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Peer Reviewed Articles:

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Legisprudential Evaluation of Ethiopian Criminal Law-Making

Simeneh Kiros Assefa ♣

Abstract

The state adopts criminal rules and punishment in order to achieve various state ends. There is very little agreement regarding the content of 'good criminal law'. However, there is a general agreement regarding 'good' criminal lawmaking process. This article argues that the lawmaking process may be used to evaluate the legitimacy of the criminalisation process. Thus, it discusses pre-legislation, legislation and post-legislation phase duties of the legislature and finds that these processes were not complied with in various Ethiopian laws that contain penal provisions.

Key terms:

Legisprudence · Criminal law · Criminal lawmaking · Law and politics · Legislation rules

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Introduction

The state has various means at its disposal to achieve its social, economic and political objectives. Legislative intervention is one of the instruments of last resort to achieve these ends. This power is expected to be exercised in a manner that reduces or avoids undue discretion and arbitrary acts that disregard legitimate, rational and proper procedural law-making processes and substantive content. Thus, in as much as the legislature has the authority to make law, it also has the duty in making the law –to make laws that are

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not only formally valid but also coherent and that make sense in the real world.[1] At the pre-legislative stage, the legislature investigates the social circumstances requiring legislative intervention. Because the criminal law implicates fundamental rights, the lawmaker first evaluates the available alternative measures, and it chooses the least intrusive method. The lawmaker also makes legislative impact assessment taking the existing and future circumstances into account.

To make an efficacious law, the lawmaker deliberates both in Committees and in the House; and the decision is made based on the available data. The initial stage of the validity of a norm relates to its formal validity; continuous validity of such norm may be maintained if the norm maintains its goal rationality. A norm may be invalid through time or as new realities and further information emerge. Therefore, continuous evaluation of such a norm is the post-legislation duty of the lawmaker. If there is such continuous assessment of the legislation, resort to judicial review would be less attractive because the court would defer to the decision of the lawmaker.

This article examines whether such legisprudential requirements set out in the law were met in making the various criminal rules. It examines lawmaking rules, draft bills containing penal provisions and the respective explanatory memoranda, minutes of Committee hearings, reports and recommendations of the respective Committees and the final legislation containing penal rule. After such examination, it finds that those legislation containing penal provisions and reviewed in this study do not meet several of the legislation requirements set out in the law.

The first section highlights the rules of lawmaking and the lawmaking process that is governed by law so that the lawmaker can make rational laws. Section 2 briefly discusses the relation between law and politics that can vary depending on the theory of law one adopts. Section 3 highlights

[1] Luc J Wintgens (2002), 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing) 26 ff; Luc J Wintgens, 'The Rational Legislation Revisited: Bounded Rationality and Legisprudence' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) at 3, 5 ff; Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) at 18-22; Robert Alexy (2002, *The Argument from Injustice: A Reply to Legal Positivism* (Bonnie L Paulson and Stanley L Paulson tr, Clarendon Press) at 85-88; Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, 2005) at 211-214. Also see Lon L Fuller (1969), *The Morality of Law* (revised edn, Yale UP).

criminal lawmaking power and the federal legislation. Section 4 discusses pre-legislation matters, such as bill initiation and pre-legislation deliberations, the core responsibilities of the lawmaker including the obligation to investigate into the facts of the failed social interaction or other factors that necessitate legislation. Sections 5 to 7 address issues relating to the gaps in the background study of various specific criminal legislation, the need for legislative impact assessment (including proactive projections relating to outcomes and impact), and the duty to maintain coherence of the law both internally and externally. Section 8 highlights the duty to deliberate and to give reason, and Section 9 deals with the post-legislation duty of the lawmaker relating to continuous evaluation.

1. General Background

The principal duties of the legislature is enacting laws and supervising the executive to ensure that the laws are properly implemented.[2] The three core functions of the legislature, i.e. representation, lawmaking and oversight are inter-related. In enacting laws, the lawmaker is bound by legislation rules, such as *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Constitution') and its lawmaking rules. The Constitution provides for a formal and material source of legislative power.[3] As such, the federal lawmaker makes laws on matters that are reserved for the Federal Government and it is specifically authorised to adopt 'a penal code'.

The current rules of lawmaking are the *Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No 470/2005*,[4] The *House of Peoples' Representatives Rules of Procedure and Members' Code*

[2] *Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No 470/2005*, arts 4(1), (2), 6, 7, 19(1), (2); *House of Peoples' Representatives Rules of Procedure and Members' Code of Conduct Regulations No 6/2015*, arts 3, 49 ff, 73 ff.

[3] For instance, the provisions of *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Const'), art 51 provide for the powers reserved for the Federal Government while art 55 provides for areas of legislation for the HoPR.

[4] The word 'amendment' in the title of the statute gives the impression that there are other already existing rules that are still in force; but that is not the case. *The House of Peoples' Representatives Legislative Procedure, Committees Structure, and Working Proclamation No 271/2002* is repealed. *Proc No 470/2005,* supra note 2, art 40(1).

of Conduct Regulations No 6/2015. The other and most important rule is the *Council of Ministers Working Directive 1996 EC* (in Amharic, 'CM Working Directive') governing policy and bill initiation and adoption procedure in the Council of Ministers. A Legislative Drafting Manual was also drafted in late 2010 EC.[5]

Complying with the requirements of these rules is the internal view of the legislature. Some have reservations about the legalistic view of such law.[6] As is evident from the readings of those rules and the working of the lawmaker, the latter is adopting laws not for the law's good but as a means to achieve certain social, economic and political ends.[7] Because the lawmaking process is also guided by the principles in other disciplines the law is meant to address, those principles are used for the evaluation of the substantive validity of the law[8] which constitute 'hermeneutic view of the legislature'.[9]

The nature of the lawmaking process defines the content of the outcome legislation. Even though there could not be disagreement that the lawmaker should adopt 'good law', the content of such 'good law' is a point where there is very little ideological and theory-neutral agreement. Thus, the procedure helps the lawmaker to come up with a reasonably agreeable result.[10] Those processes also include taking into account important interests in a fair and participatory manner. The process fairly guarantees the quality of the outcome.

A. Daniel Oliver-Lalana argues that it is possible to make good normative judgments only after a proper debate, and this argument is based on five assumptions: (i) Collective normative decisions require 'good reason' which could emerge only from an argumentation process; (ii) As legitimacy grows slowly, rational lawmaking is impossible without argumentation; (iii) There is a strong connection between the quality of law and its reasons; (iv) The perspectives of those who participate may be incorporated through argumentation; and (v) The deliberations give us a vantage point of the

[5] *Draft Legislative Drafting Manual 2010 EC* (in Amharic).
[6] Wintgens 'Legislation as an Object of Study' *supra* note 1, at 18 ff.
[7] See the national policy principles and objectives in FDRE Const, arts 85 – 92. 'Brief Explanatory Memorandum to the Draft Constitution Certified by Council of Representatives 28 October 1994' (in Amharic) at 123 – 24.
[8] Wintgens 'Legislation as an Object of Study' *supra* note 1, 31.
[9] Id., at 29 ff.
[10] Jeremy Waldron (2006), 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitution State* (Cambridge UP).

justifications of the legislation.[11] However, the process needs to be complied with for its own sake, which Robert Summers refers to as 'process value'.[12] This is rather what may be referred to as the 'good law' making process.[13]

2. The Law and Politics Nexus

The practice of lawyers and the study of legal theorists very much takes on the positive law as a paradigm.[14] This engendered a 'strong legalism' view of the law.[15] The positivist distinction between law and non-legal matters appears to have dominated the internal view of lawyers which hold up for such tight distinction between the two disciplines. Some even consign criminalisation to the realm of politics as 'not subject to a rational discussion'.[16]

However, the two disciplines are not as separate as they appear to be. Mauro Zamboni opines that politics is the social element and law is the technical element.[17] Even Kelsen holds that power and law are two sides of a coin.[18] The institutional thought of positivism sees the law as an instrument

[11] A Daniel Oliver-Lalana 'Rational Lawmaking and Legislative Reasoning in Parliamentary Debates' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) at 136 – 38.

[12] See generally, Robert S Summers (1974), 'Evaluating and Improving Legal Process: A Plea for Process-Value' 60 *Cornell LR* 1; Robert S Summers (2006), *Form and Function in a Legal System: A General Study* (Cambridge UP) at 31, 45, 66- -72, 116-118, 124 ff.

[13] Wintgens 'Legisprudence as a New Theory' *supra* note 1, at 22.

[14] Wintgens 'Legislation as an Object of Study' *supra* note 1, at 14.

[15] Ibid 19-24; Wintgens 'Legisprudence as a New Theory' *supra* note 1, at 5-9; Mauro Zamboni (2008), *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer). Also see Alicja Ornowska (2010), 'Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe' in Joanna Jemielniak and Prezmyslaw Miklaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer) at 257-271.

[16] Nina Persak (2007), *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer) at 5, 23; Luc J Wintgens (2002), 'Rationality in Legislation – Legal Theory as Legisprudence: An Introduction' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing) at 2; Wintgens 'Legislation as an Object of Study' *supra* note 1, 30; Oliver-Lalana *supra* note 11, at 135, 138, 139; Wintgens 'Legisprudence as a New Theory' *supra* note 1, at 6 – 7.

[17] Zamboni, *supra* note 15, 1.

[18] Kelsen, *Pure Theory of Law*, *supra* note 1, at 284-290; La Torre describes the relationship between law and power (state) as the relation between 'chicken-and-egg'.

which shows a significant overlap between law and politics.[19] Zamboni examines such relation on three levels, and depending on the degree of the relationship, he developed three models.

The *static* aspect is 'the law in relation to politics'[20] while the *dynamic* aspect is 'how the lawmaking relates to the political order'.[21] The third is the *epistemological* aspect, 'the degree of the relation of legal discipline to the political material'.[22] Zamboni observed that the legal theorists' argument range from the politicisation of law, where the state uses the law as part of the 'political machinery'[23] to the specialisation of law, where using principles and legal doctrines, such as the principle of legality and the rule of law, the law puts a limit to the power of the state.[24] Within this range, he identified three models of the relationship between the two disciplines. The *autonomous model,* which includes such schools as positivism, makes a clear distinction between law and politics at all three levels.[25] The *embedded model,* which includes schools, such as law and economics, and critical legal studies, considers the 'law is embedded in politics'.[26] The third model, the *intersection model*, including the realist school, considers 'law and politics are intersecting phenomena'.[27]

The general observation is that there is a strong relationship between law and politics. It is stating the obvious that the law can never be as 'pure' as traditional positivists would want it to be. It is influenced by other disciplines, such as economics and sociology, and the law is meant to address those social and economic issues.[28] From this perspective, law is an instrument to achieve those ends. In certain instances, even judges take

Massimo La Torre (2010), *Law as Institution* (Springer) at 4.

[19] La Torre, *supra* note 18, at 3-7, 159-165.

[20] Zamboni, *supra* note 15, at 1, 7 – 8.

[21] Id., at 2, 7 – 8; Kelsen, *Pure Theory of Law*, *supra* note 1, at 193-205.

[22] Zamboni, *supra* note 15, at 2, 7-8.

[23] Id., at 3, 7.

[24] Ibid.

[25] Id., at 2. Even in terms of interpretation of the law, positivists are guided by the exegetic method. However, in real life, the court is inevitably guided by hermeneutic interpretation. Simeneh Kiros Assefa (2017), 'Methods and Manners of Interpretation of Criminal Norms' 11 *Mizan LR* 88, 111. Also see Ornowska, *supra* note 15; Wintgens 'Legisprudence as a New Theory', *supra* note 1.

[26] Zamboni, *supra* note 15, at 2.

[27] Ibid.

