *Teklehaimanot Plant*, one of the operating units MOHA soft drinks Industry S.C., has many hundreds of workers. For example, at the moment, the Plant has 702 permanent and contract workers. This figure does not include non-payroll workers or workers who are paid on the basis of piece of work they perform or *piece-rate workers,* as they are called. These employees are covered by the Labour Proclamation except the managerial employees who are excluded from the purview of the Labour Proclamation by

[57]See *Moha Soft Drinks Industry S.C*., available at http://www.midroc-ethiopia.com.et/md_09moha.html, accessed on 5 December 2012.

virtue of article 2(1) of the Labour (Amendment) Proclamation, Proclamation No. 494/2006. In addition, the Plant has a collective agreement with its workers.[58] Thus, the relationship between the Plant and its workers is governed by these two laws: the Labour Proclamation and its collective agreement. Whenever there is a difference between the two regimes on a particular matter, the one that is more favourable to the worker will prevail.[59]

However, on the issue of annual leave, there is not much difference between the two regimes. Hence, we can proceed and examine how the workers at the Plant are given and using their annual leaves. Before we proceed to the discussions, readers must bear in mind that the information included in this article in relation to the practice of granting and using annual leave by the workers of the *Teklehaimanot Plant* of MOHA Soft Drinks Industry S.C. was obtained from two employees, one a personnel supervisor and the other a senior employee, at the Plant.[60]

4.2. Leave Schedule

To begin with, the *Teklehaimanot Plant* of MOHA Soft Drinks Industry S.C. has a leave schedule in accordance with which its workers can take and use their annual leave. The schedule is prepared by consulting every worker as to when she wants to use her annual leave and by also taking into account the needs of the Plant. Then, the personnel department arranges for the use of the leave by every worker as annual leave could not be granted to all workers at the same time because all the units of the Plant must continue operating. The problem however is that workers do not usually use their annual leave in accordance with the leave schedule/program.

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[58] The current collective agreement was concluded in 2011 by replacing the one concluded in 2007. See the Collective agreement of the *Teklehaimanot* Plant of MOHA Soft Drinks Industry S.C. and its Workers, April 2011, Addis Ababa.

[59] Article 134(2) of the Labour Proclamation provides "where the collective agreement is more favorable to the workers in similar matters than those provided for by law, the collective agreement shall prevail. However, where the law is more favourable to the workers than the collective agreement the law shall be applicable."

[60] The personnel supervisor is Ato Endalkachew Tibabu. The information was obtained on 8 and 9 February 2012. The other employee demanded anonymity but the information was obtained on 5 December 2012.

4.3. Extent of Annual Leave

According to the collective agreement of the Plant and its workers, any worker is entitled to a leave of 14 working days for the first year of service and one additional working day for additional year of service. A worker who has less than one year of service is entitled to annual leave on *pro rata* basis. These stipulations of the collective agreement are consistent with the stipulations of the Labour Proclamation. However, unlike the Proclamation, the collective agreement grants workers the right to request and get payments in advance for the leave period.[61]

4.4. Granting of Annual Leave

According to the collective agreement of the Plant, workers are expected to use their annual leave according to their leave schedule. In this regard, while the Plant is expected to make workers take and use their annual leave according to the schedule, workers are obliged to use their annual leave based on their leave schedule. What this means is that a worker who is entitled to get her annual leave can inform the concerned unit within the Plant and use it. If, however, the worker fails to make such request, the Plant will compel the concerned worker to take and use her leave according to the leave schedule already prepared. Of course, the collective agreement allows changing the leave schedule already prepared by the consent of the Plant and the concerned worker. But, such change cannot be made for more than two times.[62]

However, as stated before, there is a tendency on the side of the workers not to take and use their annual leave in accordance with their annual leave schedule. Moreover, although, according to the collective agreement, the Plant is expected to push workers to use their annual leave in line with their leave programs, the practice at the Plant shows that only workers with accumulated annual leave such as workers with over one hundred working days annual leave are required to take and use their annual leave.[63] Of course, there are

[61] See article 26 of the Collective agreement of the Teklehaimanot Plant of MOHA Soft Drinks Industry S.C. and its Workers, April 2011, Addis Ababa.
[62] See Id., article 26.2.7.
[63] We will see later on if a worker can legitimately have this much annual leave.

other instances where the Plant compels workers to use their annual leave. For example, when maintenance activities are carried out, the workers in the unit being maintained are required to use their annual leave. In any case, the Plant does not urge the workers it wants to stay at their posts to take and use their annual leaves according to their leave schedules. Hence, although the Proclamation does not oblige employers to compel their workers to use their annual leave, the collective agreement of the Plant, under article 27.2.7, does so. Nevertheless, the Plant does not usually discharge this duty by urging all its workers to take and use their annual leave. It is selective in its approach to compel workers to take and use their annual leave.

4.5. Postponement of Annual Leave

The collective agreement of the Plant and its workers does not deal with the issue of postponing annual leave. Hence, according to Art 79 of the Proclamation, a worker can request the postponement of his annual leave and, if the employer agrees, her leave can be postponed for two years. Similarly, an employer can, for reasons dictated by the work conditions of his undertaking, postpone the date of leave of a worker by not more than two years.

The practice at the Plant also shows that workers can postpone their annual leave. Moreover, the Plant can also postpone the leave of its worker. While this may be in line with the stipulations of the Proclamation, what is surprising is the fact that, in practice, there is no limit to workers' right to postpone their annual leaves. This means, workers at the Plant can postpone their annual leave for indefinite period. Consequently, it is said that, in practice, there is no worker whose annual leave has expired. For example, there are workers with annual leave of over two hundred working days.

Under normal course of things, a worker cannot have two hundred working days of unexpired annual leave let alone over two hundred working days. For example, a worker who has 80 years of service can get 93 working days annual leave. In her 81st year of service, she will have 94 working days of annual leave. If these two leaves are postponed, the sum will be 187 working days. But, it is obvious that a person cannot have 80 or more years of service at any undertaking. Therefore, the only logical conclusion is that the

Plant is allowing its workers to postpone their annual leave for indefinite period and that is how one can have unexpired annual leave of over two hundred working days. On the other hand, allowing a worker to have her annual leave postponed for more than two years is against the provisions of the Labour Proclamation. Besides, it defeats the very purpose for which annual leave is recognized.

4.6. Division of Annual Leave

As stated above, a worker who does not want to use her annual leave at once may request her employer to allow her to divide it into two parts. Division of annual leave into more than two parts is, however, prohibited by the law although the collective agreement of the Plant is silent on the matter. Coming to the practice at the Plant, a worker is allowed to divide her annual leave into as many parts as she wishes. In this regard, the smallest annual leave a worker can take is half a day. So, it is the worker who is deciding how to use her annual leave and the Plant seems to accept such decision. On the other hand, such practice of taking and granting annual leave is contrary to the provision of the Labour Proclamation and the rationale behind annual leave as the element of continuity is lacking during its enjoyment.

4.7. Interruption of Annual Leave

As already stated, the rule is that a worker must be left alone to use her annual leave uninterruptedly. However, at times circumstances may justify interrupting the annual leave of a worker. This could happen when a worker who is on annual leave falls sick or when she is recalled from her annual leave because of the occurrence of unforeseen circumstances which require her presence at her post. According to the collective agreement of the Plant, these two grounds have been recognized as grounds justifying the interruption of annual leave.

The practice at the Plant also shows that a worker who becomes sick while using her annual leave will be on sick leave until such leave expires. However, in relation to recall, the practice at the Plant seems at variance with the stand of the law and the collective agreement. That is, a worker on annual

leave could be recalled even if the circumstance necessitating the recall is foreseeable and the presence of the worker on annual leave is not necessarily important because the post could be covered by another employee. Then, the worker whose annual leave is interrupted will have her remaining annual leave converted to money unless she wishes to use the remaining leave another time.

4.8. Conversion of Annual Leave to Money

As we have seen before, a worker whose contract of employment is terminated or who is recalled from her annual leave can have her unused annual leave converted to money. In this regard, the collective agreement of the Plant recognizes only the conversion to money of annual leave of a worker who is recalled. Of course, since the law allows converting an unused annual leave when a contract of employment is terminated, the failure of the collective agreement to recognize it has no significance at all. Moreover, the practice at the Plant also reveals that workers who are recalled from annual leave and those whose contracts of employment are terminated before they use their annual leave are having their unused annual leaves converted to money.

What is very interesting and not contemplated in the Labour Proclamation is the fact that a worker whose contract of employment is terminated is allowed to have all of her unused annual leave from the date of her employment converted to money. This is so because, at the Plant, annual leave never expires. For example, if a worker who has ten years of service at the Plant terminates her contract and she did not use any part of her annual leave, she will be given money for all the leave not used for the ten years of service, which will be 185 working days. So, none of her accumulated annual leave will expire. Nonetheless, such practice at the Plant is in stark contradiction with the objective of the law, which is encouraging workers to take rest from their work. Moreover, it is not a rationale risk for employees to assume because the employer can at any time invoke the law and deny them the right to claim and use the annual leave postponed for more than two years or convert it to money upon termination of a contract of employment.

5. Conclusion and Recommendations

As this succinct article has attempted to elaborate, annual leave is one of the benefits workers are entitled to. Hence, it is a routine exercise for labour laws to recognize them. However, these laws may differ in relation to issues such as the duration, division, postponement, conversion to money and expiry of annual leave. In Ethiopia, the minimum period of annual leave is 14 working days and then one additional working day for additional year of service. Moreover, a worker can enjoy her annual leave in two parts or postpone it for two years if she so wishes. Annual leave not used within the time frame the Proclamation stipulates will expire.

Further, the Proclamation permits the conversion of annual leave to money under exceptional circumstances, that is, when a worker is recalled from her leave or if employment relationship is terminated before annual leave is used and the leave is unexpired. However, the practice at the *Teklehaimanot Plant* of MOHA Soft Drinks Industry S.C. reveals that the provisions of the Labour Proclamation may not always be implemented as they ought to be. For example, the Plant prepares programs or schedules at the beginning of every year so that its employees can take and use their annual leaves according to such program or schedule. The program is prepared by taking the desires of the workers and the needs of the Plant into account. Moreover, the Plant grants a minimum of 14 working days annual leave to a worker with the first year of service at the Plant and then one additional working day for additional year of service.

As far as the use of the leave is concerned, the Plant allows, under normal course of things, a worker to use her annual leave if she makes a request to that effect. Therefore, to this extent, the practice at the Plant in relation to annual leave is consistent with the stipulations of the Labour Proclamation. However, there are areas where the practice at the Plant departs considerably from the stipulations of the Proclamation. First, although the Proclamation allows the use of annual leave in two parts, the practice at the Plant shows that annual leave can be fragmented into as many parts as possible depending on the desires of the worker. Second, contrary to the stipulation in the Labour Proclamation, the Plant in practice allows its workers to postpone their annual

leave for indefinite periods. Third, although the Proclamation allows the conversion of an unused annual leave, its intention is allowing workers to have such leave converted to money only if it has not expired. Nonetheless, at the Plant workers can have their annual leave converted to money without any limit, although this takes place only upon termination of their employment contract.

Finally, contrary to the stipulations of the Proclamation and the collective agreement, the Plant recalls workers on annual leave even if the circumstances used to interrupt annual leave are foreseeable and the presence of the worker to be recalled is not indispensable.

It is, therefore, recommended that while the practices consistent with the stipulations and the spirit of the Labour Proclamation should continue, practices which are at odds with the Proclamation must be abandoned. Moreover, other undertakings that are in the same path with the Plant must make the same rectification so that the very purpose for which annual leave is recognized is served.

As far the Proclamation is concerned, among other things, its rigid prohibition of the division of annual leave into more than two parts must be changed. It suffices if the Proclamation requires a worker to use part of her annual leave continuously and then allow the use of the remainder as the worker wishes and with the consent of her employer. After all, practice shows that workers are actually using their annual leaves by dividing them into many parts. This may have some practical benefits. For example, a worker who wants to pay a visit to her family may want to get leave. However, she cannot be given leave for such purpose according the Labour Proclamation because such factor is not recognized as entitling workers to leave of any type.[64] Hence, the worker has to pay a visit to her family when she uses her annual leave even if she wants to do that at some other time. However, if

[64]Of course, article 81(2) states that a worker shall be entitled to leave without pay for up to 5 consecutive days in the case of *exceptional and serious events*. Here, the expression *exceptional and serious events* seems to show that a worker is entitled to unpaid leave for five consecutive days if she encounters some problems, whereas the need to pay visit to one's family does not seem to qualify as a problem or as an exceptional and serious event.

fragmentation of part of one's annual leave is allowed, a worker can use it under such circumstances.

Of course, a question as to whether the rationale behind recognizing annual leave could be served if fragmentation of part of annual leave is allowed may be raised. Nonetheless, I would argue that the rationale could remain unaffected by such permission. First, if a worker is required to use part of her annual leave without interruption, the required physical and psychological rest could be obtained. Of course, the length of part of annual leave to be used uninterruptedly could be determined by taking the *raison d'etre* of annual leave into account. Second, there is no reason to fear that once the division of part of annual leave is allowed, everybody will prefer to divide it into many parts. Some workers may wish to use their annual leave at once or in two parts as the Proclamation allows. Therefore, the purpose of annual leave could still be served if the fragmentation of only part of it is allowed.

An Overview of the Legal Regime Governing Minerals in Ethiopia

Tilahun Weldie Hindeya[♣]

Abstract

The contribution of the mining sector to the Ethiopian economy has been dismal. This situation is being reversed with the mining sector's contribution to the Ethiopian economy growing significantly in recent years reflecting the sector's potential to spur the economic growth of the country. Many factors including the legal reforms that have taken place over the last two decades played major roles for the growth of the mining sector's contribution to the Ethiopian economy. This article addresses the current legal framework governing minerals in Ethiopia. It examines the extent to which the laws try to strike a balance between rights of investors and the public interest with a particular focus on social and environmental considerations. The overall examination and analysis reveals that while the legal reforms have undergone substantial transformation to allure investors in the sector, some problems related to implementation of rights and obligations remain a concern. Moreover, social and environmental considerations are also poorly addressed.

Key Words: Ethiopia, Minerals, Licenses, Mineral Taxes, Social and Environmental Considerations

Introduction

Though mining investments provide significant economic opportunities, they also pose immense challenges for investors as well as host states. While investors may be rewarded with huge economic benefits upon successful discovery of minerals, they may not be able to reap such perceived profits due to risks such as geological, commercial and regulatory ones, among other things. Moreover, for effective and efficient utilization of mineral resources companies in the extractive industry need huge capital as well as sound and up-to- date technology. Hence, investors assume high risk in the sector and would decide to invest when there is a legal framework that provides sufficient guarantees and protection to their investment apart from geological,

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commercial and other considerations that would be taken into account by potential investors.

Mining investments have also the potential to spur economic growth of a country. That is one of the major reasons why many countries are keen to attract investors engaged in mining investments. As a result, host states provide incentives, protection and guarantees for mining investments. However, due to adverse social, economic and environmental consequences of the mining industry, states too may not also be able to reap perceived advantages of mining investments. Thus, the biggest challenge of the mining industry is how to strike a balance between the need for promoting mining investments on the one hand and properly regulating them, on the other hand, with a view to minimize the adverse social, economic and environmental consequences so that a win-win outcome for both investors and host states can ultimately be achieved. Therefore, states have a daunting task of striking the necessary balance between rights of investors and the public interest.

With this view countries including Ethiopia have formulated different laws that are intended to ensure such a balance is struck. Ethiopia has been confronted with such challenges especially since opening the mining industry to private investments as early as the 1990s. This article intends to provide an overview on how the recent law on minerals enacted by the country tries to address some of the issues related to rights of investors on the one hand and the public interest at large on the other hand.

The article is structured as follows: the first section addresses some of the risks that investors and host states encounter in mining investments. The second section explores mineral opportunities in Ethiopia and the contribution of the sector to the Ethiopian economy. The third section is devoted to the legal regime governing minerals in Ethiopia. Finally, some concluding remarks are provided.

It is also important to note that laws governing mining investments in gas and oil are not covered under the Mining Proclamation and hence are not the subject of this article.

1. Risks in Mining Investment: General Overview

Mining investments, while presenting opportunities for investors and countries, pose significant risks. One of the biggest risks inherent in mining investment is geological risk.[1] Geological risk can be defined as "the likelihood and degree to which actual mineralization (its quantity and quality) differs from what is anticipated at the point a decision is made to undertake exploration or development.''[2] There is usually a huge discrepancy between what is anticipated and the actual discovery of minerals. In fact, only very few of mineral exploration efforts result in a discovery of significant mineral deposits.[3] Furthermore, not all discoveries will also develop into mineral production. Only few out of the many mineral discoveries result in mineral production.[4]

Commercial risks are also other important concerns for investors engaged in mining investments. Every investor wants to make sure that the discovered minerals are commercially feasible to undertake mineral development. Not all discovered minerals are commercially feasible to mine since such investments usually require huge financial and capital expenditure. Hence, production cost, other transaction costs, mineral price instability, availability of foreign currency, exchange rates would be important considerations to determine the extent of the commercial risk involved in a mining venture.[5]

Regulatory changes are other risks that investors may face during any stages of mining investments. Legislative surprises that adversely affect rights

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[1] Williams, J., ''International Best Practice'' in Mining: Who Decides and How-And How does it Impact Law Development', *Georgetown Journal of International Law*, Vol. 39, 2007-08, p. 694.

[2] Eggert, R., 'Mineral Exploration and Mining: Risk and Reward', (Paper prepared for the International Conference on Mining, ''Staking a Claim for Cambodia,'' Cambodia, 2010), p. 2.

[3] Hefferman, V., *Worldwide Mineral Exploration- Preparing for the Next Boom*, Financial Times Energy, London, 1998.

[4] *Id.*

[5] Kwabe, H., 'How Can Mining Law Balance Public and Private Interests in the Face of Regulatory Change? The Fiscal Regime under the World Bank Strategy for African Mining 1992 and the ECOWAS Mining Directive 2009'. Available at: http://ssrn.com/abstract=1654717 (Accessed on July 10, 2012).

of investors are important factors that are taken into account for investment decisions. The interference of the state on the anticipated right of investors through legislative surprises will have huge consequences on making profits from mining investments. Hence, a risk on stable regulatory framework has been one of the most important considerations for investment decisions.

The need for stable regulatory environment in mineral exploration and mining has been termed security of mineral tenure. Security of tenure is defined as the length of time for which an investor will have mineral rights.[6] The rights of investors in mineral resources may, however, be interrupted or limited as a result of regulatory actions on the part of governments. Issues related to security of tenure, among other things, includes duration and right to renew prospecting and development of minerals, the linkage between right to explore and thereafter to mine, cancellation of exploration and mining rights, security against unlawful expropriation, and any other decisions of the government that can have an impact on the anticipated rights of investors.[7]

A security of mining rights has been considered essential precondition for investment decisions in mineral development.[8] Investors entitled to secured and long-term mining rights would be encouraged to undertake investment in the mining sector.[9] Of course, it has to be noted that the primary consideration of investors to make decisions is mineral potential and availability of infrastructure.[10]

States understand that these are some of the major considerations that are taken into account by investors. Accordingly, they try to minimize risks with a view to create conducive environment for mining investments.[11] This is

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[6] Dale, M., 'Security of Tenure as a Key Issue Facing the International Mining Company: A South African Perspective', *Journal of Energy and Natural Resources Law*, Vol. 14 No. 3, 1996, p. 299.

[7] *Id.*

[8] The World Bank, 'Strategy for African Mining', (World Bank Technical Paper Number 181, Africa Technical Department Series, Mining Unit, Industry and Energy Division, the World Bank, Washington DC, 1992), p. 17.

[9] *Id.*, p. 21.

[10] *Id.*, p. 17.

[11] A state can play an important role in ensuring security of mineral tenure. A state has control over regulatory framework governing minerals. A state can create stable and long-term

because if there are successful mineral exploration and development, states would benefit from mining investment through job creation, development of infrastructure, raising government revenue which in turn can be used for improving education and health services and poverty alleviation.[12] Because there are no many mining companies which can satisfy the demands of all states, countries compete for attracting investors.

However, mining investments also pose risks for states. The potential for mining investment contributing for long-term environmental, social and economic welfare may be questionable if not harnessed in a way that can promote sustainable development. Mining investments do have such negative impacts as degradation of the local environment, displacement of local people, depletion of the environment, misallocation of revenues derived from mining, etc. Hence, for states the biggest challenge would be to grant sufficient incentives, guarantees and protections for investors without compromising the social, economic and environmental concerns. The main issue then becomes how to strike a balance between these two competing interests.

2. Mineral Resources in Ethiopia

Ethiopia is endowed with rich mineral resources.[13] The country is believed to have excellent opportunities for investors looking to engage in the mining industry. However, the country's mineral resources remain largely unexplored.

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mineral rights so that it can induce investors to locate their mineral investments in its territory. Apart from government's role in ensuring stable legal framework, governments can take appropriate measures to minimize commercial risks. A government may take appropriate measures on exchange rates, inflation, availability of foreign currency, and other measures that may minimize risks for investors. However, not all risks are controllable by the government. For instance, risks related to geological potential are beyond the control of a state.

[12] Eggert, *supra* note 2, p.1.

[13] Embassy of the Federal Democratic Republic of Ethiopia in London *et al*., 'Investing in Ethiopia' (A conference Paper presented at Ethiopian Investment, Trade and Tourism Promotion Forum, organized in partnership between the Embassy of the Federal Democratic Republic of Ethiopia in London, Africa Matters Ltd, Developing Markets Associates and WAFA Marketing and Promotion Plc.), 2011, p. 20.

In fact, the history of mining in Ethiopia dates back to ancient times when gold had been mined through traditional means.[14] Though gold has been the most explored and developed type of mineral in Ethiopia, the country is also rich with other mineral resources. Minerals such as platinum, nickel, tantalum, copper, lead and zinc, phosphate, iron ore, and stones such as marble, granite and other coloured stones are discovered in the country.[15] The country also hosts kaolin, diatomite, feldspar, quartz, silica sand, potash and soda ash.[16] However, only few of these resources are developed and being mined.[17] While gold is being mined on small as well as large scale levels, other minerals that are being developed are at a relatively small scale level.[18]

The participation of private companies in mineral development was virtually absent prior to the 1990s.[19] With a shift of ideology towards a market-oriented economic policy, private companies started investing in the mining sector as of the 1990s. However, the number of private companies was few even after the introduction of the market-oriented economic policy. This started to change only recently when many international and local companies began mineral exploration and development activity. Hence, mineral potential of Ethiopia largely remains underexplored.[20]

Be this as it may, it is believed that Ethiopia has huge mineral potential opportunities for investors looking to invest in the industry. Recent

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[14]Ministry of Mines of the Federal Democratic Republic of Ethiopia, *Mining Journal*, 2011, p. 2.

[15]Ministry of Mines and Energy of the Federal Democratic Republic of Ethiopia, 'National Report on Mining to the United Nations Commission on Sustainable Development', New York, 2009, p. 2.

[16] UK-Ethiopia Forum, 'Investing in Ethiopia', 2011, p. 20.

[17] Ministries of Mines, *supra* note 14.

[18]Ministry of Mines and Energy, *supra* note 15, p. 2. Currently the largest gold development in the country is the Lege-dembi gold mine that is operated by Midroc-Gold, A private company. Other mineral developments undertaken at a small scale level include open pit mine of columbo-tantalite at Kenticha in the Adola belt, Soda ash at Lake Abiyata in the rift valley, Kaolin, quartz and feldspar from the Adola belt in southern Ethiopia by a government enterprise. For further details on the type of minerals and level of mining see Ministry of Mines and Energy, *supra* note 15, pp. 2-3.

[19] Ministry of Mines, *supra* note 14, p. 11.

[20] Sinkinesh Ejigu (Minister, Ministry of Mines) in Mining Journal, 2011, p. 2.

discoveries of minerals are indicative of the fact that the country has the potential to offer investors with an opportunity to develop large amount of such resources. For instance, the Ethiopian National Mining Corporation has discovered the largest gold deposits to date.[21] Nyota Minerals Limited(Ethiopia) also discovered gold deposits in the Tulu Kapi Area, South West Ethiopia, and is expected to become the second largest company in gold development after MIDROC Gold Ethiopia which is currently the only company engaged in the production of gold at large scale level.[22] A Canadian based Allana Potash Resources has also discovered potash deposits in the Dallol Depression of the Afar region.[23]

Furthermore, there are many other international and local companies that are currently engaged in mineral exploration or mineral development. Such companies include Aberdeen International Inc.(exploring for primary gold), ASCOM Mining plc (exploring for gold and base-metals), Stratex International (exploring for gold deposits), Ezana Mining Development plc, G and B Central African Resources Ltd and India's Saink Potash (both focused on exploration and development of potash resources).[24] The total number of international and local companies that are engaged in prospecting, exploration, and development of minerals has now surged to more than one hundred thirty.[25]

Despite the country's potential of mineral resources, the overall contribution of the mining sector to the Ethiopian economy has been dismal

[21]See, 'Ethiopia Strikes Large Gold Deposits', The Africa Report, 09 January 2012. Available at: http://www.theafricareport.com/East-Horn-Africa/ethiopia-strikes-large-gold deposits.html (Accessed on August 5, 2012)

[22]'Nyota Minerals Seeks Gold Mining License', The Reporter, June 2011. Available at: http://www.thereporterethiopia.com/News/nyota-minerals-seeks-gold-mining-licens.htm. (Accessed on August 10, 2012).

[23]'Allana Potash discovers 1.2 billion tons of potash', The Reporter, June 2012. Available at: http://www.thereporterethiopia.com/News/allana-potash-discovers-over-12-bln-tons-of-potash.html (Accessed on August 10, 2012)

[24] Ministry of Mines, *supra* note 14, p. 4.

[25] 'Mineral Export Generates $ 654 mln', Walta Information Center, 24 July 2012. Available at:http://www.waltainfo.com/index.php?option=com_content&view=article&id=4347:mineral-export-generates--654-mln-&catid=52:national-news&Itemid=291_ (Accessed on July 30, 2012)

until recent years. The overall contribution of the mining sector to the national economy has also been insignificant.[26] The GDP Contribution of the sector was lower than 1 percent a couple of years ago.[27] However, the sector's contribution is growing over the years. While the mining sector's contribution to the GDP was 0.6 percent in 2006, the sector's contribution to the GDP grew to 1.7 percent in 2011.[28] Even though the sector's contribution to the GDP is not yet significant, it has shown a rapid improvement registering almost a three-fold growth in just five years in terms of its GDP contribution.

The sector's contribution to foreign currency earnings has also been growing over the years. The amount of foreign currency earned from the export of minerals (such as gold, tantalite concentrate platinum, decorative dimension stones and gemstones**)** was on average $ 135 Million from 2006 to 2008 constituting only 7-10 % of the total foreign currency earnings of the country.[29] However, this trend is changing in recent years. From July 2011 July 2012 (2004 E.C budget year), the country has earned $ 654 million from the export of minerals such as gold, tantalum, platinum and gemstones- the lion's share of which was earned by artisanal miners.[30]

Thus, there is a growing importance of the mining sector to the Ethiopian economy. In fact, last year (2004 E.C budget year) the contribution of minerals to foreign currency earnings of the country was second after agriculture. The mining sector also grew by 48 per cent in 2011 reflecting its significant potential to contribute to the Ethiopian economy.[31] The government of Ethiopia is also keen to tap into the potential economic benefits of this industry. Its long-term objective is to enable the sector to contribute for

[26] Ministry of Mines and Energy, *supra* note 15, p. 7.
[27] Walta Information Center, *supra* note 25.
[28] African Development Bank *et al.*, 'African Economic Outlook 2012: Ethiopia 2012', Available at: http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/PDF/Ethiopia%20Full%20PDF%20Country%20Note. pdf (Accessed on October 10, 2012).
[29] Ministry of Mines and Energy, *supra* note 15, p. 7.
[30] Walta Information Center, *supra* note 25.
[31] African Development Bank *et al*., *supra* note 28.

10 percent of the GDP.[32] Moreover, according to the Growth and Transformation Plan of Ethiopia (GTP) (2011-15), it is envisaged that the mining sector's foreign currency earnings will increase by ten-fold at the end of 2015.[33]

However, meeting such targets may not be easy. As mentioned in the first section of this paper, many factors are at play for promoting mining investment. One of such factors is the regulatory framework that is put in place in a country. The availability of conducive legal framework is essential to attract investors in the industry and thereby ensure that the projected contribution of the industry to the country's economy is met. To this effect, the country has recently introduced mineral proclamation in 2010 after several years of experimentation of previous laws governing the mining sector. The laws governing the mining sector in Ethiopia are addressed in the section that follows.

3. Minerals law in Ethiopia

3.1 Historical Background

The history of investment law in Ethiopia as incorporated in proper investment code dates back to the early 1960s. With a view to encourage investment of private capital, both from home and abroad, and with a desire to enact a special and comprehensive legislation, the Haileselassie regime came up with a Decree to Provide for the Encouragement of Capital Investment in Ethiopia in 1963.[34] The investment types subject to the code included mining, agricultural, industrial, transport and touristic investments.[35] This piece of legislation had incorporated incentives such as exemptions from income tax and customs duty for mining and other investment activities.[36] It is important

[32] Ministry of Mines and Energy, *supra* note 15, p. 4.
[33] Ministry of Mines, *supra* note 14, p. 2.
[34] A Decree to Provide for the Encouragement of Capital Investment in Ethiopia, Decree No. 51 of 1963, *Negarit Gazeta, No.1,1963*.
[35] *Id*., Article 3.
[36] *Id*., Articles 5 and 6.

to note that investment laws in Ethiopia were enacted even before the 1960s. However, they were not incorporated in a comprehensive investment code but rather were scattered in different legislations.[37]

In 1971 the Mining Proclamation of the Empire of Ethiopia was issued.[38] This was meant to formulate a separate mining legislation with a view to properly regulate mining investments. However, efforts to encourage mining investments were largely unsuccessful as limited exploration and development of minerals took place during the Imperial period.[39]

With the coming to power of the Derge in 1974, the country adopted a policy which is fundamentally at odds with the idea of encouraging private investment to promote development. Accordingly, with the introduction of the Derge's socialist ideology, private properties were nationalized[40] and there was little room for any form of private investment.[41]

Following the downfall of the Derge, the country has devised different laws, strategies and incentives that were intended to foster private investment in the mining sector. These laws had to be revised time and again so that they would suit the ever changing environment in mining investments.

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[37]In the 1940s two proclamations, Proclamation No. 60/1944 and Proclamation No. 107/1949, were enacted to govern income taxes from businesses. Statement of Policy for the Encouragement of Foreign Capital Investment in Ethiopia was also issued (Notice No. 10, 1950 of Ethiopia).

[38] Mining Proclamation of the Empire of Ethiopia, Proclamation No.282/1971.

[39]Hundie Melka, 'The Extractive Industry in Ethiopia and Efforts Made to Join and Implement the Extractive Industries Transparency Initiative in Ethiopia (EITI)', (Paper presented to the Public Dialogue on Governance and Transparency in Extractive Industries and Natural Resource Management), (Ministry of Mines and Energy of the Federal Democratic Republic of Ethiopia, 2010), p. 7.

[40]A proclamation to Provide for Government Ownership of Urban Land and Extra Houses, Proclamation No. 47/1975, *Negarit Gazeta*, Year 34, No.41.

[41]Private investment was limited to small industrial activities with a ceiling of US $250,000 Capital, see Mulatu Wubneh in Ofcansky, T., and Berry, L., (eds.), *Ethiopia, a Country Study*, 4th ed., Washington, D.C. : Federal Research Division, Library of Congress, 1991, p. 115. Proclamation No.39/1975 of the Socialist Government of Ethiopia limited private sector's involvements in the mining industry to construction minerals like quarrying. The operation for metallic and industrial minerals was reserved for joint state and private investment whereas mining of precious metals, radioactive minerals, commercial scale salt production, and thermal power were exclusively reserved for the state. See Hundie, *supra* note 39, p. 8.

Accordingly, an investment proclamation to promote development of mineral resources, formulated under the auspices of the Transitional Government of Ethiopia, came into force in 1993.[42] A minor amendment to this proclamation was made in 1996.[43] These laws were repealed by a new law which was issued in 2010. As far as taxes on incomes from mining operations are concerned, a mining income tax proclamation was issued in 1993[44] which was later amended in 1996.[45] A mining regulation was also issued in 1994 which was slightly amended later by Mining Regulations No. 27/1998 and Mining Regulations No.124/2006.

3.2 General Legal Framework on Minerals

The Ethiopian government has been exerting efforts to reform its legal regime so as to make it competitive enough to attract investment in the mining sector. As explained above, the laws have undergone several experimentations to conform to international best practice on mining.

Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) is one of the laws that provide general principles on ownership and administration of minerals.[46] A new law dubbed 'A Proclamation to Promote Sustainable Development of Mineral Resources' (Mining Proclamation) issued in 2010 is another important piece of legislation that governs mining operations.[47] This proclamation repealed the Mining Proclamation of 1993 and its amendment (issued in 1996) and any other laws

[42] A Proclamation to Promote the Development of Mineral Resources, Proclamation No. 52/1993. A mining Regulation was also issued in 1994. This Regulation, unlike the repeal of the 1993 Mining Proclamation, is still in force as far as it is consistent with the 2010 Mining Proclamation. See Council of Ministers Regulations on Mining Operations, Council of Ministers Regulations No. 182/1994 (hereinafter the 1994 Mining Regulation).

[43] A Proclamation to Amend the Mining Proclamation, Proclamation No.22/1996.

[44] A Mining Tax Proclamation, Proclamation No. 53/1993.

[45] Mining Income Tax(Amendment) Proclamation, Proclamation No. 23/1996.

[46] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazeta*, Year 1 No.1, (1995).

[47] A Proclamation to Promote Sustainable Development of Mineral Resources, Proclamation No. 678/2010. (Hereinafter Mining Proclamation).

which would contradict the proclamation in matters governing mineral resources.[48] However, the 1994 Mining Regulation was allowed to take force provided that it is consistent with the 2010 Mining Proclamation and until such time that it is replaced by another regulation.[49] As far as income taxes from mining operations are concerned, they are governed by Mining Income Tax Proclamation of 1993 as amended. Hence, basically these are the laws that mainly govern mineral resources in the country.

The FDRE Constitution and the Mining Proclamation provide that mineral resources existing in their natural conditions belong to the state and the people of Ethiopia.[50] The government with its obligation to deploy such resources for the benefit of the society acts as a custodian of such resources on behalf of the people.[51]

It is important to note that the government's general policy direction is to encourage private investment in the mining sector. However, this does not preclude the government in engaging itself in mining operations. The government has the right to undertake mining investments considered beneficial for overall economic growth either on its own or in joint venture with private investors.[52]

The government may also acquire five percent equity participation without cost in small-scale or large scale mining operations.[53] Under the repealed mineral proclamation the equity participation of the government was ten percent[54] and the reduction of the equity participation to five percent under the existing legislation is meant to foster private mining investments and limit government's intervention in the private sector.

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[48] Article 82(1) (2), Mining Proclamation.
[49] *Id.*, Article 82(3).
[50] Article 40(3), FDRE Constitution and Article 5 (1), Mining Proclamation.
[51] Article 89, FDRE Constitution and Article 5(2), Mining Proclamation.
[52] Article 8, Mining Proclamation.
[53] *Id.*, Article 70. The equity participation of the government may also be greater than five percent provided that any equity participation of the government above five percent can only be made by agreement between the government and the private investors.
[54] Article 44, 1993 Mining Proclamation. The ten percent equity participation of the government was, however, only for large-scale mining operations.

The 2010 Mining Proclamation governs operations of all minerals with the exception of natural gas and petroleum resources.[55] Thus, natural gas and petroleum resources are governed by special laws.[56]

3.3 Federal and Regional Governments' Responsibilities in Regulating Mining Operations

While the federal government of Ethiopia is entrusted with formulating laws for utilization and conservation of mineral resources[57], regional states have the power to administer such resources in accordance with federal laws.[58] Regional states have also the power to levy and collect income taxes, royalties and land rentals from small-scale and artisanal mining operations.[59] The power to levy and collect income taxes and royalties from large-scale mining operations, on the other hand, is jointly exercised by both regional and federal governments.[60]

Though the FDRE Constitution provides that federal and regional governments share power of taxation on revenues from large scale mining, it does not specify the percentage share of federal government and regional states. The power to determine the share of both federal and regional states on revenues from large scale mining is vested on House of Federation (HoF) as provided under Article 62(7) of the FDRE Constitution. The formula set by the House of the Federation on concurrent power of taxation on minerals may become controversial in different occasions as there is no formula in the FDRE Constitution and hence is subject to revision by the HoF itself.

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[55] Article 2(19), Mining Proclamation.

[56] See Petroleum Operations Proclamation, Proclamation No. 295/1986; A Proclamation to Provide for Payment of Income Tax on Petroleum Operations, Proclamation No.296/1986; and its amendment-Petroleum Operations Income Tax Amendment, Proclamation No.226/2000, *Federal Negarit Gazeta*, 7th Year No.8 (2000).

[57] Articles 51(5) and 55(2)(a), FDRE Constitution.

[58] *Id*., Article 52(2)(d).

[59] *Id*., Article 97(8).

[60] *Id*., Article 98(3).

According to the current formula, the Federal Government has 40 per cent share of mineral taxes while the rest goes to regional governments.[61]

As far as the licensing power is concerned, regional states have the power to issue the following licenses: artisanal mining license; reconnaissance, exploration and retention licenses with respect to construction and industrial minerals; and small scale mining licenses for industrial minerals and small and large scale mining licenses for construction minerals.[62] The federal government has the power to issue reconnaissance, exploration, retention and mining licenses other than those to be issued by a state licensing authority.[63]

As Article 52 of the Mining Proclamation reveals, regional states can only issue licenses for domestic investors while issuing licenses for foreign investors is within the exclusive jurisdiction of federal government. Moreover, as the cumulative reading of Article 52(1) and (2) of the Mining Proclamation reveal, large scale mining for industrial minerals and any licenses for metallic, precious and semi-precious minerals[64] except artisanal mining license are also within the exclusive jurisdiction of the federal government.

3.4 Mineral Licenses

The law states that any person may not be engaged in mining operations without first securing a mining license from the relevant government body.[65]

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[61]Tadesse Lencho, 'The Ethiopian Tax System: Excesses and Gaps', *Michigan State International Law Review*, Vol. 20, 2012, p. 330.

[62]Article 52(1), Mining Proclamation. Article 2(11) defines industrial mineral as 'any mineral directly or indirectly used as industrial input such as kaolin, bentonite, quartz, coal, limestone, gypsum, pumice, clay and graphite.' Article 2(3) also defines construction mineral as 'any mineral directly or indirectly used as input for construction purposes such as marble, granite, limestone, basalt, sand, aggregate, ignimbrite and clay and includes any other non-metallic mineral designated as such by directives of the Ministry.'

[63] Article 52(2), Mining Proclamation.

[64]Metallic minerals include iron, copper, zinc, lead, chromite, nickel and manganese (See Article 2(17) of the Mining Proclamation. Precious minerals are precious metallic minerals which include platinum, gold and silver or precious stones such as diamond, emerald, and sapphire (See Article 2(22) of the Mining Proclamation. Semi-precious minerals are gemstones used for jewellery such as opal, rhodolite, olivine, jadite and lazurite (See Article 2(34), Mining Proclamation).

[65] Article 7(1), Mining Proclamation.

However, there are two exceptions to this rule. First, a person who is a legitimate occupant of land may produce and use construction minerals from the land he occupies without a license provided that it should be for non-commercial purpose and does not infringe on the use of an occupant's adjacent land.[66] Secondly, an Ethiopian national is not required to have a reconnaissance license.[67]

The Mining Proclamation provides six types of licenses. These are: a reconnaissance licence, an exploration licence, a retention licence, artisanal mining license, small scale and large scale mining licences.[68]

Reconnaissance refers to an undertaking of general search for any minerals[69] and a license for such operation is granted when the work does not constitute of any geological activity that result in disturbance of the surface of the earth.[70] Exploration license, on the other hand, is granted for search of minerals that involve geological activity disturbing the surface or subsurface of the earth with a view to prove the existence of minerals or determine their economic feasibility.[71]

Retention license is granted for a person who managed to discover commercially exploitable minerals but such minerals cannot be mined immediately due to factors such as adverse market conditions, lack of technology, or any other economic factors.[72] In other words, it is a license that entitles the discoverer, who is currently unable to mine such minerals, the right to develop the minerals in the future. However, such entitlement is temporary in the sense that such license may be revoked and such application may not also be granted if there is good reason to do so.[73]

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[66] *Id.*,Article 7(3).
[67] *Id.*,Article 7(5) .
[68] *Id.*,Article 9.
[69] *Id.*, Article 2(27).
[70] *Id.*, Article 16.
[71] *Id.*, Article 2(8).
[72] *Id.*, Article 23(1)(a) and (b).
[73] According to Article 23(2) of the Mining Proclamation the Licensing Authority may refuse to grant a retention license if it is established that: the required processing technology is available and the mineral deposit can be mined profitably; if it believes that granting of such

Artisanal mining license is granted to individuals and cooperatives whose mining operation is carried predominantly through manual nature and without the involvement of employed workers.[74] In other words, artisanal mining license is granted where advanced methods are not required to undertake the mining operations. That is why the law provides that artisanal mining license can be revoked where it is proved that the proper exploitation of the mineral deposits require advanced exploration and mining methods.[75] However, the licensing authority should give preference to the previous licensee if it can be proved that the licensee has the necessary financial and technical resources to undertake the required mining operations.[76]

Small-scale and large scale mining operations are relatively undertaken by advanced methods and each is distinguished based on the size or amount of mining operations undertaken annually.[77] Mining operations beyond the size or amount designated for small-scale operations as stipulated under 2(35) of the Mining Proclamation are large-scale mining operations.[78] Both mining operations relatively require advanced technical ability and better financial resources.

While reconnaissance and exploration licenses are granted for activities aimed at searching for minerals, artisanal, small-scale and large-scale mining licenses are granted for activities directed at extracting already discovered

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license may prevent fair competition; and if it believes that it would lead to the concentration of mineral resources in the hands of the applicant.

[74] See Articles 2(2) and 32, Mining Proclamation.

[75] *Id.*, Article 32(5).

[76] *Id.*, Article 32(6).

[77] Article 2(35) of the Mining Proclamation defines 'small scale mining' as any mining operation of which the annual run-off mine ore does not exceed:
a) regarding gold, platinum, silver and other precious and semiprecious minerals:(1) 100,000m3 for placer operation; (2) 75,000 tons for primary deposit mining; b) regarding metallic minerals such as iron, lead, copper and nickel: (1) 150,000 tons for open pit mining; (2) 75,000 tons for underground mining operation;
c) 120,000 tones for industrial minerals such as kaolin, bentonite, diatomite, dolomite, quartz and coal; d) regarding construction minerals: (1) 80,000 m3 for sand, gravel, pumice, ignimbrite, clay and the like; (2) 10,000m3 for dimension stones such as marble and granite; (f) 14,000 tons for salts extracted from brines.

[78] Article 2(12), Mining Proclamation.

mineral deposits.[79] Hence, a holder of a reconnaissance or an exploration license, if he is successful in the discovery of minerals, should apply to get either an artisanal, small-scale or large-scale mining license as the case may be.

However, it is important to note that a non-citizen of Ethiopia or any other group of people not registered as a cooperative society in accordance with the relevant law cannot be granted an artisanal mining license.[80] In other words, it is only Ethiopian nationals or cooperative societies registered under law that are eligible to get artisanal mining license. Thus, foreign nationals are entitled to get reconnaissance, exploration, and retention licenses and small-scale and large-scale mining licenses but not artisanal mining license. Article 11(2) of the Mining Proclamation provides that applicants for artisanal mining should not be required to prove the existence of financial resources and technical competence. This provision is also indicative that foreign nationals are not eligible to get such a license since foreign nationals are always required to allocate foreign capital to be able to engage in mining investment.[81]

Applicants should meet the conditions specified under the law so that they would be granted licenses.[82] For instance, According to Articles 26(1) and 28(1) of the Mining Proclamation applicants for small-scale and large scale mining licenses should submit proposed work programme, any evidence that the applicant has access to financial resources, proof of technical ability and an approved environmental impact assessment apart from other requirements stipulated under the Mining Regulation.

A holder of exploration license, in the event that he discovers commercially exploitable minerals, has the prior right to apply for developing such minerals or retention license and be granted such a license.[83] Such

[79] *Id*., Articles 2(18) and 2(20).
[80] *Id.*, Article 11(3)(c).
[81] *Id.*, Article 2(9) .
[82] For further details on the conditions, see Articles 11, 12, 16, 18(1), 23, 26(1), 28(1) of the Mining Proclamation and Article 3, 4 and 5 of the 1994 Mining Regulation.
[83] Article 20(1) (a) and (b), Mining Proclamation.

application may only be refused if the applicant fails to meet certain conditions such as proof of access to financial resources and technical ability.

Even though the law has conferred applicants the right to be granted a license upon meeting the conditions stipulated under the law, the implementation of such right has been marred by some problems. Ethiopia's Ministry of Mines suspended accepting any applications for mineral exploration in November 2011.[84] The justification behind such suspension is the country needed time to evaluate and regulate the companies already in the sector before letting new companies in.[85] Hence, the problem arose due to the Ministry's need to clear the piled up applications and lack of enough number of professionals to process applications.

Even though Minister of the Ministry of Mines promised that the suspension was temporary and that it will eventually be lifted,[86] it has already been more than a year since the suspension was introduced. Potential investors in the mining sector may be wary of filing mineral exploration applications in Ethiopia as the current situation casts some serious doubts on the implementation of rights of applicants of mineral exploration. This is a worrying sign for a country that strives to lure investors in the sector and to ensure mining investments serve as a catalyst for the economy. Even when the Ministry's decision to put a stay on new applications is based on good causes, it does have the potential to frustrate investors eyeing Ethiopia as an investment destination. Hence, serious efforts are required to solve the current problem once and for all and to make sure that similar problems do not arise in the future.

The licenses discussed above have different duration of validity period. A reconnaissance license is valid for a maximum of eighteen months and shall not be renewed afterwards.[87] Exploration license can be valid for a maximum

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[84] 'Ethiopia Says Stay on Mining License is Temporary', Reuters, 16 December 2011. Available at : http://www.reuters.com/article/2011/12/16/ethiopia-gold-idUSL6E7NG2GH20111216 (Accessed on July 20, 2012)

[85] *Id*.

[86] *Id*.

[87] Article 17(1) and (2), Mining Proclamation.

period of three years and unlike a reconnaissance license, it can be renewed twice for a maximum period of one year each.[88] Likewise, a retention license would be valid for a period not exceeding three years. However, a retention license can only be renewed once for a maximum period of three years.[89] Artisanal mining license may also be valid for a period not exceeding three years and can be renewed twice for three years each.[90]

Unlike the other types of license, small-scale and large-scale mining license may be renewed indefinitely. It is important to note that the validity of such licenses shall not be longer than ten years and twenty years for small-scale and large-scale mining respectively.[91] Small-scale and large scale mining licenses may be renewed each for a maximum duration of five years and ten years respectively[92] but they can be renewed even further without any limitation on the frequency of renewal. This confers investors of the right to continue their mining operations without any limit on the frequency of license renewal. Such rights are important to promote mining investment as they provide guarantee to investors that their investments may not be discontinued without good cause. Such security of mineral tenure is important to boost the confidence of investors which in turn would help the country to be a favourable destination for investors.

Mineral rights may be suspended when it is believed that the activity of the licensee is to likely cause danger to the local community, the environment and employees of the licensee with the condition that suspension is the only remedy available under the prevailing circumstances.[93] Licenses may also be revoked due to grounds mentioned under Article 44(2) of the Mining Proclamation.[94] However, the Licensing Authority has the duty to give notice

[88] *Id.*, Article 19(1) and (2).
[89] *Id.*, Article 24.
[90] *Id.*, Article 32(3) and (4).
[91] *Id.*, Articles 29(1) and Article 27(1).
[92] *Id.*, Articles 29(2) and 27(2).
[93] *Id.*, Article 44(1).
[94] The grounds to revoke a license include: Failure to comply with the financial obligations prescribed in the Mining Proclamation; conducting mining operations in a grossly negligent or willfully improper manner; breach of any material term or condition of a license, failure

in writing before taking action on suspension or revocation of licenses. The notice should specify the grounds for considering suspension or revocation, or direct the licensee to take measures to remedy any contravention or breach and the date the licensee is willing to submit any matter in writing that may prevent suspension or revocation.[95]

Any person whose application for exploration or exploitation has been rejected or any licensee whose license has been suspended or revoked can appeal to officials of the Licensing Authority in order of their hierarchy.[96] The person aggrieved by the decision of the Authority may also apply to the competent court provided that all administrative remedies are exhausted.[97]

3.5 Mining Income Taxes, Royalties and other Charges

The income tax on mining operations is governed by the 1993 Mining Income Tax Proclamation as amended. The income tax for large-scale mining operations was 50 percent under the 1993 Mining Income Tax Proclamation. However, Mining Income Tax Amendment Proclamation issued in 1996 reduced the income tax from 50 percent to 35 percent with a view to make the fiscal environment favorable to investors.[98] While there is a significant reduction of the income tax rate in comparison with the previous law, the rate is not lower than the average mining income tax rate of African countries. It is

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to conduct mining operations in accordance with the work programme; breach of the approved environmental impact assessment, and safety and health standards; submission of false or fraudulent information in connection with any matter required to be submitted under this Proclamation, regulations or directives; failure to maintain complete, accurate and current books and records or other documents or materials required or failure to file reports or other documents or failure to give notices required; or failure to grant a duly authorized official of the Licensing Authority access into the license area, the area covered by a lease or to any other site or premises of the mining operations or to his books, records, other documents or materials, or failure to carry out a lawful order or instruction of such official.

[95] Article 44(3), Mining Proclamation.

[96] *Id*., Article 79(1).

[97] *Id*., Article 79(2).

