የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት
Bahir Dar University Journal of Law

ISSN 2306-224X

ቅጽ ፲ ቁጥር ፩ | ታሕሣሥ ፪ሺ፲፪
Vol. 10 No. 1 | December 2019

In This Issue	በዚህ ዕትም
Articles	ጥናታዊ ጽሁፎ
A Reflection	ምልከታ
Selected Court Cases	የተመረጡ ፍርዶች

በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት
A Biannual Law Journal published by the Bahir Dar University School of Law

በ፪ሺ፪ ዓ.ም. ተመሠረተ
Established in 2010

የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት
Bahir Dar University Journal of Law

ISSN 2306-224X

ቅጽ ፲ ቁጥር ፩		ታሕሣሥ ፪ሺ፲፪
Vol. 10 No. 1		December 2019

In This Issue	በዚህ ዕትም
Articles	ጥናታዊ ጽሁፎ
A Reflection	ምልከታ
Selected Court Cases	የተመረጡ ፍርዶች

በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት
A Biannual Law Journal published by the Bahir Dar University School of Law

በ፪ሺ፪ ዓ.ም. ተመሠረተ
Established in 2010

MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 10. No. 1 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

On this occasion, again, the 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 law and practice. 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 national, regional, supranational and global perspectives are welcome.

The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice, to assist in 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 on the legal and institutional reforms that are still underway across the country. It is commendable to conduct 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. The Bahir Dar University Journal of Law is here to serve as a forum to make 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 in the justice system of our country in general.

የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት
Bahir Dar University Journal of Law

ቅጽ ፲ ቁጥር ፩ | ታሕሣሥ ፪ሺ፲፪
Vol. 10 No. 1 | December 2019

Law School Academic Full Time Staff

1.	Alebachew Birhanu	LLB, LLM, MPhil (Associate Professor)
2.	Alemu Dagnaw	LLB, LLM (Assistant Professor)
3.	Asirar Adem	LLB, LLM (Lecturer)
4.	Belayneh Admasu	LLB, LLM (Associate Professor)
5.	Bereket Eshetu	LLB, LLM (Lecturer)
6.	David Tushauh	PhD (Professor, Expatriate)
7.	Dessalegn Tigabu	LLB, LLM (Lecturer)
8.	Eden Fiseha	LLB, LLM (Assistant Professor)
9.	Enterkristos Mesetet	LLB, LLM (Lecturer)
10.	Fikirabinet Fekadu	LLB, LLM (Lecturer)
11.	Gizachew Silesh	LLB, LLM (Assistant Professor)
12.	Gojjam Abebe	LLB, LLM (Lecturer)
13.	H/Mariam Yohannes	LLB, LLM (Lecturer)
14.	Khalid Kebede	LLB, LLM (Lecturer)
15.	Mamenie Endale	LLB, LLM (Assistant Professor)
16.	Mihret Alemayehu	LLB, LLM, MPhil (Assistant Professor)
17.	Mohammode Doude	LLB, LLM (Assistant Professor)
18.	Mulugeta Akalu	LLB, LLM (Assistant Professor)
19.	Tajebe Getaneh	LLB, LLM (Lecturer)
20.	Tegegne Zergaw	LLB, LLM (Assistant Professor)
21.	Temesgen Sisay	LLB, LLM (Assistant Professor)
22.	Tessema Simachew	LLB, LLM, PhD (Assistant Professor)
23.	Worku Yaze	LLB, LLM, PhD Candidate (Asst. Professor)
24.	Yihun Zeleke	LLB, LLM (Assistant Professor)
25.	Zewdu Mengesha	LLB, LLM (Assistant Professor)

Law School Academic Staff Partially on Duty

1.	Adam Denekew	LLB (Assistant Lecturer)
2.	Addisu Gulilat	LLB, LLM (Lecturer)
3.	Gedion Ali	LLB, LLM (Lecturer)
4.	Misganaw Gashaw	LLB, LLM, PhD Candidate (Asst. Professor)
5.	Nega Ewunetie	LLB, LLM (Assistant Professor)
6.	Tefera Degu	LLB, LLM (Lecturer)
7.	Tikikle Kumilachew	LLB, LLM (Lecturer)
8.	Tilahun Yazie	LLB, LLM, PhD Candidate (Lecturer)

Law School Academic on Study Leave

1.	Asnakech Getinet	LLB, LLM, PhD Candidate (Lecturer)
2.	Belay Worku	LLB, LLM, PhD Candidate (Lecturer)
3.	Nebiyat Limenih	LLB, LLM (Lecturer)
4.	Yohannes Enyew	LLB, LLM (Lecturer)

Part-time Staff

1.	Biniyam yohannes	LLB, LLM (ANRS Supreme Court Judge)
2.	Geremew G/Tsadik	LLB, LLM (ANRS General Attorney)
3.	Tsegaye Workayehu	LLB, LLM (ANRS Supreme Court Judge)

የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት
Bahir Dar University Journal of Law

ቅጽ ፤ ቁጥር ፩		ታሕሣሥ ፪ሺ፲፪
Vol. 10 No. 1		December 2019

Content

Articles

A Reflection/ምልከታ

Selected Court Cases/የተመረጡ ፍርዶች

Address

The Editor-in-Chief of Bahir Dar University Journal of Law
School of Law, Bahir Dar University
P. O. Box- 5001
Tel- +251588209851
E-mail - bdujol@yahoo.com
Website: https://bdu.edu.et/pages/journal-law
Bahir Dar, Ethiopia

Analysis of ICSID Arbitration from the Perceptive of Developing Countries: A Bittersweet Choice

Haile Andargie♦

Abstract

There are growing concerns among developing countries on the arbitration proceeding of the International Center for Settlement of Investment Dispute (ICSID). The worries range from the transparency of arbitral proceedings; high arbitral costs; exclusion of national courts to the unsatisfactory nature of annulment proceedings. Investors' mounting claims against developing state, the link of ICSID to the World Bank, and their lack of resources to bear costs of defending against well-resourced investors make developing states to believe that they are at a comparative disadvantage compared with developed states and their investors. Although Ethiopia is not a party to the convention, many of its Bilateral Investment Treaties (BITs) accept ICSID jurisdiction. Thus, the main purpose of this paper is to examine the cost and benefit of ICSID in the context of developing countries. Besides, relevant BITs of Ethiopia that recognize jurisdiction of the Center are analyzed to explore the potential consequences in the event that it ratifies the ICSID. Relying on the doctrinal research methodology, the article examined the ICSID convention, scholarly research findings and the literature in the field. After due analysis, the author concluded that introducing the appellate system, ensuring transparency of the arbitration process and the publication of awards would address the concerns of developing countries. The article also argues that many of Ethiopia's BITs are inconsistent and vague with regards to submission to the jurisdiction of the Center, which implicates the need to have a model BIT.

Keywords: ICSID, Arbitration, Transparency, Developing countries, Consent, Ethiopia, BIT.

Introduction

In principle, investment benefits all parties involved. Investors can expand the market and productivity thereby accrues more profit. For the host state, particularly developing countries, investment is a crucial factor for economic

♦ LLB, LLM, and Ph.D. Candidate (Assistant Professor in Law, Debre Markos University, Ethiopia). The author can be reached at hailepowrs@gmail.com or haile17830034894@126.com. The author owes gratitude to the anonymous reviewers.

and social development, sustained economic growth, poverty reduction, improved infrastructure, and financial stability as investment help to maintain the balance of payment problem.[1] Also, investment results in transfer of knowledge and technology, creates jobs, boost overall productivity, and enhance competitiveness and entrepreneurship.[2]

A central challenge for developing countries, however, is how to strike a balance between the need for more investment flows and to secure their sovereign interest at home. For developing countries, the move to protect public interest such as public health, environmental protection, labor standards, and the legitimate interests of the investor is a lasting issue in international investment governance.[3] Those Countries with a favorable investment legal framework to protect the interest of investors attract more investment. Favorable conditions for foreign investments include a legal framework with reliable protection of property rights, an independent and effective judicial system, and a prudent dispute settlement system.[4]

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established ICSID, as a center for settlement of investment disputes. More specifically, the executive directors of the World Bank formulated the ICSID Convention in 1966.[5] As of June 2020, 155 States have ratified the ICSID Convention while there are 163 signatory States.[6]

As stated under the provisions of the Convention, ICSID provides facilities for conciliation and arbitration of investment disputes between the contracting States and nationals of other contracting states.[7] The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre according to Article 6(1) (a)–(c) of the

[1] Organization for Economic Co-operation and Development (OECD), Foreign Direct Investment for Development, *OECD Publications (2002)*, p. 5. See also L Colen, MMaertens, and J Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Relevance,' *Hum Rts& Int'l Legal Discourse, Vol.* 177, (2009); Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, *Int'l Law*, Vol. 24, (2009), p. 655.

[2] Ibid.

[3] Matthias Herdegen, Principles of International Economic Law, 2nd ed., Oxford University Press, (2017), p.405.

[4] UN, Report of the International Conference on Financing for Development, UN Doc A/ CONF.198/ 11, Monterrey, Mexico, (18– 22 March 2002), para 2.

[5] ICSID Convention Rules and Regulation, available at https://icsid.worldbank.org›Documents › resources last visited on 11 February 2020. (Hereafter called *ICSID convention*).

[6] World Bank, Database of ICSID Member, available https://icsid.worldbank.org/about/member-states/database-of-member-states/ last visited on 11 February 2020.

[7] ICSID Convention, *supra* note 5.

Convention (hereinafter the ICSID Regulations and Rules). The ICSID Regulations and Rules comprise of Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), Rules of Procedure for Conciliation Proceedings (Conciliation Rules), and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). Despite the vast majority support for ICSID, there are skeptics among some developing countries against the fairness of international investment agreements and investment arbitration.[8] Developing countries have accused many powerful global corporations of taking advantage through the international investment regime.[9] In this regard, the criticism on ICSID is that the Center prioritizes the rights and interests of corporate investors at the expense of the social and environmental goals in developing countries.[10] Some developing countries like Bolivia, Ecuador, and Venezuela are taking extreme measures by withdrawing from the Convention.[11]

Ethiopia is a signatory state to the ICSID convention, but it has not yet ratified the convention. However, ICSID mechanisms certainly have impact on Ethiopia since almost all its BITs recognized submission to the jurisdiction of ICSID and its additional facilities. During the writing of this article, Ethiopia has signed over 33 BITs with foreign Countries.[12] Almost all BITs have referred to ICSID as one of the dispute resolution mechanisms. To the best of the knowledge of this author, the Ethiopian BITs that do not refer to ICSID are those with Libya, Brazil, Russia, and Netherland.[13] Hence, the consequences of referring to the ICSID jurisdiction, without ratifying the ICSID Convention, need to be examined.

Using doctrinal research methodology, this article scrutinizes the ICSID Convention, various reports, scholarly research finding and other literatures in the field. Also, the experience of countries that withdraw from ICSID is

[8] ICSID members update, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B97 last visited on 20 March 2020. Bolivia, Ecuador, and Venezuela, for instance, withdrew from the ICSID Convention in 2007, 2010, and 2012, respectively.

[9] Pia Eberhardt & Cecilia Olivet, profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Corporate Eur. Observatory and the Transnational Inst, (2012), p.24

[10] Sarah Anderson & Sara Grusky, Challenging Corporate Investor Rule, inst. for policy studies & food and water watch *eds*,(200), p.10.

[11] United Nations Conference on Trade and Development, Course on Dispute Settlement: International Centre for Settlement of Investment Disputes, *UNCTAD/EDM/Mis*c, (2003), P.21.

[12] International Investment Agreement Navigator, available at https://investmentpolicy.unctad.org/international-investment agreements/countries/67/ethiopia last visited 13 October 2020.

[13] Ibid.

analyzed to substantiate the concern of developing countries on the issue under consideration. This article examines chiefly the arguments forwarded by developing countries against ICSID. In doing so, the article is organized under four sections. Section one presents the background, purposes, features and jurisdiction of the ICSID. The second section is dedicated to analysis of the criticisms forwarded against ICSID by developing countries. The third section discusses the bilateral investment treaties (BITs) that Ethiopia signed or ratified which refer to the ICSID as a means of dispute settlement mechanism. This section aims to analyze the potential consequences that Ethiopia may encounter if it ratifies the ICSID Convention. Finally, section five provides concluding remarks and forwards recommendations.

1 Overview of the ICSID

1.1 Rationale of ICSID

In general, the ICSID Convention is a multilateral treaty formulated to further the World Bank's objective of promoting international investment.[14] More specifically, ICSID's founding documents reveal three main purposes the Center seeks to achieve. Firstly, ICSID helps to protect foreign investment through the facilitation of investment dispute settlement.[15] ICSID provides facilities and services to support conciliation and arbitration of international investment disputes. It gives investors direct access to an international forum and enables investors to provide in an investment agreement that disputes will be decided under rules of international law. Normally, ICSID does not conciliate or arbitrate the disputes. Rather, it provides the institutional facility and procedural rules for independent conciliation commissions and arbitral tribunals constituted in each case. Besides, arbitration and conciliation under the Convention are voluntary and require the consent of both the investor and state concerned. However, once such consent is given, unilateral withdrawal is impossible.

Secondly, the ICSID Convention seeks to promote investment flows to developing and least-developed states.[16] Besides, Member States and their nationals obtain access to investment dispute settlement under the ICSID Convention as additional forum, and expert services of the Secretariat.

[14] Ibironke T. Odumosu, The Antinomies of the continued relevance of ICSID to the third world, *San Diego international law Journal,* Vol. 8, (2007), P.345, 357.
[15] Ibid.
[16] Ibironke, *supra* note, p 358.

The third goal is to provide an "atmosphere of confidence" for investors and host countries.[17] This is to mean that since foreign investors frequently do not perceive the courts of the host state as impartial to settle investment disputes, the ICSID can serve as alternative forum. Besides, domestic courts are bound to apply domestic laws though the laws fail to protect the investor's rights under international law. Furthermore, as investment disputes are complex and require specialized knowledge, ordinary courts of the host states are not competent to adjudicate the matter appropriately.[18]

1.2. Characteristic Features of the ICSID

As stated before, ICSID is not an international court or tribunal but merely provides an institutional framework that facilitates conciliation and arbitration.[19] Conciliation and arbitration are the two possible methods of dispute settlement provided by the ICSID Convention. Yet, the actual settlement of a dispute takes place mainly through arbitral tribunals constituted on ad-hock basis for each dispute.[20] Conciliation assists the parties in reaching a mutually acceptable agreement.[21] In case of conciliation, both parties must willingly agree to pursue this method of dispute resolution. If the parties reach an agreement, the ICSID commission creates a report noting the issues in the dispute and records the parties' agreed-upon decision.[22] The report generated because of the conciliation is not binding on the parties. The vast majority of cases brought under the ICSID Convention use arbitration proceedings.[23] Arbitration is a more formal process of dispute resolution. If the parties fail to reach an agreed settlement, the tribunal determines an award that is binding and enforceable on both parties. Nonetheless, developing countries criticize arbitration proceedings as a method of dispute settlement under the ICSID.

Second, ICSID Convention offers a procedure for the settlement of investment disputes**.** According to the ICSID Convention, the tribunals have to follow the law agreed upon by the parties. Primarily, it is up to the disputing parties, i.e. the

[17] Ibid.
[18] Christoph, International Center for Settlement of the Dispute, available at https://www.univie.ac.at › in law › word press › pdf › 100_icsid_epil Last visited on 11 May 2020.
[19] ICSID Convention, *supra* note 5.
[20] Christophe, *supra* note 18.
[21] Elizabeth Maul, The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime, *Santa Clara Law Review*, Vol. 55, No. 2 (2015), p. 892.
[22] As it is provided in Article 43(2) of ICSID Convention, if the parties reach an agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached an agreement.
[23] Elizabeth, *supra* note 21, p. 892.

host State and the investor, to agree on the applicable law. These laws include international investment agreements such as BITs, multilateral treaties, and customary international law and domestic investment laws.[24]

Third, ICSID has a delocalized character. The exclusive nature of ICSID arbitral jurisdiction to any other national or international remedy as provided for in Articles 26 and 27(1) respectively delocalize the ICSID remedies. It states that consent of the parties to arbitration under this Convention shall be considered to be consent to arbitration to the exclusion of every other remedy unless otherwise specified. The vital importance of this provision of the Convention was once pointed out by the executive directors of the World Bank in its report on the ICSID Convention. It explains the purpose of this provision under the heading arbitration as an exclusive remedy and when a state and an investor agreed to have recourse to arbitration, and do not preserve to have recourse to other remedies, the parties intend to have recourse to arbitration to the exclusion of any other remedies.[25]

However, there are some exceptions to the delocalization feature of ICSID. Firstly, under article 25(4) the host state may maintain power over its disputes with the foreign investors by either not consenting to ICSID jurisdiction at all or having a limited consent. Any Contracting State may, at the time of ratification, acceptance or approval of the Convention or at any time thereafter, notify the Centre of the class or classes of disputes that it would or would not consider submitting to the jurisdiction of the Centre. Hence, the contracting states can reserve some classes of the dispute to the exclusion of ICSID jurisdiction. Secondly, as the second sentence of Article 26 provides, the contracting parties can stipulate the exhaustion of local remedies as a condition to consent to arbitral submission to the ICSID jurisdiction. In practice, Guatemala has imposed such requirements by a declaration under the Convention.[26] It is under this exception that a clause that refers to a provision in investment agreement that allows the disputing parties to choose among various options of dispute resolutions or requirement to resort to local remedies are exercised.

Fourth, ICSID has a unique feature of institutional support. ICSID provides institutional support in the selection of arbitrators and the conduct of arbitration proceedings. The Convention establishes the Centre endowed with separate

[24] *Ibid*.
[25] Lukas Mistlis, International Investment Arbitration Substantive Principles, Oxford International Arbitration Series, 2nd ed., Oxford University Press, (2017), p.302.
[26] Ibid.

international legal personality.[27] While the parties are relatively free to agree on any procedural rules for the conduct of their proceeding, rules have been promulgated which applies automatically to the extent that the parties fail to agree on any procedural points. Thus, such disagreements will not prevent the initiation or progress of a proceeding. For example, arbitration proceedings are to be conducted per the Convention and, except as the parties otherwise agrees under the arbitration rules in effect on the date on which the parties consented to arbitration. The Centre's administrative council adopts the arbitration rules.

Fifth, ICSID created the novel feature of a tribunal in which the foreign investor has standing. Previously, bringing a claim against a state by an individual investor to an international forum was unthinkable.[28] The Convention not only allows a private claimant to bring a claim without espousal by national state, but the national state expressly abandons its power of diplomatic protection.[29] This principle could be considered as being inconsistent with traditional international law where wrong is done to a national of one state for which another state was internationally responsible is actionable, not by the injured national, but by his state. The Convention filled that gap, and by doing so recognized individuals as a subject of international law.

Finally, ICSID has also a unique feature in terms of enforcement mechanism. Articles 53, 54, and 55 address peculiar aspects of recognition and enforcement of an award rendered under the Convention. The ICSID award has a binding force and it is final. Accordingly, each disputing party must abide by and comply with the terms of the award without the possibility of an appeal. Besides, all contracting states of the ICSID should recognize the award and enforce it as if the award were a final judgment of a domestic court. Hence, the award of ICSID is final which is not subject to domestic court scrutiny and has enjoyed wider enforcement opportunities all over the contracting countries' territories.

1.3. The ICSID's Jurisdiction

ICSID is one of the few institutions with specialized subject-matter jurisdiction. The focus of ICSID’s jurisdiction is exclusively on disputes arising from international investment. Article 25(1) of the ICSID Convention provides:

[27] ICSID Convention, *supra* note 5, Arts. 1 and 18.
[28] Wick, Diana Marie, The Counter-Productivity of ICSID Denunciation and Proposals for Change, *Journal of International Business & Law,* vol. 11, no. 2, (2012), p. 256.
[29] Ibid.

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

There are two conditions where the jurisdiction of the ICSID is established. The first condition is the state party to the dispute, i.e., the host state and the home state of the investor must be contracting states to the ICSID Convention. The investor may be an individual (natural person) or a company or similar entity (juridical person) so long as the nationality requirement envisaged under the convention is meet. In addition, there is what is called a negative nationality requirement: the investor must not be a national of the host state. The second condition is the host state and the investor must give consent in writing to submit their case to the Center.[30] Thus, participation in the ICSID Convention does not constitute by itself submission of the upcoming cases to the Centre's jurisdiction. The Convention would rather require the separate written consent of the parties. Such consent may be either given in a direct agreement between the investor and the host State such as a concession contract, or based on an offer by the host state that may be accepted by the investor in the appropriate forum such as state's investment laws. A standing offer may also be contained in a treaty to which the host State and the investor's state of nationality are parties. Most bilateral investment treaties contain clauses offering access to ICSID to the nationals of the parties to the treaty.

Concerning the cause of action, ICSID jurisdiction is restricted only to "any legal dispute directly related investment".[31] However, the concept of "investment" is not defined in the ICSID Convention. During the Convention's drafting, there was an attempt to put a definition but eventually not included in the Convention. One of the main reasons for resisting a definition of investment in the Convention was the fear that it could give rise to lengthy jurisdictional discussions even if the parties' consent to submit a dispute to ICSID was well established.[32] However, recently, many bilateral investment treaties and multilateral treaties contain definitions of "investment".[33] In practical cases, the

[30] ICSID Convention, *supra* note 5, Art. 25.
[31] Id., Article 25, Para, 1.
[32] Subject matters of ICSI, available at http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap02.htm, last visited 12 July 2020.
[33] See USA Model Bilateral Investment Treaty Concerning the Encouragement and Reciprocal Protection of Investment (2012), Art. I, 2012, *available at*

concept of investment under the ICSID Convention has been given a wide meaning by tribunals. Varieties of activities in a large number of economic fields have been accepted as investments.[34] For example, in *Salini Vs. Kingdom of Morocco* case, the decisive criteria applied by tribunals to judge as an investment are a substantial commitment, duration, the presence of economic risk as well as relevance for the host state's development.[35] The arbitral tribunal mentioned several criteria for the term "investment" under the ICSID Convention as it states:

> *[t]he doctrine generally considers that investment infers contributions, a certain duration of performance of the contract and participation in the risks of the transaction [....] in reading the Convention's preamble, one may add the contribution to the economic development of the host state of the investment as an additional condition.*[36]

From the judgment of the tribunal, one could observe that, in conceptualizing the notion of investment, the contribution of the activity to the economic development to the host state is regarded as an additional condition.[37] Moreover, cases that are going to be submitted to the ICSID need cause of action. In this regard, the Report of the Executive Directors stated that the disputes "must concern the existence or scope of a legal right or obligation or the nature or extent of the reparation to be made for breach of a legal obligation."[38]

2. The ICSID from the Perspective of Developing Countries

ICSID is an intergovernmental institution designed to promote the settlement of disputes between states and private foreign investors and enforcement of an award that reduces the risk of investment. The ICISD system is a product of mutual compromise that the host state submits the power of exercising settling over disputes with foreign investors in return for promotion of economic development with the belief that protecting foreign investors would facilitate investment and ultimately enhance economic development in developing countries. In this regard, there are benefits to developing countries.

---

*h*ttp://www.state.gov/documents/organization/188371.pdf)., last visited 01 October 2020. The U.S. Model BIT defines an investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

[34] Christoph, *supra* note 18, P.14.

[35] Ibid.

[36] SaliniConstruttori, (SpA and ItalstradeSpA vs Kingdom of Morocco), ICSID Case No.ARB/00/4), (Decision on Jurisdiction (2001), ICSID Reports 400, Para 52.

[37] ICSID *supra* note *5*, Art. 26.

[38] Subject matter jurisdiction of ICSID, *supra* note 32.

Even though there is no empirical evidence to prove that ratification led to an increased FDI, ICSID is an important part of a favorable regulatory system for international investors as it provides appropriate dispute resolution frameworks. Institutionally, the Secretariat of the ICSID carries out several functions that may benefit developing countries. The Secretary-general plays the gate-keeping function by screening claims brought by investors to ensure that illegitimate claims are not filed against them. Unlike other arbitral tribunal, Article 36(3) of the Convention allows the Secretary-general of ICSID to refuse registration of a request for arbitration 'on the basis of the information contained in the request' indicating 'that the dispute is manifestly outside the jurisdiction of the Centre'. This provides a filter on the disputes being filed and avoids unworthy claims coming to the Centre.[39] This looks significant as the majority of ICSID claims are lodged against developing countries by developed countries as is discussed in the following sections.

Besides, ICSID standard clauses and rules of procedure provide institutional support for the conduct of proceedings, assures the non-frustration of proceedings, and facilitates the award's recognition and enforcement. Consequently, ICSID improves the investment climate in developing countries and enhance foreign investment in the host state. This article acknowledges the difficulty that may be associated with the determination of the degree that ICSID contributes in attracting international investment, but contends that an independent dispute settlement mechanism is one of the strongest incentives for the protection of foreign investment in the host state.

As stated before, ICSID is designed to restore investors' confidence and promote foreign investment.[40] It is unlikely that a foreign investor will engage in FDI in the host State without concrete assurances of protection of foreign investment. Among others, consenting to ICSID jurisdiction is a means by which the foreign investor can enforce his substantive and procedural rights against the host State.[41]According to the ICSID Report, guaranteeing investment protection by providing a mechanism for investor-state arbitration "would provide additional inducement and stimulate a larger flow of private international investment into

[39] S. Puig and C. Brown, The Secretary General's Power to Refuse to Register a Request for Arbitration under the
ICSID Convention, *ICSID Review*, Vol. 27, No.1, (2012), pp. 172–191.

[40] Felix O. Okpe, Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in the Host States, *Richmond Journal of Global Law and Business* Vol.13, No.2, (2014), p.244.

[41]Ibid.

its territories, which is the primary purpose of the Convention.[42] Yet, the protection of foreign investment is not the only factor that may stimulate FDI. Potential foreign investors may also consider economic and political factors like market size, production costs, and political stability of the host state.[43]

Besides, by consenting to ICSID arbitration the host State shields itself against diplomatic protection and ad-hoc arbitrations.[44] Diplomatic protection and ad-hock arbitration have limitation compared with ICSID. Diplomatic protection is discretionary and the investor does not have an automatic right to employ this method of resolution.[45]Additionally, diplomatic protection can potentially affect the political relations between the two countries involved in the dispute and changes the investor-state dispute to a political dispute between the host country and the home country, and may result in intense international relations. Concerning ad-hock arbitration, it is not supported by a particular arbitration institution, which creates several procedural disadvantages and inefficiencies. Among other things, the parties are required to create an arbitration agreement that regulates several procedural issues including location, the language of arbitration, and selection of arbitrators.

Despite the growing participation of states in ICSID, there is also a growing concern that the Center inequitably prioritizes the protection of investors' rights regardless of any potentially adverse consequences on the developing countries.[46] There is often a criticism that, as a part of the World Bank, in investment disputes, the ICSID has favored multi-national corporations. In this regard, The UNCITRAL Rules provide some advantages to states. If the arbitration is conducted under UNCITRAL Rules, rather than under ICSID, the World Bank cannot use its influence to prevent a recalcitrant country from obstructing the arbitration process.

Since developing countries have a concern on the legitimacy and impartiality of the international investment dispute settlement process in general and the ICSID in particular they will seek ways to avoid the international investment regime.[47]

[42] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 5 I.L.M. 524 12 (Mar. 18, 1965).
[43] Ibid.
[44] Ibid.
[45] United Nations Conference on Trade and Development, New York and Geneva, *Course on Dispute Settlement: International Centre for Settlement of Investment Disputes*, UNCTAD/EDM/Misc.232, Module 2.1 (Oct. 3, 2003) available at http://www.unctad.org/en/docs/ edmmisc232overview_en.pdf last visited 27 October 2020.
[46] Wick, *supra* note 28, p.240.
[47] Ibid.

For example, the withdrawal of Latin American countries, such as Bolivia, Ecuador, and Venezuela from the ICSID's membership signals that changes are imperative to fix the problem of the current international investment regime.[48] Also, Professor Paul Szasz, a former Secretary-general of the ICSID**,** identified the main reasons why Latin American countries had yet to adhere to the Convention; they feared that by adopting the Convention they would be undermining the well-established principle of international law of no-intervention.[49]

The concern of developing countries is also further substantiated when one assesses case statistics of ICSID and additional facilities. In this respect, developing countries, which are the major global net capital importers, are the first to bear the heavy responsibility of confronting growing investment agreement complaints before ICSID arbitration and its additional facilities. For example, among 613 cases registered in ICSID and its additional facility Rules, 275 cases relate to developing countries in Africa and Latin America alone, which accounts for 45% of the caseload. One hundred and thirty-five (135) of these cases (22%) involved African State Parties.[50] Of 135 cases of the ICSID involving African State Parties, 123 were commenced under the ICSID Convention, while the four cases were initiated under the additional facility rules. Latin America accounts for 23% of the total caseload (140 cases). When we see individual countries, Argentina alone faced an incredible 54 ICSID complaints and Mexico faced 17 ICSID complaints.[51] Be the above as it may, in the next section the author discusses the major critics forwarded by developing countries against ICSID.

2.1. Consent to the ICSID Arbitration and the Exclusion of National Courts

One of the critics forwarded by developing countries is that ICSID is outsourcing the countries' judicial authority and threatening the national sovereignty of the host state. However, it has to be noted that this critic is not peculiar to ICSID, but a concern arises across the board to all investor-state arbitration. As indicated before, investment claim brought under the provision of the Convention shall, unless otherwise stated, be construed as granting consent to such arbitration to the exclusion of any other remedies. Thus, consent to

[48] Ibid.
[49] Vincentelli Ignacio, The Uncertain Future of ICSID in Latin America, *Law and Business Review of the Americas*, Vol. 16, No. 3, (2010), p. 449.
[50] International Investment Dispute, available at https://icsid.worldbank.org/en/Pages/about/Member-States.aspx# last visited on 20 September 2020.
[51] Vincentelli, *supra* note 49, p. 449.

arbitration excludes the national courts' role from the settlement of investment disputes. To this effect, an annulment committee of ICSID in the *Helnan vs. Egypt* case explains how consent to arbitration excludes the role of national courts as follows:

> *… the contracting states agreed upon a fundamental reversal of local remedy rule as it applied in customary international law unless the relevant state expressly imposed such a condition. Article 26 create[s] a rule of priority vis-à-vis another system of adjudication to avoid contradictory decisions*.[52]

Therefore, the contracting state cannot require the exhaustion of local administrative or judicial remedies unless there is a limit in otherwise agreement. Such limited exception may apply in cases where the state has given its consent to arbitration under the condition of the exhaustion of local remedies as provided under Article 26 of the ICSID Convention.

The practice of Latin American countries has also demonstrated the existence of these problems. They were at the beginning suspicious of arbitral proceedings as opposed to judicial proceedings, primarily because ICSID's jurisdiction threatens state sovereignty.[53] In addition, Latin American states continue to express dissatisfaction after the convention enters into force. For example, on May 11, 2008, the then Ecuador's President Rafael Correa publicly stated "we had no confidence in the World Bank arbitration branch (ICSID) that is hearing U.S oil company Occidental's lawsuit against Ecuador. Ecuador handed over its sovereignty when it signed international accords binding it to the Bank's ICSID''.[54]

Moreover, the constitution of Bolivia, which is enacted after its withdrawal from the ICSID, shows the dissatisfaction of the country against the jurisdiction of the Center. Accordingly, under Article 366, the new constitution states that "…foreign companies will not be able to sue Bolivia in any foreign jurisdiction nor resort to international arbitration or diplomatic protection."[55] This provision

[52] *Helnan international hotel AS Vs. Egypt*, A decision on annulment, *ICSID Case No ARB/*05/19, IIC, (2010), P.40.

[53] Vincentelli, *supra* note 49, p. 419.

[54] Gabriela Molina, *Ecuador Wary of World Bank Arbitration in Occidental Case,* USA today, May 11, 2008**,** http://www.usatoday.com/money/economy/2008-05-11-3404362337_x.htm, last visited on 10 October 2020.

[55] Fernando Cabrera, *Bolivian Voters Approve New Constitution as Government Continues to Nationalize Oil Assets,* INv. TREATY News, Feb. 4, 2009,http://www.investmenttreatynews.org/cms/news/archive/2009/02/04/bolivian-voters-approvenew-constitution-as-government-continues-to-nationalize-oil-assets.aspx 10 October 2020.

shows Bolivia's refusal to appear before ICSID and its choice for local courts. The same worry was mentioned in Venezuela's withdrawal from ICSID. In this regard, Venezuela explicitly criticized the ICSID system saying that accession to international conventions is made under pressure from transnational economic sectors that resulted in dismantling Venezuela's national sovereignty.[56]

Furthermore, ICSID has also rules which require the automatic recognition and direct enforceability of ICSID awards. Accordingly, the rules delocalized ICSID awards from the reach of the domestic system. The ICSID system excludes domestic courts not only from the exhaustion of local remedies but also excludes domestic courts from overseeing the recognition and enforcement of awards. According to article 54 (1) of the ICSID Convention, each state party to the Convention "shall recognize an award […] as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.''[57] Even the recognition and enforcement may be sought either in the host state, in the investor's state, or in any state that is a party to the ICSID Convention with no domestic court scrutiny.[58] Thus, national courts are excluded from questioning the binding nature of the award and must enforce the pecuniary obligations imposed by it, without any further legal recognition scrutiny.[59] On this issue, the worries of developing countries are more than developed countries mainly for two reasons. First, the parties to the dispute are not on equal footing. This is a dispute where powerful investors from developed nations claim action against developing nations and the investor is nearly always the claimant.[60] Second, ICSID has an affiliation to the World Bank where developed nations play a dominant role.

3.2. Final Award with No Appeal

Under the ICSID system there is no an appellate body to review the decision of the arbitral award. In fact, under the ICSID procedure, *an ad hoc committee* may annul the award upon the request of a party.[61] However, as distinguished from an appeal, an annulment is concerned only with the legitimacy of the process of the decision but not with its substantive correctness.[62] Annulment merely

[56] Vincentelli, *supra* note 49.
[57] ICSID Convention, *supra* note 5, Art.54 (1).
[58] *SOABI v Senegal*, French Court of Cassation 30 ILM 1136, (1991), Para.108.
[59] ICSID Convention *supra* note 5.
[60] For example, among 129 recorded ICSID cases that have involved Africa countries, 126 had States as respondents while in only three cases African parties are the claimant. See also Bryan Cave LLP International Investment Arbitration in Africa: Year in Review (2016), Pp 2-6.
[61] Christoph, *supra* note 7.
[62] ICSID Convention, *supra* note 5, Art. 52.

removes the original decision without replacing the merit to the award. To receive a valid award for that particular claim, the parties must request that the dispute be submitted to a new tribunal which is more time and resource consuming for developing countries.

Moreover, the grounds for annulment under the ICSID Convention are listed exhaustively in Art. 52(1). According to the Convention, the decisions of the tribunal will be annulled in case where the tribunal was not properly constituted, the tribunal has manifestly exceeded its powers, there was corruption on the part of a member of the Tribunal, there has been a serious departure from a fundamental rule of procedure, and if the award has failed to state the reasons thereof. However, improper application of the law is not considered as a reason for annulment.[63] Therefore, the aggrieved party may not rely on errors in the application of the proper law even if it leads to an incorrect decision.[64] As a result, there is currently no cure for an award decided on a substantively invalid basis.

2.3. The Cost of Arbitration is Onerous

The cost of ICSID arbitration is extremely high. The costs of a particular proceeding consist of the charges for the use of the facilities and expenses of ICSID, the fees, and expenses of the arbitrators, and the expenses incurred by the parties in connection with the proceedings. The average cost of ICSID arbitration is 4 million US dollars, and in some cases even exceed 40 million US dollars.[65] This is costly and it is very disturbing because the rules on how to share the costs between the parties to the dispute are very flexible. Mostly, both investors and the host country face uncertainties. So, the high costs and uncertainties in cost allocation make ICSID a weapon whereby the foreign investors threaten developing countries given their limited resource at disposal. Besides, as investors continue to be successful in securing monetary awards through the arbitration process, the number of cases is rising significantly.[66]

[63] Tekalegn, Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Road-map, *Beijing Law Review*, Vol. 10, (2018), pp.115-130.
[64] Id., p.123.
[65] Carlos G. Garcia, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration, *Florida Journal of International law*, Vol.16, (2004), P.301.
[66] Ibid.

Some studies indicated that in 70% of the public decisions addressing the merits of the dispute, investors' claims were accepted, at least in part.[67] Investors from developed countries against developing countries file the vast majority of new cases.[68] As the high cost of arbitration is an advantage for a party with stronger economic strength, and it cannot reflect the fairness and reasonableness of the dispute settlement mechanism.

In addition, the cost associated with ICSID is increasing because of the significant financial charges for that goes to arbitrators.[69] Unlike judges, arbitrators do not earn a flat salary and therefore, have a financial stake in the arbitration system.[70] Arbitrators' fees can range anywhere from $375 to $700 per hour.[71] Earnings could be far greater depending on where the arbitration takes place, the case's length, and the case's complexity.[72] However, the amount of fee that an arbitrator earns on a particular case is potentially correlated to the cost the disputing parties must pay. In this regard, a closer look into the ICSID's award against some Latin American countries helps to understand the cost of choosing ICSID. For example, in a case between Pernoco Vs. Ecuador, the tribunal awarded the US company US$ 449 million as compensation for Ecuador's violation of the Participations Contracts and the BIT.[73] This expensive investment arbitration award could, thus, affect the annual budget of a country in most developing countries.

2.4. Lack of Transparency in ICSID and the Dilemma Faced by Developing Countries

Arbitration is generally known for secrecy, and investor-state arbitration is no exception. While confidentiality suits commercial arbitration well, the same standard may not be appropriate in investor-state arbitration where tribunals are frequently required to balance investment protection with the varied public interest. Proceedings involving public interest by its nature need not be

[67] United Nations Conference on Trade and Development, Recent Developments in Investor-State Dispute Settlement (ISDS), (2013) *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf last visited 16 May 2020.
[68] Carlos, *supra* note 65.
[69] Pia, *supra* note 9, p.35.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Daniela Páez-Salgado, Perenco v Ecuador: An Example of a "Lengthy, Complex, Multi-faceted, Hard Fought and Very Expensive" Investment Arbitration, available at https://www.iisd.org/itn/en/2017/09/26/icsid-tribunal-awards-roughly-usd380-million-compensation-illegal-expropriation-ecuador-matthew-levine/ last visited 10 November 2020.

confidential. Therefore, it is sometimes inappropriate to conduct confidential arbitrations involving public interests.[74]

The ICSID's Arbitration rules create a presumption in favor of confidentiality.[75] Only the members of the tribunal, the parties, and the parties' agents, counsel, witnesses and experts may be present at the hearings. According to the ICSID Convention, the tribunal is prohibited from publishing the award without the consent of the parties.[76] By choosing arbitration, as opposed to judicial proceedings, parties have rejected public courts and have elected to keep their dispute private. One of the primary reasons parties claim they elect to settle their dispute through arbitration is of course confidentiality protection.[77] In addition, many foreign investors claim that confidentiality is necessary to protect intellectual property, trade secrets, or business information that may be disclosed as part of the arbitration proceedings.[78] To some extent, the 2006 amendments to the ICSID Convention Rules improved transparency by permitting third parties to attend hearings and publication of the award, but the new rules are dependent upon the consent of the parties.

Generally, several commentators and those states that have recently denounced ICSID have criticized the emulation of the private and confidential model dispute settlement for different reasons. First, investor-state arbitration is different from commercial arbitration. Investor-state disputes, compared to the traditional international commercial arbitration, justify the need for transparency for the arbitration proceedings and award. Unlike the traditional international commercial arbitrations, investor-state disputes involve governments as parties to the dispute. The disputes often involve public interests because their subject matter affects the provision of public health, human rights, environment protection, and labor standard. Thus, in the investment disputes, the public has an interest in assuring that decisions are made using proper procedures and taking due account of public interests.

[74] Benjamin H. Tahyar, Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant? *Fordham International Journal of Law,* Vol.93, No.10, (1986),p.37.
[75] ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration 8 (Discussion Paper, 2004), *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible Improvements of the Framework of ICSID Arbitration. Pdf, last visited 2 April 2020.
[76] ICSID, Rules of Procedure for Arbitration Proceedings, R.6(2), (11965), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/ CRR_English-final.pdf last visited 16 April 2020.
[77] Amanda Norris & Katrina Metzidakis, Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War', *Harvard Negotiation Law Review*, Vol. 31, No., 47, (2010), p.46
[78] Ibid.

Secondly, the lack of transparency highly affects the predictability of an award. The requirement that an award shall not be published without the consent of the parties will limit the public's access to the award.[79] Without access to prior award information and with no precedent, it is difficult for developing countries to predict the outcome of their dispute. Moreover, when awards are not published, it is difficult to analyze how the law is applied.[80] This, in turn, harms the credibility of the institution itself by developing countries that usually do not have appropriate experience ahead of a dispute. Most of all, due to ICSID's structure and association with the World Bank, which has close relations with large corporations, developing countries are skeptical of the tribunal's reliability in rendering an objective decision.[81]

Lastly, foreign governments' big corporations may also use confidential proceedings to conceal any abuse of the system. Confidential arbitration proceedings, in an environment where the risk of corruption is allegedly prevalent, raise the possibility of illegal practices and fraud between governments and foreign companies.[82] On this issue, Elizabeth Maul stated that ''in the past six years, the World Bank received more than 2,000 allegations of corruption and found a recurring pattern of bribery and kickbacks. The writer argues that investors could use their rights to conspire with governments to force dangerous investments on unwilling populations.[83] Not only this, confidentiality can also protect arbitrators by concealing the proceedings and awards from public scrutiny.

However, high level of transparency is not also necessary in the interest of most developing countries' governments. Indeed, they have a huge domestic pressure on them to publicize the proceedings. Thus, in addition to being beneficial to the investors' interests, confidentiality may also be in the states officials' best interests because of their fear of potentially embarrassing conduct by some officials. Thus, the political figures may sometimes want confidentiality in investor-state arbitration. But, this is not in the interest of the public as an investment dispute involves a great deal of environmental, human rights, and labor issues.

[79] Benjamin, *supra* note 74.
[80] Elizabeth, *supra* note, p.885
[81] Amanda, *supra* note 77, p.63.
[82] Elizabeth, *supra* note 21, p. 908.
[83] Ibid.

3. The BITs of Ethiopia and Reference to ICSID.

3.1. Ethiopia's Role during ICSID Negotiation

Ethiopia had participated in the drafting of the ICSID convention in 1960 and even hosted a round of negotiations in Addis Ababa.[84] Nonetheless, Ethiopia has not yet ratified the ICSID Convention and the country is still only a signatory to it.

To date, it is hard to know the official justification of why the country chooses to stay outside the ICSID system. However, the statements made by Ethiopia's representative during the drafting of ICSID give some clues. As a matter of principle, Ethiopia favored the establishment of the International Conciliation and Arbitration Center. Ethiopia's representative had argued for the Center saying that ''the investor would always regard courts as the instrument of the State. On the other hand, States might be reluctant to take action against investors because of the unfavorable impression such action might make on others''.[85] According to the representative's opinion, the proposed Center would be of value in improving relations between investors and governments.

Ethiopia had also raised some concerns. The first concern was about the ICSID's administrative council affiliation to the World Bank. Ethiopia pointed out that the president of the World Bank should not be entitled to nominate the Secretary-general on which developing countries are hardly represented.[86] The Secretary-general of the ICSID must therefore be fully independent of the influence the of the World Bank president since the nomination would give a sort of veto power to the president over the Administrative Council.[87]

Moreover, Ethiopia had raised its concern over the jurisdiction of the Center. Ethiopia proposed to limit the scope of the Center only to disputes specifically listed and to set a lower limit for the value of the subject matter of dispute in cases of claims of a financial nature.[88] However, the proposal was rejected saying that to limit the scope of the Center only to disputes specifically listed would unduly affect the free choice of states. States which did not wish to

[84] UNCTAD Series on Issues in International Investment Agreements II; United Nation, (2011), pp 24-27.
[85] History of ICSID, Vol.2, part.1, vailable a thttps://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf , last visited 27 October 2020.
[86] Id, p.245.
[87] Ibid.
[88] Id., p.253.

submit certain disputes to conciliation or arbitration could freely do so by withholding their consent.

Although Ethiopia is not a party to the Convention, most of its BITs contain clauses that refer to the jurisdiction of ICSID. Ethiopia has signed more than thirty-three BITs over the past two decades.[89] To the best knowledge of this author, all Ethiopia's BITs except BITs with Libya, Brazil, Russia, and Netherland, submit to ICSID's jurisdiction upon different conditions.[90] Thus, it is imperative to explore the essence of referring to ICSID jurisdictions amid the limitations mentioned in the previous sections. In this section, the author has discussed selected Ethiopia's BITs that refer to the ICSID.

3.2. The Preconditions in Refereeing to the ICSID Jurisdiction

Before taking the matter to ICSID, countries may make their consent conditional upon resort to amicable means, exhaustion of local remedies or limit the power of the Center to a certain class of disputes. In this respect, Ethiopia's BITs exhibit different features.

Firstly, all Ethiopia's BITs have put a requirement to resort to an amicable settlement of disputes between the host state and the investors. However, recourse to amicable means of dispute settlement is not a mandatory requirement. The requirement is qualified by the phrases such as, 'as far as possible', 'to the extent necessary' or 'when available'.[91] Hence, before resorting to ICSID jurisdiction, parties to the dispute are not necessarily under obligation to try amicable means. In the vast majority of the BITs, the disputing parties have no mandatory obligation to try amicable means.[92]

Second, almost all the BITs in which Ethiopia is a party or signatory provide a six-month time limit before the dispute is submitted to ICSID arbitration or other competent authorities. In the absence of an amicable settlement by direct agreement between the parties to the dispute within six months from the

[89] International Bilateral Treaty Navigator, list of Ethiopia's Bilateral Investment treaty with *Supra* note available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia last visited 27 October 2020.

[90] *Ibid.*

[91] For example, Article 11 (1) of Ethiopia- Belgium-Luxemburg provides that as far as possible, the Parties shall endeavor to settle the dispute through negotiations, if necessary by seeking expert advice from a third party.

[92] The BIT with Denmark (Article 9(1)), Egypt (Article 9), Germany (Article 11(1), South Africa (Article 7(1), Sweden (Article 8(1)**,** UK (Article 8(1))**,** Yemen (Article 9), Tunisia (Article 7) and France (Article 9) employ simple amicable means. Whereas the BIT with China (Article (9(3)), Belgium-Luxemburg (Article 11(1)), and Israel (Article 8(1) use a more clear and direct term of 'negotiation'. The BIT with Austria, under Article 12(1)) uses the term negotiation or consultation.

notification, the dispute shall be submitted either to the competent jurisdiction of the state where the investment was made or to international arbitration. The only exceptions are the BITs with the UK and Finland, both of which provide a shorter period. According to Article 8(1) and Article 9(1) of Ethiopia's BIT with the UK and Finland respectively, if the dispute has not been settled within three months from the date on which it was raised in writing, the dispute may be submitted to ICSID.

The third issue worth discussing is which parties are allowed to submit to the ICSID. In this regard, BITs have taken a different position. The majority of the BITs have singularly given the option to investors.[93] Hence, if any dispute should arise between Ethiopia and an investor of the other contracting party and not settled amicably, then the investor affected has the option to take the dispute before a competent court or international arbitration. Where the investor opted to refer the dispute to international arbitration, an *ad hoc* arbitral tribunal set up according to the arbitration rules laid down by the United Nations Commission on International Trade Law (UNCITRAL), ICSID, ICSID additional facilities or the International Chamber of Commerce are frequent choices mentioned in almost all Ethiopia's BITs.

The BITs with China, Egypt, and UAE have adopted somehow a balanced approach. In those treaties, if the dispute cannot be settled within six months after resort to a court or administrative tribunal, either party to the dispute shall be entitled to submit the dispute to the national or international arbitration.[94] In summary, in the vast majority of the BITs, investors enjoy the power to choose either a domestic court or international arbitration among international arbitrations. Conversely, Ethiopia, as a host state in most of the cases, does not have such options.

3.3. The Scope of Reference to ICSID: Consent or Agreement to Consent?

Scholars have differing opinions on whether an ICSID arbitration clause in a BIT is consent to ICSID jurisdiction or merely an offer to consent. Aron Brochures said that the consent contained in a BIT is a mere offer to consent subject to acceptance by the investor.[95] Other scholars like Professor Gaillard

[93] Ethiopia's BIT with Belgium-Luxemburg, Algeria, Austria, Denmark, France, Germany, India, Iran, Israel, Kuwait, Malaysia, South Africa, Spain, Sudan, Sweden, Turkey, UK, Switzerland, Yemen, and Tunisia left the issue to investors' choice.

[94] Article (9)(3) of Ethiopia-China BIT, Article (8(2) of Ethiopia-Egypt BIT, and Article (15(2) and (15(3) of Ethiopia- UAE BIT.

[95] Wick, *supra* note 28, P. 257.

look at the language of the arbitration clauses. He argues that consent contained in BITs should be divided into "unqualified consent" and "agreements to consent"'.[96] Gaillard contrasts the language in BITs and concludes that the wording "shall" constitutes unqualified consent and the wording "may" constitute an agreement to consent.[97] In this author's opinion, the latter argument is sound and in line with the normal usage of language in the law. BITs are usually entered into between countries that speak different languages; thus, different conclusions may be reached depending on how the language is used.

Coming back to the point, different BITs in Ethiopia has adopted different terminologies. Some of the BITs have adopted more clear language while others prefer vague and ambiguous clauses. To begin with, Ethiopia-Denmark BIT under Article 9(2) provides:

> *where the dispute is referred to international arbitration, parties in the dispute may agree to refer the dispute either to the ICSID provided both contracting parties are parties to the said Convention; or additional facility rules, if one of the contracting Parties is not a Contracting State of the Convention; or an international ad hoc tribunal established under the UNCITRAL.*

Demark-Ethiopia BIT is relatively balanced mainly for three reasons. First, the choice to submit a dispute to a different forum is left for the parties' agreement.[98] Second, this is in line with article 25(1) of the ICSID Convention that the jurisdiction of the center is conditional upon state membership to the Convention. Finally, yet importantly, the BIT contains a long list of alternatives along with ICSID, and therefore, depending on the nature of the dispute, the parties could have many choices. Ethiopia's BIT with Egypt,[99] UAE,[100] and the UK[101] follow the same approach.

Ethiopia and Belgium-Luxemburg BIT has adopted a different position. First, the dispute shall be submitted, at the option of the investor, either to the competent jurisdiction of the State where the investment was made or to international arbitration.[102] Here, the host state does not have the same power to choose between competent domestic jurisdiction and international arbitrations.