[28] Wintgens 'Legislation as an Object of Study', *supra* note 1, at 37; Wintgens 'Legisprudence as a New Theory', *supra* note 1, at 19-22.

political material into consideration in the interpretation of positive norms.[29] It is a matter of fact that the nature of criminal law reflects the political realities; thus, in a liberal political culture, often, a liberal criminal law could be adopted.[30]

Likewise, in authoritarian regimes, authoritarian criminal law is adopted.[31] However, in as much as the politics appear to be dominating at the dynamic level, which is the lawmaking process, there is also an aspect of specialisation that helps regulate the government based on such law, as they cannot be easily manipulated by the political process.[32] Therefore, when the lawmaker adopts a policy as a prelude to legislation, the lawyers, drafting the bill, are guided by such *super* principles as rule of law and constitutionalism, or principle of legality, the prohibition of excess, and similar other doctrines.[33]

The formal validity of the law is relevant only for the coming into force of a certain norm; however, its continued existence is justified by its coherence with reality.[34] The rule must be relevant in the real world and must continue to conform to the facts it is meant to address.

[29] Ornowska, *supra* note 15, at 260, 267-268.

[30] Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2019), 'Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power', 31 *J Eth L* (forthcoming); Samuel Rodriguez Ferrandez 'Legislative Evaluation in Spain: Its Necessary Application in the Approval of Criminal Law Reform' in Adan Nieto Martin and de Marta Munoz de Morales Romero (eds), *Towards a Rational Legislative Evaluation in Criminal Law* (Springer 2016).

[31] Simeneh and Cherinet 'Governing Using Criminal Law', *supra* note 30.

[32] Zamboni, *supra* note 15, at 134-136.

[33] Humberto Ávila (2007), *Theory of Legal Principles* (Springer) 96-102; *Council of Ministers Working Directive 1996 EC* (in Amharic, 'CM Working Directive'), Annex 1 'Directive on manner of preparation of documents to be submitted to the Council of Ministers', art 8.; Guideline Circular on the Preparation and Form of Draft Laws to be submitted to Council of Ministers (dated Tikimt 27, 2011 EC).

[34] Kelsen argues that validity is 'formal' and effectiveness is 'substantive'; thus, 'effectiveness is condition of validity'. Kelsen, *Pure Theory of Law*, *supra* note 1, at 10-11, 209-213; Hans Kelsen (1949), *General Theory of Law and State* (Anders Wedberg tr, Cambridge UP) at 121; Alexy describes is as 'social efficacy'. Alexy, *supra* note 1, at 13-19; Wintgens 'Legisprudence as a New Theory', *supra* note 1, at 13 ff.

3. The Criminal Lawmaking Power and Federal Legislation

3.1 The criminal lawmaking power

The pre-legislative phase first relates to the power and responsibilities of the government regarding lawmaking. The powers of the Federal Government are listed under article 51 of the FDRE Constitution. The rest of the powers are given to the regional states. Based on this allocation of power, the lawmaking power of the House of Peoples' Representatives (the HoPR) is provided for under article 55. The House is expressly vested with the power to 'enact a penal code' which Hans Kelsen would call this immediate justification for the existence of such law.[35] This is provided for under article 55(5).

The proper reading of this provision entrusts the House with the power to adopt a criminal law, but its authority springs from the provisions of FDRE Constitution, article 55(5), and it shall enact such criminal law in a code form. Should it find it necessary to criminalise further conducts, it may do so by amending such code. A constitutional power of a government cannot spring from two different constitutional provisions, based on the nature of the constitutional economy of words.

However, article 55(1) of the FDRE Constitution is considered a catch-all basket to be invoked whether there is a provision authorising particular legislation or not.[36] Several special penal legislation and administrative regulatory legislation containing penal provisions were adopted invoking the provisions of article 55(1). They include: the *Anti-Terrorism Proclamation No 652/2009*, *Banking Business Proclamation No 592/2008*, *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005*, and *Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation No 657/2009*. Even when there is specific provision authorising a particular type of legislation, article 55(1) is invoked as a justification for the adoption of such legislation. Thus, while the provisions of article 55(11) authorise the House to legislate on tax matters, *Value Added Tax Proclamation No 285/2002*, *Income Tax Proclamation No 286/2002* and the *Stamp Duty Proclamation No 110/1998* were adopted invoking the provisions of articles 55(1) and 55(11). Likewise, *Corruption Crimes Proclamation No 881/2015* invoked article 55(1) and (5).

[35] Kelsen, *Pure Theory of Law*, *supra* note 1, at 221 ff.

[36] FDRE Const, art 55(1) provides that 'The House of Peoples' Representatives shall have the power to legislative in all matters assigned by this Constitution to the Federal jurisdiction'.

The provisions of article 51 deal with public administrative matters vested on the Federal Government. Thus, article 55(5) authorising the HoPR to adopt a penal code is not, ideally, an unlimited power, but limited by its purpose as provided for under article 51. The provisions of article 55(1) should be understood to helping the Federal Government discharge its obligations and achieve its objectives as provided for under article 51. Therefore, article 55(1) does not authorise the adoption of penal provisions in every administrative bill. Even *Corruption Crimes Proclamation 881/2015* could only be justified by article 55(5) as an amendment to the Criminal Code.

3.2 The duty to declare criminal norms to the public

The principle of legality requires that the law be 'declared'. In defining the legislative power of the HoPR, the Constitution provides that the HoPR may adopt a penal code.[37] Such code is adopted in the form of a proclamations and is published in the official Negarit Gazeta. Article 2(2) of the *Federal Negarit Gazeta Establishment Proclamation No 3/1995*, provides that '[a]ll laws of the Federal Government shall be published in the Federal Negarit Gazeta'. Even when a breach is said to be committed against 'legislation issued by an authorised public organ', it must be on that is 'duly published in the Federal Negarit Gazeta'.[38] This is not a definition of what law is in the country, but how the criminal law should be published as notice to the public, short of which it does not constitute a criminal norm.

3.3 Federal legislation rules

The principal legislative rule is found in the Constitution. Article 55 provides for the lawmaking power of the HoPR, and article 55(5) specifically governs the criminal lawmaking power of the House. The provisions of article 77(1) provide that the Council of Ministers may initiate bills on matters that fall under the jurisdiction of the Federal Government.[39] These provisions are jurisdictional matters; and, their implementation is governed by subsidiary rules, such as, *Proclamation No 470/2005*[40] and

[37] FDRE Const, art 55(5).

[38] Crim C, art 343(1). Also see Jean Graven 'The Penal Code of the Empire of Ethiopia' (1964) 1 J Eth L 267, 287.

[39] FDRE Const, art 51 lists those powers that fall under the jurisdiction of the Federal Government and art 55 provide for the lawmaking power on those subjects.

[40] The earlier legislation rules include, *House of Peoples' Representatives Legislative Procedure Proclamation No 14/1995*, *House of Peoples' Representatives Legislative Procedure (Amendment) Proclamation No 33/1995*, and *Proc No 271/2002*, *supra*

Regulations No 6/2015 adopted by virtue of article 59 of the FDRE Constitution. This includes the Council of Ministers Working Directive. It governs the initiation of bills and adoption procedure in the Council of Ministers.[41]

As the political system is dominated by the executive,[42] the Council of Ministers is the most important government organ in the bill initiation phase of primary legislation and the issuance of subsidiary legislation (regulations and directives). The Council of Ministers Working Directive is thus the most influential legislation rule. This assertion is supported by two facts. First, the principal entity empowered to initiate bills is the Government.[43] However, 'the House of Federation (the HoF), the Speaker, Federal Supreme Court, Committees of the House, Members of the House, [and] other governmental institutions directly accountable to the House' are granted the power to initiate bill.[44] This is the case since 2002.[45]

Likewise, the Council of Ministers Working Directive authorises all government agencies to initiate policies and bills in their area of competence.[46] However, none of those legislation that are discussed in this article (with regard to Ethiopian criminal law-making) is initiated by the House or its members. The Federal Government agencies (Council of Ministers, in particular) are the most important source of legislation and, *de facto*, nearly the sole source of bills.

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note 4. The discussion is made based on the applicable legislation rule at the time of the adoption of a particular legislation. While the CM Working Directive, *supra* note 33, stood fast for so long, the HoPR rules of lawmaking are changed substantially and repeatedly.

[41] The CM Working Directive, *supra* note 33, does not state the authority on the basis of what it is adopted. There does not seem to be a constitutional mandate to adopt such a directive.

[42] Assefa Fiseha 'Legislative-Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform' in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye (eds), *Constitution-Building in Africa* (Nomos 2015).

[43] *Proc No 470/2005*, *supra* note 2, art 6(2); *The House of Peoples' Representatives of the FDRE Rules of Procedure and Members' Code of Conduct Regulations No 6/2015*, art 51(1) - (3).

[44] Ibid.

[45] *Proc No 271/2002*, *supra* note 4, art 4(2).

[46] CM Working Directive, *supra* note 33, art 38(1); *Proc No 470/2005*, *supra* note 2, art 6(3). However, 'financial draft laws' are exclusively initiated by the government. Id., art 6(4); *Regulations No 6/2015*, *supra* note 43, art 51(3).

Second, the Council of Ministers Working Directive governs the essential part of the pre-legislative phase, such as, which organ initiates a bill, the adoption of a policy in order to guide the drawing up of the bill,[47] the drafting instructions to be given to the experts drafting the bill from the concerned administrative agency, the required type and level of enquiry, the required format of drawing up of the bill, the requirements of conformity with other legislation and doctrines including the Constitution,[48] and the nature of the debate to be had and approval by the Council.[49] In comparison, the legislation rules of the House are limited to the legislation stage in the House. The House limited its power of hearing and enquiry.[50]

Apart from what the law has provided for, there are instances where the Council of Ministers dictated a particular type of rule. For instance, in the adoption process of the *Commercial Registration and Business Licensing Proclamation No 980/2016*, members of the House enquired whether it was reasonable to keep those (severe) penal provisions. The resource persons replied that they understand the moral dilemma the judges face to impose such criminal punishment and had attempted to reduce the criminal punishments. However, the Council of Ministers rejected the proposal and decided to keep the provision as it had been. The provision was finally adopted as decided by the Council of Ministers.[51]

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[47] Art 38(5) gives the impression that bills emanate from a policy which is provided for under arts 30 – 36.

[48] CM Working Directive, *supra* note 33, arts 34, 35, 42(5)(a), 46(1)(a), (b).

[49] Art 3 defines the duties and responsibilities of the Council of Minsters one of which is deliberations of bills and passing over to the House of Peoples' Representatives. art 3(1)(d).

[50] For instance, the full House hearing is limited to reports and recommendations of the committees. See Section 5.3.5.2.

[51] 'Minutes of Public Hearing Organized by the Commercial Affairs Standing Committee on the Commercial Registration and Business License Bill, 5 July 2016' (later adopted into law as *Commercial Registration and Business Licensing Proclamation No 980/2016*, in Amharic) at 9, 10; 'Minutes of Meeting of Commercial Affairs Standing Committee with Resource Persons from Ministry of Trade on the Commercial Registration and Business License Draft Amendment Bill, 29 June 2016' (later adopted into law as *Proc No 980/2016*, in Amharic) at 12-13. *Commercial Registration and Business Licensing Proclamation No 686/2010*, art 60(1), engaging in business without a valid (renewed) commercial license were made punishable with 7 to 15 years imprisonment, fine Birr 150,000-300,000 and confiscation of the property used for such activity. This punishment is maintained in the new *Proc No 980/2016*, art 49(2).

The proclamations adopted by the House sometimes authorise the adoption of Regulations by the Council of Ministers and directives by the respective agencies. Those regulations and directives are required to comply with the requirements of the Proclamation. To that extent, the proclamations are also legislative rules.

4. Initiation of Bills and the Lawmaker's Pre-legislative Investigations and Deliberations

4.1 Institutions initiating bills

All legislative rules authorise government agencies to initiate a bill in the area of their competence.[52] However, the Council of Ministers Working Directive requires that when a criminal provision is introduced in a bill, the (then) Ministry of Justice would have to be consulted.[53] The designation of institutions to participate in a particular subject matter is for reasons of specialisation. Thus, the Ministry of Justice is the Federal Government advisor on legal matters.[54] However, the Ministry of Justice did not participate in several regulatory legislative preparations.

For instance, in those tax legislation that contained serious penal provisions, such as the VAT and Income Tax Proclamations, the principal actors were the Ministry of Finance and Economic Development (MoFED) and the Ministry of Revenue, respectively.[55] The Government Finance and Property Administration Proclamations were drawn up by MoFED.[56] The

[52] *Proc No 470/2005*, *supra* note 2, art 6(3), (4); *Regulations No 6/2015*, *supra* note 43, art 51(2)(d); CM Working Directive, *supra* note 33, arts 30, 38(1).