[98] Article 3(1), Mining Tax Proclamation, Proclamation No. 53/1993 as amended by Mining Income Tax (Amendment) Proclamation No.23/1996.

slightly more than the African average. The average corporate income tax in Africa which applies to the mining sector is approximately 32%.[99]

The 35 percent income tax as enshrined in the Mining Income Tax Proclamation is applicable only for large-scale mining operations. As the federal government does not have the constitutional right to determine the rate of income tax for artisanal and small-scale mining, such tax rates are fixed by the laws of each regional state.[100]

Another form of payment required from investors in the mining sector is royalty. Royalty refers to payment by investors to the government just for producing minerals from any given mineral production site and the percentage share of such payment is determined by excluding the price of production and risk expenditures.[101] Currently, the rate of royalty payment for large-scale mining operations ranges from 2 percent to 8 percent applicable for different types of minerals.[102] The royalty rate for precious minerals is 8 per cent. In comparison with many African countries, Ethiopia's royalty rates in particular the royalty rate for precious minerals are high. The average royalty rate on the African continent stands at 4 per cent.[103] For instance, Ghana's royalty rate for gold is 5 per cent (amended from 6 %), Tanzania's 4 per cent, Botswana's 5 percent, Morocco's 3 per cent, Central African Republic 3 percent, and Gabon's ranges from 4 to 6 per cent.[104]

Ethiopia's royalty rates have shown an increment from the royalty applied in the previous law which ranged from 2 percent to 5 percent.[105] The changes

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[99] Gajigo, O., *et al*, 'Gold Mining in Africa: Maximizing Economic Returns for Countries', African Development Bank Group Working Paper Series, 2012, p. 19.

[100] Article 65(2), Mining Proclamation.

[101] *Id.*, Artilce 2(32). There is no definition of what may constitute risk expenditure under the Mining Proclamation. In its ordinary meaning, risk expenditure usually includes market risks of loss that may emanate from changes such as raw material prices.

[102] *Id.*, Article 63(2). Royalty for precious minerals stands at 8 percent, semi-precious minerals 6 percent, metallic minerals 5 percent, industrial minerals 6 percent, construction minerals 3 percent, salt 4 percent and geothermal 2 percent.

[103] Gajigo, *supra* note 99, p. 18.

[104] *Id.*, p. 20.

[105] Article 34, Mining Regulation. This provision is now amended by the Mining Proclamation. The repealed law provided a 5 percent royalty rate for precious minerals, 3

in the royalty rates might have been made due to the constant price increases of especially precious minerals under international market and hence the government's interest to vie for a fair share of the revenues from mining investments.

Increasing tax rates when there is mineral price boom is a practice common in some countries. For instance, countries such as Zambia were under enormous pressure to review the mining contracts with companies while prices boomed.[106] In Tanzania too, with a promulgation of a new Mining Act in 2010 a sharp increase in the royalty rate was introduced.[107] A tendency to vie for a greater share of revenue at a time of mineral price boom is not peculiar to developing countries. Developed countries such as Austria and Norway have also revised their tax regimes on mining with a view to capture greater share from their respective mining sectors.[108]

However, such fiscal regime instability has its own risks. The revisions of tax rates may bring about a reputational risk which ultimately makes the countries less attractive for mining investment.[109] To deal with such adverse consequences of tax rate increment, some countries incorporate stabilization clauses in their laws.[110] For instance, Ghana's law on mining allows the incorporation of stabilization clauses in mining contracts with regard to the payment rates of royalties, taxes, fees and other fiscal imports.[111] It means

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percent for metallic and non-metallic minerals including construction minerals and 2 percent for geothermal deposits and mineral water.

[106] Barma, N., *et al*., *Rents to Riches?: the Political Economy of Natural Resources-Led Development*, the World Bank, Washington DC, 2012, p. 118. Zambia was under pressure from civil society organization and communities to review the mining contracts.

[107] *Id*. With the mining sector significantly playing a role in the economy of Tanzania, electoral politics was the main factor for the change of the law. President Kikwete promised and initiated for a change of the mining laws that finally brought about a new mining code in 2010.

[108] *Id*.

[109] *Id*.

[110] Stabilization clause refers to a provision in a law or contract stipulating that subsequent legislations would not affect rights and advantages granted to investors under a previous law or contract.

[111] See Article 48, Minerals and Mining Act of Ghana (Act 703 Ratified in March 2006). See also Rutherford, L., & Ofori-Mensah, M., 'Ghana's Mining Code: in Whose Interest',

that when a government increases the royalty rates by a subsequent legislation, the new rates would not apply for companies that are already in operation. However, the mining legislation limits the duration of such privilege to mining companies for 15 years.[112]

Ethiopia's Mining Proclamation does not incorporate provisions allowing for stabilization clauses for royalty and income taxes. In the absence of a law that authorizes the government to enter into contracts containing stabilization clauses, it appears that the government cannot conclude a mining contract containing such a clause. Even when the government does so in the mining contracts, under Ethiopia's legal framework, a subsequent legislation would prevail over the mining contracts.

Whether stabilization clauses should be included in mining laws or contracts has been a subject of controversy in the mining investment discourse. There are some who see such commitments as necessary to ensure a long term financial commitments by companies.[113] On the other hand, such commitments are viewed as problematic as they do not allow countries to increase their revenues in proportion to some of the unprecedented price hikes in minerals.[114] Moreover, with a significant price rise, royalty rates have insignificant burden on mining operations.[115] Hence, the variation of royalty rates during mineral price hikes may not have a significant impact on the operation and decision to invest.

The Ethiopian law in this regard arguably follows the right approach. Such an approach would give the country an opportunity to take advantage of any unprecedented mineral price increases without significantly affecting the actual mining operations and potential mining investments. However, there has to be a room for flexibility that allows the government to reduce the royalty rate in case there is a significant mineral price reduction in the world

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Governance Newsletter, *A Publication of the Institute of Economic Affairs, Ghana*, Vol.17, No. 7, 2011, p. 5.

[112] Article 48, Minerals and Mining Act of Ghana.

[113] Rutherford & Ofori-Mensah, *supra* note 111.

[114] Ayee, J., *et al.*, 'Political Economy of the Mining Sector in Ghana', the World Bank Policy Research Working Paper, WPS5730, 2011, p. 10.

[115] Gajigo, *supra* note 99, p. 25.

market. In fact to avoid any abuse, the law should provide a minimum rate that prohibits making deals for a rate that is below the minimum threshold.

With regard to royalty rates for small-scale and artisanal mining, the Mining Proclamation provides that the rates are to be determined by the respective regional states.[116] This law is simply affirming the constitutional right of states to collect income taxes and royalties from artisanal and small-scale mining operations. As mentioned earlier, regional states in Ethiopia have the exclusive jurisdiction over levying and collecting income taxes and royalties from artisanal and small-scale mining operations.

Any mineral licensee shall also pay surface land rentals in accordance with the rates fixed by regional state laws.[117] When the rates of land rentals are revised, the new rates will not be applicable to licenses issued before the revision.[118]

3.6 Mining Incentives and Guarantees

The overall benefits of incentives are to boost investments, from home and abroad, and in turn ensure that such investments play an important role to promote development objectives of a state through job creation and other positive externalities that would come along with increased investment.[119] More specifically, incentives can be used to achieve some targeted objectives. They can be used to promote regional development through encouraging investors to locate their investment in a particular area or region.[120] Incentives may also be employed to promote export, job creation, skills, training, and domestic value addition, and transfer of technology.[121]

On the other hand, incentives by their nature represent revenue costs. First, incentives may not be able to attain the very goal many developing countries

[116] Article 63(3), Mining Proclamation.
[117] *Id.*, Article 68(1).
[118] *Id*.
[119] James, S., 'Incentives and Investments: Evidence and Policy Implications', The World Bank Group, 2009, p. 3.
[120] United Nations Conference on Trade and Development, 'Tax incentives and Foreign Direct Investment: A Global Survey', UNCTAD/ITE/IPC/Misc.3, 2000, p. 12.
[121] *Id*., p. 13.

are eager to achieve i.e. attracting investment. The majority of evidence is skeptical of the role of incentives in attracting investment.[122] In many developing countries incentives have brought about serious revenue losses while the corresponding perceived advantages of incentives did not materialize.[123] Moreover, if incentives are granted to investments that would have been made even in the absence of incentives, the revenues that are foregone by governments become only costs as the revenue sacrifice is made unnecessarily.

Be this as it may, both developed and developing countries have continued to use incentives though to a different degree. This situation has brought about competition especially among developing countries as they are keen to attract capital.

Ethiopia has also provided different types of incentives for mining investment with a view to attract investors and enable the sector to play its role in spurring the economic growth of the country. One of the types of incentives provided under the Ethiopian law is exemption from customs duties and taxes. Any equipments, machineries and vehicles imported by holders of exploration license, small-scale and large-scale mining licenses are exempted from customs duties and taxes.[124] However, holders of artisanal mining license and holders of any construction minerals mining license are not eligible to exemption of import taxes and duty free materials.[125]

The exemptions are not granted throughout any stages of small-scale and large scale mining operations because Article 73(2) of the Mining Proclamation reveals that the materials to be exempted from customs duty and taxes should be necessary to start mining operations. Once a mining operation

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[122] Barbour, P., 'An Assessment of South Africa's Investment Incentive Regime With a Focus on Manufacturing Regime', ESAU Working Paper 14, Overseas Development Institute, 2005, p. 6.

[123] Holland, David and Vann, Richard, Income Tax Incentives for Investment, *in* Thuronyi, Victor (ed.), *Tax Law Design and Drafting*, volume 2; International Monetary Fund: 1998.

[124] Article 73(1) and (2), Mining Proclamation. Equipments, machineries, and vehicles imported by contractors of the holders of the licenses are also exempted from payment of customs duties and taxes.

[125] *Id.*, Article 73(6).

is began no exemption will be allowed unless the license holder decides to undertake major expansion on his mining investment. If a holder of small-scale or large-scale mining license decides to make major expansion, equipments and machineries needed for such expansion would be exempted from customs duties and taxes.[126]

Consumables may also be imported free of customs duty and taxes by a holder of exploration license during anytime of its operation while holders of small-scale and large scale mining license holders may only do so to start and sustain commercial production of minerals for three months.[127]

Other types of incentives in mining investments include reinvestment deduction and losses carry forward. Any licensee who pays mining income tax is also entitled to deduct each accounting year a non-taxable amount equal to 5 percent of gross income provided that such licensee reinvests the deducted amount.[128] However, such amount shall be subject to taxation if the licensee fails to reinvest the capital.

Moreover, the law encourages mining investors through what is known as losses carry forward. Loss carry forward is an accounting principle that allows the transfer of current year's net operating losses to future year(s) profits with a view to reduce tax liability for an investor or a business person. In Ethiopia, financial losses incurred by investors engaged in mining investment may be

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[126] *Id.,* Article 73(4). The Ethiopian investment law also provides exemption from payment of export taxes. Minerals produced and exported by holders of artisanal, small-scale and large-scale mining are also exempted from export taxes and customs duties. The objective of such incentive may be to promote export of such minerals and thereby earn a much needed foreign currency to the country. Moreover, it may also be to enable exporters from Ethiopia to be competitive enough at the international market. However, it is important to note that as virtually all products exported from Ethiopia are exempted from payment of export taxes, such advantage granted to investors in the mining sector may not necessarily be considered as an incentive proper.

[127] *Id.,* Article 73(1) and (3). Article 2(4) of the Mining Proclamation provides that "consumables" are anything needed for mining operations that are expendable and replaced during service including chemicals and those the Ministry of Mines may designate as consumables.

[128] Article 9(1), Mining Income Tax Proclamation. If such amount is not reinvested, it will be included in the gross income of the subsequent accounting year and hence will be taxable in the subsequent accounting year.

carried forward and deducted from gross income in the subsequent ten accounting years.[129]

The duration of losses to be carried forward for minerals is similar with the duration that is allowed for petroleum resource investments.[130] However, the duration of losses carried forward for other types of businesses is three years provided that during the life span of any business losses can only be carried forward for a maximum period of six years.[131] The reason why financial losses in mining investment are carried forward for longer years than other types of investments is related to the high financial and capital risks involved in mining investments. Such investments may incur huge financial and capital losses in a given accounting year and may not be able to compensate such losses in a short period of time. The nature of the investment also requires expenditure of huge capital. This would in turn have adverse consequences on the very existence of the mining investments. This necessitates a longer period of losses carry forward for such investments.

Furthermore, small-scale and large-scale mining license holders that produce exportable minerals are entitled to retain a portion of foreign currency earnings subject to rules stipulated under directives issued by National Bank of Ethiopia.[132] Foreign investors are also allowed to repatriate capital out of Ethiopia in convertible foreign currency. Foreign investors holding small-scale or large scale mining licenses can repatriate the following capital out of Ethiopia: Profits and dividends acquired from mining investment, principal

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[129] Article 10(1), Mining Proclamation. Losses or damages to physical assets not covered by insurance may be deducted from gross income in the accounting year the loss occurred (Article 10(2)). For such losses to be deductible from gross income so that they would be non-taxable, they should not arise from penalties or fines.

[130] As per Article 14 of the Income Tax Proclamation on Petroleum Operations, a loss incurred by persons engaged in petroleum resources may be carried forward for a maximum of ten consecutive accounting years following the lapse of the year in which the losses occurred. See A Proclamation to Provide for Payment of Income Tax on Petroleum Operations, Proclamation No. 296/1986.

[131] Article 28(1) and (3), Income Tax Proclamation, Proclamation No. 286/2002, *Federal Negarit Gazeta*, 8th year No. 34.

[132] Article 72(1), Mining Proclamation.

and interest on a foreign loan, payment from the transfer of shares or property and proceeds from the sale of mining enterprise.[133]

The right of investors to repatriate capital under Ethiopian law is broad. In theory this should provide sufficient guarantees to investors as far as repatriation of their capital is concerned. As the ultimate goal of foreign investors is usually to make profits and repatriate such capital out of the host state, such right is instrumental in ensuring long term investment projects are made.[134] Hence, an otherwise investment environment would frustrate investors and will ultimately have the potential to stifle foreign investment in the mining sector.

Nevertheless, the right to repatriate capital may not be a right that is always translated into action whenever the request is made. There may be circumstances especially during economic crisis that force countries to put a stay on the request of investors to repatriate their capital even when under the law such right is absolute. This should not be viewed as breach of obligations because absolute right of repatriation cannot bind a state to honor such obligation if a state is in times of serious financial difficulties.[135]

Under Ethiopia's Mining Proclamation and the BITs concluded by Ethiopia the right to repatriate appears to be absolute as the law does not provide restrictions on the exercise of such right provided that documents necessary to process repatriation application are presented to the National Bank of Ethiopia (NBE). According to the Directive of the NBE, the documents required to process profit repatriation application include: Extraction of the minutes of the Board of Directors or an equivalent body distributing the profit or declaring dividend; Copy of the usual closing financial documents duly audited by an independent third party auditing institution permitted to operate in Ethiopia; a letter recognizing the foreign investment; Photo-copies of tax receipts evidencing the payment of all taxes

[133] *Id.*, Article 72(2).
[134] Sornarajah, M., *The International Law on Foreign Investment*, 2nd edition, Cambridge University Press, 2004, p. 237.
[135] *Id.*, p. 239.

due to the government; and any other document of evidence that the Exchange Controller may require.[136]

In practice investors face delays to exercise their rights to repatriate profits even though they are not denied repatriations.[137] Foreign investors sometimes face significant delays in the repatriation of capital as the NBE does not have enough hard currency to allocate to their requests.[138] This is especially so during serious financial stringency in the country. Therefore, even though there are legal assurances on the right to repatriate, the delays to exercise the rights emanating from shortage of foreign currency can be a source of uneasiness for investors looking to make long term investments.

The government may also provide other types of incentives which are not mentioned in the Mining Proclamation under certain circumstances.[139] This provision gives the government a flexibility to grant additional incentives for mining investments that may be considered more crucial to promote the development of the country.

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[136] See the Consolidated Foreign Exchange Directives of the National Bank of Ethiopia. Available at: http://www.nbe.gov.et/pdf/Consolidated%20Forex.pdf (Accessed on June 12, 2012).

[137] Precise Consult International, 'Investing in Ethiopia: the Question of Capital Repatriation', Accessed from: www.ethiopiainvestor.com (accessed on Oct. 2012). 'When application for repatriation is made by foreign investors, the NBE gives the permit to repatriate usually without delay and proceeds to write a letter to commercial banks permitting payment. However, commercial banks that are presented with such letters do not provide foreign currency quickly to applicants because they are faced with shortage of foreign currency.' On the repatriation application process, see Precise Consult International, *Id*.

[138] U.S. Department of State, *2011 Investment Statement Climate- Ethiopia* (2011). Available at: http://www.state.gov/e/eb/rls/othr/ics/2011/157275.html. (Accessed on Nov. 12, 2012). It is also important to note that all foreign currency transactions are transferred through the NBE and Birr-the local currency is not freely convertible. This can make the transfer of foreign currency a bit difficult. To minimize such problems the law entitles investors that produce exportable minerals to retain a portion of foreign currency earnings to use them for settlement of transactions in foreign currencies. This right is subject to regulations issued by the NBE. See Article 72(1), Mining Proclamation

[139] Article 75(1), Mining Proclamation. Additional incentives and assistance may be provided by the government when there is reason to believe that some of the mining operations can help address immediate socio-economic problems of the country, to encourage consumption of local goods and to support cooperatives engaged in artisanal mining.

Apart from incentives which might induce investors to undertake investment activities in a host state, the guarantees available in a country play an important role in attracting foreign investments. Investors want to see that there are sufficient protections to their investment activities that ensure they are compensated in the event of lawful expropriation.

The Mining Proclamation, surprisingly enough, fails to incorporate provisions dealing with conditions and manner of compensation in the event that expropriation takes place. This may raise some concerns unless a guarantee for compensation against expropriation is given for investors in other laws or mining contracts. In fact, as per Art 40(8) of the FDRE Constitution, private properties will not be subject to expropriation unless there is a legitimate public interest. What is more, the Constitution provides that the expropriation has to be made against payment of compensation commensurate to the value of the property. It also provides that payment of compensation has to be effected in advance.

However, Art 40 of the FDRE Constitution uses the term 'every Ethiopian citizen (Art 40(1)) and 'every Ethiopian' (Art 40(7)) in specifying persons whose properties are protected. Such terminology may bring about some academic controversy. It may be interpreted that properties of foreign nationals, while protected under other laws, are not given due protection under the FDRE Constitution since the provision makes express reference to Ethiopian nationality.

On the other hand, it may also be argued that the reference to Ethiopian nationals in the provision does not exclude protection of properties of foreign investors who undertake business through legal persons (companies or entities). Ethiopian nationality is conferred not only on natural persons but also legal persons. Hence, this provision may refer to both natural and legal persons who have Ethiopian nationality. In this case, even though foreign natural persons may not have acquired Ethiopian nationality, the enterprise or the company they establish can be regarded as an entity that has Ethiopian nationality and be entitled to protection given under Art 40 of the Constitution.

Another problem regarding the issue of expropriation and compensation is the lack of a well-defined scope of expropriation in domestic legal instruments. While there is no clear indication as to the meaning of expropriation under the Constitution and the Mining Proclamation, the reading of the Amharic version of Art 40(8) reveals that the compensation is granted when a direct expropriation takes place.[140] It does not indicate that the same protection is accorded when a creeping or an indirect expropriation takes place.

A creeping expropriation "may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor's rights of use of the property are diminished as a result of the interference by the state."[141] As direct expropriation is becoming increasingly less common[142], currently creeping expropriations are viewed as a severe form of interference on investment undertakings. Therefore, even when we interpret the FDRE Constitution as providing appropriate compensation for expropriation of any private property, apparently it does not provide a protection for creeping expropriation. Hence, unless other instruments accord protection against creeping expropriation, there appears to be little room for compensation against creeping expropriation under the FDRE Constitution.

As explained above, the Mining proclamation does not also say on the issues of compensation in case of expropriation in general and creeping expropriation in particular. This is not to suggest that expropriation issues are not addressed in any legal instruments in Ethiopia. In fact, bilateral investment

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[140] Direct expropriation constitutes the actual taking of property by a government by direct means which may comprise of the total loss or a portion of property. Direct expropriation takes place through a formal transfer of title or outright seizure. For further distinctions between direct and indirect expropriation See Subedi, S., *International Investment Law: Reconciling Policy and Principle,* Hart Publishing, 2008.

[141] Reinisch, A., Expropriation, *in* Muchlinski, P., *et al*., (eds), *The Oxford Handbook of International Investment Law*, 2008, p.427 as quoted in Leon, P., 'Creeping Expropriation of Mining Investments: An African Perspective', *Journal of Energy and Natural Resources Law*, Vol. 27 No.4, 2009, p. 598.

[142] *Id*.

treaties (BITs) concluded by Ethiopia have provisions dealing with expropriation and compensation. Because mining investments are within the scope of the meaning of investments as defined in all BITs signed by Ethiopia, provisions of expropriation and compensation as provided in these instruments have direct relevance for mining investment expropriation issues in Ethiopia.[143] So far Ethiopia has concluded more than 25 BITs and all the BITs have provisions that address expropriation issues in general and creeping expropriation in particular except Ethiopia's BITs signed with China, Malaysia, and Libya.[144]

The BITs mainly use similar expressions to refer to direct and indirect expropriations. While some of them expressly use terms as 'direct or indirect measures' other employ phrases such as 'expropriations, nationalization or any other measure having the same nature or the same effect'.[145] These

[143] All definitions of the term Investment under BITs concluded by Ethiopia provide that investment refers to every kind of asset including concessions conferred by law or under contract to search for, explore or exploit natural resources. Please see the definition sections of BITs Concluded with Ethiopia. The list of countries that concluded BITs with Ethiopia are mentioned under *Infra* note 144.

[144] Ethiopia has concluded BITs with Algeria, Austria, Belgian-Luxemburg Economic Union, China, Denmark, Djibouti, Egypt, Equatorial Guinea, Finland, France, Germany, India, Iran, Israel, Italy, Kuwait, Libya, Malaysia, the Netherlands, Russia, Spain, Sweden, South Africa, Sudan, Switzerland, Tunisia, Turkey, and United Kingdom. Ethiopia's investment promotion agreement with Djibouti has more favourable terms with a view to grant special privileges to citizens of both countries. This feature makes the agreement different from the basic content found in other BITs concluded by the country.

[145] For further information on provisions of expropriation and compensation in BITs concluded by Ethiopia See some of them which are contained in Article 5(1) of Ethiopia—Austria BIT, Article 7(1) of Ethiopia-Belgian Luxemberg BIT, Article 5(1) of Ethiopia-Finland BIT, Article 4(2) of Ethiopia-Germany BIT, Article 5(1) of Ethiopia-India BIT, Article 5(1) of Israel, Article 5(2) of Ethiopia-Italy BIT, Article 6(1)(a) of Ethiopia-Kuwait BIT, Article 4(1) of Ethiopia-Russia BIT, Article 4(1) of Ethiopia-Sweden BIT, Article 6(1) of Ethiopia-Switzerland BIT, and Article 5(1) of Ethiopia-United Kingdom BIT. For instance, Article 5(1) of Ethiopia-United Kingdom BIT in its relevant part provides " Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation."

expressions reveal that the BITs protect and guarantee against both direct and indirect expropriation.

The BITs Ethiopia concluded with China, Malaysia, and Libya have provisions referring to direct expropriation but they do not contain expressions that tacitly refer to indirect expropriation.[146] A lack of direct reference to creeping expropriation may not necessarily mean that provisions on expropriation and compensation of these BITs exclude indirect expropriation. However, it opens a room for a wide range of interpretations.

Almost all BITs also stipulate that expropriations measures (whether direct or indirect) should only be taken in public interest, without discrimination and against payment of prompt, adequate and effective compensation.[147]

Therefore, it appears that there are sufficient protections and guarantees against expropriation-both direct and indirect as provided under the BITs Ethiopia concluded. However, these protections and guarantees are extended only for investors that come from countries which have entered into a BIT with Ethiopia. This makes the incorporation of clear provisions governing expropriation under the Mining proclamation all the more important.

It is also important to note that mining operations are governed by mining contracts concluded between investors and the government apart from laws formulated by states. This provides investors opportunities to incorporate terms that sufficiently protect and guarantee their investment. Since the terms of the contracts are laws as between the contracting parties, properties of investors would also find guarantees under such contracts. Furthermore, the Mining Proclamation stipulates that disputes related to expropriation or any other disputes between investors and the government would be settled by arbitration.[148] Such disputes, more often than not, are submitted to international arbitration tribunals if amicable settlement is not reached. This would provide opportunities for investors to claim and enforce guarantees provided in domestic laws, BITs of the country and mining contracts.

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[146]See Article 5 of the BIT between Ethiopia and China, Article 5 of the BIT between Ethiopia and Malaysia, and Article 4 of the BIT between Ethiopia and Libya.

[147] *Supra* note 145 and 146.

[148] Article 76, Mining Proclamation.

3.7 Social and Environmental Considerations

Mining industry can present opportunities to spur economic growth of a state if properly managed. However, the industry has huge social and environmental ramifications. The potential benefits of the mining industry may actually turn out to be a curse if there is no proper regulatory framework to address the social and environmental consequences of mining investments. Hence, one of the main issues in the mining sector is how to strike the necessary balance between the need to promote mining investments on the one hand and to address social and environmental problems that would come along with such investments on the other hand. All countries that host mining investments are confronted with similar problems.

Countries hosting mining investment have a daunting task of balancing the desire to attract investors in the sector and the need to manage the adverse consequences of mining investments. Such problems though faced by all countries are more challenging for developing countries as they do not have enough leverage to set what may be considered as best social and environmental standards against big companies. They are usually caught up by a dilemma of either to raise the social and environmental standards and risk flow of mining investments or lower the standards and risk the protection of social and environmental interests.

The Ethiopian mining law has incorporated different provisions that are intended to protect social and environmental interests. One of such considerations is the protection provided to reserved areas in the country. Areas reserved for purposes that serve some national interests will not be available for mining operations. According to the Mining Proclamation, areas reserved for cemeteries and religious sites, archaeological remains and national monuments, physical infrastructure, natural habitats or national parks, areas within 500 metres from the boundary of a village, city or water reservoir or dam shall not be available for mining operations.[149]

Exclusion of some areas from any mining operations shows the serious attention given to some social and environmental interests. However, the same

[149] *Id.*, Article 6(3).

provision also stipulates that such reserved areas may be open for mining investment where the government finds that it is in the national interest of the country to do so.[150] The law does not list which circumstances may be regarded in the national interest of the country. Hence, such stipulation gives the government the power to decide on case by case basis the circumstances that may be regarded in the national interest of the country. However, lack of clarity on such issues may ultimately have the effect of undermining social and environmental interests.

Another obligation relates to job creation requirements. Mining companies in Ethiopia are required to give preference to the employment of Ethiopian nationals than foreign nationals provided that the Ethiopian nationals have the expertise needed for the job.[151] This is an attempt by the law to ensure that the mining investments generate jobs. If no qualified Ethiopian experts are available they are free to employ foreign experts.

Unlike the Investment Proclamation No. 769/2012 - A Proclamation that governs virtually all other investments,[152] the Mining Proclamation does not impose obligations on investors to train Ethiopian nationals with a view to transfer skills to Ethiopians and ultimately replacing foreign experts by Ethiopian nationals. Thus, according to the law governing mining investments, providing training to Ethiopian nationals is voluntary. However, it is important to note that under the Mining Proclamation foreign experts can only be employed if Ethiopian nationals are not available possessing the qualifications needed for the job.

Companies should also undertake their mining activities in ways that would ensure the health and safety of their employees.[153]

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[150] *Id*., Article 6(5).

[151] *Id.*, Article 34(1)(h).

[152] A Proclamation on Investment, Proclamation No. 769/2012, *Federal Negarit Gazeta*, 18th year No. 63. Article 37(2) of this Investment Proclamation provides that an investor who employs expatriate shall be responsible for replacing such expatriate personnel by Ethiopians by arranging the necessary training with a short period of time. This obligation does not apply to investors in mining operations as mining investments are not governed by this Investment Proclamation.

[153] Article 34(1)(b), Mining Proclamation.

Furthermore, an exploration licensee has the obligation to participate in community development and such responsibility should be undertaken through allocating money for such purpose.[154] However, the specific type of community development is not expressly provided in the Mining Proclamation and the manner of the participation in community development is basically determined by agreement with the licensee.

Moreover, while the Mining Proclamation envisaged the enactment of a regulation for the proper implementation of investors' obligations on community development, such regulation has not been formulated yet. The Mining Regulation which is currently in force does not provide guidelines or any other rules on how investors may be involved in community development. Such scenario would further hinder the proper implementation of investor's duty to participate in community development. The laws are also devoid of any bases to determine the amount of money that investors in the mining sector should allocate for community development. The lack of such parameters can create a situation where investors allocate little or no money for community development.

In practice, some of the investors take part in community development. They are engaged in projects such as clean water supply,[155] construction of schools and reforestation programs.[156] However, the money allocated by these investors does not get prior approval from the Ministry while the law requires that such amount is to be determined by agreement with the Ministry.[157] For instance, the amount of money allocated by some companies

[154] *Id*., Article 60(3).

[155] The Shakisso Clean Water Project in Legadembi is one such a project by Midroc Gold PLC. See Midroc Ethiopia Technology Group, 'Corporate citizenship', available at: http://www.midroc-ceo.com/?q=ccitizenship (Accessed on November 5th, 2012).

[156] A secondary school is constructed by Nyota minerals in its Tulu Kapi Project area. Nyota Minerals Limited has also been operating a nursery that grows and distributes seedlings to support erosion protection and reforestation programs in Gunji Woreda. See, Nyota Minerals Limited, 'Corporate Social Responsibility', Available at: http://www.nyotaminerals.com/corporate-social-responsibility (accessed on October 5th, 2012).

[157] Article 60(3), Mining Proclamation.

in the mining sector last year ranged from Birr 100,000 to 500,000.[158] The data available does not include contributions from all companies in the mining sector and it appears that some have made contributions in excess of Birr 500,000 each year. Nyota Minerals Limited claims to have invested in excess of Birr 2.65 million in two years time in its Tulu Kapi Project.[159]

However, the amount of money the companies allocated for community development was decided by the companies themselves and the differences in the amount of money each company allocated was not related to the size of the mining area, the financial capacity of the companies or any other relevant considerations. It appears that the absence of clearly defined criteria for determining the amount of money companies should contribute for community development has resulted in arbitrary allocation of fund. This situation opens a door for allocation of unfair or insignificant amount of money even by companies with large mining or exploration license areas.

The law has also incorporated local content requirements with a view to encourage local manufacturers and service providers. Local content requirement is a nontax tool forcing companies to use domestic inputs.[160] Many countries especially developing countries have utilized local content requirements for a long time with a view to protect domestic producers and generate local employment.[161] Mining companies in Ethiopia have the obligation to give preference to domestic goods and services if such goods and services have competitive quality and price.[162] However, Ethiopia may not

[158] Ministry of Mines (on file with the author). The lowest contribution from the available data was made by Ezana Mining Development P.L.C. and Derba Midroc P.L.C.(Gypsum Production) each allocating Birr 100,000, and the highest by Pioneer Cement Manufacturing with Birr 500,000 allocation and the rest made contributions that range between 100,000 to 500,000 Birr. Other companies which allocated fund for community development include Midroc Gold Mining P.L.C (Birr 120,000), Abjata Soda Ash Share Company(Birr 180,000), East Cement Share Company(Birr150,000), Capital Cement P.L.C(Birr 200,000), Samaka Marble P.L.C(Birr 250,000), CH Cleaner P.L.C (Birr 120,000), and Enchini Bedrock P.L.C (Birr 200,000).

[159] *Supra* note 156.

[160] Rivera-Batiz, L., & Oliva, M., *International Trade: Theory, Strategies, and Evidence*, Oxford University Press, 2003, p. 448.

[161] *Id.*

[162] Article 34(1)(i), Mining Proclamation.

benefit much from such requirements as the country does not currently have the capacity to manufacture many of the inputs needed for mining investments. Hence, in practice the largest proportions of the goods needed for mining investments would be imported. Be this as it may, such requirement is important to create market for services and some of the products that are being manufactured in the country and this will be more so in the future when the country's manufacturing industry grows.

Another area of concern that the Mining Proclamation tries to address is the environment. Mining investments pose significant environmental risks. Even though the degree of environmental impacts of mining would differ based on the minerals worked, the degree of working, and the location and size of the mine, it is inevitable that mining operations impact on the environment as they involve exploration for and exploitation of mineral deposits by surface or underground methods.[163] The impacts of mining include, among other things, subsidence, air and water pollution, deforestation, land degradation, and may ultimately endanger the health and life of local communities.[164] Especially the use of acid and other chemicals in mine operations may pollute the water resources adversely affecting the health, life and livelihood of local communities.[165]

Thus, unless efforts are made to undertake environmentally responsible mining, mining investment could be counterproductive. However, in practice this is a difficult balance. Especially developing countries are increasingly driven to compete with each other to attract mineral investment and that as a result they have made commitments to undervalue their environment through setting lower environmental standards or through failure to enforce their environmental regulations.[166] Such competition is a result of the belief that

[163] Bell, F., & Donnelly, L., *Mining and Its Impact on the Environment*, Taylors and Francis, 2006, p. 5.
[164] *Id,* p. 8.
[165] *Id*.
[166] Tienhaara, K., 'Mineral Policy in Developing Countries: Protecting Investors or the Environment' (Paper Presented at the Berlin Conference on the Human Dimensions of Global Environmental Change, 2006), pp. 3-4.

investors are attracted to countries with lower environmental costs.[167] However, the competitions should not be made in ways that compromise sustainable development as practice has shown that lack of effective environmental regulations would bring about huge ramifications not only on the environment but also on the health and living standards of local communities.[168]

The FDRE Constitution, in general terms, provides that economic development projects shall not be undertaken in ways that damage or destroy the environment.[169] It also provides that the government has the duty to ensure the society is consulted on activities that affect their environment. [170] Furthermore, the Environmental Policy of Ethiopia provides that utilization of minerals should be undertaken in ways that can ensure the long-term usability of land and other natural resources.[171] To this effect, it stipulates that conditions for pre-development environmental impact assessment, sound environmental management practices and mitigation measures after operation should be imposed.[172] It also envisaged the enactment of specific mining environmental protection legislation that governs the operations of mining.

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[167] *Id*.

[168] Mining Investments have brought about some major environmental disasters. One of the leading examples of such disasters is the Ok Tedi mine in Papua New Guinea . The project operates to extract minerals mainly copper. The mine project discharges millions of tons of mining waste annually harming the environment and livelihood of 50,000 people who live on or near the Ok Tedi River. The pollution occurred as a result of the collapse of the Ok Tedi tailings dam system and the lack of a proper waste retention facility. The environment contamination is so immense that it is expected that it will take many years to clean up. Mining investments have also brought about environmental problems in many parts of the world including Africa. For mining and its environmental impacts in Africa, see OECD, *Environmental Impacts of Foreign Direct Investments in the Mining Sector in Sub-Sahara Africa*, (2002). Available at: http://www.oecd.org/env/1819582.pdf (Accessed on July 15, 2012).

[169] Article 92(2), FDRE Constitution.

[170] *Id*., Article 92(3).

[171] The 1997 Environmental Policy of Ethiopia. The Policy stipulates that environmental control should be made on mining operation so that the land where the mining activities has been undertaking can ultimately be used for agriculture and other economic activities once the mining activity is closed.

[172] *Id*.

The Mining Proclamation has incorporated some provisions that are aimed at addressing some of the potential environmental problems. It has to be noted, however, that generally environmental issues including those related to mining are governed by Environmental Impact Assessment Proclamation and other environmental regulations of the country.[173] The provisions in the Mining Proclamation are meant to add emphasis to the issue of environmentally responsible mining and to include some concerns which are specific to the mining industry.

According to the Mining Proclamation all mining license holders except reconnaissance, retention and artisanal are required to submit environmental impact assessment and they can continue the mining operations only when the necessary approval is granted from federal environmental protection authority or regional authorities as the case may be.[174] Reconnaissance license holders are not required to undergo environmental impact assessment because their activity does not involve disturbance of the surface or subsurface of the earth. It is a mere search for minerals without disturbing the outer or the inner surface of the earth. Thus, it does not have the potential to bring about adverse environmental consequences and hence there is no need to impose environmental impact assessment requirements.

Furthermore, companies have also the duty to conduct mining operations in a manner compatible with applicable laws pertaining to environmental protection at any stages of the mining operation.[175] The Environmental Impact Assessment Guidelines (Environmental Guidelines) set by Ethiopia's Environmental Protection Authority also stipulate measures that need to be taken at any stage of mining operations.[176] The Environmental guidelines

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[173] See Environmental Impact Assessment Proclamation, Proclamation No.299/2002, The Environmental Protection Organs Establishment Proclamation , Proclamation No. 295/2002; Environmental Council Directive no.1/2008, Directive Issued to Determine the Categories of Projects Subject to the Environmental Impact Assessment Proclamation No. 299/2002.

[174] Article 60(1), Mining Proclamation.

[175] *Id*., Article 60(1)(b).

[176] Environmental Impact Assessment Guidelines (Environmental Protection Authority, 2003).

specify what measures should be taken during mineral surface and subsurface exploration, mineral extraction and processing, quarry development and at the time of mine closure.

However, environmental issues in mining operations seem to have been poorly addressed. In general, there is a lack of an effective environmental impact assessment due to lack of human and financial capacity on the part of implementing organs, lack of legal and institutional arrangements for effective coordination and communication among the regional and federal offices of the government.[177] The mining operations are also causing some real damage to the environment. In particular, artisanal gold mining operations in Ethiopia are causing physical land degradation, open tunnels and pits and deforestation and little rehabilitation efforts are made.[178] Problems of air pollution due to clay and limestone mining operations in some parts of the country particularly where cement manufacturing plants are located have also been observed.[179]

Furthermore, there are no specific environmental laws that govern the particular challenges of the mining sector. Only guidelines and standards which do not have a binding authority are available. The non-binding nature of these specific guidelines hampers an effective implementation of environmentally responsible mining. In fact, there are some general environmental laws that are intended to address environmental problems. While they are applicable to the mining operations as the case may be, they do not as such effectively address the specific problems of mining operations. Due to the unique nature of such investment, specific binding regulations that take the particular challenges of the industry into account would be desirable.

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[177] Mellese Damtie and Mesfin Bayou, 'Overview of Environmental Impact Assessment in Ethiopia: Gaps and Challenges', MELCA Mahiber, 2008, p. 59.

[178] Ministry of Mines and Energy of the Federal Democratic Republic of Ethiopia, *supra* note 15, p. 10.

[179] Ministry of Mines (on file with the author). Clay and limestone are raw materials that are mainly used for the manufacturing of cement.

Conclusion

The contribution of the mining sector to the Ethiopian economy has been insignificant. However, this trend is changing in recent years. Cognizant of the potential contribution of minerals to the Ethiopian economy, due attention is currently being given to the development of the sector. Accordingly, Ethiopia has reformed its legal framework on minerals with a view to make the mining sector an important catalyst for the economic development of the country.

After several years of experimentation, the laws on minerals have undergone significant changes creating more favourable environment for mining investments. The laws provide sufficient protection, guarantees and incentives. This is an important step in alluring investors to locate their investments in the country. However, there have been concerns in implementing some rights of investors enshrined on paper. If these problems persist, they can have adverse impacts on the country's potential to become a destination for long term mining investments.

Even though there are many factors that determine flow of capital in mining investment, legal framework is at the core of such factors. Hence, the legal reform on minerals in Ethiopia is a step in the right direction and is expected that it would boost mining investments.

The potential benefits of the mining industry may turn out to be a curse if there is no proper implementation and regulatory framework to address the social and environmental consequences of mining investments. The Ethiopian mining law has incorporated different provisions that are intended to protect social and environmental interests. However, social and environmental issues in mining operations seem to have been poorly addressed.

There is generally a lack of an effective environmental impact assessment. The mining operations are also causing some real damage to the environment. In particular, artisanal gold mining operations in Ethiopia are causing high level of physical land degradation and deforestation and in many places rehabilitation efforts are not made.

Furthermore, there are no specific environmental laws that govern the particular challenges of the mining sector. Only guidelines and standards which do not have a binding authority are currently in use. Due to the unique

nature of such investments, specific binding regulations that take the particular challenges of the industry into account would be desirable.

The Mining Regulation which is currently in force does not also provide guidelines or any other rules on how investors may be involved in community development. Such scenario would further hamper the proper implementation of investor's duty to participate in community development. The laws are also devoid of any bases to determine the amount of money that investors in the mining sector should allocate for community development. The lack of such parameters can create a situation where investors allocate little or no money for community development. While the Mining Proclamation envisaged the enactment of a regulation for the proper implementation of investors' social obligations such as community development, such regulation is not enacted yet. The government and other stakeholder need to formulate the necessary regulations and take measures to address the practical problems on the ground.

The Question of Independent and Impartial Constitutional Adjudicator in Ethiopia: A Comparative Study with Germany and South Africa

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Abstract

This article sets out to evaluate whether the Ethiopian constitutional adjudicator meets standards of independence and impartiality to handle constitutional adjudicatory role. It assesses the institutional organization of the constitutional adjudicator, and how and by whom its members are elected or appointed. It considers the various elements and aspects of independence and impartiality and the factors that affect each one of them. To make a meticulous assessment of the Ethiopian constitutional adjudicator in light of those internationally accepted standards, the Article undertakes a comparative analysis with the constitutional adjudicators of two other jurisdictions, Germany and South Africa. It identifies weak sides of the Ethiopian constitutional adjudicator. Finally the Article draws conclusions.

Key terms: Constitutional Adjudication, Impartiality, Independence, Judicial Review, House of Federation, Council of Constitutional Inquiry

Introduction

After the downfall of the military regime in 1991 and a few years of transitional period, Ethiopia has adopted the Constitution of the Federal Democratic Republic of Ethiopia. The Constitution has established a Federal and Parliamentary form of government.[1] This is new to modern Ethiopia as the country had been under a unitary form of government during the military as well as the monarchical regimes.

At the federal level, the Constitution has established a two chambers parliament. The Lower Chamber of the parliament is the House of Peoples' Representatives (hereinafter HOPRs). Its members are elected through direct participation of the electorate every five years. The Upper Chamber of the Parliament is the House of Federation and it is composed of the representatives of the Ethiopian Nations, Nationalities and Peoples (herein

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[1] See Arts 1 & 45 of the Federal Democratic Republic Constitution of Ethiopia (1995), hereafter the Constitution.

after NNP). This Chamber is the home of the representatives of the members of the Federation. Members of the HOF are elected by the State Councils.[2] The Constitution gives discretionary power to the State Councils to elect members of the HOF and according to the Constitution, "the State Councils may themselves elect representatives to the HOF, or they may hold elections to have the representatives elected by the people directly."[3] For the past four election periods, no single member of the HOF had been elected by the direct participation of the people. All members were elected by State Councils among the members of the Councils themselves or from other key political persons.

Electing members of the HOF by the State Councils or thorough direct participation of the public has its own problems. The representatives elected by the State Councils or the direct participation of the public would be politicians who are Chief Executives and law makers in States. Sometimes, these representatives may be elected from the chief executives of the Federal government. In such instances these chief executives of the Federal and State governments and State law makers may be required to adjudicate over the constitutionality of their own acts. This raises question of independence and impartiality of the constitutional adjudicator.

According to the Constitution the HOF lacks the power to make law as it is the HOPR that is empowered to exercise such law-making power. The HOF is granted with the power to interpret the Constitution and to resolve all forms of constitutional disputes.[4] The HOF is the Constitutional adjudicator and courts have no power in respect of constitutional adjudication. The latter are required to refer cases to the Council of Constitutional Inquiry (CCI). We may ask a question here as to why framers of the constitution were not interested to give the Ethiopian judiciary a constitutional adjudicatory role. Different justifications are given by writers and researchers. Among these, the most dominant arguments are the political contract nature of the constitution and

[2] State Councils under the Constitution are legislatures of constituent regions.

[3] Art 61(3) of the Constitution.

[4] Art 62 of the Constitution.

the fear of judicial adventurism are the important ones.[5] Since the HOF is the representative of NNP of Ethiopia, the organ is given the power to adjudicate this political contract. Moreover, the framers of the constitution were not happy to bless the judiciary with constitutional adjudicatory role due to fear of judicial adventurism.

As the Ethiopian election system is first-past-the post[6], a political party that has the majority seat in the HOPRs will have the chance to establish government in the Federal Parliament.[7] A political party that has the highest number of seats in the HOPRs will have the same majority in the HOF, though this may not always be the case.[8] Thus there is a greater chance for members of the HOF to be from the political party that has established government. Such a possibility raises concerns of impartiality and independence of the HOF.

As members of the HOF are not legal experts, the Constitution has established the CCI as an advisory body to it. When any question of constitutionality is raised, it is the CCI which decides whether the matter bears constitutionality issue or not. If it thinks that an issue of constitutional interpretation is involved, it will refer the case with its own recommendations for final decision to the HOF. But, if it finds that there is no need for constitutional interpretation, it will remand the case to the respective court

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[5] Assefa Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation', *Mizan Law Review,* Vol.1 No.1 (June 2007), PP. 11-12.

[6] Under First Past The Post (FPTP) voting takes place in single-member constituencies. Voters put a cross in a box next to their favored candidate and the candidate with the most votes in the constituency wins. All other votes count for nothing. FPTP is the second most widely used voting system in the world, after Party List-PR – For the details see*: http://www.electoral-reform.org.uk/?PageID=481#sthash.oXrf2t4P.dpufand*.

[7] Art 56 of the Constitution.

[8] In fact, this may not be always true. For example a political party that won the majority seats in Amhara and Oromiya Regional States has the chance to establish a government in the country. But winning in Amhara and Oromiya Regions by itself is not adequate to have a majority seat in the HOF. A political party that may win a majority seat in the Southern Nations, Nationalities and Peoples Region may have the chance to control the majority seats in the HOF.

(whether it comes from the court or not). A party aggrieved by the decision of the CCI not to refer to the HOF has the right to appeal to the HOF.[9]

As literatures as well as experiences of other jurisdictions stand to testify, the issue of who ought to interpret a constitution is controversial. In Ethiopia, whether such power has to be assigned to the judicial organ or to an organ other than the judiciary has been the subject of debate before, during and since the enactment of the FDRE Constitution. The issue has been at the center of the debates of different political parties during the last four national election periods. The opposition parties have been arguing in favor of either a constitutional court or regular courts to serve as a constitutional adjudicator. One frontal and major reason forwarded in this regard has been associated with problems of efficiency on the part of HOF. Issues of independence and impartiality of the HOF seem to have got less attention and occupied secondary position.

Arguing merely on the propriety or otherwise of granting such a power to the HOF essentially focusing on the problem of efficiency seems to lack plausibility as it fails to address major values and related concerns such as the values of *independence* and *impartiality*. The problem of efficiency that is raised against HOF appears to be resolved with the establishment of the CCI as an advisory body. This author is of the opinion that issues of independence and impartiality should rather be the main focal areas of such debates and discourse. And it is vital to note that there is no universally accepted model in respect of which organ of a government should handle questions that involve constitutional adjudication. There are variety of approaches that differ from jurisdiction to jurisdiction depending on a number of factors and existing realities of respective jurisdictions.

This article aims to assess the Ethiopian Constitutional adjudicator, the HOF, from the perspectives of impartiality and independence. It examines the institutional organization of the HOF, and how and by whom its members are elected or appointed. To bring broader perspectives to these issues, the Article undertakes a comparative analysis with the approaches in Germany and South

[9] Art 84(3) of the Constitution.

Africa. Accordingly, it identifies crucial weak sides of the Ethiopian constitutional adjudicator in the light of those standards and the experiences of the two jurisdictions.

The Article proceeds as follows. Section 1 it offers an overview of the notion and purposes of constitutional adjudication. It also considers the various institutions established to discharge this task of constitutional adjudication. Section 2 is devoted to a comparative analysis of the independence and impartiality of the Ethiopian, German and South African constitutional adjudicators. Finally, there is conclusion.

1. Constitutional Adjudication: An overview

1.1. The Notion of Constitutional Adjudication

A constitution is often the supreme law of modern national jurisdictions. Often it is found in a written form. As the supreme law, it takes precedence over any other forms of legislation in a country. It is common to find in the written constitutions national jurisdictions a provision that declares the supremacy of the respective constitution over all other primary, secondary and tertiary legislation. It is this supreme document that directs the formation of major governmental bodies and set out their defining structures and relationships. As a supreme document, a constitution in any modern country serves as a source of legitimizing the power of those in government office.

Though a constitution contains a supremacy clause and declares any legislation and acts of government officials which are contrary to any provision in the constitution null and void, in practice it is common to find such violations. When conflicts arise between a provision in a constitution and another provision in a given legislation or an act of government official (s), we need to have an organ that can efficiently solve or adjudicate such conflict. The issue of constitutional adjudication comes to the picture in such scenarios. The organ that is entitled to adjudicate such conflicts exercises its task by interpreting the provisions of the constitution and it will examine whether a provision in an alleged legislation or an act of a government official(s) is inconformity with the constitution or not.

The issue of constitutional interpretation has to be clearly distinguished from the issue of ordinary law interpretation. In ordinary law interpretation, interpreters try to find out the intention of the law maker.[10] In this process, the very mission of interpreters of ordinary legislation is to find the reasons why the legislator intended to have that specific legislation. But, in case of constitutional interpretation, the task of the interpreter is to find "the intent of those individuals who have drafted the constitution and the electorate who ratified it."[11] One basic thing that has to be noted here is that, every provision of the constitution as well as the rest of legislation does not require interpretation. When the provision of the constitution is clear and written in a plain language, there may not be room for constitutional adjudication. In this condition, the interpreter is left with little to do than applying and implementing the provisions of the constitution as it is.[12] And, it must not be automatically taken that such an interpretation is within the province of judicial power for it is not always courts that exercise such a power in every jurisdiction.[13] In other words, a given country's constitution may not allow courts to exercise the power of constitutional adjudication. There are constitutions that clearly exclude the judiciary from, arguably, its inherent power of adjudicating constitutional issues.[14]

Constitutional and judicial reviews are two different and separate concepts. Judicial review is a wider and "more inclusive" term which is not limited to reviewing of the constitutionality of laws only.[15] It is the power of judges to

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[10] Farani.M, *The Interpretation of Statutes,* Lahore Law Times Publications (1977), P.32

[11] Marks T.C, *State Constitutional Law in a Nut Shell*, St. Paul Minnesota: West Publishing Company (1998), P.8

[12] Anteeau C.J, *Constitutional Construction*, London, Ocean Publications (1982), P. 3

[13] Where K.C , *Modern Constitution*, new York : Oxford University Press (1960), P.149

[14] Among these countries, we can mention for example Ethiopia and France. The Ethiopian Constitution clearly excludes the judiciary from interpreting the Constitution and this power is given to the Upper Chamber of the parliament. In France, the power to interpret constitutional issue is given to the Constitutional Council; regular courts are not allowed to participate in the processes of constitutional adjudication.