[96] Ibid.
[97] Ibid.
[98] Article (9(2)) of Ethiopia-Denmark BIT.
[99] Article 8(2) of Ethiopia-Egypt BIT.
[100] Article 15(4) of Ethiopia-UAE BIT.
[101] Article 8(3) of Ethiopia-UK BIT.
[102] Article 11(2) of Ethiopia-Belgium-Luxemburg BIT.

Second and most importantly, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by either ICSID or other types of arbitrations listed in the BIT.[103] Thus, consent contained in Ethiopia and Belgium-Luxemburg BIT is unqualified consent that does not require the further agreement of parties. It is clearly stated that the two parties already have consented to the jurisdiction of ICSID if both of them have become a party to the said Convention. Moreover, the delocalization of investment cases from the reach of the domestic court is expressly acknowledged in this BIT. To this end, both parties waive the right to take the dispute to all domestic administrative or judiciary remedies to be exhausted by consenting to the ICSID.[104]

The third BIT selected for discussion is the Ethiopia-Israel BIT. The scope of expression of consent is clearer and more unconditional under Ethiopia-Israel BIT. According to Article 8(3) of the BIT, ''[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration under the provisions of this Article''. The BIT unequivocally underlined that the parties to the Convention have given consent and further negotiation is not a requirement. The condition provided in *the BIT* is *that* ICSID is an option if both contracting parties are parties of ICSID Convention and that an additional facility is an option if only one state is a party to the ICSID Convention. Like many other BITs, the investor, not the host state, has a choice to submit the dispute to a competent court of the host state or a list of international arbitration tribunals including ICSID.[105]

Fourth, in Ethiopia and France BIT, any dispute concerning the investments occurring between one Contracting Party and a national or company of the other Contracting Party shall be settled amicably between the two parties concerned.[106] If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall at the request of the national or the company concerned is submitted to arbitration or adjudication. The dispute could be submitted to a competent court of the Contracting Party; or ICSID if the Contracting Party, a party to the dispute has acceded to it; or the Additional Facility; or an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commissions on International Trade Law (UNCITRAL).[107]

[103] Ibid.
[104] Ibid.
[105] Article 8(2) of Ethiopia-Israel BIT.
[106] Article 9 of Ethiopia-France BIT.
[107] Ibid.

In terms of word usage, Ethiopia and France BIT employs "shall" which implies the host state has consented to settle investment disputes either by a competent court or other international arbitration, ICSID included, upon the request of the investor concerned. However, the BIT has not made ICSID jurisdiction conditional upon the accession of both parties to the convention. According to the BIT, if the party to the dispute acceded to the ICSID Convention, the dispute shall at the request of the national or the company concerned be submitted to the center. Thus, a dispute could be submitted to ICSID if the Contracting Party, a party to the dispute, has become a party to ICSID convention. This creates ambiguity and vagueness in the interpretation. It neither uses the statement where both Contracting Parties are members of the Convention nor the BIT even says contracting parties. The issue seems intentional when looking into the way Article 9(c) is structured. Overall, the additional facility is available only if one of the Contracting Parties is not a Contracting State of the Convention. For example, Article 11(2) (b) of Ethiopia-Germany BIT clearly provides a resort to the Additional Facility be made only when at least one of Contracting Party is a member of the Convention, but not both.[108] However, in Ethiopia-France BIT this is not a requirement. Consequently, one cannot interfere with Article 9(c) that ICSID is available if both states are parties to the ICSID Convention and then the additional facilities are available in both states are not parties to the convention.

To sum up, the way consent to ICSID jurisdiction is expressed in Ethiopia BITs is not uniform. In some of the BITs, expressions of consent to ICSID jurisdiction are perfect and complete. They are sufficient to assert the jurisdiction of the ICSID; if the investor chooses ICSID, the state's consent contained in the BIT is enough to establish jurisdiction. Other categories of Ethiopia's BITs contain clauses that provide consent to agree to ICSID jurisdiction. In those BITs, the host state and the investor are required further agreement to consent to the jurisdiction of ICSID.

3.4. Submission to ICSID Arbitration and the Exclusion of Exhaustion of Local Remedies

In the previous section, it has been discussed that consent to ICSID arbitration excludes national courts unless the contracting state may notify ICSID of any class of disputes that it would not consider submitting to ICSID jurisdiction[109] or a Contracting State may, as a condition of its consent to ICSID arbitration, insist

[108] Article 11(2)(d), Ethiopia -Germany BIT.
[109] ICSID Convention, *supra* note *5 Art. 25(4).*

that the parties exhaust local remedies first.[110] With this in mind, this author has analyzed whether either of these conditions is enshrined in Ethiopia's BIT. The analyses revealed that except BITs with China and Tunisia, none of Ethiopia's BITs reference to ICSID jurisdiction excludes certain classes of disputes. Nor exhaustion of local remedies is a requirement. Here, the author would like to mention Ethiop-Germany as an example. Ethiopia-Germany BIT has expressly excluded the requirement of exhaustion of local remedies. According to Article 11(3) of Ethiopia-Germany BIT, the investor is not under obligation to exhaust remedies available in competent courts in Ethiopia before submitting the case to ICSID. In case the investors choose to submit the dispute to the local court of the host state, the move cannot prohibit the former from taking the matter before ICSID. Even in this case, the dispute can be submitted to ICSID if the local court has not yet rendered a decision.[111] In Ethiopia-Finland BIT too, Article 9(3) provides that an investor who has submitted the dispute to a national court may nevertheless have recourse to ICSID before a judgment has been delivered on the subject matter by a national court.

The BIT between China and Ethiopia is a bit different. First, all disputes other than the amount of compensation for expropriation has to be submitted to the competent court of the Contracting Party accepting the investment.[112] The class of disputes that would be considered by ICSID is only those disputes involving the amount of compensation for expropriation. Even for those disputes involving the amount of compensation for expropriation, the ICSID shall not apply if the investor concerned has resorted to the domestic courts.[113] Hence, in Ethiopia-China BIT, those classes of dispute other than the amount of compensation for expropriation would not be considered by ICSID.

The BIT between Ethiopia and Tunisia does not at least allow forum shopping by the investor once it choices the competent court or administrative tribunal of contracting states. According to Article 9(3) of Ethiopia and Tunisia BIT, the investor shall be entitled to submit the dispute to ICSID only if the investors concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is a party to the dispute.[114] In summary, the provisions of the Ethiopia BIT would make it far easier for companies to sue governments before ICSID

[110] Id., Article 26.
[111] Article 11(3) of Ethiopia- Germany BIT.
[112] Article 9(2) of Ethiopia-China BIT.
[113] Id., Article 9/3/.
[114] Article 9(3) of Ethiopia - Tunisia BIT.

without exhaustion of local remedies and it provides no possibility of reconsideration of the award. Consequently, all the worries of developing states discussed before are a concern for Ethiopia as well.

Conclusion

The ICSID Convention has undeniable benefits to both investors and host states. For the investor, it provides direct access to an effective international forum should a dispute arise. For those states, more specifically developing states, it improves its investment climate. However, developing states have concerns that lead some of them to withdraw, stay out of the convention, or to take defensive steps of quitting membership. Firstly, developing countries have become concerned about the complex nature, duration, and cost of arbitration. Secondly, developing countries are in dilemma with ICSID's lack of transparency given some investment dispute involves public interests. Yet another concern about investment arbitration is the exclusion of local remedies and the absence of appeal system. Although the ICSID award with procedural inefficiencies can be annulled, there is no recourse for substantively flawed rulings. Hence, an appellate system should be introduced to permit the correction of legal errors that might otherwise inappropriately affect developing nations. Finally, most of Ethiopia's BIT contains provisions submitting jurisdiction of ICSID with inconsistent expressions. While some of the BIT provides explicit consent to ICSID jurisdiction, others only provide an agreement to consent. Besides, all Ethiopia's BITs would make it far easier for companies to sue the government before ICSID without exhaustion of local remedies and with no possibility of reconsideration of the award. Introducing a model bilateral investment treaty would help Ethiopia in negotiating new or revisiting the existing BITs with clear investor-state dispute settlement clauses that should make consent to ICSID jurisdiction limited to classes of the disputes with exhaustion of local remedies.

The Regulation of Illicit Cultural Heritage Trafficking under Ethiopian Law: Analysis of the Problem of Non- comprehensive Criminalization and Inconsistent Penalties

Tilahun Yazie Tibebu[♦]

Abstract

The illicit cultural heritage trafficking belongs to the most profitable criminal activities alongside illicit drug and firearms trafficking. It is impoverishing the history, archeological context, culture, and similar resources of states. Furthermore, it has now become a security concern, and thus, the intervention of criminal law is highly required. To circumvent the problem, the Research and Conservation of Cultural Heritage Proclamation of Ethiopia, Proclamation 209/2000, incorporates provisions that regulate crimes related to cultural heritage trafficking. Writers have indicated that the incorporation of criminal offenses within administrative legislations, including Proclamation 209/2000, may create a problem of over-criminalization. Specifically, the Proclamation has been criticized for prescribing a penalty in a way that could lead to over-criminalization. This article nonetheless explores another equally problematic dimension of the Proclamation related to inadequate criminalization. Accordingly, the article argued that the inadequacy of the law results from non-comprehensive criminalization and inconsistent penalties. Following doctrinal research methodology, the article critically examined relevant literatures, laws, policies, international conventions, and soft laws. Besides, the author employed the Four-stage Network Model to explain the nature of cultural heritage trafficking as a transnational and organized crime. Consequently, for the sake of triggering academic and policy debates, the article recommends that the UNODC non-binding guidelines and the UNTOC could be referred to as a guide to fill the gaps with due human rights safeguards.

Key Words: Ethiopia's Criminal Law, Cultural Heritage Trafficking, Non-comprehensive Criminalization, Inconsistent Penalties, Network Model, Transnational and Organized Crime.

Introduction

♦ LLB, LLM, LLM, and Ph.D. Candidate (Lecturer in Law, Bahir Dar University, Ethiopia). Email: tilahunyazie@gmail.com. The author owes gratitude to Andrew Botterell (Dr.), Alelegn Wenedem Agegnehu (Ph.D. Candidate), Pim Geelhoed (Dr.), Tessema Simachew Belay (Dr.), Simeneh Kiros Assefa (Dr.), and the anonymous reviewers—for their direct or indirect support, guidance, and constructive comments. But all the errors are mine.

Ethiopia's cultural heritage has frequently been subjected to looting during armed conflict or peacetime.[1] Despite rare notable repatriation cases,[2] trafficking in Ethiopia's cultural heritage remains a persistent problem.[3] In response to the problem, Ethiopia's Constitution,[4] Cultural Policy,[5] and heritage protection legislation recognize the importance of combating cultural heritage trafficking. In particular, the Research and Conservation of Cultural Heritage Proclamation No. 209/2000 (Hereinafter, Heritage Protection Proclamation) is the main heritage protection law that regulates the management, preservation, and protection of cultural heritage. [6]

The Heritage Protection Proclamation contains provisions criminalizing offenses related to cultural heritage trafficking.[7] Even though the Proclamation is part of administrative law, it also contains criminal offenses on cultural heritage trafficking. The legislature's act of attaching criminal provisions within this administrative[8] law is problematic since the law aims to regulate a purpose other than the prevention of crime.[9] Particularly, the preamble of the Proclamation specifies that the purpose of the law is to protect and preserve cultural heritage. It does not mention the protection of 'common good' or words implying the prevention of crime as the purpose of the law.[10] Also, Simeneh and Cherinet hinted that the 'over-criminalization' problem is reflected in the punishment

[1] Rita Pankhurst, The Library of Emperor Tewodros II at Mäqdäla (Magdala), *Bulletin of the School of Oriental and African Studies*, Vol. 36, No. 1, (1973), p. 19.

[2] Richard Pankhurst, Ethiopia, the Aksum Obelisk, and the Return of Africa's Cultural Heritage, *African Affairs*, Vol. 98, No. 391, (1999), p. 236

[3] UNESCO, Ethiopia Strengthens its Capacities to Fight the Illicit Trafficking of Cultural Property through Prevention, Cooperation and Restitution, (8 July 2018), available at http://www.unesco.org/new/en/member-states/single-view/news/ethiopia_strengthens_its_capacities_to_fight_the_illicit_tra/, last accessed on 20 September 2020.

[4] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazetta*, (1995), Articles 41(9), 51(3), 91(2). (Hereinafter, FDRE Constitution).

[5] National Cultural Policy, Ministry of Youth, Sports and Culture of Ethiopia, (1997), Section 4.3 (Hereinafter, Cultural Policy (1997)); The Revised Cultural Policy of the Federal Democratic Republic of Ethiopia, Ministry of Culture and Tourism, (2016), Section 2.1.11, 2.6, 2.12, 2.1.5, 2.11.1 (Hereinafter, Second Cultural Policy (2016)).

[6] Research and Conservation of Cultural Heritage Proclamation, Proclamation No. 209/2000, *Federal Negarit Gazetta*, (27 June 2000). (Hereinafter, Heritage Protection Proclamation)

[7] Id., Article 45.

[8] Being part of the Continental Code tradition, the Criminal Law is expected to be a single body of law which is to be manifested in a unified Criminal Code. See Simeneh Kiros Assefa and Cherinet Wordofa, "Over-criminalisation": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia, *Journal of Ethiopian Law*, Vol. 29, No. 1, (2017), p. 57, 59-60, 80, and 82.

[9] Protection of 'public good' is the purpose of Ethiopia's Criminal Code. See, Criminal Code, *infra* note 29, article 1.

[10] For further discussion on the concept of common good under Ethiopia's criminal law, See, Philippe Graven, *An Introduction to Ethiopian Penal Law*, Hail-Selassie I University and Oxford University Press, (1965), p. 5-8. Article 1 of the Criminal Code is almost the replica of Article 1 of the 1957 Penal Code.

clause of the Heritage Protection Proclamation.[11] This dimension of the law needs, and is expected, to be remedied to overcome the problem of 'over-criminalization'.

Nonetheless, there is a justifiable reason to worry that Ethiopia's criminal law, including the Criminal Code and the Heritage Protection Proclamation, has shown gaps related to the criminalization of cultural heritage trafficking. For instance, the Proclamation does not specifically criminalize art dealers who conceal the original provenance of a cultural heritage although they are key participants of the illicit artifacts trade. Additionally, there appears to be an inconsistent pattern while fixing the amount of punishment attached to the offenses prescribed under Article 45 of the Heritage Protection Proclamation. Such inconsistency seems to inaptly disregard the critical and relatively balanced role of major illicit actors, in the trafficking network, for the completion of the cultural heritage trafficking process. These issues are not examined in academic literature in connection with cultural heritage trafficking, specifically on Ethiopia's law.

Therefore, in this article, Ethiopia's laws on cultural heritage trafficking is analyzed to provide an adequate criminalization scheme. In examining such an unexplored area, this article inquires the following questions: How does Ethiopia's law address the crimes of illicit cultural heritage trafficking? To what extent Ethiopia's law that criminalizes illicit acts of cultural heritage trafficking considers the transnational and organized nature of the crime? How should gaps that are reflected in Ethiopia's law related to the criminalization of cultural heritage trafficking be addressed?

To do so, the doctrinal legal research method is employed. Thus, relevant literatures, legislations, policies, international treaties, standards, and soft laws are examined. This article argued that to formulate an adequate criminalization scheme concerning cultural heritage trafficking Ethiopia needs to consider the four consecutive networking stages of this transnational and organized crime.

These sets of themes in the article are organized under three sections. The first section presents the four-stage consecutive Network Model could help to explain the nature of illicit cultural heritage trafficking. This part set the context with which Ethiopia's cultural heritage laws would be examined. The second section examines the crimes of cultural heritage trafficking as recognized under Ethiopia's law and situates them in their proper category of the trafficking

[11] Simeneh and Cherinet, *supra* note 8, p. 79 at foot note no.166.

network. The third section analyzes the gaps in light of the networking model. The article identifies two main gaps related to criminalization—incomprehensive criminalization and inconsistent penalties. Finally, the article provides concluding remarks. It points out two possible way-outs, consideration of the UNTOC and the UNDOC model guidelines as a guide, to address the gaps that are identified in section three. These recommendations aim to shed light on further academic discussion and debate on whether there is a need to reform Ethiopia's legislation or not.

1. Cultural Heritage Trafficking as a Transnational and Organized Crime Network

In this section, the author indicated the appropriate criminological framework which will help to unpack and evaluate Ethiopia's law related to cultural heritage trafficking is a 'Network' model of transnational and organized crime.

It has been suggested that the crime of cultural objects trafficking usually crosses boundaries, and it involves organized criminals.[12] According to the UN, the illicit cultural heritage trafficking is mainly committed in the form of transnational organized crime.[13] Thus, the crime could be explained better through a model that explains transnational and organized crimes. In particular, the Network model is preferable to the Hierarchical model to understand the nature of transnational and organized crimes. It means that the crime is often committed in a series of actors where each actor operates independently without long-term agreements, formal hierarchies, and command and control structures.[14] While the Network model recognizes that the crime of illicit cultural heritage trafficking shows flexibility and independence of actors, the Hierarchical Model, views the crime as an organization with a centralized command and control structure as it can be observed in some mafia syndicates and military-like groups.

[12] For the purpose of the Convention, 'organized crime' and crimes having a 'transnational nature' are defined under Article 2(a) and 3(2) of the UNTOC Convention respectively. See, UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, (8 January 2001), A/RES/55/25, available at https://www.refworld.org/docid/3b00f55b0.html, last accessed on 15 September 2020. (Hereinafter, UNTOC)

[13] Dona Yates, The Global Traffic in Looted Cultural Objects, in N. and Carribine, E (eds.), *The Oxford Encyclopedia of Crime, Media and Popular Culture*, Oxford University Press, (December 2016), p.8.

[14] Peter B. Campbell, The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage, *International Journal of Cultural Property*, Vol. 20, No. 2, (2013), p. 114, 118; Renate Mayntz, Organizational Forms of Terrorism: Hierarchy, Network, or a Type sui generis?, Max Planck Institute for the study of societies', MPIfG Discussion Paper 04/4, (2004), p. 8.

The specialization of criminal activities could vary in each stage of the trafficking network with multiple participants from source, transit, and market countries operating according to their field of specialization. Writers have employed different methods of naming and counting each stage of the trafficking process.[15] For instance, Peter Campbell[16] has described four consecutive stages and types of role specialization, which are: (1) 'looting', (2) acts committed by 'early-stage intermediaries', (3) acts committed by 'late-stage intermediaries', and (4) 'collecting'. Similarly, Kenneth Polk[17] has identified four stages: (1) 'extractors', (2) 'middlemen', (3) 'dealers', and (4) 'buyers.' Also, Jesica Dietzler has identified the 'four-stage progression model' that would help to analyze the illicit antiquities trade from the source to end.[18] These are: (1) 'theft', (2) 'transit', (3) 'facilitation', and (4) 'Sale/purchase'.[19] Even though writers slightly differ on how to count and label the networking phases, their terminologies are similar in spirit. This is because there is a "convergence in these various expressions of constituent network roles."[20] For instance, looters, extractors, and thieves are mentioned by Campbell, Polk, and Dietzler respectively to describe the typical character of criminals in the first stage. Essentially, all of these first-stage actors have a similar specialization—locating or finding and abstracting a cultural heritage from its original place. Similarly, the second, the third, and the fourth stage actors play the role of smuggling, facilitating, and collecting respectively although the stages are uniquely expressed by different writers. For the sake of consistency, Campbell's model, which focuses on the acts rather than the actors, will be primarily used to identify the illicit acts committed at each stage.

Though the illicit cultural heritage trafficking is mainly analyzed through the lens of the networking model, the possibility of different forms of organization of the trade is not necessarily excluded. For instance, Mackenzie and Davis, in their ethnological empirical study on Cambodia's artifacts trafficking problem, indicated that in source countries there may be long-term and territorial control

[15] Simon Mackenzie and Tess Davis, Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network, *British Journal of Criminology*, Vol. 54, No. 5, (2014), p. 723.
[16] Campbell, *supra* note 14, p.116
[17] Kenneth Polk, the Global Trade in Illicit Antiquities: Some New Directions? ,in L. Grove and S. Thomas (eds.), *Heritage and Crime: Prospects, Progress and Prevention*, Palgrave Macmillan, (2014), p. 212-213.
[18] Jessica Dietzler, on 'Organized Crime' in the Illicit Antiquities Trade: Moving Beyond the Definitional Debate, Trends Organ Crim, Vol. 16, No.3, (2013), p. 377.
[19] Id, p. 378.
[20] Mackenzie and Davis, *supra* note 15, p.723. Bator also considers three stages in the trafficking network: (1) looters ('local diggers'), (2) 'black market middlemen' and (3) 'local or foreign dealers.' See, Bator, P. M., An Essay on the International Trade in Art, *Stanford Law Review*, Vol 34, No. 2, (1982), 275-384. Here, it is clear that Campbell and Polk divided Bator's the 'middlemen' category into two specific categories.

by gang-like figures; whereas, in destination countries, the relation could be more opportunistic and flexible.[21] This implies that the organizational structure of the illicit trafficking in cultural property might vary depending on local peculiarities. But Mackenzie and Davis do not exclude the consecutive stages from source to transit and finally to market countries. Their ethnological study is rather framed by taking into account the progressive consecutive stages.

Whether the nature of the organization of the trade is characterized by a Network or a Hierarchical model, the direction of the transnational trafficking process remains the same which flows from source to transit and then to destination countries. There will be a sequence of events within which different actors could involve in different phases of the trafficking process, whether the organization of the trade remains flexible or not. Thus, analyzing a national law in line with the Network model is relevant so long as the purpose remains to identify those illicit acts that could be committed in the trafficking process and to properly criminalize such conduct. Consequently, Ethiopia's criminal law is expected to address each of the illicit acts in the trafficking network. Failure to do so may lead to non-comprehensive criminalization.

This is because such non-comprehensive criminalization of illicit acts may partly lead to the problem of under-criminalization. Under-criminalization problem often occurs "when: (1) criminal (in its nature) and harmful (in its results) conduct is not charged, prosecuted, or penalized; and (2) the sentence imposed is clearly inadequate to the harmful nature and consequences of the crime."[22] Thus, failure to criminalize illicit acts related to cultural heritage trafficking that are criminal by nature may result in a risk of inadequate criminalization. This is because the major illicit actors in the trafficking process play an invaluable role in the completion of the cultural heritage trafficking process. In effect, one of the under-criminalization problems—non-comprehensive criminalization—would adversely affect the protection of

[21] Neil Brodie, The Criminal Organization of the Transnational Trade in Cultural Objects: Two Case Studies, in Saskia Hufnagel and Duncan Chappell (Eds.), *The Palgrave Handbook on Art Crime*, Palgrave Macmillan, (2019), p. 440; Mackenzie and Davis, *supra* note 15, p. 736-737

[22] Kamensky, Dmitriy, American Peanuts v. Ukrainian Cigarettes: Dangers of White-Collar Overcriminalization and Undercriminalization, *Mississippi College Law Review*, Vol. 35, No. 1, (2016), p. 153. On the contrary, providing civil preventive orders instead of criminalization, while there is a justifiable reason to provide criminalization, may result in a problem of under-criminalization which will then lead to a risk of deprivation of procedural safeguards that are absent in civil proceedings. See, Andrew Ashworth and Lucia Zedner, Preventive Orders: A Problem of Undercriminalization?, in R.A. Duff and et al. (eds.), *The Boundaries of Criminal law*, Oxford University Press, (2010), p. 82-87. This implies that the under-criminalization problem, depending on the situation, may affect either public good in some cases or jeopardize individual liberties in other cases.

cultural heritage trafficking whenever the law fails to criminalize the illicit acts that are criminal by their nature.

Almost all the illicit acts the four stages of the trafficking network could have the potential to impact public good within the meaning of Article 1 of Ethiopia's Criminal Code. As a result of their transboundary effect and the gravity of the problem, the impact of the crimes has even transcended the national border and has now become a global security concern.[23] Accordingly, illicit activities related to cultural heritage trafficking threatens public peace, security, and order, and thus, could justifiably trigger the intervention of the criminal law.

Additionally, the penalty attached to each crime is expected to take into account the key role of almost every stage actor as the majorities of them play a relatively balanced role for the commission of the trafficking process.[24] All the offenses in the trafficking network are not expected to contain the same amount of penalty. However, the amount of penalty should take into account the transnational nature of the crime and must not jeopardize the mutual co-operation regime in criminal matters on transnational and organized crimes. Usually, states may refuse mutual co-operation when the penalties are significantly severe penalties on the one hand—like the case of the death penalty or life imprisonment or artificially elevated penalties. On the other hand, states could refuse to mobilize resources of the mutual co-operation system when the crime is trivial. Therefore, it is essential to look into the international trend to know how the amount of penalty could affect the international mutual co-operation system in criminal matters. In this respect, the UNTOC provides a better picture by indicating that organized crimes need to be treated as 'serious crimes' with a maximum penalty of at least four years of deprivation of penalty for mutual co-operation purposes.[25] Here, the UNTOC is referenced due to its advanced nature and wider acceptance by the international community.[26] The

[23] In 2017, the UNSC resolution 2347(2017) "formally recognized that threats to cultural heritage are a major security issue and that the international community has a direct responsibility to protect it." UNESCO, *Fighting the Illicit Trafficking of Cultural Property: A toolkit for European Judiciary and Law Enforcement*, p. 5. available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/movable/pdf/Toolkit_01.pdf, last accessed on 15 September 2020

[24] In most cases, determining the amount of proportional punishment depends on the theory a given legal system is more inclined to. For the discussion on Retributionists and Utilitarian theories of punishment, See, Johannes Keiler and David Roef(eds.), *Comparative Concepts of Criminal Law*, 2nd edition, Intersentia: Cambridge (2016), p. 19-26. Determination of the exact amount of punishment is mostly made intuitively through trial and error. See, Simeneh and Cherinet, *supra* note 8, p. 78.

[25] UNTOC, *supra* note 12, Article 2(b).

[26] 147 states are parties to the Convention. Ethiopia ratified the Convention on 23 July 2007 available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en, last accessed on 28 October 2020

spirit of the Convention could serve as a representative of international emerging trends in the field of countering transnational and organized crimes. Similarly, Guideline 16 of the UNODC's non-binding guideline recommends that the crimes related to cultural heritage trafficking be considered as serious offenses.[27]

Thus, Ethiopia's law needs to provide a penalty that takes into account such international trends to effectively counter the transnational and organized crime of illicit cultural heritage trafficking. Cultural heritage trafficking offenses are one manifestation of the transnational and organized crimes that could logically be covered by the UNTOC for mutual co-operation purposes. Thus, while this article refers to the consistency of penalties, it takes into consideration such international trend as reflected in the UNTOC that requires 'seriousness' of the crime for mutual co-operation purposes. Consequently, there is a possibility that the major offenses of cultural heritage trafficking under Ethiopia's laws, other than crimes of omission, to be treated as serious offenses.

Yet, the legislature of Ethiopia, in adapting the international instruments, has to consider the minimum obligations, and the spirit of the instruments. This article, therefore, signals the possibilities of reconsidering the penalties attached to the crimes of cultural heritage trafficking in a way that would not undermine the transnational mutual co-operation process and the transnational and organized nature of the crime. Thus, the frame of analysis to examine the penalties stipulated in Ethiopia's cultural heritage protection laws and the Criminal Code is not a specific principle of criminalization or punishment. In effect, the amount of penalties attached to each crime is not analyzed in the context of under-criminalization. The amount of penalties would nonetheless be evaluated in light of the general spirit of major emerging international trends and initiatives.

2. Criminalization of Cultural Heritage Trafficking in Ethiopia

In the preceding section, it has been discussed that illicit cultural heritage trafficking is not an act that constitutes a single crime rather it is a process that could involve multiple crimes to be committed at four consecutive networked stages. In this section, as stated before, crimes stipulated in Ethiopia's law

[27] Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, approved by the Commission on Crime Prevention and Criminal Justice of the UNODC, Vienna, and adopted by the General Assembly Resolution 69/196, in December 2014(Hereinafter, Operational Guidelines), available at https://www.unodc.org/documents/organized-crime/trafficking_in_cultural/RES-681-86/A_RES_69_196_E.pdf, last accessed on 22 July 2020. This Guidelines aim to rectify the existing global penal minimalism of binding treaties in the field of cultural heritage trafficking.

related to cultural heritage trafficking are analyzed in light of the Four-stage Network Model to identify the gaps reflected in the law.

2.1. Crimes Committed at the First Stage

In the first stage, the crimes are committed by individuals that are specialists in locating a cultural heritage since they have local knowledge on the whereabouts of an item.

a) Crimes Related to Theft

Ethiopia's law takes relatively a firm stand on crimes related to the theft of cultural heritage. For instance, Article 45(2)(a) of the Heritage Protection Proclamation states that 'unless the Penal Code provides for a more severe penalty, any person[28] who […] commits theft on cultural heritage shall be punished with rigorous imprisonment of not less than seven years and not exceeding ten years.' This provision does not list out the specific elements of the crime of theft. But a cross-reference to Article 665 of the Criminal Code[29] reveals that theft is an intentional crime that could be committed with the purpose of obtaining unlawful enrichment, to the benefit of oneself or procuring a benefit to a third party, by abstracting another person's[30] movable property or a thing detached[31] from immovable property. Hence, it is a crime that cannot be committed by way of negligence.

The nature of the penalty stated under Article 45(2) (a) of the Heritage Protection Proclamation is rigorous imprisonment. According to Article 108(1) of the Criminal Code, rigorous imprisonment[32] would be attached to crimes of 'very grave nature committed by criminals who are particularly dangerous to society.[33] Referring to the Criminal Code is plausible since the general principles of the Criminal Code apply to 'those regulations and laws except as

[28] Article 45(2)(c) of Heritage Protection Proclamation specifically criminalizes illicit acts to be committed by officials in the exercise of their official duty.

[29] The Criminal Code of Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, *Federal Negarit Gazetta,* (9 May 2005). (Hereinafter, Criminal Code)

[30] The abstraction of jointly owned movable properties is governed by Article 667 of the Criminal Code. Also, an abstraction of properties from the deceased or objects buried with the deceased is regulated by Article 668 of the Criminal Code.

[31] If the detachment causes damage, during theft, it would result in an additional concurrent crime. (See, Criminal Code, *supra* note 29, Article 665(2), 689-691. Heritage Protection Proclamation, *supra* note 6, Article 45(2)(b)

[32] To determine the quantum of punishment, the following provisions are relevant. See, Criminal Code, *supra* note 29, Articles 88(2), 178-183, 188, and 189) and the sentencing guideline issued by the Supreme Court. See, Federal Supreme Court, Revised Federal Sentencing Guideline, *Directive 2/2013*, (1 October 2006 E.C)

[33] Article 108 of the Criminal Code implies that the mode of enforcement of penalty is relatively more severe than simple imprisonment. (See, Criminal Code, *supra* note 29, Article 110).

otherwise expressly provided therein.'[34] It implies that the legislature considers theft of cultural heritage as a very serious crime that would be met by a harsh legal consequence, i.e., rigorous imprisonment.

Additionally, Article 45(2)(a) of the Heritage Protection Proclamation takes into account the possibility of increasing the penalty if the Criminal Code provides a more severe penalty. Such general cross-reference to the Criminal Code in a desperate search of a more severe penalty is a violation of the principle of legality of criminal law which requires specificity or enumeration of every element of a crime so that the public could take proper notice of the crime. This would lead to the problem of over-criminalization.[35] The fact that the provision shows the problem of over-criminalization does not mean that it should be abrogated. The offenses provided in the Proclamation should, however, be analyzed in a way that could help to update offenses stated in the Criminal Code by considering the transnational and organized nature of the crime of illicit cultural heritage trafficking.

Until Article 45(2) of the Heritage Protection Proclamation is wholly incorporated within the Criminal Code with proper synergy with the existing offenses, it is possible to explore related provisions of the Criminal Code that are referenced by Article 45(2)(a) of the Proclamation. Article 669 of the Criminal Code provides a greater penalty than the one prescribed under Article 45(1)(a) of the Proclamation.[36] Particularly, Article 669(1)(a) of the Criminal Code states that if theft is committed on 'sacred or religious objects, or objects of scientific, artistic or historical value, in places, of worship or museums or, other public buildings or buildings open to the public', the crime will be elevated to the status of 'aggravated theft'.[37] Thus, under Article 669(1)(a) of the Code, the amount of penalty could be either simple imprisonment of not less than one year of rigorous imprisonment and a maximum of fifteen years.

Acts related to theft may also be committed during armed conflict. In this regard, Article 270(j) considers that 'the destruction, removal, attack, rendering useless or appropriation of the historical monuments, works of art, or places of worship or using them in support of military effort,' would lead to a war crime. Even if the provision does not employ the term 'cultural heritage', it is fair to include 'works of art' and 'historical monument' and 'places of worship' into

[34] Criminal Code, *supra note* 29, Article 3, paragraph 2. Simeneh and Chernet argue that this provision does not allow departure from the general principle of the Criminal Code except for cases of petty offenses. See, Simeneh and Cherinet, *supra note* 8, p.69-71,

[35] Simeneh and Cherinet, *supra note* 8, p. 78-81.

[36] Articles 272, 273, 670, 671 of the Criminal Code could be relevant.

[37] Criminal Code, *supra note* 29, Article 669(1)(a).

the category of 'cultural heritage'. Consequently, the amount of penalty that would be imposed on anyone who has committed a war crime is five to twenty-five years of rigorous imprisonment or in a more serious case life imprisonment or the death penalty.

Similarly, the cumulative reading of Articles 273 and 674 of the Criminal code shows that 'pillage', 'looting', 'piracy, 'robbery', 'unlawful removal' of property under the pretext of military necessity could lead to a war crime. In doing so, the Criminal Code incorporates the requirements set by Article 15(1)(e) the Second Protocol of the 1954 Hague Convention.[38] The Protocol requires States to consider the 'theft, pillage or misappropriation of or acts of vandalism' of cultural heritage as a serious violation constituting the *actus reus* of a war crime. In this case, Articles 270(j), 273, and 674 are compatible with the Second Protocol. Although Article 237 and 674 does not specifically refer to 'cultural properties', it is reasonable to include them into the category of the generic term 'property' since there is no justification to exclude them. The provisions of the Criminal Code nonetheless should have to be more clarified to protect all types of cultural heritage.

b) Illicit Excavation

According to Article 44(1) of the Heritage Protection Proclamation, the Council of Ministers, upon the recommendation of the Minister of Tourism and Culture is empowered to reserve an area where the archeological site and the immovable cultural property are situated by declaring the reserved area and publishing the same in the official Negarit Gazetta. In such a reserved area, as per Article 44(2) of the Proclamation, excavation and any similar acts including conducting a construction work are prohibited without obtaining a prior permit from the ARCCH unless otherwise decided by the Council of Ministers. Also, if any person discovers a cultural heritage during permitted construction activity, in the reserved area, he will be required to cease construction immediately and report it to the Authority.

[38] The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), adopted on 26 March 1999, and entered into force on 9 March 2004. Ethiopia did not sign the Second Protocol although it is a party to the 1954 Convention and the First Protocol. See, Convention for the Convention for the protection of Cultural Property in the event of Armed Conflict and its first protocol Accession Proclamation, Proclamation No. 373/2003, *Federal Negarit Gazetta*, (28 October 2003). See also, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague, on 14 May 1954, entered in to force on 7 August 1956. Article 4(3) and 28 of the 1954 Hague Convention reveals that imposing penal sanction is an option left to each member states.

Consequently, illicit excavation in the designated archeological site or in areas where immovable cultural heritage is situated, in contravention of Article 44(2) of the Proclamation, would lead to criminal liability with simple imprisonment[39] of not exceeding six months or with a fine of up to 1500 birr or with both unless a more severe penalty is provided by the Criminal Code.[40] These penalties are relatively much lesser than the penalties stated for acts related to theft, under the Criminal Code.

2.2. Crimes Committed at the Second-stage

Crimes in this stage are committed mainly by early-stage middlemen who can transfer the object into another individual or outside of the country. Sellers, exporters, importers may serve as an early-stage intermediary. It is worth noting that the stages are classified based on the acts rather than focusing on the actors, in line with Campbell's model. For instance, a seller may be an early stage intermediary or on other occasions, he may play the role of a launderer at the third stage. Thus, the categorization of acts in this section takes into account such flexibility which is a typical character of the Network model that is discussed in the preceding section.

a) Failure to Notify upon Transfer of Ownership by the Transferor

Even though Article 14 of the Heritage Protection Proclamation provides that 'cultural heritage may be owned by the state or by any person,'[41] there are legal limitations on the exercise of the rights of private ownership. For instance, only the State has a right to own newly discovered cultural properties that are found by archeological, fortuitous, or any other forms of discovery.[42] If a private individual finds a cultural heritage fortuitously, the state will own it after the finder is paid in the form of an award and reimbursed for the expenses he had incurred for the preservation of the property.[43] Also, upon fulfillment of conditions stated under Article 25 of the Proclamation, the ARCCH has the power to expropriate any cultural items.[44] Similarly, the Ethiopian National Archives and Library Agency could nationalize any privately owned archives

[39] According to Article 106 of the Criminal Code, the punishment of simple imprisonment would be imposed on crimes which are not very grave by their nature and committed by persons who do not pose a serious danger to the society.
[40] Heritage Protection Proclamation, *supra* note 6, Article 45(1)(a).
[41] Similarly, Article 3 of the repealed Proclamation 36/1989 permits both private and state ownership
[42] Heritage Protection Proclamation, *supra* note 6, Article 14(2), 29, 41. For a more historical comparison, See, Vijayakumar Somasekharan Nair, Perceptions, Legislation, and Management of Cultural Heritage in Ethiopia, *International Journal of Cultural Property*, Vol. 23, No. 1, (2016), p. 103.
[43] Heritage Protection Proclamation, *supra* note 6, Article 41(2-3).
[44] See also, Article 12 of Proclamation 36/1989 and Article 7(b) of the repealed Proclamation 229/1966.

that have 'national importance', upon payment of compensation, so far as they are threatened by a 'man-made or natural disaster.'[45]

Moreover, the holder of cultural property has a right to transfer it to another party only after both the transferor and the transferee submit prior written notification to the ARCCH.[46] However, the Authority has a 'right of preemption over the sale of cultural heritage.'[47] In this case, when the Authority received the written notification, it can use its right of priority to purchase the heritage. The requirement of written notification applies to both non-gratuitous and gratuitous forms of transfers such as donation, will, or any other modalities such as a loan. But the Authority's preemption right is limited only to the cultural heritage items that would be offered for sale. Failure to observe the conditions attached to the transfer of cultural heritage could entail criminal liability. Thus, unless the Criminal Code provides otherwise, Article 45(1) (a) of the Heritage Protection Proclamation provides a punishment of either fine (up to 1500 birr) or simple imprisonment not exceeding six months or both, against anyone who transfers or receives the transfer without prior written notification to the Authority.[48]

Concerning archives, 'private archives' could be transferred to another person through sale, donation, or succession after notifying the Ethiopian National Archives and Library Agency.[49] In this regard, the Agency does not have a right of preemption over the sale of private archives. The Agency can, however, receive private archives through donation, sale, or succession.[50] Similarly, after notifying the Agency, the transfer of a 'documentary heritage' is possible.[51] Although Proclamation 179/1999 allows the transfer of 'private archives' and 'documentary heritage', after notification to the Agency, failure to do so is neither backed by a criminal sanction nor supported by any other legal consequences.[52] Therefore, while the Heritage Protection Proclamation criminalizes anyone who fails to notify the ARCCH before the transfer of cultural heritage, Proclamation 179/1999 does not criminalize those who fail to

[45] Ethiopian National Archives and Library Proclamation, Proclamation No. 179/1999, *Federal Negarit Gazetta*, (29 June, 1999), Article 8(8). (Hereinafter, Proclamation 179/1999).
[46] Heritage Protection Proclamation, *supra* note 6, Article 23(1).
[47] Ibid, Article 23(2).
[48] Proclamation 179/1999, *supra* note 45, Article 18(3). See also, Heritage Protection Proclamation, *supra* note 6, Article 21. An act of receiving will fall under stage four of the trafficking network.
[49] Proclamation 179/1999, *supra* note 45, Article 18(3); Transfer of private 'documentary heritage' is also possible after notifying to the Agency. See, Article 3(20) and 21(1) of Proclamation 179/1999.
[50] Ibid, Article 18(2)
[51] Ibid, Article 21(1)
[52] Article 25(6) of Proclamation 179/1999 might have intended to refer to Article 21(1) rather than Article 22(1) of the Proclamation.

notify the Agency while transferring 'private archives' and 'documentary heritage'.

b) Commercial Sale

As stated under Article 24 of the Heritage Protection Proclamation, commercial sale or purchase of cultural heritage is prohibited.[53] In effect, according to Article 45(1)(c) of Proclamation, a person who commercially purchases or sales a cultural heritage will be penalized by fine (10,000-15,000 birr) or rigorous imprisonment of three to five years or with both unless the Criminal Code provides a more severe penalty.[54]

Concerning commercial sale and purchase of cultural heritage, Ethiopia's law slightly differs from the 1970 UNESCO Convention.[55] Article 10 of the Convention requires States to provide either an administrative or penal sanction on antique dealers who failed to keep a register of transactions or who failed to inform purchasers as to export prohibition if there is any. The Convention seems to presuppose the existence of commercial dealings of cultural properties while using terms like 'antique dealers' and 'keep a register of transactions'. On the contrary, Ethiopia's law criminalizes commercial sale or purchase. Doing so is not a violation of the treaty obligation as the Convention does not oblige member states to permit commercial dealings. It seems that the international legal regime may tolerate the prohibition of commercial dealings. For instance, Article 2(7) of the 2001 UNESCO Underwater Convention forbids commercial exploitation of the underwater cultural heritage although it does not necessarily require criminalization.[56]

The concept of commercial sale or purchase is not defined under the Heritage Protection Proclamation. Presumably, it refers to the purchase or sale of a cultural heritage mainly with a profit motive. An act of sale primarily for the sake of profit could reasonably be taken as an economic undertaking. In this respect, the Proclamation places the economic role of the cultural heritage at a subsidiary level. Especially, Article 22(1) of the Proclamation allows the use of

[53] Commercial sale conducted after recording of the cultural heritage in the form of film or other digital form is not prohibited subject to the regulations and directives to be issued. See, Heritage Protection Proclamation, *supra* note 6, Article 24(2).

[54] However, Proclamation 179/1999 does not prohibit nor criminalize commercial sale of private archives.

[55] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, adopted at Paris, 14 November 1970, entered into force on 24 April 1972. (Hereinafter, 1970 UNESCO Convention). See also, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property Ratification Proclamation, Proclamation No. 374/2003, *Federal Negarit Gazetta*, (28 October 2003).

[56] Convention on the Protection of the Underwater Cultural Heritage, adopted at Paris, (2 November 2001)

cultural heritage primarily for 'science, education, culture, and fine arts.' Exceptionally, Article 22(2) of the law states that 'the use of cultural heritage for economic and other purposes may only be allowed if such use is not detrimental to its preservation and does not impair its historical, scientific and artistic values.'[57] Thus, one can reasonably interpret that criminalization of commercial sale and purchase is a logical extension of the idea of the subsidiary role of economic use of a cultural heritage which is embodied in the proclamation.

The 2016 Cultural Policy nevertheless tends to make equilibrium between economic development on the one hand[58] and the development of science, education, fine art, and culture on the other hand. Preamble 2 of the 2016 Cultural Policy underlines that one of the main reasons that necessitated the revision of the First Cultural Policy is a result of a lesser emphasis on the economic role of cultural heritage. To give full effect to the law, it is possible to positively correlate the Proclamation and the Second Cultural Policy. Thus, the subsidiary role of the economic use of cultural heritage under Article 22(1) of the Heritage Protection Proclamation could be understood within the meaning of sustainable development. Therefore, it would be fair to understand that the prohibition of commercial sale under Article 24 of the Heritage Protection Proclamation aims to avoid the risk of exploitation of cultural heritage by short term profit-driven sale which is to be conducted at the expense of the development of science, education, research, culture, and fine arts. The economic advantage, within the meaning of sustainable development, could be obtained through tourism or scientific study and similar activities by excluding commercial sales. In this way, the proclamation could be interpreted in a meaningful way.

At this juncture, it is worth reminding that criminalization cannot be a means of achieving a policy of sustainable development although it can be considered as one of the many factors that could help to assess the criteria of 'common good' within the meaning of 'prevention of a crime'.[59] Criminalization is essentially

[57] Article 22(2) of the Heritage Protection Proclamation restricts one of the objectives of the ARCCH which is stipulated under Article 4(3) of the same law, i.e., facilitating the heritage for the economic development of the country.

[58] Cultural Policy (2016), *supra* note 5, Preamble 2.

[59] Goal 16.4 of the 2020 United Nations Sustainable Development Goals underlines the importance of adopting policies that aim to promote culture and tourism. To that effect, it underlines the need to combat all forms of organized crime. See, UN General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at https://www.refworld.org/docid/57b6e3e44.html, last accessed on 15 September 2020. Similarly, the UNODC highlights that states need to combat illicit cultural heritage trafficking by stressing the nexus between cultural heritage protection and sustainable development. See, UNODC, *Practical Assistance Tool to Assist in the Implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences*, Vienna, (2016), Preface, p. V, available at: https://www.unodc.org/documents/organized-

guided by the prevention of a crime for the sake of the 'common good' to protect the security, peace, and order of the society. The legislature has, however, enough reason to justify criminalization by examining the test of common good given the criminological support for regulation including criminalization of illicit acts, by the criminal code, in this stage of the trafficking network.

c) Transfer of 'State Archives'

In relation to 'state archives', any form of transfer including buying, selling, and donating is prohibited.[60] Consequently, according to Article 25(4) of Proclamation 179/1999, any person who involves in buying, selling, donating, or devolving in the inheritance of state archives will be liable for one to three years imprisonment and a fine of 10,000 to 20, 000 Birr unless the Criminal Code provides a more severe penalty. This law does not indicate whether the penalty of imprisonment refers to a simple or rigorous one. But it could be understood as simple imprisonment in line with the principle of interpretation in favor of the accused in cases of doubt when there are conflicting interpretations of the law.[61]

d) Illicit Export

In addition to some restrictions on the transfer of cultural property within the country, taking them out of the country is also prohibited and criminalized. In principle, the export of cultural heritage is prohibited.[62] Also, Article 6(1) of Directive 15/2006 prohibits the export of cultural heritage by way of loan.[63] Similarly, Proclamation 179/1999 prohibits 'taking documentary heritage out of the country, in a way contrary' to the Proclamation.[64] Although the export of

crime/trafficking_in_cultural/16-01842_ebook.pdf, last accessed 16 September 2020. (Hereinafter, UNODC, Practical Assistance Tool).

[60] Proclamation 179/1999, *supra* note 45, Article 18.

[61] See, Article 22(2) of the ICC statute. See, Antonio Cassese, *International Criminal Law*, 2nd edition, Oxford University Press Inc., (2008), p.50; The principle of interpretation in favor of the defendant aims to protect the human rights of the accused. Thus, it can reasonably be used to domestic cases considering that major international human rights norms and standards are part and parcel of the domestic legal system. [It must be noted that buying or receiving the archives in the form of donation or inheritance falls under the final stage of the trafficking network.]

[62] Heritage Protection Proclamation, *supra* note 6, Article 27.

[63] There are exceptional situations that permit loan of cultural heritage, within the country, for research, educational, exhibition, protection, and preservation purposes. (See, Ministry of Culture and Tourism, Directive 15/2006, (March 2006 E.C.), Article 5(1)). In addition to loan, there is a possibility of transferring cultural heritage, with in the country, through donation to or exchange with the relevant domestic research or educational institutions or museums whenever the Heritage Collection Center deems that the items are over-redundant or beyond the required number. (See, Ministry of Culture and Tourism, Directive 10/2006, (October 2006 E.C), Articles 2(3) and 5).

[64] Proclamation 179/1999, *supra* note 45, Article 22(2). Contrary reading of Article 8(9) of the Proclamation implies that the Agency may permit temporary export of 'original archives and

cultural heritage is prohibited, the Minister of Culture and Tourism, however, may temporarily permit the export of cultural heritage for scientific study, cultural exchange, or exhibition.[65] In such cases, the ARCCH is mandated to follow up on the cultural properties that are temporarily exported for legitimate purposes.[66] In general, except for export possibilities permitted by law for those specified purposes, any other mode of export is prohibited.

Consequently, failure to observe export prohibitions will be met by a criminal sanction. To that end, Article 45(1)(c) of Heritage Protection Proclamation provides a penalty of three to five years rigorous imprisonment or fine (10, 000 to 15, 000 Birr) or both, unless the Criminal Code provides a more severe penalty, against anyone that commits illicit export of cultural heritage in violation of Article 27 of the Proclamation. Similarly, Article 25(3) of Proclamation 179/1999 provides a penalty of three to ten years rigorous imprisonment and a fine (10,000 up to 20, 000 birr), unless the Criminal Code provides a more severe penalty, against anyone illegally takes out of the country archives, books or documentary heritage. In addition to criminal sanction, Article 25(3) of Heritage Protection Proclamation provides administrative measures. Accordingly, the ARCCH can expropriate any cultural heritage that has been seized 'while being taken out of the country'.

It is worth reminding that imposing both criminal law and administrative measures does not contravene the 1970 UNESCO Convention. This is because the Convention sets a minimum requirement in the form of alternative obligations. The Convention requires states to take either penal or administrative measures on anyone who exports cultural heritage without attaching an export certificate.[67] In effect, Ethiopia's law is more stringent and demanding than the minimum requirement of the Convention.

2.3. Crimes Committed at the Third-stage

Crimes in this stage are committed by individuals who are specialists in avoiding the worries of collectors. Art historians, accountants, lawyers, and academicians could involve in various capacities in the process of disguising the illicit object as a legal object. Thus, concealing the real provenance of an object by an art historian could be taken as a laundering activity and be criminalized.

---

documentary heritage'. Also, the Agency could permit export of copies of archives and documentary heritage.

[65] Heritage Protection Proclamation, *supra* note 6, Article 27; Directive 15/2006, Articles 6(2), 6(3), 6(5), 5(5).

[66] Ministry of Culture and Tourism, Directive 9/2006, (October 2006 E.C), Article 22.

[67] 1970 UNESCO Convention, *supra* note 55, Articles 8 and 6(b).