[53] CM Working Directive, *supra* note 33, art 42(5).

[54] *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No 4/*1995, art 23(1); *Reorganisation of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No 256/2001*, art 15; *Federal Attorney General Establishment Proclamation No 943/2016*, art 6(2).

[55] Both the Ministry of Revenue and MoFED each established a Tax Reform Program Office which had worked on the VAT and the Income Tax Proclamation, respectively. 'Reports and Recommendation of Budget and Finance Affairs, and Legal and Administrative Affairs Standing Committees for the Adoption of the Value Added Tax Draft Bill into Law, Recommendation No 1/1994' (later adopted into law as *Proc No 285/2002*); 'Brief Explanatory Memorandum on Income Tax Draft Bill' and the accompanying 'Technical Document Containing Core Issues in the Draft Income Tax Bill, May 2002 (later adopted into law as *Proc No 286/2002*).

[56] 'Brief Explanatory Memorandum on the Revised FDR Ethiopia Procurement and Property Administration Draft Bill, April 2009'; 'Brief Explanatory Memorandum on the Revised Federal Government Finance Administration Draft Bill, April 2009';

drafters and resources persons of the former Anti-Terrorism Proclamation were only from the National Intelligence and Security Services, the Federal Police and the Prime Minister's Office.[57] Likewise, *Money Laundering and Financing of Terrorism Proclamation No 657/2009* was drafted by the National Bank of Ethiopia,[58] and *Corruption Crimes Proclamation 881/2015* was drafted by the Federal Ethics and Anti-Corruption Commission.[59]

For the most part, each of the penal provisions contained in those piecemeal legislation are redundant, and in some instances, significant modifications to those provisions in the Criminal Code. The Ministry of Justice (currently, the Federal Attorney General's Office) is most suitable to initiate and harmonize the revision of the penal provisions and to see to it that they are rationally integrated to the Code or help achieve the intended objective, and most importantly, to better assess the social and political impact of such provisions. Where there are changes to the existing rules, it is only expanding the scope of the criminal conduct and increasing the punishment.[60] The institution that is suitable to address the matter was not

'Minutes of Meeting with Experts on the Revised FDR Ethiopia Finance Administration and Procurement and Property Administration Draft Bills Organised by Budget and Finance Affairs Standing Committee' (later adopted into law as Proclamation No. 648/2009 and Proclamation No. 649/2009, respectively); 'Report and Recommendation of the Budget and Finance Affairs Standing Committee that the FDR Ethiopia Procurement and Property Administration draft bill be adopted into law, Recommendation No 12/2001, 2 July 2009'.

[57] 'Brief Explanatory Memorandum on the Anti-Terrorism Draft Bill' (later adopted into law as *Proc No 652/2009*); 'Brief Minutes of Hearing with Stakeholders on the Anti-Terrorism Draft Bill Organised by Justice and Administrative Affairs, and Foreign, Defence and Security Affairs Standing Committees, 24 June, 2009' (later adopted into law as *Proc No 652/2009*).

[58] Records show that the representative from the Ministry of Justice would be in attendance of the house committee hearing but he was absent. 'Minutes of Public Hearing on Money Laundering and Financing of Terrorism the Draft Bill and Explanatory Memorandum, Organized by the Budget and Finance Affairs, and Law and Administrative Affairs Standing Committees, 30 October 2009' (later adopted into law as *Proc No 657/2009*, in Amharic). Even though at the Committee hearing the resource person from the NBE asserts that opinion was sought from the Ministry of Justice that is not reflected in any record.

[59] 'Minutes of Meeting of Law, Justice and Administrative Affaires Standing Committee with Federal Ethics and Anti-Corruption Commission and the Ministry of Justice authorities on Corruptions Crimes Draft Bill Drawn up by the Ethics and Anti-Corruption Commission 10 December 2014' (later adopted into law as *Proc No 881/2015*).

[60] Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2017), 'Over-Criminalisation':

made a part of the process (in the proclamations indicated in the preceding paragraph) which certainly compromises the quality of the work. If there is no sufficient investigation conducted to establish the facts regarding the failed social interactions, no rational solution can be suggested. Therefore, penal provisions in these proclamations lack both epistemic and objective rationality.

4.2 The lawmaker's duty to investigate into facts

The most important pre-legislative activity is an investigation into the failed social interaction and contextualisation of the problem which Luc Wintgens referred to as 'the principle of alternativity'.[61] When the hermeneutic view of the legislature is argued for, it is a quintessential instrumentalist view of law;[62] the law is used to address specific social, political and economic objectives in want of legislative intervention. It is to find a proper link between legislation and the value it is intended to pursue that the investigation into the facts is required.[63]

The background study of a given legislation needs to contain several themes, including, identifying the failed social interaction, the alternative measures available to the legislature,[64] and whether legislative intervention is warranted.[65] If there was a norm governing the social relation, it should also show how such norm fails,[66] and in the instant case, if a criminal norm is sought, in conformity with the principle of *ultima ratio*, it should also indicate that those identified alternative measures have failed to achieve the intended purpose and criminalisation is necessary.

The Council of Ministers Working Directive requires that proposal and research documents submitted to the Council must be based on sufficient understanding of the subject matter, and include all information necessary to

A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia 29 *J Eth L* 49, 78-81.

[61] Wintgens 'Legisprudence as a New Theory', *supra* note 1, at 11; Ferrandez, *supra* note 30, at 79.

[62] Wintgens, 'Legislation as an Object of Study', *supra* note 1, at 13; Brian Z Tamanaha, *The Law as a Means to an End: Threat to the Rule of Law* (Cambridge UP 2006).

[63] Wintgens, 'Legislation as an Object of Study', *supra* note 1, at 12-15; Oliver-Lalana, *supra* note 11, at 135- 159; Ferrandez, *supra* note 30, at 79.

[64] Philippe Thion 'Questioning Alternatives to Legal Regulation' in Wintgens LJ, *Legislation in Context: Essays in Legisprudence* (Ashgate 2007) at 96-99.

[65] Wintgens 'Legislation as an Object of Study', *supra* note 1, at 12-13.

[66] Wintgens calls this 'normative density'. Ibid.

decide on the public interest.[67] The decision of the Council should reflect 'all government policies and procedures are thoroughly examined or looked into'.[68] Likewise, the HoPR Regulations require that the explanatory memorandum should state 'the necessity of the draft law' and 'the object of the bill'.[69]

The various bills including those indicated in Section 4.1 were drawn up by different government agencies, and their knowledge of the rules on legislation and legislative expertise are of varying degrees. Thus, the practice of compliance with those requirements is not consistent.[70] Several bills were adopted since the adoption of modern legislation rules in 2002. It is in response to such state of affairs that the *Legislative Drafting Manual 2010 EC* (in Amharic) was prepared. The Draft manual provides that where a criminal punishment is provided for, it should provide for 'proportional and clear penalty'. It prohibits drawing up provisions making preference to severe penalty.[71]

4.3 Rationality of law, and of the lawmaker

The proper link between the content of the idea of the relationship between law and politics, on the one hand, and the legislative rules on the other is the rationality of the legislature. In the insider view of lawmaking, the lawmaker is following rules as the judge does –the rules of legislation. The outsider view of lawmaking is addressing specific social, economic and political objectives. The legisprudential view of lawmaking is hermeneutic view. Consequently, rationality in legisprudence is about the aspiration to make 'good laws',[72] which is depicted in the organisation, structure, and

[67] CM Working Directive, *supra* note 33, art 5(5).

[68] Id., art 5(6). [Author's translation]

[69] *Regulations No 6/2015*, *supra* note 43, art 51(10)(a), (b).

[70] The draft Press Proclamation was adopted before the adoption of the legislation rules, other than the *Transitional Government Charter*. The preparatory material only compiles the provisions contained in the Civil and Penal Codes relating to expression. There was no explanatory memorandum attached to it, nor a justification why Ethiopia needed such regulatory legislation containing severe penal provisions on the press.

[71] *Legislative Drafting Manual 2010 EC* (Draft, in Amharic), art 71(12).

[72] Fuller, *supra* note 1, at 3-11. Wintgens reduces rationality to a choice to make 'good laws' except it is bounded by such time and circumstances. Wintgens 'Legisprudence as a New Theory', *supra* note 1, at 22; Wintgens 'Bounded Rationality', *supra* note 1, at 6, 8.

presentation of the positive law.[73] The rationality of the law is seen both in the substantive and the formal requirements of the lawmaking process. It is all about the coherence of the legal system, legal doctrines, principles and rules, and making sense in the application.

The legislature is required to pursue a 'good' lawmaking process. This is principally done by examining the legislative duties of the legislature in enquiring into the facts demanding legislative intervention, in the preparation of a bill (or examining a bill initiated by another organ) and in the lawmaking debate in the pre-legislation, and reviewing the law made in post-legislation. This is done based on the existing legislation rules, the nature of lawmaking and the practice of lawmaking.

5. Criminal Legislation with No Background Study

The criminal law includes the Criminal Code, special penal legislation, and administrative regulatory legislation containing penal provisions. They all are adopted by the HoPR. In several of those legislation, including the Criminal Code, there is no background study justifying those legislative actions. For several of these bills, there were only explanatory memoranda. Even when these legislation were subsequently amended, no implementation information was presented.[74]

5.1 The Vagrancy Control Proclamation

Vagrancy had been criminal conduct in Ethiopia for more than a half-century, first by special legislation, then in the 1957 Penal Code.[75] However, special legislation is adopted while there was such a provision in the Penal Code. The central justification for the adoption of the special legislation was treating it as a special crime with special procedure 'in order to permanently dispel the threat of vagrancy' and other crimes.[76] The bill was drafted by the Ministry of Federal Affairs and the Ministry of Justice.[77] The explanatory memorandum to the bill asserts that researches done by the Federal Police indicate that crime of vagrancy and related crimes were growing and were

[73] Wintgens 'Bounded Rationality', *supra* note 1, at 6-12.

[74] Simeneh Kiros Assefa (2018), 'Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Action' 12 Mizan LR 371, 387-399.

[75] Art 471. This is also taken over by the Crim C, art 477.

[76] *The Vagrancy Control Proclamation No 384/2004*, preamble, para 2.

[77] 'Reports and Recommendations of Law and Administrative Affairs, and Social Affairs Standing Committees Regarding the Vagrancy Control Draft Bill', 21 January 2004 (in Amharic) at 2.

matters of urgent attention.[78] The media also portrayed vagrancy as a serious problem.[79] However, no evidence was presented in support of the bill; nor was such evidence presented at the House Committee hearing.[80]

The bill focuses on two matters. On the procedural aspect, it adopts the special procedure of sorts –granting power to the police to detain suspects and to detain them without bail which forms part of the final bill.[81] On the substantive part of the law, the punishment is made severe and those conducts covered by the Vagrancy Proclamation are not new conducts but conducts punishable in the Penal Code with fine or few days detention.[82] There were discontents regarding the necessity of the bill and its motives. Some opine that the bill was meant to muzzle the opposition political parties.[83] This may be gathered from the news reports.

On April 17, 2001, Addis Ababa University students had a meeting with the Minister of Education demanding academic freedom and other rights. The meeting came to an end without agreement, and on the following day, the students staged protest demonstration. Youngsters outside the university campus had joined the students, as a consequence of which the security forces 'overreacted'. Several students died and some public institutions were set ablaze by unidentified individuals.[84] The news reports blamed opposition

[78] 'Explanatory Memorandum on Vagrancy Control Draft Bill' (later adopted into law as *Proc No 284/2004*) at 1, 4.

[79] 'Millions worth of asset damaged and looted by hooligans', *Addis Zemen*, Addis Ababa, April 20, 2001 (in Amharic); 'Ethiopian Telecommunication Corporation reported property worth Birr 50 million damaged', *Addis Zemen*, Addis Ababa, April 21, 2001 (in Amharic).