[15] Kommers Donald P, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd Ed. Durham and London : duke University Press (1997), P.4

adjudicate the constitution and rejecting all other laws and practices that are contrary to the constitution.[16] On the other hand, constitutional review is a mechanism used to adjudicate conflicts between branches and levels of government and does not include the general power to review the constitutionality of laws.[17] For example, in Germany, constitutional review is associated with its tradition of monarchical constitutionalism and "provide the mechanism for defining the rights of the sovereign states and their relationship to the larger union in cooperation with them."[18]

In a nutshell, judicial review is the power where it is exercised by courts only. As one writer has pointed out, judicial review is the court's power to find disputes related to law and includes dispute settlement act of the court.[19]But, constitutional review does not limit itself to any organ like the judicial review by courts. It can be exercised by either regular courts or any other institution that is empowered to exercise this authority.

1.2. Purposes of Constitutional Adjudication

Whether in entrenched or non-entrenched constitutional systems, disputes over constitutional matters are inevitable. In the occurrence of such an event, questions of constitutional adjudication will come into the picture and the organ that is empowered to handle such matters will assume an exercise of its power.

Constitutional adjudication protects individual rights from being violated by the legislative and executive branches of government. The legislature may enact laws that violate constitutionally protected or guaranteed individual and/or group rights. The executive organ may move on to execute or implement laws in a way that is contrary to the overall essence of such constitutionally protected individual and/or group rights. In addition, the

[16]Peltsan J.W, *Corwin and Pleltson's Understanding of the Constitution*, 8th ed. New York: Holt Renehart and Winston (1979), P.27

[17] Supra note 10, P.4

[18] Ibid, P.4

[19]Heringa. A. W, *Constitutions Compared: An Introduction to Comparative Constitutional Law***,** Antwerp: Intersentia; [Maastricht] : METRO, c. (2007), P.95

executive branch may enact regulations or directives that may be suppressive or unconstitutional in nature. In such circumstances, it is the role of the constitutional adjudicator to adjudicate such matters and to reject a piece of legislation or a provision of such legislation that is found to be unconstitutional. It is this body that remedies unconstitutionally implemented laws and policies. This role of the constitutional adjudicator is more relevant nowadays wherein individual rights and interest are being overridden from time to time in the pretext of promoting or ensuring public rights and interests such as in the fight against terrorism and drug trafficking. When extradition agreements are signed between countries, individual rights may be put at stake. When individual rights become vulnerable for both executive and legislative abuses, the role of constitutional adjudicator is essential "in reviewing the motives behind an extradition request which await an individual upon return to a requesting state."[20]

Constitutional adjudication has also the purpose of implementing uniform applicability of constitutional norms throughout a country. If there is no centralized mechanism of constitutional adjudication, the same constitutional principles may be implemented differently within a country. In a system where there is a centralized institution that has the final say on constitutional matters, there is a tendency to establish uniform and consensual practices all over the country. According to Zylberberg P, centralized mechanism of constitutional adjudication "constitutes the judiciary as an institutional means of imposing centralized political values on local bodies across a diverse political landscape."[21] But this does not mean that the same principle does not apply in other systems that entrust the power to adjudicate constitutional matters to other institutions like the French Constitutional Council or the Ethiopian HOF. This purpose of constitutional adjudication is very essential for those countries that are following the civil law legal system. In the civil

[20] Tracey Hughes*, 'Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual'*, 9 B.C. Int'l & Comp. L. Rev. (1986). P. 294.

[21] Zylberberg P*, 'Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective',* 37 McGill L. J. (1992), P. 61.

law legal system, there is no or limited concept of precedent and the lower courts in civil law countries are not obliged to follow the path of the higher courts. In such circumstances, the existence of centralized constitutional adjudication will help courts to have similar stands on those basic constitutional principles addressed by the constitutional adjudicator.

Constitutional adjudication has also the role of protecting and enforcing the well-established principles of separation of powers. This is particularly to refer to Montesquieu's understanding of the principle of separation of powers.[22] It has to be clear that Montesquieu's version of separation of powers has to be separated from the Westminster's model of separation of powers.[23] If either the legislative or the executive branches of government violates this principle of separation of powers, the judiciary will help to control them through constitutional interpretation. As Alexander Hamilton said, the legislative branch is the most dangerous branch of the government and it is necessary to have a strict control by the other branches of government. As the same author pointed out, the judiciary is the least dangerous branch of government but it can properly control the dangerous power of the legislative branch via the mechanism of constitutional interpretation.[24]

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[22] According to Montesquieu, the three branches of government must be separated personally, institutionally as well as functionally. He argues that one person should not be allowed to be a member of more than one institution or branch of government. At the same time, one branch of government should not be allowed to exercise the function of the other branch of government. To implement Montesquieuian version of separation of power, all the three branches of government must stand independently of the other branch and they should have separate existence. See, Sharon Krause, 'The Spirit of Separate Powers in Montesquieu', *The Review of Politics*, Vol. 62, No. 2, (Spring, 2000) pp. 231-265.

[23] In the Westminster's model of separation of power, we cannot find Montesquieu's version of separation of power. In Westminster's model, there is a fusion of power between the legislative and executive branches of government and at the same time a member of the executive branch of government can be a member of the legislative branch and the vice versa is also true.

[24] See Federalist Paper No. 78.

1.3. Organs Empowered to Adjudicate the Constitution

In the process of application and enforcement of either ordinary laws or the provisions of a constitution, it is inevitable that questions of constitutional interpretation would arise. When the essence of an ordinary legislation is found to be in contradiction with a provision of the constitution, the call of constitutional adjudication will come at the forefront. Moreover, since constitutional provisions are too general and often remain open-ended,[25] there is always the need to constitutional interpretation. When ordinary laws are found to be contravening a constitutional provision, such laws need to be declared as unconstitutional and should be considered as null and void. The question that immediately comes to mind at this point will be: Which governmental body is entitled to discharge this task of adjudicating constitutional issues? This question is very crucial in the process of constitutional adjudication. The difficult task in the constitutional adjudication process is finding the appropriate organ that can discharge this task properly. The most difficult task of framers of a constitution in constitutional law making process is to find a proper institution that can properly address tasks of constitutional adjudication.

There is no clear-cut answer for the question: which governmental institution ought to interpret a constitution authoritatively? Different countries have tried to manage this task by establishing different institutions that can settle issues of constitutional controversies. Some countries have established a constitutional court. Germany, Italy, Austria and Hungary are best examples in this regard.[26] On the other hand, some countries like the United States, Canada, Australia and Japan have granted this power to their respective regular courts. In some other jurisdictions, a hybrid system which combines both constitutional courts and regular courts is established.[27] In addition to constitutional or regular courts or hybrid system as organs of constitutional

[25]Norman, Dorsen et al. *Comparative Constitutionalism: Cases and Materials*, 2nd edition, West (2010), P.139

[26]Ibid, pp.151-152.

[27]Basson. Deon, *South Africa's Interim Constitution*: Text and Notes (Revised edition.), Kenwyn: Juta & Co. (1995), p.148.

interpreters, some countries have established political institutions as the proper institutions to handle constitutional adjudication matters. The Ethiopian House of Federation and the French Constitutional Council (*Conseil Constitutionnel*) can be cited as best examples of such a different model.

As the preceding discussion would suggest, there is no specific formula to assign such constitutional interpretation task for an identified governmental body. Every country chooses its own institution which it thinks is proper to assume such a responsibility. But it is generally accepted that major underlying issues that underpin the selection of one or the other constitutional adjudicatory body remain to be similar. These are issues of *impartiality* and of *independence* to adjudicate constitutional controversies. Taking these issues as central values, national jurisdictions choose their own institutions which they think are appropriate to achieve their respective goals and interests. The next sub-section is devoted to the examination of various models of constitutional adjudication by different governmental bodies.

1.3.1. Constitutional Adjudication by Courts

1.3.1.1. Adjudication by Regular Courts

Adjudication of constitutional issues by regular courts is one of the various models that are applicable nowadays. The rationale for empowering regular courts to have a role of constitutional adjudication is the presumption that a constitution is a form of law like other laws "which courts ordinarily interpret and apply."[28] Constitution is considered as a legal document and in this case it is only regular courts that are entitled to exercise such legal matter. As a constitution is believed to be the fundamental and higher law of a country, it prevails over any other laws or government orders in case of conflict. A constitution is the "vehicle through which the people establish their future government."[29] The supreme and fundamental nature of a constitution would

[28]Robert, P, *Theories of Constitutional Interpretation. Representations*, No.30, Special Issue: Law and the order of Culture, University of California Press (1990), P.15

[29]Ibid.

be maintained if courts are granted with the power to decide on constitutionality of laws and other decisions of government officials.

In countries where constitutional adjudication is exercised by regular courts like in the USA, Argentina, Brazil, Canada and Japan, the power of judicial review is shared among different levels of courts in the respective countries and ultimate decision is given by the Supreme Court of that country. In this system of judicial review, all levels of courts have the power to decide on the constitutionality of statutes and other decisions of government officials. And such system is known as the decentralized system.[30] It is known as decentralized because the power to adjudicate constitutional issues is not concentrated in the hands of a single court. Rather, all levels of courts are empowered to exercise this function. All levels of courts do participate in the work of constitutional interpretation for it is assumed that "interpreting laws and applying them in concrete cases"[31] is the function of the judiciary.

In the United States, though the constitution does not designate an authoritative interpreter,[32] all levels of courts are entitled to decide over any question of constitutional adjudication which is concrete. Moreover, any judge can decide over a case where the existing legislative norm is found to contradict the constitution. In such an instance the judge disregards the contradictory legislative norm and declares the applicability of the constitution.[33] Sometimes, disregarding existing legislative norms by courts create inconsistency as there may be different modes of constitutional interpretation. To minimize such risk of inconsistency, the system has devised the concept of doctrine of *stare decisis.*[34] This doctrine obliges the US courts

[30]Danielle E.Frinck, 'Judicial Review: The US Supreme Court versus the German Constitutional Court',. *International and Comparative Law Review,* Vol. 20 (1997) P.126.

[31] Ibid, p.126

[32]Art III of the US Constitution does not give either to the Supreme Court or to the other levels of courts the power to interpret the US Constitution. The constitution states, "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

[33]Supra note 31, p.132.

[34] Ibid, p.132

to follow their former decision on similar issues. It also obliges courts to follow the precedent of higher court's decision in the same jurisdiction. Moreover, the existence of a single Federal Supreme Court helps solving problems of inconsistency of decisions.

1.3.1.2. Adjudication by Constitutional Courts

Adjudication of constitutional disputes through the use of a centralized constitutional court is common in the majority of member countries of the European Union.[35] Though the concept of constitutional court originated in Europe, it court is not limited to Europe. This centralized constitutional court has various features. Different from the decentralized system of judicial review, there is only single and monopolized institution that can declare the constitutionality of statutes. The existence of a constitutional court as a means of constitutional adjudication excludes all levels of courts, including a supreme court from disregarding statutes on their own authority.[36] The role of the constitutional court is not only limited to nullifying unconstitutional statutes and unconstitutional acts of government officials. As Victor F. Comella asserts:

> *Constitutional courts are sometimes given jurisdiction to supervise the regularity of elections and referenda, for example, or to verify the legality of political parties or to enforce the criminal law against high government authorities or to protect fundamental rights against administrative decisions*.[37]

It is possible to classify constitutional courts into three categories based on the role they play. These categories are pure constitutional courts, middle constitutional courts and constitutional courts with so many jurisdictions. The

[35]*See* supra note 26, p.154. Among twenty seven EU member countries, eighteen countries – Belgium, Bulgaria, Austria, France, Check Republic, Latvia, Hungary, Lithonia, Italy, Luxemburg, Malta, Germany, Poland, Portugal, Slovakia, Romania, Spain and Slovenia have established a constitutional court as a sole interpreter of constitutional issues.

[36]Ibid, p.155

[37]Victor F. Comella, *The Rise of Constitutional Courts*, cited at Norman, D et al. Comparative constitutionalism, p.155

first category of pure constitutional courts is only limited with the task of reviewing the constitutionality of laws. Beyond their normal function of reviewing the constitutionality of laws, they do not have any jurisdiction to participate in any tasks. The constitutional courts in Belgium and Luxemburg are best examples.[38] The second category of constitutional courts is empowered to exercise some additional tasks beyond their regular activity of legislative review. Constitutional courts of Italy and Portugal are best examples.[39] The third category of constitutional courts has so many jurisdictions beyond their role of legislative review as their day to day function. The constitutional courts of Austria, Germany and Spain are best examples.[40]

The German Constitutional Court manifests distinctive constitutional jurisdiction. Different from the rest of German courts, the constitutional court serves as a watchdog of the German Federal system. This Constitutional Court does not involve itself in ordinary settlement of disputes unless the case involves a constitutional question.

1.3.2. Constitutional Adjudication by Special Political Council

Constitutional interpretation may also be exercised by other organs different from both constitutional and regular courts. A political institution may be empowered to adjudicate constitutional disputes. The introduction of a political organ as a constitutional adjudicator is highly influenced by the pre-World Wars European parliamentary traditions. This tradition of parliamentary supremacy has highly influenced the position of the judiciary in many European countries.[41] This historical tradition of strong parliament has influenced some European countries like France to prefer a political review of constitutionality of statutes and international treaties.

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[38]Ibid.

[39]Ibid.

[40]Ibid

[41]Yves M and Andrew K , *Government and Politics in Western Europe*, 3rd edition, Oxford University Press (1998), P.317

In the last years of the monarchical regime, the French judiciary was considered as reactionary rather than as a guardian of the people's rights and liberties. Immediately after the Revolution, the principle of separation of powers was strictly applied in the country in order to get executive immunity from political interference.[42] Moreover, the 1791 French Constitution clearly prohibited any judicial power to criticize laws on account of unconstitutionality. According to the constitution, "the court may not interfere with the exercise of the legislative power, suspend the execution of laws, encroach up on administrative functions, or summon administrators before them for reasons connected with their duties."[43] As per this provision the judiciary was totally excluded from checking the legislative and executive branches of the government. The system lost trust on the judicial branch of government as a guardian of fundamental rights and freedoms.

The 1958 Constitution is another significant document in the French constitutional history. The Constitution has granted the executive organ some powers traditionally considered as legislative function. It has established a Constitutional Council as a means of political control of any parliamentary reclaim of these functions. Now, the French Constitutional Council is considered as the guardian of the Constitution. The Council has the role of controlling the constitutionality of legislation and other international treaties signed by the executive. The decision of the French Constitutional Council is not subject to appeal; its decision is final.

Outside Europe, constitutional interpretations by political organ exist in other countries. The 1995 Ethiopian Constitution has established a political institution as a constitutional adjudicator. The HOF, the Upper Chamber of the parliament, is granted with such power. Compared to other models, the choice made by the framers of the Ethiopian Constitution looks unique and

[42]Ibid, p.319

[43]The Constitution of France, *National Assembly,* 3 September (1791), Chapter V, No. 3. http://www.historywiz.com/primarysources/const1791text.html [last accessed on March 2, 2012].

peculiar. As mentioned above, having a peculiar institution as a constitutional interpreter by itself is not a problem. For that matter, countries are encouraged to design a system that can work for them. The main issue that has to be considered at this juncture rather is whether the institutional organization of such a unique constitutional adjudicator enables it to resolve disputes in an impartial and independent manner. Preferring a new model by itself is not a problem so long as a country has designed its own constitutional adjudicator that works in an independent and impartial manner.

2. Independence and Impartiality of Ethiopian, Germany and South African Constitutional Adjudicators: Comparative Analysis

2.1. Independence of Constitutional Adjudicator

2.1. 1. Overview

The independence of a constitutional adjudicator as well as the judiciary depends on various factors. Various political, social, economic, cultural, legal and other factors in individual countries affect the state of independence of such institutions. The essence of judicial independence in common law legal system is stronger than the civil law legal system and judges in the common law legal system enjoy more independence compared to their civil law counter parts.[44]

2.1. 2. Elements of Judicial Independence and its Standards

Judicial independence is essential and it is one of the building blocks of rule of law.[45] The concept of judicial independence is included in different international and regional instruments. The UN Principles on the Independence of the Judiciary provides that, "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or

[44]Supra note 37, P.165

[45]John Bridge, 'Constitutional Guarantees of the Independence of the Judiciary', Vol.11.3 *Electronic Journal of Comparative Law* (2007).

the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[46] The independence of the judiciary is recognized in various regional instruments such as the Council of Europe's Recommendation on the Independence of Judges[47], the African Commission on Human and People's Rights[48] and the Beijing Statement of Principles of the Independence of the Judiciary.[49]

The overall aim of making the judiciary independent is to enable the institution to discharge its main functions without the influence of either the legislative or executive branches of the government or any other body. Making the judiciary independent also helps it to be free from the influence of economic, political other interest groups.

Judicial independence is considered as an "institutional safeguard of the judiciary, and it is not a privilege or a right that is given for the individual judge."[50] It aims to minimize the influence of the legislative and executive branches of the government on the judicial branch. As has been rightly observed by Burbank, the overall aim of judicial independence is proving that judges are the authors of their decisions, and that they are free from any inappropriate influence coming from the other branches of the government.[51] Sometimes it looks that there is an overlap between the concepts of judicial

[46]United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[47]See Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle 2 (b).

[48]See African Commission on Human and People's Rights' Adoption in April 1996 at the 19th Session.

[49]Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in 1995 and adopted by the LAWASIA Council in 2001, operative para.3.a.

[50]Supra note 44

[51]See Burbank, SB (ed.). *Judicial Independence At The Crossroads: An Interdisciplinary Approach*, New York: Sage Publishers, 2002 pp. 46–49.

independence and judicial impartiality. Various explanations and court decisions are given that help us differentiate between the two concepts.[52]

Commonly, judicial independence is evaluated based on the following elements: substantive independence, structural independence and personal independence. These elements and aspects of the notion of judicial independence are well recognized in international, regional as well as domestic legislation of many modern countries.

This sub-section focuses on those elements that are helpful in measuring the independence of the constitutional adjudicator in the three jurisdictions under consideration. It will not attempt to address every element that has some relevance to the concept of judicial independence

2.1. 2.1. Substantive Independence

The concept of an independent judiciary is derived from the well-established principle of separation of powers. The principle of separation of powers is among the basic components of rule of law. As the executive, legislative and the judiciary are separate branches of government, one organ should not influence the other organ in the process of discharging its function. Particularly, since the judicial branch is a protectorate of a constitution of a country, its independence from the legislative and executive branches should be scrupulously observed. But, this does not mean that, the judicial branch of the government has to be left unchecked by the other branches. The next sub-section discusses the substantive independence of constitutional adjudicator from the legislative and executive branches of the government.

[52]See *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985). For example, the Canadian Supreme court held in *Valente* case that, "Although recognizing the 'close relationship' between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees." From this court decision we can understand that, the concept of judicial impartiality is wider than judicial independence.

A. Independence from the Legislative Body

The existence of a separate and independent judicial organ different from the legislative branch of the government is essential for a fair administration of justice and the realization of the values of rule of law. In one of its decision, the European Court of Human Rights has opined:

> *In case in which a parliament adopted a law overturning the jurisdiction of the courts to hear certain requests for compensation against the Government and declaring the legality decreed damages to null and void, the court found that the independence of the court has been violated.*[53]

The above decision of the court shows that, the independence of the judiciary must be protected against the interference of the legislature. Apart from its legislative competence, the legislature must be prevented from committing abuses and should not be allowed to intervene on matters that fall within the jurisdiction of the judiciary. The legislative organ must be constrained from passing legislation that retroactively affect and reverse the decision of the judiciary.[54] There has to be a law that closes such opportunities to the legislative branch of the government.

The Basic Law of Germany (herein after the German Constitution) has recognized the substantive independence of the judiciary from the other branches of government. Though this Constitution recognizes judicial independence, the judiciary is not relieved from its duty to comply with the laws.[55] The institutional independence of the judiciary deters the legislature from interfering in the activities of the judiciary by enacting case specific laws.[56] Moreover, the principle prohibits the German legislature from

[53]*Stran Greek Refineries and Straits Andreadis V. Greece.* 13427/87 (ECtHR, December 9, 1994, Serious A301-B,Para.49.

[54]Minimum Standards of Judicial Independence adopted by the International bar association in New Delhi, 1982.

[55]Art. 97(1) of the Constitution of Germany

[56]S. Detter beck, in: sachs, Rn.12. Cited in Seibert-Fohr, Anja, *Constitutional Guarantees of Judicial Independence in Germany* (June 10, 2006). Recent Trends in German and European

adopting decisions which may influence a judge either to decide or not to decide on a certain case in a specific manner.[57] As the German constitutional adjudicator is part of the judiciary, this principle will highly influence the legislature not to interfere on the activity of the Constitutional Court. The German Constitutional Court is the final adjudicator of the Constitution and the legislature is duty bound to accept the decision of the Court.[58]

The Constitution not only protects the Constitutional Court against the interference of the legislative organ, but also gives the power to control the constitutionality of laws enacted by the legislature. The Constitutional Court has the power to decide on the compatibility between the laws enacted by the legislative organ of the government and the basic law.[59] The Constitutional Court has the power to reject laws that are enacted by the law-maker if they are found to be incompatible with the basic law which is the supreme law of the land in Germany. The existence of judicial-constitutional review has contributed a lot to protect the constitutional adjudicator against the interference of the legislative organ.

Likewise, the Constitution of the Republic of South Africa has also guaranteed the substantive independence of the judiciary. The Constitution declares that "courts are independent and subject only to the constitution and the law…"[60] Moreover, it affirms that "no person or organ of the government may interfere with the function of the courts."[61] From these provisions it can be observed that the judiciary is only regulated by the law and other branches of the government including the legislature organ are prohibited from interfering on the jurisdiction of the judiciary.

Constitutional Law, pp. 267- 287, E. Riedel, R. Wolfrum, eds., Springer Berlin/Heidelberg/New York (2006), Available at SSRN: http://ssrn.com/abstract=1706565 [last accessed on March 5, 2012]

[57] Ibid, Rn.12.

[58] Art.93(1) of the Constitution of Germany.

[59] Art.93(1(2)) of the Constitution of Germany.

[60] Art 165(2) of the Constitution of South Africa.

[61] Art 165(3) of the Constitution of South Africa.

The South African Constitutional Court is not only protected from the unnecessary interference of the legislative branch. It also has the power to annul the work of the legislature if it is contrary to the Constitution. The Constitutional Court has power to "decide on the constitutionality of any parliamentary or provincial bills"[62] and in doing so, it can exercise its role of check and balance against the legislative branch of the government.

Like the German and the South African constitutions, an independent judiciary is also established by the Ethiopian Constitution. In Ethiopia, courts at the Federal and State levels are given constitutional protection to be free from any interference or influence of any governmental body, government official or from any other source. Judges are required to exercise their functions in full independence and are directed solely by the law.[63] Though the Constitution declares the independence of the judiciary from the influence of the legislative branch of the government, the judiciary has no any role to check the constitutionality of laws enacted by the Ethiopian legislature.

As already mentioned, the arrangement of the Ethiopian constitutional adjudicator is quite different and unique. The framers of the Constitution have preferred to grant the power of reviewing constitutionality of laws to a non-judicial body. What is followed by the Ethiopian Constitution is different from that which is followed in Germany and South Africa. In Germany and South Africa, the power to review the constitutionality of legislative acts is given to the judicial branch of government, though it is a specially established constitutional court. But in Ethiopia, the power to review and control the constitutionality of legislative acts is given to the non-judiciary organ which is the other wing of the Ethiopian parliament.[64]

The Ethiopian constitutional adjudicator (HOF) is not part of the judiciary and the same logic may not apply here as the German and South African constitutional courts. As explained above, since the German and South African Constitutional adjudicators are part of the judiciary, the constitutional

[62] Art 167(4) (b) of the Constitution of South Africa.

[63] Art 79(3) of the Constitution of Ethiopia.

[64] Art 53 of the Constitution of Ethiopia.

principle of judicial independence can be applicable for the protection of the independence of the Constitutional Courts. In Ethiopia, it is the HOF that is empowered to interpret the Constitution. The HOF is part of the legislative branch of the government.[65] The basic question that has to be raised here is: What are the rationales for the framers of the Ethiopian Constitution to devise a non-judicial mechanism of constitutional adjudication? Why did they avoid establishing a constitutional court as a constitutional adjudicator?

Different views are forwarded by different writers on these questions. One reason is related to the nature of the Ethiopian Constitution itself and the role played by the Nations, Nationalities and Peoples (NNP) of Ethiopia as the sovereign power holder.[66] The Ethiopian Federal system is the coming together type and the Constitution is considered as a political contract signed between the different Nations, Nationalities and Peoples of the country. As it is a political document and the signatories are NNPs, the Constitution has to be interpreted, it is argued, by those political representatives of NNP. Each NNP of Ethiopia is represented at least by one member and additional one representation is also given for every one million population.[67]

The second reason for establishing a political institution as a constitutional interpreter and excluding the judiciary from exercising such power is related to fear of "judicial activism".[68] There is fear that the judiciary would usurp the power of the NNP in the name of constitutional interpretation. Some argue that the Ethiopian judiciary historically lacks the trust of the public. During the monarchical and military regimes, the judiciary was treated as an instrument of suppression and a means of achieving the policy of the reigning regimes. Though there may be some grain of truth, the argument that the judiciary lacks public trust and confidence seems to lack concrete evidence. It is questionable, to say the least, if a comprehensive research has been

[65]See Art 53 of the Ethiopian constitution, "There shall be two Federal Houses: The House of Peoples' Representatives and the House of the Federation."

[66]Assefa Fiseha, 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience', 52 *the Netherlands International Law Review*. (2005) .p.7.

[67] Art.61(2).

[68] Supra note 5

conducted addressing this point. It is also open to doubt if the Ethiopian people were asked to tell out there preference- if they prefer a judicial or non-judicial constitutional review or any other institution. Maybe this argument can be related to the socialist ideology of the ruling party. Before 1991, the current ruling party (the Ethiopian People's Revolutionary Democratic Front /EPRDF) was officially a pro-Marxist –Leninist front. Perhaps the Marxist-Lenninist political ideology e influenced the choice finally made out. It is asserted that "Marxist political system generally vests the power of constitutional review in parliamentary bodies while purposefully weakening the judiciary."[69] Marxist regimes do not want to see a strong judiciary for there is a fear that the judicial organ would be an obstacle to an exercise of unlimited legislative and executive powers.

The other justification given for the establishment of a non-judicial constitutional review in Ethiopia is related to the framers' assumption of the efficiency of the Ethiopian judiciary to handle such constitutionality matters. The framers thought that "the judiciary would remain the weakest branch of the government" and empowering the judiciary to play constitutional adjudicatory role will be non-sense.[70] This justification does not seem sound and it despises the institution of the judiciary as whole. The framers also appear to have reached such a decision based on political reasons rather than on the basis of proper legal justifications.

The other basic issue that has to be discussed here is the question of the independence of the HOF from the legislative branch and its role to control the legislature. An organ which is empowered to adjudicate constitutional dispute has to be independent and free from any kind of political pressure.[71] When we look the members of the HOF, they are the representatives of NNP and they are accountable to the State Councils' as well as the NNP. Even there

[69]Zdenek Khun, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', *52 AM. J. COMP, L. (2004), PP. 539-540.*

[70] Chi Mgbako et al, 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights', *Fordham International Law Journal* Vol.32, Issue.1 (2008), p.268.

[71]Ibid.

is no clear stipulation that members of the HOF be accountable to their conscience and the Ethiopian Constitution. As they are practically elected by the state councils, they will be obliged to embrace the political interests of the party that establishes a government in the state level or in the Federal government. Thus members of the HOF will be under the influence of the legislative branch of the government and there is less potential to challenge unconstitutional legislation, let alone to declare such legislation null and void.

Since EPRDF took power, more than 893 proclamations and 391 regulations have been enacted and totally more than 1284 proclamations and regulations have been enacted so far in the country.[72] But, no law or regulation was ever rejected by the HOF for its incompatibility with the Constitution. Yet, there are some laws in Ethiopia which many, if not all, opposition political parties, human rights groups[73] and civic societies in the country allege that they contain unconstitutional provisions. It is difficult to expect the HOF to exercise its controlling role as a guardian of the Constitution against the Federal legislative organ as it stands to be another wing of the same branch of government.

As things stand now, it is difficult to envisage the independence of HOF from the influence of the legislative branch of the government. The party politics that ties both the HOF and the HOPR would make the former to be dependent on the later. Moreover, since members of the HOF are accountable

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[72] http://www.abyssinialaw.com/index.php/law-information [Last accessed on March 5,2012]

[73] Human Rights Watch Group for example opposed the Ethiopian anti-terrorist law during its draft and called the government to revise the draft. Finally, the draft law approved by the legislature as it is. The main argument of the Human Rights Watch was "If implemented, this law would provide the Ethiopian government with a potent instrument to crack down on political dissent, including peaceful political demonstrations and public criticisms of government policy that are deemed supportive of armed opposition activity. It would permit long-term imprisonment and even the death penalty for "crimes" that bear no resemblance, under any credible definition, to terrorism. It would, in certain cases, deprive defendants of the right to be presumed innocent and of protections against use of evidence obtained through torture."
http://www.icj.org/IMG/Analysis_of_Ethiopia_s_Draft_CT_Proclamation_3_9_09.pdf. [last accessed on March, 12 2012]

to state councils, the latter (state councils) are entitled to remove representatives if they lose confidence on them. There is also a strong bondage between the Federal legislature and state legislatures which in turn will put some pressure on the HOF. For all these reasons, the HOF will be indirectly under the influence of the Federal legislature and its independence will be affected.

B. Independence from the Executive

The right to fair trial is relatively an absolute right that is not subject to any form of bargaining or compromise in the relationship between the government and citizens. An independent judiciary is essential to realize this right. Since the executive branch of the government controls the day to day functioning of the government, the influence of this organ over the judiciary is real and immense. There is high probability for this institution to affect the independence of the judiciary. The principle of separation of powers obliges the executive to refrain from interfering in the activities of the judiciary and it is in fact one of the basic pillars of the principle of separation of powers and functions. As the UN Special Rapporteur on the independence of the judiciary has maintained "separation of powers and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively."[74]

The principle of substantive judicial independence advocates the protection of the judiciary from the unnecessary influence of the executive branch of the government. This principle highly condemns "phone justice". The objective is that the judiciary should not be influenced by the executive and no direction should come from the executive regarding how to manage court cases. The judicial branch should not be "advised" by the executive "as how an

[74]Report of Special Rapporteur on the situation of human rights in Nigeria, UN document E/CN.4/1997/62/Add.1, Para. 71.

individual case is to be solved."[75] If such acts take place, it would be an evil thing committed against the judiciary.

The German Constitution takes a strong position that the independence of the judiciary is highly protected from the interference of the executive branch. Ordering the judiciary to decide a certain case in a specific manner and enacting administrative regulation with the purpose of influencing the judiciary is highly prohibited.[76] But this does not mean that, the executive branch is not entitled to have a say on the appointment of the judiciary. As the judiciary itself is responsible and governed by the law, judges will be responsible according to the existing governing law if they exceed their power granted by the Constitution. Judicial independence does not mean that the judiciary is not accountable for the act done by exceeding the limits of its power.

The German Constitutional court is independent from the executive branch. The Constitutional court is not only independent from the executive; rather it has also the power to check the constitutionality of executive acts.[77] The court plays an important role in the protection of fundamental rights and freedoms against the executive branch. If one of the fundamental rights and freedoms of citizens is violated by public authorities, individuals are entitled to file a complaint before the constitutional court.[78]

In South Africa, the judiciary is independent and free from the influence of the legislative organ. The Constitution has also devised a mechanism to recognize the independence of the judiciary from unlawful interference and pressure from the executive branch. The Constitution stipulates that "no

[75]Michal Bobek, 'The Fortress of Judicial Independence and the Mental of the Central European Judiciaries', *European Public Law*,Vol.,Issue.1-(2008) .P.3.

[76]Seibert-Fohr, Anja, *Constitutional Guarantees of Judicial Independence in Germany* (June 10, 2006). Recent Trends in German And European Constitutional Law, (2006) pp. 267-287, E. Riedel, R. Wolfrum, eds., Springer Berlin/Heidelberg/New York.
Available at SSRN: http://ssrn.com/abstract=1706565.

[77] Art 93 (4)(a) of the Constitution of Germany

[78]Ibid.

person or organ of the state may interfere with the function of the court."[79] At least in principle, the Constitution has designed properly in a way that helps the judiciary to be free from the influence of the executive branch. Except the regular and normal executive roles like appointment of the judiciary, the executive is totally excluded from interfering in the affairs of the judicial branch. Hence, the South African judiciary is protected from unnecessary interference of the executive branch.

The Constitution does not only recognize the independence of the judiciary from the executive branch but it also grants the judiciary with the power to check constitutionality of acts done by the executive organ. The existence of judicial-constitutional review in the country helps the South African Constitutional Court to check the constitutionality of executive tasks. Thus the Constitutional Court is participating in various and most contentious social, political and economic issues in the country. Up on its establishment, the court has challenged the views of political elites including President Mandela. The Court has shown commitment towards recognition of its independence by striking out the decision of death penalty in the country.[80] Moreover, it has also rejected in its ruling the presumption that "a confession made to magistrate is voluntary and therefore admissible in court."[81] The Constitutional Court has contributed a lot in establishing an independent judiciary that can challenge the pressure that may come from the executive branch of the government. In challenging some relics of the Apartheid regime as well as certain actions of the ruling party (ANC) in the country, there were some challenges against the Court threatening its independence. Especially its ruling on "capital punishment and other controversial issues were so unpopular that they threaten the legitimacy of the Constitutional Court."[82] Through process, the legitimacy of the Constitutional Court has increased and

[79] Art 165 (2) of the Constitution of South African.

[80] State v. Makhanyane and Others, 1995, Cited at James L.Gibson and Gregory A.caldeira, Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court, *Cambridge University Journal of Politics,Vol,65.No.1* (2003),.P.7.

[81] Ibid, State V. Zuma and Others, 1995.

[82] Ibid, p.7.

"by the end of 1997, ordinary South Africans could point few decisions of the Constitutional Court that markedly improved the quality of their life."[83]

The Ethiopian Constitution has declared that the judiciary should be free from any influence of the executive organ. It further provides that judges are only accountable to the Constitution and their conscience. Thus it is obvious that, as things appear on the paper, the influence of the executive branch on the independence of the judiciary is minimal, almost none. The framers of the Constitution have designed properly the independence of the judiciary from the executive organ except instances of check and balance such as in the appointment process.

The mainstream understanding in constitutional adjudication is that the institution which is empowered to interpret or adjudicate constitutional issues has to be free from any form of political or other affiliation or influence. If a tribunal is not separated and independent from the executive and legislative branches of the government, the law is unlikely to serve as a means of protecting human rights and achieving individual liberty. The principle of natural justice demands that "n*o man shall be Judge in her own cause."* If an individual is allowed to be a judge in his/her own affairs, it is obvious that there is always the tendency to incline to one's own side. The Ethiopian constitutional adjudicator is a political institution. The HOF by itself is another wing of the Ethiopian parliament and it represents the Upper House of the parliament. Members of the HOF are the political representatives of NNP and operate within the context of the Federal Government, currently dominated by EPRDF which controls 499 seats of the legislature out of the total 547 seats.[84] The ruling party also has the same seats in the HOF. It is obvious that it dominates both houses. In such situations, it is very difficult to expect the HOF to have reasonable independence from the executive branch. Professor Minase Haile rightly observed that "the HOF is not likely to rule

[83] Ibid

[84] See. http://www.electionethiopia.org/en/, [last accessed on March 7, 2012]

against the government when adjudicating constitutional disputes."[85] Since the HOF is a political institution under the influence of the executive branch, it is difficult to expect a fair, impartial and independent decision when issues involving some sensitive political matters.

This problem has become a big concern in the country since the advent of the Constitution in 1995. The moment the HOF is dominated by a single political party, the question of the independence of this institution has become endangered. As members of the HOF are representatives of NNP, they are directly or indirectly elected by state councils and state councils may elect "state Chief Executives".[86] Since members of the HOF could be chief executives and law makers in the state councils, the influence by the executive branch would be too obvious to require any elaboration. As the current situation stands to demonstrate, government is established in Ethiopia with a coalition of four political parties and these political parties are from four populace and politically dominant states. These four states not only control the HOPR, but they also have majority seats in the HOF. This situation would create a link between members of the HOF and executives of the Federal government. Being chief executives either at the federal or regional level, some members of the HOF may be asked to decide on the constitutionality of their own acts. In light of all these prevailing circumstances, it is difficult to imagine the possibility of independence of the HOF. It is difficult to expect fair decisions from a judge who presides on his/her own case. This author is of the opinion that the existing non-judicial constitutional adjudication in Ethiopia is against the basic principle of natural justice.

There have been practical cases in Ethiopia where the HOF was found not willing to decide against the executive branch of government though there were clear instances proving the violation of the Constitution by the executive.

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[85]Minasse Haile, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development', 20 *SUFFOLK TRANSNAT'L L. REV*. (1996). P.52

[86]T.S. Twibell,). 'Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems', *21 Loy. L.A. INT'L & COMp. L. REV. (1999),* P.447.

After the controversial 2005 Ethiopian election, the late Ethiopian Prime Minister banned any kind of public demonstration in the capital city, Addis Ababa.[87] At the time, the former leading opposition political party, Coalitions for Unity and Democracy (CUD) brought a case before the Federal First Instance Court against the Premier's ban. The Federal First Instance Court ruled that the case raised issue of constitutional controversy and it referred the matter to the CCI.[88] Then CUD appealed the case before the Federal High Court arguing that the Prime Minister's ban exceeded constitutional limits. It further argued that the matter did not require any kind of constitutional interpretation.[89] While the appellant was waiting for the decision of the Federal High Court, the CCI remanded the case to the Federal First Instance Court ruling that the Prime Minister did not exceed the constitutional limit and that there was no need to require constitutional interpretation.[90] Finally, both the Federal First Instance and Federal High Courts rejected the case based on similar justification as given by the CCI.[91] As this decision shows, Ethiopian courts are reluctant to decide over politically sensitive issues for there is a widespread belief that regular courts do not have the power to interpret the Constitution. The above case is also a clear testimony of lack of independence of the HOF's technical experts (CCI) to decide against the ruling party.

Another occasion that proved the HOF's reluctance to rule against politically sensitive issues has been the *Silte* People National Identity Claim case in Southern part of Ethiopia. The *Silte* People claimed that they do not want any more to be considered as *Gurage* Nation.[92] After a long period of controversy over the matter, the issue was resolved through referendum

[87]Dagnachew Teklu, Court Sends Meles Zenawi's Case to Inquiry Council, *THE MONITOR*, June 7, 2005, at B1, *available at* http://www.theafricamonitor.com/ resources/55%20English%20issue%20June%207,%202005.pdf,

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] Ibid.

[92]House of Federation, (2001) Decisions of the House of Federation Regarding Resolution of Claim for Identity, http://www.hofethiopia. org/pdf/CI%20Dessiontion_2.pdf

resulting in the declaration of the separate identity of the *Silte* people from the *Gurage* nation. [93] This case took a long period of time before getting its final decision. The reason was the HOF's fear of similar questions in the Region as there are more than 56 ethnic groups who might claim similar national identity questions in the Southern Nations, Nationalities and Peoples Regional State.[94] Such instances prove how problematic it would be for the HOF to handle politically sensitive questions in an independent and fair manner.

2.2. Impartiality of Constitutional Adjudicator

2.2. 1. Overview

The right to obtain a fair and impartial tribunal is an important right which is recognized in international as well as regional human rights instruments. The UN Universal Declaration of Human Rights (1948) is among those instruments that recognize right. It stipulates that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[95] As clearly provided in this Declaration, mere existence of an independent tribunal is not adequate to assure the fair trial right of peoples unless the tribunal is impartial. The International Covenant on Civil and Political Rights (ICCPR) also underline the importance this right to fair trial and impartial trial. It provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[96]

The principle of impartiality requires that judges decide cases "on the basis of facts and in accordance with the law without any restriction."[97] For judges to decide over cases based on the existing facts, government officials or private entities should refrain from pressuring judges to influence on their functions. In addition to international human rights instruments, regional

[93] Ibid.
[94] Supra note 5, P.22.
[95] Art.10 of UDHR.
[96] Art.14(1) of ICCPR
[97] UN Basic Principles on the Independence of the Judiciary, op. cit., Principle 2.

human rights conventions and commissions have stipulated more on the requirement of impartiality as a basic requirement to protect and defend human rights. In affirming the importance of an impartial judiciary the Council of Europe asserted that "judges should have unfettered freedom to decide cases importantly, in accordance with their conscience and their interpretation of facts, and in pursuance of the prevailing rule of the law."[98]

The impartiality is a necessary and essential element for the realization of fair trial rights of litigants. Unless the tribunal is in fact impartial or seen to be impartial, fair trial right of parties will be at stake. And, "impartiality of courts must be examined from a subjective as well as objective perspective."[99] A distinction has to be made between the concepts of subjective and objective impartiality. The subjective impartiality of a tribunal is related to the "personal conviction" of the individual judge in a given case.[100] If a judge has a vested interest in the outcome of the case, which may affect the impartiality of a tribunal and that particular judge should withdraw from the case. But the objective nature of impartiality of a tribunal is related to the overall institution of the judiciary rather than one particular or more judges. In some objective standards, the institution should be presumed as impartial and "guarantees should be offered to exclude any legitimate doubts."[101]

The European Court of Human Rights (ECtHR) has rendered various important decisions that underline what an impartial tribunal and an impartial judge looks like. In one of its decisions the Court, for example, maintained that "successive exercise of duties as an investigating and trial judge by the same person…constitute a violation of the right to be tried by an impartial tribunal"[102] Though a particular judge is not partial to one of the parties in

[98]Council of Europe, Recommendation No. R (94), op. cit, Principle I.2.d

[99]International Principles on the Indeopendence and Accountablity of Judges, Lawyers and Prosecutors Practioners' Guide Series N°1 International Commissions of Jurists Geneva, Switzerland, 2004. P.27.

[100] Ibid

[101]*Padovani v. Italy*, ECtHR judgment of 26 February 1993, Series A257-B, para. 25.

[102] *De Cubber v. Belgium*, ECtHR judgment of 26 October 1984, Series A86, paras 27.

fact, the other party to the dispute may have such doubts and this would affect the impartiality of the tribunal.

2.2. 2. Factors that Affect Impartiality of Tribunal

As has been mentioned repeatedly, the existence of an impartial tribunal, and for our purpose now, an impartial constitutional adjudicator, is indispensable to ensure fair trial right of parties. And, under this sub-section we focus on principal factors that may affect the impartiality of the constitutional adjudicator. Though there are other more factors that may affect the impartiality of the constitutional adjudicator, we shall consider only two factors: the organization of the tribunal, and the appointment or election mechanism of justices or members of the tribunal.

A. Organization of the Tribunal

The organization of the institution significantly affects the impartiality of the tribunal. An institution which stands by itself will be independent of other institutions. It is not necessarily true that an independent institution is always impartial. As mentioned earlier, if the judicial organ (constitutional interpreter) is dependent on the executive or the legislative branch the adjudicator cannot be impartial. The organizational structure of the institution has its own effect on the impartiality of the institution. For the constitutional adjudicator to exercise its task in an impartial manner, it is necessary that sufficient attention is given to the very organization of the institution.

The German Constitutional Court is organized within the structure of the judicial branch of the government and the Constitution has made it the supreme judicial authority.[103] This Court is divided into two "Senates" with different jurisdictions and different members from each senate. The independent structure of the Court from the other branches of the government would have its own contributions to achieve impartiality. This independent structure has helped the Court to be seen as an impartial institution. Since it is

[103] Art 93 of the constitution of Germany.

institutionally independent and separated from the executive and legislative branches, influence of the other branches will be assumed to be less.

Likewise, the Constitutional Court of South Africa is organized within the structure of the judicial branch and it is the highest court in all constitutional matters.[104] Any issue involving interpretation, protection and enforcement of the Constitution is a constitutional matter and the Constitutional Court has an absolute authority on such matter. The Constitutional Court of South Africa has been established in an environment of intense political tensions and conflicts as between the various actors since "all actors were able to foresee the power and importance of the court in South African politics."[105] Conflicts that arose during the process regarding the Court's structure have later contributed for earning its legitimacy by the public.[106] Structurally this Court has been organized in a way that ensures its objective impartiality towards the legislative and executive branches.

The organization of the Ethiopian constitutional adjudicator (the HOF) is absolutely different from that of the German and South African. As already mentioned, the Ethiopian HOF is not within the structure of the judicial branch and it is not the supreme judicial authority in the country.

It is important to note that the peculiar nature of the Ethiopian Constitution in establishing a non-judicial constitutional adjudicator is not a problem in itself. A best model and practice that may be working in the US well may not work in Ethiopia or in another country. The effort made to find domestic solutions for domestic problems is thus an idea worth praising. Yet it is vital to pay particular attention to issues of impartiality and independence.

When we come to the organization of the HOF, the Constitution clearly stipulates that it is within the structure of the legislative branch and as such it serves as the Upper House of the parliament[107]and according to the

[104] Art 167(3)(a) of the Constitution of South Africa.

[105] James L.Gibson and Gregory A.Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court', *Cambridge University Journal of Politics*, Vol. 65.No.1, (2003) P.6 .

[106] Ibid.

[107] Art.53 of the Constitution of Ethiopia.

Constitution, the power to adjudicate any form of constitutional dispute is beyond the scope of the judiciary. But there are writers who do not agree that the structure of the HOF is within the legislative branch only and there are also writers who do not agree that the HOF is within the structure of the legislative branch. For example, Takele Soboka argues that, "the HOF is a political body –an executive cum legislative hybrid- that is more of the proverbial priest than a prophet."[108] He notes that the Ethiopian constitutional adjudicator is a political body that lacks independence and impartiality.[109] For Professor Minase Haile the HOF is, though the Constitution declares the HOF as a legislative body for unclear reasons, not in fact a legislative chamber that shares law making power with the HOPR; had the HOF been part of the legislative branch, it would have had at least law making role like other upper chambers in the US. [110]

The issue of the appropriate position of the HOF, among the three branches of government, was one of the questions raised by members of the Constitutional Commission.[111] The basic issue that has to be addressed is whether the very organization of the HOF has an impact on its impartiality and independence.

As it has been mentioned, if the constitutional adjudicator is not separately established from the other branches of government, there is high probability of being dependent on other branches. If the constitutional adjudicator is not

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[108] Takele Soboka, 'Judicial Referal of Constitutional Dispuetes in Ethiopia: From Practical to Theory', *African Journal of International and Comparative Law, Vol. 19, No. 1 (2011)*, p.121.

[109] Ibid.

[110] Supra note 86, P.9.

[111] For example, one representative from Region 3 asked the Constitutional commission's experts to answer him about the exact position of the HOF among the three branches of the government. But adequate answer was not given by the experts and they were trying to glorify the political position of the HOF than answering the question. Surprisingly, one expert was trying to answer the question and said that "though there are three branches of government in Western model, it is possible to reshape this model in our context and that is why the HOF is designed in such way." See minute of the constitutional commission, Vol.7.Dec, 1-4, 1994.P7-13.

independent, there is high probability of being partial to the institution it has connection. Arguably, the Constitution made the HOF part and parcel of the Federal House. It is clear from the Constitution that the HOF has no actual and significant law making role. Apart from its constitutional interpretation power of, the HOF is given a power to recommend the enactment of civil laws that could help establishing a single economic community. Though it has no any role in the actual making of laws, it has a crucial role and responsibility to initiate the enactment of civil laws by the HOPR.

Given such organization, the impartiality of the HOF is questionable. In case a civil law is recommended by the HOF and the HOPRs enact such a law, the issue of constitutionality of that specific legislation might be raised by any interested party who is affected by the legislation. In such a case, it is the HOF which is entitled to give a final decision on the constitutionality of the law that it has initiated. The impartiality of the HOF will be questioned in such cases. Though the HOF might not be partial in fact in considering such issues, parties may not feel that it will act in an impartial manner. That the HOF is within the legislative branch of government by itself would ignite doubts.

B. Appointment and Composition of Members of the Tribunal

The appointment or selection process of members of the constitutional adjudicator is an important factor that determines the impartiality or otherwise of the institution. In addition, the composition of persons who are appointed to the position is another important factor that determines the impartiality or otherwise of the institution.

In federal forms of government, the participation of both the central government and state members is essential to have a trust on the institution that discharges the function of constitutional adjudication. In most federal countries that have a system of judicial-constitutional review of legislation, the role played by the Central government is more important when it is compared with the role played by states.[112] The system magnifies the role of

[112] Supra note 108, P.11.

the central government in the appointment process of adjudicators. Of course, it is hard to imagine the exclusion of the central government from having its own says in the appointment process of members of a constitutional court or a federal supreme court. The role of the central government is desirable to keep the unity and strength of the overall system in a country.

In Federal Republic of Germany the federal government and *Landers*[113] participate in the appointment of judges of the Constitutional Court. The Constitutional Court is composed of sixteen judges among whom "half being elected by the *Bundestag*[114] and half by the *Bundesrat*"[115] The *Bundesrat*[116] is the Upper House of the German parliament in which *Landers* are represented. The *Bundesrat* and the *Bundestag* participate in the appointment of judges of the Constitutional Court. This accommodates the interests of the Federal as well as *Lander* governments. Though the election process is highly politicized, judges of German Constitutional Court do not represent the interest of any political party in the country.[117] Unavoidably, politicians may attempt to appoint judges who could support their own policy and ideology. But the Constitution has designed an appropriate system that can avoid the problem of lack of public trust and confidence on this Court. The Constitution has guaranteed the impartiality of the Court.