However, Ethiopia's law does not specifically criminalize individuals who launder cultural heritage items. This group of individuals could be liable for their participation in secondary capacity in line with Article 37 of the Criminal Code. In reality, under Ethiopia's law, accomplices shall be punished by a similar penalty with the principal criminal unless there are mitigating circumstances specified in the Criminal Code.[68]Additionally, Article 478 of the Code which criminalizes 'conspiracy' to commit a crime could also be relevant to control launderers of artifacts.[69] Article 478(1) the Code states that 'whoever conspires with one or more persons to prepare or commit serious crimes against…property, or persuades another to join such conspiracy, is punishable, provided that the crime materializes, with simple imprisonment for not less than six months, and fine.'[70] This provision applies only to cases of conspiracy to commit 'serious crimes' which are punishable with five years of rigorous imprisonment or more. Thus, Article 478(1) of the Criminal Code can apply to cases such as 'conspiracy' to commit, for instance, illicit (commercial) purchase of cultural heritage.

In many cases, artifacts specialists may directly serve as intermediaries. The act of smuggling and facilitating in the capacity of a late-stage intermediary could be criminalized as an 'art laundering' crime. That is why Giovanni Nistri suggested that the transfer of a cultural object to another country, to conceal its real provenance 'should be punished as a laundering crime.'[71] Ethiopia's law, however, does not provide 'art or antiquities laundering crime' as a distinct crime category.

2.4. Crimes Committed at the Fourth-stage

The crimes in this stage are committed by collectors that might be museums, galleries, private artifacts collectors, and art enthusiasts.

a) 'Commercial Purchase' and 'Failure to Notify during Transfer by the Receiver'

The discussion that is made at the second stage of the trafficking network, in Sections 2.2. a and 2.2.b is also relevant for this section. For instance, acts of

[68] Criminal Code, *supra* note 29, Articles 37(4) and 179.
[69] Also, Article 274 of the Criminal Code could be relevant.
[70] Article 478(2 and 3) of the Criminal Code provides additional possibility of increasing the amount of penalty. It is worth noting that Article 35 of the Criminal Code could negate the principle of individual criminal liability unless care is taken while shifting the burden of proof to the accused in cases where collective crimes including the crime of conspiracy are committed.
[71] Giovanni Nistri, The Experience of the Italian Cultural Heritage Protection Unit, in Stefano Manacorda and Duncan Chappell(eds.), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer Science+Business Media, (2011), p. 189 at foote note no. 3.

commercial sale and purchase are criminalized by a single provision. According to Article 45(1)(c) of the Heritage Protection Proclamation, anyone who commercially purchases a cultural heritage will be penalized by a fine (10,000-15,000 birr) or rigorous imprisonment of three to five years or with both.[72] Also, according to Article 45(1)(a) of the Proclamation, unless otherwise the Criminal Code provides a more severe penalty, anyone who is becoming a transferee, either by donation or purchase, without notifying the Authority, will be punished by a penalty of either fine (up to 1500 Birr) or simple imprisonment not exceeding six months or with both.[73] Thus, the alternative minimum amount of penalty provided for commercial purchase and the 'receiving of artifacts without notification' is much lower than the crime of theft.

b) Receiving

Although not specifically prescribed in the heritage protection instruments, the Criminal Code's provision related to the criminalization of handling of stollen goods could also apply for related acts on cultural heritage. According to Article 682, 'receiving'[74] of a thing which is the proceeds of a crime is criminalized. Article 682(1) states:

> *Whoever receives a thing, which he knows is the proceeds of a crime committed against property by another, or acquires the thing, or receives it on loan, as a gift, in pledge or in any manner whatever, or consumes it, retains or hides it, resells it or assists in its negotiation, is punishable with simple imprisonment, or in more serious cases, with rigorous imprisonment not exceeding five years, and fine.*

If the crime of 'receiving' is committed negligently, according to Article 682(3) of the Criminal Code, the penalty shall be simple imprisonment not exceeding one year. Article 682 deals with receiving a 'thing', which is the proceeds of a crime, without specifying the type of property. In this case, it could be reasonable to include 'receiving' of illicitly obtained cultural heritage since the term 'thing' is an all-inclusive term, and there is no justifiable reason to exclude cultural items from the scope of protection of this provision.

[72] Proclamation 179/1999 does not prohibit nor criminalize commercial purchase of 'private archives'. However, according to Article 25(4) of Proclamation 179/1999, anyone who is buying a state archive will be punished by fine (10,000 to 20, 000 Birr) and one to three years imprisonment unless the Criminal Code provides a more severe penalty.

[73] Proclamation 179/1999 does not clearly require notifying the Agency while purchasing or receiving private archives in the form of donation or inheritance.

[74] If the purpose of 'receiving' of the thing is for facilitating its transfer to collectors through laundering, the crime of receiving may fall under the category of Stage-3 of trafficking network.

The crime of 'receiving' could serve as a vital tool to combat the illicit trafficking of cultural heritage at least for two reasons. First, the crime includes a broad category of acts such as 'receiving' of proceeds of a crime by way of loan, pledge, gift or in any other manner, or acts such as using, hiding, retaining or reselling, or acting as assistance in the negotiation of the thing. Second, the inclusion of 'negligent receiving' as a crime could help to address the problem related to proof of the mental element of the crime since proving negligence is much easier than proving the intention of an accused.

To sum up, the abovementioned key crimes are summarized as follows.

Stages	Crimes		Articles	Minimum Penalty	Maximum Penalty
First-stage	Theft		45(2)(a), Proc.	7 years	10 years
	Aggravated Theft		669(1)(a), C.C.		15 years
	Illicit Excavation		45(2)(b), Proc.	1500 Birr	6 months
	War Crime	Removal of artworks	670(j), C.C.	5 years	25 years, Life, Death
		Pillage, looting	273/674, C.C.		
Second-stage	Failure to notify during sale		45(1)(a), Proc.	1,500 Birr	6 months
	Commercial sale		45(1)(c), Proc.	10,000 Birr	5 years
	Illicit Export		45(1)(c), Proc.	10, 000 Birr	5 years
	Illicit Import		-	-	-
Third-stage	Facilitating/laundering		-	-	-
Fourth-stage	Failure to notify during purchase		45(1)(a), Proc.	1,500 Birr	6 months
	Commercial purchase		45(1)(c), Proc.	10, 000 Birr	5 years
	Receiving		682, C.C.	10 days	5 years

Table 1: List of crimes related to cultural heritage trafficking [in the Criminal Code (C.C.) and the main heritage protection law (Proclamation 209/2000/Proc.)].

As it can be observed from the table, the alternative minimum penalty (fine) prescribed for illicit excavation, crimes categorized in the second and the fourth stages are much lesser than the amount attached for the crime of theft. Also, the alternative maximum penalty prescribed for illicit excavation is disproportionately smaller than the maximum amount provided for other major crimes. Moreover, illicit importers and the third stage actors (a crime of art and antiquities laundering) are not specifically criminalized. In the next section, the author analyzed the above-mentioned findings, as indicated in the table, with their possible impacts in establishing comprehensive criminalization and consistent penalties.

3. Gaps on Criminalization of Illicit Cultural Heritage Trafficking: Incomprehensive Criminalization and Inconsistent Penalties

Ethiopia's law has endeavored to criminalize all stage actors of the illicit cultural heritage trafficking network. However, Ethiopia's law shows some gaps when it is evaluated in light of the four-stage networking model of cultural heritage trafficking and the transnational and organized nature of the crime. The main defects are non-comprehensive criminalization and inconsistent penalties. These gaps will be discussed in this section.

3.1. Gaps Related to Comprehensiveness

The illicit acts to be committed in each of the four-stages are harmful conducts which are essential for the success of a transnational cultural heritage trafficking process. As it is explained in the preceding section, Ethiopia's law fails to criminalize some critical illicit acts of cultural heritage trafficking.

For instance, in the first and second stages of the trafficking network, key criminal acts are not criminalized. Specifically, in the 'war crime' category, the law only criminalizes those acts that are to be committed at the first stage. That means unlawful removal or abstraction of works of art, pillage or looting could be a war crime as per Article 270(j) and 273 of the Criminal Code. However, illicit smuggling or export of cultural heritage from the occupied territories during situations of armed conflict could have a similar effect in impoverishing and damaging artifacts. Thus, the illicit export of cultural heritage could be included within a war crime category.

In terms of import prohibition, the 1970 UNESCO Convention required parties to provide either a criminal or an administrative sanction on those who are illicitly importing cultural heritage that is stollen, after the coming into force of the Convention, from institutions of a foreign state so long as they appear in the inventory of a foreign state.[75] Although the scope of import prohibition part of the Convention is highly controversial, which resulted in divergent understanding among states, it requires some level of import prohibition requirement.[76]

When we see the Ethiopian case, as stated under Article 28 of the Heritage Protection Proclamation, the government will protect any cultural heritage that is brought into the country for reasons such as cultural exchange or exhibition.

[75] 1970 UNESCO convention*, supra* note 55, Article 8 and 7(b)(i).
[76] Craig Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, (2010), p. 177-180

However, Ethiopia's law does not criminalize the illicit import of cultural heritage.[77] The laws adopted in all of the three successive Ethiopia's governments[78] followed a similar approach by not criminalizing the illicit import of cultural heritage. One cannot exclude the possible impact of criminalization of illicit import of cultural properties on the long-standing position of the state that has been trying to repatriate cultural properties that were stolen, looted, and taken out of the country especially during foreign occupations. Ethiopia's laws have consistently been favoring the repatriation of the country's cultural heritage that is held in foreign countries. For instance, in line with cultural policy frameworks, Article 26(1) of the Heritage Protection Proclamation emphasizes the need to repatriate cultural properties that are illegally held in other countries.[79]

Nonetheless, repatriation of looted or illegally exported cultural heritage is not an easy task as it requires political efforts in addition to following the legal routes. While countries like Ethiopia are ardently supporting the repatriation of items during colonial times,[80] some foreign countries that are possessing looted cultural properties, during colonial times, may reject repatriation.[81] In this case, there may be a case where an item, that was originally part of Ethiopia's heritage but illegally held in a foreign state, is returned to Ethiopia without following a proper legal or diplomatic path. Ethiopia's law prefers to remain silent on the fate of this item. The silence may be intended to avoid the risk of preventing repatriation of Ethiopia's heritage that is illegally held in a foreign

[77] Article 351(1)(a) of the Criminal Code is applicable only when it is related to concealment of a government revenue.

[78] The Reign of Haile- Selassie I, the Derg, and the EPRDF governments.

[79] Article 26(2) of the Heritage Protection Proclamation envisaged for gathering and publicizing of data related to cultural heritage items that are held in foreign countries.

[80] 'Cultural Property Nationalism' supports the national character of heritage items, export control, retention and repatriation. See, John Henry Merryman, Two Ways of Thinking About Cultural Property', *The American Journal of International Law*, Vol. 80, No. 4, (1986), p. 832; Craig Forrest, Cultural Heritage as the Common Heritage of Human Kind: A Critical Re-evaluation, *Comp.& Int'l L.J.S. Afr.,* Volume 40, No.1, (2007), p.132; Lyndel V. Prott, The international Movement of Cultural Objects, *International Journal of Cultural Property*, Vol. 12, No. 2, (2005), p. 233, 239. [I suggest that the looted, stollen and illegally exported Ethiopia's cultural heritage should be repatriated irrespective of time limit]

[81] Antiquity NOW (a Blog), To Repatriate or Not to Repatriate, that is the Question…. James Cuno's Case Against Repatriating Museum Artifacts', available at https://antiquitynow.org/2015/02/10/to-repatriate-or-not-to-repatriate-that-is-the-question-james-cunos-case-against-repatriating-museum-artifacts/, last accessed on 18 September 2020.
'Cultural Property Internationalism' (cosmopolitanism) advocates for the liberalization of the art market to preserve cultural heritage and reduce black market. See, John Henry Merryman, Cultural Property Internationalism, *International Journal of Cultural Property*, Vol. 12, No. 1, (2005), p. 11. It is also stated that the two views are not necessarily mutually exclusive and both are essential for the development of local, national and global policies. See, Raechel Anglin, The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide, *Yale Journal of law and Humanities*, Vol. 20, No. 2, (2013), p.242

state as a result of colonial looting or other illegal means. Such fear is justifiable given that some market states are reluctant to return looted cultural heritage items, especially those looted items during colonial times and before the adoption of the 1970 UNESCO convention.

Ethiopia's law could criminalize the illicit import of cultural heritage upon the fulfillment of two cumulative conditions. First, for import prohibition purposes, the law could make a differential treatment by dichotomizing cultural heritage items into 'purely foreign' cultural heritage items on the one hand and the looted or illegally exported Ethiopia's cultural heritage items on the other hand. Thus, it can criminalize the illicit import of only 'purely foreign' cultural properties while at the same time advancing the policy of repatriation of Ethiopia's cultural heritage from foreign states. Second, it can apply the requirement of reciprocity.[82] The legislature can criminalize the illicit import of cultural items from countries that have a reciprocal import prohibition law that is accompanied by criminalization. That means if state X criminalizes the illicit import of Ethiopia's cultural heritage items, Ethiopia's law could also respond in the same way by criminalizing the illicit import of state X's cultural item. This could be implemented through a bilateral agreement or by providing, within the law, a general clause that contains the mandatory requirement of the principle of reciprocity. Also, the UNTOC's system can be employed so far as the concerned states are willing to apply the convention for cases of cultural heritage trafficking.

In reality, Ethiopia is a source state and the chronic problem is illicit export than cases of illicit import of cultural properties. But there may be cases of illicit import of cultural heritage given that the Addis Ababa airport is a hub for the international airline industry. The UNODC states that the East African region, most notably the Addis Ababa and the Nairobi airports are increasingly becoming a transit point, for drug-trafficking criminal syndicates, from West Africa to South-East and South-West Asia.[83] Usually, criminal activities are interconnected with each other. In this case, a cultural heritage could serve as a laundering mechanism of proceeds other crimes including drug crimes. It is reasonable to expect that the drug transit spots may also have a probability of serving as a transit point for cultural heritage trafficking.

[82] The 1970 UNESCO Convention does not provide a mandatory criminalization obligation on illicit import of cultural objects.

[83] Drug Trafficking Patterns to and from Eastern Africa, available at https://www.unodc.org/easternafrica/en/illicit-drugs/drug-trafficking-patterns.html, last accessed on 21 September 2020

In addition to the aforementioned problem in the earlier stages of the trafficking process, the third stage of the trafficking phase is also given little attention. In the third stage, crimes are mainly committed by those who have specialized knowledge in art history or other laundering mechanisms.[84] The crimes in this stage are committed by individuals who are experts mainly situated in art market countries such as New York, Paris, London, Amsterdam, and to some extent located in transit countries including Singapore and Hong Kong.[85] These individuals could, however, be located in Ethiopia. In many forms, launderers may create nexus with cultural heritage items that are stollen or trafficked from Ethiopia. The fact that the criminals are located in a foreign state does not mean that they will not have the connection to crimes initiated from Ethiopia's territory.

It might be suggested that when launderers assist the collectors by way of expert advice or any other form of support, they may be liable for being an accomplice to the principal criminal, as per Article 37 of the Criminal Code. However, this does not fully resolve the problem of cultural heritage trafficking. This is because the liability of the accomplices is dependent upon the conviction of the principal criminal. Art launderers could independently be liable without the need to prove the liability of a principal criminal. Due to their critical role in the completion of the cultural heritage trafficking process, launderers could be specifically criminalized as a principal criminal.

Also, Article 478 of the Criminal Code could help to deter laundering specialists who conspire with illicit purchasers of the cultural heritage. Nevertheless, this scenario is not enough to fully address the problem of facilitation of cultural heritage trafficking. It is because the crime of conspiracy requires proving the existence of an agreement between two or more persons which could be a difficult task for law enforcement authorities. Furthermore, the crime of conspiracy will be fulfilled if the intended crime is materialized.[86] Launderers or facilitators in the illicit artifacts market could actively involve in the illicit antiquities market by transforming the illicit object into a licit one before the collectors make a deal with launderers. Thus, the crime of laundering could be committed irrespective of the launder's agreement with a collector. But, until a

[84] Campbell, *supra* note 14, p. 132. The internet is also increasingly used as a third stage medium. (See, Campbell, Id., p. 131). This area needs to be further studied within the context of cybercrime.
[85] Kenneth Polk, *supra* note 17, p. 213.
[86] Article 478 of the Criminal Code shows some anomaly since it requires that the intended crime be materialized while the offense is considered as a conspiracy crime which is supposed to be a preparatory offense.

distinct crime of 'cultural heritage laundering' is introduced, article 478 could play a role to combat the trafficking problem.

Article 478 of the Criminal Code could also apply to every stage of the trafficking network. For instance, the crime of conspiracy to commit theft or illicit export of artifacts could be governed by the provision. It does not, however, cover the crime of 'conspiracy to commit illicit excavation' of cultural heritage since the intended crime is punishable with only six months maximum imprisonment. Guideline16 (e) of the UNDOC, however, calls for states to consider criminalizing and making appropriate penalties against 'anyone' who commits 'conspiracy or participation' in an organized group for cultural heritage trafficking without singling out specific types of offenses in the trafficking network. This will help to control the frequent involvement of organized groups in cultural heritage trafficking.[87] Additionally, it also will enable to enhance international co-operation, for instance, by way of reducing refusal for extradition request 'due to lack of the proportionality and the dual criminality requirements.'[88] Therefore, Ethiopia's legislature could reconsider the specific and explicit criminalization of criminal conspiracy to commit major cultural heritage trafficking offenses including illicit excavation.

3.2. Inconsistent Penalties

This article does not focus on how to fix the amount of punishment for each of the crimes of illicit cultural heritage trafficking based on the theories of punishment. It is rather an evaluation of the pattern reflected on the crimes throughout the trafficking process by considering the transnational and organized nature of the crime.

Thus, the crimes incorporated, indicated in the laws, have shown a level of inconsistency in a way that does not take into account the nature of the trafficking network. It seems, however, fair to provide a lesser penalty for the crime of omission—failure to notify during a transfer of ownership of cultural heritage. This is in line with the trend reflected in the transnational and organized crime suppression instruments as many of them do not even require criminalization of omission except in grave situations such as corruption offenses and environmental regulations.[89] When omission is criminalized, the amount of penalty is expected to be lesser than the crimes that are committed by

[87] UNODC, Practical Assistance Tool, *supra* note 59, p. 41
[88] Ibid
[89] Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd edition, Oxford University Press, (2018), p. 23

way of commission. This pattern is also reflected in Ethiopia's Criminal Code. However, for other crimes of commission in the trafficking network, there is a visible inconsistency that would potentially threaten or impact international mutual co-operation.

There is a possible scenario that the crimes in the illicit trafficking network, other than crimes of omission, could legitimately be perceived as 'serious crimes' by considering the spirit of the UNTOC and the UNODC model guidelines. The requirement of seriousness within the context of the UNTOC is measured in terms of the maximum penalty of the crimes in question. However, the Convention also indicates that the crimes should be treated as 'serious' leaving the discretion to determine the minimum penalty for each member state. This idea is further consolidated by Guideline 16 of the UNDOC's model non-binding guideline that aims to regulate crimes related to cultural heritage trafficking. The notion of 'serious crime' is loaded with the idea that the international co-operation regime could be triggered when the crimes are grave enough to justify the cooperative response. Thus, it is noticeable that further research is needed, that is based on the principles and theories of punishment, to determine the minimum penalty within the meaning of 'serious crimes' as indicated in the UNTOC.

However, the author of this article considers one possible scenario with which the concept of 'serious crime' could justifiably be understood under Ethiopia's criminal law. Serious crime under Ethiopia's legal system could be understood as those crimes that are punishable with a minimum of one-year rigorous imprisonment. This scenario is based on the assumption that the idea of 'serious crime' under the UNTOC could be interpreted, under Ethiopia's Criminal Code, to mean 'crimes punishable with rigorous imprisonment'. In effect, the alternative minimum penalty stipulated for the crimes of illicit export, commercial sale/purchase, and illicit excavation could be at least one-year rigorous imprisonment within the meaning of Article 108(1) of the Criminal Code rather than providing a fine as an alternative minimum penalty. The minimum alternative penalty for the crimes of illicit excavation, 'commercial sale and purchase of cultural heritage', and 'illicit export of cultural heritage' is only a fine of 1500 Birr, 1500 Birr, and 10,000 Birr respectively. In these crimes, although rigorous imprisonment is provided, the penalty of fine is provided as an alternative penalty.

Almost all of the aforementioned crimes have a significant effect to elevate the crime of illicit cultural heritage trafficking into the status of transnational and organized crime. They can be treated as 'serious crimes' although it is not fair to

expect that the penalties attached to these crimes be exactly similar to the crime of theft. The fact that these crimes incorporate rigorous imprisonment, though it is provided in the form of alternative punishment, implies that the legislature partially treats the crimes as serious ones. But it is fair to fully treat them as 'serious crimes' to avoid internal anomaly within the same offense and external anomaly (between these crimes and the crime of theft). Such inconsistency of the law is against the spirit of the UNTOC and the UNODC guidelines that require legislatures to treat each of the major crimes stated above to be treated only as serious crimes. For instance, Guideline 16 of the UNODC model non-binding guideline pointed out that crimes including illicit export, illicit import, illicit excavation, conspiracy, theft, laundering, and trafficking in cultural properties need to be treated as serious crimes. Thus, there is a possibility that Ethiopia's law could be aligned with this trend by treating the aforementioned crimes as serious offenses with sufficient care not to artificially and unjustifiably elevate the minimum penalty.

A lesson could also be drawn from Proclamation 179/1999 which is one of the heritage protection laws. Article 25(3) of the Proclamation could provide a better picture of how the illicit acts in the cultural heritage trafficking network could be justifiably be treated as serious offenses.[90] The provision provides a minimum penalty of three years of rigorous imprisonment and a fine of 10, 000 Birr for the crime of illicit export of archives, books, and documentary heritage. On the contrary, Article 45(1)(c) of the Heritage Protection Proclamation provides an alternative minimum penalty of 10, 000 birr (less than $300) for the crime of illicit export of cultural heritage. It seems that there is a manifest anomaly to have such differential treatment of the same act—which is an act of illicit export—without sufficient justification. This is because there may be an overlap between the two provisions. For instance, an ancient Memo written by an Emperor which is considered as a state archive could at the same time be taken as a cultural heritage. In this case, a crime of illicit export could fall under the scope of the two proclamations. In effect, it is fair to suggest that the penalties prescribed for the same illicit act need to be fairly consistent. The anomaly is also reflected within the same provision.

In addition to discrepancies related to the minimum penalty, there is also a related problem of inconsistency in the maximum amount. The maximum

[90] Also, a further lesson could be drawn from the repealed legislation to consolidate the idea that the penalty for the illicit export of cultural heritage can be rigorous imprisonment while interpreting the concept of 'serious crime'. Article 31(2) of the repealed Proclamation 36/1989 had stated that 'whosoever takes out of the country any antiquity in contravention of Article 14 of the proclamation shall be punishable with rigorous imprisonment not exceeding fifteen years.'

penalty to be imposed on the illicit excavation is only six months. On the contrary, the maximum penalty for the crimes of illicit export, commercial sale/purchase of cultural heritage is five years of rigorous imprisonment. In some cases, fixing the maximum amount of penalty only for six months of rigorous imprisonment could have an adverse consequence for international co-operation. For instance, UNTOC's cooperation framework relies on the transnational and serious nature of the crime.[91] Unless the crime is 'serious' enough entailing a maximum of at least four years of deprivation of liberty, states are not obliged to cooperate in criminal matters so long as they rely on the Convention for co-operation purposes.

Concluding Remarks

This article has examined Ethiopia's Criminal Law regulating cultural heritage trafficking in light of the Network Model that explains the nature of this transnational and organized crime. Accordingly, it is found that although the law regulates the illicit acts as a transnational and organized crime, it also contains gaps related to non-comprehensive criminalization and inconsistent penalties. The article, therefore, suggests that it is essential to contemplate the possibilities of fixing these two gaps. To that end, the legislature could benefit from international emerging trends, especially from the UNODC non-binding model guidelines and the UNTOC, as a guide to criminalization.

The international non-binding guidelines are issued under the auspices of the UNODC and adopted by the General Assembly Resolution 69/196 in 2014.[92] Specifically, Guideline 16 requires states to "consider criminalizing, as serious offenses, acts such as (a) trafficking in cultural property; (b) illicit export and illicit import of cultural property; (c) theft of cultural property (or consider elevating the offense of ordinary theft to a serious offense when it involves cultural property); (d) looting of archaeological and cultural sites and/or illicit excavation; (e) conspiracy or participation in an organized criminal group for trafficking in cultural property and related offenses; (f) laundering, as referred to in Article 6 of the Organized Crime Convention, of trafficked cultural property." Also, states are required to criminalize 'damaging or vandalizing cultural property or acquiring, with conscious avoidance of [their] legal status' (Guideline 17), failure to report the 'suspected cases' of cultural property trafficking (Guideline 18), and failure to report the discovery of archeological objects and other cultural objects (Guideline 18).

[91] UNTOC, *supra* note 12, Articles 2(b), 3(1)(b), 16, 18.
[92] Operational Guidelines, *supra* note 27

These guidelines could serve as a very important input for Ethiopia's legislature for two major reasons. First, the Guidelines regulate almost key illicit acts in all the four-stages of the illicit artifacts trafficking network. Hence, they offer a 'comprehensive instrument against offenses related to cultural property'.[93] Second, the guidelines are the embodiment of current initiatives and state practices as well as 'principles and norms' extracted and refined from the analysis of international instruments that have relevance to the protection of cultural heritage.[94] Therefore, Ethiopia's legal system could benefit from these refined Guidelines while framing its laws and institutions in the area of cultural heritage trafficking. It must, however, be underlined that the ultimate test used to criminalize illicit acts is the criterion of protection of 'public good' which is embodied under Article 1 of the Criminal Code. However, international initiatives are important reference tools in the process of evaluating the 'common good' criteria.

Also, Ethiopia's legislature can use the UNTOC as a guide to address the gap related to inconsistent penalties. The UN, through the resolution of Conference of Parties to the UNTOC [95] and the UN General Assembly,[96] encourages states to treat cultural heritage trafficking as a "serious crime", within the meaning of Article 2(b) of the UNTOC, carrying a 'maximum penalty of deprivation of liberty of at least four years or more.' Also, UNODC's Guideline 21 indicates that states may consider the application of UNTOC to impose criminal sanctions in line with Article 2(b) of the Convention to meet the required level of gravity of a crime that would entail the imposition of custodial sentences.[97]

Even though the UNTOC mainly concerns about fixing the maximum penalty, it also uses the term 'serious crime'. Thus, international co-operation, in the field

[93] UNODC, Practical Assistance Tool, *supra* note 59, p. V, Preface
[94] Id. p.1
[95] The Conference of the Parties to the UNTOC, Combating Transnational Organized Crime Against Cultural Property, Resolution 5/7, 2010, available at https://www.unodc.org/documents/organized-crime/COP_5_Resolutions/Resolution_5_7.pdf, last accessed on 20 June 2020]. See also, Para. 9 of the UNSC Resolution 2347(2017). Some, however, suggested care for this approach for fear of over-penalization. See, Neil Boister, *supra* note 89, p. 28.
[96] UNGA, Strengthening Crime Prevention and Criminal Justice Responses to Protect Cultural Property, Especially with Regard to its Trafficking, Resolution 66/180, (19 December 2011), available at https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2011/General_Assembly/Resolution_66-180.pdf , last accessed on 15 June 2020.
[97] It must also be noted that there are states who are not willing to extend the scope of UNTOC to cultural heritage trafficking cases. See, Greg Borgstede, 'Cultural Property, the Palermo Convention, and Transnational Organized Crime', *International Journal of Cultural Property,* Vol. 21, No. 3, (2014), p. 286-287. Manacorda also calls for caution while resorting to the robust use of criminal law and reminds us of the need to properly consider individual liberties in line with proportionality and *ultima ratio* principles of criminal law. See, Stefano Manacorda, The Criminal Law Dimension in the Protection of Cultural Goods in Stefano Manacorda and Duncan Chappell(eds.), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer Science+Business Media, (2019), p. 43-45.

of combating cultural heritage trafficking, mainly focuses on countering serious offenses rather than minor crimes. This is not surprising since states may not be willing to waste resources and jointly respond in fighting offenses that are not serious enough to threaten a protected interest. Thus, there is a legitimate reason for Ethiopia's legislature to treat every key crime in the four stages of the cultural heritage trafficking network, other than crimes of omission, as a 'serious offense' within the meaning of Article 108 of the Criminal Code and Article 2(b) of the UNTOC. The penalties should not, however, be artificially inflated.

To sum up, this article mainly analyzes Ethiopia's law from the viewpoint of countering transnational and organized crimes by considering contemporary global trends. It does not, however, rely on the theories and principles of criminalization and determination of punishment. Thus, the author opines that further research is needed to consolidate the law in question from the perspective of the principles of criminalization and punishment.

Establishment of Strict Liability for Motor Vehicle under Ethiopian Law: Issues of Concern

Fikerabinet Fekadu[*]

Abstract

Due to frequent happening of accidents and their severe impact on the victims, court disputes pertaining to liabilities for motor vehicles are not only considerable in amount but also ever increasing in number. Unfortunately, some provisions governing strict liability for motor vehicles are either silent or vague or too general. These factors led to disparities in the application of laws governing strict liability for motor vehicles, particularly on issues related to the establishment of strict liability. This paper, thus, inter alia, raises the following questions: What is the scope of the law governing strict liability for motor vehicles? How the advent of a law on third party insurance against motor vehicle victim affects the scope of strict liability law? Who can be plaintiff and defendant under strict liability law? To address these issues, qualitative research approach which employs legal analysis, interview, and literature and case reviews is used. The finding concluded that laws governing establishment of strict liability for motor vehicles are neither adequate to regulate current dispute nor be able to anticipates possible future developments. Hence, for uniform and proper application of laws governing establishment of strict liability for motor vehicles, amendment of relevant provisions needs to be made, until then, the Federal Supreme Court Cassation bench shall provide guidance through interpreting vague and general provisions in light of theories of strict liability.

Key Terms: Motor Vehicle, Strict Liability, Owner, Holder, Insurer, Claimant, Defendant

Introduction

Tort could be defined as an "event arising out of an action or omission of another party, which causes injury to the human body, personality, property, or economic interests, in circumstances where the law deems it justified [to require] compensation from the one who acted or fail to act."[1] Tort law[2] consists

[*] LL.B., LL.M; Lecturer in Law, School of Law, Bahir Dar University. The author can be reached at: fekerab@gmail.com.

[1] Marshall S. Shapo, Principles of Tort Law, 2nd ed., Thomson West, (2003), p. 3.

[2] A law that governs non contractual civil disputes basically through compensating the victim has different nomenclature. Under the common Law legal System it is identified as Tort Law, while in Civil law Legal System it is interchangeably named as Non Contractual and Extra Contractual Liability

of "body of rules determining the circumstances, and conditions under which harm suffered by a victim will be borne by another person..."[3] During 19th century, two forms of tort liability laws were developed; fault based and non-fault based liability laws.[4]

Although there are many structural differences, most of the common law countries adopted fault-based liability for motor vehicles,[5] while most civil law countries alongside fault-based liability adopted strict liability for motor vehicles.[6] However, the distinction between the two systems is insignificant as those systems that limit themselves to fault-based liability accord a more stringent standard of care, which in practice equates strict liability.[7]

Ethiopia belongs to civil law tradition[8] that adopts strict liability for motor vehicle alongside fault liability. While fault-based liability is the principle, strict liability is an exception. Thus, as a matter of general rule of legal interpretation, exceptions are construed narrowly in contrast to principles.[9] This intern poses the question of how narrow the interpretation should be. In addition, the presence of legal gaps, the general and/ or vague stipulation of legal provisions[10]

Law. As the Ethiopian Law used the named Extra Contractual Liability Law, so does the author of this article in referring the Ethiopian Law.

[3] Walter Van Gerven, et al., *Common Law of European Casebooks Tort Law*, Hart publishing, oxford and Portland, Oregon, (1998), p. 13.

[4] Helmut Koziol, The Aims of Tort Law: Chinese and European Perspective, *Wien Jan Sramek Verlag, (*2017), P. 193*, available at* https://www.worldcat.org/title/aims-of-tort-law-chinese-and-europeanperspectives/oclc/ 1000314237?referer=di&ht=edition, last accessed on 22 May 2020. No fault-based liability represents two types of liabilities: strict liability (liability for property and activity one engaged in) and vicarious liability (liability for the action of another person). In both cases, the responsible person is not at fault.

[5] Pierre Widmer, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation (Attribution), *in* Pierre Widmer (ed.), *Unification of Tort Law: Fault*, Kluwer Law International, (2005), p.332, available at http://www.aspenpublishers.com/, last accessed on 22 May 2020.

[6] Jean-Sebastien Borghetti, Extra-Strict Liability for Traffic Accidents in France, *Wake Forest Law Review,* Vol.53, No. 2, (2018), p. 266.

[7] Cees Vas Dam, *European Tort Law*, 2nd ed., Oxford University Press, (2013), p. 413.

[8] George Krzeczunowicz, Code and Custom in Ethiopia*, Journal of Ethiopian Law*, Vol.2, No.2, Faculty of Law, Haile Sellassie I University, Addis Ababa, p.434. Particularly, substantive codes of Ethiopia are adopted from France and Switzerland, which are civil law countries. However, the procedural part is arguable as it holds some features of the common Law Legal System. For example, through Proclamation No. 454/2005 Ethiopia introduced binding interpretation of law made by the Federal Supreme Court's Cassation Division where it is rendered by a panel of not less than five Judges.

[9] ንጋቱ ተስፋዬ፣ ከውል ውጭ ኃላፊነትና አላግባብ መበልፀግ ህግ፣ አርቲስቲክ ማተሚያ ድርጅት፣ አዲስ አበባ፣ 1996 ዓ.ም, pp 117-118

[10] Interview with Mahider Tamiru, Federal First Instance Court Kolfe Branch Civil Bench Judge, (25 January 2020); Interview with Khalid Kebede, Lecturer at Bahir Dar University School of Law, (10 January 2020). Preliminary discussion with legal professionals and practitioners revealed that some strict provision of the Civil Code are either vague, general or silent as to some elements required to constitute a case having strict liability nature. For example, see *Netherland Development Organization v Wubet Adbaru,* Federal Supreme Court Cassation Bench, File No.21296, [April 2009; reported in የሰበር ውሳኔዎች፣ ቅፅ 05፣ 2001 ዓ.ም፣ ገፅ 113-117]. In this case, the definition given for disinterested party under article 2089(1) of the Civil Code is interpreted in different ways by the ANRS Supreme Court

as well as the existence of other laws on similar areas possibly create problems on the establishment of cases having strict liability in nature. For example, in *Kalkidan Abebe v Nile Insurance SC et al.*[11] the ANRS Supreme Court rejected compensation claim brought by daughter of the deceased against the insurance company for death of her father due to car accident for which the defendant insurance company gave insurance coverage. The Court stated that the claimant could only bring her claim as per article 2081 against the owners of the car not against the insurance company. This is against article 17(2) of Proc. No. 799/2013 that allows victims to claim compensation directly from the insurer.[12] Furthermore, where various persons are involved in disputes arising out of motor vehicle accidents,[13] confusion may arise as to who can be legal claimant and defendant and what things need to be considered to constitute a claim under strict liability provisions of extra contractual law.

Therefore, in this article, the writer aims to analyze and assess pertinent laws and assesses the practice of ascertaining elements used to establish a strict liability case on motor vehicles. More specifically, this paper analyses issues related to the scope of application of laws governing strict liability arising from motor vehicles, factors needed to constitute a strict liability case concerning motor vehicles and parties thereto. In addition to an in-depth analysis of pertinent laws and relevant documents, the writer conducted interviews with legal professionals to corroborate the legal analysis and reach a sound conclusion. As the interview aimed to get expertise opinion and explanations on the laws and the practice of the issue, purposive sampling was employed. Moreover, for a better understanding of the research problem and for the purpose of drawing lessons, pertinent laws of other countries having strict liability regimes concerning motor vehicles were reviewed.

This paper is organized into five sections. The first section makes an overview of strict liability law for Motor Vehicles. The Second deals with the scope of

and the Federal Supreme Court Cassation Bench. The former defines disinterested party only as a person who personally control the vehicle for his own benefit while the latter defines it as any person who sustained damage while he was getting any benefit from the thing caused damage.

[11] *Kalkidan Abebe v Nile Insurance SC et al.,* Amhara National Regional State Supreme Court, File No. 0151951/2019. [Hereinafter *Kalkidan Abebe v Nile Insurance SC et al.*].

[12] Vehicle Insurance against Third Party Risks Proclamation No. 799/2013, *Negarit Gazetta,* 2013, article 17(2) [hereinafter Proc. No. 799/2013]

[13] For example, a motor vehicle may cause injury while it was operated by an employed driver at the time when the motor vehicle was under custody of a person other than its owner. Adjudication of cases having such attributes is not a simple task. Different factors such as, the identity of the persons, the type of relationship between or among persons with respect to the vehicle, the manner how the damage was caused and other factors should be considered to identify a person who can be plaintiff and defendant. For example, see the discussion on *Abrar Sabir v W/ro Alemtsehay Wesene & Tibebu Construction PLC*, infra note 121.

application of laws governing strict liability for motor vehicles. The third section sets out the impact of third-party motor vehicle victims' insurance law on the application of strict liability law. The fourth one presents who could be claimants and defendants in a case similar to the concern of the paper. The last section states some concluding remarks.

1. Overview of Strict Liability Laws for Motor Vehicles

Thought fault is the principal source of tort liability elsewhere, in some scenarios a person is still held liable irrespective of any fault on his/her part. Accordingly, extra contractual liability provisions are not confined in a single category; rather they are classified in to different sections depending on their bases for establishing extra contractual liability.

In Ethiopia, sources of extra contractual liability are classified in to three. Namely fault-based liability, strict liability (liability irrespective of fault) and vicarious liability (liability for the action of others).[14] The first source of extra contractual liability is fault based extra contractual liability. It is the cardinal source of extra contractual liability while the other two categories are exceptions in the sense that liability arises only in specific grounds stipulated by the law. A person who caused damage to another by his fault is responsible for making it good.[15] If it is not him, who else should bear? This position is based on the concept of moral responsibility.[16] Making a person responsible for his own wrong deed will also have a deterrent effect.[17]

The second source of extra contractual liability is strict liability, which is an exception for fault.[18] Deviating from the principle of extra contractual law that basis itself upon fault, in some legally stipulated scenarios, a person is liable to compensate injuries caused by his/her activities or properties irrespective of his/her fault.[19] Motor vehicles are among lists of properties for which owners or holders are strictly liable.[20] This poses a question of why a person is liable

[14] Civil Code of the Empire of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 165 /1960, 19thYear, No. 2, Article 2027 [hereinafter Civil Code].
[15] Id., article 2028.
[16] Gerven, supra note 3, p. 14.
[17] Id., p. 19.
[18] Civil Code, supra note 14, article 2124-2136. The third ground of tort liability is vicarious liability, liability for the action of other. Here, the person become responsible not because he commits fault; rather because, he is related to the tortfeasor. Only some legally stipulated bonds create such liability. For example, in Ethiopia parents and custodians are responsible for the act of minors and employers for their employees provided that employees caused the damage while performing their job.
[19] Civil Code, supra note 14, article 2071-2085. Under these provisions only animals, buildings, Motor vehicles, machines and products are numerated as sources of strict liability.
[20] Id., article 2081 et. Seq.

without committing any fault. Some of rationales for strict liability are discussed in the following paragraphs.[21]

Economic and moral consideration: a person who drives benefit from certain property should also bear the risk of the damage inflicted by that property.[22] This rationale is based on a simple theory of fairness; if you benefited from something, you have to also bear the cost where it caused damage. Unlike fault-based liability that ascribes for its ethical consideration[23], strict liability relies on the idea that someone who is permitted to use a particularly dangerous thing for his/her advantage should equally bear the associated risks.[24]

Loss shifting/spreading: employers and owners have the opportunity to spread the loss through the price of the products or insurance. [25] They could do this by adding small prices on their product or by claiming on their liability insurance. In contrast to fault liability, which is attributable to corrective justice, strict liability is attributable to distributive justice.[26]

Deep pocket theory: the base for this rationale is capacity. It presupposes owners have a better economic capacity to redress the damage, than the injured victim, so they should bear it.[27] For example, given the cost of a motor vehicle, owner is presumed to have better economic capacity than an injured pedestrian.

Difficulty to proof fault: [28] a person who caused damage against another person upon fault may be accused for strict liability. This happened when it is difficult to prove existence of fault on the part of the defendant. For example, it may be

[21] Those rationales for strict liability discussed under this article are used to establish liability of the owner or other persons identified by tort law to compensate the injury sustained by motor vehicle irrespective of any fault on their part. They may not use to decide who shall bear the cost of compensation among persons in the defendant side. Regarding the later issue, countries adopt different rules using different parameters. For example, the French tort law used actual control as a parameter while the Ethiopian law employed economic gain.

[22] Simon Deakin *et al*, *Tort Law*, 6th ed., Oxford, Clarendon Press, (2008), p. 665.

[23] Helmut Koziol, *Basic Questions of Tort Law from Germanic Perspective,* Fiona Salter's *Translation, (*2012), P. 171, available at https://www.jan-sramek-verlag.at/fileadmin/user_upload/KoziolBasicQuestions_e PDF_HighResOpen_FINAL.pdf, last accessed on 23 May 2020*;* Widmer, supra note 5, p.331.

[24] Koziol, supra note 23, pp. 249-50

[25] Morbide Nicholas and Roderick Bagshaw, *Tort Law*, 2nd ed., Pearson Longman, (2005), p. 640

[26] Widmer, supra note 5, p. 334

[27] Nicholas and Bagshaw, supra note 25, P.638.

[28] Civil Code, supra note 14, General reading of article 2086(1).

too technical for the layman to prove the nature of the fault;[29] in such a case, the victim should be permitted to claim based on strict liability.

The aforementioned rationales may jointly and separately serve as grounds for establishment of strict liabilities for motor vehicles. However, this does not mean that fulfillment of one or more of the above justifications suffice to impose strict liability. Establishment of strict liability against persons potentially responsible to compensate injury caused by motor vehicles is also dependant up on other factors. These factors are addressed in the subsequent sections.

2. The Scope of Strict Liability for Damage Caused by Motor Vehicles under the Ethiopian Extra-Contractual Liability Law

The presence of various types of motor vehicles with differences in purpose, efficiency, medium of operation, and special laws governing them create pressing need to define the phrase "motor vehicle". Defining the phrase is essential to determine the scope of the law governing strict liability for motor vehicles. The transportation industry is also at the verge of introducing new forms of non- motored but highly efficient and sophisticated vehicles.[30] Nonetheless, there is no special laws aim to regulate anticipated extra contractual liabilities arising there from. This situation also urges further contemplation of the meaning and scope of "motor vehicle" under the Ethiopian Extra Contractual Liability Law.

Article 2081(1) of the Civil Code imposes strict liability on the owner for any damage caused by his motor vehicle.[31] However, in addition to establishing strict liability upon the owners of motor vehicles, the Civil Code does not define the phrase "motor vehicle". Absence of the legal definition for "motor vehicle" invite arguments on the scope of applying legal provisions governing strict liabilities for damages caused by motor vehicles. For example, one may argue that motor vehicle only refers to road vehicle powered by an engine- literal

[29] Edward A. Tomlinson, Tort Liability in France for the Acts of Things: A Study of Judicial Law Making, *Louisiana Law review,* Vol. 48, No. 6, (1988), pp. 137-38 available at https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article= 5129&context=lalrev, last accessed on 23 May 2020.

[30] Magnetic levitation train, https://en.wikipedia.org/w/index.php?title=Magnetic_levitation_train&oldid=906440119, last accessed on July 23, 2020; Hyper Loop, https://en.wikipedia.org/w/index.php?title=Hyperloop& oldid=967525604, last accessed on July 23, 2020; Interview with, Fikeresendek Fekadu, Mechanical Engineer, (10, March 2020). In Europe and China, Mechanical Engineers are already inventing non- motored trains operated by magnetic system. These newly crafted trains are better than the existing rail system interns of operation cost, efficiency, and speed. Similar improvement inventions are also on the process for other types of motor vehicles.

[31] Civil Code, supra note 14, article 2081(1) decreed "[t]he owner of a machine or motor vehicle shall be liable for any damage caused by the machine or vehicle, notwithstanding that the damage was caused by a person who was not authorized to operate, handle or drive the machine or vehicle."

meaning of the phrase. This definition is confined to ordinary motor vehicles moving on road.[32] Some Ethiopian legal scholars accepted the above narrow interpretation by saying 'motor vehicle' stands for what in Amharic commonly known as *"mekina"*[33] The theoretical base for this interpretation is the general rule of legal interpretation, which dictates narrow interpretation of exceptions.[34] Adoption of the ordinary meaning of the phrase, *inter alia,* bars application of strict liability law of the Civil Code on other motored vehicles, such as airplane, vessel, boat, train and others.

On the contrary, the second argument follows wider interpretation and extends the meaning to any conveyance powered by an engine and used for transportation on land, water, or air.[35] Hence, a person responsible to compensate damage caused by aircraft, vessel, and train is subject to article 2081 *et.seq.*,[36] in the absence or gap of special legislation governing thereof. This argument overrides the first one in two perspectives. First, rationales for strict liability that basis on better financial capacity of owners and dangers nature of the vehicles are more strongly applicable for non-ordinary motor vehicles.[37] Secondly, there are some gaps in special laws governing extra contractual liability arising out of non-ordinary motor vehicles. Particularly, special laws governing liability for aircraft and vessels.[38]

A broader interpretation of article 2081 of the Civil Code is essential to extend the protection of strict liability law up to victims of train, aircraft, and vessels in absence of similar remedy in other laws. There are some gaps in special laws governing strict liability arising out of non-ordinary motor vehicles particularly aircraft and vessels.[39] For example, the Maritime Code has some provisions having strict liability nature; however, their application is limited to vessels going on the sea with the exclusion of inland waterways.[40] In aircraft case too,

[32] The Concise Oxford English Dictionary, s.v. "motor vehicle" equated with a road vehicle powered by an internal combustion engine. Similarly, Longman Advanced American Dictionary, s.v. "motor vehicle" the dictionary defines it as car and similar road vehicles.

[33] ንጋቱ, supra note 9, p. 115

[34] Id., pp. 117-118

[35] Black's Law Dictionary, 8th ed., s.v. "vehicle" means "any conveyance used in transporting passengers and things by land, water or air."

[36] Krzeczunowicz, G., *The Ethiopian law of Compensation for Damage*, Commercial Printing Enterprise, Addis Ababa, (1977), pp. 170- 238

[37] For more on this see the discussion under section one of this article from page 5-6.

[38] Hailegabriel F., The Scope of Article 2081 of the Civil Code: A Comment on Negist Mekonnen *et al.* v. Ethiopian Airlines, Inc., *Bahir Dar University Journal of Law*, Vol.2, No. 1, (2011) p.156.

[39] Id.

[40] Maritime Code of the Empire of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 164 /1960, 19thYear, No. 1. From general reading of Maritime Code it is possible to conclude that similar to most of the shipping nations, the scope of application of our Maritime Code is limited to shipping activities on seawaters only. The general framework and the preface of the 1960 Maritime Code infer such

until the adoption of the Civil Aviation Proclamation in 2008,[41] Ethiopia did not have any domestic law that regulates extra contractual liability for damage caused by an aircraft.[42] That is, unless the phrase "motor vehicle" had been interpreted broadly to include aircraft, there had no law that could redress victims who sustained damage caused by aircraft until the adoption of the Civil Aviation Proclamation.[43] The advent of this proclamation did not also shatter the application of article 2081 *et. Seq*. since its scope of application is limited to non-state owned Crafts.[44] Moreover, to the best of the writer's knowledge, despite antiquity of railway in Ethiopia, neither the railway nor a special law governing strict liability aspects of the railway is developed. If it is so, what is the way out to address damages caused by trains and state-owned Crafts?

In the opinion of the writer, article 2081*et seq*. should be an applicable law for liabilities arising from trains and state-owned crafts too. It could also serve as a residual provision that called upon in case of any gap in the Civil Aviation Law. Generally, the aforementioned theoretical and practical justifications enable to conclude the precedence of liberal but careful interpretation of the phrase "motor vehicle" over the literal meaning of the phrase. Therefore, owners and holders of vehicles could be strictly liable under article 2081*et. Seq*. provided that the vehicles are moved by motor.

Issues of the scope are not solved only by extending its application on all motor vehicles. Limiting strict liability only on motor vehicles, in exclusion of all other non-motor vehicles, renders the law not to cope up with the existing technological dynamics. The justifications for excluding non-motor vehicles could be derived from the limited understanding of non-motor vehicles in their traditional scope, which is simple and manual. The most commonly known traditional non-motored vehicles are cart and bicycle. The damage they caused is not comparable to the damage caused by motor vehicles. Hence, no special

assertion. Under article 1 the Maritime Code defines ship as: "*…any sea going vessel…*" This definition also substantiates the above assertion as to the non-applicability of Maritime Code on vessels moving on domestic water ways.

[41] Ethiopian Civil Aviation Proclamation, *Negarit Gazeta*, No. 616/2008, year 15, No. 13, (2008) [hereinafter, Civil Aviation Proc. No. 616/2008].

[42] Of course, in Ethiopia, since its accession in 1950 to the 1929 Warsaw Convention that unified certain rules relating to international carriage by air regulates liability for international air carrier, and adoption of the 1960 Commercial Code regulates domestic liability. These legal documents regulate only liabilities arising out of contractual agreements. They are not considerate for tort liability arising thereof.

[43] Civil Aviation Proc. No. 616/2008, supra note 41, article 70(1). Any aircraft operator, while the aircraft is in flight, shall be liable for damage caused by the aircraft or the operation thereof, or caused by the fall of any person or object aboard the aircraft or attached to the aircraft, which results in the death, personal injury or damage to property of a third party on the ground.

[44] Id., article 2(2) reads: "This Proclamation shall not apply to state aircraft unless otherwise provided by a regulation issued hereunder."

provision is needed as the damage caused by them could be sufficiently regulated by other provisions of Extra Contractual Liability Law. For example, the provision governing liability for animal[45] could be applied for damage inflicted by cart and personal action of injury[46] for the case of a bicycle.

In the contemporary world's transportation system, there is a move towards non-motored but highly sophisticate, swift, efficient, and expensive vehicles which also tend to be more dangerous. Particularly, in the area of railway, we are on the brink of non-motored trains moved by magnetic system.[47] Of course, unequivocal scenery of the phrase "motor vehicle" and its exceptional nature as source of liability preclude the inclusion of non-motor vehicles. However, the aforementioned justifications used for liberal interpretation even fit better for new generation non-motored vehicles. As per rules of legal interpretation, clear law may also be subject to interpretation where its literal application become unfair or jeopardize the basic theme of the law.[48] Hence, provisions governing strict liabilities for motor vehicles should be applicable for the case of modern non-motored vehicles, which shared the above-mentioned similar attributes with motor vehicles.