[80] The bill was drafted by the Ministry of Federal Affairs and the Federal Police; 'Explanatory Memorandum on Vagrancy Proclamation', *supra* note 78, states that researches conducted by the Federal Police indicate that vagrancy is a serious problem. However, the police did not have such recording keeping division until 2006 EC (2013/14). Simeneh 'Walking in the Dark', *supra* note 74, at 377.

[81] *Proc No 384/2004*, *supra* note 76, art 4, after defining what conducts constitute vagrancy, imposes a heavier penalty. Further, art 6(1) authorises the police to effect arrest without warrant, and sub-art (3) provides that such a person suspected of vagrancy may not be released on bail.

[82] Simeneh and Cherinet 'Overcriminalisation', *supra* note 60, at 79-80.

[83] 'Minutes of Public Hearing Organized by Legal and Administrative Affairs, and Social Affairs Standing Committees on the Vagrancy Control Draft Bill 12 January 2004' (in Amharic, later adopted into law as *Proc No 384/2004*) at 12-13.

[84] See *supra* note 79.

political parties and certain human rights groups for inciting the incident.[85] These incidents were found to be good excuses for the adoption of the bill into law.

At the public hearing on the draft bill, three points were outstanding: vagrancy reflects the socio-economic problem which could only be addressed by adopting a good economic policy, not by criminal law; second, the criminalisation of vagrancy is directed against the opposition political parties; and third, the conducts that are criminalised are already criminalised in the Penal Code, except where the punishment is made severe and it is made status crime.[86] Yet, the Committee had recommended the adoption of the bill into law by the full House without any modification.[87] As those issues were not made part of the report of the Committee, records do not show the full House had discussed those issues. The bill was adopted into law as it was.

5.2 Money Laundering and Financing of Terrorism Proclamation

The bill on Money Laundering and Financing of Terrorism is drawn up by the National Bank of Ethiopia.[88] One thus would expect the National Bank of Ethiopia would present information it has gathered in the course of banking services showing problems relating to money laundering. However, the explanatory memorandum to the bill does not contain any data.[89] At the hearing with the two pertinent Standing Committees, the resource persons

[85] All the press releases made by the Federal Government, the Federal Police and the Ministry of Education blame the cause of the incident on the All Amhara People Organisation (AAPO) and Ethiopian Democratic Party (EDP) and Ethiopian Human Rights Council (EHRCO) employing vagrants to implement their 'policies'. Of those 31 people who, the Government admitted, died during clash, the police also alleged that 9 of them had prior criminal records. ENA 'Police Announces 31 People Died as a Result of Clash Following Students' Protest' *Addis Zemen*, Addis Ababa, April 24, 2001 (in Amharic). Also see, ENA 'Police reported recovering a part of assets looted' *Addis Zemen*, Addis Ababa, April 21, 2001 (in Amharic).

[86] 'Minutes of Public Hearing on Vagrancy Proclamation', *supra* note 83, at 10-14.

[87] 'Report and Recommendation on Vagrancy Proclamation', *supra* note 77.

[88] The resource persons at the public hearing stated that the bill had been drawn up with the assistance of the Ministry of Justice. However, the explanatory memorandum was drawn up and submitted by the National Bank of Ethiopia (NBE). National Bank of Ethiopia 'Explanatory Memorandum on the Bill on Money Laundering and Financing of Terrorism' (2001 EC, in Amharic). All the three resource persons present at the discussion were from the NBE. 'Minutes of Public Hearing on the Draft Bill on Money Laundering and Financing of Terrorism organized by the Budget and Finance, and Law and Administrative Standing Committees' October 31, 2008.'

[89] Explanatory Memorandum by the NBE, *supra* note 88.

from the National Bank of Ethiopia asserted that there had never been a criminal prosecution on money laundering until the date of discussion.[90] However, other related questions, such as the reasons including attorneys in the list of accountable persons, were answered by conjuncture.[91]

The explanatory memorandum does not state the reasons for such action but, it appears to have focused on the enforcement of the international conventions and resolutions.[92] The bill rather does three things: it imposes an obligation on specified individuals and entities, including lawyers, referred to as 'accountable persons' to report suspicious activities relating to their clients, criminalising possession of unexplained property and international cooperation.

5.3 Tax Legislation

There were tax crimes included in the Penal Code. It is despite such provisions that those tax legislation were adopted containing penal provisions. The penal provisions contained in those tax legislation, such as the *Income Tax Proclamation No 286/2002*, *Value Added Tax Proclamation No 285/2002*, were not commented on in the explanatory memorandum.[93] There is no mention of the tax crimes stated in the Penal Code; nor was there explanation why the tax crime provision in the Penal Code was believed to have failed to help achieve the objectives sought in the penal provisions of the draft bills. No record shows penal provisions in the Income Tax Proclamation were discussed by the Committee to which the matter was referred for a thorough examination. In the discussion on the Value-Added Tax Proclamation, the experts from MoFED suggested the penal provisions that were already in the Income Tax draft bill be included in the VAT

[90] 'Minutes of Public Hearing on Money Laundering Draft Bill', *supra* note 58, at 10 – 12. 'Minutes of the Meeting of the Budget and Finance, and Law and Administrative Standing Committees on the Draft Bill on Money Laundering and Financing of Terrorism 21 October 2008' (later adopted into law as *Proc No 657/2009*)

[91] Id., at 11.

[92] Explanatory Memorandum by the NBE, *supra* note 88, at 2 – 4, discusses the various international conventions and UN Security Council Resolution and such related requirements.

[93] 'Explanatory Memorandum on Income Tax Bill', *supra* note 55; the penal provisions were incorporated into the VAT Proclamation later after the experts made such recommendation at the Committee hearing. 'Modifications made on the Value Added Tax Draft Bill' (later adopted into law as *Proc No 285/2002*) para 4.

Proclamation too, and the Committees agreed. The penal provisions of the Income Tax bill were included in the VAT bill and adopted into law.[94]

The principal purpose of the penal provisions is to 'maximize revenue'.[95] The explanatory memorandum states that the objective of the revision the law and inclusion of severe penal provision is 'to prevent tax crimes and to have deterrence effect'.[96] While those same penal provisions were reproduced in the Value-Added Tax bill, the principal discussion was on the effect of replacing the sales tax with such VAT and the constitutional power to adopt a VAT Proclamation.[97] There was only a decision that 'penal provisions similar to that of income tax bill' be incorporated. There is no record of discussion regarding the fate of those provisions in the Penal Code, the effect and content of those penal provisions and how they relate to the general principles of the criminal law.

The Federal Tax Administration Proclamation was adopted in 2016. Regarding the penal provisions, this proclamation does two things: it lists almost all tax-related crimes in one bill in an encyclopedic manner; it also maintains other tax-related penal provisions[98] with minor modifications.[99] It elevated the directives indirectly, not unwittingly, to criminal law status.[100]

5.4 The Anti-Terrorism Proclamation

In response to the UN Security Council Resolution 1317(2001), Ethiopia held that it had sufficient law to address acts of terrorism.[101] Ethiopia, however, adopted the *Anti-Terrorism Proclamation No 652/2009*, changing

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[94] Ibid. 'Minutes of Meeting of the Economic Affairs and Legal Affairs Standing Committees with Resource Persons on the Value Added Tax Draft Bill', 7 November 2001' (later adopted into law as *Proc No 285/2002*).

[95] 'Minutes of Meeting on VAT Proclamation', Id., at 11.

[96] 'Explanatory Memorandum on Income Tax Bill', *supra* note 55, 2.

[97] 'Minutes of Meeting on VAT Proclamation', *supra* note 94; 'Report and Recommendation of Economic Affairs and Legal Affairs Standing Committees Regarding the Value-Added Tax Bill, 7 December 2001' (in Amharic).

[98] *Federal Tax Administration Proclamation No 983/2016*, art 116(2) provides that where a single conduct is criminalised in different proclamations, each shall be prosecuted as a separate crime.

[99] For instance, the punishment for violation the stamp duty rules is reduced from imprisonment 10 to 15 years under the *Stamp Duty Proclamation No 110/1998*, art 12(1) to 3 to 5 years under *Proc No 983/2016*, art 123(1) which is still unreasonable by any standard.

[100] The tax laws provide that violation of the tax laws is a crime; and in its definition, it included directives as tax laws. *Proc No 983/2016*, *supra* note 98, art 2(36).

[101] Wondwossen Demissie Kassa (2013), 'Examining some of the *raisons d'etre* for the Ethiopian Anti-Terrorism Law', 7 *Mizan LR* 49, 52.

its initial stance on the ground that the then existing laws were not sufficient to deal with such 'heinous crime'.[102] The bill was drafted by the National Intelligence and Securities Services Agency and the Federal Police. After defining terrorist acts, it grants almost unbounded power to those agencies regarding the investigation and matters relating to the prosecution of such crimes. The explanatory memorandum states that the existing rules were not sufficient to deal with the matter.[103] It makes reference to international instruments for the definition of the crime and regarding Ethiopia's international obligation to adopt such a law. It does not state other reason that justify the adoption of the law.

The committee hearing was attended by standing committee members and a few ordinary members of the House. The resource persons were high ranking officials from the Ministry of Foreign Affairs, the Ministry of Defence, the National Intelligence and Security Services and the Ministry of Justice.[104] Unlike other bills, there is no record of a public hearing, and bill was recommended for adoption into law by 17 to 6 votes of Committee members.[105]

The examination of the history of prosecution for terrorism reveals that there were two waves of action against alleged acts of terrorism. There were 214 individuals who were charged and convicted for terrorism between 1995 and 2004 in connection with the incidents in the transition period.[106] For instance, in *Beyan Ahmed, et al*,[107] *Abdulkader Mohammed, et al*,[108] *Ziyad*

[102] 'Explanatory Memorandum on the Anti-Terrorism Draft Bill', *supra* note 57.

[103] Id., at 17-19.

[104] 'Minutes of Hearing with Stakeholders', *supra* note 57.

[105] 'Report and Recommendation of Law and Administrative Affairs, Foreign, Defence and Security Affairs Standing Committees Regarding the Anti-Terrorism Draft Bill, Recommendation No 8/2001, 7 July 2009'.

[106] One of the witnesses in *Alemayehu* stated this clearly. *Central Public Prosecutor v Alemayehu Tolosa and Ketma Abdeta* (29 November 2004, Crim File No 01153 Central High Court). There were also other cases, including *Central Public Prosecutor v Ahmed Nour* (26 March 2004, Crim File No 01121 Federal High Court); *Public Prosecutor v Yahiya Zekaria* (23 July 2004, Crim File No 00586 Federal High Court); *Public Prosecutor v Mohammed Abdella* (15 June 2004, Crim File No 01137 Federal High Court); *Public Prosecutor v Ousman Abdella* (10 November 2004, Crim File No 01397 Federal High Court); *Central Public Prosecutor v Jenda Mussa* (6 February 2004, Crim File No 01114 Federal High Court.

[107] *Public Prosecutor v Beyan Ahmed, et al, 7 defendants* (15 October 2004, Crim File No 03139 Federal High Court).

Muhammed,[109] and *Alemayehu Tolosa*,[110] defendants were charged for conducts the OLF and IFLO did after exiting the Transitional Government of Ethiopia Council of Representatives. Terrorism was alleged in the context of genocide. However, the principal conduct (they were charged for and convicted) referred to those acts committed while the groups were members of the Transitional Government in May and June 1992.[111] The case of *Dinkinesh Deressa*[112] disposed of in 2005 only shows the continuation of such action of the Government. This was the first wave of prosecution for terrorism.

The second wave of anti-terrorism actions by the Government upon the adoption of the 2009 Anti-Terrorism Proclamation and the declaration of armed struggle by Ginbot-7 somehow coincided. The Government then declared two organisations terrorist organisations; the leadership of Ginbot-7 were charged in absentia and several of them were sentenced to death and many were sentenced to life imprisonment.[113] If the prosecution for acts of terrorism was possible under the already existing 1957 Penal Code, the adoption of the Anti-terrorism law was unnecessary in the absence of fact-finding showing otherwise.

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[108] *Public Prosecutor v Abdulkader Mohammed, et al, 7 defendants* (16 January 2004, Crim File No 01392 Federal High Court).