The Constitutional Court of South Africa is composed of eleven judges who are appointed in three distinct processes by the President of the country.[118] The President of the Constitutional Court is appointed by the President of the country in consultation with his/her Cabinet and the Chief Justice.[119] The President of the nation is also entitled to appoint four other

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[113] *Lander* is the name of the members of the Federation in the Federal Republic of Germany. There are 16 *landers* that are established the German Federation.

[114] It is the lower House of the Parliament in Germany.

[115] Supra note 112, P.21

[116] It is the Upper House of the Parliament in Germany and *Landers* are represented on it.

[117] Ibid, P.22

[118] Heinz Klug, *The constitution of South Africa: a contextual analysis*, Oxford; Portland, Ore.: Hart (2010), P.233

[119] Ibid.

judges in consultation with his/her Cabinet and the Chief Justice of the country.[120] These four judges of the Constitutional Court are expected to be drawn from the judges of the Supreme Court. And this helps to get experienced judges. The remaining six judges are also appointed by the President among the list of judges submitted by the Judicial Service Commission (JSC).[121] In the process of appointment of these six judges, the President of the country is expected to consult the President of the Constitutional Court. All this process is assumed to help to accommodate the interests of various interest groups in the country. In doing so, the system has tried to minimize the probability of recruiting partial judges. The Constitution has also strived to create and maintain the trust and confidence of the public in its Constitutional Court.

Members of the Ethiopian constitutional adjudicator are elected without any participation and role of the Federal government. It is only the state councils that have a direct or indirect role in the election of members of the HOF. As it is the case in respect of the organization of the HOF, the Ethiopian Constitution has chosen its own peculiar way of electing constitutional interpreters.

In the USA, the Supreme Court is the ultimate interpreter of the Constitution. The President and the Senate have an important role in the appointment process of the Federal Supreme Court judges. The President has the power to nominate judges and the Senate (which is the representatives of the states) has the power to approve the nomination of the President. The power of the Senate is extended to the extent of rejecting the nomination of the President. This shows that both the Federal government (on behalf of the President) and states (on behalf of the Senate) have important roles in the appointment of judges of the Federal Supreme Court. In Federal Republic of Germany, both the *Bundesrat* (which is the representative of *Lander* governments) and the *Bundestag* have important roles in the appointment process of the judges of the Constitutional Court.

[120] Ibid.
[121] Ibid.

When we come to the election process of the Ethiopian constitutional interpreters (members of the HOF), it is wholly dominated by state councils and the Federal government is totally excluded from the process. The Constitution has given state councils discretionary power regarding the election of members of the HOF. State councils may elect members by themselves or they can hold election to get members directly elected by the people.[122] When state councils elect members of the HOF by themselves, they may elect one among the members themselves or among the Chief Executives of the states. It means that state legislators and chief executives have the chance to be represented in the HOF. As Takele Soboka noted the Ethiopian constitutional adjudicator is "more executive minded than those of any constitutional interpreting body in the centralized or mixed system of judicial review elsewhere"[123]Given all these circumstances, could members of the HOF be impartial on issues that involve political matters if constitutional interpretation is sought?

The impartiality of the HOF as a constitutional adjudicator is questionable for a number of reasons. First, it is difficult to expect an impartial and genuine judgment from an organ that itself has an interest in the outcome of the case. This is especially true if the dispute is related to political matters. One writer rightly observed that "members of the HOF are politicians, most of them representing the executive branches of the regional states and their roles as a constitutional arbiter would be clouded by a reasonable suspicions of partiality."[124] Even if the HOF may not be partial in fact, the institution by itself is exposed for suspicion for partiality and it thus may not enjoy public trust and confidence.

Secondly, the HOF may favor the interests of states and interests of the Federal government may be compromised. As members are representing the NNP, they may always strive to accommodate the interests of the electorate

[122] Art 61(3) of the constitution of Ethiopia.
[123] Supra note 110, P.122.
[124]Ibid.

for otherwise they may be re-called by the electorates for lack a confidence.[125] Hence they may compromise the interests of the Federal government and favor their own states. This has a potential to affect national unity and integrity of the country.

Such form of arrangement is not common in federal forms of government and in most federal states constitutions try to establish a strong central government. Unless the central government is strong, the unity and integrity of that country as a whole will be endangered. If there is no strong central government, it is more akin to confederation rather than federation. In the name of constitutional interpretation, the Ethiopian Constitution, it can be argued, has established a system of strong state governments, which is the opposite of the experience of other federal countries.

The literal reading of the Constitution creates an impression that it establishes a strong central government. A critical close reading however shows that the state members are stronger than the federal government. This is a danger for the federal arrangement. If the Federal government is not strong, the states may leave the Federation at any time. The Constitution has given states the right to self-determination including secession and thus any state may exercise this right at any time it wants.[126]

There is also another problem that could arise as between the two different wings of the same branch of government in Ethiopia, i.e., HOPRs and HOF, though it is not common to hear such tensions. Political tensions often arise in cases where there are two competing political parties in the legislative and/or executive branches of government. When the legislative and executive

[125] Art. 12 of the Ethiopian constitution declare that, "in case of loss of confidence the people may recall the elected representatives." If the people or state councils lose a confidence on members of the HOF, they may recall them. To satisfy the interest of the state council or the NNP whom they are representing, they may compromise over the interest of the Federal government.

[126] Art 39(1). Of course there are counter arguments. According to Art 39 (1), it is the Nations, Nationalities and Peoples (not states as such) that are granted with this right to self-determination including the right to secession. And this latter right could only be realized by undergoing all the stringent procedures provided under Art 39 (4).

branches are controlled by two competing political parties, it would be a challenge for the executive branch to discharge its day to day activities. The nature of political tension that is discussed here is different. Tensions that could be envisaged between the HOPRs and HOF are different ones.

In Ethiopia, there are more than 80 nations, nationalities and peoples. Among these more than 60 percent are found in the SNNP Regional State and a political party that has a possibility of winning the majority votes in this State may have the a chance to control more seats in the HOF.[127] On the other hand, members of the HOPRs are directly elected by the Ethiopian people and a political party that wins elections in Amhara and Oromiya regions has a chance of establishing government across the country.[128] The vote that is obtained in these two regional states may be adequate to take the majority seats in the legislative organ. The presence of two different party dominations in the HOPR as well as in the HOF thus may create tensions between the two houses.

When the HOF and the HOPRs are controlled by two different political parties, it would be very difficult for the political party that has established a government to exercise its day to day functions without securing the consent of the HOF. A law enacted by the governing political party may be rejected by the HOF if the latter is not persuaded with policy and program of the government. Such political tensions could be very dangerous and may lead into chaos.

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[127] See http://www.hofethiopia.gov.et/web/guest/nation-nationality [Last accessed on March 13, 2012]. The number of representatives that the SNN&P Regional State has is greater than the sum of the two populace Regional States (Amhara and Oromiya) have. By the 2010 election, SNN&P Region has been represented by 51 representatives out of a total of 137 seats, but those two populace Regions are represented by 48 members (both of them by equal 24 representatives). If the SNNP Regional State could get the coalition, for example other Regional States, it would control the majority in the HOF.

[128] See http://www.ethemb.se/ee_eth_election2010.htm [last accessed on March 13, 2012]. In the 2010 Ethiopian elections out of 547 seats in the parliament, Oromiya (178) and Amhara (138) regional states comprised of 316 seats and this is more than enough to establish a government.

Conclusion

Constitutional adjudication is a proper way of settling disputes. It is important to balance power between different branches of government. It helps to control the legislative and executive branches of government. There are different models of constitutional adjudication in different countries and there is no specific model that is uniformly applicable throughout all constitutional systems. Centralized, decentralized, hybrid and special political council models of constitutional adjudication are among the varieties. Constitutional adjudication may not achieve its best objectives unless adjudicators are free from the influence of legislative and executive branches of government. To attain or meet the objectives of constitutional adjudication it is necessary that to ensure the independence and impartiality of constitutional adjudicators.

In this piece, an attempt is made to compare the arrangement of the constitutional adjudicators of three federal jurisdictions focusing on issues of independence and impartiality. Compared to German and South African constitutional adjudicators, the Ethiopian constitutional adjudicator (the HOF) is not established in a way that ensures independence and impartiality from both the legislative and executive branches of government. Not only its organization as the Upper House of the parliament, the way the members of the HOF are elected defies the internationally accepted standards values of independence and impartiality. For the last four election periods, no single member of the HOF has been elected directly by the people. State councils sent their representatives either from the members of state councils or among the chief executives of states. State councils could also elect representatives among chief executives of the Federal government (from the members of Council of Ministers).

The independence of the HOF will be questionable if its members are elected from both the Federal and regional states' official figures. Officials may intend to achieve the political ends and interests of their own government. As shown in detail, the HOF could be under the indirect influence of both the executive and legislative branches of the government.

The election of members of the HOF from the Federal and state government politicians would further impair the perception of the public. The public may assume that the HOF is a partial body and it may not have trust and confidence in its activities. The active participation of the Federal and state government politicians in the floor of the HOF could further weaken its image as an impartial actor particularly when politically sensitive issues are under discussion.

The principle of natural justice would not have a place if representatives of the HOF could decide on cases in which they have a vested interest. Attaining fair and impartial trial in such circumstances is very much questionable. Further, as members of the HOF are political representatives of the different Ethiopian nations, nationalities and peoples, it will be difficult to handle politically sensitive questions in an impartial and independent manner.

The possibility for political tensions is also there if the Upper and the Lower Houses of the parliament are controlled by two different competing political parties. In such an event, it would be difficult for a government to exercise its day to day activities and to enact laws.

The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation?

Alebachew Birhanu Enyew[♣]

Abstract

The International Criminal Court (ICC) was set up by virtue of the Rome Statute to prosecute and punish core crimes – genocide, crimes against humanity, war crimes and crimes of aggression. The ICC has jurisdiction over such crimes in States Parties to the Rome Statute, and other States whose situation is referred to it by the Security Council. To date, the ICC has opened 18 cases in 8 situations which are all from Africa. As a result, some African leaders complained that the ICC has unfairly targeted Africans and described the Court as "a Court of Western countries." The African Union has also referred the ICC as an impediment to peace, and has eventually called African ICC member States for non-cooperation with the Court. This article thus explores the relationship between the ICC and Africa, and examines some criticisms of the Court in the exercise of its jurisdiction in Africa.

Key Terms: ICC, Africa, States Parties, the Rome Statute, core crimes, human rights, contribution, cooperation, confrontation

1. Introduction

On 17 July 1998, the International Criminal Court (hereinafter ICC) was founded with potentially worldwide jurisdiction pursuant to the Rome Statute. At the time of drafting and adoption of the Statute at the Rome conference, African States played a pivotal role in shaping and supporting the creation of the ICC. As can be seen later, the support of the Court by African States was further expressed in terms of ratification. Several African countries are parties to the Rome Statute.

The Rome Statute has granted the ICC jurisdiction over genocide, crimes against humanity, war crimes and the crimes of aggression. To date, 18 cases in 8 situations have been brought before the ICC from Uganda, the Democratic Republic of Congo, the Central African Republic, Mali, Sudan,

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Libya, Kenya and Cote d'Ivoire.[1] All the cases have been from African countries. As a result, the Court has been accused of 'exclusively' targeting Africans and losing its impartiality in the continent. In particular, following the issuance of arrest warrant for the sitting president of Sudan – Al Bashir, some African leaders have said that the ICC is a "mechanism of neo-colonialist policy used by the West against free and independent countries."[2] In this regard, the African Union (AU) has also expressed its deep concern over arrest warrants, and undertaken initiatives that undermine the Court, including calling for non-cooperation by AU members States in the arrest of President Al Bashir.[3] It now appears that the relationship between the ICC and Africa is somewhat strained.

This being so, this article intends to explore the underlying reasons for current coarse relationship between the ICC and Africa, and examine some of the major criticisms launched against the Court in this regard. The article proceeds as follows. Section 2 focuses on the creation of the ICC and on its mandates. This involves an overview of the birth and structure of the ICC, and examination of issues related to jurisdiction and the principle of complementarity. Section 3 explores what African States have contributed to

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[1] *The Prosecutor v.Thomas Lubanga Dyilo*, *The Prosecutor v. Germain Katanga, The Prosecutor v. Bosco Ntaganda*, *The Prosecutor v. Callixte Mbarushimana*, *The Prosecutor v. Sylvestre Mudacumura*, *The Prosecutor v. Mathieu Ngudjolo Chui* from Democratic Republic of Congo*; The Prosecutor v. Jean-Pierre Bemba Gombo* from Central African Republic*; The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* from Uganda*; The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), The Prosecutor v. Omar Hassan Ahmad Al Bashir*, *The Prosecutor v. Bahar Idriss Abu Garda*, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, *The Prosecutor v. Abdel Raheem Muhammad Hussein* from Sudan*; The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, *The Prosecutor v. Uhuru Muigai Kenyatta* from Kenya*; The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* from Libya*;* and *The Prosecutor v. Laurent Gbagbo*, *The Prosecutor v. Simone Gbagbo* from Côte d'Ivoire, available at: http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx, (last accessed on 23 April 2013)

[2] The International Criminal Court (the ICC) Issues Bashir arrest warrant (5th March, 2009), available at: http://www.aljazeera.com/news/africa/2009/03/20093412473776936.html, (accessed on 23 April 2013)

[3] Assembly of the AU, Assembly/AU/Dec.296 (XV), Kampala, 27 July 2010, paras 5, 8 and 9

the creation and advancement of the ICC, how African States have cooperated with the Court, and why their relationship with the Court turned out to be contentious. It also briefly discusses the reaction of Africa to the works of the Court in the Continent. In the last section, some concluding remarks follow.

2. The ICC at a Glance

2.1 The Birth of ICC

In the aftermath of World War II, the international community had faced two important concerns: 1) how to ensure the respect of human dignity in the future, and 2) how to deal with the holocaust. Regarding the first concern, the international community attempted to ensure the respect of human dignity and worth of human being by setting human rights standards as a common universal value system. These human rights standards have been embodied in the international human rights instruments, which in turn have marked the end of the exclusive States' jurisdiction over human rights issues. International human rights instruments have, therefore, internationalized human rights standards, and made them the concern of international community as a whole.

As a reaction to the second concern, the international community established the International Military Tribunals in Nuremberg (IMT, hereinafter Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTF, hereinafter Tokyo Tribunal) by virtue of London Charter on August 8, 1945 and Special Proclamation on January 19, 1946 respectively.[4] The Nuremberg and Tokyo tribunals were created to punish the perpetrators of World War II (German and Japanese officials) for crimes against peace, crimes against humanity and war crimes.[5]

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[4] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, pp. 93& 95. These tribunals were a response to the overwhelming horrors of the Nazi genocide in Europe and the Japanese crimes perpetrated during the wartime occupation of large parts of many South East Asian nations.

[5] Simi Singh, 'The Future of International Criminal Law: the International Criminal Court', *Touro International Law Review*, 2000, p. 2

The prosecution and punishment of the major Nazi and Japanese criminals sparked a flame of hope for a new system of international criminal justice.[6] However, in spite of the hope that trials after World War II would set a precedent for others, there was no early successor to the Nuremberg and Tokyo Tribunals to prosecute international crimes at the international level. Put differently, the international community was unable to transform the flame of hope into a lasting institution i.e. permanent international criminal court.

Concomitantly, the Cold War gave rise to massive crimes in Europe, Latin America, and Asia; Africa was still under the rule of colonialism and apartheid.[7] Sadly, the Security Council failed to address those atrocities through post-conflict justice mechanisms, for some States and commentators questioned if it had a power to set up tribunals within the scope of its mandate under Chapter VII of the UN Charter.[8] The Security Council did not act in pursuit of post conflict justice between 1948 and 1992. In effect, the world had to wait for almost half a century since Nuremberg and had to witness two genocide instances – first in the former Yugoslavia, and then in Rwanda – to create the *ad hoc* tribunals for Yugoslavia and Rwanda.[9]

In response to the two conflicts during 1990s (the Yugoslav wars of dissolution and the Rwandan genocide), the United Nations revived the idea of international criminal tribunals. In the end, the Security Council established two *ad hoc* international criminal tribunals to try perpetrators of the atrocities in the former Yugoslavia[10] and Rwanda[11]. Furthermore, the Security Council

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[6] *Id*

[7] Luis Moreno-Ocampo, preface, in Jose Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of International Criminal Law*, IHL series, Martinus Nijhoff publishers, 2009, p. xv

[8] M. Cherif Bassiouni, 'Perspectives on International Criminal Justice', *Virginia Journal of International Law*, Vol.50:2, 2010, 272

[9] *Id*

[10] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

has subsequently created mixed model tribunals for Sierra Leone, Kosovo, Timor-Leste, Cambodia, Bosnia and Herzegovinian, and Lebanon.[12]

The overall successes of the Yugoslavia and Rwanda Tribunals contributed to the emergence of the International Criminal Court even if the two *ad hoc* tribunals were limited both temporally and geographically to the conflicts in the former Yugoslavia and Rwanda respectively.[13] Indeed, the wish for a permanent court to judge the most heinous crimes in humanity had been repeatedly expressed throughout history, starting in 1872[14], and was manifested in the Nuremberg and Tokyo tribunals after World War II and the *ad hoc* tribunals of Rwanda (the "ICTR") and Yugoslavia (the "ICTY") in the 1990s. [15]

The question of a permanent international criminal court came back on to the United Nations' agenda and was taken up by the International Law Commission (ILC) in 1989. The International Law Commission responded by producing the draft Statute of the International Criminal Court. In the summer of 1998, over 160 countries met in Rome to negotiate the draft Statute of the ICC that would establish a permanent international criminal court. After five weeks of intense negotiations, the final text of the Statute (hereinafter the Rome Statute) was adopted by a vote of 120 to 7 (USA, Libya, Israel, Iraq,

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[11] Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

[12] M. Cherif Bassiouni, *supra note* 8, P. 272

[13] Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, P.34.

[14] Gustave Moynier, one of the founders of the International Committee of the Red Cross, presented a proposal to the International Committee of the Red Cross calling for the establishment by treaty of an international tribunal to enforce laws of war and other humanitarian norms on 3 January 1872. Until Moynier suggested a permanent court, almost all trials for violations of the laws of war were by ad hoc tribunals constituted by one of the belligerents – usually the victor – rather than by ordinary courts or by an international criminal court. He did not think that it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they would at any moment be subjected to pressure.

[15] Anna Triponel & Stephen Pearson, 'African States and the International Criminal Court, A Silent Revolution in International Criminal Law', *Journal of Law and Social Challenges*, Vol.12, 2010, p. 66

China, Qatar, Yemen) with 21 abstentions.[16] In 1998, the international community finally created the International Criminal Court (the ICC) to try perpetrators of the most heinous crimes. The establishment of the ICC marked a major advance in international criminal justice. Its creation represents a great step forward in the march towards universal human rights and rule of law, and signifies international efforts to replace impunity with accountability.[17]

Article 126 of the Rome Statute requires sixty ratifications or accessions for entry into force. Accordingly, the Rome Statute entered into force on 1 July 2002 upon the fulfillment of the required sixtieth ratification. The Rome Statute not only establishes a new judicial institution to investigate and try international offences, but also sets out a new code of international criminal law. Thus, the adoption of the Rome Statute is seen as one of the most important developments in international criminal law.

2.2 Structure

The ICC is structurally not part of the United Nations, rather an independent judicial institution endowed with an international legal personality. However, the framers of the Rome Statute wished the Court to maintain a cooperative relationship with the United Nations through an agreement so as to assert the authority of the Security Council (acting under Chapter VII of the UN Charter) over issues concerned with case referral to the Court, and international peace and security.[18]

The ICC consists of a judicial, prosecutorial and administrative (registry) branch. According to article 34 of the Rome Statute, the Court is composed of four organs: the Presidency, the judicial Divisions, the Office of the

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[16] Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, Cavendish publishing, 2003, P.376.

[17] Triponel & Pearson, *supra note* 15, P.66

[18] Bantekas and Nash, *supra note* 16, p. 376. *See also* the Rome Statute of the International Criminal Court, document A/CONF.183/9, 1998, Articles 2, 4 and 13(b) [Hereinafter, the Rome Statute].

Prosecutor and the Registry. The judicial Divisions consist of eighteen fulltime judges organized into the Pre-Trial Division, the Trial Division, and the Appeals Division. Judges are nominated by Assembly of States Parties[19] and elected for a non-renewable nine years by secret ballot requiring a two thirds majority of the States present and voting.[20] Under article 36 (3) of the Rome Statute, there is a requirement that judges must be fluent in at least one of the official languages of the Court and is required to have a high moral character, impartiality and integrity. Article 36(3) also requires judges to have competence in criminal law or in relevant areas of international law such as international human rights law and international humanitarian law.

The Presidency is composed of three judges of the Court - the president and two vice-presidents - and elected by the judges from among their number, for a term of three years.[21] The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute.[22]

The Office of Prosecutor is the other part of the ICC. As described under article 42 of the Rome Statute, the prosecutorial branch is responsible for receiving and examining referrals and information on crimes within the jurisdiction of the Court, and for investigation and prosecution. The Prosecutor as outlined under article 42(2) of the Rome Statute has full authority over the management and administration of the Office, and is assisted by one or more Deputy Prosecutors. The Prosecutor and Deputy Prosecutors are elected from different nationalities by the Assembly of States Parties for a nine year non-renewable term. Both the Prosecutor and the Deputy Prosecutors are to be persons "of high moral character" with

[19] As per article 112 of Rome Statute, Assembly of States consist one representative from each nation who is a party to the Rome Statute, although other nations that have signed the Statute can be observers in the Assembly. The Assembly of States, albeit not an official organ of the court, is still an important unit of the ICC.

[20] The Rome Statute, *supra note* 18, Article 36(6) and (9) (a).

[21] *Ibid* Article 38

[22] *Id*

"extensive, practical experience" in criminal prosecutions. In order to preserve the independence of the Office, the Rome Statute under article 42(5) prohibits the Prosecutor and a Deputy Prosecutor from engaging in any activity which is likely to interfere with his/her prosecutorial functions or to affect confidence in his/her independence. None of them can participate in any matter in which their impartiality might reasonably be doubted on any ground. Besides, article 42(1) of the Rome Statute in its last sentence states that a member of the Office should not seek or act on instructions from any external source.

The other organ of the Court is the Registry which is responsible for the non-judicial aspects of the administration and servicing of the Court.[23] Registry is headed by the Registrar who is described in the Rome Statute as a principal administrative officer of the Court.[24]

2.3 Jurisdiction and the Principle of Complementarity

Article 5(1) of the Rome Statute has granted the Court jurisdiction over the most serious crimes of international concern: genocide, crimes against humanity, war crimes and crimes of aggression. Regarding Crimes of aggression, the Court cannot however exercise jurisdiction until an amendment to the Rome Statute is made to define crime of aggression and set out preconditions for the ICC to take jurisdiction.[25] For the time being, the

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[23] Rome Statute, *supra note* 18, Article 43

[24] *Id*

[25] *Ibid*, Article 5(2), Article 121 and 123. The first Review Conference of the Rome Statute was held in Kampala, Uganda on 12 June 2010. After a week of high-level discussions on the impact of the Rome Statute to date, ICC States Parties came to an agreement regarding amendments to the Rome Statute pertaining to the crime of aggression. They provided a definition for the crime of aggression which criminalizes the use of armed force by one State against another and carried out in contravention to the United Nations Charter. On this basis individuals responsible for unlawful acts of war may be subject to prosecution before the ICC. The Review Conference determined that the Court will not be able to exercise jurisdiction until 30 states have ratified the new amendment. In addition, states parties will have to make a positive decision to activate the jurisdiction after 1 January 2017.

ICC is thus limited to jurisdiction over crime of genocide, crimes against humanity and war crimes which are defined in detail from article 6 – 8 of the Rome Statute. But the Court can only try such crimes committed on or after July 1, 2002 – *jurisdiction ratione temporis* (article 11(1) of the Rome Statute).[26]

International agreements are capable of binding only contracting States, and they do not bind third parties without their consent.[27] Being multilateral treaty, the Rome Statute has created obligations on States Parties. Thus, the ICC is granted the power to exercise jurisdiction over crimes committed in States Parties, even when perpetrated by nationals from States which are not parties to the Rome Statute. However, the jurisdiction of the Court may also be extended to crimes committed in non-States Parties if they accept jurisdiction of the Court with respect to the crimes in question, or if a situation is referred to the Prosecutor by the Security Council by virtue of article 13(b) of the Rome Statute. As per Article 12(1) a State Party to the Statute is subject to the automatic jurisdiction of the Court, whereas non-State Parties (where a crime takes place or the State of the perpetrator's nationality) can accept ICC jurisdiction with regard to a specific case or situation by lodging a declaration to that effect.[28]

According to article 13 of the Rome Statute, the Court may exercise its jurisdiction when a situation is referred to the Prosecutor by a State Party, in instances where a situation is referred to the Prosecutor by the Security Council, or in instances where the Prosecutor initiates an investigation of a particular crime within the jurisdiction of the Court. Acting under the terms of Chapter VII of the United Nations Charter[29], the Security Council may refer a situation to the Prosecutor of the ICC. In order for the Security Council to act

[26] As indicated under Article 11(2) of the Rome Statute, with regard to a State that becomes a Party to the Statute after its entry into force, the ICC may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has made a declaration.

[27] The 1969 Vienna Convention on the Law of Treaties, 1969, Article 34

[28] Rome Statute, *supra note* 18, Article 12 (3)

[29] The United Nations Charter, 1945, Article 39-51

under Chapter VII, the specific situation must be a threat to the international peace, or a breach of peace, or an act of aggression. In that case, no State consent is required.

In relation to Prosecutor's independent power of referral, different mechanisms are set in place under article 15 of the Rome Statute to counterbalance the possible abuse of such power. For example, the said article of the Statute provides a judicial guarantee that such a power will be exercised in a neutral and non-politically motivated manner. Once the Prosecutor receives information about the occurrence of crimes of international concern, the Prosecutor has to make an assessment whether there is a reasonable basis for continuing with an investigation.

In his/her assessment, the Prosecutor must determine whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed", whether the case is admissible and whether the proceeding is in the interest of justice.[30] If the Prosecutor determines a reasonable basis exists based on the assessment, he/she has to submit a request for the authorization to investigate to the Pre-Trial Division. Then the Pre-Trial Division will independently determine whether a reasonable basis exists to carry on an investigation. No investigation by the Prosecutor will be conducted if the Pre-Trial Division determines that no reasonable basis exists. The Prosecutor must, therefore, obtain the authorization of the Pre-Trial Division before commencing an investigation into a situation. By contrast, in the case of referral of a situation by the Security Council or a State, the Prosecutor is not required to request the Pr-Trial Division for the authorization of investigation.

The other issue which needs to be discussed in connection with jurisdiction is the principle of complementarity. The term complementarity is defined nowhere in the Rome Statute. But Article 1 of the Statute states that the Court shall "be a permanent institution and shall have the power to

[30]The Rome Statute, *supra note* 18, Article 53. The procedures for investigation and prosecution such as ensuring the properness of the case for the Court in terms of evidence and jurisdiction, and the inability or unwillingness of a national court to try the case have the effect of restricting the power of the Prosecutor.

exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions." In the Preamble of the Statute, it is also stated that the ICC is "complementary to the national criminal jurisdictions."[31] Complementarity is understood as a principle that priority must be given to trials for international crimes at national level rather than at the ICC.[32] The principle is embodied in the Rome Statute not only for respect of the primary jurisdiction of States but also for practical considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.[33] Regarding the principle, it is said:

> *The ICC is intended to supplement the domestic punishment of international violations, rather than supplant domestic enforcement of international norms. The complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crimes. It balances that supranational power against the sovereign right of States to prosecute their own nationals without external interference.*[34]

The ICC is created to complement national courts in a way which gives priority to national courts, where a State with jurisdiction wants to prosecute. The ICC is only one way to prosecute crimes of international concern and it may not in all circumstances be the best one. As described under article 17(1) of the Rome Statute, the Court will be able to exercise jurisdiction over a case only if a State with jurisdiction is unwilling[35] or unable[36] to genuinely

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[31] The Rome Statute, *supra note* 18, para. 10

[32] Andrew Clapham, Issues of Complexity, Complicity and Complementarity: from the Nuremberg Trials to dawn of the New International Criminal Court in Philippe Sands (ed.), *From Nuremberg to The Hague: the Future of International Criminal justice*, Cambridge University Press, 2003, p.63.

[33] Cryer , *supra note* 4, P.127

[34] Mohamed M. El Zeidy, The *principle of Comeplementarity in the International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff Publishers, 2008, p.158.

[35] As per 17(2) of the Rome Statute, a State may be considered as 'unwilling' when: (i) in fact the national authorities have undertaken proceedings for the purpose of shielding the

prosecute. Thus, the Court is a court of last resort. The drafters of the Rome Statute have given the first bite of prosecution to national courts. According to Antonio Cassese, there are two underlying reasons for this approach. First, the drafters saw a practical ground: if the Court were a court of first resort, it would be flooded with cases from all over the world which they considered it inappropriate.[37] Secondly, the drafters were perhaps intended to respect State sovereignty as much as possible.[38]

3. The Relationship between the ICC and Africa

As we will discuss below in detail, Africa has undeniably contributed a lot to the establishment and advancement of the ICC. The continent has also cooperated with the Court by enacting national legislation for the implementation of the Rome Statute, and referring situations. Regardless of these earlier contributions and cooperation, recent developments in African countries reveal that the ICC has faced serious limitations in winning the hearts and minds of Africa leaders. In fact, the relationship between the Court and Africa has become weak and coarse. In this section, we will analyze what the relationship between Africa and the ICC has looked like since the creation of the Court, and discuss the underlying reasons for their current contentious relationship.

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person concerned from criminal responsibility; or (ii); there has been an 'unjustified delay' in the proceedings showing that in fact the authorities do not intend to bring the person concerned to justice; or (iii) the proceedings are not being conducted independently or impartially or in any case a manner of showing the intent to bring the person to justice.

[36] As per 17(3) of the Rome Statute, a State is 'unable' when, due to a total or substantial collapse or unavailability of judicial system, it is not in a position: (i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody; or (ii) to collect the necessary evidence; or (iii) to carry out criminal proceedings.

[37] Cassese, *supra note* 13, p 351. The Court, having a limited number of judges and limited financial resources and infrastructure, would be unable to cope with a broad range of cases.

[38] *Id*

3.1 Contributions

After the Rwanda and Yugoslav Tribunals, the international community has provided the strongest support for the idea that a permanent international criminal court is desirable and practical. Like other regions Africa showed a very positive gesture towards the creation of permanent international criminal court. In this respect, during the Rome negotiations for the creation of the ICC, the representative of the then Organization of African Unity (OAU) remarked that Africa has a special interest in the establishment of the ICC, for its people had for centuries endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence which continue to exist despite the continent's post-colonial phase.[39] In particular, the vivid memories of the Rwandan horrendous genocide strengthened the determination of Africa to support the idea of permanent international criminal court that would prosecute and punish perpetrators of such heinous crimes in the future.[40]

The participation of Africa in discussions regarding the creation of an International Criminal Court (ICC) begun as early as 1993 when the International Law Commission presented a draft ICC statute to the United Nations General Assembly for consideration.[41] The delegations of South Africa, Senegal, Lesotho, Malawi, and Tanzania were among African countries present in the 1993 discussions.[42]

After the presentation of the draft statute by the International Law Commission in 1993, different ICC related activities were carried out in Africa to make a meaningful impact on the outcome of negotiations. For

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[39] T. Waluwa, Legal advisor of the OAU Secretariat Statement at the 6th plenary, 17 June 1998; Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, UN Doc A/CONF 183/13/(Vol. II) 104, 115-118 Para 116.

[40] *Id*

[41] Coalition for the International Criminal Court (CICC), Africa and the International Criminal Court, available at: http://www.iccnow.org/documents/Africa_and_the_ICC.pdf, (accessed 20 June, 2013)

[42] *Id.*

instance, in September 1997, experts of Southern African Development Community (SADC) met and provided impetus for a continent-wide consultation process on the creation of the Court.[43] The participants agreed on a set of principles which included a number of far-reaching suggestions .[44] The SADC principles were embodied in the Dakar Declaration for establishment of the ICC. In February 1998, the Council of Ministers of the Organization of African Unity took note of the Dakar Declaration and called on all OAU member States to support the creation of the Court.[45]

In July 1998, 47 African Countries attended the Rome Conference for the drafting of the Statute; many of these countries were members of the Like-Minded Group that pushed for adoption of the final Statute.[46] The African delegates participating in the conference considerably contributed to the outcome of negotiations, for they had two guiding documents: the SADC principles and the Dakar Declaration.[47] Finally, the vast majority of African Countries voted in favor of adopting the Rome Statute and establishing the ICC.

After the adoption of the Rome Statute, an African country, Senegal, became the first country in the world to ratify the Rome Statute on 2 February

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[43] Max Du Plessis, *The International Criminal Court that Africa wants, Institute for Security Studies*, Remata iNathi Printing, 2010, p.6.

[44] Ibid, The SADC principles include: the ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes; the court should have an independent prosecutor with power to initiate proceedings *proprio motu*; there should be full cooperation of all states with the court at all stages of the proceedings; and stable and adequate financial resources should be provided for the ICC and states should be prohibited from making reservations to the statute.

[45] Plessis, *supra note* 43, p.7. The resolution of the Council of Ministers of the OAU was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998. Dakar Declaration was the result of an African conference in favor of the establishment of the ICC.

[46] Coalition for International Criminal Court, *supra note* 41. Members of Like-minded Group were countries from all regions of the world which were committed to a Court independent from UN Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.

[47] *Ibid*

1999.[48] This can obviously make Africa's early support to the ICC clear. Moreover, there are 120 countries currently parties to the Rome Statute and of which Africa comprises 33 member States, the largest regional bloc in the Assembly of States Parties.[49] This also illustrates that Africa is the major support base of the ICC. Besides, Assembly of States Parties elected some African legal experts to serve as judges and prosecutor of the ICC; and Africa is thus well represented in the ICC.[50]

Apart from African States' robust backing for the Court, many African non-governmental organizations and civil societies made a significant contribution to the emergence and advancement of the ICC through domestic advocacy and joining the Coalition for an International Criminal Court (CICC) which comprises activists from different parts of the world.[51]

Another measure of commitment to the ICC is noticeable from the response of a few African States to the United States efforts of encouraging States to enter into bilateral immunity agreements (non-surrender agreement)

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[48] The Rome Statute of the International Criminal Court, Plans for International Criminal Court gather momentum, available at: http://untreaty.un.org/cod/icc/general/court.htm, (accessed on 4 April, 2013)

[49] Nanjala Nyabola, 'Does the ICC have an African problem?', 28 March 2012, Al Jazeera, available at : http://www.aljazeera.com/indepth/opinion/2012/03/20123278226218587.html, (accessed on 4 April, 2013)

[50] At time of writing of this article, Africans out of eighteen judges of the ICC are: Sanji Mmasenono Monageng of Botswana (first vice president of the Court), Akua Kuenyehia of Ghana, Joyce Aluoch of Kenya, and Chile Eboe-Osuji of Nigeria. Fatoumata Dembele Diarra (Mali) is continuing in office to complete their trials, in accordance with article 36(10) of the Rome Statute. The Office of Prosecutor is also headed by the Prosecutor, Mrs. Fatou Bensouda of the Gambia. In addition, Medard Rwelamira, a citizen of South Africa and Tanzanian by birth was the first director of the secretariat of the Assembly States Parties, before his untimely passing in 2006.

[51] Plessis, *supra note* 43, P.20. The CICC has actively been engaged in various activities for creation and support of the ICC, such as lobbying for the adoption of the Rome Statute, campaigning for swift achievement of the minimum ratifications of the Statute, and supporting for the draft of ancillary legal instruments such as the ICC's Rule of Procedures and Evidence.

whereby States agreed not to send United States citizens for trial at the ICC.[52] Such an agreement conspicuously undermines the works of the ICC. Although United States extracted such agreements from more than 60 mostly poor countries under pressure, a few African countries such as Kenya, Mali, Namibia, Niger, South Africa and Tanzania refused to sign an agreement.[53] Thus, Africa has been actively involved in the creation and advancement of the ICC ranging from shaping the creation of the Court to expressing its commitment to the ICC by a few African countries irrespective of the American pressure.

3.2 Cooperation

Prior to 1998, the focus of the international community was on the issues of the establishment of the permanent international criminal court and the importance of ending impunity. After the ICC came into being and through the passage of time, the focus of attention turned into some practical issues like whether the ICC would be able to operate effectively so as to meet its noble mission.[54] The ICC does not have its own police force or law enforcement agency with powers to arrest, to search and seize evidentiary materials or to execute other orders of the Court. The Court cannot itself implement its decisions such as an arrest warrant or execution of sentence in

[52] *Ibid*, P. 9. The US has negotiated bilateral agreements with other States, some of them parties to the Statute, others not, which provide that no nationals, current or former officials, or military personnel of either party may be surrendered or transferred by the other State to the ICC for any purpose. The US refer to Article 98(2) of the Rome Statute as the basis for these agreements, maintaining that the ICC will not be able to request a State to surrender a US national to the Court, once that State has entered into such an agreement with the US. The agreements will of course only be effective in preventing the Court from making such a request if they are in truth compatible with the Statute. Non-surrender agreements are usually linked with other area of cooperation such as granting aid. US threatened South Africa to cut military aid, as the latter was not signed such agreement with the US.

[53] *Ibid* p.10.

[54] The mission of the ICC is, through prosecution and punishment, to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community, and thus to contribute to the prevention of such crimes.

cases of conviction on the territory of a State. As a result, the success of the ICC heavily depends on the level of cooperation secured from states and intergovernmental organizations. In this regard, the former president of the Court described:

> *[T]he Rome Statute is a two pillar system: a judicial pillar represented by the Court, and an enforcement pillar represented by the States, which undertook a legal obligation to cooperate with the Court through the Rome Statute. Cooperation is the inter-play between these two pillars, shown clearly by the fact that the Court requires the States to play their part in order for the system created by the Statute to work.*[55]

Thus, the issue of cooperation is at the core of the Rome Statute. In accordance with article 86 of the Rome Statute, States Parties are under a general obligation to co-operate with the Court in its investigation and prosecutions of the core crimes. More specifically, the Statute obliges States Parties to cooperate with the Court in various ways such as arresting and surrendering suspects, investigating and collecting evidence, protecting witnesses, extending privileges and immunities to ICC officials.[56]

From the moment that the Rome Statute became binding on States in question, some African member States to the Rome Statute have cooperated with the Court at least in two ways: self-referral of situations, and enactment of national legislation for the implementation of the Rome Statute. Regarding self-referral, the governments of Uganda, Democratic Republic of Congo, Central African Republic and Mali have referred their respective situations to the ICC. Besides, the Democratic Republic of Congo set an example in terms of cooperation regarding enforcement in dealing with the arrest warrants issued against Thomas Lubanga Dyilo, Germain Katanga and Mathieu

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[55] Silyana Arbina (ICC Registrar), 'No Peace without Justice, Roundtable on Implementing Legislation', (July 17, 2009), available at : http://www.icc-cpi.int/NR/rdonlyres/9EA855BC-A495-40AA-B5F8-92F44EO8D695/280578/StatementRegistar2.pdf, (accessed 4 April, 2013)

[56] The Rome Statute, *supra note* 18, articles 87-102

Ngudjolo Chui.[57] A number of African cases before the ICC may signify the African commitment to justice for the most serious crimes.

Upon the entry into force of the Rome Statute, several State Parties have been considering national legislation to enable them not only to surrender suspects to the new Court, but also to assert jurisdiction over various categories of individuals accused of genocide, crimes against humanity and war crimes.[58] Accordingly, some African ICC member States such as Burkina Faso, Central African Republic, Kenya, Senegal, South Africa, and Uganda have enacted comprehensive ICC implementing legislation, although other States have passed legislation implementing some aspects of the Rome Statute, and draft implementing legislation is pending in others.[59] The enactment of national legislation to implement the Rome Statute does not only demonstrate to the Court the extent to which these countries are able and willing to conduct national criminal trials for heinous international crimes, but also reflects those States' acceptance of international criminal law as agreed upon by world leaders in the Rome Statute.[60]

As described under article 87(7) of the Statute, if a State Party fails to cooperate, and if such non-cooperation prevents the Court from exercising its functions and powers under this Statute, "the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." The consequences of non-cooperation will be decided by Assembly of States Parties or the Security Council as the case may be.

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[57] Eugenebakama, State Cooperation: the weak link of the ICC, (14 June 2010), available at: http://www.coalitionfortheicc.org/blog/?p=588&langswitch_lang=en/, (accessed on 4 April, 2013)

[58] Sands, *supra note* 32, p.64

[59] Human Rights Watch, Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court November 2010 p.14

[60] Triponel & Pearson , *supra note* 15, pp.69-70

3.3 Confrontation

From the foregoing discussion, we can squeeze that Africa played a significant and constructive role before, during and after the creation of the Court. However, through time in particular following the indictment of President Al Bashir for commission of the core crimes, the early positive attitudes and constructive support of Africa seem to be turning into a growing trend of contention. Thus, it appears that Africa changes its position towards the ICC from cooperation to confrontation. The confrontation revolves around the ICC's perceived prioritization of Africa over other regions, its selection of cases, the potential effect of prosecutions on peace processes and U.S. position on the ICC. Now let us turn to points of controversies between the ICC and Africa.

3.3.1 ICC's Focus on African States

As discussed above, Article 13 of the Rome Statute outlines that the Prosecutor can initiate an investigation on the basis of a referral from any State Party, Security Council, or his/her *proprio motu* power on the basis of information on crimes within the jurisdiction of the Court received from individuals or organizations. To date, 18 cases in 8 situations have been brought before the ICC. The governments of four countries (all parties to the Statute) - Uganda, the Democratic Republic of Congo, the Central African Republic and Mali have referred situations occurring on their territories to the prosecutor. The United Nations Security Council has referred two situations to prosecutor: the situation in Darfur, Sudan and the situation in Libya – both non-States Parties. Two more situations (situation in Kenya and situation in Côte d'Ivoire) have been opened by the prosecutor for investigation upon the authorization of Pre-Trial Division. After a thorough analysis of available information, the ICC Prosecutor has opened and is conducting investigations in all of the above-mentioned situations.

The above facts reveal that all situations under ICC investigations to date are in Africa. So far, no investigation into situation of a country from other region has been conducted by the Prosecutor of the ICC.[61] Put differently, the

[61] In May 16, 2013, Comoros has referred the action of Israeli troops in boarding the flotilla headed to Gaza on 31 May 2010 to the International Criminal Court. The ICC

work of the ICC is so far limited to African countries. Thus, the work of the ICC raises a number of questions. Why does the ICC target Africans? Does the Court have African problems only? Are there not victims of conflict in other regions? To deal with these questions, let us explore the position of African countries, and reaction of the Court and its proponents.

Many African leaders are currently unhappy with the functioning of the Court as it has merely focused on Africa, and for it has not shared the concerns of African countries. In this regard, the former chairperson of the AU Commission, Jean Ping, complained that it is "unfair that all those situations referred to the ICC so far were African", and "it seems that Africa has become a laboratory to test the new international law."[62] In more or less similar terms, in 2009 Benin's President Boni Yayi said that "we have the feeling that this Court [ICC] is chasing Africa."[63] Similarly, Rwandan president Paul Kagami portrayed the ICC as "a new form of imperialism that seeks to undermine people from poor African countries, and other powerless countries in terms of economic development and politics."[64] Others have further criticized that the Prosecutor has unfairly focused on Africa in investigation due to geopolitical pressure either out of a desire to avoid

Prosecutor has announced that she is opening a preliminary examination of the situation and it now remains to be seen whether this will lead to a proper investigation and perhaps even charges being brought by the ICC against Israeli troops or officials. Israel, of course, is not a party to the Statute of the ICC, but this does not itself mean that the ICC cannot exercise jurisdiction over Israeli nationals or officials. Comoros is a party to the Statute and the main vessel on which the Israeli actions took place, the Mavi Marmara, was registered in Comoros. Under Article 12(2) of the ICC Statute, the Court may exercise jurisdiction not only to nationals of State's party to the ICC statute but also, crucially, where: the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft is a party to the Statute. *See also*, 'Court between A Rock and a Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC', 16 May 2013, available at: http://www.dipublico.com.ar/english/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/, (accessed 20 June, 2013).

[62] World Reaction-Bashir Arrest, 4 March 2009, BBC, available at: http://news.bbc.co.uk/2/hi/africa/7923797.stm, (accessed on 4 April, 2013)

[63] M. Tostevin, 'Putting Africa on Trial', 25 January, 2009, available at: http://blogs.reuters.com/africanews/2009/01/25/putting-africa-on-trial/, (accessed on 4 May, 2013)

[64] AFP, Rwanda's Paul Kagami says ICC targeting poor African countries, July 31, 2008

confrontation with major powers or as a tool of western foreign policy.[65] In 2013, a Uhuru Kenyatta voter described the ICC to *the New York Times* as "a tool of Western countries to manipulate undeveloped countries."[66]

The displeasure of Africa with ICC has once again appeared clear at the recent African Union summit held on 26-27 May, 2013. At the conclusion of the AU summit in the press conference, Hailemariam Desalegn, AU chairman and Prime Minster of Ethiopia, said: "African leaders have come to a consensus that the ICC process conducted in Africa has a flaw. The intention was to avoid any kind of impunity…, but now the process has degenerated to some kind of race-hunting."[67] Thus, the ICC has been accused of 'exclusively' targeting Africans, and being a mere tool for western countries.

Against those criticisms, the current prosecutor of the ICC, Fatou Bensouda, has contended that seeking justice for victims on the continent is hardly evidence of discrimination.[68] According to Bensouda, the Court has not targeted Africans, instead simply sought justice for victims of crimes against humanity, including African victims. She further pointed out that "all of the victims in our cases in Africa are African victims, and they are the ones who are suffering these crimes."[69] She contends that the Court is protecting Africans rather than targeting them. The Coalition for the International Criminal Court (CICC) also argued that the ICC is not unfairly focusing on

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[65] Steve Odero, The Politics of International Criminal Justice: the ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis, unpublished, p. 156.

[66] Analyst Questions ICC's Intense Focus on Africa, April 3, 20013, available at: http://www.voanews.com/content/icc-focus-on-africa-questioned/1633694.html, (accessed on 3 April, 2013), Uhuru Kenyatta is indicted for crimes committed following 2007 Kenya national election crisis.

[67] African Union accuses ICC of 'hunting' Africans (27 May, 2013), available at : http://www.bbc.co.uk/news/world-africa-22681894/, (accessed on 2 June, 2013)

[68] David Bosco, 'Why is the International Criminal Court picking only on Africa?', March 29, 2013, available at: http://articles.washingtonpost.com/2013-03-29/opinions/38117212_1_international-criminal-court-african-union-central-african-republic, (accessed on 3 April, 2013). Fatou Mensouda, a Gambian, was elected in December 2011 as a prosecutor of the ICC, and expected to repair the rift between the Court and Africa.

[69] *Id.*

Africa, rather fighting against impunity all over the world.[70] It is thus argued that the ICC has targeted impunity, not African individual leaders.

One commentator has given three explanations why the ICC seems to be targeting Africa. First, since a number of African countries still remain conflict-prone, and since the ICC primarily focuses on situations of armed conflict, those countries have obviously been areas of interest for the Court.[71] Secondly, since a number of African Countries chose to join the Rome Statute, the ICC has got broad jurisdiction over potential crimes committed on their territory.[72] Thirdly, the Security Council has given the ICC more room to operate in Africa by referring two situations of non-States Parties: Sudan and Libya.

In addition to the above explanations, the fact that the national legal systems in Africa are weak has also allowed the ICC to assert its jurisdiction under the principle of complementarity. The ICC as court of last resort assumes jurisdiction over core crimes only when national courts fail to try perpetrators of heinous crimes. Failure to prosecute by national courts allows the ICC to exercise its mandate. In addition to this, the usage of self-referral by some African governments has given the ICC a chance to intervene in African countries. However, some critics argue that those States have been manipulated into making State referrals so as to build the profile of the ICC.[73]

But still one may wonder why the ICC has not gone into other areas of conflict in which it has jurisdiction such as Afghanistan, Syria, Colombia, Iraq, Georgia and Sri Lanka.[74] Besides, why Security Council has not acted even handedly in respect of international criminal justice – willing to send African situations of non-States Parties to the ICC, but unwilling to send similarly deserving situations in respect of Israel, Chechnya and Syria to the

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[70] Africa and the International Criminal Court, available at: http://www.iccnow.org/documents/Africa_and_the_ICC.pdf, (accessed on 3 April, 2013).

[71] Bosco, *supra note* 68

[72] *Id*

[73] Africa and the International Criminal Court: mending Fences, Avocats Sans Frontieres, July 2012, p.8

[74] Africa and the International Criminal Court, *supra note* 70

Court.[75] At this juncture, it is important to note that the ICC could have opened investigations outside of Africa; and the Security Council could also have referred the situations of non-States Parties to the Court, including the situations of Gaza-Israel and Syria.[76]

As described above, the Prosecutor has contended that the ICC is seeking justice for victims of crimes of international concerns. But, a related question is what kind of court has stood up for victims in Africa, but has failed to do so for victims of conflict in other regions. In this connection, it is ironically asked that: "aren't there also victims in Afghanistan; aren't there also victims in Colombia, in Georgia, and other places?"[77] An international court which is standing up for victims should stand up for victims in Africa as well as in other places of the world. There are, therefore, justified concerns of selectivity and partiality in relation to the prosecution of international crimes of concern in Africa, and referrals by the Security Council.