Moreover, since law is a normative prescriptive tool,[49] it should anticipate possible future occurrences. Therefore, article 2081 of the Ethiopian Civil Code needs to be either interpreted or amended in a manner that can incorporate non-motored vehicles that share the justifications provided for motored vehicles. Recent developments in other countries, for example, France, underpin the appropriateness of the liberal interpretation of article 2081, as it extends the scope of strict liability to properties other than stipulated under article 1384 of the French Civil Code,[50] which has a similar stance with article 2081 of the Ethiopian Civil Code.

---

[45] Owners of animals have similar liabilities with motor vehicle owners for any damage caused by their animals. See article 2071 *et. seq.*

[46] Article 2066 of the Civil Code can be applied for damage caused by riding a bicycle, as it dictated damage against a person by personal action can be made directly or indirectly using things. The rider who caused the damage may not be an owner; he may rent or borrow it. In such a case owner's liability should not be raised. This is because, saving the luxury one, a bicycle is not an expensive vehicle to implicate the owner's deep pocket or their capability to spread the loss. Hence, it is better to confine the liability issue under article 2067, where the damage sustained in the absence of fault on the part of the tortfeasor.

[47] Magnetic levitation train, supra note 30; Fikeresendek, supra note 30.

[48] Paranjape, N.V., *Studies in Jurisprudence and Legal Theory*, 3rd Edition, Central Law Agency, (2001), pp. 214-218

[49] Vago Steven, *Law and Society*,7th Edition, New Jersey, (2003), p. 9

[50] Michel Channarsa, *Compensation for Personal Injury in France*, (2003) P. 7, available at http://www.jus.unitn.it/cardozo/review/2002/cannarsa.pdf, last accessed on 15 May 2020; Esmain P., Liability in French Law for damages Caused by Motor Vehicle Accidents, *The American Journal of*

3. The Law on "Vehicle Insurance against Third-Party Victims" and Its Impact on the Scope of Strict Liability Law

The severity and high frequency of damage caused by motor vehicles everywhere in the world, justify the development of a special type of compulsory third-party liability insurance.[51] Consequently, in the majority of jurisdictions, Extra Contractual Liability Law is ceased to be the sole mechanism to redress non-contractual damage;[52] it is supplemented or replaced with different loss distribution instruments, such as mandatory or voluntary third party insurance and social security.[53] In almost all legal systems, a statutory scheme of liability insurance has been established with obligatory minimum insurance sums for traffic accidents.[54] The aim behind taking such steps is to achieve a greater degree of distributive justice through overcome actual or supposed deficits of the extra contractual system.[55]

Mandatory liability insurance serves interests of triple parties: the victims, tortfeasors, and the public. Primarily, victims are benefited from full compensation regardless of the economic means of the tortfeasor and from its efficient and cost-effective compensation process. In effect, the law permits victims to claim directly from the motor vehicle insurer in addition to the tortfeasor.[56] This procedural rule saves victims from settling their claims out of court for a meager sum due to their pressing economic needs. The tortfeasor also

---

Comparative Law, Vol. 2, No., 2, PP. 157-158. Previously, article 1384(1) of the French Civil Code was read in tandem with article 1385 and 1386 to establish strict liability only when harm was caused by animal or dangerous buildings under his control. However, in the landmark *Teffaine* decision, the *Courde cassation* ruled that Article 1384(1) has to be considered as a general stand-alone provision and construed it as it could include liability where damage is caused by things of whatever sort. Irrespective of the nature of the property, the court uses this article to impose liability on the sole basis of the "use, direction and control" by the defendant of the thing which caused the damage. Since then, article 2084(1) serves as the principal contrivance for the application of strict liability in tort.

[51] Bernhard Gomard, Compensation for Automobile Accidents in the Nordic Countries, *The American Journal of Comparative Law*, Vol. 18, No. 1, Oxford University Press, (1970), p. 81, available at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/amcomp18&id=105&men_tab=srchresults, last accessed on 14 may 2020; Margaret Chan, WHO*, Global Status Report on Road Safety*, *Foreword* to Tami Toroyan, (2015), p. vii

[52] Karner, Ernst., A Comparative Analysis of Traffic Accident Systems, *Wake Forest Law Review,* vol. 53, no. 2, (2018), p. 367, available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/wflr53&div=16&start_page=365&collection=journals&set_as_cursor=1&men_tab=srchresults, last accessed on 25 May 2020; Gomard, supra note 51, p89

[53] Id.

[54] Olga Shev*chenko,* Motor Third Party Liability after CJEU Interpretation of the Directive 103/2009/EC in Vnuk Judgment, *Teisė*, Vol. 111, Vilnius University Press, (2019), p. 131

[55] Wagner G., Tort Liability and Insurance: Comparative Report and Final Conclusions, in Wagner G. (ed.), *Tort Law and Liability Insurance, Tort and Insurance Law,* Vol 16. Springer, Vienna, (2005), pp. 348-52, available at https://doi.org/10.1007/3-211-30631-5_14, last accessed on 15 May 2020

[56] Europe Economics, Retail Insurance Market Study, *Final Report by Europe Economics*, (2009), p. xxii https://ec.europa.eulinfo/system/files/retail-insurance-market-study, last accessed on 18 May 2020

benefited from an unprecedented economic burden through spreading the cost of compensation among premium payers.[57] All in all, the above-mentioned dual functions also mitigate the inconvenience caused to the society through loss of production, increased social expenses, and strain on the capacity of hospitals and other institutions.[58]

However, the insurance system is not self-sufficient to redress claims of victims for two reasons. The first is presence of a maximum limit on the amount of compensation given for victims.[59] The second reason is existence of the practical challenge of insurers to cover the insured liability, particularly, where the injury was caused in breach of terms of the agreement by the insured.[60] These factors render the insurance system incomplete to redress victims and demand presence of the extra contractual law as a backup.

In Ethiopia, there are two separate legal documents: Extra Contractual Liability Law and Vehicle Insurance against Third Party Risks Law (Proc. No. 799/2013) in regulating civil liability for motor vehicles. This could pose a problem of choosing the applicable law, which cannot be simply determined by the principle of "the later prevail over the previous" or "the special prevail over the general". Their disparity in the amount of compensation and nature of beneficiaries further aggravate the confusion.

Proclamation No.799/2013 is introduced for enabling victims to get quick compensation either where the defendant is insolvent or the vehicle causing the damage is unknown.[61] Besides, it broadens beneficiaries of compensation for a fatal accident by enabling all dependents of the victim to claim material compensation.[62] Under Extra Contractual Liability Law, only children, parents,

[57] Wagner G., (Un)insurability and the Choice between Market and Public Compensation Systems, in Willem H. van Boom & Michael Faure, *(*ed.), *Shifts in Compensation Between Private and Public Systems,* (2007), 1st ed., Springer, p. 87

[58] Daniel Rubin, Conclusions*,* in Attila Fenyves *et. al.* (eds.), *Compulsory Liability Insurance from a European Perspective*, (2016), P. 431; WHO*, Global Status Report on Road Safety*, p. vii

[59] Van Boom & Faure, supra note 57, pp. 106-108

[60] See the discussion under section 4.2.2 page 28 of this paper. Contrary to the law that declares the unconditional right of victims to bring compensation claims directly against the insurer, Sometimes the practice went otherwise.

[61] Id., article 20(1)

[62] Id., article 20(1)(c), cumulative reading with article 2(13). Article 20(1(c)) stated that compensation for the deceased's family members as one among the aims of the law. For the proclamation, article 2(13) defines family members to mean spouse, child, father, or mother of the insured person or any person under the support of the insured person. Contrary to tort law, this proclamation enables dependents to claim compensation for the loss they sustained due to the death of the victim as far as they prove their dependency on the livelihood of the victim. Dependents' that are denied to bring compensation claim under article 2095 of the Civil Code can bring their claim based on Proc. No. 799/2013.

and spouse of a victim are legitimate claimants of compensation provided that they were dependents of the victim.[63]

Regarding the amount of compensation, fixing the roof of compensation given for third- party victims is a common practice almost in all jurisdictions having vehicle insurance against- third party victim law.[64] In Ethiopia, for all damages and expenses due by motor vehicle accident, the total amount of compensation given for a victim under the proclamation is limited to the maximum of 40,000 *birr*.[65] This stipulation may have two contrary implications on the interests of claimants. For dependents of a fatal accident, it is more beneficial, as it entitled them to get compensation in a lump sum, unlike the extra contractual law that state payment in the periodical base.[66]

On the other hand, as the proclamation limits total compensation to the maximum of 40,000 *birr*, it disobeys the principle of compensation that demands commensurability of damage and compensation. Hence, the indemnity given under this proclamation would not be satisfactory for victims where material damages they suffered are beyond 40,000 *birr*. However, it may be important for a victim who cannot prove material damage sustained due to death of the victim as it stipulates a minimum of 5000 *birr* compensation in such a case.[67]

Presence of the two laws on similar area, one follows principle of equivalence in assessment of compensation while the other put maximum and minimum limit seems to create confusion in choosing the applicable law. However, the proclamation states a layout by permitting claimants to bring an extra claiming to get additional compensation as per the relevant law; [68] such relevant law in our case is obviously, the extra contractual law. Hence, the plaintiff can bring his claim for additional compensation as per extra contractual law in the same file, or he can bring his claim in a fresh suit and it should not be subject to the objection of *resjudicata*; since the law permits so.

[63] Civil Code, supra note 14, article 2095. The English version state ascendants and descendants contrary to the Amharic version which says children and parent. For further on this point see the discussion on pages 16 under section 4.1.1

[64] Andrea Renda and Lorna Schrefler, *Compensation of Victims of Cross-Border Road Traffic Accidents in the EU: Assessment of Selected Options*, Centre For European Policy Studies, Brussels, (2017), P. 10, available at https://www.kolettis.com/downloads/EUCrossBorderVictimCompensation.pdf, last accessed on 27 May 2020; Gomard, supra note 51, p. 100.

[65] Proc. No. 799/2013, supra note 12, article 16.

[66] Civil Code, supra note 14, article 2095(2).

[67] Proc. No. 799/2013, supra note 12, article 16(1(a)).

[68] Id., article 16 (3).

The other important point about the two laws is their scope of application. The Proclamation is not applicable where the victims are family or employee of the insured defendant,[69] while such relations are immaterial to limit the victims' claim as per Extra Contractual Liability Law. Besides, the Vehicle Insurance against Third Party Proclamation is applicable only for road motor vehicles commonly called "*mekina*" strict liability apply for all motor vehicles in absence or gap of special law governing thereof.

Therefore, thought strict liability provisions of Extra Contractual Law and Insurance Law cover similar damages, plaintiffs' dilemma of choosing either of the two laws can be solved based on their differences such as, on their scope of application, identity of the victim benefited thereby, and the nature and quantum of damage they covered.

Once the scope of the law governing strict liability for damage caused by 'motor vehicles" is clarified, the next issue ought to be addressed is identification of parties in a case having strict liability associated with necessary conditions thereof.

4. Parties in a Case Constituting Strict Liability for Motor Vehicles

Determination of parties in a case having strict liability is the other essential issue for establishment of a case having strict liability for damage caused by motor vehicles. However, identification of a person that can be claimant in such a case and a person liable thereof is sometimes a difficult task. Not all persons who are injured by motor vehicles can bring compensation claims based on strict liability law. Their right to claim based on strict liability law is dependent upon their relation with the person having strict liability in respect to the motor vehicle that caused the injury.

4.1. Claimants

Based on their relationship with the person having strict liability for a damage caused by motor vehicle, victims can be classified as contracting[70] and non-contracting parties.[71] The presence of many differences in the requisites for and consequences of liability in contractual and extra contractual liability laws deters litigants from making an arbitrary choice between them. In this regard, strict

[69] Id., article 7 (2&3).

[70] Contracting victims are persons who have a contractual agreement with the owner or holder of a motor vehicle and sustained damage thereof; Such as paid passengers, sender and receiver of carriage for the damage on the carriage, and employees of the owner or holder of the vehicle.

[71] Non-contracting victims are third party victims of motor vehicles such as, pedestrians, relatives of the victim, property owners, and attendants of an atrocious vehicle accident.

liability law is applicable for non-contracting third-party victims while laws governing contractual agreement regulate damage sustained on the contracting party.[72] Disinterested parties are also excluded from claiming compensation based on strict liability law.[73] Determination of disinterested party depends on deferent factors like, the type of the vehicle, and the knowledge and consent of the owner/holder.[74] For example, non-paying passenger is a typical example for disinterested party. A passenger in a vehicle assigned for a purpose other than public transportation is legally presumed as non-paying passengers. Hence, no strict liability is imposed on the owner or holder of the vehicle where that vehicle caused damage against non-paying travelers.[75] Even though passengers paid transportation fee for the driver, still owners or holders of the vehicle would not be liable unless proof is made as to their benefit from the payment.[76] Accordingly, in *Yilikal Bewketu v Siyum Abady*, the Federal Supreme Court Cassation Bench decided that accidental damage sustained on a person traveling by a vehicle for free would not lead to owners or holders' liability, as the party is a disinterested party under article 2089 of the Civil Code.[77]

Claimants under extra contractual liability law in general and strict liability law in particular are classified as *independent* and *derivative* claimants.[78] However, in the adjudication of tort cases identification of the victim entitled for the compensation is a difficult task.[79]

[72]Civil Code, supra note 14, article 2037, 2088, and 2147. These provisions limit the scope of Extra Contractual Liability Law in favor of Contract Law. Under article 2037, damage for breach of contractual agreement is regulated as per the contract law. Article 2088 also stated contract law governs a compensation claim, whenever the victim was connected with certain instrumentalities of harm under contract with the person who would otherwise be strictly answerable by tort law. A passenger who paid for his travel impliedly concludes a contractual agreement with the carrier by which the later obliged to take him at his destination safely. Hence, as a cumulative reading of article 1795 of the Civil Code and article 595 of commercial code reveals, the carrier is contractually liable for any damage that happen to the passenger whilst mounting, during the journey and at the time of alighting from the vehicle.

[73] Civil Code, supra note 14, article 2089. Disinterested person means a person who used the motor vehicle in absence of contract and without giving any benefit for the person having strict liability

[74] Interview with, Ato Biniam Yohanis, Amhara National Regional State Supreme Court Civil Bench Judge, (3 June 2020)

[75] Civil Code, supra note 14, article 2089. This provision is not applicable for employee who traveled by the employer vehicle as they are regulated by Employment law

[76] If the contrary is proved, it will be regulated by the Commercial Code, as if they are concluded contractual agreement.

[77] *Yilikal Bewketu v Siyum Abady*, Federal Supreme Court of Ethiopia, Cassation File No. 24818 [February 2008; reported in የሰበር ውሳኔዎች፣ ቅፅ 5፣ 2003 ዓ. ም፣ ገፅ 125-128]

[78] Abdulmalik Abubeker & Desta G/Michael, *Extra-contractual Liability Teaching Material*, Prepared under the Sponsorship of the Justice and Legal System Research Institute (2009), p. 171.

[79] Interview with Ato Girma Ewnetu, Amhara National Regional State Supreme Court Civil Bench Judge, (3 June 2020); Biniam, Supra note 74.

4.1.1. Independent Claimants

Independent claimants are persons who brought compensation claims on their own behalf. Hence, they are required to prove their vested interest as per article 33(2) of the Ethiopian Civil Procedure Code. From general reading of Ethiopian Extra Contractual Liability Law independent claimants could be classified into two: the victim himself and relatives of the victim.[80]

The victim

The person who directly sustained either material or moral damage could bring a compensation claim against the person strictly responsible for the damage caused by a motor vehicle. In addition to the direct victims, spouse of a victim also could claim compensation for moral damage they suffered due to the bodily injury sustained on their spouses that renders their spouses companionship less agreeable or less useful.[81] A claim of moral compensation by a spouse for the damage he or she suffers due to physical damage sustained on the other spouse is the only exception that enables a person to claim compensation while the direct victim survives the injury.

Relatives of the Victim

Upon the death of the victim, his relatives could be an independent claimant for the loss they sustained due to the death of the victim. However, there is a legal dichotomy among relatives of the victim for moral and material damages. For moral damage, family members of the deceased are entitled to claim the compensation they suffer due to the death of the deceased. For this claim parents, spouse, children, brother, and sister of the deceased are considered as family members.[82]

On the contrary, comparing with relatives who can claim moral compensation, relatives entitled to bring claim for material damage are limited in scope. There is also discrepancy between the Amharic and the English version on relatives entitled to claim material compensation on their behalf due to death of the victim. The English version states the spouse, ascendants, and descendants of

[80] Abdulmalik & Desta, supra note 78, P. 171

[81] Civil Code, supra note 14, article 2015(1) "[f]air compensation may be awarded by way of retires; to a husband against a person who, by inflicting bodily injury on the wife, render, her companionship less useful or less agreeable to the husband." Taking literal meaning of this article exclude the claim of moral compensation by a woman whose husband's compassion becomes less agreeable due to the damage inflicted on his body. However, this is against the principle of equality enshrined in the Ethiopian Federal Democratic Republic Constitution article 25 and article 36 (1 & 2). Hence, article 2015(1) should be construed in a way that confers a similar right for wives too.

[82] Id., article 2015 in tandem with article 2017

the victim, while the Amharic version only confers such rights on the spouse, children and parents of the deceased.[83] The English version serves victims' interest by increasing number of claimants while the Amharic version lightning burden of persons responsible to compensate the damage. However, this inconsistency between the two versions could be solved by applying the law that gives priority for the language of the law maker- *The Amharic version prevails over the English version*.[84] Hence, only the spouse, children and parents are capable to bring claims for material damage on their behalf in case of fatal accidents.

The other issue worth discussing here is identifying a person entitled to claim compensation where the deceased was in bigamous or heterogamous marriage. Bigamy is prohibited under the revised Federal Family Code[85] and it is labeled as criminal act under the 2004 Criminal Code[86]. This situation invites two arguments. One may argue that since bigamy is criminal act, those spouses who solemnized bigamous marriage should not be benefited from their crime. Hence, courts should first identify the spouse who had committed bigamy and excluded them from compensation. This argument enables to avoid one's benefit from consequence of his/ her criminal act. It is also used to lightened compensation burden of the person having strict liability, whose liability is based not on fault. However, such restriction on spouses should not be applicable where bigamy is committed inconformity with religious or traditional practices recognized by law.[87]

The other argument focuses on the purpose of extra contractual liability law, which is compensating the victim. As far as existence of marriage and damage sustained on the spouses due to death of the victim is factually proved, compensation has to be given for more than one spouse. The author of this paper supports the second argument for four reasons. First, punishing for crime is not the purpose of Extra Contractual Liability Law. If the act is a criminal one, it has to be decided by criminal bench. Second, the bigamous marriage is voidable marriage. That is, it is valid until invalidated by court. In the case at hand both spouses will have similar status as their marriage is dissolved upon death of the

[83] Id., article 2095(1)
[84] A proclamation to Provide for the Establishment of the Federal Negarit Gazeta, Proclamation No. 3/1995, *Negarit Gazetta*, (1995), article 2(4)
[85] Revised Family Code of Ethiopia, Proclamation No. 213/2000, *Federal Negarit Gazetta*, (2000), article 11
[86] The Criminal Code of Ethiopia, proclamation No. 414/2004**,** *Federal Negarit Gazetta*, (2004), article 650 [Hereinafter, Criminal Code**]**
[87] Id., article 651

victim.[88] Third, identifying the bigamous spouse to exclude from compensation claim demand elongated judicial process which also affects the purpose of the law to give quick compensation. The last reason, thought excluding bigamous spouse lightened compensation burden of the defendant, this argument is sounder in conceptual speaking than practical perspective. This is true because, basically amount of the compensation is determined based on the extent of damage not in number of victim. Since the income of the deceased remains constant, increment on the number of family decreased per capita damage sustained on each member, so does amount of compensation for each of them.

The law is also not clear whether those claimants under article 2095(1) needed to be in a state of necessity to claim the compensation or not. This vagueness of the law leads into controversies as to whether those persons should be incapable of generating their own livelihood or not. Fortunately, article 2095(3) of the code sparks a clue on this dilemma by stating that presence of other relatives from whom they can ask support could not preclude them from constituting compensation claims. The general reading of this provision implicates only two objective facts are required to be proved: the fact that claimants' relation with the deceased falls under one of the categories stated under article 2095(1) and the existence of regular support that ceased due to the victim's death. No additional requirement is stated in the law. Hence, the presence of other relatives they could lean on and their capacity to generate their own livelihood would not preclude them from claiming material compensation.

Contingently, the legal presumption on the incapacity of the deceased for work and support the claimants due to tender age or other grounds did not bar claimants from the claim. In light of the above contention, in *Birhanu Feyisa v Nile Insurance & Solomon Ahmed*, the Federal Supreme Court Cassation Bench decided material compensation for the parent of minor deceased who proved the existence of material support from the deceased minor child that ceased upon the death of the child.[89] On the other hand, descendants who attain the age of 18 are

[88] *Aminat Ali v Fatuma Wubet,* Federal Supreme Court of Ethiopia, Cassation File No.45548 [September 2010; reported in የሰበር ውሳኔዎች፣ ቅፅ 13፣ 2005 ዓ. ም፣ ገፅ 167- 170] Even if the author could not find cassation decision on the issue, in Aminat Ali v Fatuma Wubet, which is about liquidation of pecuniary property of spouses that involve issue of bigamy, the Bench decided that the second wife to have a share on the common property. This proves that though bigamy is criminal act, it would not deny the bigamous spouses civil rights.

[89] *Birhanu Feyisa v Nile Insurance & Solomon Ahmed,* Federal Supreme Court of Ethiopia, Cassation File No.38117 [December 2011; reported in የሰበር ውሳኔዎች፣ ቅፅ 11፣ 2004 ዓ. ም፣ ገፅ 423- 425] Ato Birhanu's 11 years old son was killed by Ato Solomon's car that has an insurance cover from Nile insurance SC. Accordingly, Ato Birhanu jointly sued Ato Solomon and Nile Insurance Company before Semen Shewa Zone High Court for material damage he *will* suffer due to the death of his child on the ground that his child will financially support him after attaining the age of 18. However, the court dismissed his

not precluded from claiming compensation. In *Ethiopian Insurance Company v W/ro Zinash Asefa and Mulat Assefa,* the Federal Supreme Court Cassation Bench awarded compensation claim for children of the deceased who attain the age of eighteen but depends on the deceased's income.[90]

Article 2095(1) is close-ended provision; dependents other than victim's spouse, parents and children are not entitled to claim material compensation; even though, they have no one to lean on. For example, a minor sister and brother of the deceased are not benefited from this provision even if the deceased was their only source of livelihood. In this regard, the writer argued that limiting persons who can claim compensation is essential. Nonetheless, exclusion of other dependents, particularly minor brother, and sister of the deceased, from claiming material compensation no matter what they are in state of necessity while they are allowed for moral compensation is illogical and unfair. It is also disregarded the culture of the people which is attributed to the extended nature of the dominant family structure in the country. Hence, the absence of a formal social security scheme in the country coupled with the above justifications require a revision of the provision in the manner that accommodates other dependents' interests, particularly, those having no other means of livelihood.

claim on the ground of uncertainty of the alleged damage. The plaintiff amended his petition and submitted it for the Federal Supreme Court Cassation Bench. In his petition, he stated that he is a farmer and his son had served him by looking after his cattle and supporting him in his farming activity and after the death of the child, he is forced to expend 10 birr per day for such services. The Bench held the case in ex-party defendants as they failed to appear and decided that parents would not be precluded from claiming material compensation for the death of their minor child as far as they prove the existence of factual support.

[90] *Ethiopian Insurance Company v W/ro Zinash Asefa and Mulat Assefa*, Federal Supreme Court of Ethiopia, Cassation File No.50225 [December 2010; reported in የሰበርውሳኔዎች፥ቅፅ 10፣ 2003 ዓ. ም፣ገፅ 255-256] The case was started in East Shewa Zone High Court, where W/ro Zinash Asefa and Ato MulateAsefa, sued Ethiopian Insurance Company. The plaintiffs sued the insurer for the material damage they suffer due to the death of their father who was killed by a car insured by the company. The advocate of the insurance company opposed the claim on the ground of their age; as both of them are more than 18 years old, they are not presumed to get maintenance support from their father. The Court disregarded the defense and ordered the insurance company to pay 21,000 birr because the insurance company has insurance cover for the owner of the car who is strictly liable for the damage claimants suffer. On appeal, the Oromia Region Supreme Court rejected the claim by affirming the decision of the lower court. Finally, the Insurance Company appealed to Federal Supreme Court Cassation Bench on the ground of basic error of law. The Bench also rejected the petition. The reasoning on which the Bench relay for its decision showed that being attaining majority age should not preclude a person from claiming compensation as per article 2095(1) of the Civil Code. The subjective condition of the claimants should be considered. If the evidence proved their reliance on the livelihood of the deceased, compensation for the material damage they suffered has to be awarded.

4.1.2. Derivative Claimants

Claim for compensation is personal and not allowed to assign to the third person.[91] However, derivative claimants are exceptions for this rule. Derivative claimants are not victims; rather they bring an action for compensation by substituting the victim. These groups of claimants are Heirs and creditors of the victim.

Heirs of the Victim

Upon the death of the victim, testate or intestate successors of the victim may also institute an action for compensation for material damage suffered by the victim.[92] On the contrary, they can bring a compensation claim for moral damage on behalf of the victim only when the victim constituted such a claim before his death.[93] Those persons who could claim compensation for moral damage they sustained due to death of the victim under article 2015 of the Civil Code could also be party under this claim.

Creditors of the Victim

Creditors could subrogate the victim debtor's action for compensation only when the injury sustained after the date when the victim became his debtor and the damage sustained solely on the financial interest of the victim.[94] In addition, the creditor must apply to the court and be authorized by the court to that effect.[95] Hence, creditors could subrogate only property damage and financial loss claim of the victim. If the injury had sustained on the debtor's personality, bodily integrity or honor, the creditor could not subrogate.

Compensable Interests and Conditions for Claims

To establish compensation claim under strict liability law, the plaintiff is required to prove the damage he suffered is legally recognized and action of the motor vehicle is an adequate case for such damage.

A contrary reading of article 2081 and 2082 of the Civil Code reveals victims' right to claim for *any damage* they sustained due to motor vehicles. Any damage

[91] Civil Code, supra note 14, article 2046(1). However, once compensation is decided by the court, the judgment debtor can assign the compensation for anyone.
[92] Id., article 2144(1).
[93] Id., article 2144(2).
[94] Id., article 2045(1 & 2).
[95] Id., article 1993.

stands for material and moral damage.[96] Material damage represents any damage that can be quantified in terms of money. Types of material or pecuniary damages are almost similar in every jurisdiction, which mainly encompass property damage, loss of income, medical expenditure, nursing, and related expenses.[97] Compensability of any pecuniary loss and expenses is universally subject to a test of reasonableness. Moral damage refers to an injury inflicted on a person's honor, reputation, or personal feelings.[98] The pain, mental anguish, and frustration, which resulted from pain and disability or disfigurement of his body parts due to vehicle accident, caused moral damage.

To claim compensation for the aforementioned injuries, the plaintiff is required to prove a cause and effect relationship between the motor vehicle and the damage sustained.[99] However, the Ethiopian Extra Contractual Liability Law did not set the standard used to determine the causal link. However, the standard for causal link could be measured by appealing to judicial common sense or by analogy to article 24(4) of the Criminal Code[100] that state adequacy of the cause as a standard.[101] Interviewed judges also unanimously asserted that *adequate cause* could commonly be an adopted standard in the determination of causal link for extra contractual liability cases too.[102]

Accordingly, the damage whether it is material or moral or both, the action of the vehicle should not be a remote cause for the damage sustained, rather it has to be a legal cause or adequate cause. The adequacy of the cause is ascertained by proving that the damage would not happen had it not been for the action of the vehicle. Establishing legal nexus between action of the vehicle and the damage sustained is not a simple task. The difficulty aggravated when concurrent causes are there. In such cases, many jurisdictions such as England adopted *but for* test.[103] i.e., the plaintiff is required to prove that he would not

[96] Id., article 2090. To limit the scope of this article within the required space the writer would not indulge in an in-depth analysis on types of compensable interests.
[97] Renda and Schrefler, supra note 64, P. 11.
[98] Krzeczunowicz, supra note 36, pp. 258-259.
[99] Civil Code, supra note 14, article 2028; Michael John, *A Text Book on Torts*, 3rd ed., Blackstone Press, (1996), p. 190.
[100] Criminal Code, supra note 86, article 24(1) stated that "[T]his relationship of cause and effect shall be presumed to exist when the act within the provisions of the law would, in the normal course of things, produce the result charged."
[101] Krzeczunowicz, G., *The Ethiopian law of Extra-Contractual Liability*, Commercial Printing Enterprise, Addis Ababa, (1970), p. 136.
[102] Biniam, Supra note 74; Girma, Supra note 79; Mahider, Supra note 10. The legal or adequate case is not defined in the Civil Code. As tort law and criminal law covers similar offenses with deferent remedy customarily, the meaning given for legal cause under article 24 of the 2005 criminal code is applicable for appraisal of cause and effect relation in a dispute having extra contractual liability nature.
[103] Harpwood V., *Law of Torts*, Cavendish Publishing, (1993), p. 86.

have been injured in the way he was but for the damage caused by the vehicle.[104] Accordingly, the defendant is not liable for remote damage, which is unforeseeable consequence, based on reasonable person's perception.[105] This standard sets the limit of the legal accountability of the defendant for the damage sustained.[106] Since Criminal Code standard used by analogy for civil cases, similar standard is also adopted in Ethiopia as per article 24(2-3) of the Criminal Code:[107]

> *(2) Where there are preceding, concurrent or intervening causes, whether due to the act of a third party or to a natural or fortuitous event, which are extraneous to the act of the accused, this relationship of cause and effect shall cease to exist when the extraneous cause in itself produced the result.*
>
> *If, in such a case, the act with which the accused person is charged in itself constitutes a crime he shall be liable to the punishment specified for such a crime.*
>
> *(3) Relationship of cause and effect shall be presumed to exist between each cause specified under sub-article (2) above and the result achieved, when the result is the cumulative effect of these causes, even though each cause cannot independently produce the result.*

Hence, in Ethiopia the defendant is only liable for the normal consequence of his act not for the whole damage unless the damage is caused by intentional tort.[108] That is, a third-party victim of a motor vehicle accident can bring a claim for material or moral compensation under strict liability law as far as he proves adequacy of the causal link thereto.

4.2. Persons Strictly Liable for Damage Caused by Motor Vehicles

4.2.1. Owners and Holders

Owners are strictly liable for any damage caused by their motor vehicle.[109] In addition to owners, holders[110] of the motor vehicle for personal gain have also

[104] Nicholas and Bagshaw, supra note 25, p.530.
[105] Richard Kinder, *Case Book on Torts*, Oxford University Press, (2002), p.68.
[106] Alan J. Pannet, *Law of Torts*, Pitman publishing, (1995), P.72.
[107] Criminal Code, supra note 84, article 24(2-3).
[108] Civil Code, supra note 14, article 2101.
[109] Id., article 2081.
[110] Krzeczunowicz, supra note 101, pp. 43-44. The caption of Article 2082 says *keeper*. However, to differentiate *keeper* from persons who attend vehicles for a person's sake, George Krzeczunowicz translated it to mean *holder*.

strict liability for any damage attributed to the vehicle.[111] Agents or employees in charge of the vehicle for the owner or holder's account are not subject to strict liability.[112]

The presence of different accountable persons creates a question of what share of responsibility is imposed on whom or issue of ultimate liability. Regarding the first question, the Ethiopian Strict Liability Law did not have provisions that apportion liability between owner and holder of motor vehicles.

Ultimate liability presupposes the presence of transitive liability. This means, there should be different persons responsible for compensation but only one or some of them have ultimate liability. Hence, those persons who have transitive responsibility could recourse against persons having ultimate liability after paying compensation for the victim. In some jurisdictions there is no such issue as the law only imposed strict liability on the person who should bear the cost of compensation ultimately. For example, in the USA, after the enactment of the 2005 transportation equity act, lessors of motor vehicles are relieved and only lessees have strict liability for the damage caused by the motor vehicle they leased.[113]

On the contrary, the Ethiopian Extra Contractual Liability Law recognizes two types of strict liabilities: transitive and ultimate liability. This dichotomy is functioned when the damage sustained while the motor vehicle is under custody of a person other than its owner. Article 2083 of the Civil Code reads the owner of a motor vehicle who has paid compensation to the victim may recover from the holder. This provision creates two types of liabilities, i.e., transitive liability on the owner and ultimate liability on the holder. A cumulative reading of article 2081, 2082, and 2083 of the Civil Code extends compensation option of the victim. Accordingly, a victim can claim against either of the owner or holder, or

[111] Civil Code, supra note 14, article 2082(1).

[112] Id., article 2082(2). Thought article 2066 of the same code imposes strict liability on a person whose action caused damage, as an exception to it, agents or employees in charge of the vehicle for owner's or holder's account are not subject to strict liability. This is because, the rationale behind article 2066 is that even though the author is not at fault, in most cases, he is direct beneficial of his action which is missed in case of innocent employees or agents who act for the sole interest of the employer or the principal.

[113] Harry Stoffer, Pump It Up: Finance Companies are Expanding Incentives on Balloon Loans to Minimize Risk from Vicarious Liability Laws, *Automotive News*, (31 March 2003), p. 12; Kenneth J. Rojc and Karoline E. Kreuser, End of the Road for Vicarious Liability, *The Business Lawyer,* Vol. 64, No. 2, American Bar Association, (2009), p. 617, available at http://www.jstor.com/stable/41552811, last accessed on 01 June 2020. Before enactment of the 2005 transportation equity act, lessors were strictly liable for damage caused by their leased vehicle merely because the lessor is the registered or titled owner of the motor vehicle. The act repealed such liability of lessors to insulate motor vehicle lessors from exposure to one of the most significant risks of leasing or renting a motor vehicle.

both. Hence, the victim can bring a compensation claim from the owner irrespective of the vehicle is under the custody of the holder while causing the damage. In such cases, the owner cannot defend the claim; what he can do is compensating the victim and recourse against the holder. This stance of the law that imposes ultimate strict liability on a holder leads to a question of who the holder is.

In this regard, there are practical disparities in understanding a holder as ultimate bearer of the liability. For example, whether it is the owner or holder should bear ultimate liability for damage caused by vehicle under use of the holder, while the driver was employed by the owner has been argumentative. Until the issue was solved by the Federal Supreme Court Cassation Bench,[114] different courts entertained the issue contrary to the true intent of the law by using *factual control* as a base to determine the issue. In *Abrar Sabir v W/ro Alemtsehay Wesene & Tibebu Construction PLC*, Arsi Zone High Court employed *factual control* as a parameter to determine a person responsible for damage caused by motor vehicle irrespective of fault. Accordingly, the Court imposed ultimate liability on the owner on the ground that he employed the driver.[115] Hence, in the determination of strict liability for vehicle under use of the holder but operated by third party employee, liability rests upon the person who employs the driver.

Finally, in its judgment on the above case, the Federal Supreme Court Cassation Bench decided that ultimate strict liability for damage caused by motor vehicle move on land should be borne by the holder. And, the Bench defines holder as a person who was benefiting from that vehicle at the time of damage; rather than a person who had factual control on the motor vehicle.[116]

Besides its binding nature,[117] the interpretation made by the cassation bench is proper in light of the law because, although the Ethiopian Civil Code is adapted from the French Civil Code, its conception of the holder is different from the custodian (*gardien*) under the French Civil Code.[118] In France, strict liability for motor vehicles is imposed on custodian, a person who has controlling power

[114] *Abrar Sabir v W/ro Alemtsehay Wesene & Tibebu Construction PLC*, infra note 121, pp. 416-419.
[115] Id. As explained in the decision of the Bench, the Oromia Regional State Supreme Court and the Federal Supreme Court held similar stand with Arsi Zone High Court as they affirm the latter's decision in the given case.
[116] Id.
[117] Federal Courts Proclamation Re-amendment Proclamation, No. 454/2005, *Negarit Gazetta*, (2005), article 2(4) reads: "interpretation of law rendered by the Federal Supreme Court cassation bench with not less than five judges have a binding effect on all federal and regional courts, saving the power of the bench to render a different legal interpretation some other time."
[118] Krzeczunowicz, supra note 101, p.43; Borghetti, supra note 6, p. 274.

over the vehicle. In contrast to factual controlling power stated under French law, the Ethiopian law only requires the establishment of some economic or juridical elements enumerated under Article 2072(2) of the Civil Code.[119] The juridical element implies the legal bond between the vehicle and the person as a holder and the economic element is to mean the holder received the vehicle for his benefit.[120]

Another question worth mentioning here is, in what circumstances the owner held responsible for the damage and entitled to recourse against the holder given that the holder is ultimate bearer of strict liability? On this issue one may argue that since holders are the ultimate bearer of the burden, to shorten the path, victims should bring legal action against the holder, given the holder is known and solvent. Owners should be obliged only when the holder is not ascertained or insolvent. Though it is not overtly stated, the decision rendered by the Federal Cassation Bench on *Abrar Sabir v W/ro Alemtsehay Wesene & Tibebu Construction PLC* supports this assertion.[121] In this case, the plaintiff claims for compensation against the owner of the vehicle. Nonetheless, the Bench did not impose transitive liability by obliging the owner to make compensation and later recourse against the lessee (holder) who shall bear the ultimate liability.

[119] Civil Code, supra note 14, article 2072(2) stated that: "provisions of sub-article (1) shall apply where a person has hired or borrowed the animal or has taken possession of it to take care of it, or for any other reason." Under Ethiopian strict liability law liability arising from animal and motor vehicles are similar. A keeper of a motor vehicle is equivalent to a holder of animals. Hence, the elaboration stipulated under article 2072(2) is applicable in both cases.

[120] Krzeczunowicz, supra note 101, p. 43.

[121] *Abrar Sabir v W/ro Alemtsehay Wesene & Tibebu Construction PLC*, Federal Supreme Court Cassation Bench, File No.55228, [January 2011; reported in የሰበር ውሳኔዎች፡ቅፅ 11፣ 2003 ዓ.ም፣ ገፅ 416-419] [hereinafter *Abrar Sabir v W/ro Alemtsehay Wesene & Tibebu Construction PLC*]. Ato Abraham Aklil, husband of W/ro Alemtsehay Wesene, while traveling by car, seriously injured and later died due to collusion of the car, he embarked on, with a tree. Consequently, W/ro Alemtsehay Wesene brought suit for compensation before the High Court of Arsi Zone against Ato Abrar Sabir, who is the owner of the car. Ato Abrar appeared before the Court and argued that he should not be liable for the car was leased to Tibebu Construction PLC and by the defendant's request; *Tibebu Construction PLC* (the lessee) joined the litigation on the defendant's side. However, in the final verdict, the court held the owner liable for the damage as per article 2081 of the Civil Code; based on the fact that *the driver is employed by the owner.* On appeal, the Supreme Court of Oromia Regional State affirmed the decision of the lower court as regards liability. The Federal Supreme court also rejected the appeal made by Ato Abrar and affirms the lower Court's decision. Finally, Ato Abrar submitted a cassation petition to the Federal Supreme Court Cassation Bench for lower Courts' judgment review on the grounds of the fundamental error of law. In its decision, the Bench explained that thought holders' have ultimate strict liability for motor vehicles. The parameter used by lower courts for identification of the holder is erroneous as they used *controlling power*. For article 2082 of the Civil Code, the holder is not a person who controls the vehicle rather it is the person who received the vehicle for his benefit. Hence, the owner who had controlling power on the car, for the diver is employed by him and responsible for him, is not a holder. On the contrary, the holder is the lessee who used the car at the time of damage. Accordingly, the Cassation Division repealed the lower Courts' decisions and imposed liability of compensation on the lessee, holder of the car, during the accident.

This decision of the Bench wrongly infringed victim's right to bring compensation claim jointly and separately against the owner and the holder. The reading of article 2083, particularly the Amharic version,[122] seems in all circumstances the choice is left for the victim. The law is clear and its content is not absurd to demand interpretation.

The above argument that state solvency and certainty of the holder as a precondition to determine victim's right to choose his defendant conceptually seems logical. However, practically, ascertaining identity and solvency of the holder might be difficult and time taking, which is against the motive of the law that aims to provide a quick compensation scheme.

Exceptions for Rules Stipulated under Article 2081et. Seq.

Extra contractual provisions governing strict liability for motor vehicles are not always applicable. Their application is subject to the contrary contractual agreement and special laws for non-ordinary motor vehicles, particularly, vessels and aircraft.

The graveness of motor vehicle accidents associated with its substantial impact on victims as well as persons responsible for the damage urges a person to engage in contractual agreements involving motor vehicles that give due focus on the liability issue. The content of the agreement concerning their liability for third party victims may be contrary to the stipulation of article 2081 *et.seq*.[123] This questions the legality of such agreement in a sense that terms of agreement are contrary to article 2082 and 2083 of the Civil Code. For example, say X (the lessor) and Y (the lessee) make a car lease agreement that imposes strict liability solely on the lessor or on the contrary on the lessee. Could contracting parties, the lessor in the first scenario and the lessee in the second, raise their agreement against a third-party victim contrary to article 2082 and 2083? If not, what would be the effect of their agreement?

Answering these questions requires due consideration on the nature and purpose of strict liability provisions on one hand and basic principle of contract and impacts of the agreement on the victim on the other.

For employing terms having obligatory nature, apparent looking of article 2082 and 2083 of the Civil Code seems mandatory provisions that preclude any

[122] Civil code, supra note 14, article 2083(1). The authoritative Amharic version of this provision reads: "የመኪናው [ወይም] የባለሞተር ተሽከርካሪው ባለቤት ተበዳዩን ተገዶ ከካሰ በኋላ ጠባቂ የነበረውን ሰው በኪሳራ አከፋፈል ሊጠይቀው ይችላል።"

[123] Tatek Tasew & Tana Beles Project, *Construction Equipment lease contract*, on file with the author.

contrary undertakings. However, strict liability provisions of extra contractual law do not have any punitive motive. Their purpose is only compensating the victim, where there is no person to be blamed for their injury, by imposing a cost of compensation, *mutatis mutandis,* on the owner or holder. The concern of the law is not to make holders and owners pay for what they did rather save victims from material and moral distress. Hence, article 2082 and 2083 could be derogated by contractual agreement as far as it does not affect the victims' interest.

The principle of freedom of contract dictates persons' legal right to conclude an agreement as between them to create, vary or extinguish obligations of a proprietary nature, provided that they comply with validity requirements of the law. However, this contractual freedom is not absolute. For example, the privity nature of contract precludes making of contract that bestow any right or impose any obligation against the third party, saving those exceptions exhaustively provided under the Civil Code.[124] For the case at hand, the privity nature of the contract does not bar agreement of parties as to their strict liability for motor vehicles, as far as their agreement does not jeopardize victims' right for compensation in any way. Hence, their agreement should be limited to the issue of *ultimate liability*. It could not preclude the victim from claiming compensation from both or either of them; otherwise, their agreement breaches the privity nature of contract. Thus, where a victim of a motor vehicle brought compensation claim against the lessor, he should not raise a contractual agreement that relieved him from liability as a defense. Rather, he should be compelled to pay the victim and recourse against the lessee as per their agreement.

Therefore, even though the law governing strict liability missed contrary agreements between the owner and holder as to ultimate liability as an exception, article 2082 and 2083 should not be applied where there is a contrary agreement between the owner and the holder.[125]

There are also special laws that restrict the application of article 2081 *et seq.* in some types of motor vehicles. For example, Article 2081 or 2083 is not *prima facially* applicable for liabilities arises from vessels or aircraft as they are

[124] Civil Code, supra note 14, articles 1953- 2000. Exceptions for the privity nature of the contract are exhaustively listed under six categories in the above subsequent provisions.

[125] Hailu Gelan v Jifara Ngeso, *Car Lease Agreement*, on file with the author. In this Contract, strict liability is imposed on the owner. The lessee is liable only for fault.

governed with a standardized contract of a lease that puts strict liability on the party who has *actual control* on the ship or on the aircraft.[126]

4.2.2. Insurer

Almost in all jurisdictions, third party victim liability insurance is mandatory. To shorten the path, according to many jurisdictions, for instance, European countries entitle the victim to claim compensation directly from the insurance company. Particularly, in France and Nordic countries, this right of the victim is unconditional.[127] Similarly, in Ethiopia, the legislator bestows such rights upon victims of a motor vehicle accident.[128] On this point *Ato Yenew Bitew* noted that although insurers sometimes challenge the unconditional nature of the claim, the practice usually goes in line with the law.[129] That is, any defense the insurer may have against the insured would not rise against the victim. Instead, after compensating the victim, the insurance company may recourse against the insured. However, in *Ethiopian Insurance Company v Ato Tsigabu Gebru et. al.,* the Federal Supreme Court Cassation Bench denied victims' right to bring compensation claimed directly from the insurer, by saying there is no provision in the Civil Code that entitle third party victims to bring direct compensation claim to the insurer.[130] This decision is against the clear stipulation of Article 17(2) of proclamation No. 799/2013. In this decision the Bench did not recall presence of the above proclamation. Thus, it shall not have binding nature in subsequent similar cases. However, in *Kalkidan Abebe v Nile Insurance SC et al.*[131] the ANRS Supreme Court repeats the same mistake by rejecting compensation claim brought by daughter of the deceased against the insurance company for similar reason. Therefore, in Ethiopia, as the law held insurers strictly liable along with holders and owners of motor vehicles, judicial practices that deviate from the governing law need to be corrected.

[126] Hailegabriel F., A Legal Appraisal of the Liability of the Actual Air Carrier under Ethiopian Law, *Bahir Dar University Journal of Law*, Vol.2, No.1, (2011), pp.94-97. For article 2083 as it defined in tandem with article 2072 holder is defined only as a person who receives vehicles for his benefit. This implies that controlling power is not necessarily follow the holder. Hence, ultimate strict liability for damage sustained on third party victims by aircraft or vessels rests on the person having controlling power, that person may be an owner, holder, or third-party operator.

[127] Gomard, supra note 51, p. 97; Cannarsa, supra note 50, p. 28.

[128] Proc. No. 799/2013, supra note 12, article 17(2).

[129] Interview with AtoYenew Bitew, Attorney of Nile Insurance at Bahirdar Branch, (7 July 2020).

[130] *Ethiopian Insurance Company v Ato Tsigabu Gebru et*., Federal Supreme Court of Ethiopia, Cassation File No. 104544 [May 2017; reported in የሰበር ውሳኔዎች፣ ቅፅ 20፣ 2009 ዓ. ም፣ ገፅ 328-332]

[131] *Kalkidan Abebe v Nile Insurance SC et al,* supra note 11.

Conclusion

Clearly stated scope of the law governing strict liability for a motor vehicle, grounds used to constitute the claim, and parties to the claim are essential prerequisites for establishing a case having strict liability nature for the damage caused by motor vehicle. However, Ethiopian strict liability law in this regard is inadequate. Some provisions of the law are vague, general, or silent as to the above elements; accordingly, there is a heterogeneous stance on the same issues among legal professionals.

Regarding the scope, the writer concludes that scope of application of the law governing strict liability for motor vehicles is not and should not be limited to ordinary motor vehicles commonly called "*mekina"*; rather it encompasses all motor vehicles in absence or gap of special provisions governing similar liability. Furthermore, given the ongoing technological transformation, the phrase motor vehicle should be construed to include or to be amended in a way of incorporating non-motored vehicles, which share the justifications provided for imposition of strict liability for motored vehicles. Vehicle insurance against third party risk proclamation is the other important point worth considering in relation to scope of strict liability law. Although introduction of Proclamation No. 799/2013 seems to jeopardize application of strict liability law (as they have differences in the scope of application, identity of the victim benefited therein, and nature and quantum of damage covered by them), the two laws complement each other than contradict.

In case of fatal accident, only the spouse, children and parents of the deceased who used to receive regular material support from the deceased are entitled for material compensation. A spouse in bigamous marriage should also have similar right in this regard. Accordingly, age or other subjective traits of the victim or his dependents are irrelevant for the determination of their capacity as claimant. In this regard, the law is criticized for excluding dependents other than spouse, children, and parents of the deceased, particularly helpless minor sisters and brothers, from claiming compensation for material damage suffered due to the death of the victim while they are entitled to claim compensation for moral damage as its position is illogical and unfair.

Coming to causation, though the standard is not stated by Extra Contractual Liability Law, by way of analogy, the Criminal Code standard should be used. Hence, the plaintiff should prove the vehicle is adequate cause for the damage sustained.

Concerning parties having strict liability for damage caused by motor vehicles, owners and holders are strictly liable for damage caused by motor vehicles while ultimate liability is destining on the holder who uses the vehicle for his benefit. Nonetheless, presence of holder or other person responsible for ultimate liability would not out rightly release the owner from liability. Instead, what the owner entitled is to recourse against the person responsible for the damage after compensating the victim. However, such stipulations are subject to contrary provisions in special laws governing strict liability for motor vehicles and contractual agreements. In the latter case, the presence of contractual agreement between the owner and holder or another person concerning their liability is valid only for the determination of ultimate liability; otherwise, it will transcend the privity nature of the contract and the aim of Extra Contractual Liability Law.

In addition to owners and holder, insurer of the vehicle could be jointly and severally liable for the damage caused by the motor vehicle under its insurance cover. Hence, victims have unconditional right to bring an action for compensation directly from the insurer.

Characterization of Taxable Units and Tax Bases under Schedule 'C' of the Federal Income Tax Proclamation of Ethiopia: A Commentary

Belete Addis ♦

Abstract

Schedule 'C' is the third income tax schedule incorporated under the Federal Income Tax Proclamation of Ethiopia. The Schedule deals with business income taxation. Though the Schedule is entangled with several concerns, this work is restricted to issues related to the characterization of its taxable units and tax bases. As a commentary, it intends to serve as a guidance to understand the taxable units and tax bases of the Schedule. To accomplish this, the work used desktop research method and analyzed the relevant legislation, literature and cassation decisions. In examining how taxable units and tax bases are characterized under Schedule 'C', the work considers the areas of developments made by the current income tax regime such as the incorporation of provisions with clear income sources subject to the Schedule. Most importantly, the work tries to identify gaps (with potential administrative difficulties) that need consideration such as characterization tensions with other income tax schedule of the Proclamation and provisions that lack clarity. It also questioned the appropriateness of the inclusion of some entities (notably partnerships) as taxable units of the Schedule and it provides arguments to seek the attention of the concerned organs regarding the issues involved. Issuance of supplementary directives and advance rulings, the need to take relevant lessons from the experience of other jurisdictions and reconsidering some of the existing characterization are among the solutions the work recommends.