[109] *Public Prosecutor v Ziyad Muhammed Oumer* (10 June 2004, Crim File No 01178 Federal High Court).

[110] *Central Public Prosecutor v Alemayehu Tolosa and Ketma Abdeta* (29 November 2004, Crim File No 01153 Central High Court).

[111] The facts are stated in almost every case; but reports of the TGE Council of Representatives Enquiry Commission report is attached to *Beyan Amhed* case, *supra* note 107, as evidence which constituted only one count, count 10.

[112] *Public Prosecutor v Dinkinesh Deressa and Negassa Negussie* (27 May 2005, Crim File No 13433 Federal High Court)

[113] In *Federal Public Prosecutor v Brigadier General Teferra Mammo Cherkos, et al, (46 defendants)* (22 December 2009, File No 81406, Federal High Court) 5 defendants, Melaku Teferra, Dr. Birhanu Nega, Andargachew Tsige, Muluneh Eyuel, and Mesfin Aman, were sentenced to death; 33 were sentenced to life imprisonment and 2 were sentenced to 10 years rigorous imprisonment. The reason the court handed down the death sentence stated that the defendants were involved in similar conduct for which they had been pardoned. Because they were found in the same criminal conduct which shows they had no remorse and no legal ground to mitigate the punishment (ENA). 'Those Charged for Violating the Constitution by Force and Armed Violence were Sentenced to Death, Life Imprisonment and 10 Years Rigorous Imprisonment'. *Addis Zemen*, Addis Ababa, 23 December 2009 (in Amharic) at 1, 3.

5.5 Administrative Regulatory Legislation Containing Penal Provisions

Several administrative regulatory draft bills were accompanied by a short explanatory memorandum. They addressed regulatory matters, and their explanation focused on parts they deemed important – i.e., the regulatory part. While they contain penal provisions, the provisions were not discussed at all because they were not deemed 'essential' to the subject. Therefore, there is no comment on the penal provisions. The following proclamations illustrate the undue inclusion of penal provisions in regulatory legislation.

The *Media Regulation Proclamations* claimed to enforce the rights enshrined in the Constitution –freedom of expression– and it is administrative regulatory legislation. It can also be called penal legislation. There are penal provisions in the Criminal Code, including those unconstitutional provisions, such as, those establishing guilt by presumption and precluding contrary evidence.[114] Thus, there was no need for further penal provision. The media regulatory legislation were meant to define such terms as, editor and producer in order to enhance the enforcement of the provisions of the Criminal Code.[115] The explanatory memorandum did not touch upon the penal provisions; nor were such provisions discussed at the committee hearing.

The *Consumer Protection Proclamation* is meant to protect both consumers and traders/business firms from unfair trade practices. There are several prohibited practices and several of those conducts are criminally sanctioned.[116] However, there was no explanation presented why those conducts were criminalized. Nor was there data presented to the House relating to the issue of criminalisation of conduct.

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[114] Crim C, art 43(5) provides for proof of knowledge and consent of editor-in-chief of a periodical or producer or a broadcast by presumptions and precludes any 'proof to the contrary'.

[115] The Criminal Code provides for criminal liability for conducts committed through the media and the Mass Media Proclamation defines those responsible persons in order to make the prosecution and conviction easier. 'Brief Explanatory Memorandum on Freedom of the Media and Access to Information Bill' (later adopted into law as *Proc No 590/2008*) at 12-14.

[116] For instance, art 49(1) punishes the abuse of dominance 'with a fine of 15% (fifteen percent) of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 500,000 (five hundred thousand birr) to birr 1,000,000 (one million birr) and with rigorous imprisonment from 5 (five) to 15 (fifteen) years.'

The *Federal Government Finance and Property Administration Proclamations* (i.e., the Federal Government of Ethiopia Financial Administration and Ethiopian Federal Government Procurement and Property Administration bills) were drawn up by MoFED.[117] Both bills were drawn up containing penal provisions. The crimes included are bribery, conspiracy to commit a crime, falsifying documents, disbursing illegal payment, illegal collection of payment, and other corrupt practices.[118] The provisions are redundant with those contained in the Criminal Code.[119] Yet, there was no mention of the need and justification for the inclusion of those provisions in the respective proclamation; nor was there a discussion in the committee hearings.[120]

5.6 Legislation with Limited Background Study

In some instances, there is an effort to present a background study investigating the facts that were said to require legislative intervention. However, few refer to the penal provisions in their comments. One such legislation is the *Commercial Registration and Business License Proclamation 980/2016*. The explanatory memorandum refers to the five years' practice and trade promotion policy. This relates to the essential part of the Proclamation. It attempted to reduce the punishment for engaging in business without a license but this was not accepted by the Council of Ministers.[121]

The crude comment of those provisions merely states that effort was made 'to elaborate' those penal provisions and to make them clear,[122] while

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[117] MoFED 'Explanatory Memorandum on the Revised Federal Government of Ethiopia Financial Administration, April 2009' (in Amharic); MoFED '[Explanatory Memorandum] Federal Government of Ethiopia Procurement and Property Administration, April 2009' (in Amharic).

[118] *Federal Government of Ethiopia Financial Administration Proclamation No 648/2009,* art 70; and *Ethiopian Federal Government Procurement and Property Administration Proclamation No 649/2009,* art 77.

[119] Crim C, art 404 ff. Those alleged illegal procurement and property management conducts were prosecuted under the provisions of the Criminal Code. See for instance *Federal Attorney General v Zayid W/Gabriel, et al,* (Federal High Court, File Nos 204242, 204153, 204154).

[120] 'Minutes of Meeting with Experts' on *Proc No. 648/2009* and *Proc No. 649/2009*, *supra* note 56; 'Report and Recommendation of the Budget and Finance Affairs Standing Committee that the FDR Ethiopia Procurement and Property Administration Draft Bill be Adopted into Law' (Recommendation No 12/2001, 2 July 2009).

[121] 'Minutes of Meeting on *Proc No 980/2016*', supra note 51, at 12 – 14.

[122] When the *Commercial Registration and Business License Proclamation No 67/1997*

the bill does something else more –criminalisation of other conducts previously not prohibited, and increasing punishments. For instance, passing a commercial license to someone in any form practice is criminalised in article 49(4) of *Proclamation No 983/2016*, punishable with rigorous imprisonment from 5 to 10 years, fine from Birr 50,000 to 100,000. Where such transfer is made to a foreign national, it is punishable with 7 to 15 years imprisonment and fine from Birr 200,000 to 300,000.[123] The explanatory memorandum does not give any justification for such action; nor was it discussed at both committee and public hearings.

6. Legislative Impact Assessment

As rules of conduct, legislation are of prospective application. The investigation into the facts also reviews the impacts of the legislation when applied in the future. This is the normative, social, institutional, and economic impact of the legislation. The legislature needs to take into consideration not only the existing circumstances but also future circumstances so that the rules may remain valid for a reasonably longer period depending on the nature of the law.[124] The Explanatory Memorandum to the Draft Constitution states that the criminal law has to be reasonably stable.[125] However, it has to consider several factors which Wintgens refers to as 'contingencies'.[126] First, it is in the nature of social facts that they change over time and, thus, the legislature needs to consider that possible future changes. However, such changes may also be the result of the legislation itself, therefore, the impact of such legislation or conduct of individuals should be reasonably predicted to have efficient rules.[127]

was adopted, no explanation was provided for including penal provisions in the regulatory provision. Yet again, not sufficient evidence was presented justifying the increased punishment when it was replaced with *Proc No 686/2010*, *supra* note 51. However, when it was replaced by *Proc No 980/2016*, *supra* note 51, there were researches apparently reviewing the practice.

[123] *Proc No 980/2016*, *supra* note 51, art 49(4).

[124] Once criminal laws are adopted, it appears there is no political will to repeal them. The current situation in Ethiopia is an exception where the newly formed Abiy Ahmed's Government understands the criminal law is used as a means of suppressing political dissent and any form of opposition, which starts with pardon, amnesty, and termination of charges.

[125] 'Explanatory Memorandum to the Draft Constitution', *supra* note 7, at 49-51.

[126] Wintgens 'Bounded Rationality', *supra* note 1, at 17-22.

[127] Id., at 23-26.

Criminal legislation has an impact on the right of the individual.[128] The Council of Ministers Working Directive requires certification that the intended legislation does not contradict the Constitution. This is one of the most pertinent aspects of the impact assessment because the lawmaker needs to make sure that such a bill does not unjustifiably impact the rights of the individual. The other important aspect of the enquiry is the effect of the rules on other interests, such as social consequences, institutional and other resource demands.[129] The Council of Ministers Working Directive requires that the bill presented to the Council decision should not be one that would demand reform before or soon after its adoption into law.[130] As an aspect of the investigation is to be conducted, there are different consultations required to be conducted by the proposing agency. Thus, before a matter is tabled in the Council for discussion, the agency is required to conduct consultation with relevant organs and consider their opinion.[131]

The consultation is principally within governmental institutions;[132] but it may also be with the public and professional associations.[133] Consultation is required to be made regarding financial matters, institutional matters, and or where there is a fundamental change in the existing rule.[134] Further, it is specifically provided for in the Council of Ministers Working Directive that if a draft bill has an impact on other institutions' powers or has financial implications, the Ministry of Finance need to be consulted.[135] Likewise, for penal provisions, the Ministry of Justice (currently Federal Attorney General) should be consulted.[136]

However, records do no show that any of those bills proposed and adopted into law had such investigation, nor was there a hearing on this subject. For instance, when the tax bills introduced imputed and non-fault liability, their effect on the business, on the government revenue, on individual freedom, is not discussed at all. When corruption offences were

[128] This conforms with the argument on rights as principium. Wintgens 'Legisprudence as a New Theory', *supra* note 1, at 11 ff.
[129] Wintgens 'Bounded Rationality', *supra* note 1, at 17-22; Ferrandez, *supra* note 30, at 85-99.
[130] CM Working Directive, *supra* note 33, art 42(4)(b).
[131] Id., art 5(3).
[132] Id., art 10(1)(a), (3).
[133] The consultation with the public and interest groups may be conducted only upon the Council of Minsters' approval. Id., art 10(2), (4).
[134] Id., art 9(2).
[135] Id., art 31(7)(e).
[136] Id., arts 42(1)(c), (5)(b).

made non-bailable, their potential negative consequences were not foreseen.[137]

7. The Duty to Maintain Coherence

One of the fundamental principles of legislation is the principle of coherence.[138] It connotes a wide range of things in the normative structure and legislative process.[139] Wintgens discusses various types of coherence which are more or less similar to those discussed by Oliver-Lalana: linguistic, legal, social, goal and value rationality (coherence). Linguistic rationality relates to clarity of the law; legal rationality relates to the Kelsenian type of validity of rules; social rationality relates to the effectiveness of those norms; goal rationality relates to whether the intended means would help achieve the objectives sought and value rationality is about constitutional values.[140] Without engaging in such details, we can, in the context of this article, discuss legisprudential coherence under two categories – the coherence of the legal system in general and coherence with reality.

7.1 Coherence within the legal system (internal coherence)

The principle of unity of the legal system requires that the norms in a legal system need to cohere with one another, irrespective of the category they fall under.[141] Thus, in making or amending such law, the lawmaker is required to comply with the existing system of norms. The Council of Ministers Working Directive specifically requires that a bill be accompanied with a

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[137] The amendment makes corruption crimes bailable unless they are punishable by at least 10 years' imprisonment. However, several of the corruption offences were punishable by 7 to 15 years' rigorous imprisonment and by a wrong interpretation of the bail provision, those offences are also included in the non-bailable category that rendered the revision less useful.

[138] Wintgens 'Legisprudence as a New Theory', *supra* note 1, at 15-22. The other three principles of legislation include the Principle of Alternativity, the Principle of Normative Density and the Principle of Temporality. Id., at 11-15.

However, his theory of coherence was initially developed in 2002 and it relates to the judicial application of norms consisting of consistency as an element. He is coherence in five levels – consistency within the judicial decision, consistency of judicial decisions over time, consistency within the entire legal system, and consistency of decisions with reality.

[139] Summers, *Form and Function*, *supra* note 12.