In sum, we can argue that there has been uneven application of international criminal justice – an intense focus on Africa. The ICC may not prosecute leaders of powerful States, or even those States they protect. This being so, Africa seems to have some aversion and to lose confidence in the ability of the Court to deliver a kind of protection in an equitable way as it was designed. However, the danger of this argument is that it shields African dictators and their followers who seek reasons to delay or resist being held responsible under universally applicable standards of justice. Indeed, some African leaders have sought to exploit unevenness of the application of justice

[75] The UN Security Council has faced immense criticism of impartiality; the Council was at the center of the process that referred the Situations of Sudan and Libya to the ICC. The majority of its permanent members (US, China and Russia) are not a party to the Rome Statute. It is unlikely for the Security Council to refer the Gaza-Israel situation to the ICC. If the case is brought to the attention of the Court, it will be vetoed by US.

[76] Human Rights Activists reported that Israel committed human rights abuses in Gaza in November 2012; and similarly, there has been huge humanitarian crisis in Syria since 2011. The death toll in Syria soared to 100,000 people.

[77] Africa and in the International Criminal Court, *supra note* 70

to undercut accountability by presenting the ICC as a new form of imperialism that should not be supported.[78]

Irrespective of the selectivity and partiality, no one dares to argue that all indicted individuals before the ICC are in clean hands. In fact, most of them have heartlessly messed around with their own people. Thus, they hardly deserve the kind of protection that some African leaders are hoping to provide by shielding Africans from prosecution at the ICC. For that matter, they do not even deserve to be imprisoned in a luxurious prison cell in The Hague while their victims were languished in torturing centers and finally killed. Indeed, this should not be construed to imply the perpetrators of core crimes do not have human rights. Rather, this is simply to mean that they must have been put in prison cell of the respective country in which they would have been put had their national court been able or willing to prosecute them.

3.3.2 The Peace versus Justice Debate

The other point of confrontation between the ICC and Africa relates to the arrest warrant for Sudanese president Omar Al Bashir. On 31 March 2005, as per article 13 of the Rome Statute, the UN Security Council adopted Resolution 1593 to refer the situation in Darfur, Sudan to the ICC by using its discretion for the first time. Following the referral, the Pre-Trial Division of the ICC issued arrest warrants for four Sudanese officials, including the sitting president of Sudan - Omar Al Bashir for war crimes, crime against humanity and genocide.[79]

The issuance of the arrest warrant for President Al Bashir received ambivalent responses among different countries, organizations and groups.

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[78] Human Rights Watch, *supra note* 59, p.7

[79] The ICC Pre-Trial Division I, 'Warrant of Arrest for Omar Hassan Ahmad Al Basher', March 4, 2009. *See also* ICC Press Release, "Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a Leader of the Militia/Janjaweed," May 2, 2007. The ICC issued arrest warrants for the former interior minister Ahmad Harun, and for an alleged former Janjaweed leader in Darfur Ali Kushayb in May 2007 for war crimes and crimes against humanity. In May 2009, ICC issued a summons to Abu Garda for war crimes.

For example, many human rights organizations and civil societies have praised the arrest warrant as a crucial step against impunity. While France, Germany, Canada, the United Kingdom, Denmark and the European Union called on Sudan to cooperate, some Arab and Africa leaders, Russia and China expressed their opposition to the arrest warrant.[80] Regional organizations such as the African Union (AU), the Arab League, the Community of Sahel-Saharan States (CEN-SAD), and the Organization of the Islamic Conference (OIC) have further criticized the ICC and called on the UN Security Council for deferral of prosecution by invoking article 16 of the Rome Statute.[81] Article 16 gives the Security Council the exclusive power to defer the ICC investigations and prosecutions for security for one renewable year. For better or worse, the Security Council has failed to act on the request of deferral.

In 2009, the African Union construed the arrest warrant for Al Bashir as a serious threat to the ongoing peace efforts in the Sudan, and consequently directed all African ICC member States to withhold cooperation from the Court in respect of the arrest and surrender of Al Bashir.[82] One year later at its July summit in Kampala, the African Union once again called on African ICC members States not to cooperate in the arrest of President Al Bashir, and

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[80] Alexis Arieff *et al*, International Criminal Court Cases in Africa: Status and Policy Issues, Congressional Research Service RL 34665, 2011, p.14.

[81] *Ibid* p.16; Article 16 of the Rome Statute states: "*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."* Since the deferral has not been made by the Security Council, the AU presented a proposal for an amendment to article 16 giving the General Assembly the authority to defer an investigation should the Security Council fails to act on such request within six months.

[82] Assembly of the African Union, "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec.245 (XIII), Sirte, July 3, 2009, para. 10. Since issuing of the arrest warrant for him, Al Basher travelled to non-States parties to the ICC (Egypt, Libya, Ethiopia, Zimbabwe, Qatar, Saudi Arabia and China), and States Parties (Chad, Kenya, and Djibouti). However, Botswana, the only AU member, indicated that it intends to enforce the warrants.

rejected the opening of an ICC liaison office in Addis Ababa.[83] The crux of criticism against the arrest warrant is that the ICC has risked prolonging the violence or endangered fragile peace processes by prosecuting active participants in ongoing conflict or recently settled conflicts.[84] In this regard, Jean Ping, the former chairperson of the AU Commission, stated:

> *The AU's position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace.*

Africa's position seems that the search for justice should be pursued in a way that does not jeopardize efforts aimed at promoting lasting peace. The dilemma between peace and justice appears in the course of the exercise of the ICC's mandate. Such dilemma has been particularly prominent in connection with Sudan, Libya, Uganda and Kenya. For example in Uganda, critics criticized the ICC for partly contributing to the unsuccessful Juba Peace talks between the Ugandan government and the Lord Resistance Army when it issued arrest warrants for the latter rebel leaders.[85] Similarly, in Kenya, concerns persist that ICC prosecution could destabilize the fragile political truce that has underpinned the post 2007 government of national unity.[86] In Sudan too, the concern is that the attempt to prosecute Al Bashir in Sudan could complicate the peace processes in Darfur. Such concern was reinforced when the Sudanese government responded to the ICC arrest warrant for the President by expelling aid agencies and threatening peacekeeping troops and non-governmental organizations.[87]

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[83] Assembly of the African Union, "Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec.296 (XV), Kampala, July 27, 2010, paras. 5, 8 and 9

[84] 'Communique of the 142nd meeting of the Peace and Security Council' African Union, 2008.

[85] Africa and the International Criminal Court, *supra note* 70, p.10

[86] Arieff *et al*, *supra note* 80, p.29

[87] *Id*

Supporters of the ICC, on the other hand, argue that the ICC will contribute to Africa's long term peace and stability. In respect of the arrest warrant for Al Bashir, France's representative in Security Council stated that there was no contradiction between justice and peace, but that combating impunity was a condition for lasting peace.[88] The arrest warrant for Al Bashir may, it is argued, open up new opportunities to secure peace in Darfur by putting some pressure on actors on the conflict.[89] On the contrary, the argument goes a lack of accountability for human rights violations will threaten future stability.

To conclude, the peace versus justice issue has become a source of tenuous relationship between Africa and the ICC. While critics argue that the work of the ICC is undermining rather than assisting African efforts to solve its problems, others still contend that the ICC prosecution is a preferred approach, if not a panacea for the malady of impunity. In fact, peace and justice are not always conflicting, rather reinforcing imperatives. But, the question is: which should be compromised in case of conflict between them. Should we make peace at the price of justice? Sometimes, it may be self-defeating if we apply international justice without a careful consideration of political realities of the conflict area. For instance, from a conflict resolution perspective, the arrest warrant for Al Bashir is ill-timed and seen as provocative and carried out in disregard to the objective of sustainable peace in Sudan.[90] Leaders who have committed core crimes against their own people may fight to death, for they have found their exile options substantially diminished since the creation of ICC. Hence, in cases where the ICC prosecution sparks or aggravates conflicts, it may be very important to postpone the prosecution by invoking article 16 of the Rome Statute. The Security Council has the power to defer investigation or prosecution in a resolution adopted under Chapter VII of the Charter of the United Nations.

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[88] Sudan's president 'will face justice'; 'Power does not provide Immunity', ICC prosecutor stresses in Security Council, Security Council 6230th Meeting, Security Council SC/9804, (2009), p.2

[89] Arieff *et al*, *supra note* 80, p.29

[90] Odero, *supra note* 65, p.153

3.3.3 The U.S. Position on the ICC

The United States, along with other members of Security Council referred the situations of non-States Parties (Sudan and Libya) to the ICC, is not a party to the Rome Statute. The Clinton Administration signed the Statute on 31 December 2001, but failed to submit it to the Senate for ratification, as the administration faced objections.[91] According to Article 18 of the Vienna Convention of the Law of Treaties (hereinafter VCLT), a signatory State may not "defeat the object and purpose of a treaty prior to its entry into force" unless it has made clear its intention not to become a party to the treaty. That is to say signature imposes an obligation on a signatory State. In order to avoid the obligation under Article 18 of the VCLT, the United States made clear its intention not to ratify the Statute in a communication to the United Nations Secretariat on 6 May 2002.[92]

United States has allegedly committed gross human rights violations in various areas such as Abu Ghraib and Guantanamo Bay following the campaign of war on terror. Since United States is not a party to the Rome Statute, the ICC cannot open investigation for the alleged crimes unless the Security Council (the only body to subject non-party state to the Court's jurisdiction) refers the situations. Unfortunately, referral by the Security Council has zero possibility due to the veto power of the United States. This is the other reason that Africa has become cynical to the application of international justice even-handedly.

Apart from renouncing any obligation under the Rome Statute, the United States further took two hostile measures to the ICC: concluding bilateral immunity agreements and enacting the American Service Members Protection Act. As described under article 98(2) of the Rome Statute, the ICC cannot proceed with a request for surrender if such request requires the requested State to act contrary to its international obligations. Simply put, the ICC is barred from asking for surrender of persons from a State Party that would

[91] Arieff *et al*, *supra note* 80, p.3
[92] Cryer, *supra note* 4, p.140

require it to act contrary to its international obligations. As discussed in section 3.1, the United States concluded bilateral agreements (also referred as Article 98 agreements) with most States Parties to exempt United States citizens from possible surrender to the ICC.[93] In Africa alone, 42 countries concluded the bilateral agreement with the United States; 26 of them are parties to the Rome Statute.[94] Each party to the bilateral agreement promises that it will not surrender citizens of the other party to the ICC.

Besides, in 2002, the United States enacted a piece of national legislation to preclude cooperation with the ICC. This legislation is referred as the American Service Members Protection Act (also known as the Hague Invasion Act) that provides for a mechanism of penalizing any country that hands over a United States national to the ICC, including military force.[95] The Act also prohibits the United States government from providing material assistance to the ICC in its investigation, arrests, detentions, extraditions, or prosecution.[96]

Both the bilateral immunity agreement and the American Service Members Protection Act undermine the uniform application of international justice, and the principle of equality of sovereign States as outlined in the preamble and article 2 (1) of the United Nations Charter. They also reinforce the position of Africa that the ICC is being used "as a whip by former colonial masters to discipline weaker and poor developing countries in impoverished continents such as Africa."[97]

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[93] Arieff *et al*, *supra note* 80, p.3

[94] *Ibid*, pp. 31-32

[95] US Congress Passes Anti-ICC Hague Invasion Act, Coalition for the International Criminal Court, Press Release, 26 July 2002, available at: http://www.iccnow.org/documents/07.26.02ASPthruCongress.pdf (accessed 3 April, 2013).

[96] Arieff *et al*, *supra note* 80, p.3. The American Service Members Protection Act provides exceptions: Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice to Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

[97] Odero, *supra note* 65, p.158

3.4 Africa's Move to break the Impasse

In the foregoing discussion, we have explored politics of the international criminal justice or the reasons why Africa has a coarse relationship to the ICC. At this juncture, we briefly touch upon the reactions of Africa to the works of the Court in the continent. As pointed out earlier, the Security Council failed to act on the African Union's request for a deferral of prosecution regarding Al Bashir by virtue of article 16 of the Rome Statute. In response to failure of the Security Council, the African Union presented a proposal for an amendment to article 16 of the Rome Statute in a manner that it can give the General Assembly the authority to defer an investigation if the Security Council fails to act on such a request within six months.[98] The proposed amendment to the provision however doesn't succeed.

As discussed, in relation to referral of the situations of non-States Parties to the ICC, the Security Council has faced criticism regarding its impartiality. In this connection, the African Union has called for the reservation of a permanent seat in the Security Council for Africa with veto power so that the continent can be protected from the perceived neocolonialist tendencies of present composition of the Council.[99] This demand is also improbable to happen.

The other reaction of Africa pertains to the proposed criminal jurisdiction of African Court of Justice and Human Rights (hereinafter the African Court). Against the background of the tension between the ICC and Africa, some suggested that it may be time for Africa to develop its own criminal court which could handle the cases of violence without the ICC being involved.[100]

In fact, African Union has indicated its intention to expand the jurisdiction of the African Court to include prosecutions of individuals for genocide, war crimes and crimes against humanity. To that end, a draft

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[98] Plessis, *supra note* 43, p.2

[99] *Ibid* p.159

[100] Analyst Questions ICC's Intense Focus on Africa, available at: http://www.voanews.com/content/icc-focus-on-africa-questioned/1633694.html (accessed 3 April, 2013)

protocol for the proposed criminal jurisdiction of the African Court has been finalized and recommended to the Africa Union Assembly for adoption.[101] Although, the African Union received a proposal to expand the statute of the African Court to include jurisdiction over crimes of international concern, it has not yet decided on the proposal.

The recent tension between the ICC, the Security Council and African States no doubt had some influence on the move of Africa to give African Court jurisdiction over international crimes. However, the drafters of the protocol have given reasons other than anti-ICC sentiment for process of expanding the jurisdiction of the African Court. According to them, the reasons are: i) African Union's work on the misuse of the principle of universal jurisdiction; ii) the challenges with Senegal's impending prosecution of the former president of Chad, Hissene Habre; iii) the need to give effect to article 25(5) of the African Charter on Democracy, Elections and Governance, which requires African Union to formulate a new international crime of 'unconstitutional changes of government.'[102] In their view, these are thus the reasons which have motivated the process of expanding the African Court to include jurisdiction over core crimes. However, considering the recent displeasure of African Union with the ICC, the reasons may not be convincing.

4. Concluding remarks

It is clear from the entire discussion that Africa has played a major role for establishment as well as advancement of the ICC. The contribution of Africa to the Court can be expressed in terms of its active participation in the Rome negotiation, ratification of the Rome Statute, the participation of African civil societies in CICC, Africans involvement in assuming high position in the

[101] Max Du. Plessis, Implications of the AU Decision to give the African Court Jurisdiction over International Crimes, Institute for Security Studies, Paper 235, 2012, p.5.

[102] Don Deya, 'Worth the Waite: Pushing for the African Court to Exercise Jurisdiction for International Crimes', International Criminal Justice, Open space Issue 2, February 2012, p.1

Court, self-referrals, and drafting national legislation for implementation of the Rome Statute.

However, regardless of Africa's contribution and cooperation with the ICC, the relationship between the Court and Africa has increasingly escalated into the trend of animosity due to the perceived prioritization of prosecution, selection of cases, the dichotomy between peace and justice, and the U.S. position on the Court. Undeniably, all cases brought before the ICC are so far from Africa. The Court has not gone anywhere outside Africa to open investigations. This makes African governments believe that the Court has exclusively targeted Africa countries. Yet others argue that human rights abuses in Africa are the most serious in the world; and thus the gravity of abuses is certainly a legitimate criterion for selection of cases. Still we may find similarly serious situations outside Africa, but are not brought before the ICC. To bridge the gulf between the ICC and Africa, the Court needs to play an impartial role in conducting investigation in all jurisdictions in which core crimes are alleged to have been committed. The Court also needs to have genuine communication and understanding with African governments and Africa Union in relation to the Court's investigatory and prosecutorial strategies. Otherwise, the current coarse relationship may in the long run affect seriously the works of the ICC in the continent, and may thus lead to an isolation of the Court from the region.

The other point of controversy between the ICC and Africa revolves around the dilemma between peace and justice. The issue was surfaced when the ICC issued the arrest warrant for Al Bashir. Similar concern was voiced with regard to the arrest warrant for President Mohammed Gaddafi when he refused to cede power. In some instances, the aims of peace and justice may conflict. In such instances, if we stick to prosecution to do justice, the conflict may be intensified. In such a case, before we pick prosecution as an automatic solution, we need to even-handedly consider the political realities of the conflict areas. Thus, the Security Council has, as mandated, to defer prosecution for one renewable year if it thinks that prosecution may be a threat to peace and order as per chapter VII of the UN Charter.

The African Union is now on the road towards actualizing regional criminal court by expanding the jurisdiction of African Court of Justice and Human Rights over core crimes. This gesture seems the extension of anti-ICC sentiment. Creating additional venues for accountability is positive in principle. However, there are several legal and practical challenges that the African Union should give a thought. Instead of attempting to create regional criminal courts with all its possible challenges, it would be wise for African governments to strengthen the national courts. As a court of last resort, the ICC would not have operated in Africa to such magnitude had national courts been able or willing to genuinely prosecute perpetrators of core crimes.

To conclude, although the relationship between the ICC and Africa continues to be tenuous, it is important for Africa Union, African governments, the Security Council and the ICC to fight against impunity and to make peace as well. They must also ensure that perpetrators should not shield themselves from the ICC prosecution by using the strained relationship.

REFLECTION QUARTER

Some Remarks on the Anomalies in the Ethiopian Tax Legislative Process

Kinfe Micheal Yilma[♣]

'If you want to know where the apathy is, you are probably sitting on it.'
Florynce Kennedy, "*Color Me Flo: My Hard Life and Good Times", 1976*

Opening

Ignorance of the legislative process on the part of legal academics has been a cause for concern for so long. Several decades back, an American writer rebuked lawyers' reluctance, not just for researching the subject, but for taking far less effort to understand it.[1] He had even capitalized the 'disturbing' state of the ignorance by epitomizing it as 'deliberate ignorance'.[2] This concern is still lingering in the academic sphere and bureaucracy six decades after Moffat expressed his lament. A relatively recent survey has revealed the very little attention paid both in the academic literature and in recurrent technical assistance missions of global financial institutions to legislative processes, especially to the tax legislative process in developing and transitional economies.[3]

These sorts of problems are also rampant in Ethiopia. But, this might not be that much surprising given the dearth of scholars in the field and the scant literature on the subject in the country. There are flaws of various sorts particularly in the tax legislative process.[4] This brief reflection seeks to put up

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[♣] LLB (Addis Ababa University), LLM (University of Oslo), Lecturer-in-Law, Hawassa University College of Law and Governance. Some of the points raised in this piece were initially discussed a couple of years ago with my colleagues Gosaye Ayele and Misganaw Kifelew who instigated its later writing, for which I am grateful. An updated version of this piece has also been presented recently on the Academic Forum of the Law School of Hawassa University; the comments of my colleagues helped enriching this piece.

[1] Moffat, A., 'The Legislative Process', *24 Cornell Law Quarterly*, (1938/39), P. 223.

[2] *Ibid*.

[3] Gordon, R. and Thuronyi, V., Tax Legislative Process, in Thuronyi, V. (Ed.,), *Tax Law Design and Drafting*, Kluwer Law International, (2000), P. 1.

[4] Note that though this piece singles out flaws from the tax legislative process, one can readily wed out similar legislative problems in the legislative process of various parts of the

examples of such problems upfront and asks why these problems are still left to reign for nearly two decades after the Constitution of Federal Democratic Republic of Ethiopia has been put in place. It questions why the meager literature on the subject is still shying away from the problem. However, it should be clear at the outset that this piece does not purport to offer a conclusive analysis of the problems in this area and it doesn't pretend to forward comprehensive solutions. The piece is organized as follows. First, it explains what is meant by "legislative process" in this context and then it goes on to raise some anomalies. Finally it closes with some suggestions.

1. Tax Legislative Process: A Contextual Enunciation

The enunciation made by two writers on the subject-matter of tax legislative process is partly befitting to the present discussion. As these writers put it, tax legislative process is "the process of designing and drafting tax legislation".[5] In this context, the expression 'tax legislative process' is meant to involve a series of legislative chores ranging from the initiation of legislative proposals to the crafting of the tax legislation and the consequent endorsement of the later by the pertinent law making body. It is all about the procedure by which tax laws are made.[6]

In this sense, the tax legislative process involves various institutions as well as experts of various disciplines. It, for instance, involves government agencies or ministries that set new legislative proposals on the agenda. It involves draft persons who would go through the toil of converting proposals set by clients or sponsors into legally sound and effective legislation. More importantly, it involves a body that deliberates on the draft bill- usually parliament or any other legally entrusted organ of the government.

Ethiopian law. Also noteworthy is that this piece takes up only a few examples of the flaws in the tax legislative process among the very many.

[5] Gordon and Thuronyi, *supra* note 3, P. 1.

[6] See generally, Simon, K., 'Constitutional Implications of the Tax Legislative Process', *10 Am. J. Tax Pol'y* (1992), *235*. See also, Graetz, M., 'Reflections on the Tax Legislative Process: Prelude to Reform', *Virginia Law Review*, Vol. 58, No. 8, (1972), PP. 1395 *et seq*.

The expression 'tax legislative process' should not however be confused with 'tax law making process', at least for the purpose of this piece. Tax law making[7] essentially constitutes only the last phase of the legislative process − the parliamentary deliberation and adoption of the draft bill. It does not include all the preliminary procedures of designing, crafting and sometimes the research process involved in the legislative continuum. This reflection endeavors to address all the legislative process as a whole.

2. Major Anomalies

This section treats two broad themes concerning the tax legislative process in Ethiopia. First, it addresses problems witnessed in relation to undesignated tax powers under the FDRE Constitution. Secondly, it briefly addresses some salient problems that exist in the area of concurrent tax powers.

A. Undesignated Tax Powers and Beyond

The FDRE Constitution categorizes taxation powers as follows: Federal Power of Taxation (Art 96), State Power of Taxation (Art 97), Concurrent Power of Taxation (Art 98) and 'Undesignated Powers of Taxation (Art 99). Some people commend the inclusion of the fourth category of taxation powers for it may help avoiding the need to amend the Constitution − which normally follows rigorous procedures− should introducing new varieties of taxes appear necessary.

A closer look at of the current pieces of tax legislation in force in Ethiopia, both at the Federal and State levels[8], evinces considerable contradictions with

[7] Law making is described as the process during which an 'idea of a law' is transformed into a law. Bogdanovskaia, *The Legislative Bodies in the Law Making Process*, Available at: <http://www.nato.int/acad/fellow/97-99/bogdanovskaia.pdf.> Accessed on November 2012. The Black's Law Dictionary describes law making as "the process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process." See, Garner B., (Ed.,) *Black's Law Dictionary*, Ninth Edition, Thomson Reuters, (2009), P. 982 cum P. 966.

[8] Owing to accessibility constraint, only the laws of the Southern Nations, Nationalities and Peoples Regional State (hereafter SNNPR) and Oromia Regional State (hereafter ORS) are considered in this piece.

the revenue provisions of the Constitution. There are a good number of taxation powers made undesignated under the Constitution that are being exercised by either layers of the federal or regional governments unilaterally. One such example is the power to tax income from winning of state lotteries and other games of chance. In allocating the power to tax such incomes, the Constitution explicitly provides about "national lotteries and other games of chance".[9] Local or state lotteries remain undesignated thus requiring the joint decision of the two houses- the House of Federation and the House of Peoples' Representatives.[10]

The word 'national' under Art 96(4) evidently connotes the wider geographical scope and dimension of lotteries and other games of chance thereby implying the possibility of having local or state-wide lotteries and other games of chance. Despite such stipulation, the federal government has already established a monopoly on all varieties of lotteries and games of chance by issuing unilateral subordinate law. On top of its exclusive power to undertake a range of lottery activities, the National Lottery Administration reserves the right to issue permits to those who wish to undertake any lottery activities.[11] This is just one instance, an example of an anomaly in the Ethiopian tax legislative process. To this, there is another additional anomaly. Some of the regional states in the country have provided in their respective income tax laws stipulating that income from games of chance are within State Taxation Power. For example one regional state has expressly put in its income tax law income from games of chance as one item of Schedule D income.[12]

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[9] See Art 96(4) of the FDRE Constitution, Proclamation No. 1/1995, *Federal Negarit Gazeta*, 1st year, No. 1.

[10] As per Art 99, the House of the Federation and the House of Peoples' Representatives shall, in a joint session, determine by a two-thirds majority vote on the exercise of powers of taxation which have not been specifically provided for in the Constitution.

[11] See Arts 12 & 13 of National Lottery Administration Re-Establishment Council of Ministers Regulation, Regulation No. 160/2009, *Federal Negarit Gazeta*, 15th year No. 21.

[12] See, for instance, Art 33 of The Southern Nations, Nationalities and Peoples Regional State Income Tax Proclamation, Proclamation No. 56/2003, *Debub Negarit Gazeta*, 8th year, No. 5.

There are also other cases where the federal government appears to make some inroads into the taxation powers of the states. Taxation pertaining cooperative societies is a good case in point. Pursuant to Art 97(3), it is the exclusive power of the states to levy and collect agricultural income taxes on farmers incorporated in the form of cooperative associations. Most of the regional states including the ORS and SNNPR have accordingly issued laws that levy agricultural income taxes and rural land use fees.[13]

But, the law that regulates the formation, operation and winding up of cooperative societies is promulgated by the legislative body of the Federal Government.[14] And, this federal law contains a provision that exempts cooperative societies from payment of taxes on their profits.[15]While states' laws authorize levying taxes, this federal law is granting a legal grace to societies. Consequently, this raises a number of troubling questions. One is: what constitutes a tax power? Does not it include both the power to levy and, where necessary, to exempt the tax subject from the tax burden?[16] Of course it

[13]See, for instance, Oromia National Regional Government Proclamation to Amend Rural Land Use Payment and Agricultural Income Tax of Oromia Regional State's, Proclamation No. 99/2005, *Megeleta Oromia.* See also The Southern Nations, Nationalities and Peoples Regional Government Land Use Rent and Agricultural Activities Income Tax Proclamation, Proclamation No. 4/1996, *Debub Negarit Gazeta*, 1th year, No. 5. The later proclamation has been amended by Proclamation No. 63/2003, Proclamation No. 91/2005 and proclamation No. 122/2008 with changes in the rates of the tax and land rents.

[14]Cooperative Societies Proclamation, Proclamation No. 147/1998(as amended), *Federal Negarit Gazetta*, 5th year, No. 27; yet, the competence of the federal government to issue this law is debatable. There is no clear constitutional mandate authorizing the federal government to issue law of cooperative societies. This is also evident from the absence of any 'enabling clause' in the preamble of the Cooperative Societies Proclamation. After all, failure to mention enabling law in many of the laws, both proclamations and regulations, is commonplace in Ethiopia while it is one indispensable conventional rule of bill drafting.

[15]*Ibid*, Art. 31(1(a)); by a passing remark it is interesting to note that the same sub-article provides that members of societies shall pay dividend tax. However, the tax subjects of Ethiopian dividend tax are only shareholders of Share and Private Limited Companies. See, Income Tax Proclamation, Proclamation No. 286/2002, *Federal Negarit Gazetta*, 8th year, No. 34, Art 34 (1).

[16]This point brings to mind a famous constitutional law case once entertained by the American Supreme Court presided by the Chief Justice Marshall ― *McCulloch V. Maryland*. In this oft-cited case Justice Marshall is reported to have claimed that *'the power to tax includes the power to destroy.'* The case was regarding a bank called 'Bank of the United States'

does! If it were possible for one level of government to erode the tax base of the other layer of the government by granting whatever exemptions, it would seriously undermine the revenue interest of the former. More importantly, it would afoul against the cardinal principle of fiscal federalism-*intergovernmental tax immunity*.

The intergovernmental tax immunity principle puts, among other things, a limitation on both layers of government to refrain from intruding into the exclusive tax domain of the other.[17] In our case, the exemption of cooperative societies from paying tax by the above mentioned federal law constitutes interference in the taxation power of the states. This is no less infringement of the principle than taxing the property of the other layer of the government. After all, capacity to grant exemption implicitly carries with it the capacity to tax the same and hence the exemption granted by federal law jeopardizes the tax immunity of the states.[18]

Speaking of cooperative societies, the above-mentioned federal law, whose constitutionality is at best questionable, categorizes cooperatives into seven: namely, Agricultural Cooperative Societies, Housing Cooperative

established by federal government and had branches in different states including the state of Maryland, a party in the case. While operating through its branch in Maryland, the latter claimed to tax the branch merely because it is operating within its territory. The court ruled that since the bank is incorporated under federal law and that since the state of Maryland is well represented in the federal legislature, it is the power of the federal government to tax the bank. See generally, Stone, G. et al, *Constitutional Law*, Little, Brown and Company, (1986), PP. 41-61. See also Solomon, *infra* note 17, P. 152 (citing Mason A.T. and D.G. Stephenson (1996), *American Constitutional Law*, 11th Ed., Prentice Hall, PP. 270-271. This is probably a point of argument that any savvy person in favor of the exemption by the federal government would raise. As far as what power of taxation comprises is concerned, Solomon writes, albeit in a slightly different context, that 'the power of taxation comprises of two specific powers: the power to set a tax rate and the power to collect the tax paid'. See, Solomon, *infra* note 17, P.140.

[17]For a concise description of the principle; see, Solomon Nigussie, *Fiscal Federalism in The Ethiopian Ethnic Based Federal System*, Wolf Legal Publishers, Revised Edition, (2008), PP. 151-154.

[18]Strikingly, a cooperatives law of the SNNPR, issued in 2007, provides that cooperative societies shall be exempted from profit taxes in line with the federal cooperatives law. See, Art 41(1(1(a))) of a Proclamation to Provide for the Establishment of Cooperative Societies in Southern Nation, Nationalities and Peoples Regional State, Proclamation No. 111/2007, *Debub Negarit Gazeta*, 13th Year, No. 11.

Societies, Industrial and Artisans Producers' Cooperative Societies, Consumers Cooperative Societies, Savings and Credit Cooperative Societies, Fishery Cooperative Societies, Mining Cooperative Societies.[19] A cursory reading of Art 97(3) in light of this categorization leads one to conclude that the power of states is restricted to taxing only agricultural cooperatives, which are indicated just as one type of cooperative societies under Art 2(1(a)) of the cooperatives law. Put differently, states' power of taxation is not applicable on the other six types of societies. Accordingly, the power to tax those types of societies has to be determined by the joint decision of the two houses as an undesignated tax.

On the other hand, the agricultural income tax laws of some regions provide otherwise broadening the subjects of such taxation in addition to agricultural cooperatives. Art 6 of the SNNPR law, for instance, states that income from agricultural activities or agricultural businesses are subject to tax.[20] And, the law further defines 'agricultural business' to include a wide variety of activities including fishery which is identified as separate activity of fishery societies under cooperatives law.[21]This oversteps the constitutional taxation power of states, further exemplifying the flaw in the tax legislative process.

Let us add one more case. This relates to Mining Income Tax law. In assigning taxation powers on mineral extractions, the Constitution has opted to make taxation on the basis of the classification of mining activities into 'small scale' and 'large scale' mining operations. Accordingly, taxation of the former is within the exclusive powers of the states[22] while the latter fall under

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[19] Art 2(1) of Cooperative Societies Proclamation, *supra* note 14.

[20] The Southern Nations, Nationalities and Peoples Regional Government Land Use Rent and Agricultural Activities Income Tax Proclamation, Proclamation No. 4/1996, *Debub Negarit Gazeta*, 1th year, No. 5.

[21] Art 2(5) defines 'agricultural business' *as production of seasonal and annual crops, the development of animals and fishery(sic) and their products, the development forestry and wild lives and their products including the processing of such products in a way suitable to consumers whether it is undertaken individually or by enterprises*. [Emphasis Supplied]

[22] FDRE Constitution, *supra* note 9, Art 97(8). Note that small scale mining operations are not mentioned by name under Art 97(8) but they can readily be inferred from the cumulative reading of Art 98(3) and Art 97(8) of the constitution.

concurrent taxation powers.[23] Nevertheless, the federal mining income tax law is applicable both on large scale and small scale mining operations without any distinction.[24] This is an instance of usurpation of taxation power by the Federal Government. By virtue of this proclamation, the taxation power of the Federal Government not only applies to small scale mining operations but also extends to unilateral exercise of such power against the concurrent taxation power over large scale mining operations.

Perhaps, concurrent taxation power was not conceived during the promulgation of this mining income tax law.[25]Given this legal framework, it is unlikely that the states have exercised their respective powers on small scale mining operations. In the SNNPR, for instance, no law has been issued so far and as a result such tax has never been collected.[26]

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[23] *Ibid*, Art 98(3).

[24]*A Proclamation To Provide for The Payment of Tax on Income From Mining Operations, Proclamation No. 53/1993(as amended),* Negarit Gazeta, *52nd year, No. 43, Art 3 (1). This proclamation, issued in accordance with the Transitional Government Charter, was amended by Proclamation No. 23/1996 to equalize the tax rate on both small scale and large scale mining operation to 35%. Note that a new mining income tax law has recently been tabled to the HPR partly with a view to lower the tax rate on large scale mining operations to 25%. See* *ዮሃንስ አምበርብር: በማዕድን አምራቾች ላይ የተጣለው የገቢ ግብር በአሥር በመቶ ዝቅ ሊደረግ ነው: ሪፖርተር ቅፅ 18 ቁጥር 1370: ኤሑድ ሰኔ 9 ቀን 2005: Available at < http://www.ethiopianreporter.com/index.php/news/item/218.*

[25]See below a discussion on the current state of concurrent power of taxation and the problems therein.

[26]One faces a more serious legislative confusion while reading the federal mineral operations proclamation which provides that income tax to be paid by holders of artisanal and small scale mining licenses shall be determined by the laws of the states. See, Art 65(2) of A Proclamation to Promote for Sustainable Development of Mining Resources, Proclamation No. 678/2010, *Federal Negarit Gazeta*, The law can be an evidence for the federal government's belated realization of the fact that states do have the constitutional power to collect taxes on small scale mining operations. We cannot but hope that the newly tabled mining income tax law at the federal parliament restricts itself to large-scale mining operations, which still is a concurrent tax matter. In my recent conversation with tax officers at the SNNPR Revenues and Customs Bureau I learned that they plan to issue a directive to enable them collect the tax, yet relying on direction put forward in the above cited proviso of federal mining law.

B. The Issue of Concurrent Tax Powers: Constitutional Amendment or Interpretation?

Issues concerning concurrent taxation powers under the FDRE Constitution have remained controversial in the Ethiopian discourse of fiscal federalism. This is one of the areas where one comes across a host of puzzling questions. The problem primarily relates to the current practice of levy and collection of taxes from concurrent sources. The Constitution under Art 98 generically stipulates that both the center and the states have the power to jointly levy and collect taxes from sources designated therein. While this is what the black letters of the Constitution provides, in the practice this is reversed as the power of levy and collection is already assigned to the federal government while states are only to claim their share from the proceeds. The legal basis for delegated [sic] such levying and collecting taxes by the Federal Government to the exclusion of regional states still remains too obscure.

Despite the scant literature on these issues, there are some contradictory claims that are being aired from some writers on the subject. According to some writers the practice follows the formal 'constitutional amendment' made to the Constitution. Others attribute this prevalent practice to 'constitutional interpretation' of concurrent power of taxation. There still others who express their opinion basing on 'amendment' or 'interpretation' interchangeably while legally speaking the two are disparate procedures**.** On this point, Solomon Nigussie writes:

> It is said[sic] that the Constitution has been amended whereby the power is to the federal government. He continues to write that: 'the provision has been interpreted[sic] in such a way that those tax sources listed under concurrent power have to be levied and collected by the center but the proceeds are compulsorily shared with the states.[27]

As it can readily be gleaned from this quote, the writer seems uncertain as to what is the basis of the practice. He appears to be uncertain as whether it is

[27]Solomon, *supra* note 17, P. 141; elsewhere in the different parts of his book he prefers to use the term amendment than interpretation. See, for instance, pages 156(footnote number 156) and 208(footnote number 1).

attributable to constitutional interpretation or constitutional amendment.[28] He further writes (in footnote): "the amendment of the provision, rather the interpretation, follows Art 9(1) of Proclamation No. 33/1993 which defined the sharing of revenue between the central government and the regions during the transitional period."[29] The limitation with this opinion is not just its confusion of the two strikingly distinct procedures; it is also evasive in telling us how either of the procedures could be the basis. If it is attributable to interpretation, which organ proffered such an interpretation? Was it by the House of Federation, or courts?[30] No clear answer has been given to these and other related questions.

In respect of the interpretation rationale, the 1992 law of revenue sharing is cited as the basis. Yet, we are bound to question if this law could ever be used to interpret a constitutional provision. As is well known, the 1992 law

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[28] This has been observed, though in glimpse, in a review of the above cited book. See, Taddese Lencho, Book Review, *Journal of Ethiopian Law*, Vol. XXIII, No. 2, (2009), PP. 190-191. In reading this interesting book review where the reviewer goes even to clarify certain thorny points, one would notice how even the reviewer was not certain about what has happened regarding the issue as he skipped his clarification on the point.

[29] Solomon, *supra* note, 17, P. 141; the full text of Art 9(1) of the Proclamation to Define the Sharing of Revenue between the Central Government and the National Self-Governments, Proclamation No. 33/1992 reads as follows: *"Central Government revenues and revenues jointly owned by the Central Government and National/Regional Governments shall be collected by the Central Government revenue collection organs. However, whenever deemed necessary the collection of such revenue may be delegated to Regional Governments."*[Emphasis Supplied].
It is also instructive to cumulatively note Art. 8(4) of the same proclamation which provides as: *'The tax rates levied on types of taxes jointly owned by the Central Government and Regional Governments shall be fixed by the Central Government.'* [Emphasis Supplied].

[30] The same questions may also be raised as far as the alleged 'amendment' is concerned. Has the said amendment proposal been submitted to the relevant bodies as set forth under Art 105 of the Constitution? In this regard, one might claim that amendment to the text of constitutions can happen informally through practices and custom without their being formal amendment. This author insists that while such amendment might be held as valid in certain exceptional circumstances, it could hardly justify random snatching of clear constitutional power of taxation. It rather appears to have resulted from the lack of entrenched constitutional culture. For more on informal constitutional amendment, see Elkins, Z. et al, *The Endurance of National Constitutions*, Cambridge University Press, (2009), P. 45 *et seq*.

was issued before the ratification of the Constitution during the Transitional Period and pursuant to the Transitional Period Charter.[31] And, the Charter, which was the 'interim constitution', was promulgated to serve as the supreme law of the land for the duration of the Transitional Period.[32] Since the Charter was meant to serve for a specified duration, it was a temporal statute. [33] Normally, when a temporal law expires, all rules issued under such statute will come to an end.[34] Accordingly, since the 1992 law had been issued pursuant to that temporal law, the Transitional Charter, which has already expired, it had run out of time and it could be of no legal use. This begs the question: can an interpretation of a provision within the Constitution be sought based on an already gone law, which is the 1992 law? This author is of the opinion that the 1992 law couldn't be a ground of interpretation of Art 98 of the Constitution. But, it is true that this 1992 law has put its immense influence over existing regimes of tax assignments.[35]

In an otherwise impertinent source, it is opined that the current practice has sprung following a stealthy and hardly complete constitutional

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[31] See, the Preamble of the Proclamation to Define the Sharing of Revenue between the Central Government and The National Self-Governments, Proclamation No. 33/1992, *Negarit Gazeta*, 52nd year, No. 7.

[32] Transitional Period Charter of Ethiopia, *Negarit Gazeta,* No. 1, 5oth year, No. 1, Art 18. It is to be noted that the Transitional Government of Ethiopia officially stayed in power from July 1991 to August 1, 1995 though it was initially mandated for a maximum of two years and six months. See, Art 12 of the Charter. Confusingly, Solomon writes that the Transitional Government was mandated only for six months. See, Solomon, *supra* note 17, P. 23(footnote 58).

[33] Singh, A., *Introduction to Interpretation of Statutes*, Wadhwa and Company, Reprint Edition, (2007),P. 217. Temporal statutes are applicable for a specified time and cease to apply upon the expiry of the specified time unless it is repealed earlier.

[34] *Ibid*, P. 119; it is also to be noted all of the rules, orders, notifications, orders, by-laws made or issued under the statute will not be continued even if the provisions of the expired act are reenacted. Applying this rule in our case, all subordinate laws issued after the expiry of the Transitional Government Charter but while the transitional government was practically functioning were not willy-nilly laws in the stricter sense of the expression.

[35] Taddese Lencho rightly describes this persistent leverage as: 'The 1992 law is the voice behind the silences and ambiguities of the 1995 Constitution.' Taddese Lencho Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About, *Mizan Law Review*, Vol. 4, No. 1, (2010), P. 42.

amendment made to Art 98 of the Constitution.[36] This document states that the amendment of the provision had been deliberated and approved by both the House of Peoples' Representatives and the House of Federation, first separately, and later in a joint session with full votes.[37]However, this document states that there is no clue if the draft was submitted for consideration by Regional State Councils. Furthermore, the document states that the amendment law has never been published in the *Negarit Gazetta*. If this source were to be taken as credible, it would ostensibly attest the deeply entrenched lack of transparency that characterizes the legislative process in Ethiopia, not to mention the lethargy of those involved in it.

Closing

In the foregoing an attempt is made to point out three major flaws in the tax legislative process in Ethiopia. Contrary to the intent of the framers of the Constitution, Taxation powers are being randomly apportioned and translated into tax laws. We noted that certain undesignated taxation powers awaiting the designation by the appropriate bodies are snatched away by either layers of the government. In other cases, powers of collection of taxes from concurrent sources are being exercised by the Federal Government using perhaps surreptitiously made laws. These inconsistencies represent clear contravention of one of the cardinal directives (or principles, as the Amharic version of Art 100(1) of the Constitution reads) which provides that any tax must be related to the source of revenue taxed, and further, rather more importantly, that it must be determined following proper consideration.

The most worrying aspect of the problem is the lack of transparency on how the federal government becomes the default beholder of concurrent tax

[36] Federal Justice Organs Professionals Training Center, *Tax Law and the FDRE Constitution*, Pre-Job Training Manual, P. 31[Amharic −Translation Mine].

[37] *Ibid*; note that as a standard requirement any proposed constitutional amendment shall be approved by the joint session of the HPR and HF with majority vote and by at least 2/3 of the state councils. See, FDRE Constitution, *supra* note 9, Art 105(2).

powers though states are taking a share out of the proceeds. This may give rise to questions of constitutionality.[38]

These problems are just tips of the iceberg and the aim here in this piece is to draw the attention of concerned stakeholders. These legislative problems may emanate from apparent apathy among those directly involved in the process of tabling tax laws and, more importantly, those involved in the actual process of drafting of proposed tax laws. It appears to this author that such flaws are partly attributable to the lack of competence of draftspersons and others involved in the process. To this we may add the dearth of academic exposition on the subject, equally to share the blame for these and lingering shortcomings.[39]It goes without saying that due expositions of the constitutional provisions by academics could help lessening ambiguities and imprecision.[40]

While we acknowledge the limited number of experts specifically trained in legislative drafting and all associated background works of research and the dearth of jurisprudence and other literature, yet the problems pointed out in this piece are intolerable ones with multifarious ramifications. The search for solutions shouldn't be postponed for an unlimited period of time.

A feasible short-term solution therefore is to strengthen drafting offices, both at the federal and regional levels. There has to be seasonal trainings on the basics of legislative drafting along with research processes. It is also vital to prepare a comprehensive drafting manual that would guide draftspersons as the one which has been done at the federal level.[41] The implementation of the new legal education curriculum that includes legislative drafting as one course may help in the alleviation of the existing problems. Also, publicizing formal

[38] FDRE constitution, *supra* note 9, Art 12.

[39] Elsewhere, I argued that the Ethiopian tax law regime is generally ignored by academics and this argument goes along with the ignorance towards the legislative process. See generally, Kinfe Micheal Yilma 'Teaching and Writing Tax Law in Ethiopia: Exhibit B for Low Scholarly Productivity', *Mizan Law Review*, Vol. 6, No. 1(2012).

[40] One barely finds writings on the subject except a few student theses tucked away in the shelf of libraries and thus highly inaccessible to readers.

[41] The manual already prepared by the Justice and Legal System Research Institute can still be enriched and useful lessons can be learned from benchmark drafting manuals such as Max Planck Manual on Legislative Drafting on the National Level in Sudan of 2006.

processes that assign taxation powers to the Federal Government do help in eliminating some confusion. What is more, academics have meaningful roles in all these endeavors.