Key Terms: Characterization, Schedule 'C', Taxable unit, Tax base, Business, Business income

Introduction

In Ethiopia, the schedular income tax approach, which has been serving as the basic structure of income taxation to this day, was officially introduced in 1944.[1]

♦ LL.B, LL.M in Business and Corporate Law, Lecturer in Law, School of Law, University of Gondar. The author can be reached at beleadd82@gmail.com. The author would like to thank the anonymous reviewers for their constructive comments on the initial draft of the manuscript. But, the author is solely responsible for any errors in fact or interpretation.

Since then income from business is subjected to a separate schedule.[2] Under the current income tax regime, Schedule 'C', which is the third income tax schedule recognized under the Federal Income Tax Proclamation No. 979/2016 (the Proclamation),[3] is dedicated to taxation of business income. Regardless of the overall design of the income tax system, it is common to provide special rules for taxing business income. These rules are primarily related to the tax base, timing of the recognition of income and deductions, and collection of tax.[4] That is why, in Ethiopia too, the great majority of the provisions of the Proclamation and the Federal Income Tax Regulation No. 410/2017 (the Regulation) are devoted to the affairs of Schedule 'C' taxpayers.[5]

In the context of business income taxation, the characterization of a certain economic item as business income is important despite the nature of the income tax system (whether it is a schedular or global income tax system).[6] To determine whether an item of income is business income or not it is important first to determine whether the activity giving rise to the income is properly characterized as business.[7] The focus of this work is to examine these elements in the context of Schedule 'C' of the Proclamation. It tries to shed light on the taxable units and tax bases characterization under Schedule 'C'.[8] Since the work is a commentary, it is intended to help those who are interested (such as law students) as a guidance to understand the taxable units and tax bases of the Schedule. Moreover, law instructors may use it as an input for their class delivery, enriching it with further ideas. Having this in mind, in the following sections a critical analysis is made on the characterization of taxable units and

[1] See Personal and Business Income Tax Proclamation No. 60/1944, *Negarit Gazeta*, (1944).

[2] Business income taxation was initially introduced as Schedule 'B' and it became Schedule 'C' in 1956, up on the introduction of rental income tax. See Income Tax Decree No. 19/1956, *Negarit Gazeta*, (1956). For detail historical facts, see Taddese Lencho, Towards Legislative History of Modern Taxes in Ethiopia, *Journal of Ethiopian Law*, Vol. 25, No. 2,(2012), pp. 116-120.

[3] Federal Income Tax Proclamation No. 979/2016, Federal *Negarit Gazzeta*,(2016), Art. 8. [Hereinafter, Proclamation No. 979/2016].

[4] Lee Burns and Richard Krever, Taxation of Income from Business and Investment, *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 2, (1998), p. 1.

[5] See Proclamation No. 979/2016, *supra* note 3, Arts. 18-50 and the Federal Income Tax Regulation No. 410/2017, Federal *Negarit Gazeta*, (2017), Arts. 27-49. [Hereinafter, Regulation No. 410/2017].

[6] Burns and Krever, *supra* note 4, p. 2.

[7] *Id.*

[8] The characterization of taxable units and tax bases of Schedule 'A' and 'B' are discussed in the other issue of this Journal. See Belete Addis, Characterization of Taxable Units and Tax Bases under the Income Tax Schedules of Schedule 'A' and 'B' of the Federal Income Tax Proclamation of Ethiopia: A Commentary, *Bahir Dar University Journal of Law*, Vol. 8, No. 1, (2019), pp. 35-67. So, this work can be taken as part two of the commentary on the characterization of taxable units and tax bases of the income tax schedules. Schedule 'D' consists a dozen of income sources, hence, the discussion on its taxable units and tax bases cannot be made part of this work without exceeding the page limit of the Journal.

tax bases' of Schedule 'C' of the Proclamation, under section one and two respectively. The work winds up with concluding remarks and recommendations.

1. Taxable Units of Schedule 'C'

According to the Proclamation "… business income tax shall be imposed … *on a person* conducting business that has taxable income for the year" (emphasis added).[9] Since the provision uses the word 'person', both an individual and a body (a legal person) are taxable units of Schedule 'C'. The former category refers to a sole proprietor, while the latter constitutes a body conducting business. The term 'body' is not defined in the Proclamation, but under the Federal Tax Administration Proclamation No. 983/2016 (the Tax Administration Proclamation).[10] Art. 2 (5) of the latter defined 'body' as "a company, partnership, public enterprise or public financial agency, or other body of persons whether formed in Ethiopia or elsewhere." Thus, the listed entities are taxable units of Schedule 'C', as long as they conduct business. The list begins with company and it is defined as "a commercial business organization established in accordance with the Commercial Code of Ethiopia and having legal personality, and includes any equivalent entity incorporated or formed under a foreign law."[11] Accordingly, Share Companies (SCs) and Private Limited Companies (PLCs) are taxpayers of Schedule 'C'; as the Commercial Code recognizes only the two as 'company'.[12]

The other entity recognized as a 'body' is a partnership. Regarding the taxation of partnerships, there are two main approaches.[13] First, partnerships may be taxed as an entity ("*fiscal intransparency*"), emphasizing its similarity to corporations.[14] Second, the partnership is inexistent for tax purposes and serves

[9] See Proclamation No. 979/2016, *supra* note 3, Art. 18 (1).
[10] Federal Tax Administration Proclamation No. 983/2016, Federal *Negarit Gazeta*, (2016). [Hereinafter, Proclamation No. 983/2016]. The Income Tax Proclamation declares that the definition provided in the Tax Administration Proclamation is applicable to it, unless the term is defined otherwise in the Proclamation itself. See, the introductory paragraph of Art. 2 of Proclamation No. 979/2016.
[11] See *Id*, Art. 2 (7).
[12] See Commercial Code Proclamation, *Negarit Gazzeta*, (1960), Art. 212 (1) (e) and (f). [Hereinafter, the Commercial Code]. However, the Draft Commercial Code (which at the time of writing of this work is approved by the Council of Ministers and tabled to the House of Peoples Representatives (HPR) for its consideration and approval) stipulates that a PLC can be established by one person, which shall be named as "a single-member PLC". This seems that Ethiopia is on its way to embrace a one-man company. See the Draft Commercial Code, Arts. 505 (2), 508 and 210. If the Draft ratified as it is, a single-member PLC will also be made a tax payer of Schedule 'C', as a company.
[13] Martin H. Seevers, Taxation of Partnerships and Partners Engaged in International Transactions: Issues in Cross-Border Transactions in Germany and the US, *Houston Business and Tax Law Journal*, Vol. 2, (2002), pp. 147-151.
[14] *Id*.

merely as a "conduit" through which the individual partners derive their income ("*fiscal transparency*").[15] This approach emphasizes the partnership's characteristic as a mere aggregation of its partners.[16] Many jurisdictions adopted the latter approach while the entity approach is typically found in some Roman law countries, such as Spain, Portugal, and Latin American Countries.[17] The practice in many countries, however, shows that partnerships are recognized as a mere association of persons not as entity-proper and for taxation purpose, they are not taxed at the entity level (i.e., the only taxpaying persons are the individual partners).[18] For instance, in Nordic and many OECD countries partnerships are subject to a *transparent* tax assessment rules or considered as fiscally transparent entities.[19] This implies that taxation occurs at the participant level. Hence, business income is calculated and taxed at the partner level, not at a partnership.[20] The same goes to the U.S., Germany, and some transition/developing countries where, the partnership is treated as a conduit which passes income through to the partners.[21] In South Africa, a partnership is not a separate legal entity and therefore all partners are jointly and severally liable for the debts of the partnership.[22] Following this, the individual partners are taxed separately from the partnership, each on their share of partnership profits or losses.[23]

Once the *transparency* rule is adopted, the next important question is how to allocate partnership income to partners. Regarding this, there are basically two approaches.[24] The first is the entity theory which holds that the partnership is an entity separate from the partners; thus, the income of the partnership will be determined separately, and this income can then be allocated to the partners.[25] The second is the aggregate or fractional theory, which holds that the

[15] *Id*.
[16] *Id*.
[17] *Id*. However, it can be said that whether a particular jurisdiction adopts an *intransparent* (i.e., entity) approach or a *transparent* (i.e., conduit) approach is a matter of tax policy rather than conceptual considerations.
[18] *Id.*
[19] Langhave Jeppesen *et al*, Taxation of Partnership in Nordic Countries, Legal National Reports for the Nordic Tax Research Council's Annual Meeting, *Nordic Tax Journal*, Vol. 2,(2015), pp. 63-108; and Commentary to OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital [as updated in 2017], pp. 24-26.
[20] *Id.*
[21] See Seevers, *supra* note 13, pp. 147-151; and Alex Easson and Victor Thuronyi, Fiscal Transparency, *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 2, (1998), p. 6.
[22] Nina Marie, The Treatment of Partnership Income and Expenditure in South African Income Tax Law, LL.M thesis, University of Cape Town, (2006), pp. 8-9.
[23] *Id,* p. 10.
[24] Easson and Thuronyi,*supra* note 21, p. 9.
[25] *Id*. This approach is very common in countries where the partnership has independent legal personality.

partnership does not exist independently of the partners; hence, there is no need to determine income at the entity level, rather each partner is simply allocated the partner's fractional share of partnership receipts and outgoings, and the tax consequences are determined in the hands of each individual partner.[26] There are also other issues that need to be addressed once, a *transparency* approach is adopted. For instance, the *transparency* principle makes it necessary to have rules regarding the ongoing taxation and tax laws have to incorporate several anti-abuse rules that aimed at preventing the use of personal companies (partnerships) as part of tax planning.[27]

Coming to the Ethiopia's income tax system, as it has been mentioned above, Art. 2 (5) of the Tax Administration Proclamation recognizes 'partnership' as a body and Art. 2 (23) of the same defines 'partnership' as "a partnership formed under the Commercial Code including an equivalent entity formed under foreign law." The Commercial Code recognizes four forms of partnerships: ordinary partnership, general partnership, limited partnership and joint venture.[28] Except joint venture all other forms of partnerships do have legal personality.[29] Thus, it is possible to conclude that in Ethiopia partnerships are recognized as incorporated entities, which makes them taxable units of Schedule 'C'. This is also how the income tax system understood partnerships.

Even though, partnerships are made taxpayers of Schedule 'C' under the Proclamation, this work intends to question its appropriateness. The mere fact that partnerships are given with legal personality may not necessarily mean that they are incorporated entities, hence, taxable at the entity level. In different jurisdictions, even if partnerships are given with legal personality under civil laws, this may not be necessarily the case under tax laws.[30] And again

[26] *Id*. This approach is very common in countries where the partnership has no independent legal personality, but viewed as a simple aggregation of the partners. From the two, the aggregate approach is considered as administratively complex since it depends on compliance by individual partners, which can lead to enforcement problems. For those with weak tax administration, the adoption of pure entity approach is widely recommended (determine the income at the entity level and flowed through to the partners as business income). There are also countries (such as the United States) which use a hybrid of the two approaches. See, *Id*, p. 24.

[27] For details, see *Id*, pp. 10-23. See also Jeppesen *et al*; *supra* note 19, pp. 63-108.

[28] Commercial Code, *supra* note 12, Art. 212 (1) (a) – (d). The new Draft Commercial Code deleted Ordinary Partnership, and introduces another form of partnership; limited liability partnership. See, Art. 212 of the Draft. This type of partnership is recognized as having an independent legal personality separate from the partners. The liability of the partners is also limited. The detail regulation can be seen from Arts. 257-270 of the Draft Commercial Code.

[29] *Id*, Art. 210 (2).

[30] While in some countries the tax status of an entity is determined by its status (as a legal person or otherwise) under civil law, in many systems the tax status of an entity is established by the tax law, and does not always coincide with its status under private law. See Easson and Thuronyi,*supra* note 21, p. 2.

partnerships may be treated as entities under tax laws but only for some important procedural matters; such as for filing financial information and accounting purpose, since the partnership accounting period and accounting method determines the tax liability of the partners.[31] Under the Commercial Code, except for few cases, partners in the partnership have unlimited liability.[32] If partnerships were truly considered as entities having separate existence with that of their partners (in the strict sense of the term 'legal personality'), they would have a limited liability which is the very doctrine developed following the 'legal personality' of companies/business organizations.[33] The main effect of having legal personality is for the organization to hold rights and bear liabilities by its own. Based on this it may be argued that like the experience in other jurisdictions, in Ethiopia too, partnerships are unincorporated (mere aggregation of partners). Understanding partnership in this way implies, when a partnership engages in business activities, business income tax will be logically imposed on the partners not on the partnership or at entity level.[34]

In addition to the above possible legal argument, imposing business income tax on partnerships at entity level may have other negative implications. The main reason for providing diverse forms of business organizations is to give wider opportunities/choices of doing business for the business community.[35] Tax implications are among the determining factors in the choice of a business form. Subjecting both a partnership and a company to the same taxation requirements/treatments, may narrow the choice of partnerships as a form of business doing. As long as partnerships are treated equally with companies, there will be tax at two levels: a business income tax at partnership level (with a harsh 30% flat rate) and at partners level dividend taxation on the profit distributed from the partnership. Under the repealed income tax proclamation No. 286/2002 (the repealed Income Tax Proclamation), the concept of dividend was restricted to distributions made by SCs and PLCs; hence, the taxable units

[31] See Seevers, *supra* note 13, pp. 147-151; and Jeppesen *et al*, *supra* note 19, pp. 63-108.

[32] See Commercial Code, *supra* note 12, Arts. 255, 277, 280 and 296 for Ordinary Partnership, Joint Venture, General Partnership and Limited Partnership respectively. From the reading of these provisions, we can infer that except for limited partners in a limited partnership, there is personal or unlimited liability of partners for third parties. As mentioned above, the Draft Commercial Code introduces limited liability partnership. Save for few exceptions, the partners of limited liability partnership have limited liability (no personal liability). See, Arts. 264 and 265 of the Draft.

[33] See Endalew Lijalem Enyew, the Doctrine of Piercing the Corporate Veil: It's Legal and Judicial Recognition in Ethiopia, *Mizan Law Review*, Vol. 6, No.1, (2012), pp. 77-114.

[34] There is a view that the absence of legal personality of partnerships under civil/commercial laws in many countries may have facilitated for their *transparent* treatment under tax laws. See Easson and Thuronyi,*supra* note 21, p.5.

[35] Angela Schneeman, *the Law of Corporations and Other Business Organizations*, 5th ed., Delmar Cengage Learning, United States, (2010), pp. 21-23.

of dividend taxation was limited to shareholders of companies.[36] However, this is no more the case under the existing income tax Proclamation since the Proclamation defines "dividend" as "a distribution of profits by *a body to a member* …" (emphasis added).[37] As it has been seen partnerships are treated as 'body' under the tax laws, so, a partner who received a profit from the partnership will be a taxable unit of dividend tax. Besides, the definition of "dividend" cited above, explicitly mentions partnerships by name. Had partnerships been treated as "conduit", the profit distributed to partners would have been considered as a business income, not as a dividend.[38] In effect, under the Proclamation, there is no difference between the income tax treatments of partnerships and companies.

Moreover, even though it is decided to adopt the entity approach and made partnerships taxable units of Schedule 'C', differential treatments could have been considered. For instance, Micro Enterprises[39] are made taxable units of Schedule 'C'. However, in assessing their income tax liability, the applicable rate is the one applicable on individual taxpayers.[40] Hence, the 30% flat rate, applicable to 'body' taxpayers,[41] is not applicable to them. Moreover, regarding their duty to maintain books of account, micro enterprises are treated as individuals.[42] Thus, as long as their annual gross income is less than Birr 500, 000, they will be treated as category 'C' taxpayers,[43] which are not obliged to

[36] See, Income Tax Proclamation No. 286/2002, Federal *Negarit Gazeta*, (2002), Art. 34 (1). [Hereinafter, Proclamation No. 286/2002].

[37] See Proclamation No. 979/2016, *supra* note 3, Art. 2 (6).

[38] Many States consider the profits of a business carried on by a partnership are the partners' profits derived from their own exertions; they are business profits. The position is different for the shareholder of a company. The shareholder is not a trader and the company's profits are not his/her; so they cannot be attributed to them. The shareholder is personally taxable only on those profits which are distributed by the company. From the shareholders' standpoint, dividends are income from the capital which they have made available to the company as its shareholders. See, OECD Commentary, *supra* note 19, p. 135.

[39] Federal Urban Job Creation and Food Security Agency Establishment Regulation No. 374/2016, Federal *Negarit Gazetta*, (2016), Art. 2(3), defines Micro enterprises as "enterprises having a total capital, excluding building, not exceeding Birr 50,000 in the service sector or not exceeding Birr 100,000 in the industrial sector engaging 5 workers, including the owner, his family member and other employees." [Hereinafter, Regulation No. 374/2016].

[40] See Proclamation No. 979/2016, *supra* note 3, Art. 19 (3) and (4).

[41] See *Id*, Art. 19 (1).

[42] See Regulation No. 410/2017, *supra* note 5, Art. 48. It reads "[f]or the purpose of Art. 82 of the Proclamation, micro enterprises shall be treated as individual and the obligation to maintain books of account shall apply to such enterprises on the basis of their annual turnover." The cross referred provision of the Proclamation, deals about the record keeping duties of taxpayers.

[43] Proclamation No. 979/2016, *supra* note 3, under Art. 3 (1), categorizes the taxpayers of Schedule 'B' and 'C' in to Category 'A' - a body taxpayer and individual taxpayers with annual gross income of Birr 1, 000, 000 or more; category 'B' - individual taxpayers with annual gross income of Birr 500, 000 or more but less than 1, 000, 000; and category 'C' - individual taxpayers with an annual gross income of less than Birr 500, 000.

maintain books of account and whose income tax liability is determined based on a presumptive tax assessment.[44] Without such explicit exceptions made by the law, micro enterprises would have been considered as category 'A' taxpayers, which are imposed with a rigorous degree of tax assessment and record keeping.[45] This again will increase their compliance costs, which can be unbearable for enterprises with small capital, such as micro enterprises. Such a positive and differential treatment of micro enterprises is a new addition under the existing income tax system and this is one of the areas where the system makes an improvement. This helps these enterprises reduce their compliance cost by avoiding the strict book keeping requirement and also encourages their business growth by exempting them from the 30 % flat rate. In fact, its coverage of only micro enterprises can be a subject of critics. For instance, 'small enterprises' could have been made beneficiaries of such scheme.[46] Since no special arrangement is provided for them, they are equally treated as SCs and PLCs. This may put the income tax laws in paradox with the objective of recognizing these entities and government's plea to design and implement appropriate economic policies, strategies, and legal and regulatory framework as prerequisites for creating an enabling environment to promote medium and small enterprises.[47]

Cooperative societies[48] are also exempted from paying income tax at entity level and the tax is imposed on members where they are required to pay income tax

[44] The book keeping standard varies according to the categories of taxpayers. While category 'A' and category 'B' taxpayers are required to maintain adequate books and records (the latter's being imposed with a lesser standard than the formers), category 'C' are subject to a presumptive tax regime, which nonetheless requires them to declare their annual turnover to the tax authorities. See *Id*, Arts. 49, 82 and 83 and Regulation No. 410/2017, *supra* note 5, Art. 49.

[45] See *Id*, Arts. 82 and 83. The reading of these provisions is telling that more rigorous rules/duties of record keeping, tax assessment and declaration are imposed on category 'A' taxpayers, than the remaining two category taxpayers.

[46] Regulation No. 374/2016, *supra* note 39, Art. 2 (4) defines 'small enterprises' as "an enterprise having a total capital, excluding building, from Birr 50,001 to Birr 500,000 in the case of service sector or Birr 100,001 to Birr 1,500.000 in the case of urban agriculture, artisanal mining and construction sector engages from 6 to 30 workers including the owner, his family members and other employees."

[47] See Gebrehiwot Ageba and Wolday Amha, Micro and Small Enterprises (MSE)Development in Ethiopia: Strategy, Regulatory Changes and Remaining Constraints, *Ethiopian Journal of Economics*, Vol. X, No 2, (2006), pp. 4-8. Given the state of current economic and social realities, it is advisable to follow the same policy with regard to the income tax treatment of small enterprises.

[48] "Cooperative Society" means a society established by individuals on voluntary basis to collectively solve their economic and social problems and to democratically manage same. This includes Agricultural, Housing, Industrial and Artisans Producers', Consumers, Savings and credit, Fishery and Mining Cooperative Societies. See Cooperative Societies Proclamation No. 147/1998, Federal *Negarit Gazeta*, (1998), Art. 2 (1) and (2). [Hereinafter, Proclamation No. 147/1998].

on their dividends.[49] This is despite the fact that cooperative societies have their own legal personality separated from their members and established as a limited liability entity.[50] Thus, though conventionally cooperative societies could be taxable units of Schedule 'C' for some other policy reasons they are exempted from paying income tax at entity level. Moreover, members of the cooperative societies are required to pay income tax on their dividends. This mean, the law treated the distributions from the societies to their members as a dividend not business income. If so, their exemption from business income tax is not only at entity level but also at individual level.

This author believes that though it may not be strictly similar, such differential treatments can be considered for partnerships so that the business community can benefit from the availability of diverse forms of doing business. Of course, taxing partnerships as entities has the advantage of administrative simplicity, since it can be easier to collect tax from a single entity than from the individual participants.[51] However, the disadvantage is that once partnerships are decided to be taxed as entities, the income will be taxed at a flat rate rather than the marginal/progressive rates applicable to the individual taxpayers.[52] So, if the government preferred to tax partnerships as entities, for some reasonable justifications, it should at least provide some preferential treatments than treating them the same way with companies, in all respects.

On a related note, the repealed Income Tax Proclamation in defining "body" used the expression 'registered partnership' which had the effect of excluding joint ventures as they are not required to be registered.[53] Currently, the definitional provision of "body" simply uses the term 'partnership'. A body is considered as a resident of Ethiopia and subject to tax if it is incorporated or formed in Ethiopia.[54] Incorporation is made through registration but a joint venture is not subject to registration.[55] If so, how is it possible to apply tax on it as a 'body'? It may be hard for the Tax Authority to enforce it properly. Had the tax been imposed only at partner's level, this would have not been a big concern.

[49] *Id*, Art. 31 (1) (a). Members shall receive dividends from profit according to their shares and contribution after deducting and setting aside an amount necessary for reserve and social services. See Arts. 5 (3) and 33 of the same.
[50] *Id*, Art. 10.
[51] Easson and Thuronyi, *supra* note 21, p.7. Taxing partnerships as entities may also helps to avoid discrimination between different forms of business organization and to eliminate "entity shopping" (many businesses may operate in the form of partnerships because such forms are taxed less heavily than corporations).
[52] *Id*.
[53] See Proclamation No. 286/2002, *supra* note 36, Art. 2 (2).
[54] Proclamation No. 979/2016, *supra* note 3, Art. 5 (5) (a).
[55] Commercial Code, *supra* note 12, Art. 272 (2).

In this regard, it may be helpful to cite one case entertained by the Federal Supreme Court Cassation Division.[56] In that case, the Court ruled that it is inappropriate to conclude that no partnership is formed based on the fact that the partnership agreement is not registered and does not specify the specific type of the partnership. According to the decision of the Court it is possible to consider that a joint venture is formed as it is not required to be registered. Regarding the business activity of the venture, the Court affirmed that the business activity of the joint venture is undertaken in the name of the partners not in the name of the venture.[57] Though the point of dispute in this case is not a tax dispute, it affirmed that in case of joint venture's business engagement the business activity is considered as done by the partners. Thus, the business income tax will be imposed on the partners not on the joint venture as a 'body'.

In the Tax Administration Proclamation public enterprises[58] are also listed as 'body'.[59] It is sound to make public enterprises taxable units of Schedule 'C' since they are commercial entities. The list also includes 'public financial agency', as a body. It is not clear, however, what it is meant by 'public financial agency'. The tax laws nowhere define this entity. If it is meant to refer to 'public financial enterprise' it refers to a public enterprise engaged in banking or insurance business; hence, already fall under the ambit of public enterprises.[60] If the term is seen from the perspective of its use of the word 'agency', it seems to refer to the 'Financial Public Enterprises Agency', which is established to regulate the public financial enterprises.[61] If so, this will not be a concern of business income tax since administrative agencies are not subject to tax. However, since the Amharic version of Art. 2 (5) of the Tax Administration Proclamation says *"...የመንግስት የፋይናንስ ድርጅት..."* it rather seems to refer to government owned enterprises engaging in banking or insurance business such as the Commercial Bank of Ethiopia and the Ethiopian Insurance Corporation.[62]

It should be underlined that the list of Art. 2 (5) of the Tax Administration Proclamation is not exhaustive. The phrase 'other body of persons' in the

[56] See **ወርቁ ወ/ጻዲቅ** vs **የወ/ስላሴ ወራሾች፤ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፤ መ.ቁ** 76394፤ 2005 **ዓ.ም**.
[57] *Id*. The court substantiated its verdict using Arts. 212 (1) and 272 of the Commercial Code.
[58] These are a wholly state owned enterprises established to carry on for gain manufacturing, distribution, service rendering or other economic and related activities. See the Public Enterprises Proclamation No. 25/1992, Art. 2 (1).
[59] See Proclamation No. 983/2016, *supra* note 10, Art. 2 (5).
[60] See the Financial Public Enterprises Agency Establishment Regulation No. 98/2004, Federal *Negarit Gazeta*, (2004), Art. 2.
[61] *Id*, Art. 3.
[62] *Id*, Art. 2 also uses the wording "**የመንግስት የፋይናንስ ድርጅቶች**" for the direct meaning of the English version "Financial Public Enterprises".

provision is indicative of the broad understanding of 'body'. If constructed extensively, it has the effect of including non-business entities such as not-for-profit-organizations (NPOs) and religious institutions, as taxable units of Schedule 'C' (provided that they conduct business). Even if there are diversified approaches among countries, concerning the income tax treatments of NPOs, the widely accepted practice is to exempt only public benefit organizations (PBOs).[63] The exemption of the latter is also weighted against many competing interests such as the impacts on the commercial sector and possible abuses of the PBOs for personal gains.[64] In Ethiopia, in order to raise funds for the fulfillment of their objectives, NPOs (both PBOs and non-PBOs) have the right to engage in any lawful business and investment activities, either directly or by establishing separate business entities, in accordance with the relevant trade and investment laws.[65] As a matter of principle, religious institutions should not carry out business activities since their sole objective is fulfilling the spiritual needs of their followers. Yet, it is considered as wise and prudent to permit religious institutions carry out very limited trade activities in order to enable them to generate some income to cover the costs of their humanitarian and social goals.[66] However, even if religious institutions engage in trade activities, they are not considered as traders for the purpose of the Commercial Code.[67] When it comes to the issue of income tax, the Proclamation exempts the income of a non-profit organization *other than business income that is not directly related to the core function* of the organization (emphasis added).[68] Thus, as a rule, income generated by non-profit organizations (including NPOs and religious institutions) is exempted from income tax. However, even if NPOs or religious institutions can engage in both related and unrelated business activities, the income they derived from a "business activity which is not directly related" with their main purpose of establishment is not exempted. So, the mere fact that they

[63] See Klaus J. Hopt *et al*., *Feasibility Study on a European Foundation Statute*, Final Report to European Commission, (2015), p. 52. PBOs are established for the benefits of the general public, than for the few.

[64] Peter Pajas, Economic Activities of Not-for-Profit Organizations, Conference Report in Regulating Civil Society Conference, Budapest, (2015), p. 8. Specially, the tax privileges for business and passive investment activities of PBOs are recommended not to be extensive and should be attached with the necessary conditions.

[65] Organizations of Civil Societies Proclamation No. 1113/2019, Federal *Negarit Gazzeta*, (2019), Arts. 63 (1) (b) and 64 (1). [Hereinafter, Proclamation No. 1113/2019].

[66] See Tilahun Teshome and Taddese Lencho (eds.), Position of the Business Community on the Revision of the Commercial Code of Ethiopia, Addis Ababa Chamber of Commerce and Sectoral Associations, PSD Hub Publication No. 8, (2008), p. 8.

[67] Commercial Code, *supra* note 12, Art. 4 (1) reads *"[*u]nless otherwise expressly provided by law, bodies corporate under public law, such as administrative or *religious institutions* or any other public undertakings, shall not be deemed to be traders even where they carry on activities under Art. 5" (emphasis added). Art.5 (1) of the draft Commercial Code has also similar stipulation.

[68] See Proclamation No. 979/2016, *supra* note 3, Art. 65 (1) (m).

are non-profit entities will not grant them automatic exemption from business income tax. The institutions should make both activity and financial reports to the Tax Authority so that it can determine whether the income is related or not.[69] This indicates that non-profit entities can be taxable units of Schedule 'C'. Therefore, to be a tax payer of Schedule 'C'; the important factor is the activity (whether it is business or not) not the identity of the person (whether it is a commercial or non-commercial entity).

There are also certain entities which may be considered bodies for the purpose of Schedule 'C', yet, not taxable units of the Schedule. In this regard, we can mention cooperative societies, which are exempted from paying income tax at entity level.[70] On the other hand, as discussed above Micro-Enterprises which are conventionally characterized as 'body' are considered as 'individuals' at least in terms of the applicable tax rate and the use of presumptive taxation.[71] It means, still they are taxable units of Schedule 'C', but by large treated as individual taxpayers. It should also be remembered that 'body' taxpayers are not only those entities formed in Ethiopia, but also include those incorporated or formed under a foreign law.[72] Thus, as so long as they derive taxable business income, either as a resident by having effective management in Ethiopia or as a non-resident by deriving Ethiopian source business income, they are treated as taxable units of Schedule 'C'.[73]

To sum up this section, it is compelling to ask, what is/are the base(s) or factor(s) to characterize the taxable units of Schedule 'C'? The above discussion indicates that there seems no hard and fast rule to characterize business income tax payers. What is important is to follow the defining elements: whether someone or a certain entity engaged in activities construed as business with a view to generate profit (i.e., the activity test and profit motive, to be discussed

[69] For instance, NPOs (CSOs) are required to make annual financial, audit and activity report to the Civil Society Organizations Agency and other relevant bodies. See Proclamation No. 1113/2019, *supra* note 64, Arts. 71-76. The same goes to religious institutions where they are required to report their financial audit to the Ministry of Federal and Pastoral Development Affairs (now the Ministry of Peace). See በፌራዬልና አርብቶ አደር ልማት ጉዳዮች ሚኒስቴር የሃይማኖትና እምነት ድርጅቶች፣ማህበራትን ለመመዝገብ እና ተዛማጅ አገልግሎት ለመስጠት የወጣ፤ መመሪያ ቁጥር 1/2010 ዓ.ም. Art. 20 (5) (b) of this directive required religious institutions to report about the institutions they administered and the payment of relevant income taxes to the Ministry, in their annual financial audit report.

[70] See Proclamation No. 147/98, *supra* note 48, Art. 31 (1) (a).

[71] See Proclamation No. 979/2016, *supra* note 3, Art. 19 (3) and Regulation No. 410/2017, *supra* note 5, Art. 48.

[72] See Proclamation No. 983/2016, *supra* note 10, Art. 2 (5). There is an expression "… other body of persons *whether formed in Ethiopia or elsewhere*" (emphasis added).

[73] See Proclamation No. 979/2016, *supra* note 3, Arts. 5 (5) (b) and (6) (3).

below). Thus, the taxpayers of Schedule 'C' are sole proprietors and bodies,[74] whether commercial or non-commercial, who/which engages in business activities, as long as they are not exempted. They can also be residents or non-residents.[75] If they are residents of Ethiopia, they are expected to pay income tax on their Ethiopian and foreign source business income, while non-residents will be taxable units of the Schedule if they received Ethiopian source business income.[76]

2. Tax Bases of Schedule 'C'

2.1. Business

As long as we are talking about income tax, it is clear that the tax is to be imposed on an item of income considered as business income. However, before determining whether an item of income is business income it is important to determine whether the activity giving rise to the income is characterized as a business. The Proclamation itself stipulates that "…business income tax shall be imposed … on a person *conducting business* that has taxable income for the year" (emphasis added).[77] Thus, the tax base of Schedule 'C' is income derived from business. In the absence of a definition in the income tax law, the term "business" will have its ordinary meaning, under commercial laws.[78] The Proclamation prefers to define "business" for its own purpose. It defines

[74] The absence of definition for the term 'body' in the Proclamation itself may make the exact identification of body taxpayers of Schedule 'C' a bit difficult. Unlike the current Proclamation, the repealed income tax proclamation had its own definition of 'body' (see Art. 2 (2)). However, scholars were critical of having repetitive definition of terms, including 'body' in many tax proclamations, while the terms signify exact similar meanings. Thus, they recommended defining such terms, under a single statute and declaring their cross-border applicability. See, Taddese Lencho, The Ethiopian Tax System: Excesses and Gaps, *Michigan State International Law Review*, Vol. 20, No. 2, (2012), pp. 355-356. The recent legislations have bought this idea and terms applicable for all tax laws (unless the context otherwise requires) are defined under the Tax Administration Proclamation (see Art. 2 where a definition for 44 terms is provided). As a matter of principle, this author too is in favor of having a single definition of terms which are applicable to several types of taxes across the board. However, at the same time it may also better to adopt a contextualized definition of 'body' under the Income Tax Proclamation for certain exceptional circumstances that enable flexibility [to tax or not to tax certain 'bodies'].

[75] See Proclamation No. 979/2016, *supra* note 3, Art. 7 - Both residence and source are used to assume income tax jurisdiction where residents of Ethiopia are subject to tax with respect to their worldwide income; while, non-residents are subject to tax in Ethiopia only with respect to their Ethiopian source income.

[76] *Id*, Art. 6 (2) and (3) stipulated the instances when to say business income is Ethiopian source. Income derived from conducting business in otherwise instances, will be considered as foreign business income and if a resident taxpayer has paid tax to the other jurisdictions on this income, it can claim a tax credit under Art. 45 of the Proclamation.

[77] See *Id*, Art. 18 (1).

[78] See Burns and Krever, *supra* note 4, p.2. In broad terms, a business is a commercial or industrial activity of an independent nature undertaken for profit.

business with three alternative categories.[79] Of course, the main definition of business is the one provided under Art. 2 (2) (a) of the Proclamation. It reads "[b]usiness means any industrial, commercial, professional, or vocational activity conducted for profit and whether conducted continuously or short-term, but does not include the rendering of services as an employee or the rental of buildings." From this definition, the following points can be inferred.

First, it recognizes a wide range of activities as business, owing to its expression 'any industrial, commercial, professional, or vocational activity'. The expression 'professional activity' by itself is too broad, arising from the existence of numerous professions.[80] So, based on this definition, service of a professional is a business activity. Second, the motive of the activity is the core element of business, i.e., it must be conducted 'for profit'. The phrase 'for profit' gives rise to a number of controversies particularly with religious organizations and charitable institutions. These entities, especially religious organizations, believed that they can engage in profit-making activities (side to side their main philanthropic or spiritual activities), however, without paying business income tax.[81] For them, the phrase 'for profit' concerns only business entities, though the Tax Authority back then had the opposite stand; hence, they are compelled to pay tax.[82] This author believes that the latter's stand is appropriate, at least, from the view point of the law. The phrase 'for profit' is to mean whether a person engages in the activity with a view to generate profit or not. It is immaterial, for what purpose a person will use the profit derived from the activity. The characterization of the activity as business is more important than the identity of a person who derives the income. Of course, it is without forgetting part of their income exempted from income tax. As discussed above, Art. 65 (1) (m) of the Proclamation exempt 'related business income' of a non-

[79] See Proclamation No. 979/2016, *supra* note 3, Art. 2 (2).

[80] Though, there is no agreeable definition, in general, profession is conceived as a paid occupation, especially one that involves prolonged training and a formal qualification and a skill involved predominantly mental/intellectual, than physical/manual. In fact, such classical definitions of profession are being questioned. See for instance, Alan Tapper and Stephan Millett, 'Revisiting the Concept of a Profession: Conscience, Leadership and the Problem of 'Dirty Hands'', Research in Ethical Issues in Organizations, Vol. 13, (2015), pp. 1-18. In Ethiopia, professional association is recognized as one type of civil society organizations under Proclamation No. 1113/2019, *supra* note 64, Art. 2 (1); and the draft Civil Societies Organization Regulation (expected to be ratified in the near future), under Art. 7 (1) defines 'profession' as "… educational certificate issued by officially recognized educational institution confirming knowledge, experience or skill relating to a profession or a profession certified by relevant Government or authorized body."

[81] Taddese Lencho, The Ethiopian Income Tax System: Policy, Design and Practice, PhD thesis, University of Alabama, (2014), pp. 297-311. See also Belete Addis, Income Tax Privileges of Charities and Charity Giving in Ethiopia: A Critical Legal Analysis, LL.M thesis, Bahir Dar University, (2018), pp. 48-70.

[82] *Id*.

profit organization. However, the fact that the income is exempted should not be construed to mean, the entities were not engaged in the activity 'for profit'. The exemption is made with a view to reward their social objectives, but not with a view that the activity they engaged in was not business or a for profit activity.

Third, the phrase 'whether conducted continuously or short-term' indicates that for a certain activity to be considered as a business, the frequency of the activity is immaterial. Hence, for business income tax purpose 'regularity' is not a determining factor so that it is inclusive of undertakings which may be done at once or infrequently, keeping in mind the tax administering organs are able to reach them. Here, the case of informal traders can be raised.[83] Informal trading is prevalent in Ethiopia (especially in major cities), mainly due to the increasing of unemployment; weak law enforcement; and the cost of operating formally such as high tax burdens, expensiveness of business premise rents, bureaucratic hurdles and corruption.[84] The operators in this sector are not paying business income tax not because they are not taxable units of Schedule 'C', but because the system (the tax authorities and its administration) is unable to reach them.[85] Though it is the duty of the taxpayers themselves to file their tax declaration and pay the income tax within the period specified by the law,[86] there is very little chance (if not absent) that informal traders will comply with this duty. Since they are not as such in the reach or regulation of the government they face little sanctions for not complying. The fact that informal traders have no fixed/known place of business operations and engage in activities without making commercial registration and without getting business license, makes it difficult for the Tax Authority to trace and tax them. In fact the Commercial Registration and Licensing Proclamation prohibit engaging in any business activity, without first, being registered in commercial register and securing business license.[87]

[83] Informal traders or informal trade practices, commonly, refers to trade practices characterized by operation of commercial activities without adhering to the required regulatory laws such as business registration and securing business license. They are not intrinsically unlawful/illegal since they are not producing and selling illegal products and services, but failed to adhere the regulatory laws while expected to do so; such as not filing taxes. See Diana Farrell, The Hidden Dangers of the Informal Economy, *the McKinsey Quarterly*, Number 3, (2004), p. 28.

[84] See Asmamaw Enquobahrie, Some Controversies on Informal Sector Operation in Ethiopia: Problems and Prospects for a Development Strategy, (2006), p.9, available at http://homepages.wmich.edu/~asefa/Conference%20and%20Seminar/Papers/2003%20papers/Enquobahirie,%20Asmamaw%20(delete).pdf last accessed on 12 May 2020.

[85] For details about the potential adverse impacts of this sector on the formal business sector, including by not paying tax; see Yibekal Tadesse, Informal Trade Practices in Light of objectives of the Ethiopian Trade Competition and Consumer Protection Law: An Appraisal of the Law and the Practice, LL.M thesis, Bahir Dar University, (2017), pp. 52-90.

[86] See Proclamation No. 979/2016, *supra* note 3, Arts. 83 (4) – (6) and 84 (2) – (4).

[87] See the Commercial Registration and Licensing Proclamation No. 980/2016, Federal *Negarit Gazzeta*, (2016), Arts. 5 (1) and 22 (1). [Hereinafter, Proclamation No. 980/2016]. Here we can see that informal

However, it should be underlined that the fulfillment of these conditions is immaterial for the purpose of taxation (i.e., they are not a prerequisite for taxation).To impose business income tax, the important factor is whether the activity is construed as a 'business' or not under the income tax laws, not whether the operator is issued with a business license or not.[88]

Fourth, the definition has explicit exclusions. Accordingly, the rendering of services as an employee and the rental of buildings are not considered as business. In fact, these activities are already subjected to Schedule 'A' and 'B', respectively. It has been mentioned that services of a professional is a business activity. However, the exclusion here is telling that it is not the activity of all professionals that fall under the ambit of business. If the service of a professional is rendered as an 'employee', it is not considered as business owing to its explicit exclusion. There are instances where the concept of business may overlap with the notion of employment for tax purposes when 'employment' is defined broadly under tax laws in a way that includes some independent contractor relationships (i.e., relationships that are within the ordinary meaning of business).[89] In such cases, it is recommended that the definition must be coordinated with the definition of business so that the same economic activity is not characterized as both a business and an employment for income tax purposes.[90] This could be achieved by providing that a business does not include an employment and this is what the Proclamation preferred to do. Therefore, Ethiopian income tax system does not regard employment as business. In this case, professional activities that are subject to Schedule 'C' are those being rendered as an independent contractor or self-employed individuals.[91] That is

traders are committing concurrent offenses: not paying tax and undertaking business activities without getting registered and licensed.

[88] Related to this, Taddese has mentioned one case decided by the Federal Supreme Court Cassation Division, where the Court underlined the distinction between "business" and "business license" and treat the latter as a mere regulatory tool, thus, held that a business could exist independently of a business license. See, Taddese, *supra* note 80, p. 388.

[89] See Burns and Krever, *supra* note 4, p.2.

[90] *Id*.

[91] For instance, lawyers provide consultancy services by opening their own offices. In fact, there is an ongoing debate as to whether or not it is proper to consider legal advocacy services, as business. While the government is insisting that it is, hence, advocates need to pay business income tax, the latter's and legal academicians commonly oppose this view invoking that it would adversely affect the integrity or core value of the profession, i.e., the main aim of the service may tend to be commercial than serving justice. Currently, they are paying business income tax as a category 'C' taxpayer. One of the highly controversy on Art. 5 of the earlier draft of the Commercial Code was the unqualified inclusion of all consultancy services to the list of trade activities. Agreeing to the inclusion of consultancy services in the list of trading activities, scholars forwarded their recommendations for its qualifications like: "Without prejudice to the specific laws and regulations governing the licensing, code of conduct and discipline of the respective professions, consultancy services…" See Tilahun and Taddese, *supra* note 65, p. 9. But, the final Draft of the Code, is not mentioning consultancy services at all under Art. 7,

why it is important to carefully characterize employee and independent contractors, as it has income tax implications; while the former is taxed under Schedule 'A' the latter is charged under Schedule 'C'. Coming to rental of buildings, the current Proclamation, clearly affirmed that rental of buildings are not subject to Schedule 'C', despite the activity is being undertaken for profit and for that matter even if it is done by companies which are considered as always commercial.[92]

The second alternative definition of business provided under the Proclamation reads "any other activity recognized as trade under the Commercial Code."[93] For the purpose of the Commercial Code, traders are persons who professionally and for gain carry on the activities listed under Art. 5.[94] So, any activity which may not fall with the domain of the above definition of business, could also be considered as 'business' as long as it is recognized as trade under the Commercial Code. However, it has to be noted that the Proclamation's conception of 'business' is broader than the Commercial Code's conception of 'trade'. The Code understood trade in its narrow sense where it provides a list of specific activities considered as trade, while this is not the case for the Proclamation.[95] In addition, Art. 5 of the Code does not include many professional activities as trade and excludes vocational activities, such as handicraftsmen, even if they are being done for profit-making.[96] But, these exclusions are no more relevant for the Proclamation, since it includes professional and vocational activities as business without exception. Besides,

where it lists out activities considered as trade. However, after naming 11 activities, the provision has indications that other main categories not mentioned by name may be considered as trade provided it is determined by the law. See Arts. 7 (1) (l) and 7 (2) of the Draft). Consultancy services can be still considered as trade using this open-ended expression.

[92] See Proclamation No. 979/2016, *supra* note 3, Art. 2 (2) (c). To have a glimpse of why is this; readers are strongly advised to consult the first commentary- Belete, *supra* note 8, pp. 64-67.

[93] *Id*, Art. 2 (2) (b).

[94] Commercial Code, *supra* note 12, Art. 5. The reasons for cross refereeing to the Commercial Code is associated with the impossibility of exhausting all activities in the Proclamation and the fact that the Code is considered as the source for answers to the ultimate question of which activities should qualify as 'trade'. See Taddese, *supra* note 80, p. 381.

[95] *Id*, Art. 5 listed 21 activities as trade. Whether this list is exhaustive or not was the subject of debate for a long time, though subsequent legislations and acts of the Ministry of Trade conclusively proved the list is illustrative. In this regard, Art. 7 of the draft Commercial Code explicitly adopted the 'indicative approach' since it allowed the inclusion of other activities (beyond those named specifically) as trade, provided it is determined by the law. Such laws can be the Commercial Registration laws or directives issued by Ministry of Trade like the Ethiopian Business Licensing Categories Directive No. 17/2019 – also known as the Ethiopian Standard Industrial Classification (ESIC). Once an activity is considered as trade or business, it will open up the way for income taxation of the activity.

[96] For the exclusions, see *Id*, Arts. 6 - 9. These exceptions are maintained under the current Draft Commercial Code with few modifications and one addition; special profession (ልዩ ሙያ). See, Arts. 9-13 of the Draft.

while 'regularity' of the activity is material under the Code this is not the case under the Proclamation.

The third alternative definition of business is "any activity, other than the rental of buildings, of a share company or private limited company whatever the objects of the company."[97] So, if the activity of the company is rental of buildings, it is not subject to Schedule 'C' (but Schedule 'B'), while the rest activity of companies are considered as 'business' irrespective of their objectives, i.e., it is immaterial whether the objective of the company is profit making or not. Thus, if someone wants to engage in non-profitable activities without paying business income tax, company is not a sound choice.[98] Under the Commercial Code too, SCs and PLCs are always regarded as commercial in nature whatever their objects are.[99] Though companies are always considered as commercial/business persons, if their activity is rental of buildings, they are excluded from business income tax and subjected to Schedule 'B'. This inversely is telling that business persons are not fully subject to Schedule 'C'. Even if the Proclamation does not consider rental of buildings as business, it does not mean that the undertakings are not business for other purposes: such as for the purpose of commercial registration and licensing or other regulatory purposes.[100] So, the definition of "business" under the Proclamation should be taken only for the purpose of income tax, not for all other purposes too.

From the reading of Art. 2 (2) of the Proclamation and other laws mentioned above (the Commercial Code and the Commercial Registration and Licensing Proclamation), it is clear that there are two cumulative requirements for a certain activity to be considered as 'business'. These are the activity test (type of activity) and the profit test (motive of the activity).[101] The activity test requires for the concerned activity to fall under the category of activities provided under the Proclamation. This simply means the activity must be capable of being

[97] See Proclamation No. 979/2016, *supra* note 3, Art. 2 (2) (c).

[98] Some jurisdictions recognize companies formed for non-commercial purposes (like charities), such as, 'company limited by guarantee', where the members guarantee the payment of certain amounts, usually nominal, if the company goes into insolvent liquidation, but otherwise they will have no economic rights in relation to the company. See Getahun Seifu, Revisiting Company Law with the Advent of Ethiopian Commodity Exchange (ECX): An Overview, *Mizan Law Review*, Vol. 4, No.1, (2010), p. 106.

[99] Commercial Code, *supra* note 12, Art. 10 (2) reads "[s]hare companies and private limited companies shall always be deemed to be of a commercial nature whatever their objects." The same is true under the Draft Commercial Code-Art. 14 (2).

[100] If we refer to the ESIC cited above, we can find rental of buildings in the listed business categories.

[101] See Taddese, *supra* note 80, p. 382. Taddese has made these notes based on the definition of 'businesses' under the repealed Income Tax Proclamation, but holds true for the current Proclamation too.

categorized under the expression of 'any industrial, commercial, professional or vocational activity; or any other activity recognized as trade under the Commercial Code; or any activities by companies apart from rental of buildings'. It is said that this expression is capable of including any human activity as a business.[102] But, the second requirement (the profit test), helps us narrow down the activities so that it can make sense. The phrases, 'conducted for profit' in the Proclamation and 'for gain' in the Commercial Code implied this test. Accordingly, any activity will be subject to Schedule 'C' only if it is undertaken with the intent to generate profit. This, of course, should only be taken as a rule since there can be exceptional circumstances. For instance, as stated above, companies are subject to business income tax even if their activity is not made for profit (unless the activity is the rental of buildings which is subject to Schedule 'B').

2.2. Business Income

A person conducting business will derive 'income', on which the tax under Schedule 'C' is to be imposed.[103] This refers to 'business income', the tax base of the Schedule 'C'. Thus, the characterization of an income as business income is important, especially in schedular income tax systems where it is common for separate taxes to be imposed on employment, business, and investment income.[104] Defining business income or providing the particular items of income that are considered as business income can be used as a way of characterization.[105] When it comes to the Proclamation, the definitional provision, Art. 2 (4), without defining 'business income' it simply cross refers to Art. 21. The cross-referred provision, most importantly, Art. 21 (1), provides the list of income categories which are considered as business income. First, "the gross amounts derived from the conduct of a business, including the gross proceeds from the disposal of trading stock and the gross fees for the provision of services."[106] The first part of this sentence uses a general and broad expression, where all income derived from the conduct of a business is considered as business income. Then, the second part of the sentence mentions two illustrations. One is the disposal of trading stock, which is about trade in goods. According to the Proclamation, trading stock includes: anything

[102] *Id*, p. 389. Proclamation No. 286/2002, *supra* note 36, Art. 2 (6), had similar expression.
[103] See Proclamation No. 979/2016, *supra* note 3, Art. 18 (1) that reads "…*business income tax* shall be imposed … on a person conducting business that has *taxable income* for the year" (emphasis added).
[104] Burns and Krever, *supra* note 4, p.2. Consequently, the characterization of an item of income determines which tax regime applies to it.
[105] *Id*, p. 3.
[106] See Proclamation No. 979/2016, *supra* note 3, Art. 21 (1) (a).

produced, manufactured, purchased, or otherwise acquired for manufacture, sale, or exchange; any raw materials or consumables used in a production or manufacturing process; or livestock, but not including animals used as beasts of burden or working beasts.[107] In general, trading stocks are goods which are the subject of sale by a business person (goods for sale), inputs of production (raw materials) or work and other current/consumable goods. Thus, the proceeds from the disposal of such goods are considered as business income. The other illustration is the provision of services which is about the trade in services. So, the fees derived from the supply of services are considered as business income.