[140] Oliver-Lalana, *supra* note 11, at 140-144.

[141] Ávila, *supra* note 33, at 84 – 91. Also see Summers, *supra* note 12, at 305-350.

certification that it does not contradict with the Constitution.[142] The bill should also be shown that it conforms with other legal doctrines, principles, the existing law, and international obligations.[143]

To ensure such coherence, other agencies are also consulted, and if criminalization or punishment is included, the Ministry of Justice (Federal Attorney General) would be consulted to make sure that it does not contradict with the Criminal Code.[144] If the bill has institutional modification implications, the PM Office needs to be consulted before the draft is drawn up.[145] Finally, before the bill is presented to the Council for discussion, it is presented to the legal team to ensure that it conforms with the policy[146] and technical requirements.[147]

There are, however, several rules that violate this basic requirement of coherence within the legal system. There are penal rules that contradict the constitutional principle of presumption of innocence[148] by establishing guilt by presumption or shifting the burden of proof onto the defendant. For instance, the *Corruption Crimes Proclamation No 881/2015*, article 3 presumes 'intent to obtain an advantage or to injure' and requires the defendant to prove otherwise. Likewise, the crime of 'unexplained property' provided for under article 15 of *Suppression and Prevention of Money Laundering and Financing of Terrorism Proclamation No 657/2009* is based on a presumption of guilt.[149]

Article 20(4) of the FDRE Constitution, enshrines two fundamental procedural rights. The first part provides that 'accused persons have the right to full access to any evidence presented against them, [and] to examine witness testifying against them'. Article 23 of the former *Anti-Terrorism*

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[142] CM Working Directive, *supra* note 33, art 42(5)(a)).

[143] Id., art 46(1).

[144] Id., arts 42(5)(b), 42(1)(c).

[145] Id., art 42(7).

[146] It is apparent that before a bill is drawn up the Agency needs to have a policy document to be adopted by the Council. It is based on such a policy document the bill would be drawn up. Id., arts 40(5), 45.

[147] A bill presented to the Council should be prepared in Amharic and English languages accompanied by a brief explanatory memorandum. The language must be of a high standard, etc. Id., arts 9(6), 43(2) 45. However, this is also the requirements when the bill is sent to the House.

[148] FDRE Const, art 20(3) provides that 'accused person have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves'. One may see that there is no exception to this rule.

[149] The punishment is 'confiscation' of the unexplained property, 'imprisonment from three to five years and fine from Birr 5,000 to Birr 10,000'.

Proclamation No 652/2009, provided that 'intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered; [and] hearsay evidence' is admissible. This provision is repealed in the recently adopted *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020*.

The second part of article 20(4) of the Constitution provides that defendants have the right 'to adduce or to have evidence produced in their defence, and to obtain the attendance of and examination of witnesses on their behalf before the court.' In the face of such fundamental rights, article 43(5) of the Criminal Code, provides that for crimes committed through the mass media 'the content of the matter shall be deemed to have been inserted, published or disseminated with […] full knowledge and consent' of the editor-in-chief, the printer, the author, editor, and publisher. It is further provided that '[n]o proof to the contrary may be admitted in such a case'.[150]

The criminal law is based on four fundamental principles which are also incorporated in the Criminal Code – the principle of legality, the principle of conduct, the principle of guilt and the principle of personal responsibility.[151] In not a few cases, contrary to the principle of legality, the criminalised conduct is just not clear. For instance, the *Suppression of Money Laundering and Financing of Terrorism Proclamation No 675/2009*, article 17(5) provides that 'whosoever contravenes any other provisions of this Proclamation shall be punished under the provisions of the Criminal Code.'

Article 58(7) of the *Banking Business Proclamation No 592/2009* provides that: "[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with imprisonment up to three years." And according to art. 78(2) of the *Mining Operations Proclamation No 678/2010*, "[a]ny person who contravenes or fails to comply with any provision of this Proclamations, regulation[s], directives or the terms and conditions of a license, shall be punished with fines up to birr 200,000 or imprisonment up to five years or both."

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[150] What is worse is the said 'crime' may have not been committed by the accused, however, criminal liability is attached to status as 'editor-in-chief', or 'publisher', 'producer', or 'licensee' which are given meaning in *Freedom of Mass Media and Access to Information Proclamation No 590/2008* in order to give effect to those provisions of the Criminal Code. 'Explanatory Memorandum on Freedom of the Media', *supra* note 115, at 12, 14, 28, 29.

[151] For an in-depth discussion on those principles, see Simeneh 'Methods and Manners', *supra* note 25.

These provisions violate the principle of legality in different levels. As a rule of conduct for the individual, the conducts criminalised are vague and cannot be complied with. The conducts are not fully predefined, and embody clauses that envisage regulations and directives yet-to be issued by the Executive which has no criminal lawmaking power.[152] In some instances, where the violation is against a directive, the criminal norms (the prohibited conducts and/or the punishment) are not published in the official *Negarit Gazeta*.

Contrary to the principle of conduct, the *Income Tax Proclamation No 286/2002,* article 102(1), and *Value Added Tax Proclamation No 285/2002,* article 56(1) provide that if a company is found guilty of tax crimes as defined in the respective proclamations, '… the manager of that entity at the time of the commission of the offence is treated as having committed the same offence and is liable to a fine and imprisonment' fixed for the company. Those provisions also contradict the principle of guilt.

Finally, the principle of lenity is an important principle of criminal law enshrined both in the Constitution[153] and the Criminal Code.[154] The penal provisions in those administrative regulatory legislation are drawn in a consistent manner preferring for a graver penalty. For instance, article 45 of the *Broadcasting Services Proclamation No 533/2007,* provides for specific jail term punishment and fine to be imposed for persons violating the provisions of the Proclamation '[u]nless punishable with more severe penalty under the Criminal Code'.[155]

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[152] *See* text for n 37. Further, *Forest Development, Conservation and Utilisation Proclamation No 524/2007*, art 20(6) of the provides that a person who 'commits a fault that are not mentioned in sub-article (1) to (5) here in above and for which punishment is not imposed shall be punishable with not less than 6 months and not exceeding 5 years imprisonment and with fine Birr 30,000'. Likewise, *Proc No 980/2016*, *supra* note 51, art 49(8) provides that '[a]ny person who violates the other [sic] provisions of this Proclamation shall be punished with fine from Birr 10,000 (ten thousand) to Birr 30,000 (thirty thousand) and with simple imprisonment from one year to three years.'

[153] Art 22 provides for the non-retroactivity of the criminal law and punishment. However, 'a law promulgated after the commission of the offence shall apply if it is advantageous to the accused or convicted person'.

[154] Art 5 provides for the non-retroactive application of criminal law. However, art 6 provides that the provisions of the Criminal Code apply to an accused person if 'they are more favourable to him than those in force at the time of the commission of the crime'.

[155] There are similar provisions in *Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007*, art 16(1); *Forest Development, Conservation*

Therefore, the system of norms is not coherent within itself, and some rules even contradict the basic doctrine of criminal law.

7.2 The coherence of norms with the reality (external coherence)

The coherence of the legal system fairly relates to the validity of laws and the coherent co-existence of norms. However, formal validity is not sufficient for the continued existence of norms. Wintgens upholds that formal validity is a reason for the initial existence of a norm; its continued existence is justified by its coherence with reality.[156] The law must be reasonably complied with by the public and it must be able to be enforced by law enforcement authorities. This is what Oliver-Lalana refers to as 'social rationality' and 'goal rationality'.[157] The law adopted must be accepted and complied with by society and it must be one that helps achieve its intended goal.

However, certain criminal rules do not cohere with reality, and some are not clear. For instance, the Commercial Registration and Business License Proclamation requires the trader to have a valid (renewed) license to conduct his business. When such a rule is violated, a certain punishment may be imposed. The punishment is, among others, a fine between Birr 150,000 and Birr 300,000. If a person has an initial capital of less than Birr 150,000 which is often the case, and his entire asset is less than Birr 150,000, the punishment cannot be enforced at all. Such law is unrealistic.

The cardinal purpose of the tax law is to maximise state revenue, and there are various ways of obtaining such revenue. Likewise, the Explanatory Memorandum on Commercial Registration and Business License Draft Bill' indicates that the requirement of a license is to maximise state revenue.[158] The sole justification for *excessive punishment* in both laws that incorporate penal provisions is to strictly enforce the revenue collection activity. If a person is punished twice for the same purpose (under the tax and registration

and Utilisation Proclamation No 542/2007, art 20; *Biosafety Proclamation No 655/2009*, art 21; *Copyright and Neighbouring Rights Protection Proclamation No 410/2004*, art 36(1), (2).

[156] See *supra* note 34.

[157] Oliver-Lalana, *supra* note 11, at 140-144.

[158] 'Explanatory Memorandum on Commercial Registration and Business License Draft Bill' (later adopted into law as *Proc No 686/2010*); Brief Minutes of Public Hearing Organised by the Trade and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Draft Bills, 23 June 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) at 44-45, 61-62.

laws), each of which, in their own right, is disproportionately severe punishment, it is excessive use of the criminal law.

For instance, all of those who (were alleged to have) engage(d) in trade without a valid (renewed) commercial license were sentenced to a term of imprisonment, some of which are suspended ones, irrespective of their personal predicaments. Yet, the court is not imposing the legally provided amount for punishments. The law determines fine between Birr 150,000 and 300,000. The court consistently imposes a fine not exceeding Four Thousand Birr. This author has never encountered a case where property confiscation is ordered. On the other hand, after the provision criminalising transfer of commercial license was adopted, 737,930 business license were deactivated in the year 2018 of which 708,306 were in Addis Ababa.[159] It appears that the law causes more harm than positive outcomes.

8. The Duty of Deliberation and to Give Reason

As indicated earlier, the principal duties of the lawmaker are making laws and supervising the executive that its laws are properly implemented.[160] It is discussed in great length that legislating is normative judgment and it requires good justifications. Such justifications may be developed only through the process of deliberation.[161] Cognizant of such fact, deliberations are recognised in the rules of legislation. Such deliberation is even proper because there are conflicting interests and a mutually agreeable solution could be achieved by such deliberation and voting. Deliberation is a method of obtaining both formal validity and political legitimacy.[162] It is so central in the lawmaking process in every democratic society that some even argue against a stronger judicial review based on their faith in the deliberative process.[163] The deliberation on a bill is one aspect of the process of justifying the norm.

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[159] 'Business license deactivation growing in Ethiopia' <https://newbusinessethiopia.com/investment/business-license-deactivation-growing-in-ethiopia/> last accessed 20 July 2019.

[160] FDRE Const, art 51(1) provides that '[t]he House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to the Federal Jurisdiction'. The following provisions provide for specific legislative powers. This is further provided for in *Proc No 470/2005*, *supra* note 2, art 4(1).

[161] Oliver-Lalana, *supra* note 11, at 136 ff.

[162] Id., at 138.

[163] One of the reasons Waldron objects to strong judicial review is taking into the role of the lawmaker as a 'large deliberative body' which has the capacity to deal with difficult issues with sufficient safeguards, such as, bicameralism, strong committee

There are enquiry researches made based on proposals, policy documents, diagnostic studies, explanatory memorandum, expert recommendations, public discussion, etc. Deliberations fall under two general categories subject to a third category of post-legislation continuous evaluation discussed in Section 9. The pre-legislative deliberation is arguably the longest deliberation that helps the bill to get the final shape as it is presented to the House. The legislative deliberation is conducted by the Committees and in the House.

8.1 Pre-legislative deliberation

Every agency has the competence to draw up a bill in its area of competence.[164] To get into the legislative drafting venture, however, such agency needs to have included in the annual legislative program[165] to be scheduled in the Council of Ministers and to be communicated by the President of the Republic at the first session in a joint session of both Houses.[166] It is imperative that prior consultations should be conducted and the reports should demonstrate that such consultations with other public agencies,[167] professional associations[168] and stakeholders[169] and members of the public were made. The findings of the discussion would be presented to the Council of Ministers.[170]

Where the Council finds it essential that the subject requires an in-depth study before the matter is tabled in the Council, it may refer the matter to a standing or ad hoc committee.[171] Once such deliberations are made, 'a Green Paper' (policy discussion paper marked as 'only for discussion') will be

scrutiny, multiple levels of consideration of the issues and debate. Jeremy Waldron 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346, 1361.