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መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

ጉዳዩ የቀረበው አመልካቾች የደቡብ ብሔር ብሔረሰቦችና ሕዝቦች ክልል ጠቅላይ ፍርድ ቤት የሰበር ችሎት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት ስለሆነ በሰበር ታይቶ ይታረምልኝ በማለት ያቀረቡትን አቤቱታ አጣርቶ ለመወሰን ነው፡፡ ክርክሩ በመጀመሪያ የታየው በሀዋሳ ከተማ ከፍተኛ ፍርድ ቤት መደበኛ ጉዳይ ችሎት ነው፡፡ የክርክሩ መነሻ ተጠሪ ያቀረበው የወንጀል ክስ ነው፡፡ ተጠሪ አመልካቾች በ1996 ዓ.ም በወጣው የወንጀል ሕግ አንቀፅ 32/1/ለ እና አንቀፅ 33 እና በወንጀል ሕጉ አንቀፅ 419 ንዑስ አንቀጽ 1 የተመለከተውን በመተላለፍ በወንጀል ግብረ-አበርና ልዩ ተካፋይ በመሆን ምንጩ ያልታወቀ ሀብት ይዘው የመገኘት ወንጀል ፈፅመዋል በማለት ክስ አቅርቧል፡ ፡ ተጠሪ ባቀረበው የወንጀል ክስ ክርክር በሥር አንደኛ ተከሳሽ የሆነው አንደኛ አመልካች የመንግስት ሠራተኛ ሆኖ ከተቀጠረበት ከመስከረም 1984 ዓ.ም ጀምሮ ክስ እስከ ቀረበበት ድረስ የታክስ አስተዳደርና ገቢ ሰብሳቢ ሆኖ የተለያየ የደረጃ እድገት እያገኘ እንደሠራ ገልፆ፣ አንደኛ አመልካች በሕጋዊ መንገድ በመንግስት ስራው የሚያገኘው ጠቅላላ ገቢ ከብር 90,220 /ዘጠና ሺህ ሁለት መቶ ሃያ/ ብር የሚበልጥ አይደለም፡፡ ነገር ግን ተከሳሾች፡-

- ሁለተኛ ተከሳሽ ዳሽን ባንክ በሒሳብ ቁጥር 50165201 ብር 332,363.63 /ሶስት መቶ ሰላሳ ሁለት ሺህ ሶስት መቶ ስልሳ ሶስት ብር ከስልሳ ሶስት ሳንቲም/ተቀምጦ ይገኛል፡፡
- አንደኛ ተከሳሽ በዳሽን ባንክ በሒሳብ ቁጥር 501651238200114004 ብር 1,646,371.24 /አንድ ሚሊዩን ስድስት መቶ አርባ ስድስት ሺህ ሶስት መቶ ሰባ አንድ ብር ከሃያ አራት ሣንቲም/ በስሙ የሚገኝ ሲሆን
- አንደኛ ተከሳሽ በኢትዮጵያ ንግድ ባንክ ሂሳብ ቁጥር 24499 ብር 46,802.11 /አርባ ስድስት ስምንት መቶ ሁለት ብር ከአስራ አንድ ሣንቲም/ በስሙ የሚያንቀሳቅሰው ገንዘብ አለው

- ተከሳሾች በልጃቸው በደስታ ወርቅነህ ስም ብር 55,931.92 /ሃምሳ አምስት ሺህ ዘጠኝ መቶ ሰላሳ አንድ ብር ከዘጠና ሁለት ሣንቲም/ ግመት ያለው የመኖሪያ ቤት አላቸው፡፡ በጠቅላላው ተከሳሾች ብር 2,081,468.90 /ሁለት ሚሊዮን ሰማኒያ አንድ ሺህ አራት መቶ ስልሳ ስምንት ብር ከዘጠና ሣንቲም/ ምንጩ ያልታወቀ ሀብት ያላቸው በመሆኑ የሙስና ወንጀል ፈፅመዋል በማለት ክስ አቅርቧል፡፡ ተጠሪ ክሱን ሊያስረዱ ይችላሉ የሚላቸውን የሰነድ ማስረጃዎች አቅርቧል፡፡ አመልካቾች ክሱ ከደረሳቸውና እንዲረዱት ከተደረገ በኋላ የወንጀሉን ድርጊት አልፈፀምንም ጥፋተኞች አይደለንም በማለት ተከራክረዋል፡፡ አመልካቾች በበኩላቸው በተጠሪ ክስ የተዘረዘረው ገንዘብ ሕጋዊ ምንጭ የሚሏቸውን በመዘርዘር አቅርበዋል፡፡ አመልካቾች
- በወንዶገነት ወረዳ አባያ ቀበሌ ከ1984 ዓ.ም ከቤተሰብ የተሰጣቸው 2.5 ሄክታር መሬት የላቸው መሆኑንና ጫት የተከሉ በመሆኑ በዓመት ከመቶ ስልሳ ሺህ ብር በላይ እንደሚያገኙ፣
- በሌላ በኩል 0.25 ሄክታር የሆነ መሬት እንዳላቸውና የሽንኮራ አገዳ በማልማት በዓመት ሃያ አምስት ሺህ ብር በላይ እንደሚያገኙና በዚህ ገቢ ቤቱን እንደገዙት፣
- በሁለተኛ ተከሳሽ ስም በዳሸን ባንክ የነበረው ገንዘብ፣ ብር 5,000,000፣ የሚሰራ ፕሮጀክት አንደኛ ተከሳሽ ቀርፆ፣ ከባንክ ብድር ሲጠይቅ አንድ ሶስተኛ አሳይ በመባሉ በብድር የተገኘና ከሁለተኛ አመልካች አካውንት ወጥቶ በአንደኛው አመልካች አካውንት እንደገባና በፍርድ ቤት ትዕዛዝ የታገደ መሆኑን፣
- በአንደኛው አመልካች ስም ከዳሸን ባንክ ከተገኘው ገንዘብ ውስጥ ብር 1,120,500.00 /አንድ ሚሊዮን አንድ መቶ ሃያ ሺህ አምስት መቶ ብር/ የጋራራም ላንች እና የጋልማ ባሕላዊ ሎጅ ኃላፊነቱ የተወሰነ የግል ማህበር ንብረት ነው በማለት የተከራከሩ ሲሆን ማስረጃዎች አቅርበዋል፡፡

የከፍተኛው ፍርድ ቤት የተጠሪንና የአመልካቾችን ክስና ማስረጃ ከመረመረ በኋላ አመልካቾች የተጠሪን ክስና ማስረጃ ያስተባበሉ መሆኑን ገልፆ ከተከሰሱበት ወንጀል በወንጀለኛ መቅጫ ሥነ ሥርዓት ሕግ 149 ንዑስ አንቀፅ 1 መሠረት በነፃ አሰናብቷቸዋል፡፡ ተጠሪ ይግባኝ ለደቡብ ክልል ጠቅላይ ፍርድ ቤት ይግባኝ ችሎት አቅርቧል፡፡ የክልሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት ተጨማሪ ማጣሪያ ካደረገና ተጨማሪ ምስክሮች ከሰማ በኋላ የሥር ፍርድ ቤት ውሳኔን አፅንቷል፡፡ ተጠሪ ለክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት የሰበር አቤቱታ አቅርቧል፡፡ የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት የግራ ቀኙን ክርክር ከሰማ በኋላ የአመልካቾችን የመከላከያ ማስረጃ ታዓማኒነትና ክብደት የሌለው በመሆኑ የተጠሪን ክስና ማስረጃ ለማስተባበል አይችልም በማለት አንደኛ አመልካች በሶስት ዓመት ፅኑ እስራት እንዲቀጣ ክስ የቀረበበት ንብረት እንዲወረስ፣ ሁለተኛ አመልካች በአንድ ዓመት ፅኑ እስራት እንድትቀጣ፣ ቅጣቱ እንዲገደብና በስሟ ያለና ክስ የቀረበበት ገንዘብ እንዲወረስ ውሳኔ ሰጥቷል፡፡

አመልካቾች ታህሳስ 5 ቀን 2003 ዓ.ም በተፃፈ የሰበር ማመልከቻ የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት መሠረታዊ የሕግ ስህተት የማረም እንጂ ፍሬ ጉዳይ የማጣራት ስልጣን አልተሰጠውም፡

፡ዐቃቢ ሕግ በክሱ የጠቀሰውን ገንዘብ ከየት እንዳገኘው አስረድተን እያለ ፍርድ ቤቱ የእኛን የመከላከያ ማስረጃ ውድቅ በማድረግ የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት ነው፡፡ የእግድ ትዕዛዝ የተሰጠበት ገንዘብም እንዲወረስ መደረጉ ተገቢነት የለውም፡፡ ስለዚህ በሰበር ታይቶ ይሻርልን በማለት አመልክተዋል፡፡ ተጠሪ በበኩሉ መጋቢት 2 ቀን 2003 ዓ.ም በተፃፈ የሰበር አቤቱታ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት አመልካቾች ያቀረቡትን የፍሬ ጉዳይ ክርክር የመመርመር ሥልጣን የለውም፡፡ ይህ የሚታለፈ ቢሆን አመልካቾች የወንጀል ክስ ከቀረበባቸው በኋላ በተለይም በይግባኝ በሚሰማበት ጊዜ ያመጡት የመሬት ይዞታ ማረጋገጫ የምስክር ወረቀት የክልሉ ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውድቅ ያደረገው በአግባቡ ነው፡፡ አመልካቾች ወንጀሉን የፈፀሙ መሆኑ ተረጋግጧል፡፡ ስለዚህ የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት የለበትም በማለት መልስ ሰጥቷል፡፡ አመልካች መጋቢት 30 ቀን 2003 ዓ.ም የተፃፈ የመልስ መልስ አቅርቧል፡፡

ከስር የክርክሩ አመጣጥና በሰበር የቀረበው ክርክር ላይ የተገለፀው ሲሆን እኛም የክልሉ ጠቅላይ ፍርድ ቤት የሰጠው የጥፋተኝነትና የቅጣት ውሳኔ ተገቢ ነው ወይስ አይደለም? የሚለውን ጭብጥ በመያዝ ጉዳዩን መርምረናል፡፡

1. ጉዳዩን እንደመረመርነው የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ሰሚ ችሎት በአመልካቾች ላይ የጥፋተኝነትና የቅጣት ውሳኔ የሰጠው አመልካቾች በሥር ፍርድ ቤትና በክልሉ ጠቅላይ ፍርድ ቤት ስለገቢ ምንጫቸው ያቀረቧቸው ምስክሮችና ማስረጃዎች ታዓማኒነት የሌላቸውና የተጠሪን ክስና ማስረጃ ለማስተባበል የሚችሉ አይደሉም በማለት ነው፡፡ የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ሰሚ ችሎት ከዚህ መደምደሚያ ላይ የደረሰ ውሳኔና የሰጠው በተጠሪ በኩል የቀረበውን ማስረጃ ይዘት፣ ታዓማኒነትና ክብደት በዝርዝር በመመርመር በመመዘን እንደዚሁም በአመልካች በኩል የቀረበውን የሰውና የጽሁፍ ማስረጃ በዝርዝር በመመርመርና የማስረጃውን ታዓማኒነትና ክብደት በመመዘን ነው፡፡ በሌላ አገላለፅ የክልሉ ጠቅላይ ፍርድ ቤት ውሳኔ የሰጠው የስር ፍርድ ቤት ይግባኝ ሰሚው ችሎት ፍሬ ጉዳይ በማጣራትና ማስረጃ በመመዘን ሂደት ፈፅመዋል የማለውን ስህተት ለማረም የማስረጃ ምርመራና ምዘና በመፈፀም ነው፡፡
   ይህም ፍሬ ጉዳይ በማጣራትና ማስረጃ በመመዘን ሂደት በክልሉ ፍርድ ቤቶች ወይም ሌላ የዳኝነት ስልጣን የተሰጣቸው አካላት የፈፀሙት ስህተት ቢኖር የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ሰሚ ችሎት ፍሬ ጉዳይ አጣርቶና ማስረጃ መርመሮና መዝኖ የማረም ስልጣን አለው ወይስ የለውም? የሚለውን ነጥብ እንድናይ የሚያስገድደን ሆኖ አግኝተነዋል፡፡ በኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ ሕገ-መንግስት አንቀፅ 80 ንዑስ አንቀጽ 3/ለ/ የክልል ጠቅላይ ፍርድ ቤት መሠረታዊ የሆነ የሕግ ስህተት ያለበትን በክልል ጉዳዮች ላይ የተሰጠ የመጨረሻ ውሳኔ ለማረም በሰበር ችሎት የማየት ስልጣን እንደሚኖረውና ክርክሩ በሕግ እንደሚወሰን ይደነግጋል፡፡ በ1994 ዓ.ም ላይ ተሻሽሎ የወጣው የክልሉ ሕገ-መንግስት አንቀፅ 75 ንዑስ አንቀፅ 2/ሐ/ የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በክልል ጉዳዮች

የተሰጠ የመጨረሻ ውሳኔ ላይ የተፈፀመ መሠረታዊ የሕግ ስህተት የማረም ስልጣን ያለው መሆኑን በግልፅ ይደነግጋል፡፡ የክልሉ ፍርድ ቤቶች ማቋቋሚያ አዋጅ ቁጥር 43/1994 አንቀፅ 5 ንዑስ አንቀፅ 3 የክልሉ ጠቅላይ ፍርድ ቤት መሠረታዊ የሕግ ስህተት የፈፀመበትን በክልል ጉዳዩች የተሰጠ የመጨረሻ ውሳኔ ላይ የተፈፀመ መሠረታዊ የሕግ ስህተት የማረም ስልጣን ያለው መሆኑን በግልፅ ይደነግጋል፡፡ ከላይ የጠቀስናቸውን የፌዴራል ሕገ-መንግስት፣ የክልሉ ሕገ-መንግስት የክልሉ አዋጅ ቁጥር 43/1994 ድንጋጌዎች ለክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት ፍሬ ጉዳይ የማጣራት፣ ማስረጃ የመመርመርና የመመዘን ስልጣን የሚሰጡ ሆነው አላገኘናቸውም፡፡ ስለሆነም የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት የተጠሪንና የአመልካቾችን ማስረጃ በዝርዝር በመመርመርና በመመዘን የተጠሪን ማስረጃ የወንጀል ክሱን የማስረዳት ብቃትና ታማኝነት አለው፡፡ የአመልካቾች ማስረጃ ታማኝነትና ክብደት የሌለው ነው በማለት የደረሰበትን መደምደሚያና፣ የግራ ቀኙን ማስረጃ መርመሮና መዝኖ የደረሰበትን መደምደሚያ መሠረት በማድረግ በአመልካቾች ላይ የሰጠው የጥፋተኝነትና የቅጣት ውሳኔ ከላይ የገለፅናቸውን ድንጋጌዎች የሚጥስና መሠረታዊ የሕግ ስህተት ያለበት ሆኖ አግኝተነዋል፡፡

2. የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት ፍሬጉዳይ የማጣራት፣ ማስረጃ የመመዘንና የመመርመር ስልጣን የለውም ማለት፣ በክልሉ የሚገኙ ፍርድ ቤቶች ወይም የዳኝነት ስልጣን የተሰጣቸው ሌሎች አካላት፣ መሠረታዊ የሆነ የዳኝነት አካሄድ ስርዓት ሳይከተሉ፣ መመስረት የሚጋባቸውን ጭብጥ ሳይመሰርቱና ጭብጥን የማስረዳት ሁኔታ (Burden of proof) ያለበት ተከራካሪ ወገን የማስረዳት ግዴታውን በአግባቡ እንዲወጣ ሳያደርጉና መጣራት የሚገባውን ፍሬ ጉዳይ ሳያጣሩ የሰጡትን ውሳኔ በሰበር ታይቶ የማረምና በክልሉ የሚገኙ ፍርድ ቤቶች ወይም ሌሎች የዳኝነት ስልጣን የተሰጣቸው አካላት፣ ተገቢውን ጭብጥ በመመስረት፣ በሕግ የማስረዳት ግዴታ የለበት አካል ግዴታውን የተወጣ መሆኑን በአግባቡ መመርመርና በመመዘን እንደዚሁም መጣራት የሚገባውን ፍሬ ጉዳይ አጣርተው እንዲወስኑ ትዕዛዝ የመስጠትና ጉዳዩን የመመለስ የዳኝነት ስልጣን የለውም ማለት እንዳልሆነ ትከከለኛ ግንዛቤ ሊያዝበት የሚገባ ሆኖ አግኝተነዋል፡፡
በያዝነው ጉዳይ የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት በዝርዝር የግራ ቀኙን ማስረጃ በመመዘንና በመመርመር ውሳኔ መስጠቱ መሠረታዊ የሕግ ህተት ያለበት ቢሆንም በውሳኔው የወንጀል ሕግ አንቀፅ 419 በተከራካሪ ወገኖች ከሚጥለው የማስረዳት ግዴታ (Burden of proof) አንፃር አመልካቾችና ተጠሪ በሕግ የተጣለባቸውን ግዴታ ተወጠተዋል ወይስ አልተወጡም? የስር ፍርድ ቤትና ይግባኝ ሰሚ ችሎት በአመልካቾችና በተጠሪዎች መካከል ያለውን አከራካሪ የፍሬ ጉዳይ ጭብጥ ለመወሰን መጣራት የሚገባቸውን ፍሬ ጉዳዮች በማጣራትና የግራ ቀኙን ማስረጃ የሕጉ ድንጋጌ የሚጥልባቸውን የማስረዳት ግዴታ መሠረት በማድረግ በመመርመርና በመመዘን ውሳኔ ሰጥተዋል ወይስ አልሰጡም? የሚሉትን ጭብጦች በውስጡ የያዘ መሆኑን የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት ከሰጠው ውሳኔ ተረድተናል፡፡

ከላይ የገለፅናቸውን ጭብጦች የስር ፍርድ ቤትና ይግባኝ ሰሚ ችሎት በአግባቡ በማየት ውሳኔ የሰጡባቸው መሆን ያለመሆኑን ለመወሰን በመጀመሪያ አመልካቾች የተከሰሱበት የወንጀል ሕጉ አንቀፅ 33 እና 419 ንዑስ አንቀፅ 1 ተጠሪና አመልካች ያለባቸውን የማስረዳት ግዴታ (Burden of proof) መመርመር አስፈላጊ ሆኖ አግኝተነዋል፡፡ አመልካቾች የተከሰሱበትን የወንጀል ሕግ አንቀፅ 33 እና አንቀፅ 419 ንዕስ አንቀፅ 1 ዝርዝር ይዘት ተመልክተናል፡፡ "ምንጩ ያልታወቀ ንብረትና ገንዘብ" የሚለው ርዕስ ያለው የወንጀል ሕጉ አንቀፅ 419 በንዑስ አንቀፅ 1 "የመንግስት ሠራተኛ የሆነ ወይም የነበረ ማንም ሰው

ሀ/ የኑሮ ደረጃው አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግስት ስራ ወይም በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ የበለጠ እንደሆነ ወይም፣

ለ/ ያለው ንብረት ወይም የገንዘብ ምንጭ አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግስት ስራ ወይም በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ ጋር የማይመጣጠን እንደሆነ፣

የዚህ አይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት ሊገባ እንደቻለ ለፍርድ ቤት ካላስረዳ በስተቀር እንደሁኔታው የንብረቱ መወረስ ወይም ለባለቤቱ መመለስ እንደተጠበቀ ሆኖ በቀላል እስራት ወይም በመቀጮ ነገሩ ከባድ ሲሆን ከአምስት ዓመት በማይበልጥ ፅኑ እስራትና በመቀጮ ይቀጣል" የሚል ይዘት ያለው ነው፡፡

ተጠሪ አንደኛ አመልካች ከ1984 ዓ.ም ጀምሮ በዚህ ጉዳይ በወንጀል ክስ አስከቀረበበት ጊዜ ድረስ በክልሉ በተለያየ ደረጃ የመንግስት ሠራተኛ ሆኖ እየሰራ ያገኘው የተጣራና የታወቀ ገቢ ብር 90,220 /ዘጠና ሺህ ሁለት መቶ ሃያ/ ብር መሆኑን የሚያስረዳ ማስረጃ እንዳለው በክሱ ከገለፀ በኋላ አመልካቾች በስማቸው በተለያዩ ባንኮች ባላቸው ሂሳብና በልጃቸው ስም የገዙት ቤት ብር 2,018,468.90 /ሁለት ሚሊዩን ሰማኒያ አንድ ሺህ አራት መቶ ስልሳ ስምንት ብር ከዘጠና ሣንቲም/ ያላቸው በመሆኑ ምንጩ ያልታወቀ ሀብት ይዘው ተገኝተዋል በማለት ክስ ያቀረበ ሲሆን ተጠሪ አንደኛ አመልካች የመንግስት ሠራተኛ በነበረበት ጊዜ ያገኝ የነበረውን ገቢ፣ ሁለተኛ አመልካች የቤት እመቤት መሆናቸውንና ንብረቱ በጥሬ ገንዘብ ያለ በስማቸው ያለመሆኑንና አመልካቾች በልጃቸው ስም ቤት ያላቸው መሆኑን የሚያስረዳ ማስረጃ እንዳቀረበ ፍሬ ጉዳይ የማጣራትና ማስረጃ የመመዘን ስልጣን ባላቸው ፍርድ ቤቶች ተረጋግጧል፡፡ አመልካቾች በበኩላቸው በባንክ ሂሳባቸው ውስጥ የተገኘው ገንዘብና ቤቱን የሰሩበትን ሀብት ምንጭ ለማስረዳት የመከላከያ ማስረጃዎች እንዳቀረቡ ከስር ፍርድ ቤትና የክልሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎትና የሰበር ችሎት ከሰጡት ውሳኔ ተረድተናል፡፡

እዚህ ላይ የሚነሳው ጥያቄ አመልካቾች ተጠሪ ያቀረበውንና በማስረጃ ያረጋገጠውን ፍሬ ጉዳይ ማለትም በግልፅ ከሚታወቀውና አንደኛ አመልካች ከ1984 ዓ.ም በመንግስት ሠራተኝነት ያገኝ ከነበረው ሕጋዊ ገቢ በላይ በባንክ ሂሳብ ቁጥራቸው የተገኘው ጥሬ ገንዘብና በልጃቸው ስም ቤት

የሠሩበት ሀብት ማለት ብር 2,081,468.90 /ሁለት ሚሊዮን ሰማኒያ አንድ ሺህ አራት መቶ ስልሳ ስምንት ብር ከዘጠና ሳንቲም/ ትክክለኛ ምንጭ የማስረዳት ግዴታና ኃላፊነት አለባቸው ወይስ የዐቃቢ ሕግን ክስና ማስረጃ ሊያስተባብሉ የሚችሉ አንድ አንድ ፍሬ ጉዳዮችን ለፍርድ ቤት ማቅረባቸው በቂ ይሆናል ወይስ አይሆንም የሚለውን ነጥብ በወንጀል ሕግ አንቀፅ 419 ንዑስ አንቀፅ 1 ድንጋጌ ከተደነገገው የማስረዳት ግዴታ አንፃር መመርመር አስፈላጊ ነው፡፡

ከወንጀል ሕግ አንቀፅ 419 ንዑስ አንቀፅ 1/ሀ/ እና /ለ/ ድንጋጌዎች ለመረዳት የሚቻለው ዐቃቢ ሕግ የመንግስት ሠራተኛ የሆነው ወይም የነበረው ሰው ያገኘ የነበረውና የሚያገኘው ገቢ ምን ያህል እንደሆነና የመንግስት ሠራተኛው በራሱ ስምም ሆነ በቤተሰቡ ስም ከሕጋዊ ገቢው ውጭ ይዞት የሚገኘውን የገንዘብና የንብረት ግምት የማስረዳት ግዴታ ያለበት መሆኑን በግልፅ ተደንግጓል፡፡ በሌላ በኩል የመንግስት ሠራተኛ የነበረው ሰውና ከእሱ ጋር በልዩ አባሪነት የተከሰሰ ሰው የመንግስት ሰራተኛው ሲያገኝ ከነበረውና ከሚያገኘው ገቢ በላይ ይዞ የተገኘው ገንዘብ ወይም ሀብት ትክክለኛው ምንጭ ምን እንደሆነ የማስረዳት ግዴታ እንዳለበት በወንጀል ሕጉ አንቀፅ 419 ንዑስ አንቀፅ 1 ሶስተኛው ፓራግራፍ፣ “….የዚህ አይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት እንደገባ ለፍርድ ቤቱ ካላስረዳ በስተቀር” ምንጩ ያልታወቀ ሀብት ይዞ በመገኘቱ /በመገኘታቸው/ ጥፋተኛ ተብለው ዐቃቢ ሕግ በግልፅ ከሚታወቀው ሕጋዊ ገቢ በላይ ነው በማለት በክሱ የገለፀውንና በማስረጃ ያረጋገጠውን ሀብት ትክክለኛ ምንጭ የማስረዳት ግዴታ (Burden of proof) በተከሳሾች ላይ የሚወድቅ መሆኑን ነው፡፡ የተከሳሾች የማስረዳት ግዴታም በዐቃቢ ሕግ በክሱ ከገለፀውና በማስረጃ ካረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ስራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍርድ ቤቱ በማሳየት የሚወሰን ሳይሆን፣ በዐቃቢ ሕግ ክስና ማስረጃ ከተረጋገጠው ገቢ ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብና ሀብት ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታና ኃላፊነት ያለበት መሆኑን ከወንጀል ሕግ አንቀፅ 419 ንዑስ አንቀፅ 1 ሶስተኛው ፓራግራፍ ድንጋጌ አቀራረፅና ይዘት ለመረዳት ይቻላል፡፡

ከዚህ አንፃር ስንመለከተው አንደኛው አመልካች የመንግስት ሠራተኛ ሆኖ ከሚያገኘው ደመወዝ /ሕጋዊ ገቢ/ በላይ በስማቸው በተከፈተ የባንክ ሂሳብና በልጃቸው ስም ቤት የተሰራበትና እንደያዙት የተረጋገጠው በአጠቃላይ መጠኑ ብር 2,081,468.90 /ሁለት ሚሊዮን ሰማኒያ አንድ ሺህ አራት መቶ ስልሳ ስምንት ብር ከዘጠና ሣንቲም/ የሆነ ገንዘብና ሀብት ምንጩ በአንደኛ አመልካች ስም በወንዶነት ወረዳ አባዮ ቀበሌ ካለው 2.5 ሄክታር መሬት ላይ ካለሙት የጫትና የቡና ሰብል ሽያጭ፣ በሁለተኛ አመልካች ስም 0.25 ሄክታር መሬት ላይ ካለሙት የሰንኮራ አገዳ እንደሆነ፣ ከፊሉን በብድር ከግለሰብ ያገኙት መሆኑንና ከፊሉ የጋራራሙ ላንቶ የእንስሳት ማድለብና ኃላፊነቱ የተወሰነ የግል ማህበርና የጋልማ ባህላዊ ሎጅ ኃላፊነቱ የተወሰነ የግል ማህበር መሆኑን የሚየሳዩ ማስረጃዎች እንዳቀረቡ ከሥር ፍርድ ቤትና ከይግባኝ ሰሚው ፍርድ ቤት ውሳኔ ተገንዝበናል፡፡

ሆኖም የስር ፍርድ ቤትና ይግባኝ ሰሚው ችሎት አመልካቾች ያቀረቧቸው ማስረጃዎች አንደኛ አመልካቾች ከሚሰራው የመንግስት ስራ በተጨማሪ ሌላ የገቢ ምንጭ የነበረው መሆኑን የሚያሳዩ ማስረጃዎች መሆናቸውን በመመልከት ብቻ መጣራት የሚገባቸው ፍሬ ጉዳዮችን ሳያጣሩና በተለይም

አመልካቾች በዐቃቢ ሕግ ክስና ማስረጃ ከሕጋዊ ገቢያቸው በላይ የያዙ መሆናቸው ብር 2,081,468.90 ያገኙበትን ትክክለኛ የገቢ ምንጭ የወንጀል ሕጉ አንቀፅ 419 ንዑስ አንቀፅ 1 በሚደነግገው መሠረት የማስረዳት ግዴታቸውን ተወጥተዋል ወይስ አልተወጡም የሚለውን ጭብጥ በመያዝ በሕጉ በአመልካቾች ላይ የተጣለውን የማስረዳት ግዴታ (Burden of proof) መሠረት በማድረግ ተገቢውን ማጣራት አድርገው መርምረውና መዝነው ውሳኔ የሰጡ አለመሆናቸውን ከውሳኔያቸው ይዘት ለመረዳት ችለናል፡፡ ምክንያቱም

ሀ/ አመልካቾች በስማቸው እንዳለና ጫት፣ እንሰት፣ ቡናና ሽንኮራ አገዳ እያለማን ገቢ እናገኝበታለን ያሉት 2.25 ሄክታር መሬት በተመለከተ አመልካቾች የእርሻ መሬቱ ባለይዞታ ናቸው ወይስ አይደሉም? የእርሻ መሬቱ ባለይዞታ ከሆኑ የእርሻ መሬቱን በይዞታነት የያዙት መቼ ነው? መሬቱን በማልማት ኢኮኖማያዊ ጠቀሜታ ያላቸው የተለያዩ ተክሎች በማልማት ምርት ገቢ ማግኘት የጀመሩት መቼ ነው? ከመሬቱ የሚገኘው ገቢና መሬቱን ለማልማትና ምርቱን ለገበያ ለማቅረብ የሚወጣው ወጭ ምን ያህል ነው? አመልካቾች ከመሬቱ ተጣርቶ የሚደርሳቸው ገቢ ምን ያህል ነው የሚለው ፍሬጉዳይ በአግባቡና በገለልተኛ ባለሙያ ተጣርቶ ባልታወቀበት ሁኔታ ከቀበሌና ከዞኑ ግብርና ጽ/ቤት የተፃፉ ደብዳቤዎችን ብቻ መሠረት በማድረግ አመልካቾች ከእርሻ የሚያገኙት ገቢ መጠን ከፍተኛ እንደሆነ መወሰኑ በወንጀል ሕጉ አንቀፅ 419 ንዑስ አንቀፅ 1 በአመልካቾች ላይ የሚደነግገውን የማስረዳት ግዴታ (Burden of proof) መሠረት በማድረግ ጉዳዩ ተጣርቶ የተወሰነ አለመሆኑን የሚያሳይ በመሆኑ፣

ለ/ አመልካቾች በባንክ ሂሳባቸው ውስጥ ከተገኘው ገንዘብ ውስጥ ብር 1,120,500 /አንድ ሚሊዮን አንድ መቶ ሃያ ሺህ አምስት መቶ ብር/ በአንደኛው አመልካች ስም የተቀመጠ ከፊሉ የጋራራሙ ላንቶ የእንስሳት ማድለብ ኃላፊነቱ የተወሰነ የግል ማህበር ገንዘብ ከፊሉ ደግሞ የጋልማ ባህላዊ ሎጅ ኃላፊነቱ የተወሰነ የግል ማህበር መሆኑን ለማስረዳት የማህበራቱ ቃለ ጉባኤና አባላት በማስረጃነት ያቀረቡ መሆኑን ከሥር ፍርድ ቤትና ከይግባኝ ሰሚው ችሎት ውሳኔ ተገልጿል፡፡ ሆኖም በመጀመሪያ ደረጃ ኃላፊነታቸው የተወሰኑ የግል ማህበራት የሚመሰረቱት የማህበሩ ዋና ገንዘብ ልክና የማህበሩ ዋና ገንዘብ በሙሉ መግባቱን የሚያስረዳ መግለጫ ሲቀርብ መሆኑ በንግድ ሕጉ አንቀፅ 519 ንዑስ አንቀጽ /መ/ እና /ሰ/ በአስገዳጅነት የተደነገገ በመሆኑ እነዚህ የንግድ ማህበራት ሕጋዊ ሰውነት አግኝተው ተመዝግበው ከሆነ ሲመዘገቡ ያስመዘገቡትና ገቢ ያደረጉት የማህበሩ ዋና ገንዘብ ምን ያህል ነው? ማህበራቱ በካፒታልነት ካስመዘገቡት ካፒታል በላይ በአመልካቾች ስም ለማህበር መመስረቻ የተዋጣው ገንዘብ አለ በማለት የሚጽፉቸው የተለያዩ ማስረጃዎች ሕጋዊ ተቀባይነት፣ ያላቸው ናቸው ወይስ አይደሉም? የሚሉት ነጥቦች ኃላፊነቱ የተወሰነ የግል ማህበር አመሰራረት፣ መዋጮ አከፋፈል፣ የማህበሩ ዋና ገንዘብና ገንዘቡ ገቢ ስለሚሆንበት ሁኔታ የተቀመጡ ሕጋዊ መስፈርቶችን በወንጀል ሕጉ አንቀፅ 419 ንዑስ አንቀጽ 1 ያለባቸውን የማስረዳት ኃላፊነት መሠረት በማድረግ ተጣርተው ውሳኔ የተሰጠበት ሆኖ አላገኘነውም፡፡

ስለሆነም የሥር ፍርድ ቤትና ይግባኝ ሰሚ ችሎት ከላይ የዘረዘርናቸውን መጣራት የሚገባቸውን ፍሬጉዳዮች ሳያጣራና አመልካቾች ያቀረቧቸው ማስረጃዎች በወንጀለ ሕጉ አንቀፅ 419 ንዑስ አንቀፅ 1 የተጣለባቸውን የማስረዳት ግዴታ (Burden of proof) የተወጡ መሆኑን ያለመሆኑን የሚያሳዩና አግባብነት ያላቸውን ሕጎች መሠረት ያደረጉና ተቀባይነት ያላቸው ናቸው ወይስ አይደሉም? የሚለውን ጭብጥ በመመስረት ውሳኔ ያልሰጡበት በመሆኑ መሠረታዊ የሕግ ስህተት ያለበት ሆኖ አግኝተነዋል፡፡ በመሆኑም የክልሉ ጠቅላይ ፍርድ ቤት የሰበር ችሎት የተጠሪንና የአመልካቾችን ማስረጃ በዝርዝር በመመርመርና በመመዘን የሰጠው ውሳኔም ሆነ የሥር ፍርድ ቤትና ይግባኝ ሰሚው ችሎት ከላይ በዝርዝር የገለፅናቸውን ፍሬጉዳዮችን ሳያጣራና ለጉዳዩ አግባብነት ያላቸውን የሕግ ድንጋጌዎች መሠረት በማድረግ የአመልካቾችን ማስረጃ ተቀባይነት ሳይመረምሩ የሰጡት ውሳኔ የወንጀል ሕጉን አንቀፅ 419 ንዑስ አንቀጽ 1 ድንጋጌዎችና ከላይ የዘረዘርናቸውን የሕግ ድንጋጌዎች የሚጥሱና መሠረታዊ የሕግ ስህተት ያለባቸው ናቸው በማለት ወስነናል፡፡

<u>ውሳኔ</u>

1. የደቡብ ብሔር ብሔረሰቦችና ሕዝቦች ክልል ጠቅላይ ፍርድ ቤት የሰበር ችሎት የሰጠው ውሳኔ ተሽሯል፡፡
2. የሀዋሳ ከተማ ከፍተኛ ፍርድ ቤት መደበኛ ችሎትና የክልሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የሰጡት ውሳኔ ተሽሯል፡፡
3. የሀዋሳ ከተማ ከፍተኛ ፍርድ ቤት መደበኛ ችሎት ከዚህ በፊት ጉዳዩን ያላዩት ዳኞች በመሰየም በዚህ ፍርድ በተራ ቁጥር 2/ሀ/ እና /ለ/ የተዘረዘሩትን ነጥቦች በማጣራትና የማስረጃዎቹን ተቀባይነት፣ ክብደትና ተዓማኒነት በመመዘን በወንጀለኛ መቅጫ ሥነ-ሥርዓት ሕግ ቁጥር 149/1/ መሠረት ፍርድ እንዲሰጥበት ጉዳዩን መልሰንለታል፡፡ የውሳኔው ግልባጭ ይላክለት፡፡
   መዝገቡ ተዘግቷል፣ ወደ መዝገብ ቤት ይመለስ ብለናል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

በአማራ ብሔራዊ ክልላዊ መንግስት
የምዕራብ ጎጃም ዞን ከፍተኛ ፍ/ቤት
ባሕር ዳር

የወንጀል መዝገብ ቁጥር 41634
ቀን ግንቦት 28/2004 ዓ.ም

ዳኞች፡- 1ኛ. አለኸኝ ብዙአየሁ
2ኛ. ማርቆስ በቀለ
3ኛ. ስሜነህ በላቸው

ከሳሽ፡- የአብክመ ሥነ-ምግባርና ፀረ-ሙስና ኮሚሽን ዐ/ሕግ ሞገስ ወረታ ቀረቡ
ተከሳሽ፡- ዳግም ደሳለኝ ገደቡ ከጠበቃው ከአቶ አደራው ደምለውም ጋር ቀረበ

መዝገቡ ለዛሬ የተቀጠረ ለምርመራ ነው፤ በዚህም መሰረት መዝገቡን መርምረን ቀጥሎ ያለውን ፍርድ ሰጥተናል፡፡

ፍርድ

የአብክመ ሥነ-ምግባርና ፀረ-ሙስና ኮሚሽን በቁጥር ፀ/ሙ/40/05/2003 በቀን 14/11/2002 ዓ.ም በተፃፈ የሙስና ወንጀል ክስ ማመልከቻ ተከሳሹ በወንጀል ሕግ አንቀፅ 419(1)(ለ) ስር የተደነገገውን በመተላለፍ ከ1983 ዓ.ም እስከ 30/10/2002 ዓ.ም ድረስ የመንግስት ሰራተኛ ሆኖ ተቀጥሮ ሲሰራ በዚህ ጊዜ ውስጥ የተከፈለው የተጣራ ደመወዝ ድምር ብር 337,978.39 /ሶስት መቶ ሰላሳ ሰባት ሺህ ዘጠኝ መቶ ሰባ ስምንት ብር ከሰላሳ ዘጠኝ ሳንቲም/ ሆኖ እያለ በባሕር ዳር ከተማ ቀበሌ 13 ውስጥ ስፋቱ 206 ካ.ሜ ቦታ ላይ በ163,774.52 ወጭ የተሰራ በስሙ የተመዘገበ አንድ ቪላ የመኖሪያ ቤት፣ በባሕር ዳር ከተማ ቀበሌ 11 ውስጥ ስፋቱ 250 ካ.ሜ ቦታ ላይ የተሰራ በተከሳሹ ባለቤት በወ/ሮ ወለላ አየለ ስም በብር 147,704.14 ከአቶ አበበ አለማየሁ የተገዛ፣ በኢትዮጵያ ንግድ ባንክ ባሕር ዳር ቅርንጫፍ በሂሳብ ቁጥር 703501015628 በስሙ የተቀመጠ ብር 101,857.54፣ በዳሽን ባንክ ባሕር ዳር ቅርንጫፍ በቁጠባ ሂሳብ ቁጥር 5020004680008 በስሙ የተቀመጠ ብር 202108.41 እና በዳሽን ባንክ ባህር ዳር ቅርንጫፍ በቁጠባ ሂሳብ ቁጥር 5020519090001 በተከሳሽ ባለቤት በወ/ሮ ወለላ አየለ ስም የተቀመጠ ብር 105,746.74 የተገኘ በመሆኑ ይህ ያለው ንብረትና ገንዘብ አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግስት ስራ ወይም በሌላ መንገድ ሲያገኘው ከነበረው ሕጋዊ ገቢ ጋር የማይመጣጠን በመሆኑ ምንጩ ያልታወቀ ንብረትና ገንዘብ ማፍራት ወንጀል ፈፅሟል በማለት ክስ የመሰረተ ሲሆን ይህንም ክስ ያስረዳልኛል በማለት 26 ገጽ ያላቸው 11 የሰነድ ማስረጃዎች አያይዞ አቅርቧል፡፡

ተከሳሹም በክሱ መሰረት ፍ/ቤት እንዲቀርብ ተደርጎ የዕምነት ክህደት ቃሉን ሲጠየቅ የተከሰሰኩበትን የወንጀል ድርጊት አልፈፀምኩም፤ ጥፋተኛም አይደለሁም በማለት ክዶ ተከራክሯል፡፡ በዚህም ምክንያት ዐ/ህግ ተከሳሹ የተከሰሰበትን የወንጀል ድርጊት የካደ ስለሆነ ከክሳችን ጋር አያይዘን

ያቀረብናቸው የሰነድ ማስረጃዎች ተመርምረው ብይን ይሰጥልን በማለት ስላሳሰቡ የዐ/ህግ የሰነድ ማስረጃዎች እንዲመረመሩ ተደርገዋል፡፡

በዐ/ህግ የሰነድ ማስረጃ ዝርዝር መግለጫ በተራ ቁጥር 9 እና 10 የተጠቀሱት ማስረጃዎች ተከሳሹ በመንግስት ሰራተኝነት ከተቀጠረበት ከመስከረም 03 ቀን 1983 ዓ.ም እስከ ሰኔ 30 ቀን 2002 ዓ.ም ድረስ ያገኝ የነበረውን ደመወዝ የሚገልፅ ሲሆን እሱም ተከሳሹ መጀመሪያ ሲቀጠር በብር 500.00 /አምስት መቶ ብር/ የተቀጠረ መሆኑንና በየጊዜው እድገትና የደመወዝ መሻሻል እየተደረገለት ይህ ማስረጃ እስከተፃፈበት እስከ ሀምሌ 01 ቀን 2002 ዓ.ም ድረስ ብር 3,752.00 /ሶስት ሺህ ሰባት መቶ ሃምሳ ሁለት ብር/ ያገኝ እንደነበረና ከተቀጠረበት ቀን ጀምሮ ይህ ማስረጃ እስከተፃፈበት ቀን ድረስ ያገኘው የተጣራ ደመወዙ ድምር ብር 337,978.14 /ሶስት መቶ ሰላሳ ሰባት ሺህ ዘጠኝ መቶ ሰባ ስምነት ብር ከአስራ አራት ሳንቲም/ እንደሆነ ያስረዳል፡፡

ከተራ ቁጥር 4-7 እና 11 የተጠቀሱት የሰነድ ማስረጃዎች ደግሞ ተከሳሹ በፓሊ ፔዳ ቁጥር 1 የቤት ስራ ማህበር አባል በመሆን ግምቱ ብር 163,774.52 /አንድ መቶ ስድሳ ሶስት ሺህ ሰባት መቶ ሰባ አራት ብር ከአምሳ ሁለት ሳንቲም) የሆነ የመኖሪያ ቤት የሰራ መሆኑን ያስረዳል፡፡

በተራ ቁጥር 8 የተጠቀሰው የሰነድ ማስረጃ ደግሞ ተከሳሹ በባለቤቱ በወ/ሮ ወለላ አየለ ስም በባሕር ዳር ቀበሌ 11 ውስጥ ስፋቱ 250 ካ.ሜ በሆነ ቦታ ላይ የተሰራ አንድ መኖሪያ ቤት በብር 147,704.14 /አንድ መቶ አርባ ሰባት ሺህ ሰባት መቶ አራት ብር ከአስራ አራት ሳንቲም/ የገዛ መሆኑን የሚያሳይ ነው፡፡

ከተራ ቁጥር 1-3 የተጠቀሱት የሰነድ ማስረጃዎች ደግሞ ተከሳሹ በራሱና በባለቤቱ ስም በባሕር ዳር ንግድ ባንክ እና ዳሽን ባንክ ቅርንጫፎች በድምሩብር 409,712.69 /አራት መቶ ዘጠኝ ሺህ ሰባት መቶ አስራ ሁለት ብር ከስልሳ ዘጠኝ ሳንቲም/ አስቀምጦ የተገኘ መሆኑን ያስረዳሉ፡፡

ፍ/ቤቱም ዐ/ህግ በተከሳሹ ላይ ያቀረባቸውን የሰነድ ማስረጃዎች ሲመረምራቸው ተከሳሹ ከመስከረም 03 ቀን 1983 ዓ.ም ጀምሮ እስከ ሰኔ 30 ቀን 2002 ዓ.ም ድረስ በሰራባቸው ወደ 20 ዓመታት የሚጠጋ ጊዜ በመንግስት ሰራተኛነት ተቀጥሮ ሲሰራ የተከፈለው አጠቃላይ የተጣራ የደመወዝ ድምር 337,978.14 /ሶስት መቶ ሰላሳ ሰባት ሺህ ዘጠኝ መቶ ሰባ ስምንት ብር ከአስራ አራት ሳንቲም/ ሆኖ እያለ ተከሳሹ አንድ ቤት የሰራበት፣ በሚስቱ ስም ቤት የገዛበት እና በራሱና በሚስቱ ስም በተለያዩ ባንኮች ያስቀመጠው ገንዘብ ድምሩ ብር 721,191.35 /ሰባት መቶ ሃያ አንድ ሺህ አንድ መቶ ዘጠና አንድ ብር ከሰላሳ አምስት ሳንቲም/ ነው፡፡ ይህም የሚያሳየው በአጠቃላይ በሀብቱ ድምር እና ከደመወዝ ባገኘው ገንዘብ መካከል የብር 383,213.21 (ሶስት መቶ ሰማኒያ ሶስት ሺህ ሁለት መቶ አስራ ሶስት ብር ከሃያ አንድ ሳንቲም) ልዩነት ያሳያል፤ በዚህም ምክንያት ይህ በልዩነት የሚታየው ገንዘብ ምንጩ ምን እንደሆነ ስላልታወቀ ተከሳሹ ይህን በልዩነት የሚታየውን ገንዘብ ከየት እንዳገኘው እንዲያስረዳ በወ/መ/ሥ/ሥ/ህ/ቁ 142(1) መሠረት ሊከላከል ይገባል በማለት ብይን ሰጥቷል፡፡

ተከሳሹ በብይኑ መሰረት ገንዘቡን ያገኘሁበትን ምንጭ ያስረዱልኛል በማለት ስምንት የሰነድ ማስረጃዎች አያይዞና የሰባት ምስክሮችን ስም ዘርዝሮ አቅርቧል፡፡ የተከሳሹ የመጀመሪያው የሰነድ ማስረጃ ተከሳሹ በመንግስት ሰራተኝነት ከተቀጠረበት ከመስከረም 03 ቀን 1983 ዓ.ም ጀምሮ እስከ ሰኔ 30 ቀን 2002 ዓ.ም ድረስ ያገኝ የነበረውን ደመወዝ የሚገለፅ ሲሆን እሱም ተከሳሹ መጀመሪያ ሲቀጠር በብር 500.00 /አምስት መቶ ብር/ የተቀጠረ መሆኑንና በየጊዜው እድገትና የደመዝ መሻሻል እየተደረገለት ይህ ማስረጃ እስከተፃፈበት እስከ ሀምሌ 01 ቀን 2002 ዓ.መ ድረስ ብር 3752.00 /ሶስት ሽህ ሰባት መቶ ሃምሳ ሁለት ብር/ ያገኝ እንደነበረና ከተቀጠረበት ቀን ጀምሮ ይህ ማስረጃ እስከተፃፈበት ቀን ድረስ ያገኘው የተጣራ ደመወዙ ድምር ብር 337,978.14 /ሶስት መቶ ሰላሳ ሰባት ሽህ ዘጠኝ መቶ ሰባ ስምንት ብር ከአስራ አራት ሳንቲም/ እንደሆነ ያስረዳል፡፡

የተከሳሹ ሁለተኛ የሰነድ መከላከያ ማስረጃ ደግሞ ተከሳሹ ከኢፌዴሪ የፌደራል ዋና ኦዲተር መ/ቤት ከየካቲት 24 ቀን 2000 ዓ.ም ጀምሮ የሂሳብ አዋቂ ሆኖ ለመስራት የሚያስችለው የሙያ ብቃት ማረጋገጫ የምስክር ወረቀት የተሰጠው መሆኑን፣ የባሕር ዳር ከተማ አስተዳደር ንግድ ኢን/ኢን/ማስ/ማስ/ጽ/ቤት በብር 25,000.00 /ሃያ አምስት ሽህ ብር/ ካፒታል የንግድ ምዝገባ የምስክር ወረቀት የሰጠው መሆኑን እና ይህ የንግድ ምዝገባ ፈቃድም በ2001 ዓ.ም የታደሰ መሆኑን ያስረዳል፡፡

ሶስተኛው የተከሳሹ ማስረጃ ደግሞ የተከሳሹ ባለቤት በምግብ ንጽህና አገልግሎት እና በቤት እቃዎች የንግድ ስራ መስክ በብር 5,000.00 /አምስት ሽህ ብር/ ካፒታል መስከረም 28 ቀን 2002 ዓ.ም የንግድ ስራ ፈቃድ የተሰጣት መሆኑንና ከዚያ በኋላ ያልታደሰ መሆኑን ያሳያል፡፡

አራተኛው የመከላከያ ማስረጃ ደግሞ በአሶሳ ከተማ ውስጥ ነዋሪ የሆኑት ወላጅ አባቴ በአወጡት ንግድ ፈቃድ በሚኖሩበት ከተማ በስማቸው ተመዝግቦ በሚገኘው የይዞታ ቦታቸው 5 ልጆቻቸውን የማህበሩ አባል በማድረግ ባቋቋሙት የብሎኬት ማምረቻ ድርጅት እኔ በማህበር አባልነቴ የገቢ ምንጭ አገኝ የነበረ መሆኑንና በማህበሩ አባላት ስምምነት በተሰጠኝ ኃላፊነት መሰረት ከብሎኬት ማምረቻ ድርጅቱ የሚገኘውን ገንዘብ በስሜ የማስቀምጥ መሆኔን ያስረዳልኛል የሚል ነው፡፡

አምስተኛው የሰነድ ማስረጃ ደግሞ በአወጣሁት የሂሳብ አዋቂነት የንግድ ፈቃድ መሰረት በባሕር ዳር የመጠጥ ውሃና ፍሳሽ አገልግሎት ጽ/ቤት፣ በአማራ መልሶ ማቋቋም ልማት ድርጅት መ/ቤት፣ በእየሩሳሌም ህፃናት ማሳደጊያ ድርጅት እና በአቶ አሊ እንድሪስ የግል ንግድ ድርጅት ሂሳብ በመስራት ገቢ ያገኘሁ መሆኔን ያስረዳልኛል ተብሎ የቀረበ ነው፡፡

ስድስተኛው የመከላከያ ማስረጃ ደግሞ ከ1986 ዓ.ም እስከ መጋቢት 1998 ዓ.ም በአማራው ውሃ ስራዎች ኮንስትራክሽን ድርጅት ውስጥ በአካውንታንትነት፣ በፋይናንስ አገልግሎት ኃላፊነትና በሂሳብ አማካሪነት በንፅፅር ከሌሎች መ/ቤቶች በተሻለ ደመወዝ የሰራሁ እንደሆነና የድርጅቱን የበርካታ ዓመታት ሂሳብ በቡድን መሪነት የትርፍ ሰዓት ክፍያ እየተከፈለኝ ስሰራ መቆየቴን እና ከ10 ዓመት ላላነሰ ጊዜ ድርጅቱ በሰጠኝ የመኖሪያ ቤት ስኖር የቤት ኪራይ፣ የውሃ እና የመብራት ክፍያ ሳልከፍል በመቆየቴ የተሻለ ገንዘብ መቆጠቤን ያስረዳልኛል የሚል ነው፡፡

ሰባተኛው የሰነድ ማስረጃ ደግሞ በ1988 ዓ.ም በማህበር ተደራጅቼ የመኖሪያ ቤቴን ስሰራ ለግንባታው አስፈላጊ የሆኑት ነገሮች ዋጋ አሁን ካለው ዋጋ ጋር ሲነፃፀር በጣም አነስተኛና ዝቅተኛ ስለነበር የቤቱ ግምት ቤቱ በተሰራበት ጊዜ በነበረው ዋጋ ተገምቶ መቅረብ ሲገባው በ2002 ዓ.ም ባለው ዋጋ ተገምቶ መቅረቡ አግባብ ባለመሆኑ በ1988 ዓ.ም የነበረውን የገበያ ዋጋ መሰረት በማድረግ ገለልተኛ በሆነ ባለሙያ ተገምቶ ይቅረብልኝ የሚል ሲሆን ይህንን ዋጋም ገምቶ እንዲያቀርብ የታዘዘው የባሕር ዳር ከተማ አስተዳደር አገልግሎት ጽ/ቤት ተከሳሹ ቤቱን ለማሰራት ያስፀደቀው ዲዛይን ዝርዝር ግምት 163,774.52 /አንድ መቶ ስልሳ ሶስት ሽህ ሰባት መቶ ሰባ አራት ብር ከሃምሳ ሁለት ሳንቲም/ እንደሆነ ያስረዳል፡፡

ስምንተኛው የሰነድ ማስረጃ ደግሞ ተከሳሹ የፓሊና ፔዳን ቁጥር 1 የቤት ስራ ማህበር አባል ሆኖ እንደማንኛውም አባል በየጊዜው በማዋጣት ባጠራቀመው ገንዘብ የመኖሪያ ቤቱን የመሰረት ግንባታ የሰራ መሆኑን ያስረዳል፡፡

ከሰነድ ማስረጃዎች በተጨማሪ ተከሳሹ በቴፒ ቡና ተክል ልማት ድርጅት ከ1983-1985 ዓ.ም ድረስ ለሶስት ዓመታት በሂሳብ ሰራተኛነት ተቀጥሬ ስሰራ ከመደበኛ ደመወዜ በተጨማሪ በሂሳብ መዛግብት ስራ የትርፍ ሰዓት ክፍያ ስለማገኝና ድርጅቱ በሰጠኝ የመኖሪያ ቤት ኪራይ ሳልከፍል በነፃ በመኖሬ የተሻለ ገቢ የነበረኝና ገንዘብ ለመቆጠብ ምቹ ሁኔታ የፈጠረልኝ መሆኑን በወቅቱ አብረውኝ ይሰሩ የነበሩት ሰዎች ያስረዱልኛል፤ ወላጅ አባቴ አቶ ደሳለኝ ገደቡ በአቋቋሙት የሸርከና ማህበር ውስጥ የማህበሩ አባል መሆኔንና የድርጅቱን ገቢ በሙሉ ተረክቤ በስሜ ሳስቀምጥ መቆየቴን ከሰነድ ማስረጃው በተጨማሪ ያስረዱልኛል በማለት በመጀመሪያው ጭብጥ 1ኛ ደሳለኝ አያሌው፣ 2ኛ የወንድወሰን አካሉ፣ በሁለተኛው ጭብጥ ደግሞ 1ኛ ደሳለኝ ገደቡ፣ 2ኛ ናዝሬት ደሳለኝ የተባሉን ምስክሮች አቅርቦ አሰምቷል፡፡

በመጀመሪያው ጭብጥ ላይ የተጠሩት ሁለቱም የተከሳሹ መከላከያ ምስክሮች ተመሳሳይ በሆነ ቃል ተከሳሹ በ1982 ዓ.ም በቴፒ ቡና ተክል ልማት ፕሮጀክት ውስጥ በብር 500.00 /አምስት መቶ ብር/ የወር ደመወዝ ተቀጥሮ ሲሰራ በወቅቱ በመ/ቤቱ ውስጥ የሂሳብ ስራ ስለነበር እሱን ለመስራት በየቀኑ ከስራ ሰዓት ውጭ እና ቅዳሜ እና እሁድ ያንን ሂሳብ ከሌሎች ሰራተኞች ጋር በመሆን ይሰራ ስለነበር ለዚህ ለሰራው ስራ የትርፍ ሰዓት ክፍያ ይከፈለው እንደነበር ፕሮፖጀክቱ ያለበት ቦታ ከከተማ የራቀ በመሆኑ ፕሮጀክቱ ለሰራተኞች የመኖሪያ ቤት ኪራይ ነፃ ሰጥቷቸው የነበረ እንደሆነና የውሃ እና የመብራት ክፍያ የማይከፍሉ እንደነበር አስረድተዋል፡፡