The second category of business income is "a gain on disposal of a business asset."[108] In its ordinary meaning, disposal covers all situations in which the ownership of the asset changes.[109] In this regard, Art. 67 (1) of the Proclamation states that "[a] person disposes of an asset when the person has *sold, exchanged, or otherwise transferred legal title to the asset*, and *includes* when the asset is cancelled, redeemed, relinquished, destroyed, lost, expired, or surrendered" (emphasis added). The important factor to determine whether the transaction is disposal or not is the transfer of ownership of the asset from one person to another (the Amharic version of Art. 67 (1) says *"...*በሀብቱ ላይ ያለውን የባሌበትነት ስም ሲያስተላልፍ …"). It is common and advisable to include any gains arising on the disposal of business assets as business income and the inclusion should be to all assets of a business and not just those used in the normal operations of the business.[110] This way, the concept of business asset should include not only assets physically used in, or held by the business, but also investment assets related to a business activity. This is the case under the Proclamation where 'business asset' is defined as "an asset held or used in the conduct of a business, wholly or partly, to derive business income."[111] Business assets are different from trading stocks because they are capital goods not current goods. These are, for instance, properties or machines that a business owns and uses but which it does not buy and sell as part of its regular trade. The gain from the disposal of such assets is considered as business income. To say there is gain from the disposal of a business asset, the amount by which the consideration for the disposal of the asset must exceed the net book value of the asset at the time of disposal.[112] However, where the business asset in question is also regarded by

[107] See *Id*, Art. 2 (24).
[108] *Id*, Art. 21 (1) (b).
[109] Burns and Krever, *supra* note 4, p.49.
[110] *Id*, p.7.
[111] See ProclamationNo. 979/2016, *supra* note 3, Art. 2 (3).
[112] *Id*, Art. 21 (3). At this juncture, we can notice one of the developments the current Proclamation has made. It dedicates separate provisions to explain the important accounting concepts, which are

the law as a taxable asset,[113] the gain which shall be considered as business income is the amount (if any) by which the cost of the asset exceeds the net book value of the asset at the time of disposal and any gain above the cost is taxable under Art. 59.[114] Thus, if business persons are transferring their business asset above the net book value of the asset[115] (but below the cost) it will be taxed under Schedule 'C'. But, if business persons dispose the asset above the cost, it will be capital gain and hence will be taxed under Schedule D. Here the gain is not necessarily to mean the profit rather the sales proceeds obtained from the business asset. The possible reason is that since the law deducts the costs of the business asset in the form of depreciation allowance;[116] if business persons are to sale the property, the proceeds will be part of business income.

The taxation of gains from a disposal of business assets indicates that the Proclamation recognizes not only the sale of inventory (trading stocks) or the provision of services that results in the realization of business income, but also sale of business assets. However, this recognition rule has exception in which the sale of business assets does not result in the recognition of income. Under the Proclamation, non-recognition results when assets are transferred in the context of corporate reorganization.[117] Thus, a gain derived from disposal of business asset done as part of corporate re-organization will not be considered as 'gain' taxable under Schedule 'C'. This allows businesses to engage in business reorganizations, such as mergers, without fear of income taxation. It has to be clear that the objective here is not to grant a tax exemption to the companies or shareholders involved, but to neutralize the tax consequences of the business

necessary to determine income tax liability, especially for a tax to be imposed on income derived from disposal of assets. The Proclamation, under Arts. 67 – 70, deals with acquisition of an asset, disposal of an asset, cost of an asset, net book value of a business asset and consideration for the disposal of an asset. Stipulating what kinds of transactions constitute disposal, what kind of expenses are considered as cost, and which payments are treated as consideration (the price received for the asset) has important significances, including to understand the tax to be imposed on a gain derived from the disposal of business assets. So, to meaningfully comprehend the taxation of disposal of business assets, readers are advised to go through these provisions.

[113] This refers to non-business capital assets (specifically immovable asset, shares and bonds) taxable under *Id*, Art. 59 (which founds under Schedule 'D'). The term 'taxable asset' is introduced by the current Proclamation. This may arise from the Proclamation's distinction of capital assets as business and non-business assets. A gain from the disposal of business capital assets is subject to Schedule 'C' (Art. 21 (1) (b)), hence, Art 59 concerns with non-business capital assets. Thus, if Art. 59 employed the term 'capital assets' it may found confusing since it does not tax all capital assets, but a specified non-business capital assets.

[114] *Id*, Art. 21 (4).

[115] Mathematically speaking; net book value of the asset is cost of an asset minus depreciation allowances. Cost of an asset does not include the allowed deductions, hence the value of the business asset is still not net, and then when the allowed deductions reduced, the value of the asset will become net.

[116] See ProclamationNo. 979/2016, *supra* note 3, Art. 25. See also, RegulationNo. 410/2017, *supra* note 5, Art. 36.

[117] *Id*, Art. 35.

reorganization, so that the reorganization involves neither a tax advantage nor a tax disadvantage.[118] During reorganizations, it will be considered as if the transferee has acquired the asset with a cost equal to the cost of the asset.[119] However, to have this effect the transfer has to meet the pre-conditions provided under Art. 35 of the Proclamation. To mention the basic ones: the transfer should be from a resident company to a resident company; the transfer should be made as part of reorganization and the Tax Authority shall be satisfied that the reorganization does not have a principal purpose of tax avoidance.[120]

Does the above category of "business income" (i.e., disposal of business assets) include a gain from the sale of business? The Commercial Code recognizes business as an intangible movable property.[121] It is also clearly stipulated that business is more than its constituent elements, such as the business assets.[122] Hence, business itself, as a type of asset, can be owned, leased, mortgaged, contributed to another business or disposed.[123] If business can be subjected to sale, separate of its elements, which income tax schedule charges the gain derived from this? A related question that should be asked (perhaps before the where to tax question) is; when to say business is sold? In this regard, it is important to notice that some elements of business are considered more essential than the others. The Commercial Code, clearly states that good will is the main part of business[124] and declares that sale of good will entails sale of business.[125] Even, Art 127 (2) of the Code, while listing the remaining constituent elements

[118] See, Frans Vanistendael, Taxation of Corporate Reorganizations, *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, Vol. 2, International Monetary Fund, 1998, p. 13. The principle of tax neutrality in business reorganization has two aspects: one, no tax is levied at the time of the reorganization and two after the reorganization, the taxable profits of the transferee company and its shareholders are calculated on the basis of tax elements that were present in the transferor company and its shares immediately before the reorganization.

[119] See Proclamation No. 979/2016, *supra* note 3, Art. 35 (1). This is done by deeming the taxpayer to have disposed of relevant property for consideration equal to its cost and to have reacquired the property (if there has been no actual disposal of assets) or to have acquired replacement property for consideration equal to the original cost. See Burns and Krever, *supra* note 4, p. 53.

[120] For tax avoidance schemes and the methods adopted to fight it, see *Id*, Arts. 78-80. The detailed rules setting conditions for tax-free reorganizations vary considerably from one country to another, but can be summarized in two basic conditions: continuity of business enterprise and continuity of shareholder interest. See Vanistendael, *supra* note 117, p. 14. In addition to these conditions Art. 35 of the Proclamation also requires the existence of 'a bona fide commercial or business purpose or the absence of tax avoidance'.

[121] Commercial Code, *supra* note 12, Art. 124. But, it is not as ordinary movable. We can infer this from the registration requirement imposed on transactions concerning business such as sale or hire. Besides, it is only mortgage attached to business, not pledge which is security with movable property. See Arts. 150 -209 of the same.

[122] *Id*, Arts. 127 (2) and 128.

[123] *Id*, Arts. 150-209.

[124] *Id*, Art. 127 (1).

[125] *Id*, Art. 159.

of business, use the word "may". This may be constructed to mean that business can be established only with good will. Therefore, a sale of business can be understood as referring to the sale of business in its totality or sale of the good will. Coming to the tax issue, it is good to note that sale of business is an exit from business.[126] Since Schedule 'C' is about income derived from "conducting business", it seems that it is not inclusive of a gain derived from sale of business. Hence, the above category of business income (Art. 21 (1) (b) of the Proclamation), concerns with a gain from the sale of elements of a business (business assets), not a gain from sale of business in its totality. If Schedule 'C' is not the place to tax a gain from sale of business, then under which Schedule will it be taxed? Considering business as investment/capital asset, it may be resorted to Art. 59 of the Proclamation, which deals with a gain from disposal of investment assets. However, this provision exhaustively listed assets subject to its taxation (i.e., immovable asset, a bond and a share). Thus, it is not inclusive of a gain from disposal the business itself.

The third category of business income is "any other amount included in business income of the taxpayer for the tax year under the Proclamation."[127] This indicates that the list under Art. 21 (1) of the Proclamation is not exhaustive. Thus, it is possible to include other amounts as business income provided that it is considered as such by the Proclamation. For instance, we can mention Art. 50 of the Proclamation, which, imposed business income tax (at the rate of 3% of the gross amount) on a non-resident conducting an international air transportation business and derived income for the carriage of passengers, livestock, mail, merchandise, or goods embarked or loaded in Ethiopia and destined for a place outside Ethiopia.[128] The contrary reading of Art. 27 of the Proclamation can also be considered for this purpose. This provision list downs automatic non-deductable expenditures and expenditures not deductible if they exceed a certain amount. If the expenditures are not going to be deducted or the amount exceed the deductable amount, they are going to be considered as business income. Besides the Proclamation, the Regulation has also additional tax bases of Schedule 'C'. Income from lease of business assets is one of them. Art. 22 of the Regulation reads "[i]ncome derived from the lease of a business, including goods, equipment, and buildings that are part of the normal operation

[126] Of course, it can be an entry to business for the buyer or may be for the seller if she is doing the sale to expand/change her business.

[127] See Proclamation No. 979/2016, *supra* note 3, Art. 21 (1) (c).

[128] This tax is not applicable to an amount that is exempt income; an amount derived in respect of a passenger who is in Ethiopia as a result of being in transit between two places outside Ethiopia and the transshipment of livestock, mail, merchandise, or goods. See *Id*, Art. 50 (2).

of a business, shall be taxable under Schedule 'C' of the Proclamation". This refers to buildings and other assets which are part of the business and handed over to the lessee (business owner) since they cannot be separated from the business. A gain from a foreign currency exchange is another income source recognized as business income under the Regulation.[129] A taxpayer may have foreign currency holdings as a consequence of engaging in international transactions such as receiving foreign currency as payment for services rendered or goods supplied or may acquire foreign currency to meet business expenditure or may keep foreign currency as a hedge against inflation or as an investment.[130] In each case, the foreign currency is an asset of the taxpayer so that a gain or a loss will accrue as the value of the foreign currency fluctuates relative to the local currency during the period in which the foreign currency is held. It is such transactions that are dealt under Art. 44 of the Regulation where it states a foreign currency exchange gain derived by a taxpayer shall be included in business income.[131]

Based on the above discussion, it is possible to conclude that business income tax is imposed on income, cash or in kind,[132] derived from business activities. It has to be underlined that business income is not limited to those discussed above. As stated above, while elaborating 'business income' Art. 21 (1) (a) of the Proclamation uses the expression "the gross amounts derived from the *conduct of a business, including* …" (emphasis added). It is after this inclusive statement, the Proclamation goes to the specific inclusion rule or explicitly mentions sources considered as business income. So, the specific types of income discussed above are illustrative examples of business income. Other income sources can also be considered as the same, so long as they are derived from the "conduct of business", though they are not explicitly mentioned under the Proclamation or the Regulation.[133] So, the baseline is whether the income in

[129] See Regulation No. 410/2017, *supra* note 5, Art. 44.

[130] See Burns and Krever, *supra* note 4, pp.28-31.

[131] Regulation No. 410/2017, *supra* note 5, Art. 44 (1). 'Foreign currency exchange gain' is defined as "a gain attributable to currency exchange rate fluctuations derived in respect of foreign currency transactions." See Art. 44 (6) (b) of the same.

[132] The word 'amount' (የገንዘብ መጠን) includes an amount in kind. See Proclamation No. 979/2016, *supra* note 3, Art. 2 (1).

[133] For instance, amounts received as consideration for accepting a restriction on the capacity to carry on business; amounts received as an inducement payment to enter into a contract or business arrangement; gifts received by a person in the context of a business relationship; recovery of amounts previously deducted as business expenses, including bad debt claims; and amounts received in respect of lost business profits under a policy of insurance or a contract for indemnity or as a result of a legal action are among the items considered as business income in various jurisdictions. See Burns and Krever, *supra* note 4, p.8. These sources may be taken as potential business income sources for Schedule 'C', so long as they are considered as income derived from "conducting business". This of course is without

question is derived from activities constituted as business or not; and whether the income in question is exempted or not since exempted income does not make the tax base of Schedule 'C' from the very beginning.[134] It should also be remembered that the income sources discussed above are the tax bases of Schedule 'C', not taxable business income. The Proclamation stipulates that taxable business income of a taxpayer can be known after the total business income of the taxpayer is reduced by the total deductions allowed.[135] Thus, there is a need to identify all the allowed deductions and made the deductions thereof from the gross business income of the taxpayer.[136] In addition, according to Art. 21 (2) of the Proclamation, exempt income is not considered as business income. In effect, unlike deductions, from the outset exempt income does not make part of the tax base of Schedule C'.[137]

2.3. Schedule 'C' *vis-a-vis* Other Income Tax Schedules

The fact that the current Proclamation dedicates a separate provision to define 'business income' or to provide income sources which are considered as 'business income' can be taken as an improvement. The repealed Income Tax Proclamation had imposed business income tax on "income realized from entrepreneurial activity", however, without clarity as to which income source constitute part of the income realized from entrepreneurial activity and which does not.[138] However, it does not mean that the existing Proclamation's characterization of business and business income has left no issue to talk about. In its nature, Schedule 'C' shares borders with other Schedules, which may increase the cases of overlap. As it has been seen, the Proclamation, in defining "business" includes professional and vocational activity, but excludes services of an employee. This means the rendering of services as an employee is not

forgetting the possible adverse impacts of not explicitly providing the tax bases under the law; it will hinder predictability or goes against the canon of certainty.

[134] See Proclamation No. 979/2016, *supra* note 3, Art. 21 (2).

[135] *Id*, Art. 20 (1).

[136] Schedule 'C' is known for its extensive deductions. The issues of deductions including deductible expenses, non-deductible expenses and depreciation allowances applicable for Schedule 'C' taxpayers are mainly dealt under *Id*, Arts. 22-33 and more extensively under Regulation No. 410/2017, *supra* note 5, Arts. 27-47.

[137] To this end, it is important to go through the lists of Schedule 'E' and find out the possible exemptions applicable to Schedule 'C' taxpayers. There is also floor exemption (the first 7, 200 birr) for individual taxpayers under Art. 19 (2) of Proclamation. There are also exemptions under other laws. For instance, income tax exemptions are provided for investors under the Investment Regulation No. 270/2012, Federal *Negarit Gazzeta*, (2012), Arts. 5-7. The draft Investment Regulation tabled for the Council of Ministers consideration (at the time of writing this work) has also similar treatments.

[138] See Proclamation No. 286/2002, *supra* note 36, Art. 17. Art. 24 was the only provision that addressed the issue of what income source to include in Schedule 'C', which was about a gain from transfer of business assets.

considered business, hence, subject to Schedule 'A'; while the rendering of services through other forms of relationships such as, as an 'independent contractor', is considered as business and subject to Schedule 'C'. Art. 2 (7) of the Proclamation, defines employee as "…an individual engaged … to perform services under the *direction and control* of another person, other than as an independent contractor …" (emphasis added); while Art. 2 (15) of the same defines independent contractor as "an individual engaged to perform services under an agreement by which the individual retains *substantial authority* to direct and control the manner in which the services are to be performed" (emphasis added). Though the two phrases in these provisions, "direction and control" and "substantial authority", are important to determine whether the relationship is an employment or independent contract, the income tax laws failed to set clear criteria for the phrases. Thus, the lack of clarity (to the required extent) as to the boundary between employment relationship and independent contract may open a door for overlap between the two Schedules.[139]

The Proclamation also excludes "rental of buildings" from the ambit of business, hence, the income derived from this activity shall not be considered as business income. However, this conclusion is incompatible with Art. 22 of the Regulation, according to which a lease of a building as part of the normal operation of a business is not subject to Schedule 'B', but Schedule 'C'. It should be noted that this provision is not inclusive of all buildings destined for conducting business, such as buildings rented out as a business premise. It only concerns with buildings which are part of the business and handed over to the lessee (the business owner) since they cannot be separated from the business. This can be the case, for instance, for undertakings where the rental of buildings is fully integrated into the other businesses, which are taxable under Schedule 'C' (e.g. hotel businesses). But, lease of buildings in other forms or other than rental of buildings which have become part of the business inseparably is subject to Schedule 'B'. Thus, aware of this distinction is important to appropriately characterize the income or to avoid possible overlap between the two Schedules.[140]

On a related note, it is important to distinguish between lease of a business and lease of business assets. It is not only assets which are considered as business asset,[141] but also business itself as a property can be a subject of lease.[142] The

[139] For the details in this regard, see Belete, *supra* note 8, pp. 46-48 and 53.
[140] For the details see, *Id*, 59 and 62.
[141] For instance, buildings can be leased as a business premise. See the Commercial Code, *supra* note 12, Arts. 142 - 147. Other movable assets such as machines or equipments can also be subjected to lease.

question here is whether the nature and scope of the lease under Art. 22 of the Regulation include both these separate leases? Seeing the title of the provision, "lease of business assets", it may be said that business lease is not a subject matter of Schedule 'C'. However, in the body part, the provision has the expression "…the lease of a business…", hence, business lease seems also to be included. In addition, if lease of business assets fall under Schedule 'C', for a stronger reason lease of a business will also fall under the same.[143] Even if the Commercial Code is clear in that business is more than its constituent elements including the lease right over the business premise,[144] there is a common misunderstanding about business and business premise. Whenever transactions, such as lease or sale, are made concerning the business premise, there is a tendency to consider as if the same has happened to the business. This seems the reason that the Federal Supreme Court Cassation Division in several occasions has entertained cases related to the confusion between business lease and lease of business premise.[145]

While undertaking their business activities, Schedule 'C' taxpayers may also derive income sources falling under Schedule 'D'. In such cases, they are not required to add these incomes in their Schedule 'C' income since these are subject to final taxes under Schedule 'D'.[146] But, this prescription alone may not avoid the characterization overlaps or difficulties. Schedule 'C' activities are responsible for generating many forms of income taxable under Schedule 'D'.

---

[142] *Id*, Arts. 194 – 205. These provisions indicate that business as a property can be leased.

[143] This seems the position of the Regulation too, when it use the phrase 'lease of a business' under Art. 22. If so, the provision not only taxes business assets which are rented out together with the business/good will; but also the lease of good will or lease of the business assets together with the business. In the latter case, the lease will be treated as business lease, not lease of assets. Business lease is mainly about lease of good will, which can be made together with the business assets or not.

[144] See the Commercial Code, *supra* note 12, Arts. 127 (2) (c) and 151 (2).

[145] For instance, in one case, after declaring the divorce of the spouses, the lower court allowed the division of the business, owned by the divorcing spouses. However, the lesser (also owner) of the business premise (Gondar City *Arada Kebele* Administration) intervened and opposed the decision invoking that the divorcing spouses should not be allowed to take a property which they do not own. The Administration argued that the spouses have no ownership entitlement over the business. When this matter reached to the cassation bench (after the Amhara Regional Supreme Court decided that the divorcing spouses have no entitlement over the property in question); the Court decided that the concept of business is greater than the trading stocks and the building where the business is being operated. Citing Art. 127 (2) of the Commercial Code, the bench affirmed that business is separate from the lease right over the business premise. Rather business includes the rental rights a person has over the premise. The court then proclaimed that the ownership right of the *Kebele* Administration is over the business premise, not over the business. See ሀጂ ታጁ ለገሰና መሪም መሀመድ vs የጎንደር ከተማ ማዕከላዊ አራዳ ቀበሌ፤ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎች፤ መ.ቁ 3760፤ 2000 ዓ.ም. See also ፀጋየ አማን ለጃ vs የካ ክ/ከተማ ወረዳ 08 አስተዳደር፤ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎች፤ መ.ቁ 79561፤2006 ዓ.ም. In this case too, the cassation bench affirmed the separate existence of business lease and lease of a business premise.

[146] See Proclamation No. 979/2016, *supra* note 3, Art. 64 (2). It provides that tax paid under Schedule 'D' is final income tax regarding that income.

Among the income sources taxable under Schedule 'D'; dividends, windfall profit, undistributed profit and repatriated profit are solely results from Schedule 'C' business activities.[147] Business activities may also be regarded as the source for other income sources of Schedule 'D'.[148] This opens a room for possible overlaps between the two Schedules.

This may happen, for instance, between payments made for independent contractors (subjected to Schedule 'C') in one hand and management and technical fee on the other hand (which are subject to Art. 51 of Schedule 'D').[149] If someone independently performs managerial or technical services and received payments as a result: is it considered as business income or management/technical fee? We cannot use 'regularity' of the service as a factor to categorize the income as business income or management/technical fee, since it is immaterial for the Proclamation's conception of "business".[150] Management and technical fees are made taxable under Schedule 'D' only when derived by non-residents. Nowhere in the Proclamation are management and technical fee made taxable when received by residents of Ethiopia. This may opens a room for an argument in that when the fees are received by the latter, it will be considered as business income since these can fall under "professional activities", which are considered by the Proclamation as business unless given in the form of employment services; and when received by non-residents it shall be taxed under Schedule 'D'.

[147] These income sources are defined in related with business. The relevant provisions of the Proclamation, governing these income sources, use either the term 'profit' which refers to income derived from business activities or 'business' or both. See *Id*, Arts. 2 (6) (which defined 'dividend' as "distribution of *profits*"); 60 (1) (states that "Windfall *profit* obtained from *businesses* …"); 61 (titled 'undistributed *profit*"); and 62 (1) (opened with the expression "A non-resident conducting *business* …") - (emphasis added).

[148] For instance, commercial banks derive 'interest' income from their banking business; granting loans to persons with an obligation to pay interest is one of the banking businesses. See the Banking Business Proclamation No. 592/2008, Federal *Negarit Gazeta*, (2008), Art. 2 (2) (b); and the Banking (Amendment) Proclamation No. 1159/2019, Federal *Negarit Gazeta*, (2019), Art. 2 (13). Publishing service of books, musical books and others is considered as one of the business categories per the Ethiopian Standard Industrial Classification (ESIC). These publishing businesses may derive 'royalty' income from copy right works they owned; when they allowed others to use it for consideration. They can be owner of copyright works in different occasions such as by financing the work or when only the publisher's name appears on the work (in in the absence of proof to the contrary). See the Copyright and Neighboring Rights Protection Proclamation No. 410/2004, Federal *Negarit Gazeta*, (2004), Arts. 21 (4) and 22 (3).

[149] ProclamationNo. 979/2016, *supra* note 3, Art. 2 (17) defines management fee as; "an amount as consideration for the rendering of any managerial or administrative service, but does not include employment income." Art. 2 (23) of the same also defines technical fee as; "a fee for technical, professional, or consultancy services, including a fee for the provision of services of technical or other personnel."

[150] See *Id*, Art. 2 (2) (a); in defining "business" it uses the expression "… whether conducted continuously or short-term …"

However, resident persons who obtained income from a rendering of technical service may be the subject of Schedule 'D' pursuant to Art. 63 (as "other income"). Art. 63 of the Proclamation is the comparable provision to Art 21 of the OECD and UN Model Conventions which attribute an exclusive taxing right to the state on items of income not covered by other distributive rules of the income tax law.[151] When there is difficulty in characterizing an income, this provision will be relevant.[152] Hence, unlike the repealed income tax laws, under the current Proclamation, not only the technical service fee of non-residents, but also the income of residents from technical service may be taxed under Schedule 'D'. Accordingly, a resident person who received an income from technical service can be taxed under Art. 63, if the income is not considered to be income from carrying on business, independent (professional) personal services or as an employment income[153] under the Proclamation. Moreover, it is good to notice that a non-resident who provides a technical service will be the subject of Schedule 'C' if a non-resident person provides the service with permanent establishment.[154] So, if a non-resident received any income sources from its permanent establishment in Ethiopia, it is not subject to the non-resident taxation of Art. 51. A non-resident doing business in Ethiopia through permanent establishment is subject to the other provisions of Schedule 'D' or 'C', as long as the income is attributable to this establishment. Thus it is important to distinguish between a non-resident and a non-resident having permanent establishment in Ethiopia.[155]

Difficulties may also arise with capital gain tax. As discussed above, a gain from disposal of a business asset is subject to Schedule 'C'. However, in case the business asset in question is also happened to be a taxable asset, the gain which

[151] See OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital [as updated in 2017], Art. 21; and Articles of the United Nations Model Double Taxation Convention between Developed and Developing Countries, (2011), Art. 21.

[152] Proclamation No. 979/2016, *supra* note 3, Art. 63 reads "A person who derives any income that is not taxable under Schedule A, B, C, or the other Articles of this Schedule shall be liable for income tax at the rate of 15% on the gross amount of the income". There are, several income sources not explicitly provided with a Schedule or a provision to be taxed under, such as the proceeds from sale of business, raised above. So, this provision can be used as a last resort to tax such income sources. In the absence of Art. 63, the effect would have been exempting those income sources.

[153] Regarding employment income vs. management/technical fee, see Belete, *supra* note 8, pp. 55-56.

[154] See Proclamation No. 979/2016, *supra* note 3, Art 51(3). Permanent establishment is one of the grounds of assuming income tax jurisdiction in Ethiopia. For the details about permanent establishment, see Art. 4 of the same.

[155] Yet, the mere fact a person has a permanent establishment in Ethiopia is not a ground to exclude it from non-resident taxation. It is only if the income concerned is attributable to the permanent establishment, where in such cases, the other provisions of Schedule 'C' or 'D' that are applicable to a resident of Ethiopia will be equally applicable to a non-resident. Therefore, care must be taken in characterizing the income.

will be considered as business income is the amount by which the cost of the asset exceeds the net book value of the asset at the time of disposal and any gain above cost is taxable under Schedule 'D' (Art. 59).[156] Thus, the mere fact that it is a business asset does not necessarily mean the gain from its disposal is wholly subject to Schedule 'C'. Business assets are assets being held or used in conducting a business activity subject to Schedule 'C'. However, the assets taxable under Art. 59 are not assets held or used to conduct business at the time of their disposal. The person buying them may latter use them to conduct business or buy the assets to make them part of its business operation. But at the time of disposal they were not part of a business operation. Therefore, it needs a cautious tax administration, which can differentiate between taxable asset and business asset and also a careful calculation of the amount belongs to each Schedule.

The specific inclusion of 'income from lease of business assets', on the one hand, and the exclusion of 'income from casual rental of assets', on the other hand may also further complicate the scope of Schedule 'C'. Income from casual rental of assets is subject to Schedule 'D', as per Art. 58 of the Proclamation. Art. 50 of the Regulation tries to clarify this provision, by stating that income derived from 'casual rental of asset' means "gross income derived by a person who is not engaged in the regular business of rental of movable or immovable asset." It is not clear whether the phrase 'casual rental of asset' includes income from casual rental of business asset. In other words, the Regulation is not clear whether the fact that the regularity or causality of the lease would make any difference for business lease and lease of business assets (which are subject to Schedule 'C'). However, since Art. 50 of the Regulation is intended to clarify Art. 58 of the Proclamation (which is under Schedule 'D'), it is unlikely that it includes casual rental of business assets. Therefore, it can be concluded that any rental of business asset is subject to Schedule 'C', irrespective of the frequency of the lease. This way, we can mitigate the possible characterization conflict. Of course, other way outs may be considered such as the nature of Schedule 'D'. Under the Ethiopian income tax system, passive income sources and most irregular income sources are taxed under Schedule 'D'. So, even if the income from a casual rental of business assets is not taxed under Art. 58 as a casual rental of assets, it may be still taxed under Schedule 'D' as 'other income' per Art. 63.

[156] See Proclamation No. 979/2016, *supra* note 3, Art. 21 (4). Meaning, if the sale is above the net book value but below the historical cost, it will be subject to Schedule 'C' and if the sale is above the net book value and again above the historical cost, it will be subject to Schedule 'D' as a capital gain.

The potential for overlaps or characterization difficulties between Schedules 'C' and 'D' may not be limited to the above cases. In this regard, it may be helpful to highlight some of the problems reflected in the previous income tax system and see if the current system is any better. For instance, characterization difficulties were claimed between business income and royalties, where, a publishing company was required to include income from the sale of books in its business income under Schedule 'C' and income from royalties from the sale of same books by others under Schedule 'D'.[157] This author believes that this practice is compatible with the spirit of the current Proclamation. Selling of books is a business for a publishing company, thus, the income from this activity is a business income taxable under Schedule 'C'. For others, who derive income from the books, for instance, if the author derives income from the sale of its own book, Schedule 'D' is appropriate - taxable under Art. 54, as royalty. It would be royalty for a publishing company if the payment is made to it because it allows others to use the book which a company has copy rights over.[158] Similar concern was also raised between business income and interest income. For instance, if a company derived 'interest income' from loans granted to other companies/businesses, the company was required to add this income with its Schedule 'C' income; while if the interest income was derived from deposits in a bank, this income was subjected to Schedule 'D' (and not required to be added as business income under Schedule 'C').[159] So, there was a need to identify the very source of the income to characterize it as business or interest income. The current Proclamation addressed this concern by subjecting all kinds of interest income to Schedule 'D', irrespective of the source it is derived from.[160]

[157] See Taddese, *supra* note 80, p. 372.

[158] Besides, the fact that the current Proclamation provides a list of payments that are considered as 'royalty' also mitigates this concern. See Proclamation No. 979/2016, *supra* note 3, Art. 2 (20). This provision tries to define 'royalty' as a periodic or lump sum payment made to use or to have a right to use the number of assets and rights listed under it [the provision]. Art. 2 (2) of the Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014, Federal *Negarit Gazeta*,(2014), also defines royalty' as "fees payable to an owner of a work protected under this Proclamation by the user of such work for commercial purpose."

[159] See Proclamation No. 286/2002, *supra* note 36, Art. 36; and Art. 10 of the [repealed] Income Tax Regulation No. 78/2002, Federal *Negarit Gazeta*, (2002).

[160] See Proclamation No. 979/2016, *supra* note 3, Art. 56. At this point it is good to note that the method of explicitly including a certain item as business income may be used to give priority to the characterization of a particular item of income as business income where the income may also be characterized as investment income. For example, investment income usually includes interest income. However, where interest income is derived by a person in carrying on a business of banking or money lending, it is appropriate to treat the income as business income and not investment income. The same goes to interest income derived incidental to business operations. See Burns and Krever, *supra* note 4, p. 8.This was true under the previous income tax system where interest received by a Schedule 'C' taxpayer from loans to others as part of its business and interest derived by a non-resident financial institution from loans granted to Ethiopian resident business were taxable under Schedule 'C' as

Before closing this commentary, this author wants to remind readers that Schedule 'C' includes income from mining and petroleum operations. Though, these operations were subjected to separate income tax regimes for a long period of time,[161] the current income tax system merges them with the other business income sources, under Schedule 'C'. Since, both mining and petroleum operations are business activities; it is sound to subject them to a similar regime of business income tax. However, it is important to note that though they share the provisions of Schedule 'C' with other business activities subject to Schedule 'C', there are also a variety of treatments applicable only to the mining and petroleum operations (i.e., treatments not applicable to the other income sources of Schedule 'C'). Chapter four of the Proclamation (Arts. 36 - 44), is dedicated to provide special provisions applicable to the two operations. Accordingly, there are long lists of special definitions[162] and special rules concerning tax rates,[163] deductions,[164] and expenditures,[165] among other things. It is acceptable and also expected to have some special rules, owing to the special nature of the two operations.

Concluding Remarks

This work tried to examine issues relating to the characterization of taxable units and tax bases of Schedule 'C', which taxes business income. As revealed in the discussion, the current income tax system has made improvements that are helpful in identifying the taxpayers and the type of income sources subject to the Schedule. The relevant provisions are providing that the taxable units of business income tax are persons, both individuals and legal/bodies, conducting business. Body taxpayers constitute a wide range of entities, including non-commercial ones, as long as they are engaged in activities defined as business. The characterization of the activity as business is found more important than the

business income; while interest accruing from deposit accounts were taxable under Schedule 'D' as passive/investment income. However, currently the Proclamation taxes all kinds of interest income under Schedule 'D'. Though, this can ease the characterization process from an administrative point of view, its appropriateness of considering certain interest incomes which typically are business income, such as interest income derived by commercial banks from their lending activities, as passive/investment income may be questioned.

[161] See the Mining Income Tax Proclamation No. 53/1993, *Negarit Gazeta*, (1993); the Mining Income Tax (Amendment) Proclamation No. 23/1996, Federal *Negarit Gazeta*, (1996); and the Petroleum Operations Income Tax Proclamation No. 296/1986, *Negarit Gazeta*, (1986).

[162] Proclamation No. 979/2016, *supra* note 3, Art. 36, is dedicated to provide definitions (for 20 terms) only applicable to the mining and petroleum operations.

[163] *Id*, Art. 37. The rate is reduced to 25% than being 30% which is applicable to other body taxpayers.

[164] For instance, deduction is allowed for reinvestment, to the extent of 5% gross income (which is not allowed to the other business taxpayers of Schedule 'C'). See *Id*, Art. 42.

[165] There are the so-called exploration expenditure, development expenditure and rehabilitation expenditure which are unknown to the other taxpayers of Schedule 'C'. See *Id*, Arts. 39-41.

identity of a person who derives the income. Since there is no hard and fast rule to characterize business income tax payers, the important thing is to identify; one, whether someone or a certain entity is engaged in activities considered as business with a view to generate profit and two, whether the said entity is exempted or not. In terms of tax base, business income tax is imposed on income derived from conducting business activities. Besides, this catches all expression, the Proclamation goes on to list down the main income items considered as business income. Yet, the baseline is whether the income in question is derived from activities that are treated as business or not; and whether the income in question is exempted or not.

The work also raised questions regarding the appropriateness of the inclusion of certain taxpayers (and income sources) under Schedule 'C'. Partnerships are a notable example. For this, the work has tried to indicate the concerns involved and tried to shed a light on the jurisprudence and prevalent international experiences so that the relevant government organ can be aware of the issues and consider appropriate measures. This work has argued for a differential income tax treatment of partnerships, than the existing one. The same goes to small enterprises. This requires the reconsideration of the existing characterization. However, this author is not in a position to recommend the implementation of this proposal without careful analysis and consideration. By large, the work has made the discussions more with the aim of raising questions than to make statements, and in a spirit of seeking further understanding regarding the taxable units and tax bases of Schedule 'C'.

The tensions between Schedule 'C' and the other income tax Schedules is also highlighted.[166] For instance with Schedule 'A', the case of employee/employment income and independent contractor/business income is raised, which is the result of exclusion of employees from business income tax, however, without having clear parameters to distinct employee from independent contractor. The same exclusion is made regarding rental of buildings, which primarily are subjected to Schedule 'B'. Yet, this definitional exclusion is incompatible with the Regulation's prescription which subjects the lease of buildings as part of the normal operation of business to Schedule 'C' (than, Schedule 'B'). Hence, it needs a careful characterization. Schedule 'D' is

[166] Overlapping between income tax schedules is one of the disadvantages of a schedular income tax structure. See Lee Burns and Richard Krever, 'Individual Income Tax', *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 1, (1996), p. 3. Thus, the work is not saying that the problem is peculiar to Ethiopia, but intends to give insights as to the possible tensions so that the concerned organs can be aware of them and if found practically problematic, to explore potential way outs.

dedicated to charge mainly irregular and passive income sources, most of which are derived by Schedule 'C' taxpayers while undertaking their business activities. Though, this cannot be a reason by itself, there are instances where potential characterization difficulties could be posed between the two Schedules. As a way out from these and other related problems, the work recommends for the enactment of supplementary directives/guidelines either by the Ministry of Revenue or Ministry of Finance. The latter may also issue public advance rulings which setting out its interpretation of the law, regarding the raised issues.[167]

[167] The Ministry of Finance is empowered to issue such rulings. See Proclamation No. 983/2016, *supra* note 10, Arts. 68-75. For details about advance rulings, see Taddese, *supra* note 73, pp. 365-369.

በስካር፣ በንዴትና በአስገዳጅ ሁኔታ የተፈጸሙ ወንጀሎች ኢ-ኃላፊነት በዐፄ ኢያሱ እና በዐፄ ዳዊት ሣልሳዊ ፍርዶች ውስጥ፦ ምልከታ ከታሪክ ማኅደር

*ኑጋ እውነቱ መኮንን**

አጭሮተ ጥናት

በኢትዮጵያ ዘመናዊ የፍትሕ አስተዳደር ከመጀመሩ በፊት በወንጀል ጉዳዮች ላይ ይሰጡ የነበሩ ፍርዶች ለነገሥታቱ ችሎት ቀርበው የነገሥታቱ የመጨረሻ ይሁንታና ትንታኔ ያርፍባቸው የነበረ ሲሆን እስከ 1967 ዓ.ም ድረስ የቀጠለው የቀዳማዊ ኃይለ ሥላሴ የዙፋን ችሎት በዋናነት ተጠቃሽ ነው። ነገሥታቱ የሚሰጧቸው ፍርዶች በአብዛኛው በዚህ ዘመን በብዙ አገራት የወንጀል ሕግጋት ውስጥ እውቅና አግኝተው ሥራ ላይ የዋሉ የወንጀል ሕግ መርኖችንና ጽንሰ-ሃሳቦችን ያንጸባርቁ ነበር። ይህ ምልከታ ለዐፄ ኢያሱ እና ለዐፄ ዳዊት ሣልሳዊ ችሎቶች የቀረቡ ሦስት ጉዳዮች የሚዳሰሱበት ሲሆን በሁለቱ ነገሥታት ፍርዶች ውስጥ የተሰሉት በስካር፣ በንዴትና በአስገዳጅ ሁኔታ የሚፈጸሙ ወንጀሎችና መከራከሪያዎች ከዘመናዊው የወንጀል ኃላፊነት መለኪያ መርኖች ጋር የሚጣጣሙ ናቸው በማለት ፀሀፊው ይከራከራል።

ቁልፍ ቃላት፦ ስካር፣ ንዴት፣ አስገዳጅ ሁኔታ፣ ጥፋትን ማመን፣ የነገሥታት ፍርዶች፣ የወንጀል ኢ-ኃላፊነት

መግቢያ

በኢትዮጵያ ዘመናዊ ሕግ ተቀርጾ ዘመናዊ የፍትሕ አስተዳደር ከመጀመሩ በፊት ይሰጡ የነበሩ ፍርዶች በአብዛኛው የነገሥታቱ የመጨረሻ ይሁንታና ትንታኔ ያረፈባቸው ነበሩ።[1] ይህ ሁኔታ በተወሰነ መልኩ እስከ 1967 ዓ.ም ድረስ የቀጠለ ሲሆን በዋናነት የቀዳማዊ ኃይለ ሥላሴ የዙፋን ችሎት ተጠቃሽ ነው። ለነገሥታቱ የሚቀርቡ ጉዳዮች በአብዛኛው የወንጀል ጉዳዮች ሲሆኑ የሚሰጧቸው ፍርዶች በዚህ ዘመን በብዙ አገራት የወንጀል ሕግጋት ውስጥ እውቅና አግኝተው ሥራ ላይ የዋሉ የወንጀል ሕግ መርኖችና ጽንሰ-ሃሳቦችን ያንጸባርቁ ነበር።

---

* በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት የሕግ ተባባሪ ፕሮፌሰር። ኤል ኤል ቢ(አዲስ አበባ ዩኒቨርሲቲ በ1996 ዓ.ም)፣ ኤል ኤል ኤም (ዩኒቨርሲቲ ኦፍ ግሮኒንገን፣ ዘኔዘርላንድስ በ2000 ዓ.ም)፣ ከፍተኛ ዲፕሎማ በማስተማር ሥነ-ዘዴ (ባሕር ዳር ዩኒቨርሲቲ በ2007 ዓ.ም)፣ ፐ ኤቺ ዲ ተማሪ (ባሕር ዳር ዩኒቨርሲቲ)፤ ፀሀፊውን በኢ-ሜይል አድራሻው beleteeng@yahoo.com ማግኘት ይቻላል።

[1] በኢትዮጵያ የመጀመሪያው ዘመናዊ የወንጀለኛ መቅጫ ሕግ የወጣው በ1923 ዓ.ም ሲሆን እስከ 1923 ዓ.ም ድረስ ለወንጀልና ለፍትሐ ብሔር ጉዳዮች ሕግ ሆኖ ያገለግል የነበረው ፍትሐ ነገሥት ነበር። አዲሱ የ1923 ዓ.ም የወንጀለኛ መቅጫ ሕግ ሙሉ በሙሉ ከነባሩ ፍትሐ ነገሥት ያፈነገጠ አዲስ ሕግ ሳይሆን ከፍትሐ ነገሥቱ የተወሰዱ ድንጋጌዎች የነበሩትና ከነባሩ ሕግ ጋር ተጣጥሞ ሥራ ላይ እንዲውል የተደረገ ነው። ይህንን በተመለከተ በ1923 ዓ.ም የወጣው የወንጀለኛ መቅጫ ሕግ በመቅድሙ ቁጥር 4 ሥር የሚከተለውን አስፍሮ እናገኘዋለን "[...] ወንጀሉና ቅጣቱ ተለያይቶ ታውቆ ይህንን የመሰለው ችግር ሁሉ እንዲቀር ሕዝቡም ሕጉ የሚከለክለውንና የማይከለክለውን ያለ ችግር ለመለየት እንዲችል የአውሮፓንም ሥርዓት እየተማረ ወደ ትልቅ የእውቀት ደረጃ እንዲደርስ እስካሁን ባገሩ የቆየውን ሥርዓት ሳንለውጥ የእኛም የፍትሐ ነገሥት መሠረቱ ከአውሮፓ ፍትሐ ነገሥት ጋራ በብዙ ሥፍራ ይገጥማልና ሁሉቱን እያስማማን በ1923 ዓመት ይህንን ደንብ አቁመናል።" ከዚህ ጋር የተያዘና በሌሎች ጉዳዮች ላይ የበለጠ መረጃ መረጃ ለማግኘት የወንጀለኛ መቅጫ ደንብ፣(ቀዳማዊ ኃይለ ሥላሴ ማተሚያ ቤት፣ አዲስ አበባ)፣ 1923 ዓ.ም ይመለከቷል።

ከእነዚህ የወንጀል ሕግ መርኖችና ጽንሰ-ሃሳቦች መካከል አንድ ሰው በስካርም ይሁን በሌላ የአዕምሮን የማሰብና የማመዛዘን ችሎታ በሚቀንስ ምክንያት ወንጀል ከፈጸመ ከወንጀል ኃላፊነት ነጻ የሚሆንበት ይገኝበታል። ከዚህ በተጨማሪ የወንጀል ድርጊቱ የተፈጸመው በቸግር ወይም በቁሳዊ እጦት ከሆነ፣ ወንጀለኛው ወንጀሉን የፈጸመው በንዴት ተነሳስቶ ከሆነና እንዲሁም ወንጀለኛው የተከሰሰበትን ጉዳይ ካመነ ቅጣቱ የሚቀልበት ከዚያም አልፎ በነጻ የሚሰናበትባቸው አጋጣሚዎች ነበሩ።

ወደ ጥናቱ ይዘት ስንመጣ በመጀመሪያ ከዚህ በላይ የተዘረዘሩት ከወንጀል ኃላፊነት ነጻ የሚያደርጉ ምክንያቶች ይዘትና ምንነት፣ በሌሎች አገራት ሕግጋት ውስጥ የነበራቸውና ያላቸው ቦታ ምን እንደሚመስል ምልከታውን መረዳት በሚያስችል መልኩ አጭር ዳሰሳ ይደረጋል። በሌሎች አገራት ሕግጋት ላይ የሚደረገው ዳሰሳ ከሕግጋቱ ወቅታዊ ይዘት ይልቅ በዋናነት ታሪካዊ ዳራቸውና አመጣጣቸው ላይ ያተኩራል። ይህን የመረጠበት ምክንያት እነዚህን ሕግጋት ከሦስት መቶ አመታት በፊት በኢትዮጵያ ነገሥታት ከተሰጡ ፍርዶች ጋር በዘመን አቻነት ለማነጻጸር ይበልጥ ይጠቅማል በሚል ነው። ከዚህ በመቀጠል እነዚህ መርኖችና ጽንሰ-ሃሳቦች በሁለት የጎንደር ነገሥታት ማለትም በዐፄ ኢያሱ እና በዐፄ ዳዊት ሣልሳዊ በተሰጡ ፍርዶች ውስጥ የነበራቸውን ቦታ እንመለከታለን። በዐፄ ኢያሱ የተሰጡት ፍርዶች ሁለት ሲሆኑ የመጀመሪያው በስካር የተፈጸመ ወንጀል ሲሆን ሁለተኛው ፍርድ ቁሳዊ እጦትና ንዴት እንዲሁም የተከሰሱበትን ወንጀል ማመን ከወንጀል ኃላፊነት ነጻ እንደሚያደርጉ የሚያመላክት ነው። በዐፄ ዳዊት የተሰጠው ፍርድ ለዐፄ ኢያሱ ከቀረበላቸው የመጀመሪው ጉዳይ ጋር ተመሳሳይ ሲሆን በስካር የተፈጸመ ወንጀል የወንጀል ኃላፊነት እንደማያስከትል የሚያሳይ ነው። እነዚህ የተጠቀሱት ሁለት ነገሥታት የተመረጡት ለጊዜው ለጉዳዩ ጠቃሚ ሆነው የሁለቱ ነገሥታት ፍርዶች ብቻ በመሆናቸው ነው። በመጨረሻም ጥናቱ የማጠቃለያ ነጥቦችን በማንሳት ይቋጫል።

1. በስካር ሁኔታ/መንፈስ የተፈጸመ ወንጀል ኢ-ኃላፊነት በሌሎች አገራት ሕግጋት ውስጥ ያለው ቦታ፡ አጭር ዳሰሳ

በስካርና በሌሎች የአዕምሮ ህመም ወይም ችግሮች ሳቢያ ወንጀል የሚፈጸሙ ሰዎችን ከወንጀል ኃላፊነት ነጻ ማድረግ በጥንታዊ ሕግጋት ውስጥ እውቅና ተሰጥቶት ሲሠራበት የኖረ ነው። ጉዳዩ ከጥንታዊ ሕግጋት በተጨማሪ በመጽሐፍ ቅዱስ ውስጥም ተጠቅሶ እናገኘዋለን።[2] በስካር የተፈጸመ ወንጀል ከኃፊነት ነጻ የሚያደርግበት መሠረታዊ ምክንያት አጥፊው አዕምሮው በአልኮልም ሆነ በሌሎች አደንዛዥ ነገሮች ከተበረዘ ጥሩን ከመጥፎ፣ ትክክለኛን ነገር ከስህተት የመለየት፣ የማመዛዘንና የመወሰን አቅሙ ይዳከማል ወይም ጨርሶ ይጠፋል ከሚል እሳቤ የመጣ ነው።[3] በእነዚህና በሌሎች ምክንያቶች የአዕምሮው

[2] Gabriel Hallevy, The Matrix of Insanity in Modern Criminal Law, (Springer, Newyork, Dordrecht, London), 139 (2015). ፕሮፌሰር ሀልቨይ ይህንን ጉዳይ ለማብራራት በመጽሐፍ ቅዱስ ዘፍጥረት 9፣ 20-27ና 19፣31-38 ድረስ ያለውን በምሳሌነት ይጠቅሳሉ።

[3] Finbarr McAuley, The Intoxication Defense in Criminal Law, 32 Irish Jurist (N.S.) 244 (1997).

የማመዛዘን አቅም ተዳክሞ ወይም ጠፍቶ ወንጀል የፈጸመ ሰው አስቦ (intentionally) ወንጀል ፈጽሟል ስለማይባል የወንጀል ኃላፊነት የለበትም።[4]

ቀደም ባሉት ጊዜያት በተለይም ከ16ኛው ክፍለ ዘመን በፊት የኮመን ሎው የሕግ ሥርዓት በሚከተሉ አገራት በዋናነት በእንግሊዝ በስካር የተፈጸመ ወንጀል ከኃላፊነት ነጻ ለመሆን እንደመከራከሪያ አያገለግልም ነበር።[5] በተለይ ከ19ኛው ክፍለ ዘመን በፊት በእነዚህ አገራት በስካር የተፈጸመ ወንጀል ከኃላፊነት ነጻ ለመሆን እንደመከራከሪያ ሳይሆን ክስን በተቃራኒው ለማክበድ ያገለግል ነበር።[6] በዘመኑ በእነዚህ አገራት ስካር እንደ ወንጀል ባይቆጠርም እንደ መጥፎ ድርጊትና ከሞራል ያፈነገጠ ተግባር ተደርጎ ይቆጠር ነበር።[7] ተከሳሽ ስካርን ከኃላፊነት ነጻ ለመሆን እንደ መከራከሪያ እንዲያቀርብ መፍቀድ ቅጣት አልባ አስከፊ ወንጀሎችን እንዲፈጽም የሚያስችል በር እንደ መክፈት ይቆጠራል የሚል መከራከሪያ ይቀርብ ነበር።[8] ነገር ግን ጉዳዩ በሂደትና ቀስ በቀስ የፍርድ ቤቶችን ትኩረት እያገኘ መጥቶ ለመጀመሪያ ጊዜ እ.አ.አ. በ1819 የእንግሊዝ ፍርድ ቤትን እውቅና አገኘ።[9] ቢሆንም ይህ እንደ ብቸኛ ክስተት ሊቆጠር የሚችል የፍርድ ቤት ውሳኔ ዳብሮና በስፋት እውቅና አግኝቶ በእንግሊዝና በሌሎች የኮመን ሎው አገራት ሕግ ለመሆንና በቶሎ ሥር ለመስደድ ጊዜ ወስዶበታል። በመሆኑም ጉዳዩ በተለያየ ጊዜ የቀረበላቸው የአሜሪካ ፍርድ ቤቶች በስካር የተፈጸመ ወንጀል ከኃላፊነት ነጻ ያደርጋል የሚል ውሳኔ ላይ ለመድረስ አልቻሉም ነበር።[10] ነገር ግን እ.አ.አ. በ19ኛው መቶ ክፍለ ዘመን መጨረሻ ጀምሮ በስካርና በሌሎች አደንዛዥ ነገሮች የተፈጸመ ወንጀል ከኃላፊነት ነጻ እንደሚያደርግ የፍርድ ቤቶችን እውቅና እያገኘ መጥቷል።[11]

በስካር የተፈጸመ ወንጀል የአህጉረ አውሮፓ የሲቪል ሎው ሕግ ሥርዓትን በሚከተለው የፈረንሳይ ሕግ ያለውን ቦታ ስንመለከት እ.አ.አ. እስከ 1957 ድረስ በስካር የተፈጸመ ወንጀል ከኃላፊነት ነጻ ለመሆን እንደመከራከሪያ አይቀርብም ነበር።[12] ከ1957 ዓ.ም በኋላ ግን ሕጉ ቀስ በቀስ እየላላ መጥቶ ስካር አንድን ሰው ራሱን ሙሉ በሙሉ

[4] በዚህ ዘመን በሁሉም አገራት የወንጀል ሕግጋት ውስጥ አንድ ሰው የወንጀል ኃላፊነት የሚኖርበት ሦስት ነገሮች ተሟልተው ሲገኙ ሲሆን እነሱም፦ ጉዳዩ በሕግ ወንጀል ወይም ሕገወጥ ሆኖ የተከለከለ መሆን ይኖርበታል፣ ሁለተኛው ይህንን ሕገወጥ ሆኖ በሕግ የተከለከለ ጉዳይ በድርጊት ወይም በግድፈት መጣስ ይኖርበታል፣ ሦስተኛውና ከያዝነው ጉዳይ ጋር የሚገናኘው ክፍል የሃሳብ ክፍል ሲሆን ይህም ድርጊቱ ወይም ግድፈቱ ሆነ ተብሎ ወይም በግዴለሽነት መፈጸም ይኖርበታል።

[5] Kyndra K. Miller, Criminal Law - Intoxication as a Defense: The Drunk and Dangerous Model - Montana v. Egelhoff, 33 Land & Water L. Rev. 751 (1998).