[164] CM Working Directive, *supra* note 33, art 38(1); *Proc No 271/2002*, *supra* note 4, art 6(2)(a).

[165] CM Working Directive, *supra* note 33, art 38(2).

[166] Id., art 36(1).

[167] The report should indicate that such consultation with the relevant government agencies was conducted and what their view was and whether they express their agreement to the proposal.

[168] CM Working Directive, *supra* note 33, art 10(2), (3).

[169] Id., arts 5(3), 10(1)(a)

[170] Id., art 9(4).

[171] Id., art 9(11). One such bill was the first *Broadcasting Proclamation No 178/1999*. The initial draft was discussed by a technical committee composed of Ministry of Information and Culture, Ministry of Transport and Communication and Ministry of Justice. 'Brief Explanatory Memorandum on Draft Bill for the Regulation of Broadcasting Services' (later adopted into law as *Proc No 178/1999*) at 2-5.

drawn up by the proposing agency.[172] 'A White Paper' (a policy document indicating government policy direction) may be drawn up by the proposing agency and needs to be approved by the Prime Minister prior to a discussion by the Council.[173] The report of the discussion on the Green and White Papers would be presented to the Council for decision[174] and every effort should be exerted to obtain a proposal on which there is a consensus by every government agency which participated in such consultation.[175]

The Council of Ministers Working Directive requires specific consultations as compulsory. For instance, if the proposal has budgetary and financial implications, the Ministry of Finance and Economic Development should mandatorily be consulted.[176] Before drawing up a new bill or create a new institution or introduce fundamental changes in the already existing legislation or institutional structure, the Prime Minister has to be consulted.[177] If the bill relates to a contentious issue or affects the powers and responsibilities of an agency, that agency should be consulted[178] and such an agency should provide a written confirmation that the consultation was conducted.[179] If the bill contains penal provisions, consultations should be made with the Ministry of Justice (currently the Federal Attorney General) to determine its propriety and to avoid contradiction with the Penal Code.[180]

Once a policy opinion is accepted, a policy document will be drawn up and discussions will be conducted. The complexity of the bill to be drawn up will be determined. The deliberations will be conducted to develop a guideline for the drafters of the bill. Once the bill is drawn up, it will be submitted to the legal affairs team regarding its presentation to the Council.[181]

The agency proposing the bill submits the draft to the legal affairs team certifying that the bill does not contradict the Constitution, other laws and doctrines, and international obligations or expressly state where those laws and doctrines are implicated.[182] After making sure that the bill conforms

[172] CM Working Directive, *supra* note 33, art 10(4)(b).
[173] Id., art 10(4)(c).
[174] Id., arts 10(4)(e), 31(6).
[175] Id., art 31(8).
[176] Id., arts 9(2)(b), 31(7).
[177] Id., arts 9(5), 42(7).
[178] Id., arts 33(1), 42(3).
[179] Id., art 33(2)-(4).
[180] Id., art 42(5)(b).
[181] Id., art 40(1)-(8).
[182] Id., art 46.

with the policy adopted and meets the technical and quality requirements provided for in article 9, the bill is presented to the Council for a final decision.

The Council may deliberate on the bill or may refer it to the appropriate standing committee after the first reading for further examination and research.[183] Decisions are to be made after deliberations. The deliberation may be made on line-item, or words and phrases, or in general.[184] Where the matter is one that requires expertise, the Council may be assisted by experts and resource persons.[185] At the end of the deliberation, decisions are made by consensus; where consensus is not possible or a member requests for voting, decisions may be made by voting.[186] The decision may be to adopt the bill, to send it back to the agency for further study, to suspend its hearing for a specific period, or to conduct the debate some other time.[187]

Because the deliberations in the Council of Ministers is classified by such Working Directive, it is not possible to verify the compliance of the procedures with in the process of adoption of a bill before it is sent to the House for adoption into law. However, there are a few observations that may be made. First, policy documents are not being submitted to the House along with the draft bills which gives the impression that the rules of lawmaking are not complied with. Often, bills (drawn up in Amharic and English languages) are submitted to the House only with short explanatory memorandum.

8.2 Legislative deliberation

The criminal norms discussed in this article have passed through the pre-legislation deliberation in the Council of Ministers with no exception. The bills were submitted to the House for deliberation and adoption into law. There are two phases of deliberation in the House. The bill is presented to the House through the Speaker for first reading. The first reading is 'the reading and discussion process held on a draft bill to be endorsed by the House, before referring it to the pertinent Standing Committee for further

[183] Id., art 40(9)-(11).
[184] Id., art 27.
[185] Id., arts 13(1), 21.
[186] Id., art 28.
[187] Id., art 22.

inspection'.[188] The first reading is a simple reading of the bill followed by general 'deliberations on the spirit of the draft bill in general'.[189]

Where the House, by a two-thirds majority, decides to see the bill in its regular meeting, the bill would be deliberated on for adoption into law.[190] But none of the bills discussed here were seen in this manner. All of those bills discussed in this article have passed through the regular process. There was the first reading, presumably, because the records do not show anything; the bill is referred to a Committee or joint Committees.[191]

The Committee(s) conduct a public hearing which is the presentation of the bill to the 'public' by the resource person(s) from the proposing agency. Even though it is not provided for in the law, in a few instances, the Committees conduct 'closed' hearing probably to enhance their awareness about the bill. Thus, the Value-Added Tax bill was initially discussed only in the presence of the Legal Affairs and Economic Affairs Standing Committee members.[192]

The practice of the House regarding a public hearing is that individuals from invited institutions deliberate on the bill. With little or no change to such bill based on such public hearings, the Committee routinely recommends the bill to the House to be adopted into law. In some instances, such as in the case of *Anti-Terrorism Proclamation No 652/2009*, there was no public hearing at all.[193]

When the bill comes back to the House, there is a second reading. The second reading is 'the discussion on the recommendation and suggestions of the Standing Committee, to which the draft bill was referred for thorough inspection after the first reading'.[194] At the second reading, the discussion to

[188] *Proc No 271/2002*, *supra* note 4, art 2(10).

[189] Id., art 3(9)(c).

[190] Id., art 3(9)(e).

[191] For instance, the Value-Added Tax bill was referred to the Legal and Administrative Affairs, and Economic Affairs Standing Committees jointly. Likewise, the Anti-Terrorism Bill was referred to Law, Justice and Administrative Affairs, and Foreign, Defence and Security Standing Committees jointly.

[192] See 'Minutes of Meeting on VAT Proclamation', *supra* note 94; the 'Report and Recommendations from the Budget and Finance Affairs Standing Committee to have the Income Tax Draft Bill Adopted into Law 4 July 2002' (in Amharic) indicates that there had been a public hearing three days earlier on 1 July 2002.

[193] There is no record of public hearing. Both the 'Reports and Recommendation on the Anti-Terrorism Draft Bill', *supra* note 105, and the 'Minutes of Meeting with Stakeholders', *supra* note 57, rather show the discussion was a closed one.

[194] *Proc No 271/2002*, *supra* note 4, art 2(11). This is not the law in force currently. However, specific reference is made to this provision because the bulk of the

be had is on the recommendations made'.[195] The House votes on the bill without delving into the content of the bill for deliberation, and it evaluates only the recommendations and suggestions by the Committee.

More or less, the same provisions are contained in *Proclamation No 470/2005*. However, article 4 of *Regulations No 6/2015,*[196] gives a different impression. Article 4(1) provides that 'the draft law shall be deliberated upon in detail.' However, sub-article (2) states that 'the report and recommendation on the draft law prepared by the committee or committees concerned shall be caused to be read to the House.' Sub-article (3) further provides that the deliberation shall be made 'in detail based on the report and the recommendations.' These provisions are equivocal in that, on the one hand, they appear to provide for detailed deliberations on the provisions of the bills; on the other hand, they give the impression that the deliberations, as they are based on the reports and recommendations, are limited to such reports and recommendations.

There are various legislation containing penal provisions adopted both after the adoption of the legislation rules in 2005 and the adoption of the legislative regulations in 2015. The practice continued in the same manner.[197] Therefore, the equivocation could be interpreted as conformity with the established deliberation practice of the House. This deliberation should reflect the democratic nature of the process and every member, who has a view on the content of the bill, should be heard.

9. Post-Legislation Evaluation, Revision and Review of Constitutionality

So far, it is discussed how a bill may be adopted into law following certain standardised procedures. It is stated that the law is prospective and the information used is both established as well as predicted. As time goes by, facts change as they always do by themselves as well as because of the bill

legislation containing penal provisions were adopted after 2002 but before 2005 legislation. However, even after the legislation rule was replaced in 2005, the practice is not changed at all.

[195] *Proc No 271/2002*, *supra* note 4, art 4(11)(b).

[196] *Proc No 470/2005*, art 39 authorizes the House to adopted regulations. However, *Regulations No 6/2015*, *supra* note 43, claims to be adopted as per the provisions of the FDRE Const, art 59(2).

[197] Both the Anti-Terrorism Proclamation and *Proc No 980/2016*, *supra* note 51, were adopted after 2005 as per the new legislation rules; however, the same practice continued.

adopted into law. It is also stated that a norm remains valid if it continues conforming to the social reality.[198] To ensure that a norm continues conforming to social reality, each norm is evaluated continuously.[199] If such a norm is in want of revision, it would possibly be the investigation stage of the next bill. However, to justify the revision of a criminal norm, its application must be seen in various forms, one of which is some criminal statistics.

There are several penal provisions revised over the years both expanding criminalisation and increasing sentence. For instance, when the tax laws containing severe penal provisions were adopted, there was already the Penal Code punishing certain conducts relating to tax. There was no data presented in support of the penal provisions of the tax laws. Likewise, when the Commercial Registration and Business License Proclamation was revised repeatedly expanding its scope, there was no criminal statistics presented as a justification. In simple terms, there was no any background research in support of those legislative actions.

One might argue, if the House is not debating the bills, it cannot demand evidence of the social reality and it does not have the quality control mechanism at its disposal. In the fact-finding stage, it was asserted that those laws adopted without proper investigation, or those rules which turn out to contradict reality should have been revised soon after their adoption. For instance, the tax statutes included unjustified criminalisation of conduct, such as strict liability and imputation of criminal liability.

Often, it is to avoid the threat of such 'unjustified criminal responsibility' that individuals obtain a business license and commercial registration through another person. For instance, the coffee export audit report shows that several of those coffee exporters were doing business under a commercial license obtained through another person who is not financially able to undertake such business.[200] The lawmaker addressed the issue differently –it criminalised transferring one's commercial license to someone else, which entails severe imprisonment. Even though there is no evidence regarding the causal connection, the number of commercial registration that were returned to the Ministry of Trade increased dramatically.[201]

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[198] Wintgens 'Bounded Rationality', *supra* note 1, at 3, 5-13.

[199] Alberto Muñoz Arenas, 'Theoretical and Procedural Aspects of the Evaluation of Public Policies' in Adan Nieto Martin and Marta Muñoz de Morales Romero (eds) *Towards a Rational Legislative Evaluation in Criminal Law*, (Springer 2016).

[200] 'The Ethiopian Coffee and Tea Development Marketing Authority 2001 EC to 2007 EC Coffee Purchase and Export Audit (February 2017)'.

[201] See *supra* note 159.