በሁለተኛ ጭብጥ ላይ 1ኛው የተከሳሹ መከላከያ ምስክር ሲያስረዳ ክልል 6 ውስጥ አሶሳ ከተማ 4800 ካ.ሜ ቦታ ስለነበረኝ ይህንን ቦታ ከማቦዝነው ለምን ከልጆቹ ጋር የብሎኬት ማምረቻ አንከፍትም በማለት ልጆቹን አሰባስቤ ማህበር በ1995 ዓ.ም ከአቋቋምን በኋላ የማምረቻ ማሽኑን ገዝቶ የላከልኝ ተከሳሹ ነው፡፡ ብሎኬቱን በማምረት የምናገኘውን ገቢ የተከሳሹ ታናሽ ወንድም ለስራ ወደ አዲስ አበባ ስለሚመላለስ በየወሩ ወደ አዲስ አበባ ይዞ በመሄዱ በአጋጣሚ ተከሳሹ ለስራ ከባሕር ዳር ወደ አዲስ አበባ ሄዶ ከተገናኙ ለእሱ ካልተገናኙ ደግሞ አዲስ አበባ ለምትኖረው የተከሳሹ ታላቅ እህት ተከሳሹ ወደ አዲስ አበባ ሲመጣ ለእሱ እንድታስረክበው በማለት ሰጥቷት ነው

የሚመለስ፤ በአቋቋምነው ማህበር ውስጥ የማህበር አባላት የነበሩት ዳግም፣ ሰናይ፣ ስንዱ፣ ናዝሬት፣ ፍሬሕይወት እና ሰብለ ወንጌል የተባሉ ልጆች ሲሆኑ የብሎኬት ማምረቻው ማምረት ካቆመ በግምት ወደ 10 ዓመት ይሆነዋል በማለት አስረድቷል፡፡

በሁለተኛው ጭብጥ ላይ ሁለተኛዋ የመከላከያ ምስክር ስታስረዳ ደግሞ አሶሳ ከተማ ውስጥ የአባታችን ሰፋ ያለ ቦታ ስላለው በዚህ ቦታ ላይ ለቤተሰቡ መታሰቢያ የሚሆን የብሎኬት ማምረቻ እንድናቋቁም አባታችን ሀሳብ ስላቀረበ በሀሳቡ ተስማምተን አባታችን ብር 150,000.00 /አንድ መቶ ሃምሳ ሺህ ብር/፣ እኛ ደግሞ እንደየአቅማችን ገንዘብ በማዋጣት በ1995 ዓ.ም የሸርከና ማህበር ካቋቋምን በኋላ በአጠቃላይ ሂሳቡን እንድቆጣጠርና የገንዘቡን አቀማመጥና አሰሳሰብ በበላይነት እንዲመራ ተከሳሹን መርጠነዋል፡፡ ማህበሩን ስናቋቁም የማህበሩ አባላት አባታችን፣ እኔ /ናዝሬት/፣ ተከሳሹ፣ ሰናይት፣ ፍሬሕይወት እና መስፍን ነን፡፡ ማህበሩ ተቋቁሞ ማምረቻው ስራ ከጀመረ በኋላ በየጊዜው የምናገኘው ገንዘብ ወጪ እና ገቢው ምን ያህል እንደሆነ አላስታውስም፡፡ ከማህበሩ የሚገኘውን ገንዘብ የሚሰበስብ አባቴ ሲሆን ለተከሳሹም ባሕር ዳር አምጥቶ የሚሰጠው አባቴ ነው፡፡ ማምረቻ ድርጅቱ እስከ አሁን ድረስ ስራ አላቆመም፤ እየሰራ ነው በማለት አስረድታለች፡፡

እኛም የተከሳሹን መከላከያ ማስረጃዎች ከ0/ሕግ ማስረጃዎች ጋር በማገናዘብ መርምረናቸዋል፡፡ በምርመራው መሰረትም የተከሳሹ የመጀመሪያ መከላከያ ማስረጃ ተከሳሹ ከተቀጠረበት ጊዜ ጀምሮ እስከ ሰኔ 30 ቀን 2002 ዓ.ም ድረስ ያገኘው የተጣራ ደመወዙ ድምር ብር 337,978.14 /ሶስት መቶ ሰላሳ ሰባት ሺህ ዘጠኝ መቶ ሰባ ስምነት ብር ከአስራ አራት ሳንቲም/ እንደሆነ የሚያስረዳ ነው፡፡ ይህ ማስረጃ የሚያስረዳው ተከሳሹ በመንግስት ሰራተኝነት ተቀጥሮ ለ20 ዓመታት ሲሰራ ያገኘውን የተጣራ ደመወዙን ሲሆን ማስረጃው የሚያሳየው ተከሳሹ በዚህ ጊዜ ውስጥ ያገኘውን የተጣራ አጠቃላይ ደመወዙን እንጅ ለመሰረታዊ ፍላጎቶቹ ማለትም ለምግብ፣ ለልብስና ለመጠለያ እንዲሁም ለቤተሰቦቹ ማስተዳደሪያ ያወጣው ወጪ ምን ያህል እንደሆነ አያስረዳም፡፡ ይህ በሆነበት ሁኔታ ተከሳሹ ገቢውን በማሳየት ገንዘብ ያገኘበትን ምንጭ አስረድቷል ለማለት የሚቻል ሆኖ አላገኘነውም፡፡ የተከሳሹን ሁለተኛውን የሰነድ ማስረጃ ስንመረምረው ተከሳሹ ከኢፌዴሪ የፌዴራል ዋና ኦዲተር መ/ቤት የካቲት 24 ቀን 2000 ዓ.ም የሂሳብ አዋቂ ሆኖ ለመስራት የሚያስችለው የሙያ ብቃት ማረጋገጫ የምስክር ወረቀት የተሰጠው መሆኑን እና ይህንን የብቃት ማረጋገጫ የምስክር ወረቀት መሰረት አድርጎ የባሕር ዳር ከተማ አስተዳዳር ንግድ ኢን/ኢን/ማስ/ማስ/ጽ/ቤት በብር 25,000.00 /ሃያ አምስት ሺህ ብር/ ካፒታል የንግድ ምዝገባ የምስክር ወረቀት የሰጠው መሆኑና ይህ የንግድ ምዝገባ ፈቃድ በ2001 ዓ.ም የታደሰ መሆኑን ከሚያስረዳ በስተቀር በዚህ ፈቃዱ መሰረት ስራ ሰርቶ ገቢ ያገኘ መሆኑን የሚያስረዳ ሆኖ አላገኘነውም፡፡

ሶስተኛው መከላከያ ማስረጃ ደግሞ የተከሳሹ ባለቤት በምግብ ንጽህና አገልግሎት እና በቤት ዕቃዎች የንግድ ስራ መስክ በብር 5,000.00 /አምስት ሺህ ብር/ ካፒታል መስከረም 28 ቀን 2002 ዓ.ም የንግድ ስራ ፈቃድ የተሰጣት መሆኑንና ከዚያ በኋላ ያልታደሰ መሆኑን ከሚያሳይ በስተቀር በተሰጣት ፈቃድ መሠረት የንግድ ስራ አከናውና ያገኘችው ትርፍ ምን ያህል እንደሆነ የማያሳይ ከመሆኑ በተጨማሪ በተከሳሹ ላይ ክስ እስከተመሰረተበት ጊዜ ባለው 10 ወር ጊዜ ውስጥ በብር

5,000.00 /አምስት ሽህ ብር/ ካፒታል ብር 105,746.74 /አንድ መቶ አምስት ሽህ ሰባት መቶ አርባ ስድስት ብር ከሰባ አራት ሳንቲም/ የሚደርስ ገቢ ታገኛለች ተብሎ ስለማይገመት ይህ የመከላከያ ማስረጃም ሚዛን የሚደፋ ሆኖ አላገኘነውም፡፡

በአሶሳ ከተማ ውስጥ ነዋሪ የሆኑት ወላጅ አባቴ በአወጡት ንግድ ፈቃድ በሚኖሩበት ከተማ በስማቸው ተመዝግቦ በሚገኘው የይዞታ ቦታቸው 5 ልጆቻቸውን የማህበሩ አባላት በማድረግ በአቋቋሙት የብሎኬት ማምረቻ ድርጅት ውስጥ እኔ በማህበር አባልነቴ የገቢ ምንጭ አገኝ የነበረ መሆኑንና በማህበሩ አባለት ስምምነት በተሰጠኝ ኃላፊነት መሰረት ከብሎኬት ማምረቻ ድርጅቱ የሚገኘውን ገንዘብ በስሜ የማስቀምጥ መሆኔን ያስረዳልኛል በሚል የቀረበውን የሰነድ ማስረጃ ስንመረምረው ደግሞ ማስረጃው በብር 225,000.00 /ሁለት መቶ ሃያ አምስት ሽህ ብር/ ካፒታል የብሎኬት ማምረቻ ለማቋቋም ስድስት አባላት ያሉት የእሸሙር የሸርከና ማህበር ለማቋቋም የመግባቢያ ሰነድ እና የአባላቱን የስራ ኃላፊነት አዘጋጅተው የተፈራረሙ መሆናቸውን የሚያስረዳ ከመሆኑ ባሻገር አንደኛ አባላቱ ሊያዋጡት የተስማሙበትን ብር 225,000.00 /ሁለት መቶ ሃያ አምስት ሽህ ብር/ ካፒታል ማዋጣታቸውን የሚያሳይ የሂሳብ ሰነድ አልቀረበም፤ ሁለተኛው የብሎኬት ማምረቻ መሳሪያውም የተገዛ መሆኑን የሚያሳይ ማስረጃ አልቀረበም፤ ሶስተኛ በአባላቱ ለማዋጣት የተስማሙበት ካፒታል ወጥቶ የብሎኬት ማምረቻ መሳሪያው ተገዝቶ ስራ በመስራት ትርፍ ይሰበሰበና በተከሳሹ ስም ይቀመጥ ነበር ቢባል እንኳ ይህ ከብሎኬት ማምረቻው የሚገኘው ገቢ በተከሳሹ ስም መቀመጡን የሚያስረዳ የባንክ ስቴትመንት በማስረጃነት አለመቀመጡ የቀረበውን የሰነድ ማስረጃ ተቀባይነት እንዳይኖረው ከማድረጉ በተጨማሪ ይህንን ማስረጃ ያጠናክራሉ ተብለው የተጠሩት የሰው መከላከያ ምስክሮችን ቃል ከዚህ የሰነድ ማስረጃ ጋር በማገናዘብ ስንመረምረው በዚህ ጭብጥ ላይ የተጠራው 1ኛው የመከላከያ ምስክር ሲያስረዳ ብሎኬቱን በማምረት የምናገኘውን ገቢ የተከሳሹ ታናሽ ወንድም ለስራ ወደ አዲስ አበባ ስለሚመላለስ በየወሩ ወደ አዲስ አበባ ይዞ በመሄድ በአጋጣሚ ተከሳሹ ለስራ ከባሕር ዳር ወደ አዲስ አበባ ሄዶ ከተገናኙ ለእሱ ካልተገናኙ ደግሞ አዲስ አበባ ለምትኖረው የተከሳሹ ታላቅ እህት ተከሳሹ ወደ አዲስ አበባ ሲመጣ ለእሱ እንድታስረክበው በማለት ሰጥቷት ነው የሚመለስ በማለት የመሰከረ ሲሆን 2ኛዋ የመከላከያ ምስክር ደግሞ ከማህበሩ የሚገኘውን ገንዘብ የሚሰበሰብ በአባቴ ሲሆን ለተከሳሹ ባሕር ዳር አምጥቶ የሚሰጠው አባቴ ነው በማለት መመስከሯን እና በዚሁ ጭብጥ 1ኛው የመከላከያ ምስክር የብሎኬት ማምረቻው ማምረት ካቆመ በግምት ወደ 10 ዓመት ይሆነዋል በማለት ሲያስረዳ 2ኛዋ የመከላከያ ምስክር ደግሞ ማምረቻ ድርጅቱ እስከ አሁን ድረስ ስራ አላቆመም፤ እየሰራ ነው በማለት ማስረዳቷ ሲታይ ይህ ማስረጃ ተቀባይነት እንዳይኖረው በበለጠ የሚያጠናክር ሆኖ አግኝተነዋል፡፡

በአወጣሁት የሂሳብ አዋቂነት የንግድ ፈቃድ መሰረት በባሕር ዳር የመጠጥ ውሃና ፍሳሽ አገልግሎት ጽ/ቤት፣ በአማራ መልሶ ማቋቋም ልማት ድርጅት መ/ቤት፣ በእየሩሳሌም ህፃናት ማሳደጊያ ድርጅት እና በአቶ አሊ እንድሪስ የግል ንግድ ድርጅት ሂሳብ በመስራት ገቢ ያገኙሁ መሆኔን ያስረዳልኛል ተብሎ የቀረበውን ማስረጃ ስንመረምረው የባሕር ዳር ውሃ እና ፍሳሽ አገልግሎት ጽ/ቤት በቁጥር ልዩ 2/6058 በቀን 11/04/03 ዓ.ም በተፃፈ ደብዳቤ ተከሳሹ ከሀምሌ 01 ቀን 1999 ዓ.ም እስከ ሰኔ 30 ቀን 2000 ዓ.ም ድረስ በየወሩ ብር 2,500.00 /ሁለት ሽህ አምስት መቶ

ብር/ እየተከፈለው የጽ/ቤቱን የሂሳብ መዝጋት ስራ የሰራ መሆኑን ያስረዳል፤ የአማራ መልሶ ማቋቋም ልማት ድርጅት መ/ቤት በቁጥር አመልድ/ፓ-1-1-16-12 በቀን 30/09/2003 ዓ.ም በተፃፈ ደብዳቤ እንዲሁም የእየሩሳሌም ህፃናትና ማህበረሰብ ልማት ድርጅት የባሕር ዳር ማህበረሰብ ልማት ፕሮግራም ጽ/ቤት በቁጥር ባ/ዳ/ማ/ል/ፕ/ጽ/ቤት 5167/2003 በቀን 07/04/2003 ዓ.ም በተፃፈ ደብዳቤ ተከሳሹ በሁለቱም ጽ/ቤቶች ገንዘብ እየተከፈለው በግሉ የሰራው ስራ አለመኖሩን ገልፀዋል፡፡ በመሆኑም ይህ ማስረጃም ቢሆን ተከሳሹ ከባሕር ዳር ውሃ እና ፍሳሽ አገልግሎት ጽ/ቤት በሰራው የአንድ ዓመት የሂሳብ መዝጋት ስራ ካገኘው ብር 30,000.00 /ሰላሳ ሽህ ብር/ ውጭ ከሌሎች ድርጅቶች ግን ያገኘው ምንም አይነት ገንዘብ እንደሌለ የሚያስረዳ ስለሆነ ተከሳሹ ለተከሰሰበት ምንጩ ያልታወቀ ገንዘብ ማፍራት ወንጀል እንደመከላከያ ሆኖ የሚያገለግል ሆኖ አላገኘነውም፡፡

ስድስተኛው የመከላከያ ማስረጃ ደግሞ ከ1986 ዓ.ም እስከ መጋቢት 1998 ዓ.ም በአማራ ውሃ ስራዎች ኮንስትራክሽን ድርጅት ውስጥ በአካውንታንትነት፣ በፋይናንስ አገልግሎት ኃላፊነትና በሂሳብ አማካሪነት በንፅፅር ከሌሎች መ/ቤቶች በተሻለ ደመወዝ የሰራሁ እንደሆነና የድርጅቱን የበርካታ ዓመታት ሂሳብ በቡድን መሪነት የትርፍ ሰዓት ክፍያ እየተከፈለኝ ስሰራ መቆየቴን እና ከ10 ዓመት ላላነሰ ጊዜ ድርጅቱ በሰጠኝ የመኖሪያ ቤት ስኖር የቤት ኪራይ፣ የውሃ እና የመብራት ክፍያ ሳልከፍል መቆየቴ የተሻለ ገንዘብ መቆጠቤን ያስረዳልኛል በሚል የቀረበው ሲሆን ይህ ማስረጃም ተከሳሹ በተራ ቁጥር 1 በጠቀሰው የሰነድ ማስረጃ ስር የሚካተት በመሆኑ እና እኛም ይህንን የሰነድ ማስረጃ ተቀባይነት የለውም በማለት ውድቅ ያደረግነው በመሆኑ ድጋሚ ትንታኔና ምክንያት የሚሰጠው ሆኖ ያላገኘነው ከመሆኑ በተጨማሪ ተከሳሹ ድርጅቱ በሰጠኝ የመኖሪያ ቤት ስኖር የቤት ኪራይ፣ የውሃ እና የመብራት ክፍያ ሳልከፍል ቆይቻለሁ በሚል ያቀረበውም ቢሆን የአማራ ውኃ ስራዎች ኮንስትራክሽን ድርጅት በቁጥር አው/00-8/717 በቀን 11/04/2003 ዓ.ም በተፃፈ ደብዳቤ ተከሳሹ ከሚያዚያ 26 ቀን 1992 ዓ.ም እስከ መጋቢት 1988 ዓ.ም ድረስ ሲሰራ ለተለያዩ ወጭዎች ተብሎ ብር 60.67 /ስድሳ ብር ከስድሳ ሰባት ሳንቲም/ በፔሮል ይቀነስበት እንደነበር የገለፀው ሲታይ ተከሳሹ ከመሰረታዊ ፍላጎቶች ወጭ በተጨማሪ ሌላ ወጭ የነበረበት መሆኑን የሚያስረዳ በመሆኑ ይህ ማስረጃ የዐ/ህግን ማስረጃ ያጠናከራል ካልተባለ በስተቀር ለተከሳሹ ተከላካሎለታል የሚባል ሆኖ አላገኘነውም፡፡

በ1988 ዓ.ም በማህበር ተደራጅቼ የመኖሪያ ቤቴን ስሰራ ለግንባታው አስፈላጊ የሆኑት ነገሮች ዋጋ አሁን ካለው ዋጋ ጋር ሲነፃፀር በጣም አነስተኛና ዝቅተኛ ስለነበር የቤቱ ግምት ቤቱ በተሰራበት ጊዜ በነበረው ዋጋ ተገምቶ መቅረብ ሲገባው በ2002 ዓ.ም ባለው ዋጋ ተገምቶ መቅረቡ አግባብ ባለመሆኑ በ1988 ዓ.ም የነበረውን የገቢያ ዋጋ መሰረት በማድረግ ገለልተኛ በሆነ ባለሙያ ተገምቶ ይቅረብልኝ የሚል ሲሆን ይህንን ዋጋም ገምቶ እንዲያቀርብ የታዘዘው የባሕር ዳር ከተማ አስተዳደር አገልግሎት ጽ/ቤት ተከሳሹ ቤቱን ለማሰራት ያስፀደቀው ዲዛይን ዝርዝር ግምት 163,774.52 /አንድ መቶ ስድሳ ሶስት ሽህ ሰባት መቶ ሰባ አራት ብር ከሃምሳ ሁለት ሳንቲም/ እንደሆነ የሚያስረዳ በመሆኑ ይህንንም ግምት በጥር ወር 2001 ዓ.ም ባለሙያ ገምቶ ሲሰጠው አምኖበት ተቀብሎ የወሰደው ከመሆኑ ባሻገር ለተከሳሹ የግንባታ ፈቃድ የተሰጠው መጋቢት 14 ቀን 2002 ዓ.ም መሆኑ ሲታይ

ደግሞ ተከሳሹ ቤቱን የገነባው ከዚህ ጊዜ በኋላ መሆኑን ግምት ስለሚያስወስድ ከመጋቢት ወር 2002 ዓ.ም በኋላ ያለው ግምት ቢወሰድ ኑሮ የቤቱን ግምት ከፍ ያደርገው ነበር እንጅ ይህ ብቻ ባልሆነ ነበር፡፡ በመሆኑም በዚህ በኩል የቀረበው ማስረጃም ቢሆን የዐ/ህግን ክስ ያጠናክራል ከሚባል ውጭ ተከሳሹን ተከላክሎለታል የሚያሰኝ ሆኖ አላገኘነውም፡፡

የመጨረሻው የተከሳሹ የሰነድ ማስረጃ ደግሞ ተከሳሹ የፓሊና የፔዳ ቁጥር 1 የቤት ስራ ማህበር አባል ሆኖ እንደማንኛውም አባል በየጊዜው በማዋጣት ባጠራቀመው ገንዘብ የመኖሪያ ቤቱን የመሰረት ግንባታ የሰራ መሆኑን የሚያስረዳ ሲሆን ይህን የሰነድ ማስረጃ ስንመረምረው አንደኛ ይህ ማስረጃ ተከሳሹ በየጊዜው በማዋጣት ያጠራቀመው ገንዘብ ምን ያህል እንደሆነ የሚያስረዳ አይደለም፤ ሁለተኛ ይህ ማስረጃም ቢሆን የሚያስረዳው ተከሳሹ ባጠራቀመው ገንዘብ የመኖሪያ ቤቱን የመሰረት ግንባታ ብቻ የሰራ መሆኑን እንጅ ከመሰረት ግንባታው ውጭ ያለውን የቤት ክፍል የሰራው በምን ገንዘብ እንደሆነ የሚያስረዳ አይደለም፡፡ በመሆኑም ይህ ማስረጃም ተከሳሹን ተከላክሎለታል ማለት የሚቻል ሆኖ አላገኘነውም፡፡

በቴፒ ቡና ተክል ልማት ድርጅት ከ1983-1985 ዓ.ም ድረስ ለሶስት ዓመታት በሂሳብ ሰራተኛነት ተቀጥሬ ስሰራ ከመደበኛ ደመወዜ በተጨማሪ በሂሳብ መዛግብት ስራ የትርፍ ሰዓት ክፍያ ስለማገኝና ድርጅቱ በሰጠኝ የመኖሪያ ቤት ኪራይ ሳልከፍል በነፃ በመኖሬ የተሻለ ገቢ የነበረኝና ገንዘብ ለመቆጠብ ምቹ ሆኔታ የፈጠረልኝ መሆኑን ያስረዱልኛል በማለት ተከሳሹ አቅርቦ ያስመሰከራቸው መከላከያ ምስክሮች ተከሳሹ በተጠቀሰው ጊዜ በሂሳብ መዛግብት ስራ የትርፍ ሰዓት ክፍያ እየተከፈለው ይሰራ እንደነበርና ለመኖሪያ ቤትም ኪራይ ሳይከፍል የኖረ መሆኑን ቢገልፁም ይህ ይከፈለው የነበረው የትርፍ ሰዓት ክፍያ ምን ያህል እንደነበር በትክክል አላስረዱም፡፡ ምን አልባት ይህ ይከፈለው የነበረው ገቢ ለተከሳሹ መሰረታዊ ፍላጎትቶች ወጭ በቂ ሆኖት በየወሩ ይከፈለው የነበረውን ደመወዙን ያስቀምጥ ነበር ተብሎ ግምት ቢወሰድ እንኳ ይህ በሶስት ዓመት የሚጠራቀመው ገንዘብ ከብር 18,000.00 /አስራ ስምንት ሽህ ብር/ የሚበልጥ ባለመሆኑ ተከሳሹ ለተከሰሰበት የወንጀል ድርጊት መከላከያ የሚሆን አይደለም፡፡

በአጠቃላይ ተከሳሹ የተከሰሰበትን እና በዐ/ህግ ማስረጃዎች የተረጋገጠበትን ምንጩ ያልታወቀ ንብረትና ገንዘብ ማፍራት ወንጀል ባቀረበው የሰነድ ማስረጃና አቅርቦ ባሰማቸው የሰው ምስክሮች ማስተባበል ስላልቻለ ተከሳሹ በተከሰሰበት በወንጀል ሕግ አንቀፅ 419(1)(ለ) ስር የተደነገገውን ተላልፎ የተገኘ ወንጀለኛ ነው በማለት በወ/መ/ሥ/ሥ/ህ/ቁ 149(1) መሠረት የጥፋተኛነት ፍርድ ሰጥተናል፡፡

<u>የቅጣት አስተያየት</u>

የዐ/ህግ የቅጣት አስተያየት

- ጥፋተኛ የተባለው ተከሳሽ የወንጀል ድርጊቱን ለመፈፀም የቻለበት ዓላማ ከባድና አደገኛነት ያለው በመሆኑ ምንም እንኳ በቅጣት መመሪያው ላይ ጥፋተኛ የተባለበት የሕግ ድንጋጌ ደረጃ ያልወጣለት ቢሆንም የተፈፀመው ድርጊት ከፍተኛ ጉዳት ያደረሰና አደገኛ በመሆኑ በቅጣት መመሪያው አንቀፅ 19(2) መሠረት ተመጣጣኝ የሆነ ቅጣት እንዲወሰንልን እንጠይቃለን፡፡

- በተጨማሪም ቀደም ሲል በዚሁ ፍ/ቤት የዕግድ ትዕዛዝ የተሰጠባቸው ንብረቶች ማለትም፡-
  1ኛ. በባሕር ዳር ከተማ በቀበሌ 11 ውስጥ በተከሳሹ በራሱ ስም የሚገኘው መኖሪያ ቤት፣
  2ኛ. በባሕር ዳር ከተማ ቀበሌ 13 ውስጥ በተከሳሹ ባለቤት ስም ተመዝግቦ የሚገኘው አንድ መኖሪያ ቤት፣
  3ኛ. በኢትዮጵያ ንግድ ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሹ ስም ተመዝግቦ የሚገኘው ብር፣
  4ኛ. በዳሸን ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሹ ስም ተመዝግቦ የሚገኘው ብር እና
  5ኛ. በዳሸን ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሹ ባለቤት በወ/ሮ ወለላ አየለ ስም ተመዝግቦ የሚገኘው ብር በወንጀል ሕግ አንቀፅ 98(2) እና የሥነ-ምግባር እና ፀረ-ሙስና ኮሚሽን ልዩ የሥነ-ስርዓት ሕግ ቁጥር 434/97 አንቀፅ 29 ላይ በተመለከተው መሠረት ለመንግስት ገቢ እንዲሆን እንዲደረግልን እንጠይቃለን፡፡

የተከሳሹ የቅጣት አስተያየት /በጠበቃው አማካኝነት/

- ተከሳሹ ከአሁን በፊት ሌላ ወንጀል የፈፀመ ስለመሆኑ ሪከርድ አለመቅረቡ እስከ አሁን ድረስ የዘወትር ፀባዩ መልካም የነበረ መሆኑን የሚያስገነዝብ ነው፡፡ በዐ/ሕግ በኩል ጠቅላላ ወይም ልዩ የቅጣት ማክበጃ ምክንያት አልቀረበም፡፡ ይልቁንም ተከሳሹ ከ20 ዓመት ያላነሰ በመንግስት መስሪያ ቤት ተቀጥሮ በመልካም ስነ-ምግባር ሀገራቸውንና ሕብረተሰቡን ሲያገለግሉ መቆየታቸው፣ በዚህ የአገልግሎት ዘመናቸው ምንም አይነት ጥፋት መፈፀማቸው አለመቅረቡ፣ እንዲሁም በመንግስት ስራ ተቀጥረው በሚያገኙት ደመወዝ አካለ መጠን ያልደረሱ ልጆቻቸውንና ሌሎች ቤተሰቦቻቸውን አስተዳዳሪ መሆናቸውን ቅጣትን ሊያቀሉ የሚችሉ መሆናቸውን ፍ/ቤቱ ግንዛቤ ይዞልን እነዚህን የቅጣት ማቅለያ ምክንያቶች የተከበረው ፍ/ቤት ከአዲሱ የቅጣት ወሰን መጀመሪያ ጋር በማገናዘብ ቅጣቱን በሚያቀል ሁኔታ ውሳኔ እንዲሰጥልኝ፡፡
- በሌላ በኩል ተከሳሹ የተከሰሰ እስከ አሁን ድረስ ያገኘው ከነበረው ገቢ ጋር የማይመጣጠን ገቢ ወይም ንብረቶች ማፍራት የሚል ክስ የተመሰረተ እንጅ ምንም ገቢ ሳይኖራቸው ንብረት ወይም ገንዘብ እንዳፈሩ ክሱ ያልቀረበ ስለሆነ ከገቢያቸው ጋር ተመጣጣኝነቱን በሆነ ሁኔታ ያፈሩት ንብረትና ገንዘብ በሙሉ ለመንግስት ገቢ እንዲሆን በሚል የቀረበው አስተያየት ህጉን መሰረት ያላደረገና ከገቢያቸው ጋር ተመጣጣኝ የሆነ ንብረት የማፍራት መብታቸውንም ፍ/ቤቱ ተገንዝቦ ለመንግስት ገቢ እንዲሆን የቀረበውን አቤቱታ ውድቅ እንዲያደርግልን እናመለክታለን፡፡

ቅጣት

ተከሳሹ ጥፋተኛ የተባለ በወንጀል ሕግ አንቀፅ 419(1)(ለ) ስር የተደነገገውን ተላልፎ ከገቢው ጋር የማይመጣጠን ምንጩ ያልታወቀ ንብረትና ገንዘብ አፍርቶ በመገኘቱ ነው፡፡ ይህ ወንጀል ደግሞ በቅጣት አወሳሰን መመሪያው መሰረት ደረጃ እና እርከን ካልወጣላቸው ወንጀሎች አንዱ ነው፡፡ ምንጩ ያልታወቀ ንብረትና ገንዘብ የማፍራት ወንጀል የንብረቱ መወረስ እንደተጠበቀ ሆኖ በቀላል

እስራት ወይም በመቀጮ ወይም ነገሩ ከባድ ሲሆን ከአምስት ዓመት በማይበልጥ ጽኑ እስራትና በመቀጮ የሚያስቀጣ ነው፡፡ እኛም ተከሳሹ ሊቀጣበት ይገባል በማለት የቀላል እስራት ቅጣቱን መርጠነዋል፡፡

የቀላል እስራቱ ቅጣት ለአራት ሲከፈል ደረጃ አንድ ከ10 ቀን እስከ 9 ወር፣ ደረጃ ሁለት ከ9 ወር እስከ 1ዓመት ከ6 ወር፣ ደረጃ ሶስት ከ1 ዓመት ከ6 ወር እስከ 2 ዓመት ከ3ወር እና ደረጃ አራት ከ2 ዓመት ከ3ወር እስከ 3 ዓመት ይሆናል፡፡ ተከሳሹ ህጋዊ ባልሆነ መልኩ ያገኘውን ምንጩ ያልታወቀ ንብረትና ገንዘብ ያፈራው በሰራባቸው የመንግስት መ/ቤቶች ተራ ሰራተኛ እና መካከለኛ በሆነ የኃላፊነት ደረጃ ላይ ተመድቦ በሰራበት ወቅት በመሆኑ እንዲሁም ያገኘው ምንጩ ያልታወቀ ንብረትና ገንዘብም በጣም ከፍተኛ ነው ለማለት የማይቻል ሆኖ ስላገኘነው የተከሳሹ የወንጀል አፈፃፀም በመካከለኛ ደረጃ የሚመደብ ነው፡፡

መካከለኛ ደረጃው የሚያስቀጣ ከ9 ወር እስከ 1 ዓመት ከ6ወር ሲሆን ተከሳሹ የሚቀጣበትን 1 ዓመት መነሻ ቅጣት ይዘን ወደ ነፃነትን የሚያሳጡ የቅጣት እርከኖች ሰንጠረዥ ስንወስደው እርከን 6 ላይ ያርፋል፡፡ በተከሳሹ ላይ የቀረበ የቅጣት ማክበጃ ምክንያት የለም፡፡ በሌላ በኩል ተከሳሹ ከዚህ በፊት የፈፀመው የወንጀል ቅጣት ሪከርድ የሌለበት መሆኑ እና የቤተሰብ አስተዳዳሪ መሆኑ በወንጀል ህግ አንቀጽ 82(1)(ሀ) እና አንቀፅ 86 መሠረት ሁለት ጠቅላላ የቅጣት ማቅለያ ምክንያቶች ናቸው፡፡ በቅጣት አወሳሰን መመሪያው አንቀፅ 16(4) ድንጋጌ መሠረት በቀላል እስራት በሚያስቀጡ ወንጀሎች ቀጥተኛ ለተባለ ወንጀለኛ አንድ የቅጣት ማቅለያ ምክንያት አንድ እርከን ወደታች የሚቀነስለት በመሆኑ በተከሳሹ ላይ የተገኙት ሁለት የቅጣት ማቅለያ ምክንያቶች ሁለት እርከን ወደታች ስለሚቀንሱለት ተከሳሹ የሚቀጣበት እርከን ወደ እርከን 4 ዝቅ ይላል፡፡

እርከን 4 በቅጣት አወሳሰን መመሪያው መሰረት ከ4 ወር እስከ 7 ወር የሚያስቀጣ ሲሆን ተከሳሹ ያርምና ያስተምረዋል፤ ሌሎችንም ሰዎች ያስጠነቅቃቸዋል በማለት ተከሳሹ ከአሁን በፊት በዚህ ጉዳይ ተይዞ የታሰረበት ጊዜ ካለ በሚታሰብ በ6 ወር ቀላል እስራት ሊቀጣ ይገባል በማለት ልዩነት በሌለው ድምፅ ወስነናል፡፡

ተከሳሹ በባሕር ዳር ከተማ ቀበሌ 13 ውስጥ ግምቱ 163,774.52 የሆነ በስሙ የተመዘገበ አንድ ቪላ የመኖሪያ ቤት፣ በባሕር ዳር ከተማ ቀበሌ 11 ውስጥ በባለቤቱ ስም የተመዘገበ ግምቱ ብር 147,704.14 የመኖሪያ ቤት፡ በኢትዮጵያ ንግድ ባንክ ባሕር ዳር ቅርንጫፍ በስሙ የተቀመጠ ብር 101,857.54፣ በዳሽን ባንክ ባሕር ዳር ቅርንጫፍ በስሙ የተቀመጠ ብር 202,108.41 እና በዳሽን ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሽ ባለቤት ስም የተቀመጠ ብር 105,746.74 ሀብትና ንብረት የተገኘበት መሆኑ ተረጋግጧል፡፡

በሌላ በኩል ተከሳሹ በመንግስት መስሪያ ቤት ለሃያ ዓመታት ተቀጥሮ ሲሰራ ብር 337,978.39፣ ተከሳሹ ከባሕር ዳር ውኃ እና ፍሳሽ አገልግሎት ጽ/ቤት በሰራው የአንድ ዓመት የሂሳብ መዝጋት ስራ ብር 30,000.00 /ሰላሳ ሽህ ብር/፣ እንዲሁም ተከሳሹ በቴፒ ቡና ተክል ልማት ፕሮጀክት ውስጥ በሰራባቸው ሶስት ዓመታት በትርፍ ጊዜው በሰራው የሂሳብ መዝጋት ስራ ያገኘ የነበረውን ገቢ

ለመሰረታዊ ፍላጎቶቹ ማሟያ በማድረግ ደመወዙን ቢያስቀምጥ ብር 18,000.00 ሊያገኝ ይችላል ተብሎ በፍ/ቤቱ ግምት የተወሰደበት ገቢ የነበረው መሆኑ በማስረጃዎች ተረጋግጧል፡፡

በዚህ መሠረት ተከሳሹ የመንግስት ሰራተኛ ሆኖ ለሃያ ዓመታት ሲሰራ ያገኝ የነበረው የወር ደመወዝ በተነፃፃሪ ከሌሎች የመንግስት ሰራተኞች የተሻለ እንደነበር ከቀረበው የዐ/ህግ የሰነድ ማስርጃ መገንዘብ የሚቻል በመሆኑ ይህ ደመወዙ መሰረታዊ ፍላጎቶቹን ከማሟላት በተጨማሪ አንድ የመኖሪያ ቤት ለመስራት አያስችለውም የሚል ግምት ስለሌለን በባሕር ዳር ከተማ ቀበሌ 13 ውስጥ ግምቱ 163,774.52 የሆነ በስሙ የተመዘገበ አንድ ቪላ የመኖሪያ ቤት፣ ከባሕር ዳር ውኃ እና ፍሳሽ አገልግሎት ጽ/ቤት በሰራው የአንድ ዓመት የሂሳብ መዝጋት ስራ ያገኘው ብር 30,000.00 /ሰላሳ ሽህ ብር/ እንዲሁም በቴፒ ቡና ተክል ልማት ፕሮጀክት ውስጥ በሰራባቸው ሶስት ዓመታት በትርፍ ጊዜው በሰራው የሂሳብ መዝጋት ስራ ያገኝ የነበረውን ገቢ ለመሰረታዊ ፍላጎቶቹ ማሟያ በማድረግ ደመወዙን ቢያስቀምጥ ብር 18,000.00 ሊያገኝ ይችላል ተብሎ በፍ/ቤቱ የተወሰደውን ግምት ለራሱ በማድረግ ከዚህ ውጭ ያለው ገንዘብና ንብረት ውርስ ሊሆን ይገባል በማለት ልዩነት በሌለው ድምፅ ወስነናል፡፡

ትዕዛዝ

- ይግባኝ መብት ስለሆነ ለጠየቀ ወገን ፍርዱና የቅጣት ውሳኔ ተገልብጦ ይሰጥ፡፡
- ተከሳሹ ላይ የተወሰነውን የእስራት ቅጣት ተከታትሎ እንዲያስፈፅም ለባሕር ዳር ማረሚያ ቤት የማሰሪያ ትዕዛዝ ይፃፍ፡፡
- በባሕር ዳር ከተማ ቀበሌ 11 ውስጥ በተከሳሹ ባለቤት በወ/ሮ ወለላ አየለ ስም የተመዘገበ አንድ የመኖሪያ ቤት፣ በኢትዮጵያ ንግደ ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሹ ስም ከተቀመጠው ብር 101,857.54 ውስጥ ብር 48,000.00 ተቀንሶ በተከሳሹ ሂሳብ ለተከሳሹ እንዲመዘገብ ሆኖ ቀሪው ብር 53,857.54፣ በዳሽን ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሹ ስም የተቀመጠ ብር 202,108.41 እና በዳሽን ባንክ ባሕር ዳር ቅርንጫፍ በተከሳሽ ባለቤት ስም የተቀመጠው ብር 105,746.74 ለመንግስት ገቢ እንዲሆን ለሚመለከታቸው መ/ቤቶች ትዕዛዝ ይፃፍ፡፡
- በተከሳሹ ላይ የነበረው ዋስትና ወርዷል፤ ይፃፍ፡፡
- መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ፡፡

የኮ/መ/ቁ 106020
ነሐሴ 28 ቀን 2004 ዓ.ም

ዳኞች፡- መ/ስ/ጠ/ፋ አህመድ
ዮሐንስ ጌሰያብ
ጥዑም ገብሩ

ከሣሽ፡- የፌ/የሥ/ም/ፀ/ሙ/ኮ/ዐ/ሕግ አቶ በቃሉ ያለው ቀረቡ
ተከሣሽ፡- አቶ ያሬድ ጌታነህ ተ/ኃይማኖት ከማ/ቤት ቀረቡ

የግራ ቀኙ ክርክር እና ማስረጃ ተመርምሮ የሚከተለው ፍርድ ተሰጥቶአል፡፡

ፍርድ

የኮሚሽኑ ዐ/ሕግ በ14/06/04 በተፃፈና በፍ/ቤት ትዕዛዝ ተሻሽሎ በቀረበ ማመልከቻ በተከሣሹ ላይ ሁለት ክሶችን የመሠረተ ሲሆን ይዞታቸውም በአንደኛ ክስ ተከሣሹ በኢ.ፌ.ዴ.ሪ የወንጀል ሕግ በአንቀጽ 419 (1)(ሀ) እና (ለ) ሥር የተደነገገውን በመተላለፍ ተከሣሹ ከሰኔ 18 ቀን 1993 ዓ.ም እስከ ሰኔ 9 ቀን 2002 ዓ.ም በተለያዩ የመንግስት መሥሪያ ቤቶች ማለትም በአዲስ አበባ መንገድ ትራንስፓርት መ/ቤት በሂሣብ ፀሐፊነት ብር 285.00 /ሁለት መቶ ሰማኒያ አምስት ብር/ በን/ስ/ላ/ክ/ከተማ ቀበሌ 17 በደንብ አስከባሪነት ብር 950.00 /ዘጠኝ መቶ ሃምሳ ብር/ በየካ ክ/ከተማ ገቢዎች ጽ/ቤት በነገረ ፈጅነት ብር 1,040.00 /አንድ ሺ አርባ ብር/ እንዲሁም በፌ.ደራል የመጀመሪያ ደረጃ ፍ/ቤት በሕግ ረዳትነት ብር 1,200.00 /አንድ ሺ ሁለት መቶ ብር/ እና በዳኝነት ብር 2,150.00 /ሁለት ሺህ አንድ መቶ ሃምሣ ብር/ ደመወዝ እየተከፈለው ሲሰራ የነበረ ሲሆን ከመንግስት መ/ቤቶች ከሚያገኘው ደመወዝ ውጭ ሌላ የገቢ ምንጭ ሣይኖረው ከሚያገኘው ህጋዊ ገቢ ጋር የማይመጣጠን በኦሮሚያ ክልል ሰበታ ከተማ ቀበሌ 03 በካርታ ቁጥር ሰ/6239/99 የተመዘገበ ጅምር ቤት በ16/2/2002 ዓ.ም በባለቤቱ ብርቁ ገለታ ስም በ105,000.00 ብር /አንድ መቶ አምስት ሺ ብር/ ከገዛ በኋላ ግምቱ ብር 554,377.35 /አምስት መቶ ሃምሣ አራት ሺ ሶስት መቶ ሰባ ሰባት ብር ከሰላሳ አምስት ሣንቲም/ የሆነ ቪላ ቤት የሰራ በመሆኑ የሰሌዳ ቁጥሩ ኮድ 2 አ.አ 96146 የሆነ ላንድ ክሮዘር መኪና በ26/4/2003 ዓ.ም በብር 200,000 ብር /ሁለት መቶ ሺ ብር/ የገዛ በመሆኑ እንዲሁም በ28/10/2002 ዓ.ም የሰሌዳ ቁጥር ኮድ 2 አ.አ 99082 የሆነ የቤት መኪና ከገዛ በኋላ በ29/09/2003 ዓ.ም በብር 370,000.00 /ሶስት መቶ ሰባ ሺህ ብር/ የሸጠው ሲሆን ከሽያጩ ያገኘውን ብር 370,000.00 ምንጩ ካልታወቀ ብር 230,000.00 /ሁለት መቶ ሰላሳ ሺህ ብር/ በድምሩ ብር 600,000.00 /ስድስት መቶ ሺህ ብር/ ልደታ ክ/ከተማ ቀበሌ 01 የቤት ቁጥር 999 በሆነውና ከቀበሌው በተከራየው ቤት ውስጥ የተገኘ በመሆኑ በተጨማሪ ሰበታ ከተማ ቀበሌ 03 ውስጥ በሚገኘው የመኖሪያ ቤቱ ውስጥ ብር 45,000 /አርባ አምስት ሺ ብር/ በድምሩ

645,000 /ስድስት መቶ አርባ አምስት ሺ ብር/ ካስቀመጠበት በብርበራ የተገኘ በመሆኑ በፈፀመው ምንጩ ያልታወቀ ንብረትና ገንዘብ ይዞ መገኘት የሙስና ወንጀል ተከሷል፡፡

2ኛ ክስ ወንጀሉ በ1997 ዓ.ም በሥራ ላይ የዋለውን የኢ.ፌ.ዴ.ሪ የወንጀል ህግ አንቀፅ 684(1) ስር የተደነገገውን በመተላለፍ፡፡ የወንጀሉ ዝርዝር፤-ተከሣሹ በሙስና ወንጀል ተጠርጥሮ በፌዴራል የሥነ ምግባር እና የፀረ ሙስና ኮሚሽን ምርመራ እየተካሄደ ባለበት ወቅት ንብረቱን ከኮሚሽኑ እይታ ውጭ ለማድረግ በማሰብ ምንጩ ባልታወቀ ገንዘብ በ28/10/2002 ዓ.ም የገዛውን የሰሌዳ ቁጥር 2 አ.አ - 99ዐ82 የሆነ የቤት መኪና ህገ ወጥ አመጣጡን በመሰወርና ህጋዊ በማስመሰል በ29/9/2003 ዓ.ም በብር 370,000 (ሶስት መቶ ሰባ ሺ ብር) ሙላቷ በየነ ለተባሉ ግለሰብ በሽያጭ ያስተላለፈ በመሆኑ በፈፀመው በወንጀል ድርጊት የተገኘን ንብረት ህጋዊ አስመስሎ ማቅረብ የሙስና ወንጀል ተከሷል የሚል ነው፡፡

ተከሣሹ በ26/11/03 በነበረው ችሎት ቀርቦ የክስ ማመልከቻው ደርሶት ከተነበበለት በኋላ ጉዳዩ በመደበኛ የክርክር ሥነ ሥርዓት እንዲመራ በእለቱ በተሰጠው ትዕዛዝ መሠረት ሲጠየቅ የሚያቀርበው መታወቂያ አለመኖሩን በመግለፅ በአንደኛ ክስ የተመለከቱትና በይዞታዬ ሥር የተገኙት ተሽከርካሪ፣ ቢላ ቤት እና ብር 645,000 /ስድስት መቶ አርባ አምስት ሺህ/ ጥሬ ገንዘብ የግል ንብረቶቼ እና በሕጋዊ መንገድ ያገኘኋቸው ስለመሆኑ አስረዳለሁ፤ በሁለተኛ ክስ የተመለከተውን ተሽከርካሪ መሸጤ ትክክል ነው፡፡ የሸጥኩት ግን በክሱ እንደተባለው ኮሚሽኑ ምርመራ መጀመሩን አውቄ ከምርመራው እይታ ለመሰወር በማሰብ አይደለም በማለት ቃሉን ያስመዘገበ ሲሆን ዐ/ሕግም ጉዳዩን በአዳር ካስቀጠረ በኋላ ተከሳሹ በአንደኛ ክስ የተመለከተውን ፍሬ ነገር ያመነ በመሆኑ በክስ ማመልከቻው የምስክሮች ዝርዝር በተ.ቁ 1፣4፣5፣ እና 6 የተጠቀሱትን ምስክሮች መስማት አያስፈልገንም፤ በተ.ቁ 2 እና 3 የተጠቀሱትን ምስክሮች በሁለተኛ ክስ እናሰማለን በማለት አስመዘገበ፡፡ ፍ/ቤቱም ይህንኑ ካገናዘበ በኋላ ተከሣሹ በጠየቀው መሠረት በአንደኛ ክስ መከላከያውን እንዲያሰማ፤የሚያሰማው ግን ዐ/ሕግ በሁለተኛ ክስ ምስክሮቹን ካሰማ በኋላ እንደሆነ ዐ/ሕግ በሁለተኛ ክስ ምስክሮቹን እንዲያሰማ በ27/11/2003 ዓ.ም በሰጠው ትዕዛዝ መሠረት ሁለቱን ምስክሮች በ30/02/2004 ዓ.ም አቅርቦ አሰምቶአል፡፡

በዚህም መሠረት ወ/ሮ ሙላቷ በየነ የተባሉ 1ኛ ምስክር ከተከሣሹ ጋር የተገናኙት ለነበረባቸው የፍ/ቤት ክርክር የሕግ ባለሙያ ሲያፈላልጉ እንደሆነ፣ የተገናኙትም በ27/04/2003 ዓ.ም እንደሆነ፣ በ26/09/03 ከተከሣሹ ጋር በቢሮው ቀጠሮ እንደነበራቸው፣ ከቀጠሮው ሰዓት ዘግይተው እንደደረሱ፣ የዘገዩት በትራንስፓርት ችግር እንደሆነ እና መኪና እንደሌላቸው እንደነገሩት፣ በዚህ መነሻ ተከሣሹ የሚሸጥ መኪና እንዳለው እንደነገራቸውና በሞባይሉ ላይ ያለውን የመኪናውን ምስል እንዳሳያቸው፣ የሰሌዳ ቁጥሩ 2-99082 እንደሆነ ተነጋግረውና ተስማምተው በ27/09/03 በብር 370,000.00 /ሶስትመቶ ሰባ ሺህ/ እንደገዙት፤ እለቱ ቅዳሜ ስለነበረ ውሉን ሰኞ በ29/09/03 በውልና ማስረጃ ተፈራርመው ባለንብረቱን በ30/09/03 እንዳዛወሩ በውልና ማስረጃ በተፈራረሙት ውል ላይ የግዥ ዋጋው በተከሣሹ አነሳሽነት ብር 150,000 /አንድ መቶ ሃምሳ ሽህ/ ተደርጐ

እንደተፃፈ፣ የብር 370,000.00 ውል እና ቀጥሎም በውልና ማስረጃ ከተፈራረሙ ከሶስት ቀናት አካባቢ በኋላ የብር 225,000 /ሁለት መቶ ሃያ አምስት ሺህ/ ውል እንደተዋዋሉ፣ የብር 225,000 ውል ለመዋዋል የቻሉት የሰው ብድር ስላለብኝ መኪናውን በዚህ ዋጋ እንደሸጥኩ ለማሣየት ፈልጌ ነው በማለት ተከሣሹ ደውሎ በጠየቃቸው መሠረት እንደሆነ፣ የግዥውን ዋጋ የተለያየ አድርገው የፈረሙት ተከሳሹ የሕግ ባለሙያ በመሆኑ ምክንያት እምነት አሳድሮባቸው ስለነበረ እንደሆነ፡ የስም ዝውውሩ ተፋጥኖ እንዲከናወን የጠየቁት እርሳቸው እንደሆኑ፣ ብር 370,000 እና 225,00 የተጠቀሰባቸው ውሎች የተፃፈበትን ቀን በወቅቱ እንዳላስተዋሉ፣ የብር 370,000 ውል የተፃፈው በህዳር ወር 2003 ዓ.ም ተብሎ መሆኑን ያወቁት ፀረ ሙስና ኮሚሽን ተጠርተው ውሉን በተመለከቱበት ጊዜ እንደሆነ፣ ያለብኝን የሰው ዕዳ ለመክፈል ነው ከማለት በስተቀር መኪናውን የሚሸጥበት ሌላ ምክንያት የነበረው ስለመሆኑ ተከሣሹ የነገራቸው ነገር እንደሌለ፣ በውልና ማስረጃ በተደረገው ውል ላይ አቶ አብርሃም በርመጂ እና የተከሣሹ ባለቤት በምስክርነት እንደፈረሙ እቶ አብርሃም የመጡት በእርሣቸው በኩል እንደሆነ በመግለጽ የመሰከሩ ሲሆን አቶ አብርሃም ቢርመጂ የተባሉት 2ኛ ምስክር ከ1ኛ ምስክር ጋር ቤተሰብ እንደሆነ ስለመኪና እውቀት እንዳላቸው፣1ኛ ምስክር መኪና ለመግዛት አስበው እንዲያዩላቸው በጠየቋቸው መሠረት በ27/09/03 ብሔራዊ ትያትር አካባቢ ሄደው ተከሣሹን እንዳገኙት እና ተሽከርካሪውን ተመልክተው ይዞታው ጥሩ እንደሆነ ለ1ኛ ምስክር እንደገለፁ ምስክሩዋም ተስማምተው ገንዘብ ከባንክ አውጥተው ወደ ተከሣሹ ቢሮ አብረው በመምጣት ክፍያ ፈጽመው ሊብሬውን ተረክበው እንደሄዱ በ29/09/03 በውልና ማስረጃ ውሉን በብር 150,000 እንደተዋዋሉ፣ በ30/09/03 ስም እንዳዛወሩ እና በብር 370,000 ውል ላይ እንዳልፈረሙ በመግለጽ መስክረዋል፡፡