[6] Charles W. Smith, Intoxication as a Defense to a Criminal Charge in Pennsylvania, 76 Dick. L. Rev. 16 (1971).

[7] ዝኒ ከማሁ።

[8] ዝኒ ከማሁ፣ ገጽ 16-17።

[9] ኪንደራ ኪ ሚለር፣ ከዚህ በላይ ማስታወሻ ቁጥር 5፣ ገጽ 715። ፍርድ ቤቱ ይህንን እውቅና የሰጠው በKing v. Grindley ሲሆን ጉዳዩን እደሚከተለው ተመልክቶታል፦ "though voluntary drunkness cannot excuse from the commissioin of crime, yet where, as on a charge of murder, the material question is, whether an act was premeditated or done with sudden heat or impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration." (የማስመር አጽንኦት በአጥኚው የተጨመረበት።)

[10] The Missouri Supreme Court in State vs. Cross, 1858, the Vermont Suprme Court in State vs. Tatro, 1878 እንደምሳሌ መጥቀስ ይቻላል።

[11] ለምሳሌ Hopt vs. People, 1882 መመልከት ይቻላል።

[12] Alan Reed, Michael Bohlander, Nicola Wake, and Emma Smith(eds.), General Defense in Criminal Law, Domestic and Comparative Perspectives, (Ashgate Publishing Limited, Burlington), 223 (2014).

ወደማይቆጣጠርበት ደረጃ ካደረሰው እንደ አዕምሮ ሕመምተኛ ተቆጥሮ ከወንጀል ኃላፊነት ነጻ የሚሆንበት ሁኔታ ተፈጥሯል።[13] ነገር ግን እ.አ.አ. 2007 በወጣው ሕግ መሠረት በመጠጥና በአደንዛዥ ዕጽ ተገፋፍተው የሚፈጸሙ ወሲባዊ ወንጀሎችን በተመለከተ ስካር በተቃራኒው የቅጣት ማክበጃ ምክንያት ሆኖ ተደንግጓል። ከዚህ ሕግ በስተጀርባ ያለው ምክንያት ከሌሎች ወንጀሎች በተለዩ የፈረንሳይ ሕግ ወሲባዊ ወንጀሎችን ለመቆጣጠርና ለመቅጣት የሰጠውን ትኩረት የሚያመላክት ሊሆን ይችላል።

ምንም እንኳ በጥቅሉ በስካር ወይም በሌሎች አደንዛዥ ነገሮች የአዕምሮው የማመዛዘን አቅም በተዳከመበት ወይም በጠፋበት ወንጀል የፈጸመ ሰው ኃላፊነት ባይኖርበትም በብዙ አገራት ሕግጋት ውስጥ ወንጀሉን የፈጸመው ሰው የሰከረው ወንጀል ለመፈጸም አስቦ ነው ወይስ አይደለም የሚለው ጉዳይ መሠረታዊ ነጥብ ነው። ለምሳሌ፦ በአሜሪካ ሕግ በስካር አንድ ወንጀል የፈጸመ ሰው ከኃላፊነት ነጻ የሚሆነው ወንጀል ለመፈጸም አስቦ ስካር ውስጥ እስካልገባ ድረስ ነው።[14] በተወሰኑ የአሜሪካ ግዛቶች ፍርድ ቤቶች ወንጀል ለመፈጸም በነጻ ፈቃድ መስከር (voluntary intoxication) ከኃላፊነት ነጻ ለመሆን እንደ መከራከሪያ ቢቀርብም ተቀባይት የለውም፤ መከራከሪው ክስ የሚመሠረትበትን ወንጀል ደረጃ ዝቅ ለማድረግና ቅጣትን ለማቅለል ብቻ ጥቅም ላይ ይውላል።[15] በመሆኑም ሕጉ በስካር ለተፈጸመ ወንጀል ከኃላፊነት ነጻ ለመሆን ወንጀል ለመፈጸም አስቦ በነጻ ፈቃድ በመስከርና ካለፈቃድ ሰክሮ (involuntary intoxication) ወንጀል በመፈጸም መካከል ልዩነት ማስቀመጡን እንገነዘባለን። የእንግሊዝ ሕግም በተመሳሳይ መልኩ በነጻ ፈቃድ በመስከርና ካለፈቃድ በመስከር መካከል ልዩነት የሚያስቀምጥ ሲሆን ወንጀሉን የፈጸመው ሰው ካለፈቃዱ የሰከረ ከሆነ ከወንጀል ኃፊነት ነጻ ይሆናል።[16]

2. ጥፋትን ማመን እንዲሁም በቁሳዊ ችግር የተፈጸመ ወንጀል ከኃላፊነት ነጻ በማድረግ ወይም ቅጣትን በማቅለል ረገድ ያላቸው አስተዋጾ

2.1. ጥፋትን ማመን

ተከሳሾች በተከሰሱበት ወንጀል ላይ በተለያየ መልኩ ለፍትሕ አካላት ለሚያደርጉት ትብብር የሚጣልባቸውን መደበኛ ቅጣት መቀነስ ከብዙ ጊዜ ጀምሮ በተለያዩ አገራት የወንጀል ሕግ ውስጥ ሲሠራበት የቆየ ነው። በተመሳሳይ መልኩ የተከሰሱበትን ወንጀል ያመኑ ተከሳሾችን ከሌሎቹ ጥፋታቸውን ካላመኑት ጋር ሲነጻጸር አነስተኛ ቅጣት መቅጣት የተለመደ ነው።[17]

የጉዳዩን ታሪካዊ አመጣጥ በአጭሩ ለመዳሰስ በመጀመሪያ የኮመን ሎው የሕግ ሥርዓትን እንመልከት። ጥፋትን ማመን በኮመን ሎው የሕግ ሥርዓት ውስጥ የነበረው ቦታና ታሪካዊ አመጣጥ በደንብ ያልተጠና፣ ያልተሰነደና አከራካሪ የሆነ ጉዳይ ነው።[18] ጥፋትን ማመን

[13] ዝኒ ከማሁ።
[14] Obi N.I. Ebbe (ed.), Comparative and International Criminal Justice Systems: Policing, Judiciary, and Corrections, (CRC Press, Boca Raton, London, New York, 3rd ed.), 30 (2013).
[15] ዝኒ ከማሁ።
[16] ገብርዔል ሀልቨይ፣ ከዚህ በላይ ማስታወሻ ቁጥር 2፣ ገጽ 143።
[17] Douglas Husak, The Philosophy of Criminal Law, Selected Essays, (Oxford University Press, Oxford, New York) 313 (2010).
[18] Joseph B. Sanborn Jr., A Historical Sketch of Plea Bargaining, 3 Just. Q. 111 (1986).

በኮመን ሎው የሕግ ሥርዓት ከመቼ ጀምሮ ነው ሥራ ላይ የዋለው? የሚለውን ጥያቄ ለመመለስ ሁለት የክርክር መስመሮች ያሉ ሲሆን የመጀመሪያው የክርክር መስመር ጥፋትን ማመን ጥቅም ላይ የዋለው የወንጀል ፍትሕ ከተጀመረበት ጊዜ አንስቶ ነው የሚል ነው፤[19] ሁለተኛው የክርክር መስመር ጉዳዩን በአንጻሩ የቅርብ ጊዜ ክስተት አድርጎ የሚያቀርብ ሲሆን በዋናነት የ19ኛው መቶ ክፍለ ዘመን የአሜሪካ የርስበርስ ጦርነትን መነሻ ያደርጋል።[20] ይህንን የ19ኛው መቶ ክፍለ ዘመን ለአሜሪከ ብቻ ሳይሆን በእንግሊዝም የጉዳዩ መነሻ ጊዜ አድርገው የሚቆጥሩ ጸሕፍት አሉ።[21] እነዚህን ሁለት ጽንፎች ለማስታረቅ የሚቀርበው ሦስተኛው አመራጭ ሃሳብ የጉዳዩን አጀማመርና ታሪካዊ አመጣጥ ከአሜሪካ የርስበርስ ጦርነት በፊት እንደነበር ያስቀምጣል።[22]

ጥፋትን ማመን የአኅጉረ አውሮፓ የሲቪል ሎው ሕግ ሥርዓት በሚከተሉ አገራት ዘንድ የነበረውን ታሪካዊ ቦታ ስንመለከት ከዚህ በላይ ከተመለከትነው የኮመን ሎው የሕግ ሥርዓትን ከሚከተሉ አገራት የተለዬ ሆኖ እናገኘዋለን። ጥፋትን ማመን የአኅጉረ አውሮፓ የሲቪል ሎው ሕግ ሥርዓት ውስጥ በአንጻሩ የቅርብ ጊዜ ክስተት ሲሆን ጠንካራ ታሪካዊ መሠረት አልነበረውም። ለዚህ በዋናነት እንደ ምክንያት የሚጠቀሰው በእነዚህ ሁለት የሕግ ሥርዓቶች ውስጥ የወንጀል ክርክር ሂደቱ የሚመራበት መሠረታዊ ልዩነት በመኖሩ ነው። በኮመን ሎው የሕግ ሥርዓት በወንጀል ክርክር ሂደት እውነቱን የማሳየት ሸክም የተከራካሪ ወገኖች (adversarial) በመሆኑ የፍርድ ቤቶች ሚና ውስን ነው። በተቃራኒው የአኅጉረ አውሮፓ የሲቪል ሎው ሕግ ሥርዓትን በሚከተሉ አገራት ዘንድ በወንጀል ክርክር ሂደት እውነቱን በማረጋገጥ ሂደት ውስጥ ፍርድ ቤቶች (inquisitorial በመሆኑ)ንቁህ ሚና ይጫወታሉ። በመሆኑም በኮመን ሎው የሕግ ሥርዓት ውስጥ ተከሳሹ ጥፋቱን አምኖ ከሳሹ አቃቤ ሕግ የሚጣለውን ቅጣት አቅልሎ ካቀረበ ከፍርድ ቤቶች የሚጠበቀው ሚና ይህንን የሁለቱን የከሳሽና የተከሳሽ ስምምነት ከማጽደቅ ብዙም የዘለለ አይደለም።[23] በተቃራኒው የአኅጉረ አውሮፓ የሲቪል ሎው ሕግ ሥርዓት በሚከተሉ አገራት ዘንድ ግን የፍርድ ቤቶች ሚና ከዚህ የዘለለና እውነትን ከመፈለግ ጋር በእጅጉ የተቆራኘ ነው።[24] ነገር ግን ምንም አንኳ የአኅጉረ አውሮፓ የሲቪል ሎው ሕግ ሥርዓት በባሕርይው ጥፋትን ከማመንና ይህንን ተከትሎ ቅጣትን ለማቅለል ከአቃቤ ሕግ ጋር ከሚደረገው ስምምነትና በጉዳዩ ለይ ፍርድ ቤቶች ከሚኖራቸው ሚና ጋር የማይጣጣም ቢሆንም በሕግ ሥርዓቱ ውስጥ ያሉ አገራት ይህንን አሠራር የሕጋቸው አካል ለማድረግ ፍላጎት እያሳዩ መጥተዋል።[25] ለዚህ መሠረታዊ ለውጥ በምክንያትነት የሚጠቀሰው በእነዚህ አገራት የወንጀል ቁጥር በመበራከቱና ይህንን ተከትሎ ከዚህ ቀደም ሲሠራበት በነበረው በነባሩ

[19] Alschuler, A. W., Plea bargaining and its history, 13(2) Law & Soc'y Rev. 212 (1979).
[20] ጆሴፍ ቢ. ሳንቦርንጀአር፣ ከዚህ በላይ ማስታወሻ ቁጥር 18፣ ገጽ 112።
[21] John H. Langbein, Understanding the Short History of Plea Bargaining, 13 LAW & Soc'y REV. 261 (1979).
[22] ጆሴፍ ቢ. ሳንቦርንጀአር፣ ከዚህ በላይ ማስታወሻ ቁጥር 18፣ ገጽ 113።
[23] Maximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 HARV. INT'l L.J. 1 36 (2004).
[24] ዝኒ ከማሁ፣ገጽ 37።
[25] ዝኒ ከማሁ።

የወንጀል ፍትሕ ሥነ-ሥርዓት አማካይነት እየተበራከተ ለመጣው ወንጀል በአጭር ጊዜ እልባት መስጠት አስቸጋሪ በመሆኑ ነው።[26]

በአሁኑ ወቅት በተለይ የኮመን ሎው የሕግ ሥርዓት በሚከተሉ ብዙ አገራት የተከሰሱበትን ወንጀል በማመን ቅጣትን መቀነስ እየተለመደ የመጣ አሠራር ነው።[27] ነገር ግን ይህንን ጉዳይ ከከፊል ይቅርታ ጋር መዛመድ አለመዛመዱን በንድፈ-ሃሳብ ደረጃ ያቀረቡና የተነተኑ የዘርፉ ሊቃውንት አልተገኙም።[28] በመሆኑም የተከሰሱበትን ወንጀል ማመንና ይህን ተከትሎ ቅጣትን ከማቅለል ጀርባ ሊኖር የሚችለው ምክንያት ተከሳሹ የአቃቤ ሕግንና የፍርድ ቤቶችን ጊዜ በመቆጠቡ ይህም ለፍትሕ አስተዳደር ሥርዓቱ መሳለጥ አስተዋጾ በማድረጉ ነው ብሎ መገመት ይቻላል።[29] ይህ ጥፋትን ከማመን ጀርባ ያለውን ምክንያት እ.አ.አ. በ2007 ተሻሽሎ የወጣው የእንግሊዝ የቅጣት ማቅለያ መመሪያ በግልጽ አስቀምጦታል።[30] በተግባር እንደሚታየውና በሌሎች አገሮች የፍርድ ቤት ውሳኔ ላይም እንደሚንጸባረቀው የተከሰሰበትን ወንጀል ማመኑ ብዙውን ጊዜ ተከሳሹ በፈጸመው ወንጀል ተጸጽቷል የሚል ምክንያት ይሰጠዋል።[31]

2.2. በአስገዳጅ ሁኔታ የተፈጸመ ወንጀል

በተለያዩ አገራት የወንጀል ሕጎች ሰዎች ከአቅም በላይ የሆነ ችግር (necessity) ገጥሟቸው ለሚፈጽሙት በሕግ የተከለከሉ ተግባራት ወይም ወንጀል ኮንላፊነት ነጻ ማድረግ ከብዙ ዘመናት ጀምሮ እውቅና ያገኘ ጉዳይ ነው። እነዚህ ከአቅም በላይ የሆኑ ችግሮች የተለያዩ ሲሆኑ የሰው እጅ የሌለበትና በተፈጥሮ የሚከሰቱ ችግሮችን (Act of God) እንዲሁም ሊቀለበሱ የማይችሉ ድንገተኛ አደጋዎችን ይጨምራሉ። ከአቅም በላይ የሆነ ችግር ትርጓሜና ይዘት ለማስረዳት ብዙ ጻሕፍት የ16ኛው መቶ ክፍለ ዘመን እንግሊዛዊ የሕግ ብሂል (legal maxim) ፀሀፊ የነበሩትን ሰር ፍራንሲስ ባኮንን በዋቢነት ይጠቅሳሉ። ባኮን ከአቅም በላይ የሆነ ችግርን በሦስት የከፈሉት ሲሆን አንዱ የራስን ሕይዎት ማዳን (conservation of life (self preservation)) ነው በማለት ይጠቅሳሉ።[32] ሕይዎትን ማዳን

[26] ዝኒ ከማሁ።

[27] Geraldine MacKenzie, The Guilty Plea Discount: Does Pragmatism Win over Proportionality and Principle, 11 S. Cross U. L. Rev. 206 (2007).

[28] ዳግላስ ሁሳክ፣ ከዚህ በላይ ማስታወሻ ቁጥር 17፣ ገጽ 313።

[29] ዝኒ ከማሁ። ዳግላስ ሁሳክ፣ ከዚህ በላይ ማስወሻ ቁጥር 17 Andrew Ashwoorth, Sentencing and Criminal Justice, (Butterworths, London, 2nd ed., London), 137 (1995) ጠቅሰው እንደጻፉት።

[30] *A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation.* (SGS, Reductioin in Sentence for a Guilt Plea, Revised Guideline, para. 2.2, (2007)

[31] Andrew Ashwoorth, Sentencing and Criminal Justice, (Cambridge, London, 6th ed., London), 181 (2015).

[32] John C. Hogan & Mortimer D. Schwartz, On Bacon's Rules and Maximes of the Common Law, 76 Law. Libr. J. 72 (1983).

ምን ማለት እንደሆነ ባኮን ሲያብራሩ "አንድ ሰው ርቦት ጊዜያዊ ርሃቡን ለማስታገስ ምግብ ቢሰርቅ የስርቆት ወንጀል አልፈጸመም" በማለት ይገልጻሉ።[33]

ከአቅም በላይ የሆነ ችግር ትርጓሜን በዚህ መልኩ ማስቀመጥ ቢቻልም አከራካሪው ጉዳይ ግን በተግባር ምን ምን ጉዳዮች ከወንጀል ኃላፊነት ነጻ ለመሆን በሕግ ተደንግገው እንደመከራከሪያነት ያገለግላሉ የሚለው ጥያቄ በአጭሩና በቀላሉ የሚመለስ አይደለም። በተለይ በዚህ ንዑስ ክፍል ሥር የምንዳስሰው በቁሳዊ ችግር የተፈጸመ ወንጀልን በተመለከተ የተለያዩ አገራት ሕግጋት ምን ይላሉ የሚለው ጥያቄ መሠረታዊ ጥያቄ ሲሆን ሕግጋቱ ጉዳዩን በተለያየ መልኩ ደንግገውት እናገኛለን።

ጉዳዩ በአሜሪካ ሕግ ውስጥ ያለውን ቦታ ለመረዳት ቀደምት የፍርድ ቤት ውሳኔዎችን ስንመለከት ርሃብን በመሳሰሉ ኢኮኖሚያዊ ችግሮች ሳቢያ ተገፋፍቶ ወንጀል መፈጸም ቅጣትን ለማቅለል እንጂ ከወንጀል ኃፊነት ነጻ ለመሆን በመከራከሪያነት አይቀርብም ነበር።[34] ጉዳዩን ለማብራራት እ.አ.አ በ1933 ለፍርድ ቤት የቀረበ ጉዳይ (State v. Moe) እንመልከት። በዋሽንግተን ግዛት ነዋሪ የሆኑ ሥራ አጥ ሰዎች የምግብ ገበያ ማዕከል በመውረር ለተከሰሱበት የስርቆት ወንጀል ድርጊቱን የፈጸምነው ከአቅም በላይ የሆነ ችግር ስለገጠመን ነው የሚል መከራከሪያ ቢያቀርቡም ፍርድ ቤቱ ኢኮኖሚያዊ ችግር ለወንጀል ክስ መከላከያ ሆኖ መቅረብ አይችልም፤ ችግሩ ነበር ቢባል እንኳ ይህንን መቀበል ግለሰቦች ሕጉን በእጃቸው እንዲያስፈጸሙት መፍቀድ ይሆናል፤ የሚል ምላሽ በመስጠት መከራከሪያውን ውድቅ አድርጎታል።[35]

ቀደምት የእንግሊዝ ፍርድ ቤት ውሳኔዎችን ስንመለከት ጉዳዩ በአሜሪካ ሕግ ከተሰጠው ቦታ ጋር ተመሳሳይ ሲሆን ፋና ወጊ ከሆኑ ውሳኔዎች ውስጥ ተጠቃሽ የሆነውን The Queen v. Dudley and Stephens በአጭሩ እንመልከት። ክሱ የቀረበው እ.አ.አ. በ1884 ሲሆን ዳድሊና ስቲፈንስ የተከሰሱበት ወንጀል ባሕር ላይ ለሃያ ቀናት ምግብና ውሃ በማጣታቸው በነበሩበት መርከብ ላይ የሚሰራ ፓርከር የተባለ ባልደረባቸውን በመግደል ብሩክስ ከተባለና በድርጊቱ ካልተስማማ ጓደኛቸው ጋር በልተዋል የሚል የግድያ ወንጀል ነው።[36] ተከሳሾች ያቀረቡት መከራከሪያ ከአቅም በላይ የሆነ ችግር ወይም ጽኑ ረሃብ ሲሆን ፍርድ ቤቱ መከራከሪያውን ውድቅ በማድረግ በተከሳሾች ላይ የሞት ቅጣት ወስኗል።[37]

ወደ አሜሪካ ሕግ ተመልሰን በጊዜ ሂደት ለጉዳዩ የተሰጠውን የሕግ ምላሽ እንመልከት። በአሜሪካ የሕግ ኢንስትቲዩት እ.አ.አ. በ1962 ተረቅቆ የወጣው የአሜሪካ ሞዴል የወንጀለኛ መቅጫ ሕግ ከዚህ በላይ ከተሰጡ የፍርድ ቤት ውሳኔዎች ለየት ያለና "በእኩዮች ምርጫ"

---

[33] ዝኒ ከማሁ፣ ገጽ 73። ባኮን ርሃብን ተክትሎ ከሚፈጸም ስርቆት በተጨማሪ ጉዳዩን የባሕር ጠላቂዎች ሊገጥማቸው ከሚችል ድንገተኛ አደጋና ሕይወታቸውን ለማዳን ከሚያደርጉት ጥረት ጋር በማገናኘት ጉዳዩን እንደሚከተለው ያብራራሉ፦ "So if divers bee in danger of drowning by the casting away of some boate or barge, and one of them get to some plancke, or on the boates side to keep himself above water, and another to save his life thrust him from it, whereby hee is drowned; this is neither *se defendendo* nor by misadventure, but justifiable."

[34] George W. III Hersey & Alfred Avins, Compulsion as a Defense to Criminal Prosecution, 11 Okla. L. Rev. 292 (1958).

[35] Michele Cotton, The Necessity Defense and the Moral Limits of Law, 18 New Crim. L. Rev. 41 (2015).

[36] Queen's Bench Division 14 Q.B.D. 273 (1884).

[37] ዝኒ ከማሁ።

መርኅ ላይ የተመሠረተ ድንጋጌ አውጥቷል።[38] በዚህ ሕግ መሠረት የአንድ ሰው ድርጊት ከአቅም በላይ የሆነ ችግር ሆኖ የሚቆጠረው በራሱ ላይ ወይም በሌሎች ሰዎች ላይ የተጋረጠን ጉዳት ወይም እኩይ ተግባር ለመቀልበስ የተከናወነ እና የተቀለበሰው ጉዳት ወይም እኩይ ተግባር በሕግ ጥበቃ ከተሰጠው መብት በልጦ ሲገኝ ነው።[39] ይህ ሞዴል የወንጀለኛ መቅጫ ሕግ ድንጋጌ ከተለመደውና አሪታዊ ከሆነው "ከአቅም በላይ የሆነ ችግር" ምንነትና አረዳድ ላይ የተመሠረተ አይደለም።[40] ምንም እንኳ ሞዴል የወንጀለኛ መቅጫ ሕጉ ይህንን በመስፈርት ላይ የተመሠረተ ድንጋጌ ቢያስቀምጥም ከተወሰኑ ግዛቶች በስተቀር የፌደራል መንግሥቱም ሆነ አብዛኞቹ ግዛቶች ይህንን ሕግ ሙሉ በሙሉ ወስደው የሕጋቸው አካል አድርገው አልተቀበሉትም።[41]

ከዚህ በላይ ከአቅም በላይ የሆነ ችግር የኮመን ሎው የሕግ ሥርዓት በሚከተሉት አሜሪካና እንግሊዝ ምን እደሚመስል ተመልክተናል። ከዚህ ቀጥሎ ጉዳዩ በአኅጉረ አውሮፓ የሲቪል ሎው የሕግ ሥርዓት ምን እንደሚመስል በአጭሩ እንዳስሳለን። ከአሜሪካና ከእንግሊዝ ሕግጋት በተቃራኒው በአኅጉረ አውሮፓ የሲቪል ሎው የሕግ ሥርዓት ውስጥ ከአቅም በላይ የሆነ ችግር ከወንጀል ኃላፊነት ነጻ ለመሆን በመከራከሪያት ሲያገለግል ቆይቷል፤ በምሳሌነት እ.አ.አ. በ1871 የወጣውን የጀርመን የወንጀል ሕግና እ.አ.አ. በ1810 የወጣውን የፈረንሳይ ሕግ መጥቀስ ይቻላል።[42] ከዚህ ጉዳይ ጋር በተለይም ርህብን ለስርቆት ወንጀል ክስ እንደመከላከያ ከማቅረብ ጋር በተያያዘ በብዙ ጸሕፍት የሚጠቀስ የፈረንሳይ ፍርድ ቤት ውሳኔ አለ። ክሱ የቀረበው እ.አ.አ. በ1898 ሲሆን መደበኛ ሥራ ማግኘት ባልቻለች ሊዊ ሜና በተባለች ከእናቷና ወታደራዊ አገልግሎት በመስጠት ላይ ከሚገኝ እጮኛዋ ከወለደችው ሕጻን ልጇ ጋር የምትኖር የሃያ ሁለት አመት ወጣት ላይ የቀረበ ነው።[43] ሜና፣ እናቷና ሕጻን ልጇ ለሰላሳ ስድስት ሰዓታት የሚላስ የሚቀመስ አጥተው ከቆዩ በኋላ ዳቦ በመስረቋ ተከሳ ታሰረች። ጉዳዩ የቀረበላቸው ማኒው የተባሉ የችሎቱ ሰብሳቢ ዳኛ በወቅቱ ስርቆትን ይቀጣ የነበረውን ሕግ ወደ ጎን በመተው የሚከተለውን ወስነዋል፦ "በዚህ በደንብ በተደራጀ ማኅበረሰብ ውስጥ አንድ የማኅበረሰቡ አባል በተለይም እናት ካለጥፋቷ ዳቦ ማጣቷ ያጸጽታል፤ አንድ ሰው መሠረታዊ ፍላጎቱ የሆነውን ዳቦ ለማግኘት ተገፋፍቶ ድርጊቱን መፈጸሙ ይህን ተራና ከወቀሳ የማያልፍ ተግባር የወንጀል ተፈጥሮውን እንዲያጣ ያደርገዋል።"

በአሁኑ ውቅት በፈረንሳይ ሕግ ውስጥ ከአቅም በላይ የሆነ ችግር ለሁሉም አይነት ወንጀሎች እንደ መከላከያ የሚያገለግል ሲሆን ለዚህም ሦስት ቅድመ-ሁኔታዎች መሟላት አለባቸው፤ እነሱም በቅርብ የተጋረጠ አደጋ መኖር፣ ይህ አደጋ ለወንጀሉ መፈጸም ምክንያት መሆን ይኖርበታል፣ እንዲሁም የተፈጸመው ወንጀል ከተጋረጠው አደጋ ጋር

[38] ሚሽል ኮተን፣ ከዚህ በላይ ማስታወሻ ቁጥር 35፣ ገጽ 42።
[39] The Model Penal Code, § 3.02 (1962).
[40] ሚሽል ኮተን፣ ከዚህ በላይ ማስታወሻ ቁጥር 35፣ ገጽ 42።
[41] ዝኒ ከማሁ፣ ገጽ 42-43።
[42] George P. Fletcher, Rethinking Criminal Law, (Oxford University Press, New York), (2000).
[43] ከዚህ በታች ያለው የጉዳዩ ታሪክ የተወሰደው Rachel G. Fuchs, Contested Patrinity, Constructing Families in Moderen France, (The Johns Hopkins Universty Press, Baltimore), 98 (2008) ላይ ነው።

ተመጣጣኝ መሆን አለበት፡፡ እነዚህ ቅድመ-ሁኔታዎች ከሞላ ጎደል ከዚህ በላይ ከተመለከትነው የአሜሪካ ሞዴል የወንጀለኛ መቅጫ ሕግ ጋር ተመሳሳይ ናቸው፡፡[44]

3. የነገሥታት ፍርዶች

3.1. በስካር ሁኔታ የተፈጸሙ ወንጀሎች

በስካር ከተፈጸመ ወንጀል ጋር የተያያዘ የመጀመሪያው ፍርድ የተሰጠው በዐፄ ኢያሱ በሥሙ-መንግሥታቸው አድያም ሰገድ ነው፡፡ ዐፄ ኢያሱ ከ1674-1694 ዓ.ም ድረስ በድምሩ ለሃያ አራት ዓመታት ኢትዮጵያን ያስተዳደሩ ንጉሥ ናቸው፡፡ ለፍርዱ መነሻ የሆነው ጉዳይ የሚከተለው ነው፦

> ከዕለታት አንድ ቀን በጥቂት የእልፍኝ አሽከሮቻቸው ታጅበው ጎንባሲት በምትባለው በር ወጥተው ፈረሳቸው በወርቅ መጣብር አጊጦ ባማረ የወርቅ እቃ ተጭኖ እፊታቸው እየተሳበ ሲሄድ አንድ መጠጥ ያሸነፈው ሰው እመንገድ አገኛቸውና ይህ ፈረስ ይሸጣልን ብሎ ጠየቃቸውና አለፈ፡፡ ንጉሡም በትዕግሥት ከኋላው ተከትላችሁ የሚገባበትን ቤቱን እዩ ብለው ስላዛዙ የታዘዘው አሽከር በመጠጥ የተሸነፈው ሰውየ የገባበትን ቤት አይቶ ተመለሰ፡፡ በማግስቱ ልብሰ መንግሥታቸውን ለብሰው ግሩማን (ገቦር ጋዶች) የሆኑትን ጋሻ ጃግሬዎቻቸውን ግራና ቀኝ አቁመው እችሎት ተቀመጡ፡፡ ከዚህ በኋላ ያንን ሰው አስጠርተው ያንኑ ፈረስ ቀድሞ ተጭኖ የነበረውን የወርቅ ዕቃ እንደተጫነ እመካከል አስቁመው ያውልኽ ትላንት ልትገዛው ጠይቀኽ የነበረውን ፈረስ አሁን ግዛው አሉት፡፡ ይኽንንም ማለታቸው ግኾርውን እንደትላንትናው በድፍረት የገፋበት እንደሆነ ወይም መልስ ያጣ እደሆነ ለመቅጣት ይመስላል፡፡[45] ነገር ግን ሰውየው ጮሌ የነገር መላ አዋቂ ኖሮ ትላንት ከኔ ጋራ ከነበሩት ባልንጀሮቼ መክሬ ነው የምገዛው ሲል መለሰ፡፡
>
> ንጉሡም "ትላንት ስናይህ ብቻህን አልነበርህምና ምን ባልጀራ ነበረኽ" ቢሉት "ትላንትና የነበሩት ባልንጀሮች ከጠላና ከጠጅ የሚገቡት ሥሮች እነጌሾ እነግራዋ እነብቅል ናቸው" ብሎ መለሰላቸው፡፡ ንጉሡም የንግግሩ አካሄድ ስላሳቃቸው[46] ቁጣቸውን ወደ ምሕረት መልሰው በሠላም ወደ ቤቱ እንዲሄድ አሰናበቱት ይባላል፡፡[47]

ከስካር ጋር የተያያዘ ሁለተኛው ፍርድ የተሰጠው በዐፄ ዳዊት ሣልሳዊ በሥሙ-መንግሥታቸው አድባር ሰገድ ነው፡፡ ዐፄ ዳዊት ኢትዮጵያን ከ1708-1713 ዓ.ም ድረስ ያስተዳደሩ ንጉሥ ሲሆኑ የዐፄ ኢያሱ አድያም ሰገድ ልጅ ናቸው፡፡ አንባቢ ጉዳዩን በሚገባ እንዲረዳው የጉዳዩ አመጣጥና የንጉሡ ፍርድ እንዲሚከተለው በዝርዝር ይቀርባል፦

> ደግሞ ከእለታት አንድ ቀን የሰው ገንዘብ ሳይደባልቅ ደክሞ ባፈራው ገንዘብ የሚኖር ማነው ብለው ጠየቁ፤ባጠገባቸው ያሉ ባለሟሎች ገበሬ ነው ብለው

---

[44] Catherine Elliot, French Criminal Law, (Routledge Taylor and Francis Group, London, New York, 1st ed.), 114 (2001).

[45] ይህ ድርጊት በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ሕግ አንቀጽ 607ና ተከታዮቹ ሥር በተደነገገው መሠረት በክብር ላይ የተፈጸመ ወንጀል ነው ሊባል ይችላል፤ የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ሕግ፣አዋጅ ቁጥር 414/1997፣ፌደራል ነጋሪት ጋዜጣ፣ ልዩ እትም፣ አንቀጽ 607ና ተከታዮቹ፡፡

[46] "ንጉሡም የንግግሩ አካሄድ ስላሳቃቸው ቁጣቸውን ወደ ምሕረት መልሰው በሠላም ወደ ቤቱ እንዲሄድ አሰናበቱት" የሚለው አገላለጽ ጉዳዩ በታየበት ችሎት በአጋጣሚ (incidentally) የተከሰቱ ክስተቶችን ለማመላከት የገባ አንጂ የውሳኔው መነሻ ተከሳሹ ሰክሮ ድርጊቱን መፈጸሙ ሳይሆን በፍርድ ሂደቱ የተናገረው ነገር ንጉሡን ስላሳቃቸው ነው፤ የሚል መደምደሚያ ላይ ለመድረስ አለመሆኑን አንባቢ ልብ ሊለው ይገባል፡፡

[47] ተክለ ጻድቅ መኩሪያ፣ የኢትዮጵ ታሪክ፣ ክፀሜ ልብነ ድንግል እስከ ዐፄ ቴዎድሮስ፣ (ትንግሌ ዘጉባዔ ማተሚያ ቤት፣ አዲስ አበባ)፣ 304(1953)፡፡

መለሰላቸው፤ንጉሡም ገበሬዎቹ ውስጥ ሽማግሌዎች የሆኑትን መርጣችሁ አምጡልኝ ብለው አመጡላቸውና ከነሱ ጋር እሁድ እሁድ ሰንበቱ አብረው ይጠጡ ጀመር።

ከሰንበታቶቹ በአንደኛው ቀን ትኩስ ወተት የሚመስል ቡሌ የሚባለውን ኃይለኛ የሳንደር ጠላ ደጋግሞ ጠጥቶ በዚሁ መጠጥ አእምሮው የተነካ አንድ ማኅበርተኛ ተነስቶ ንጉሱን በጥፊ መታቸው። ሰውም እንምታው እያለ ሲጋበዝ ርሳቸው መጠጥ ቢያሸንፈው ነውና ተውት ይልቅስ እቤቱ ወስዳችሁ አስተኙት ብለው አዘዙና ወስደው አስተኙት።

በማግስቱ ችሎት ተዘርግቶ በዚህ ሰውየ ላይ ፍርድ ተጀመረ። መኳንንቱም ሊቃውንቱም የሞት ፍርድ ፈረዱበት። እንዲሁም አራቱ ሊቀ መጣኞች አዛገሮች[48] (ባለፍትሐ ነገሥቶች) "ዘያወርድ እደሁ ዳበ መሲሐ እግዚአብሄር ይትመተር እደሁ (እግዚአብሄር ቀብቶ ባነገሠው ላይ እጁን የሚዘረጋ እጁ ይቆረጥ)" የሚለውን ጠቅሰው የሞት ፍርድ ፈረዱበት።

ንጉሡም ይኸን ሁሉ ከሰሙ በኋላ ከችሎት እልፍኛቸው ተመልሰው ገቡ። በዚያውም ሊቃውንቱንና መኳንንቱን ወንጀለኛውም ጭምር አስጠርተው በነሱ ፊት አንድ የአንበሳ ለማዳና የገዘጀሮ ለማዳ አስመጥተው አቆሙ። ዝንጀሮውም አንበሳውን አይቶ በፍርሀት ይንቀጠቀጥ ጀመር። በኋላ ግን በቆራ[49] መሉ ጠጅ አቀረቡላቸው ሁለቱም አብረው ጠጡ። ከዚህ በኋላ ዝንጀሮው ፍርሀቱ ተወገደለትና እንደልቡ ይቀናጣ ጀመር፤ እንዲያውም በአንበሳው ራስ ላይ ወጥቶ እየተዝናና ተቀመጠ።

በዚህ ጊዜ ፊታቸውን ወደ መኳንንቱ አዙረው አሁንስ በማን ትፈርዳላችሁ ቀድሞውንም ከገበሬ ጋር ማኅበር በመጠጣቱ ያጠፋሁ እኔ ነኝ በማኅበርና በቦታ ባንገናኝ ኖሮ ይህ ሰው መቼ ይደፍረኝ ነበር ብለው ወደ ችሎት ተመልሰው ምሕረት አድርገው ወደ ቤቱ በሠላም ሰደዱት ይባላል።[50]

እነዚህ ከዚህ በላይ የቀረቡት ሁለት ጉዳዮች ምንም እንኳ በተለያየ ጊዜ የተፈጸሙና በሁለት ነገሥታት ፍርድ የተሰጠባቸው ቢሆኑም አንድ የሕግ ጭብጥ ያመሳስላቸዋል፤ ወንጀሎቹ በተፈጸሙበት ከዛሬ ሦስት መቶ ዓመታት በፊት በነበረው ዘመን እሳቤና ሕግ መሠረት በስካር የተፈጸመ ወንጀል ኃላፊነትን እንደማያስከትል የሚያሳዩ ናቸው። በተለይ ዐፄ ዳዊት ጉዳዩን የዳኙ እንስሳትን በመጠቀም ድራማዊ በሆነ መልኩ ለመኳንንቱና ሊቃውንቱ ማቅረባቸው ስካር ወይም የአልኮል መጠጥ የሚያስብ አዕምሮ ባለቤት የሆነውን የሰው ልጅ ብቻ ሳይሆን በደመ-ነፍስ (instinctively) የሚንቀሳቀሱ እንስሳትን ባሕርይ ጭምር መሉ በመሉ እንደሚቀይር ለማስረዳት የሄዱበት ርቀት አቻ የማይገኝለት ዘዴ ሲሆን እግረ መንገዱን የንጉሡን ጥበብ የተሞላበት ዳኝነት (judicial wisdom) በደንብ የሚያሳይ ነው።[51]

---

[48] ሊቀ መጣኝ አዛኘር ማለት የፍርድ ቤት ዳኛ ማለት ነው። ሊቀ መጣኞች ለዳኝነት ሥራ ብቻ ሳይሆን በተለያዩ ተግባራት ሹመትን ጨምሮ ነገሥታትን ያገለግሉና ያግዙ ነበር። ቁጥራቸው ሁለት በሆነ ጊዜ አንዱ ሊቀ መጣኝ ከንጉሡ በስተግራ ሌላው በስተቀኝ ይቀመጣሉ። ከዚህ በላይ በቀረበው ጉዳይ ላይ ሊቀ መጣኝ አዛገሮች የፍትሐ ነገሥት ሊቃውንት ሲሆኑ ቁጥራቸው አራት ስለሆነ ሁለቱ ሊቀ መጣኞች ከንጉሡ በስተግራ ሁለቱ ከንጉሡ በስተቀኝ ይቀመጣሉ። ይህንን ከንጉሡ አኳያ ያላቸውን የአቀማመጥ ሥርዓት ተከትሎ ሊቀ መጣኝ አዛገሮች የቀኝ አዛኘርና የግራ አዛኘር የሚል ማዕረግ የሚሰጣቸው ሲሆን የቀኝ አዛኘርነት ከግራ አዛኘርነት የበለጠ ማዕረግ ነበር። የሊቀ መጣኝ አዛኘርን ትርጉምና ሌሎች ተያያኘር ጉዳዮችን የበለጠ ለመረዳት Bairu Tafla and Heinrich Scholler, SER'ATA MANGEST: An Early Ethiopian Constitution, Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America, Vol. 9, No. 4, 487-499(1976) ይመለከቷል።

[49] ቆራ ማለት እንደዋንዛ ካለ ግንድ እየተጠረበ የሚሰራና ለውሃ መያዣ፤ ለማስታጠቢያ የሚያገለግል የቤት ዕቃ፤ ገበቱ ማለት ነው (አማርኛ መዝገበ ቃላት፤ በኢትዮጵያ ቋንቋዎች ጥናትና ምርምር የተዘጋጀ፤ ገጽ 208)።

[50] ተክለ ጻድቅ መኩሪያ፤ ከዚህ በላይ ማስታወሻ ቁጥር 47፤ ገጽ 335-36።

[51] ምንም እንኳ ንጉሡ "ቀድሞውንም ከገበሬ ጋር ማኅበር በመጠጣቱ ያጠፋሁ እኔ ነኝ" ማለታቸው የፍርድ ጥበባቸውን አያሳይም፤ በተቃራኒው ለገበሬ ያላቸውን ንቀት ያሳያል፤ ሰውዬው ወንጀሉን የፈጸመው ስለጠጣ እንጂ

በስካር ማለትም በአልኮል መጠጥ ወይም አእምሮን በሚያደነዝዝ ነገር የተፈጸም ወንጀል ኃላፊነት አንደማያስከትል በኢትዮጵያ የወንጀል ሕግ ተደንግጎ ይገኛል።[52] በወንጀል ሕጉ በስካር፣ በአልኮል መጠጥ ወይም አእምሮን በሚያደነዝዝ ነገር የተፈጸም ወንጀል ከኃላፊነት ነጻ የሚያደርገው ወንጀለኛው ወንጀል ለመፈጸም በማቀድ ወይም ሊፈጽም አንደሚችል እያወቀ ራሱን ለስካር (አእምሮን ለሚያደነዝዝ ነገር) ያላጋለጠ ከሆነ ነው።[53] ከዚህ ቀደም ሲል እንደተመለከትነው የኢትዮጵያ የወንጀል ሕግ እንደ አሜሪካ ሕግ አስቦ በነጻ ፈቃድ በመስከርና ካለፈቃድ ሰክሮ ወንጀል በመፈጸም መካከል ልዩነት ያስቀመጠ መሆኑን እንገነዘባለን።

ምንም እንኳ ከዚህ በላይ የቀረቡ ሁለት ጉዳዮችን ባያጠቃልልም በስካር የተፈጸመ የግድያ ወንጀል ከኃላፊነት ነጻ እንደሚያደርግ፣ በተለይም በዘመኑ የነበረው "የገደለ ይሙት" የሚለው ፍርድ እንደማይፈጸምበት በጊዜው ሥራ ላይ በነበረው ፍትሐ ነገሥት ውስጥ እንደሚከተለው በግልጽ ተደንግጎ እናገኘዋለን፦

> መግደልም በሁለት ክፍል ይከፈላል ከእነርሱም አንዱ ቅጣት የማይገባው (የማያስቀጣ) ነው። ይኸውም አዕምሮ የሌለው ነው። ዘመኑም ከሰባት ዓመት ላልበዛ <u>ለስካራምም ፍርዱ አዕምሮ እንደሌለው ሰው ሰለሆነ ሞት አይገባውም</u>። <u>ርሱ በፈቃዱ አዕምሮውን አጥፍቷልና</u>። ለስድብና ለዘንጉዕ ግን አእምሮአቸው ያለፈቃዳቸው ይጠፋል። ቅጣቱም እንደቅጣታቸው አይሁን። እርሱ በስካር የለመደ እንደሆነ ልብ ይፈርዳል። በመንደላቀቅ ቢሆን ግን ቅጣቱ እንደቅጣታቸው አይሆንም። ይልቁንም በመስከሩ አንድ ጊዜ ሁለት ጊዜ ቢገድል ወይም በሚችና በገዳይ ከጥንት ጠብ ቢኖር በመቀማጠል (በመንደላቀቅ) የታወቀ ካልሆነ በመካከላቸውም ጠብ ባይኖር በሰካራሞች ቅጣት ይቀጣ። ቅጣቱም ያለፈቃዱ እንደገደለ ሰው ቅጣት ይሁን። (የማስመር አጽንኦት በፀሀፊው የተጨመረበት)[54]

አጥኚው ይህንን የፍትሐ ነገሥት ክፍል መጥቀስ የፈለገበት ምክንያት ከዚህ በላይ እንደተመለከተው ጉዳዩ ለሁለቱ ነገሥታት ከቀረቡት ጉዳዮች በተለዬ ከግድያ ወንጀል ጋር ቢገናኝም በስካር ለተፈጸመ ወንጀል ወንጀለኛው ለምን ከኃላፊነት ነጻ እንደሚሆን ምክንያቱን (ratioinale) ስለሚያሳይ ነው። በፍትሐ ነገሥቱ አገላለጽ በአልኮል መጠጥና አዕምሮን በሚያደነዝዝ ነገር ሰክሮ ወንጀል የፈጸመ ሰው አዕምሮ እንደሌለው ሰው ይቆጠራል። በዚህ ሁኔታ ወንጀል የሚፈጽም ሰው አዕምሮ እንደሌለው ሰው ክፉና ደጉን መመዘንና መመርመር አይችልም፤ የወንጀል ድርጊቱን ውጤት አያውቅም የሚል መሠረታዊ የወንጀል ሕግ ጽንሰ-ሃሳብ የያዘ ነው።

3.2. በንዴት፣ በአስገዳጅ ሁኔታ የተፈጸመ ወንጀልና ጥፋትን ማመን

ዐፄ ኢያሱ የተመለከቱት ሁለተኛው ጉዳይ ንብረታቸው በነበረ በግ ላይ የተፈጸመ ስርቆት ሲሆን ጉዳዩ የሚከተውን ይመስል ነበር፦

ገበሬ ስለሆነ አይደለም፤ የሚል ክርክር ማንሳት ቢቻልም ይህ አባባል ድርጊቱ በተፈጸመበት ቅጽበት በንዴትና በጸጸት ንጉሡ የተናገሩት በመሆኑ፣ የንጉሡ ንዴትና ጸጸት በቀል ሆኖ በፍርዳቸው ውስጥ አለመንጸባረቁ እንዲሁም ወንጀሉን የመረመሩበት መንገድ የፍርድ ጥበባቸውን የሚያደበዝዝ አይደለም።

[52] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ሕግ፣ ከዚህ በላይ ማስታወሻ ቁጥር 45፣ አንቀጽ 50።

[53] ዝኒ ከማሁ፣ አንቀጽ 50(1)(2)።

[54] ፍትሐ ነገሥት ንባቡና ትርጓሜው፣ (ትንሣኤ ማተሚያ ድርጅት፣ አዲስ አበባ) ፣ 1990፣ አንቀጽ 47።

> የድቁስ ቀንድና ቢላዋ ከነማኅደሩ ባንገቱ ያንጠለጠለ የንጉሡ የበግ መክት ነበር። እሱም በከተማው እየዞረ የተሰጣውን የመንደር እኽል ይበላ ነበር፤ ሰውም እንዳይመታው የንጉሥ በግ በመሆኑ ይፈራ ነበር። ከእለታት አንድ ቀን አንድ የጎንደር ቁም ፀሀፊ ካህን ቁጭ ብሎ ሲጽፍ ይኸው በግ መጥቶ አጠገቡ ያሰጣውን እኽል በላበት፤ ካህኑም ተነሥቶ ይዞ እቤቱ አርዶ አንገቱ ባለው በራሱ ድቁስ በላው።
>
> ከዚህ በኋላ ካህኑ፦
>
> እድሜ እለምናለሁ ለንጉሥ ኢያሱ፣
>
> ያንን የበግ መክት ቢሰደው ንጉሡ፣
>
> በጦ ቢላዋዉ በጦ ድቁሱ፣
>
> አመስግኜ በላሁ ከነራስ ምላሱ።
>
> (ማነኽ እንጃልኽ) የሚል ፅፎ በጉፋያ መስጫ ሜዳ ላይ ጥሎት ተገኘ።
>
> ከዚህ በኋላ መጀመሪያ ፅሁፉ ሁለተኛ በብዙ ምርመራ ካህኑ ተገኝቶ ተይዞ እንጉሡ ፊት ቀረበና ይኽን የጻፍክ አንተ አይደለህምን እውነቱን ንገረኝ ብለው ንጉሡ ጠየቁት፤ እሱም እተቀባው ንጉሥ ፊት ቀርቤ ውሸት አልናገርም፤ መቸገር ያስደፍራልና ሰው ሁሉ ይህን የንጉሡን በግ ሲፈራ አርጀ የበላሁ ወረቀቱንም የፃፍኩ እኔ ነኝ ሲል በድፍረት ተናገረ።
>
> ንጉሡም በሐቀኝነቱ አመስግነው የገንዘብ ጉርሻ ሰጥተው በሠላም አሰናበቱት ይባላል።[55]

ከተከሳሹ መልስ እንደምንረዳው ወንጀሉን ለመፈጸም የገፋፉት ሁለት ምክንያቶች ሲሆኑ እነሱም ተከሳሹ በመልሱ በግልጽ እንደተናገረው ቁሳዊ እጦትና አንባቢ ከጉዳዩ እንደሚረዳው ወንጀሉን የፈጸመው በንዴት ተነሳስቶ መሆኑ ናቸው። ተከሳሹ "መቸገር ያስደፍራል" በማለት የተናገረው ቁሳዊ እጥረት ወይም ረሀብ እንደገጠመው የሚያመላክት ሲሆን የንጉሡ በግ ድርጊት በተከሳሹ ላይ ንዴት እንደፈጠረ መገንዘብ ይቻላል።