የጽሑፍ ማስረጃን በተመለከተ በክስ ማመልከቻው የጽሁፍ ማስረጃ ዝርዝር ከተ.ቁ 1 እስከ 8 የተዘረዘሩት ሰነዶች ቀርበው ለተከሣሹም እንዲደርሱ የተደረገ ሲሆን ፍ/ቤቱም የዐ/ሕግ ክስ እና ማስረጃ እንዲሁም ተከሣሹ ስለቀረበበት አንደኛ ክስ ያስመዘገበውን ቃል ከመረመረ በኋላ በሁለቱም ክሶች መከላከያውን ማሰማት እንዲጀምር በ28/06/04 በነበረው ችሎት በሰጠው ትዕዛዝ መሠረት ተከሣሹ በ03/08/04 በነበረው ችሎት አራት ምስክሮችን አቅርቦ አሰምቷል፡፡

በዚህ መሠረት አቶ ገብሬ ዳዲ የተባሉ 1ኛ የመ/ምስክር የተከሣሹ እናት እና የባለቤታቸው እናት እህትማማቾች በመሆናቸው ከተከሣሹ ጋር የጋብቻ ዝምድና እንዳላቸው የሚኖሩት በኦሮሚያ ክልል በምስራቅ ሸዋ ዞን በአደአ ወረዳ ኡዴ ቀበሌ ውስጥ እንደሆነ፣ ቀበሌው በቢሸፍቱ ከተማ በ12 /አስራ ሁለት/ ኪ.ሜ ርቀት ላይ እንደሚገኝ የሚተዳደሩት በግብርና ሥራ እንደሆነ ተከሣሹ በሰበታ ከተማ አካባቢ የገዛውን ጅምር ቤት ለማስጨረስ ገንዘብ እንዳጠረው ገልጾ ከቤታቸው ድረስ በመምጣት ብር 250,000 /ሁለት መቶ ሃምሳ ሺህ/ እንዲያበድሩት እንደጠየቃቸው ተከሣሹ የጠየቀውን ገንዘብ በመስከረም ወር 2002 በተፃፈ ውል እንዳበደሩት፣ በውሉ ላይ ባለቤታቸው እና ምስክሮች እንደፈረሙ፣ ምስክሩ ወደ አስር ሄክታር አካባቢ የእርሻ ማሳ እንዳላቸው፣ ሁለቱ ሄክታር የራሣቸው ይዞታ ሆኖ ቀሪውን የሚያርሱት ተከራይተው እንደሆነ፣ ከእርሻ ሥራ በተጨማሪ ዶሮ እና ከብት እንደሚያረቡ ወደ 100 /መቶ/ አካባቢ ዶሮዎች እንዳሏቸው፣ የወተት ከብቶች ወደ ስድስት

እንደነበሩዋቸውና አሁን ያሉት ግን ሁለቱ ብቻ እንደሆኑ በዓመት እስከ ብር 150,000 /አንድ መቶ ሃምሳ ሺህ/ ገቢ እንደሚያገኙ ገንዘቡን የሚያስቀምጡት በቤታቸው እንደሆነ በባንክ የማያስቀምጡት ገንዘቡ ተመልሶ ሥራ ላይ ስለሚውል እንደሆነ እና ለተከሣሹ ያበደሩት ብር 250,000 ተቀምጦ የነበረው በቤታቸው እንደሆነ በመግለጽ መስክረዋል፡፡

ወ/ሮ ሙሉነሽ አሰፋ የተባሉ 2ኛ ምስክር የተከሣሹ እናት እንደሆኑ የሰሌዳ ቁጥሩን የማያስታውሱት ሚኒባስ የሥራ መኪና እንደነበራቸው፣ የገዙት አቶ ሣሙኤል ኃ/መስቀል የሚባሉ የልጃቸው ባለቤት በሰጣቸው ብር 265,000 /ሁለት መቶ ስድሳ አምስት ሺህ/ በየካቲት ወር 2002 እንደሆነ ሥራው አዋጭ ሆኖ ስላልተገኘ መኪናውን በ2003 በብር 285,000 /ሁለት መቶ ሰማኒያ አምስት ሺህ/ አቶ አለማየሁ ለሚባል ሰው በወኪላቸው በወ/ሮ ብርቄ ገለታ አማካኝነት እንደሸጡ ከሸያጩ ገንዘብ ውስጥ ብር 160,000 /አንድ መቶ ስድስት ሺህ/ የእርሻ ሥራ ጀምሮ ለነበረው አደም ጌታነህ ለተባለው ልጃቸው እንደሰጡ፣ ብር 120,000 /አንድ መቶ ሃያ ሺህ/ ደግሞ ለተከሣሹ እንደሰጡ የሰጡት በጥቅምት ወር 2003 እንደሆነ ሊሰጡት የቻሉትም ተከሣሹ እግሩን ስለሚያመውና የነበረውን አነስተኛ ተሽከርካሪ ሸጦ በኮረኮንች መንገድ ጭምር ሊያገለግል የሚችል የተሻለ ተሽከርካሪ የመግዛት ሃሣብ እንዳለው ስለነገራቸው እንደሆነ በዚሁ መሠረት ተከሣሹ ገዛሁ ያለውን መኪና አሳይቷቸው እንደነበረ ገንዘቡን የሰጡት በብድር ደንብ ተነጋግረው ሣይሆን ሰርቶ ይመልስልኛል የሚል እምነት ኖሮአቸው እንደሆነ ሣሙኤል ኃ/መስቀል እና የልጃቸው ልጅ የሆነችው ባለቤቱ ራሄል ጌታነህ አንድ ልጅ እንዳላቸው ራሄል አዲስ አበባ ውስጥ ተከራይታ እንደምትኖር ሣሙኤል የሚኖረው አሜሪካን ሀገር እንደሆነ እና ገንዘቡን በታህሳስ ወር 2002 አዲስ አበባ ውስጥ በእጅ እንደሰጣቸው በመግለጽ መስክረዋል፡፡

አቶ ንጉሴ ሀሰን የተባሉ 3ኛ ምስክር የሚተዳደሩበት በግንበኝነት ሙያ እንደሆነ፣ ተከሣሽ ሰበታ አካባቢ ወለቴ በሚባል ቦታ የሚገኝ መሠረቱ የተጀመረ ቤት እንዲሰሩላቸው በመስከረም ወር 2002 ዓ.ም እንደጠየቃቸውና ፕላኑን እንዳሳያቸው ዋጋ አውጥተው እንደነገሩት የግንበኝነት እና የአናፂነት ሥራን ጨምሮ ለቤቱ ሥራ በብር 25,000 /ሃያ አምስት ሺህ/ ለአጥሩ ደግሞ በብር 10,000 /አስር ሺህ/ የእጅ ዋጋ እንደተስማሙና እንደሰሩ ቤቱ 72 /ሰባ ሁለት/ ቆርቆሮ፣ 2700 /ሁለት ሽህ ሰባት መቶ/ ብሎኬት፣ አራት መኪና አሸዋ 130 /መቶ ሰላሳ/ ኩንታል አካባቢ ሲሚንቶ አጥሩ ደግሞ አምስት መኪና ድንጋይ እና 150 ብሎኬት እንደጨረሰ ግብአቶቹ የተገዙበትን ዋጋም ሆነ የቤቱን አጠቃላይ የዋጋ ግምት እንደማያውቁ በመግለጽ መስክረዋል፡፡

አቶ ታደሰ ሰንበቶ የተባሉ 4ኛ እና የመጨረሻ ምስክር ለተከሣሹ እናት አጐት እንደሆኑ የሚተዳደሩት በሞጆ ወረዳ ሞሞሽኬ በሚባል ቀበሌ በግብርና ሥራ እንደሆነ ተከሣሹ ቤት ሰርቼ እግሬን ስለሚያመኝ የመኪና መግዣ አጣሁ ገንዘብ አበድረኝ በማለት በግንቦት ወር 2002 እንደጠየቃቸው እና እርሳቸውም ሰኔ ወር 2002 ብር 250,000 /ሁለት መቶ ሃምሳ ሺህ/ በብድር እንደሰጡት የጽሁፍ ውል እንዳደረጉ የራሳቸው የሆነ ሶስት ሄክታር እና በኪራይ ደግሞ እስከ አምስት ሄክታር መሬት እንደሚያርሱ ከእርሻ ሥራ በተጨማሪ እስከ 15 /አስራ አምስት/ እና 20 /ሃያ/ ከብት

እንደሚያደልቡ፣ ያበደሩት በዓመት ሊመልስላቸው እንደሆነ ውሉን የፃፈው ልጃቸው እንደሆነ መኖሪያቸው ከሞጆ ከተማ በእግር የሁለት ሰዓት መንገድ እንደሆነ የባንክ አገልግሎት እንደማይጠቀሙ የማይጠቀሙትም የሚያገኙት ገንዘብ በአጭር ጊዜ ውስጥ ተመልሶ ለቀጣይ ሥራ ስለሚውል እንደሆነ እና ለተከሣሹ ያበደሩት ገንዘብ ተቀምጦ የነበረው በቤታቸው እንደሆነ በመግለጽ መስክረው የሰው መከላከያ በዚሁ የተጠናቀቀ ሲሆን ተከሣሹ በ17/07/04 ከተፃፈ መግለጫ ጋር የተለያዩ የጽሁፍ ማስረጃዎችን አቅርቦ ዐ/ሕግ በ16/08/04 የተፃፈ የማስተባበያ አስተያየት ሰጥቶባቸዋል፡፡

በመጨረሻም ተከሣሹ በ24/08/04 የተፃፈ የክርክር ማቆሚያ ንግግር አቅርቦ አጠቃላይ ክርክሩ በዚሁ የተጠናቀቀ ሲሆን የዐ/ሕግን ክስ እና ማስረጃ ተከሣሹ በመከላከያው ያስተባበለ መሆን አለመሆኑን ፍ/ቤቱ እንደሚከተለው መርምሮአል፡፡

በዚህም መሠረት በወ/ሕ/አ/ 419(1) (ሀ) እና (ለ) ሥር የተደነገገውን በመተላለፍ ምንጩ ያልታወቀ ሀብት ይዞ ተገኝቶአል በማለት በተከሣሹ ላይ ያቀረበውን አንደኛ ክስ ለማስረዳት ዐ/ሕግ ካቀረበው የጽሁፍ ማስረጃ መካከል በመንግስት ሥራ ያገኘ የነበረውን ገቢ በተመለከተ የተከሣሹ የወር ደመወዝ፡-

1. በአዲስ አበባ መንገድ ትራንስፓርት መ/ቤት ከ18/10/93 እስከ 30/04/94 ድረስ በሂሳብ ፀሐፊነት በሰራበት ጊዜ ብር 285 የነበረው መሆኑን፣
2. በን/ስ/ላ/ክ/ከተማ በቀበሌ 17 ከ01/05/94 እስከ 30/02/96 ድረስ በደንብ አስከባሪነት በሰራበት ጊዜ በክስ ማመልከቻው ላይ ደመወዙ ብር 950 ተብሎ የተገለፀ ቢሆንም በቀረበ የጽሁፍ ማስረጃ መሠረት ግን ብር 450 የነበረ መሆኑን፣
3. በየካ ክ/ከተማ ገቢዎች ጽ/ቤት ከ01/03/96 እስከ 30/01/98 ድረስ በነገረ ፈጅነት በሰራበት ጊዜ ብር 1040 የነበረ መሆኑን፣
4. በፌ/የመ/ደ/ፍ/ቤት ከ01/11/98 እስከ 25/10/99 ድረስ በሕግ ረዳትነት በሰራበት ጊዜ ብር 1200 የነበረ መሆኑን እና፣
5. በፌ/የመ/ደ/ፍ/ቤት በ26/10/99 እስከ 09/10/02 ድረስ በዳኝነት በሰራበት ጊዜ ብር 2,150 የነበረ መሆኑን የሚገልፁ ማስረጃዎች የሚገኙበት ሲሆን በተከሣሹ ይዞታ የተገኘ ምንጩ ያልታወቀ ነው ተብሎ በክሱ ማመልከቻ ላይ የተገለፀው ደግሞ በጥሬ ገንዘብ ብር 645,000 በንብረት ደግሞ ብር 754,377.35 በድምሩ ብር 1,399,377.35 /አንድ ሚሊዮን ሶስት መቶ ዘጠና ዘጠኝ ሺህ ሶስት መቶ ሰባ ሰባት ከ35/100/ ዋጋ ያለው ሐብት ነው፡፡

ተከሣሹ በይዞታው ተገኝቶአል የተባለው ገንዘብና ንብረት የራሱ መሆኑን አምኖ ነገር ግን ገንዘብና ንብረቱ ዐ/ሕግ እንደገለፀው ምንጩ ያልታወቀ ሣይሆን የታወቀ እና ሕጋዊ መሆኑን በመከላከያው እንደሚያስረዳ ገልጾ የሰው እና የጽሁፍ ማስረጃ ካልቀረበባቸው የመከላከያ ነጥቦች መካከል፡-

1. አቶ ገብሬ ዳዲ ከተባሉ ግለሰብ ብር 250,000 እና አቶ ታደሰ ሰንበቱ ከተባሉ ግለሰብ ብር 250,000 በብድር ወስጃለሁ በማለት ተከሣሽ ያቀረበውን የክርክር ነጥብ በተመለከተ የመ/ምስክሮቹ በግብርና ሥራ የሚተዳደሩ ሆነው የሚኖሩት የባንክ አገልግሎት ከሚገኝበት ቦታ በቅርብ ርቀት መሆኑን የገለፁ በመሆኑ ለአንድ ዓመት በብድር ሊሰጥ የሚችል ብር 250,000 ተቀማጭ ገንዘብ ያለው ሰው ደግሞ ገንዘቡን በባንክ ማስቀመጡ የተለያዩ ጠቀሜታ እንደሚሰጠው የሚታወቅ ሆኖ እያለ ምስክሮቹ ገንዘቡን በየቤታቸው ያስቀምጡ እንደነበር መግለፃቸው እና በሌላ በኩል ደግሞ በብድር የሚሰጥ ይህን ያህል ገንዘብ ካላቸው የባንክ አገልግሎት ለምን እንዳልተጠቀሙ ተጠይቀው ገንዘቡ በእጃቸው ብዙ ስለማይቆይና መልሰው በሥራ ላይ ስለሚያውሉት እንደሆነ መግለፃቸው ሲታይ የምስክርነት ቃላቸውን እምነት እንዳይጣልበት የሚያደርገው በመሆኑ በዚህ ነጥብ የቀረበው መከላከያ ተቀባይነት ሊኖረው የሚገባ ሆኖ አልተገኘም፡፡
2. በመንግስት ሥራ ከተቀጠርኩበት ከሰኔ ወር 1990 ዓ.ም ጀምሮ እስከ ለቀቅሁበት ሰኔ ወር 2002 ዓ.ም ድረስ ባሉት 12 ዓመታት በየወሩ ሲከፈለኝ የነበረውን ደመወዝ እና አበል በሙሉ ሳጠራቀም ነበረ በማለት ተከሣሹ ያቀረበውን የክርክር ነጥብ በተመለከተ በመከላከያ መግለጫው ላይ ከገለፀው ገቢ መካከል ከውትድርና አገልግሎት ሲሰናበት ከታህሳስ 1993 ጀምሮ የብር 167.70 የጡረታ አበል ተወስኖለት የነበረ ስለመሆኑ በጡረታ መለያ ቁጥር ወ/630572 የተሰጠውን የመታወቂያ ወረቀት ከማቅረብ በስተቀር የብር 19,184.00 /አስራ ዘጠኝ ሺህ አንድ መቶ ሰማኒያ አራት/ የጡረታ አበል በርግጥም የተቀበለ ስለመሆኑ ያቀረበው ማስረጃ አለመኖሩ እንደተጠበቀ ሆኖ ማንኛውም የመንግስት ሠራተኛ በየወሩ ከሚያገኘው ደመወዝ እና ሕጋዊ ገቢ ላይ ለክፋ ቀን በሚል አቅሙ በፈቀደው መጠን የተወሰነ ገንዘብ ሊቆጥብ እንደሚችል በተለመደው ማህበራዊ ኑሮ የሚታወቅ ቢሆንም ተከሣሹ በየወሩ ያገኝ የነበረውን ደመወዝና አበል እንዳለ ያስቀምጥ እንደነበር ከመግለጽ በስተቀር በማህበራዊ ኑሮ በተለመደው አግባብ መሠረት በየወሩ ወይም በየተወሰነው ጊዜ ይቆጥብ ስለነበረው የገንዘብ መጠን ያቀረበው ክርክር የለም በመሠረቱ ተከሣሹ የተማረ እና በአዲስ አበባ ከተማ የሚኖር የመንግስት ሠራተኛ እንደመሆኑ መጠን ከወርሐዊ ደመወዝ እና ሕጋዊ ገቢው የሚቆጥበውን ገንዘብ ያስቀምጣል ተብሎ የሚገመተው እንደማንኛውም ሌላ የመንግስት ሠራተኛ በባንክ በቁጠባ ማህበር ወይም በመሰል ተቋማት ሲሆን ተከሣሹ ገንዘቡን ያስቀምጥ የነበረው የት እንደሆነ በመኖሪያ ቤቱ ከሆነም የዚህ ዓይነቱን አማራጭ ለምን መከተል እንደመረጠ ያቀረበው ክርክር የለም የተከሣሹ ወላጅ እናት የተከሣሹን እና የቤተሰቡን የኑሮ ወጪ ለመሸፈን የሚያስችል የተለየ እና የተትረፈረፈ ገቢ ወይም ሐብት እንዳላቸው ባልተገለፀበትና ማስረጃ ባልቀረበበት ሁኔታ ተከሣሹ የምኖረው ከእናቴ ጋር በአንድ ግቢ ስለነበር በቀለብ ረገድ ወጪ አልነበረብኝም ለማለት ያቀረው ክርክር ምክንያታዊ ካለመሆኑም በላይ ከቀለብ ውጭ ያሉትን ለእርሱና ለቤተሰብ የሚያስፈልጉ የተለመዱ እና የማይቀሩ ሌሎች ወጪዎችን በተመለከተ ያቀረበው ክርክር የለም ተከሣሹ በማህበራዊ ኑሮ ልማድ መሠረት ከደመወዙ በየወሩ የተወሰነ መጠን በመኖሪያ ቤቱም

ቢሆን ይቆጥብ የነበረ ስለመሆኑ ያቀረበው ክርክር በሌለበት ሁኔታ ፍ/ቤቱ የማህበራዊ ኑሮ ልማድን ብቻ መሠረት በማድረግ ተከሣሽ በየወሩ ገንዘብ ይቆጥብ እንደነበር ግምት መውሰድ የሚችልበት አግባብ አልተገኘም በመንግስት ሥራ ከተቀጠርኩበት ጊዜ ጀምሮ እስከለቀቅሁበት ጊዜ ድረስ ይከፈለኝ የነበረውን ደመወዝ አበል በሙሉ አስቀምጥ ነበር በማለት ተከሣሹ በደፈናው ያቀረበው ክርክር ደግሞ ሊታመን የሚቻል አይደለም በመሆኑም የመከላከያ ነጥቡን ፍ/ቤቱ አልተቀበለውም፤

3. ከጥብቅና አገልግሎት በ2ዐዐ3 ዓ.ም. በብር 266,ዐዐዐ/ሁለት መቶ ስድሳ ስድስት ሺህ/ ገቢ አግኝቻለሁ በማለት ተከሣሹ ያቀረበውን የክርክር ነጥብና ማስረጃ በተመለከተ ይህን ያክል ገቢ ማግኘቱ ለገቢዎች ጽ/ቤት የገለፀውና የገቢ ግብር የከፈለበት ክሱ ከተመሰረተበት በኋላ በመሆኑ ምክንያት ገቢው በትክክል ከጥብቅና አገልግሎት የተገኙ መሆኑን ማረጋገጥ የሚቻልበት ሁኔታ ካለመኖሩም በላይ ተከሳሹ የጥብቅና ውሎቹን ያላቀረበ የጥብቅና አገልግሎቱ የተሰጠባቸውን ፍ/ቤቶች እና መዛግብት ያልጠቀሰ እና ገቢው የተገኘው ከሕግ ምክር አገልግሎት ብቻ ነው የሚባል ከሆነም ምክሩን ከሰጣቸው ባለጉዳዮች መካከል የተወሰኑትንም ቢሆን አቅርቦ ለማሰማት ያልደፈረ በመሆኑ መከላከያውን ፍ/ቤቱ እምነት ሊጣልበት የሚችል ሆኖ አላገኘውም፡፡

4. ለክሱ ምክንያት ከሆኑት መካከል የሰ.ቁ. 2-99ዐ82 የሆነውን ተሽከርካሪ የገዛሁት በብር 265,ዐዐዐ የሸጥኩት ደግሞ በብር 37ዐ,ዐዐዐ መሆኑን ዐ/ሕግ ያቀረበው ማስረጃ ራሱ የሚያመለክት በመሆኑ በሁለቱ ዋጋዎች መካከል ያለው ልዩነት ብር 1ዐ5,ዐዐዐ ሕጋዊ ገቢ ወይም ትርፍ ተደርጐ ሊወሰድልኝ ይገባል በማለት ተከሣሽ ያቀረበውን ክርክር በተመለከተ በሙስና ወንጀል ከተገኘ ንብረት የተፈራ ሐብት በሙስና ወንጀል የተገኘው ንብረት አካል ተደርጐ እንደሚወሰድ ከፀረ ሙስና ልዩ ሥነ ሥርዓት አዋጅ ከአንቀጽ 34/1/ ድንጋጌ መገንዘብ የሚቻል በመሆኑ የክርክር ነጥቡ ተከሣሹ ተሽከርካሪውን ያገኘው በሙስና ወንጀል ነው ወይስ አይደለም? ለሚለው መሠረታዊ ጭብጥ በሚሰጠው ውሣኔ እልባት የሚያገኝ ይሆናል፡፡

5. ከተያዘው ብር 6ዐዐ,ዐዐዐ ውስጥ ብር 23ዐ,ዐዐዐ /ሁለት መቶ ሰላሳ ሺህ/ የወንድሜ የአቶ አደም ጌታነህ ነው በማለት ተከሣሹ ያቀረበውን የክርክር ነጥብ በተመለከተ ተከሣሽ በ26/11/03 በነበረው ችሎት ቀርቦ ሲጠየቅ ብር 645,ዐዐዐ ውን ጨምሮ በክሱ የተጠቀሰው ገንዘብና ንብረት በሙሉ የግል ንብረቱ መሆኑን በማረጋገጥ ገንዘብና ንብረቱን ያገኘው ከሕጋዊ ምንጭ መሆኑን እንደሚያስረዳ ገልጾ እያለ በመከላከያ ደረጃ ወደ ኋላ ተመልሶ ብር 23ዐ,ዐዐዐ የወንድሜ ገንዘብ ነው በማለት ተከሣሹ ያቀረበውን ክርክር ፍ/ቤቱ ተቀባይነት ሊኖረው የሚገባ ሆኖ አላገኘውም፣

6. ብር 12ዐ,ዐዐዐ /አንድ መቶ ሃያ ሺህ/ ከእናቴ ከወ/ሮ ሙሉነሽ አሰፋ የወሰድኩት ነው በማለት ተከሣሹ ያቀረበውን ክርክር በተመለከተ የተከሣሹ 2ኛ የመ/ምስክር ሆነው የተሰሙት ወ/ሮ ሙሉነሽ አሰፋ የተከሣሽ እናት መሆናቸውን ገልፀሙ የራሣቸው የሆነ

ተሸከርካሪ በሸጡበት ጊዜ ተከሣሹ የነበረውን ተሸከርካሪ ሽሞ የተሻለ በኮረኮንች መንገድ መሄድ የሚችል ተሸከርካሪ ለመግዛት እንደሚፈልግ ገልጾ በጠየቃቸው መሠረት ብር 120,000 የሰጡት መሆኑን መስክረዋል በስማቸው ተመዝግቦ የነበረውን ተሸከርካሪ በብር 285,000 /ሁለት መቶ ሰማኒያ መስት ሺህ/ የሸጡ ስለመሆኑም በ04/02/03 የተፃፈ የሽያጭ ውል ተከሣሹ በመከላከያ ማስረጃነት ያቀረበ ሲሆን ዐ/ሕግ በተከሣሹ የጽሁፍ ማስረጃ ላይ በ16/08/04 በተፃፈ ማመልከቻ አስተያየት በሰጠበት ወቅት የሽያጭ ውሉን አስመልክቶ የቀረበው የማስተባበያ ሃሳብ የለም በመሆኑም ይህ ብር 120,000 /አንድ መቶ ሃያ ሺህ/ ለተከሣሹ እንደ ሕጋዊ ገቢ ሊያዝለት የሚገባ መሆኑን ፍ/ቤቱ ተገንዝቦአል፡፡

7. ባለቤቴ ወ/ሮ ብርቄ ገለታ ከደመወዝ እና ከስንብት ክፍያ ያገኘችው በድምሩ ብር 36,850.70 /ሰላሳ ስድስት ሺህ ስምንት መቶ ሃምሳ ከ70/100/ ሕጋዊ ገቢያችን ነው በማለት ተከሣሹ ያቀረበውን ክርክር በተመለከተ ተጠቃሿ በወርልድ ቪዥን ኢትዮጵያ ተቀጥራ የነበረ መሆኑን እና የሥራ ውሏ ሲቋረጥም የሰንብት ክፍያ የተፈፀመላት መሆኑን የሚገልጽ ደብዳቤ ተከሣሹ በማስረጃነት አቅርቦአል በማስረጃው ላይ ዐ/ሕግ ያቀረበው ማስተባበያ ካለመኖሩም በላይ ገቢው የተገኘው ከሕጋዊ ምንጭ እንደሆነ የተረጋገጠ በመሆኑ እና የጋራ እንደሆነ ግምት የሚወስድበት በመሆኑ በሕጋዊ ገቢነት ሊወሰድ የሚገባው ሆኖ ተገኝቶአል፡፡

ሲጠቃለል በአንደኛ ክስ ተከሣሹ ይዞ ተገኝቶአል ከተባለው የብር 1,399,377.35 ምንጩ ያልታወቀ ንብረት እና ገንዘብ መካከል ከላይ በተ.ቁ 6 እና 7 የተጠቀሰው በድምሩ ብር 156,850.70; አንድ መቶ ሃምሳ ስድስት ሺህ ስምንት መቶ ከ70/100) ያገኘው ከታወቀ ሕጋዊ ምንጭ መሆኑን በመከላከያው ከማስረዳቱ እና ይህ የገንዘብ መጠን በይዞታው ከተገኘው ብር 645,000 ላይ ተቀናሽ መደረግ የሚገባው ከመሆኑ በስተቀር ቀሪውን ገንዘብና ንብረት ያገኘው ከታወቀ ሕጋዊ ምንጭ መሆኑን በመከላከያው ማስረዳት የቻለ ሆኖ አልተገኘም፡፡

ተከሣሹ በወ/ሕ/አ 684(1)ሥር የተከሰሰበትን እና ይከላከል የተባለበትን ሁለተኛ ክስ በተመለከተ በክሱ የተጠቀሰውን የሰ.ቁ 2-99082 የሆነውን ተሽከርካሪ በ29/09/03 በብር 370,000 በሽያጭ ማስተላለፉ ተረጋግጧል፡፡ ተከሣሹም ተሽከርካሪ ውን መሸጡን ሣይክድ ነገር ግን የሸጥኩት ከፀረ ሙስና ኮሚሽኑ እይታ ውጭ ለማድረግ በማሰብ አይደለም በማለት ተከራክሮአል፡፡ በጉዳዩ የቀረቡት የዐ/ሕግ ምስክሮችም ተከሣሹ ተሽከርካሪውን የሸጠው በመደበኛ ሁኔታ እና ግንኙነት መሆኑን ከማረጋገጥ በስተቀር በክሱ እንደተገለፀው ምርመራ የተጀመረበት መሆኑን አውቆ እና ከኮሚሽኑ እይታ ለመሰወር ሰማሰብ ነው የሚል ግምት ለመውሰድ የሚያስችል ሁኔታ ስለመኖሩ የገለጹት ነገር የለም፡፡ ተከሣሹ ተሽከርካሪውን የገዛሁበት ገንዘብ ያፈራሁት ከሕጋዊ ምንጭ ነው በማለት በአንደኛ ክስ መከላከያ ከማቅረብ በስተቀር ሁለተኛ ክስን በተመለከተ ነጥሎ ያቀረበው መከላከያ የሌለ ቢሆንም በሁለተኛ ክስ የተመለከተው እና መፈፀሙ የተረጋገጠው ድርጊት በድንጋጌው የተመለከተውን ወንጀል የሚያቋቁም ነው ወይስ አይደለም የሚለው የሕግ ነጥብ መጤን የሚገባው ሆኖ ተገኝቷል፡፡

በዚህ መሠረት የወ/ሕ/አ 684(1) በወንጀልነት የደነገገው በሙስና ወንጀል አማካይነት የተገኘን ገንዘብ ወይም ንብረት ሕገወጥ አመጣጥ ሰውሮ በጥቅም ወይም በስራ ላይ በማዋል፣ በማዛዋወር ወይም በማስተላለፍ ሕጋዊ አስመስሎ ማቅረብን ሲሆን በክስ ማመልከቻው አነጋገር መሠረት ተከሣሹ በሙስና ወንጀል አግኝቷል የተባለው በ29/09/03 በሽያጭ ያስተላለፈውን ተሽከርካሪውን ራሱን ሳይሆን ቀደም ሲል ይህንኑ ተሽከርካሪ በ28/10/02 የገዛበትን ጥሬ ገንዘብ ነው፡፡ በድንጋጌው አነጋገር መሰረት ተከሳሹ ተጠያቂ ሊደረግ ይችል የነበረው በሙስና ወንጀል ያገኘውን ገንዘብ ሕገወጥ አመጣጥ ሰወሮ ተሽከርካሪውን ገዝቶአል የሚል ክስ ቀርቦበት ቢሆን ኖሮ ነው፡፡ ይሁን እንጅ በዚህ ረገድ የቀረበበት ክስ የለም፡፡ በተከሣሹ መፈፀሙ የተረጋገጠው ድርጊት በአንቀጽ ከተደነገገው የተለየ ከሆነ ደግሞ በወ/ሕ/አ/ 2(3) እንደተመለከተው በሕግ ላይ ከተደነገጉት ወንጀሎች ጋር ይመሳሰላል በማለት ወንጀልነቱ በግልጽ ያልተደነገገ ድርጊት ወይም ግድፈት ፍ/ቤቱ እንደወንጀል ሊቆጥረው አይችልም፡፡ ይህ እንደተጠበቀ ሆ ኖ በከሣሹ ይዞታ ከተገኘው ብር 645,000 ውስጥ ብር 370,000 የዚሁ ተሽከርካሪ የሽያጭ ገንዘብ መሆኑ በአንደኛ ክስ ውስጥ ተመልክቷል በመሆኑም ተከሣሹ በሁለት ክስ በተመለከተው ወንጀል ጥፋተኛ ሊባል የሚቻልበት አግባብ አልተገኙም፡፡

ከላይ የሰፈረው ገንዘብ በማጠቃላል ተከሣሹ በአንደኛ ክስ በወ/ሕ/አ 419(1)(ለ) ስር የተደነገገው በመተላለፍ ባደረገው ምንጩ ያልታወቀ ንብረት እና ገንዘብ ይዞ የመገኘት የሙስና ወንጀል ጥፋተኛ ነው፡፡

በሁለተኛ ክስ በወ/ሕ/አ/ 684(1) ስር የተደነገገው በመተላለፍ አድርጐአል ተብሎ በተከሰሰበት በወንጀል ድርጊት የተገኘን ገንዘብ ወይም ንብረት ሕጋዊ አስመስሎ የማቅረብ የሙስና ወንጀል ጥፋተኛ አይደለም በማለት ፍ/ቤቱ በወ/መ/ህ/ሥ/ሥ/ቁ 149(1) መሠረት ወስኗል፡፡

የቅጣት ውሳኔ

በወንጀል ጉዳይ ጥፋተኛ ሆኖ በተገኘው ሰው ላይ ቅጣት ሊወሰን የሚገባው በወንጀል ሕጉ የተመለከቱ የቅጣት አወሳሰን ደንቦችን መሠረት በማድረግ የቅጣት ማክበጃ ማቅለያ ምክንያቶች መኖር አለመኖራቸውን በማጤን እና በማመዛዘን፣ የቅጣት አወሳሰን መመሪያውን መሠረት በማድረግ እና በአጠቃላይ በአጥፊው ላይ የሚጣለው ቅጣት በአንቀጽ 1 ላይ የተመለከተውን የወንጀል ሕጉን ዓላማ ግብ ሊያሳካ የሚችልበትን አቅጣጫ በመከተል መሆኑ ይታወቃል፡፡

ተከሳሽ ጥፋተኛ የተባለበት የወ/ሕ/አ/419(1) ቀላል እስራትን ወይም መቀጮን ወይም ነገሩ ከባድ ሲሆን ከአምስት ዓመት የማይበልጥ ጽኑ እስራትን እና መቀጮን የሚደነግግ ሲሆን የኮሚሽኑ ዐ/ሕግ በ28/12/04 በተፃፈ ማመልከቻ ወንጀሉ ደረጃ ካልወጣላቸው ውስጥ የሚመደብ በመሆኑ ምክንያት የቅጣት አወሳሰኑ የሚመራው በቅጣት አወሳሰን መመሪያው አንቀጽ 13 መሠረት መሆኑን ተከሳሹ ምንጩ ያልታወቀውን ገንዘብና ንብረት ያፈፈራው በዳኝነት ተሹሞ ይሰራ በነበረበት ጊዜ ጭምር መሆኑን ይዞታ የተገኘው ምንጩ ያልታወቁ ገንዘብና ንብረት ግምትም ከፍተኛ የሚባል መሆኑን እነዚህ ሁኔታዎችም በክብደቱና በአፈፃፀሙ ወንጀሉን በከባድ ደረጃ መመደብ የሚያስችሉ መሆኑን እና በወ/ሕ/አ/108 ላይ የተመለከተውን መስፈርት የሚያሟሉ በመሆኑ ምክንያት በተከሳሹ

ላይ ለሚጣለው ቅጣት መሠረት ተደርጐ መያዝ የሚገባው የጽኑ እሥራት አማራጭ መሆኑን በዝርዝር በመግለጽ በከባድ ደረጃ ለተመደበ ወንጀል በቅጣት አወሳሰን መመሪያው በተቀመጠው ፍቅድ ስልጣን መሠረት ተገቢው ቅጣት እንዲጣልበት እና ምንጩ እንዳልታወቀ በጥፋተኛነት ውሳኔው ላይ በተገለፀው ገንዘብና ንብረት ላይ የውርስ ትዕዛዝ እንዲሰጥለት ጠይቋል፡፡

ተከሳሽ በበኩሉ በ30/12/04 በተፃፈ ማመልከቻ ይዘህ ተገኝተህል የተባለው ምንጩ ያልታወቀ ገንዘብና ንብረት ከፍተኛ ነው መባሉ ብቻውን የወንጀሉ ደረጃ ከከባድ ለመመደብ የሚያበቃ አለመሆኑን ወንጀሉ ሊመደብ የሚገባው በዝቅተኛ ደረጃ መሆኑን በወ/ሕ/አ/108 ድንጋጌ መሠረት የጽኑ እሥራት ቅጣት የሚጣለው ወንጀሉ ከባድ ሲሆን እና በተለይ የአደገኛነት ጠባይ ባላቸው አጥፊዎች ላይ ሆኖ እያለ የጽኑ እስራት ቅጣት አማራጭ መሠረት ተደርጐ እንዲወሰድ 0/ሕግ ያቀረበው ሐሳብ ተቀባይነት ሊኖረው የማይገባ እና መሠረት ተደርጐ መያዝ የሚገባው የቀላል እስራት አማራጩ መሆኑን የቀረበበት ሪከርድ አለመኖሩ ባለትዳር እና የሶስት ህፃናት ልጆቹን ጨምሮ የቤተሰብ አስተዳዳሪ መሆኑ በኤርትራ መንግስት የተቃጣውን ወረራ ለመመከት በውትድርና ገብቶ ማገልገሉ እና በጦርነቱ ምክንያት ቋሚ የአካል ጉዳት የደረሰበት መሆኑ ራሳቸውን ችለው በአራት የማቅለያ ምክንያትነት ሊያዙለት የሚገባ መሆኑን በዝርዝር በመግለጽ እና በቅጣት አስተያየቱ የተካተቱ ፍሬ ነገሮችን የሚያረጋግጡ ማስረጃዎችን በማያያዝ ፍ/ቤቱ እስካሁን የታሰረበትን የአንድ ዓመት ከሁለት ወር ከ25 ቀን በቂ አድርጐ እንዲያሰናብተው ይህ ታልፎ ተጨማሪ ቅጣት የሚወሰንበት ከሆነ ቀሪው የቅጣት መጠን ከመፈፀም ታግዶ እንዲቆይ ትዕዛዝ እንዲሰጥለት እና በተሸከርካሪው እና በቤቱ ላይ የውርስ ትዕዛዝ እንዲሰጥለት 0/ሕግ ያቀረበው ጥያቄ ተቀባይነት የለውም እንዲባልለት የጠየቀ ሲሆን ፍ/ቤቱም ጉዳዩን መርምሮአል፡፡

በዚህ መሠረት በድንጋጌው ስር ከተቀመጡት ሶስቱ የቅጣት አማራጮች መካከል በተከሳሹ ላይ ለሚጣለው ቅጣት ሶስተኛው ማለትም የጽኑ እስራት የመቀጮ አማራጭ መሠረት ተደርጐ እንዲያዝ 0/ሕግ ያቀረበውን ሃሳብ ፍ/ቤቱ ተቀብሎአል በሌላ በኩል ድንጋጌው ሶስተኛውን የቅጣት አማራጭ የደነገገው የወንጀሉን የአፈፃፀም ከባድነት በመስፈርትነት በመውሰድ መሆኑን ከድንጋጌው አነጋገር መገንዘብ የሚቻል በመሆኑ በክብደቱና በአፈፃፀሙ ወንጀው ሊመደብ የሚገባው 0/ሕግ እንደጠየቀው በከባድ ሳይሆን በመካከለኛ ደረጃ መሆኑን ፍ/ቤቱ ተገንዝቦአል በመካከለኛ ደረጃ ለተመደበ ወንጀል በመመሪያው የተቀመጠው ፍቅድ ስልጣን ከሁለት ዓመት እስከ ሶስት ዓመት የሚደርስ ሲሆን ከዚህ ፍቅድ ስልጣን ውስጥ በተከሳሹ ላይ መነሻ ተደርጐ መጣል የሚገባው የሁለት ዓመት ከሁለት ወር ጽኑ እስራት እና የብር አንድ ሺህ መቀጮ እንዲሆን ፍ/ቤቱ ወስኖአል፡፡ ይህ የእስራት ቅጣት መጠንም በአባሪ አንድ በእርከን 11 ሥር የሚወድቅ ነው መነሻ ተደርጐ የተያዘ የቅጣት መጠን በማከበጃ እና /ወይም በማቅለያ ምክንያቶች ከፍ ወይም ዝቅ ሊደረግ የሚችል ሲሆን በ0/ሕግ በኩል የቀረበም ሆነ በፍ/ቤቱ የተገኘ የማከበጃ ምክንያቶች የለም ተከሣሹ የመልካም ፀባይ ባለቤት የነበረ መሆኑ በመደበኛ የማቅለያ ምክንያትነት ሊያዝለት የሚገባ ሲሆን በማስረጃ በተረጋገጠው ተከሣሹ በሀገራችን ላይ በኤርትራ መንግስት የተቃጣውን ወረራ ለመመከት የውትድርና አገልግሎት መስጠቱ እና በውትድርና አገልግሎቱም ቋሚ የአካል ጉዳት የደረሰበት መሆኑ

በወ/ሕ/አ/86 መሠረት በአንድ ልዩ የማቅለያ ምክንያትነት ሊያዝ የሚገባ መሆኑን ፍ/ቤቱ ተገንዝቦአል ከላይ የተጠቀሱት ሁለት የማቅለያ ምክንያቶች የፍቅድ ስልጣኑን መጠን ከእርከን 11 ወደ እርከን 7 ዝቅ የሚያደርጉት ሲሆን የመቀጮው መጠንም በተመሳሳይ ስሌት ዝቅ መደረግ ይኖርበታል፡፡ በመሆኑም ከላይ የሰፈረውን ዝርዝር በማጠቃለል ተከሣሹ ከዚህ ጉዳይ የታሰረው የሚታሰብለት በአንድ ዓመት ከአንድ ወር ጽኑ እስራት እና በብር አምስት መቶ መቀጮ እንዲቀጣ ፍ/ቤቱ በወ/ሕ/ሥ/ሥ/ቁ 149 (5) መሠረት ወስኗል፡፡

<u>ትዕዛዝ</u>

1. በፀረ ሙስና ልዩ የሥነ ሥርዓት የማስረጃ ሕግ አዋጅ ቁጥር 434/97 በአንቀፅ 3ዐ(1) እና (2) በተመለከተው መሠረት የውርስ አቤቱታውን ከስድስት ወራት በኋላ እንዲያቀርብ ትዕዛዝ ተሰጥቶአል፡፡
2. ተከሣሹ የተወሰነበትን የአንድ ዓመት ከአንድ ወር ጽኑ እስራት ቅጣቱን ማጠናቀቁን ከመዝገቡ ማረጋገጥ ስለተቻለ መቀጮውን ገቢ ማድረጉ ሲረጋገጥ የሚፈለግበት ሌላ ጉዳይ አለመኖሩን አረጋግጦ እንዲቀለው ለማ/ቤት ይፃፍ፡፡
3. በጥፋተኛነቱም ሆነ በቅጣት ውሳኔው ቅር የተሰኘ ወገን ይግባኝ የማለት መብት እንዳለው በችሎት ተነግሯል፡፡
4. እልባት ያገኘ ስለሆነ መዝገቡ ተዘግቷል፡፡

Call for Contributions

The Law School of Bahir Dar University publishes a bi-annual peer-reviewed journal of law, the *Bahir Dar University Journal of Law* (BDU Journal of Law). The main aim of the *Journal* is to create a forum for the scholarly analysis of Ethiopian law and to promote research in the area of the legal system of the country in general. The Journal also encourages analyses of contemporary legal issues.

The *Journal* is now calling for contributions for its volume 4 No. 1 and No. 2 issues. The Editorial Committee of the *Journal* welcomes scholarly *articles, notes, reflections, case comments* and *book reviews* from legal scholars, legal practitioners, judges and prosecutors and any legal professional who would like to contribute his/her own share to the betterment of the legal system of Ethiopia and of the world at large.

Any manuscript which meets the preliminary assessment criteria shall be referred to anonymous internal and external assessors for detailed and critical review.

Authors may send us their manuscripts any time at their convenience.

Submissions should include:

- Full name (s) and contacts of author (s);
- Declaration of originality;
- A statement of whether the work has been previously published or tendered for publication in any other publication and where this is the case, the name of the publisher and the date of publication;
- A statement that the author consents to the publication of the work by the *Bahir Dar University Journal of Law*.

All submissions and enquiries should be addressed to:

The Editor- in-Chief,
Bahir Dar University Journal of Law;
E-mail: workusos@yahoo.com; or
jol@bdu.edu.et

Guide for authors

Aim and scope of the *Journal:*

The *Bahir Dar University Journal of Law* is established in 2010 G.C. under the stewardship of the School of Law Bahir Dar University. It aims to promote legal scholarship and critical inquiry. The *Journal* places the needs of the readers first and foremost in its composition and aspires to become a well-cultivated resource for the community of legal professionals. While, in principle, it is open for any kind of contributions on the subject matter of law or interdisciplinary issues related to law, it gives high priority to contributions pertaining to Ethiopian laws to encourage discourse on Ethiopian laws where literature is scanty.

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The *Bahir Dar University Journal of Law* invites submission of manuscripts in electronic format (Soft copy). Manuscript should be sent in Microsoft Word format as attachment to

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or

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Contributions should be unpublished original work of the author. The form of contributions can be feature article, case comment, book review, or reflection paper.

Review procedure

The *Bahir Dar University Journal of Law* is a peer-reviewed journal. All submissions are reviewed by the editor-in-chief, one member of the editorial committee. The publication of feature articles is further subject to review by an anonymous external referee and final discussion and approval by the editorial committee. Please note that our evaluation process takes account of several criteria. While excellence is a necessary condition for publication, it is not always the only condition. The need for balance of topics, the *Journal's* particular area of interest which may change overtime, and the fact that an article discussing a similar topic has already been commissioned, etc., may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of the piece.

Time frame

You can submit your manuscript at any time. We do not have deadlines for submission of manuscripts. Each day we accept submissions and those qualified submissions will be commissioned for publication on a rolling basis. As soon as we receive your submission we will send you an acknowledgement email. We aim to give notification of acceptance, rejection, or need for revision within four weeks of acceptance, although exceptions to this timeframe may occur. In the event of final acceptance you will be notified when it will be published and in which issue of the *Journal* the paper will feature.

Language

All submissions need to be written in articulate and proficient language either in English or Amharic. Authors who lack good command of the language are encouraged to send their article to language editing prior to submission.

Size of contributions

The size of contributions shall be as follows:

- feature articles: Min 15 pages, max 40 pages
- case comments: Min 3 pages, max 15 pages
- Book Review: Max 3 pages
- Reflections: Min 3 pages, max 15 pages

Manuscript presentation

Bahir Dar University Journal of Law generally follows the style and citation rules outlined below.

Author's affiliation:

The author's affiliation should be indicated in a footnote marked by an asterisk and not by an Arabic number. Authors should refer to themselves in the third person throughout the text.

Headings:

Manuscripts shall have an abstract of approximately 200 words and introduction and the body should be arranged in a logically organized headings and sub-headings. Headings in the various sections of the manuscript shall be aligned to the left margin of the page and shall be as follows:

Abstract
Introduction
1. First Heading
1.1. Second Heading
1.1.1. Third Heading
1.1.1.1. Fourth heading
i. Fifth heading
a. Sixth heading
Conclusion

Italicization:
All non-English words must be *italicized*

Emphasis:
To indicate emphasis use *italics*.

References:
All contributions should duly acknowledge any reference or quotations from the work of other authors or the previous work of the author. Reference shall be made in the original language of the source document referred to.

Quotations:
Quotations of more than three lines should be indented left and right without any quotation marks. Quotation marks in the block should appear as they normally do. Quotations of less than three lines should be in quotation marks and not indented from the text. Regarding alterations in a quotation, use:-

Square bracket "[ ]" to note any change in the quoted material,
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Footnotes:
Footnotes should be consecutively numbered and be set out at the foot of each page and cross-referenced using *supra*, *infra*, *id*. and *ibid*, as appropriate. Footnote numbers are placed outside of punctuation marks.

References in footnotes:
References in footnotes should generally contain sufficient information about the source material. In general, references should have the content and style outlined below in the illustrations for the various types of sources.

Books:

Brownlie,I., *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, New York, 2003(first published in 1966), p. 5, [hereinafter Brownlie, *Principles of Public International Law*]

Contributions in edited books:

Fleck, Dieter, the Law of Non-International Armed Conflicts, *in* Fleck, Dieter (ed.),*The Handbook of International Humanitarian Law*, Second Edition, Oxford University Press, Oxford, New York, 2008, p. 613, [hereinafter Fleck, *The Handbook of International Humanitarian Law*]

Articles in Journals:

Jinks, D., September 11 and the Laws of War, *Yale Journal of International Law*, Vol.28, No. 1, 2003, p. 24.

Legislations:

Federal Courts Proclamation, 1996, Art. 8(1) & (2), Proc.no.25/1996, *Fed. Neg. Gaz.*, year 2, no. 13.

Codes:

Revised Family Code, 2000, Art. 7 (1), Proc.no. 213/2000, *Fed. Neg. Gaz*. (Extraordinary issue), year 6, no. 1.

Treaties:

Vienna Convention on the Law of Treaties, 1969, Article 31.

Resolutions:

Security Council Resolution 1368 (2001), at WWW http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement > (consulted 10 August 2008).

Cases:

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgement, 15 July 1999, para. 120, at WWW <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf > (consulted 7 August 2008), [hereinafter, ITY, Tadic case, Appeals Chamber, Judgement].
የኢትዮጵያ መድን ድርጅት vs. **ጊታሁን ሀይሉ ፤ ጠቅላይ ፍርድቢትሰበር ሰሚ ችሎት ፤ መ.ቁ.** 14057 ፤ 1998 **ዓ.ም**.

Format requirements:

All contributions should be submitted in Microsoft Word document format, written in 12 fonts, double space, Times New Roman (Footnotes in 10 fonts, single space, Times New Roman).

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