ከዚህ በላይ እንደተመለከትነው ተከሳሹ ክሱን በማመኑ ቅጣትን ማቅለል በዘመናዊ የወንጀል ሕግጋት ውስጥ እውቅና ያገኘ ሲሆን በተመሳሳይ መልኩ በኢትዮጵያ የወንጀል ሕግ ቅጣትን ለማቅለል ምክንያቶች ናቸው። በኢትዮጵያ የወንጀል ሕግ ወንጀለኛው ወንጀሉን የፈጸመው ከፍተኛ ቁሳዊ እጦት ደርሶበት ከሆነ፣ የተበደለው ሰው ጠባይ ወንጀለኛውን ብስጭት ላይ ጥሎት እንደሆነ እንዲሁም ወንጀለኛው ተከስሶ ፍርድ ቤት በቀረበ ጊዜ በክስ ማመልከቻው ላይ የተመለከተውን የወንጀል ዝርዝር በሙሉ ካመነ ቅጣት እንደሚቀልለት ተደንግጓል።[56] እነዚህን በሕጉ የተቀመጡ ምክንያቶች ከቀረበው ጉዳይ ጋር ለማነጻጸር ወንጀለኛው በፅህፈት ሥራ የሚተዳደር ባለሙያና ካህን በመሆኑ ከፍተኛ ቁሳዊ እጦት ደርሶበት ነበር፣ በተለይም ርቦት ነበር ለማለት ባያስደፍርም በተወሰነ መልኩ ችግር እንደነበረበት ከሰጠው መልስ መረዳት ይቻላል።[57] በሕጉ የተቀመጠው ሁለተኛው ነጥብ የግል ተበዳይ ወንጀለኛውን በማበሳጨት ለወንጀሉ መፈጸም የሚያደርገው አስተዋጾ ሲሆን

---

[55] ተክለ ጻድቅ መኮሪያ፣ ከዚህ በላይ ማስታወሻ ቁጥር 47፣ ገጽ 305።

[56] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲዊ ሪፐብሊክ የወንጀል ሕግ፣ ከዚህ በላይ ማስታወሻ ቁጥር 45፣ አንቀጽ 82 (1) (ሐ፣ መ፣ ሠ)።

[57] በቀረበው ጉዳይ ላይ እንደተመለከተው ወንጀለኛው ወንጀሉን ለመፈጸም ያነሳሳው አስጥቶት የነበረውን እኽል የንጉሡ በግ ስለበላበት ነበር። ይህንን ሁኔታ ስንመለከት ወንጀለኛው የነበረበት ሁኔታ የሚበላው ያጣና የተቸገረ ነበር ለማለት በፍጹም አይቻልም።

በቀረበው ጉዳይ ላይ የንጉሡ በግ የተከሳሽን የተሰጣ እኽል መብላቱ ተከሳሹን እንዳናደደው መረዳት ይቻላል። ሦስተኛው በሕጉ የተቀመጠው ምክንያት ተከሳሹ ክሱን ማመኑ ሲሆን ይህም በቀረበው ጉዳይ ውስጥ ሙሉ በሙሉ የተሟላ ቅድመ-ሁኔታ ነው። በዚህ ዘመን የወንጀል ሕግጋት መሠረት እነዚህ ቅድመ-ሁኔታዎች ቅጣትን ለማቅለል[58] የተቀመጡ እንጂ ከወንጀል ኃላፊነት ሙሉ በሙሉ ነጻ እንደማያደርጉ ከዚህ በላይ ተመልክተናል። በቀረበው ጉዳይ ወንጀለኛው በነጻ መለቀቁን የተመለከትን ሲሆን ይህም የንጉሡ ፍርድ ከዘመኑ ሕግ በተሻለ ለተከሳሹ ጥበቃ የሰጠ መሆኑን ያሳያል።

በክሱና በተከሳሽ መልስ ውስጥ በግልጽ ባይመለከትም ከዚህ ጉዳይ ጋር አብሮ የሚነሳው ሌላው ነጥብ በተከሳሹ ፅሁፉ ውስጥ ያለው "ማነኽ እንጃልኽ" በሚል የተገለጸውና የበጉ ባለቤት (ንጉሡ) ምን ታመጣለህ የሚል ትርጉም ያለው ትዕቢት አዘል መልዕክት ነው። ንጉሡ ይህንን ተከሳሹ ያሳየውን ንቅት ችላ ብለው ማለፋቸው፣ በክሱ ውስጥ አለማንሳታቸውና አለመቅጣታቸው ከዚያም አልፎ ገንዘብ ሰጥተው መሸኘታቸው ተከሳሽ ክሱን ማመኑ በዋናት እንዲሁም ከዚህ በላይ የተዘረዘሩት ሌሎች ሁለት ምክንያቶች በዘመኑ ለወንጀል ኢ-ኃላፊነት መሠረቶች መሆናቸውን እንረዳለን።[59]

4. የማጠቃለያ ነጥቦች

የኢትዮጵያን ሕግጋት የማዘመን ተግባር በ1940ዎቹና 50ዎቹ በስፋት የተከናወነ ሲሆን[60] እነዚህ ዘመናዊ ሕግጋት በዋናነት ከአኅጉረ አውሮፓ የሕግ ሥርዓት የተቀዱ ቢሆንም በተወሰነ መልኩ የኢትዮጵያ የሕግ አስተምህሮና አሻራ የሚያንጸባርቁ ናቸው። በዝርዝር እንደተመለከትነው በ1997 ዓ.ም ተሻሽሎ የወጣው የኢትዮጵያ ፌዴራላዊ ዲሞክራሲዊ ሪፐብሊክ የወንጀል ሕግ በስነ የተፈጸመ ወንጀል ኃላፊነት እንደማያስከትል እንዲሁም ጥፋትን ማመን፣ በንዴትና በቁሳዊ እጦት ምክንት የተፈጸመ ወንጀል ቅጣትን ለማቅለል በምክንያትነት አካትቷል።

ከዚህ ባለይ የተመለከትናቸው ሦስቱ የጎንደር ነገሥታት ፍርዶች የኢትዮጵያን ጨምሮ በዘመናዊ የወንጀል ሕግጋት ውስጥ የተካተቱና የወንጀል ኃላፊነትን የማያስከትሉ እንዲሁም ለቅጣት ማቅለያ የሚያገለግሉ ሁኔታዎች ሥር ያሉትን መርኖችንና ጽንሰ-ኃሳቦችን የያዙ ናቸው። ከእነዚህ መርኖችና ጽንሰ-ኃሳቦች መካከል በተለይ በስነ የተፈጸመ ወንጀል ከኃላፊነት ነጻ ያደርጋል የሚለው መርኅና ጥፋትን ማመን በጊዜ ሂደት ከዳበረው የአውሮፓ

[58] ከእነዚህ ቅጣትን ለማቅለል ከተቀመጡት ቅድመ-ሁኔታዎች ውስጥ ንዴትን (provocation) በተመለከተ በሥራ ላይ ያሉት ሕግጋት የሚደነግጉት እንዲሁም የተጻፉ ድርሳናት የሚያትቱት በዋናነት በግል ተበዳይ ምክንያት በተፈጠረ ንዴት የሚፈጸምን ወንጀል እንጂ በቀረበው ጉዳይ ላይ እንደተመለከተው በእንስሳት ምክንያት ስለሚፈጠር ንዴትና ይህን ተከትሎ ስለሚፈጸም ወንጀል ባለመሆኑ ፀሀፊው ጉዳዩን በስፋት መዳሰስ አስፈላጊ ነው ብሎ አላመነበትም።

[59] በዘመኑ ለነገሥታት ይሰጥ ከነበረው ክብር አኳያ እንዲሁም ከዚህ ያነሱ ጉዳዮች ለክስና ለቅጣት ምክንያት ይሆኑ እንደነበር ሲታይ ለንጉሡ "ማነኽ እንጃልኽ" ብሎ መጻፍ በቀላሉ የሚታለፍ ጉዳይ አይመስልም። ጉዳዩን በንጽጽር ይበልጥ ለመረዳት ከዚህ በላይ እንደተመለከትነው የራሳቸውን የዐሜ ኢያሱን ፈረስ ልግዛ ብሎ የጠየቀው ሰው በወንጀል መክሰሱን በምሳሌነት መጥቀስ ይቻላል፤ እንዲሁም ከዚህ በላይ እንደተጠቀሰው ይህ ድርጊት በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ሕግ አንቀጽ 607ና ተከታዮቹ ሥር በተደነገገው መሠረት በክብር ላይ እንደተፈጸመ ወንጀል ሊቆጠር ይችላል።

[60] በእነዚህ አመታት ውስጥ የወንጀለኛ መቅጫ ሕግ፣ የፍትሐ ብሔር ሕግ፣ የባሕር ሕግ፣ የንግድ ሕግ፣ የወንጀለኛ መቅጫ ሥነ-ሥርዓትና የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ወጥተው ሥራ ላይ መዋላቸው ይታወቃል።

አገራትና የአሜሪካ ሕግጋት በመቶ ሃምሳ አመታት ቀድሞ ኢትዮጵያዊ መሠረት የነበረው መርኅ ነው።

እነዚህ በወንጀል ሕጉ ውስጥ የተካተቱ መርኖችና ጽንሰ-ኃሳቦች በምሳሌነት የሚጠቀሱ እንጂ ሌሎች ተመሳሳይ የነገሥታት ፍርዶችንና ነባር የኢትዮጵያ ሕግጋትን መሠረት ያደረጉ መርኖችና ጽንሰ-ኃሳቦች በወንጀል ሕጉና በሌሎች ሕግጋት ውስጥ መኖራቸው አይካድም። እነዚህን በነባር የኢትዮጵያ ሕግጋት ውስጥ የነበሩ የሕግ መርኖችንና ጽንሰ-ኃሳቦችን መመርመር፣ ሳይንሳዊ በሆነ መልኩ በጥልቀት ማጥናት፣ ወደፊት በሚወጡ አዲስ ሕግጋት ውስጥ እንዲት ተጣጥመው ሊካተቱ እንደሚችሉና የኢትዮጵያ ሕግጋት አካል እንዲሆኑ ማመላከትና ሃሳብ መስጠት የሕግ ምሁራንና ሊቃውንት ሙያዊ ኃላፊነት እንዲሁም መልካም አጋጣሚ ነው ብሎ ይህ አጥኚ ያምናል።

Intoxication, Provocation and Necessity as Defenses of Criminal Irresponsibility in the Judgments of Emperor Iyasu, and Emperor Dawit III of Ethiopia: A Historical Reflection

Nega Ewunetie Mekonnen ♣

Abstract

Judgments rendered before the introduction of modern justice system in Ethiopia were largely subject to the final approval and analysis of the emperors. This trend continued to some extent until 1974; in this regard the Crown Court of Haile Selassie I was the first to be mentioned. Cases brought before the emperors' courts were often criminal cases, and the judgments of the emperors reflected principles and concepts of criminal law that have been recognized in the criminal law of many countries today. This reflection presents three criminal cases brought before the courts of Emperor Iyasu, and Emperor Dawit III of Ethiopia and argues that the judgments of these two emperors are compatible with the principles of defenses of intoxication, provocation, necessity, and criminal responsibility.

Key words: Intoxication, provocation, necessity, plea of guilty, judgments of emperors, criminal irresponsibility

♣ Associate Professor of Law, Bahir Dar University, School of Law. PhD Student, Bahir Dar University, Higher Diploma in Teacher Educator (Bahir Dar University, 2015), LL.M. (The University of Groningen, The Netherlands, 2008), LL.B. (Addis Ababa University, Ethiopia, 2004). The writer can be reached for comments at beleteeng@yahoo.com.

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የመ/ሠ/ቁጥር 184647

ግንቦት 27 ቀን 2012 ዓ/ም

ዳኞች፦ ብርሃኑ አመነዉ
ተሾመ ሽፈራዉ
ሀብታሙ እርቅይሁን
ብርሃኑ መንግሥቱ
ነጻነት ተገኝ

አመልካች፦ አቶ ፍስሀ አበበ

ተጠሪ፦ አቶ አለነ ደሞዝ

መዝገቡ ተመርምሮ ከዚህ የሚከተለዉ የፍርድ ዉሳኔ ተሰጥቷል።

ፍርድ

ጉዳዩ የቤት ሽያጭ ውልን መነሻ ያደረገ ሲሆን ጉዳዩ በመጀመሪያ የታየበት በትግራይ ክልል በፀለምቲ ወረዳ ፍርድ ቤት የአሁን አመልካች የከሳሽ ተጠሪ ደግም ከሳሽ በመሆን ተከራክረዋል። ከክርክሩ እንደተረዳነዉ ተጠሪ በአመልካች ላይ በመሰረተዉ ክስ በግይ ተክሊት ቀበሌ አዲስ በተመሰረተችዉ በግይ ተክሊት ከተማ ለመኖሪያ ተብሎ በ1994 ዓ/ም ተሰጠኝ ስፋቱ 10×15 ሜትር በሆነ ቦታ ያለኝን እንድ ክፍል ቤት የመኖሪያ ቤትና ቦታ በ2000 ዓ/ም ለአሁን አመልካች በብር 7700.00 (ሰባት ሺህ ሰባት መቶ ብር) ሸጬለት የነበረ ቢሆንም መሬት ስለማይሸጥ አመነሻው የፈረሰ ዉል ነዉ። ቤቱን ሲገዛ የከፈለዉን ብር 7700.00 ደግሞ በኪራይ መልክ አመልካች እያከራየ ወስዶ ጨርሷል። ነገር ግን አመልካች በዚህ ይዞታዬ ላይ 5×5 ሜትር የሆነ ቤት ሰርቶበት ይዞ አለቅም ስላለኝ በይዞታው ላይ የተሰራውን ቤት አፍርሶ መሬቴን እንዲለቅልኝና ከቤቱ ጋር የተረከባቸዉን ንብረቶች ዋጋ በግምት ብር 5500.00 እንዲከፍለኝ ይወሰንልኝ በማለት ዳኝነት ጠይቋል።

አመልካች ለክሱ በሰጠዉ መልስ ለክርክር መነሻ የሆነዉ ይዞታ በ1999 ዓ/ም ከአንድ ክፍል ቤት ጋር በብር 7700.00 መኖሪያ ቤትና ቦታ ከገዛሁ በኋላ 2 ትላልቅ በግንብ የተሰራ ዘመናዊ የቆርቆሮ ክፍል ቤቶችን ከብር 360,000 በላይ ወጭ አዉጥቼ ስለሰራሁ ዉሉ ወደነበርንበት ይመለስ ከተባለ በጣም ስለሚጎዳኝ የሽያጭ ውሉ ይፅናልኝ። ባንኮኒ ከቤቱ ጋር የገዛሁት ነዉ። ሌሎች ንብረቶችን ስላልተረከብኩ ግምት ልከፍል አይገባም በማለት ተከራክሯል።

ጉዳዩን በመጀመሪያ ደረጃ ዳኝነት ስልጣን ያየዉ የወረዳ ፍርድ ቤት ግራ ቀኙን በመ/ቁጥር 13075 ላይ አከራክሮና ምስክሮታቸዉን ሰምቶ በቀን 22/09/2011 ዓ/ም በሰጠዉ ዉሳኔ በሕገ-መንግስቱ አንቀፅ 40/7 መሰረት መሬት የሕዝብና የመንግስት ሀብት በመሆኑ ለመሸጥ ለመለወጥ ስለማይቻል በግራ ቀኝ መካከል የተደረገዉ የሽያጭ ውል ሕገ መንግስቱን የሚቃረን በመሆኑ የሽያጭ ዉሉ እንዲፈርስና አመልካች የሰራዉን ቤት አፍርሶ እንዲወስድ

በማለት ወስኗል። አመልካች በዚህ ውሳኔ ቅር በመሰኘት ለጉራይ ክልል ሰሜን ምዕራብ ዞን ከፍተኛ ፍርድ ቤት ይግባኝ ቢያቀርብም ፍርድ ቤቱ በመ/ቁጥር 12167 ላይ በቀን 07/10/2011 ዓ/ም በፍ/ሥ/ሥ/ሕግ ቁጥ 337 መሰረት በሰጠዉ ትእዛዝ ይግባኙን ሰርዟል።

በመቀጠል አመልካች ለክልሉ ሰበር ሰሚ ችሎት የሰበር አቤቱታ አቅርቦ ችሎቱ በመ/ቁጥር 117434 ላይ ግራ ቀኙን አከራክሮ በቀን 21/10/2012 ዓ/ም በሰጠዉ ውሳኔ ተጠሪ በስር ፍርድ ቤት ክስ ሲያቀርብ ማይ ተህሊት ቀበሌ አዲስ የተመሰረተች አተማ እንደሆነች በመግለጽ አመልካች በዚህ አተማ የሚገኝ የመኖሪያ ቤትና ቦታ ይልቀቅልኝ በማለት ዳኝነት ቢጠይቅም በስር ፍርድ ቤት አዲስ የተመሰረተች አተማ ናት ወይስ አይደለችም የሚለው አልተጣራም። በተጨማሪ ተጠሪ በክሱ ውስጥ አዲስ የተመሰረተች አተማ መሆኗን ቢገልም እንኳን በተግባር ግን ከ1ኛ እስከ 3ኛ ደረጃ ባሉት አተሞች ማይ ተኽሌት አዲስ የተመሰረተች አተማ ሆና በአዲስ አተማነት የተካተተች አለመሆኗ ተረጋግጧል በማለት የሽያጭ ዉሉ የገጠር መኖሪያ ቦታ ሽያጭ የሚመለከት በመሆኑ ዉሉ ሕገወጥ ነው ተብሎ አመልካች የሰራዉ ቤት ካለ አፍርሶ ይውሰድ በሚል በስር ፍርድ ቤት መወሰኑ ተገቢ ነዉ በሚል በማፅናት ነገር ግን አመልካች ቦታዉን የገዛበትን ብር 7700.00 ተጠሪ እንዲመልስ በአብላጫ ድምጽ ወስኗል ። አመለካች በቀን 30/01/2012 ዓ/ም የተጻፈ የሰበር አቤቱታ ያቀረበዉ በዚህ አግባብ በተሰጠ ውሳኔ መሰረታዊ የሕግ ስህተት ተፈጽሟል በሚል ሲሆን የአቤቱታዉ ይዘት በአጭሩ የሚከተለዉ ነዉ።

አመልካች የገዛሁት የገጠር መሬት ሳይሆን ለተጠሪ በከተማ ለድርጅት ተብሎ በተሰጠዉ ቦታ ላይ የተሰራ ቤት ከነ ይዞታው ሆኖ እያለ የስር ፍርድ ቤቶች የገጠር መሬት አይሸጥም ብለዉ ከሚያከራክረን ጭብጥ ዉጭ ውሳኔ ሰጥተዋል። በግራ ቀኙ የቀረቡ ምስክሮች የተረጋገጠዉም በከተማ የተሰራ ቤት የተሻሻጥን መሆኑን ነዉ። ቤትና ቦታዉን መልቀቅ አለብህ የሚባል ከሆነ ተጠሪ ፈቅዶ እና ሳይቃወመኝ 2 ትላልቅ ቤቶች ብር 360000.00 የሚገመት ስለሰራሁበት በፍ/ሕግ ቁጥር 1179/2/ መሰረት የዚህን ግምት እና የቤቱን የግዢ ዋጋ ብር 7700.00 ተጠሪ ከወሰደበት ከቀን 12/05/1999 ዓ/ም ጀምሮ በሚታሰብ ህጋዊ ወለድ ጋር እንዲከፍለኝ አለመወሰኑም መሰረታዊ የህግ ስህተት ነው ተብሎ እንዲታረም ዘበመጠየቅ አቤቱታዉን አቅርቧል።የሰበር አጣሪ ችሎት አቤቱታዉን መርምሮ በዚህ ጉዳይ የሻየጭ ዉሉ የተደረገዉ በከተማ ይሁን በገጠር ባልተለየበት እና አመልካች ቤትና ይዞታ ገዛሁ በማለት እየተከራከረ ዉሉ ፈርሶ የገነባዉን ቤት አፍርሶ ይልቀቅ ተብሎ የተወሰነበትን አግባብ ከፍ/ብ/ሕግ ቁጥር 1731 እና 1179 አንጻር ለማጣራት ጉዳዩ ለሰበር ሰሚ ቻሎት ያስቀርባል ብሎ ትእዛዝ በመስጠቱ ተጠሪ በቀን 02/06/2012 ዓ/ም የተፃፈ የአጭሩ የሚከተለውን መልስ አቅርቧል።

አመልካች በቦታው ላይ 360000.00 ወጭ እድርጌበታለሁ ይበል እንጂ የተሰዉ ቤት በሁለት ገጽ የድንጋይ ካብ ሲሆን በሁለት ገፅ ደግሞ ግድግዳ እና በ25 ቆርቆሮ ሁለት ቢያጅ ድንጋይ እና ግድግዳው የገጠር እንጨት ነው። ይህም በትክክል ቢገመት የወጣዉ ወጪ ከብር 6000-7000 ቢሆን ነዉ። ቦታዉ የገጠር መሬት ስለሆነ አይሸጥም አይለወጥም። ውላችን በ2000 ዓ/ም ፈርሶ ቤቱን የሰጠኝን ገንዘብ እራሴ በቦታው የስራሁትን ቤት እያከራየ እንዲወስድ ተስማምተን ገንዘቡን መዉሰዱን በወረዳ ፍርድ ቤት በምስክሮች ተረጋግጧል። ቤቱንም ከሁለት አመት በፊት ለቆ አስረክቦኛል። ግምት እንኳ መፈል ካለብኝ

የገጠር ቦታ ስለሆነ በሽማግሌዎች የተገመተውን ብር ውሰድ ብዬው ፈቃደኛ አይደለም። ስለዚህ የሥር ፍርድ ቤቶቻ የሰጡት ውሳኔ በአግባቡ ተብሎ አቤቱታዉ ዉድቅ እንዲደረግለት በመጠየቅ ተከራክራል። አመልካች በቀን 21/06/2012 ዓ/ም በተፃፈ የመልስ መልስ አቤቱታዉን በማጠናከር ተከራክራል።

ከዚህ በላይ የተመዘገበዉ የግራ ቀኝ ክርክርና በስር ፍርድ ቤቶች የተሰጡት ዉሳኔዎች ይዘት ሲሆንእኛም ሰበር አጣሪ ችሎት ጉዳዩ በሰበር ችሎት ያስቀርባል ብሎ ሊያዘዉ ጭብጥ አንጻር በክልሉ ፍርድ ቤቶች በተሰጠ ዉሳኔ መሰረታዊ የሕግ ስህተት መፈጸም አለመፈጸሙን ከግራ ቀኝ ክርክሩ ከስር ፍርድ ቤቶች ዉሳኔዎች ይዘት እና አግባብነት ካለዉ ሕግ ድንጋጌዎች ጋር በማገናዘብእንደሚከተዉ መርምረናል።

እንደመረመርነውም ግራ ቀኙን ያከራከረዉንና የዚህን ችሎት ውሳኔ የሚፈልገዉ ጭብጥ ተጠሪበአመልካች ላይ በመሰረተው ክስ የጠየቀዉ ዳኝነት ከአመልካች ጋር አዲስ በተመሰረተችዉ ማይ ተኽሊት ከተማ ዉስጥ ለመኖሪያ ተብሎ በ1994 ዓ/ም በተሰነጠዉ ቦታ ላይ የተሰራዉን አንድ ክፍል የመኖሪያ ቤትና ቦታ ለአመልካች በ1999 ዓ/ም ስለሸጥኩ መሬት መሸጥና መለወጥ ስለማይቻል ዉሉ ከመነሻዉ ፍርስ(void) ስለሆነ አመልካች በይዞታው ላይ የሰራውን ቤት አፍርሶ መሬቱን እንዲለቅልኝይወሰንልኝ በሚል የጠየቀዉን ዳኝነት በተመለከተ የተሰጠዉ ውሳኔ ነዉ። አመልካች ከስር ጀምሮየቤት ሽያጭ ዉሉ ባዶ መሬት ለመግዛት የተደረገ እንዲልሆን እና በቦታዉ ላይ ከፍተኛ ገንዘብአዉጥቼ ተጠሪ ሳይቃወመኝ ተጨማሪ 2 ክፍል ቤቶች ስለሰራሁ ውሉ ሊፈርስ እንደማይገባ በመግለጽ ተከራክሯል። የክልሉ ፍርድ ቤቶች በግራ ቀኝ መካከል የተደረገው የቤት ሽያጭ ዉል እዲፈርስ የወሰኑት ዉል የተደረገዉ በሕገ መንግስቱ የተከለከለዉን መሬት እንዲይሸጥ የተደነገገዉንክልከላ በመተላለፍ የተደረገ በመሆኑ የዉሉ ጉዳይ ሕገወጥ ነዉ በማለት እንደሆነ ተገንዝበናል።

እንደሚታወቀው በኢፌዲሪ ሕገ መንግስት እና በተመሳሳይ በትግራይ ክልል ሕገ መንግስት አንቀጽ 40/3 ስር የገጠርም ሆነ የከተማ መሬት ባለቤትነት መብት የመንግስትና የሕዝብ ብቻ በመሆኑመሬት የማይሸጥ የማይለወጥ የኢትዮጵያ ብሔሮች ብሔረሰቦችና ሕዝቦች የጋራ ንብረት መሆኑ በግልጽ ተደንግጓል። በዚህ መሰረት በገጠርም ሆነ በከተማ ባዶ መሬት በመሸጥ የሚፈጸም ዉል ሕገመንግስታዊ የሆነዉን መሬት አይሸጥም የሚለዉን ክልክላ የሚጥስ በመሆኑ የጸና ዉል እንዲኖር አስፈጊ ሁኔታ ተደርጎ በፍ/ብ/ሕግ ቁጥር 1678/ለ ስር የተደነገገዉን የዉሉን ጉዳይ ሕጋዊ የመሆንሁኔታ የማያሟላ ስለሚሆን በፍ/ብ/ሕግ/ቁጥር 1716 እና 1808/2 ስር በተደነገገው መሰረት ዉሉ የተደረገበት ጉዳይ ከሕግ ዉጭ ሰለሆነ ከመነሻዉ ዋጋ አልባ ዉል እንደሆነ የሚቆጠር ወይም ደግሞ ዉሉ ፈርሷል ተብሎ በፍርድ እንዲነገር ጥቅም አለኝ በሚል ሰዉ ተጠይ ቆ እንዲፈርስ ሊወሰን ይችላል።

በሌላ በኩል በኢ.ፌ.ዲ.ሪ. ሕገ መንግስትም ሆነ በተመሳሳይ በትግራይ ክልል ሕገ መንግስት አንቀጽ 40/7 ስር እንደተደነገገዉ ማንም ኢትዮጵያዊ በገጠሩም ወይም በገዝዙ ከመሬት ላይ ለሚገነባዉ ቋሚ ንብረት (የማይንቀሳቀስ ንብረት) ወይም ለሚያደርገዉ ቋሚ

መሻሻል ሙሉ መብቱ እንደሰጠዉና ይህ መብት የመሸጥ፣ የመለወጥ፣ የማዉረስ፣ የመሬት ተጠቃሚነቱ ሲቋረጥ ንብረቱን የማንሳት፣ ባለቤትነቱን ማዛወር ወይም የካሳ ክፍያ የመጠየቅ መብትን የሚያካትት እንደሆነ በግልጽ ተመልክቷል። ከሽያጭ ጋር በተያያዘ በሕገ መንግስቱ አንቀጽ 40/3 እና 40/7 ስር ከተደነገገዉ በግልጽ የምንረዳዉ የተከለከለዉ ተግባር የገጠርም ሆነ የከተማ ባዶ መሬት እንዲይሸጥ እንጂ ማንም ኢትዮጵያዊ በጉልበቱ ወይም በገንዘቡ በመሬት ላይ የገነባዉን ቋሚ ንብረት (ለምሳሌ ቤት) መሸጥ ወይም ባለቤትነቱን ማዛወር የተከለከለ ተግባር አይደለም። ምክንያቱም ማንኛውም ኢትዮጵያዊ በመሬት ላይ ጉልበቱን ወይም ካፒታሉን(ገንዘቡን) በማፍሰስ የሚገነባዉ የማይንቀሳቀስ ንብረት በኢፌዲሪ ሕገ መንግስት አንቀጽ 40 (1እና2) ስር በተደነገገዉ መሰረት ሕገ መንግስታዊ ጥበቃ የሚደረግለት የግል ንብረት በመሆኑ ነዉ።

በተያዘዉ ጉዳይ ተጠሪ ለአመልካች በሽያጭ ያስተላለፈዉ ባዶ መሬት ነዉ የሚል ክርክር በግራ ቀኙ አልቀረበም። የተሸጠዉ የከተማም ሆነ የገጠር ባዶ መሬት ስለመሆኑ የሚያሳይ ማስረጃም ቀርቧል በሚል በስር ፍርድ ቤቶች የተረጋገጠና በዉሳኔዎቻቸዉ ላይ የተገፅጸ ነገር የለም። ይልቁንም ተጠሪራሱ በክሱ ላይ የገለጻዉ ፍሬ ነገር የሚያሳየዉ በሺያጭ የተላለፈዉ ቤት አዲስ በተመሰረተችዉ ማይ ተኽሊት በተባለች ከተማ ተጠሪ መኖሪያ ቤት እንዲሰራበት በተሰጠዉ 10x15 ሜትር በሆነ ቦታ ላይ የሰራዉን አንድ ክፍል ቤት መሆኑን የሚያሳይ ነዉ። በወረዳ ፍርድ ቤት የተሰየሙት የግራ ቀኝ ምስክሮች ከዚህ የተለየ ነገር ስለመመስከራቸዉ አልተረጋገጠም። በፍሬ ነገር ደረጃ የተረጋገጠዉ ተጠሪ ለአመልካች በሽያጭ ያስተላለፈዉ የግል ንብረቱ የሆነውን ቤት እንጂ ባዶ ቦታ አለመሆኑ በተረጋገጠበት ሁኔታ እንዲሁም ማንም ኢትዮጵያዊ በመሬት ላይንብረቱን ወይም ካፒታሉን(ገንዘቡን) በማፍሰስ የሚገነባዉ የማይንቀሳቀስ ንብረት የግል ንብረቱ በወመሆኑ በሽያጭ ለማስተላለፍ የሚያስችል ሕገ መንግስታዊ ጥበቃ የተደረገለት መብት ያለዉ መሆኑ በፌዴራልም ሆነ የክልሉ ሕገ መንግስት አንቀጽ 40(1 ፣2 እና 7) ስር የተደነገገ በመሆኑ ተጠሪም ይህንኑ መብቱን በመጠቀም ለክርክሩ መነሻ የሆነዉን ቤት በሽያጭ ለአመልካች ማስተላለፉን ተገንዝበናል። በዚህ አግባብ ባዶ መሬት በሕጋዊ መንገድ በማግኘት በመሬቱ ላይ ቤት በመመስራት የሚደረግ የቤት ሽያጭ ውል ሕገ መንግስቱንም ሆነ ሌሎች ሕጎችን ይቃረናል የሚባልበት ሕጋዊ ምክንያት ባለመኖሩ በግራ ቀኝ መካከል የተደረገዉ የቤት ሽያጭ ዉል ጉዳይ ከህግ ዉጭ ነዉ ተብሎ እንዲፈርስ የሚወሰንበት የሕግ መሰረት የለም።

ሲጠቃለል የሽያጭ ዉሉ ላይ የተመለከተዉ የዉሉ ጉዳይ የከተማም ሆነ የገጠር ባዶ መሬት በሽያጭ ለማስተላለፍ የተደረገ ካልሆነ በስተቀር ማንም ኢትዮጵያ በመሬት ላይ በጉልበቱ ወይም በገንዘቡ የገነባዉን ቤት (የማይንቀሳቀስ የግል ንብረት) በሽያጭ ለማስተላለፍ የሚያስችል ሕገ መንግስታዊ ጥበቃ ያለዉ መብት በመሆኑ በመሬት ላይ የተገነባን ቤት ለመሸጥ የሚደረግ ዉል ጉዳይ ሕገወጥ ነዉ ሊባል የሚቻል አይደለም። ስለሆነም የክልሉ ፍርድ ቤቶች ለግራ ቀኝ ክርክር መነሻ የሆነዉን የቤት ሽያጭ ዉሉን ጉዳይ ሕገ መንግስቱን ስለሚቃረን ሕገ ወጥ ነዉ በማለት መወሰናቸዉም ሆነ በክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ የጽና የቤት ሽያጭ ዉል ነዉ በማለት ዉሉ ሕገ ወጥ ስለሆነ ዋጋ አልባ ነዉ ተብሎ በስር ፍርድ ቤቶች የተሰጠ ዉሳኔ የተፈጸመዉን ስህተት ማረም ሲገባዉ በአብላጫ ድምጽ ዉሳኔ የተሸዉ ቤት ቤት አዲስ በተመሰረተ ከተማ ዉስጠ እንደሚገኝ በተጠሪ ክስ ላይ በግልጽ እያለና ይህንን የሚያስተባብል ማስረጃ በተከራካሪ

ወገኖችም ሆነ በፍርድ ቤት ትእዛዝ ባልቀረበበት በገጠር የእርሻ መሬት ላይ ቤት ተሰርቶ ከሕግውጭ በሆነ አኳኋን የሽያጭ ውል እንደተፈጸመ በመቁጠር የቤት ሽያጭ ውሉ ጉዲይ ከሕግ ዉጭ ነዉ በማለት እንዲፈርስ መወሰኑ መሰረታዊ የሆነ የክርክር አመራርና የሕግ አተገባበር ስህተት የተፈጸመበት በመሆኑ ተከታዩን ዉሳኔ ሰጥተናል።

ዉሳኔ

1. የፀለምቲ ወረዳ ፍርድ ቤት ቡመ/ቁጥር 13079 ላይ በቀን 22/09/2011 ዓ/ም የሰጠዉ ውሳኔ፤ የሰሜን ምእራብ ዞን ከፍተኛ ፍርድ ቤት በመ/ቁጥር 12167 ላይ በቀን 07/10/2011 ዓ/ም የሰጠዉ ትእዛዝ እና የትግራይ ክልል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 117434 ላይ በቀን 21/01/2012 ዓ/ም የሰጠዉ ዉሳኔ በፍ/ብሥ/ስ/ሕግ ቁጥር 348/1 ተሸረዋል።

2 በግራ ቀኝ መካከል የተደረገው የቤት ሽያጭ ውል የጸና ነዉ በማለት ወስነናል። 3 ግራ ቀኝ በዚሁ ችሎት ያወጡትን ወጭ የየራሳቸውን እንዲችሉ ተወስኗል።

መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ ብለናል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የሰ/መ/ቁ.150408

ግንቦት 29 ቀን 2010 ዓ.ም

ዳኞች፦ አልማው ወሌ
መስጠፋ አህመድ
አብርሃ መሰለ
ፈይሳ ወርቁ
ጳውሎስ ኦርሺሶ

አመልካች፦ ወ/ሮ አመለወርቅ ፍቅሬ - ጠበቃ ለገሰ ማሞ -ቀረቡ

ተጠሪ፦ አቶ ተስፋሁን ታፈሰ -የቀረበ የለም

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል።

ፍርድ

ጉዳዩ የቀረበው አመልካች የወላይታ ሶዶ ከፍተኛ ፍርድ ቤት እና የደ/ብ/ብ/ሕ/ክ/መ/ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የሰጡት ውሳኔ መሰረታዊ የህግ ስህተት ያለበት ስለሆነ በሰበር ታይቶ እንዲታረምልኝ በማለት ያቀረቡትን የሰበር አቤቱታ አጣርቶ ለመወሰን ነው። ክርክሩ በመጀመሪያ የታየው በወላይታ ሶዶ ከፍተኛ ፍርድ ቤት ነው። አመልካች በተጠሪ ላይ ያቀረቡት ክስ ከተጠሪ ጋር በቀን 3/6/2006 ዓ.ም በተፈጸመ ጋብቻ በቁጥር 240/270//2006 በቀን 12/06/2006 ዓ.ም በብሔራዊ የጋብቻ ስነስርዓት መሰረት ከሶዶ ከተማ ማዘጋጃ ቤት የጋብቻ ምስክር ወረቀት ወስደው ጋብቻ ከፈጸሙ በኋላ እንደማንኛውም ባለትዳር በአንድ ጣራ ስር መኖር ሳይጀምሩ ወደ አሜሪካን አገር መሄዳቸው በመግለጽ ለአለፉት አራት ዓመታት ከተጠሪው ጋር ምንም ዓይነት ግንኙነት ሳይኖር በተለያየ ቦታ የሚኖሩ መሆናቸውና ልጆች ሆነ የጋራ ሀብት ያላፈሩ በመሆኑ በመካከላቸው ያለው ጋብቻ ፈርሶ የፍቺ ውሳኔ እንዲወሰንላቸው ተጠሪው ላይ ክስ አቅርበዋል። ተጠሪም ለቀረበው ክስ የሰጡት መልስ በአመልካችና በተጠሪ መካከል በህግ የፀና ጋብቻ ስለመኖሩ ሳይክዱ በጋብቻ ውስጥ መኖራችን ጥያቄ ማንሳት የሚችሉት ተጋቢዎች ወይም አንዳቸው እንጂ ሌላ ሰው የሚያነሳው ሀሳብ የህግ ድጋፍ የሌለው በመሆኑ ስለተጋቢዎ ሆኖ ጠበቃ የፍቺ ጥያቄ ማቅረብ የማይችል ስለሆነ ክሱ ወድቅ እንዲደረግ ይህ መቃወሚያ የሚታለፍ ከሆነ በህጉ መሰረት የሞራል

ካሳ ተወስኖ የወጪና ኪሳራ የመጠየቅ መብት ተጠብቆ እንዲወሰንላቸው የመጀመሪያ ደረጃ መቃወሚያና አማራጭ መከላከያ መልሳቸው በማቅረብ ተከራክረዋል።

ጉዳዩን በመጀመሪያ የተመለከተው ፍርድ ቤትም በቀረበው መቃወሚያ የግራ ቀኙን ክርክር ከሰማ በኋላ በቀን 4/3/2010 ዓ.ም በዋለው ችሎት የአመልካች ወንድም አስቀድሞ የተጻፈ

ሕጋዊ ውክልና ሰነድ ሳይኖር አመልካችን ወክሎ የአመልካች ጋብቻ እንዲፈርስ ጠበቃን የመወከል መብት በህጉ አልተሰጠውም፤ ስለሆነም በተጠሪ የቀረበው መቃወሚያ ተገቢ ሁኖ ስለአገኘን በፍ/ብ/ስ/ስ/ህ/ቁ 33/2/ እና 244/መ/ መሰረት የአመልካች ተወካይ ነኝ ባይ ክሱን ለማቅረብ መብት የለውም ሲል ብይን ሰጥቷል። ይህንን ብይን በመቃወም የአመልካች ተወካይ ይግባኙቸውን ለክልሉ ጠቅላይ ፍርድ ቤት

ይግባኝ ሰሚ ችሎት ያቀረቡ ቢሆንም ተቀባይነት ሳያገኝ በፍ/ብ/ስ/ህ/ቁ.337 መሰረት ሰርዞታል።

የሰበር አቤቱታው የቀረበውም ይህንኑ የስር ፍርድ ቤቶች ውሳኔ በመቃወም ለማስለወጥ ነው። አመልካች ታህሳስ 4 ቀን 2010 ዓ.ም በፃፉት አቤቱታ የስር ፍርድ ቤቶች ውሳኔ መሰረታዊ የሆነ የሕግ ስሕተት ተፈጽሟል የሚሉባቸውን ምክንያቶችን ዘርዝረው አቅርበዋል። የአመልካች የሰበር አቤቱታ ተመርምሮ በዚህ ጉዳይ አመልካች ለወንድማቸው የሰጡት ውክልና በውጭ ጉዳይ ሚኒስቴር ተረጋግጦ ቀርቦ ባለበት የተሟላ ውክልና አልቀረበም በሚል ውድቅ መደረጉ ያላግባብ ነው በማለት በአመልካች የቀረበው አቤቱታ ከውክልና አንፃር ለመጣራት ለሰበር ችሎት እንዲቀርብ በመደረጉ ተጠሪ መልስ እንዲሰጡበት በታዘዙት መሰረት የካቲት 21 ቀን 2010 ዓ.ም የተፃፈ መልስ አቅርበዋል። አመልካች ጠበቃ በተጠሪ የቀረበው መልስ ላይ የመልስ መልስ መስጠት የሚይፈልጉ መሆኑን በመግለጻቸው ምክንያት የቀረበ የመልስ መልስ የለም።

የጉዳዩ አመጣጥ እና የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን እኛም አቤቱታ የቀረበበት ውሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት መሆን አለመሆኑን ለክርክሩ ከተያዘው ጭብጥ አንፃር መርምረናል። በመሰረቱ በመርህ ደረጃ የግራ ቀኙ ጋብቻ በፍቺ እንዲፈርስ መጠየቅ የሚገባው ከባልና ሚስቱ አንደኛው ተጋቢ ወይም ሁለቱም ቢሆንም በህግ አግባብ ተቀባይነት ያለው ውክልና ማስረጃ ጋር የሚቀርብ የፍቺ ጥያቄ በህግ የተከለከለ አይደለም። ከባልና ሚስት አንዳቸው የፍቺ ጥያቄ እስካቀረቡ ድረስ ፍቺው ሊከለከል እንደማይቻልና ፍቺ ሊወሰን አይገባም የሚለውን ነጥብ መሰረት በማድረግ ብቻ የይግባኝ አቤቱታ ማቅረብ እንደማይቻል በተሻሻለው ፌዴራል ቤተሰብ ህግ አዋጅ ቁጥር 213/1992 አንቀጽ 112 ሆነ በደ/ብ/ብ/ሕ/ክ/መ/ የቤተሰብ ህግ አዋጅ ቁጥር 75/1996 አንቀጽ 127 ድንጋጌዎች መገንዘብ ይቻላል። በሌላ በኩል ፍርድ ቤት የባልና ሚስትን ክርክር በሚያይበት ጊዜ እንደነገሩ ሁኔታ አስፈላጊ ሁኖ ካገኘው ባልና ሚስቱን በአንድነት ወይም በተናጠል ሲያነጋግር ወይም ጉዳዩን ሲመረምርና ምስክር ሲሰማ በገዛ ችሎት ያስችላል የሚለውን የቤተሰብ ህጉ ድንጋጌአንቀጽ 110/ በመጥቀስ ጋብቻና ጋብቻ ፍቺ በውክልና ሊቀርብ አይችልም በማለት በተጠሪ የሚቀርበው ክርክር ተቀባይነት የለውም። ምክንያቱም ፍርድ ቤቱ ተጋቢዎችን የሚያነጋግራቸው አስፈላጊ ሁኖ ሲገኝ እንጂ የግድ ማናጋገር እንዳለበት የሚደነግግ ባለመሆኑ፤ ጋብቻ በእንደራሴ መፈጸም በመርህ ደረጃ የማይቻል ቢሆንም ከተጋቢዎች አንደኛው ጋብቻው ለመፈጸም ፈቃዱን በማያሻማ ሁኔታ በመግለጽ በግንባር ለመገኘት የማያስችለው ከባድ ምክንያት

ሲያጋጥመው ጉዳዩ ለፍትህ ሚኒስትሩ ቀርቦ ሲረጋገጥ ጋብቻውን በእንደራሴ አማካኝነት መፈጸም እንደሚቻል በግልጽ በተሻሻለው ፌዴራል ቤተሰብ ህግ አንቀጽ 12 ተደንግጓል።

ጋብቻ ለመፈጸም በልዩ ሁኔታ በውክልና እንደሚቻል ህጉ እየፈቀደ የፍቺ ጥያቄ በውክልና ሊቀርብ አይችልም በማለት በተጠሪ በኩል የሚቀርበው ክርክር ተቀባይነት ያለው ሁኖ አልተገኘም። እዚህ ሊታይ የሚገባው ነጥብ የውክልናው ማስረጃ ህጋዊነት ነው። ጉዳዩ በስር ፍርድ ቤት የአመልካቹ ወኪል ሆነው የቀረቡት ሰው በፍርድ ቤት በሚደረግ ክርክር በተሟጋችነት ሊቆሙ ስለሚችሉ ሰዎች በአጉ የተመለከተውን መስፈርት የሚያሟሉ ናቸው ወይስ አይደሉም? የሚለው ጥያቄ ነው።

በመሰረቱ በማናቸውም ፍርድ ቤት አቤቱታ ለማቅረብ ወይም ለመከራከር ባለጉዳዩ ራሱ እንዲቀርብ የሚያስገድድ ሕግ ወይም በፍርድ ቤቱ የተሰጠ የተለየ ትዕዛዝ የሌለ በሆነ ጊዜ ባለጉዳዩ ራሱ ለመቅረብ የማይችል ወይም የማይፈቅድ ሲሆን ነገሩን ለማስረዳት፣ ለመከራከር፣ለሚጠየቀው ሁሉ በቂ መልስ ለመስጠት የሚችል ሰው በዋናው ባለጉዳይ ተተክቶ በነገረ ፈጅነት፣በወኪልነት፣በጠበቃነት እንዲከራከር ለማድረግ እንደሚችል በፍ.ስ.ሥ.ሕ.ቁ.57 ተደንግጎ የሚገኝ ሲሆን በዚሁ ሕግ በቁጥር 60፣61 እና 62 ስር የተመለከቱት ልዩ ሁኔታዎች እንደተጠበቁ ሆነው አበል ሳይሰጣቸው ስለሌላ ሰው ሆኖ በወኪልነት ወይም በነገረ ፈጅነት አቤቱታ ለማቅረብ፣ ለመከራከር፣ ለመሟገት እና ነገሩን ለመከታተል የሚችሉት የዋናው ባለጉዳይ ባለቤት፣ወንድም፣እህት፣ልጅ፣አባት ወይም አያት ስለመሆናቸው በቁጥር 58(1) ስር ተመልክቷል። በተያዘው ጉዳይ ስለአመልካቹ በመሆን ውክልና የተሰጣቸው የአመልካች ወንድም በመሆናቸው ከዋናው ባለጉዳይ ጋር በቁጥር 58(1) ከተመለከተው የዝምድና ግንኙነት መካከል አንዱን የሚያሟሉ ስለመሆኑ አከራካሪ ጉዳይ አይደለም። ነገር ግን የውክልና ሰነድ ከውጭ ሀገር ተዘጋጅቶ የተሰጠ በመሆኑ ከሰነዶች ማረጋገጥና ምዝገባ አዋጅ ቁጥር 922/2008 አንጻር መመርመሩ ተገቢ ሁኖ አግኝተነዋል። ከኢትዮጵያ ውጭ የተዘጋጁ ሰነዶች ትክክለኝነታቸው በሰነዶች ማረጋገጥና ምዝገባ አዋጅ ቁጥር 922/2008 አንቀጽ 1፤6፤23 እና 24 ድንጋጌዎች መሰረት በኢፌዴሪ ውጭ ጉዳይ ሚንስትር እና በኢፌዴሪ የፍትህ ሚንስተር የሰነዶች ማረጋገጥና ምዝገባ ጽ/ቤት መረጋገጥ እንዳለበት ተደንግጓል።

አመልካች ለወንድማቸው የሰጡት ውክልና ስልጣን በኢፌዴሪ ኢምባሲ ዋሽንግተን በቁጥር 05155/09 በቀን 14/07/2009 ዓ.ም የፌርማና ማህተም ትክክለኛነት ተረጋግጦ የተሰጣቸውን ውክልና የኢፌዴሪ ውጭ ጉዳይ ሚንስተር በቁጥር 28456/10 በቀን 22/01/2010 ዓ.ም የፌርማ ማህተሙ ህጋዊነት ከተረጋገጠ በኋላ የኢፌዴሪ የሰነዶች ማረጋገጫና ምዝገባ ጽ/ቤት በቁጥር ቅጽ/2380/10/2010 በቀን 22/01/2010 ዓ.ም ትክክለኛነቱ የተረጋገጠና የተመዘገበ የውክልና ማስረጃ መሆኑን በተጠሪ በኩል ማስተባበያ ያልቀረበበት መሆኑ ከክርክሩ ሂደት ተገንዝበናል። የተሰጠው ውክልና ማስረጃ ይዘትም በፍ/ብ/ስ/ስ/ህ/ቁ.58 እና በፍ/ብ/ህ/ቁ.2199 አመልካችን ፍቺን ጨምሮ በማናቸውም ጉዳዮች ወክሎ ለመከራከርም ሆነ ሌላ የህግ ባለሙያ ለመወከል እንደሚችሉ በውክልና ሰነድ ላይ በግልጽ የተመለከተ መሆኑን ተገንዝበናል። በመሆኑም ተጠሪ የውክልና ማስረጃው ፍትህ ሚንስተርና ውጭ ጉዳይ ሚንስተር ቀርቦ ማህተም ተደርጎ በባለስልጣን ፊርማ ተረጋግጦ የቀረበ ባለመሆኑ ሕጋዊነት የጎደለው ነው በማለት ያቀረቡት ክርክር ተቀባይነት ያለው ሁኖ አልተገኘም። በአጠቃላይ ከላይ በዝርዝር እንደተገለጸው የቤተሰብ ህጉ የጋብቻ ፍቺ ክስ በወኪል ማቅረብ የማይከልክል ሁኖ እያለ እንዲሁም አመልካች ለወንድማቸው የሰጡት ውክልና ማስረጃ የህጉን መስፈርት የሚያሟላ ሁኖ ተወካዩ በራስቸው ወይም ጠበቃ

በመወከል ክስ ለማቅረብና ለመከራከር የሚያስችላቸው ህጋዊ ውክልና በመያዝ ያቀረቡት ክስ ውድቅ በማድረግ የስር ፍርድ ቤቶች የሰጡት ብይንና ትእዛዝ መሰረታዊ የህግ ስህተት ያለበት ሁኖ ስለተገኘ ተከታዩን ውሳኔ ሰጥተናል።

ውሳኔ

1. በወላይታ ሶዶ አከፍተኛ ፍርድ ቤት በመ/ቁ. 38955 ህዳር 4 ቀን 2010 ዓ.ም ተሰጥቶ በደ/ብ/ብ/ሕ/ክ/መ/ ጠቅላይ ፍርድ ቤት ወላይታ ምድብ ችሎት በመ/ቁ. 21387 ህዳር 19 ቀን 2010 ዓ.ም በትእዛዝ ያጸናው ብይን በፍ/ብ/ሥ/ሥ/ሕ/ ቁጥር 348(1) መሰረት ተሽሯል።

2 የወላይታ ሶዶ አከፍተኛ ፍርድ ቤት የተዘጋውን መዝገብ በማንቀሳቀስ ጉዳዩን ተመልክቶ ተገቢውን እንዲወስን ጉዳዩን በፍ/ብ/ሥ/ሥ/ህ/ቁ 341(1) መሰረት መልሰናል። ይፃፍ።

3. በዚህ ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ ብለናል።

መዝገቡ ተዘግቷል፤ወደ መዝገብ ቤት ይመለስ ብለናል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።