Those who argue against 'strong judicial review' principally base their arguments on the democratic nature of lawmaking and the various forms of institutional and normative guarantees.[202] Taking Oliver-Lalana's five levels of justification, linguistic rationality relates to the principle of legality which can be addressed by a criminal court. Legal rationality, relating to hierarchy of norms along with value rationality could have been handled by the same court, but this power is said to be reserved for the House of Federation (HoF) and Council of Constitutional Inquiry (CCI) in the case of Ethiopia.[203]

A clear case of legisprudential aspect of constitutional review is social rationality (partly coherence with the reality) and goal rationality. Such legisprudential judicial review is almost 'non-existent' in Ethiopia.[204] In an ideal situation, constitutional review is not only maintaining a normative hierarchy, but also having a rationally made law; that is, whether the norms adopted by the lawmaker are well justified. In this sense, constitutionality review enquires into whether the lawmaker made the necessary effort to adopt 'good law' by complying with a pre-legislative enquiry into the facts and making prior evaluation of those findings at the legislation stage.[205] If a rule is justified, there would only be deference to the decision of the lawmaker.[206]

If the HoF or CCI believes that the lawmaker does not have obligation to give a reason for the adoption of particular legislation, the lack of justification or poor justification may not be ground for striking out the rule.[207] However, such legislation is suspect for 'arbitrariness'.[208] This is

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[202] Strong judicial review as identified by Waldron is 'courts hav[ing] the authority to decline to apply a statute in a particular case […] or to modify the effect of a statute to make its application conform with individual rights.' Waldron 'Against Judicial Review', *supra* note 163, at 1354.

[203] Assefa asserts that such power was not given to the courts because there was no trust in the courts of independence and impartiality. Assefa Fiseha 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)' (2007) in 1 Mizan LR 1, 11.

[204] The House of Federation and the Council of Constitutional Inquiry are constitutionally vested with the power to interpret the Constitution. In their more than two decades' life of constitutional interpretation, in the face of patently unconstitutional penal legislation, their presence could not even be felt positively impacting individual rights.

[205] Wintgens 'Bounded Rationality', *supra* note 1.

[206] Oliver-Lalana, *supra* note 11, at 177-178.

[207] This would take us to the theory of legislation which is beyond the scope of this study.

particularly so in criminal matters because such rules implicate individual fundamental rights.[209] This should not give the impression that the review is limited to mere meta-procedural review of legislation; nor does the CCI review the justifications *de novo* for that would be tantamount making policy decisions by the CCI on behalf of the lawmaker; it is rather a mid-way between the two.[210] Thus, where the CCI finds the norm unconstitutional either because of the natural change of facts because the legislature failed to make rules up to date, the court would have to give the legislature time to make the necessary enquiry and take the appropriate measure.[211]

Conclusion

The legislative process is one mechanism for ensuring the 'good' content of the law. There are various doctrines –both within the criminal and constitutional laws– that limit the criminal lawmaking power of the state. The obligation to make laws also carries the obligation to make 'good laws'. Even though it is difficult to establish the content of 'good law', it is possible to make agreeable law following a fair procedure.

In exercising its authority, the lawmaker, enquires into the facts with regard to where social interactions have failed, whether they require legislative intervention and whether the criminal law is a necessary measure. In making such a decision, it has to conduct a hearing of different sorts. Apart from complying with the lawmaking process which is intended to be fair, the lawmaker should also adopt rules which cohere among themselves and with reality. As laws are made to be applied prospectively, and as facts change over time, the limited information the lawmaker has certainly affects the quality of legislation; and thus, continuous evaluation is essential. However, these processes have gaps in the context of Ethiopia's criminal lawmaking, thereby necessitating utmost attention at pre-legislation and legislation phases. ■

[208] Oliver-Lalana, *supra* note 11, at 179.

[209] When two public policy decisions conflict, the lawmaker has to assess and make a determination of which one should be given priority. Where a fundamental right is implicated, the decision is made based on the principle of proportionality.

[210] Wintgens 'Bounded Rationality', *supra* note 1, at 27.

[211] Id., at 26-27.

Tax Appeal Proceedings before the Federal Tax Appeal Commission in Ethiopia: Critical Reflections

Aschalew Ashagre Byness ♣

Abstract

Under the 2016 Federal Tax Administration Proclamation (FTAP), it is by way of appeal that taxpayers reach the judiciary when they can show that the Federal Tax Appeal Commission (FTAC) has committed an error of law. As far as factual issues are concerned, the decision of the FTAC is thus final and conclusive. Ethiopia's tax dispute resolution system has made improvements although there has been discontent on the part of taxpayers. This article examines the tax appeal processes at the federal level to see whether the processes enhance fair play between taxpayers and the tax authority. Specifically, the article evaluates whether there are clear and adequate procedural rules that ensure access to justice for aggrieved taxpayers and fair treatment by the Federal Tax Appeal Commission (FTAC). I argue that although there have been certain improvements made by the FTAP (as far as administrative appeal before the FTAC is concerned), there are still some critical shortcomings that have to be reconsidered.

Key terms:

Tax appeal · Tax Appeal Commission · Hearing · Burden of proof · Ethiopia

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Introduction

Tax is a compulsory debt levied and collected by the government of a given country irrespective of the will of an economic unit (a physical or juridical person) designated as a taxpayer by a piece of tax legislation or tax code as the case may be.[1] As world history of taxation clearly demonstrates, a government has an inherent power of taxation[2] whether it is dictatorial, democratic or monarchical.[3] The fact that governments have the power to levy and collect tax does not mean that they are not accountable to their citizens as regards to the kind of taxation system they put in place. Therefore, tax systems have to meet certain standards by embracing critical features of a good tax system such as canons and principles of taxation.[4]

Equally important to the substantive content of a taxation system is creating a fair tax administration since administrative issues of taxation are as decisive as substantive issues.[5] One of the most important components of a fair tax administration is the existence of a fair and efficient tax dispute

Frequently used acronyms

FAG	Federal Attorney General
FAPP	Federal Administrative Procedure Proclamation
FDRE	Federal Democratic Republic of Ethiopia
FHC	Federal High Court
FTAC	Federal Tax Appeal Commission
FTAP	Federal Tax Administration Proclamation
FTAR	Federal Tax Administration Regulation
HoPR	House of People's Representatives
PM	Prime Minister

[1] See Victor Thuronyi (2003), Comparative Tax Law, Kluwer Law International, New York, p.45.

[2] Odd-Helge Fjeldstad (2001), 'Taxation, Coercion and Donors: Local Government Tax Enforcement in Tanzania,' Journal of Modern African Studies, Vol. 39, No. 2, p. 293.

[3] *See* Hanneke Du Freez (2015), A Construction of Fundamental Principles of Taxation, Ph.D. Thesis, Unpublished, Faculty of Economics and Management Sciences, at the University of Pretoria,pp.46-61.

[4] Clinton Alley and Duncan Bentley (2005), A Remodeling of Adam Smith's Tax Design Principles, Australian Tax Forum,p.586; see also Beverly I. Moran, 'Adam Smith and the Search for an Ideal Tax System,' available at taxprof.typepad.com/taxprof_blog/files/Moran.pdf, accessed on July 15, 2020

[5] Richard M. Bird, 'Improving Tax Administration in Developing Countries,' Journal of Tax Administration Vol.1, No.1, pp.23-38; see also Richard M. Bird (2004), 'Administrative Dimensions of Tax Reform,' Asia-Pacific Tax Bulletin, pp.134-150.

resolution system.[6] That is why many jurisdictions have established both internal (administrative) disputes resolving organ or department or section within the tax authority and external dispute resolution bodies such as quasi-judicial tax tribunals (commissions), a special tax court or ordinary courts as the case may be. Alternative Dispute Resolution (ADR) mechanisms are also employed in various jurisdictions.[7]

In Ethiopia, the foundation for modern taxation was laid down starting from the early 1940s[8] and resolution of tax disputes by a tax appeal commission has remained the hallmark of the Ethiopian tax dispute resolution system.[9] The Federal Tax Appeal Proclamation (FTAP) has also retained the tax appeal commission as a tax appellate organ.[10] Under the FTAP, taxpayers aggrieved by the decision of the tax authority are entitled to take their appeals against tax decisions to the FTAC by meeting the preconditions set forth by the Proclamation. When a tax dispute involves only a question of fact, the decision rendered by the FTAC remains non-appealable to the regular appellate courts, which demonstrates that regular appellate courts in Ethiopia are absolutely debarred from entertaining tax appeals that do not contain question of law.[11] The adjudicative power of the Federal Tax Appeal Commission (FTAC) is thus very much influential and far reaching in Ethiopia.

This article examines legal (procedural) and practical issues relating to the resolution of tax disputes by the FTAC. The main research method is doctrinal, with due focus on the relevant provisions of the FDRE Constitution, the FTAP, Federal Tax Administration Regulation (FTAR), directives issued by the Prime Minister and the FTAC, provisions of the Civil Procedure Code and other legal instruments. In order to shed some light on how the law is implemented on the ground (the law in action), the doctrinal method is supplemented by empirical qualitative research as the

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[6] Binh Tran-Nam and Michael Walpole (2012), 'Independent Tax Dispute Resolution and Social Justice in Australia,' University of New South Wales Law Journal, Vol. 35, No.2, pp.470-474.

[7] See generally Simon Whitehead (ed.), Tax Disputes and Litigation Review, Law and Business Research, 2018.

[8] Taddese Lencho (2012), 'Towards Legislative History of Modern Taxes in Ethiopia (1941-2008),' *Journal of Ethiopian Law*, Vol. 25, No.2, pp. 104-158.

[9] Aschalew Ashagre (2014), '*የታክስ ክፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ*,' *Mizan Law Review*, Vol.8, No.1, pp. 202-208.

[10] Federal Tax Administration Proclamation, Proc. No.983/2106, Fed. Neg., Extraordinary Issue, Year 22, No. 103, Art. 86.(*Hereinafter cited as FTAP*)

[11] Id, Arts. 56-58.

latter is instrumental to capture and categorize social phenomena and their meanings.[12] To this end, the author has conducted in-depth interviews with fifteen (15) purposely selected individuals (consisting of members of the FTAC, tax practitioners, lawyers and taxpayers), has analyzed relevant documents and has made use of his personal observations as consultant and attorney at law.

The *first* section provides an overview on the resolution of tax disputes by tax appeal tribunals, and *Section 2* discusses the establishment, constitutional status and the appellate power of the FTAC. The *third* section examines issues pertaining to membership to the FTAC (focusing on selection, appointment, composition and termination). The *fourth* and *fifth* sections address critical issues arising in connection with the appellate proceedings: preconditions to lodge an appeal, memorandum (notice) of appeal, appearance of the parties at the time of hearing and the effects of non-appearance, hearing procedures and burden of proof. The *sixth* section deals with procedural issues arising in relation to decision-making procedures and the enforcement of FTAC decisions. Finally, brief concluding remarks have been made.

1. Resolution of Tax Disputes by a Tax Appeal Tribunal: An Overview

Tax disputes are common in all jurisdictions,[13] and they occur where there is discordance between the tax authority and the taxpayer regarding the taxpayer's liabilities or rights and associated issues.[14] That is why tax dispute resolution mechanisms exist in all legal regimes in spite of their variation in content, the way they are organized, staffed and operation.[15] Despite such variation, tax disputes are resolved by internal review organs, tax tribunal (board or commission), special tax courts, regular courts (mostly by way of review) and different kinds of ADR methods.[16]

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[12] Lisa Webley (2010), Qualitative Approaches to Empirical Legal Research, in Peter Cane and Herbert Kritzer (eds.), The Oxford Handbook of Empirical Legal Research, p.2.

[13] Tran-Nam and Walpole cited above at note 6, p. 473.

[14] Melinda Jone (2016), Tax Dispute Systems Design: International Comparisons and the Development of Guidance from a New Zealand Perspective, Ph.D. thesis, unpublished, Department of Accounting and Information Systems in the University of Canterbury, p.19.

[15] *See* Simon Whitehead, cited above at note 7.

[16] Ibid.

Where tax appeal tribunals (boards, commissions, etc.) have appellate jurisdiction and their decisions become final and conclusive as far as factual issues are concerned, taxpayers do not have, as a matter of rule, direct access to ordinary courts or administrative courts without first exhausting the remedies available to them before the tax tribunal. This approach is common in many jurisdictions. Tax appeal tribunals are preferred to regular or administrative appellate courts for various reasons. Although it is believed that appeal tribunals substitute courts as far as the resolution of disputes arising between an administrative agency (the tax authority in our case) and private persons (taxpayers) is concerned, they are considered to be more advantageous than courts owing to speed, relatively lesser cost, informality and expertise.[17] In addition, it was argued that the establishment of administrative tribunals for tax cases is justified to entertain disputes, such as tax disputes, arising between an administrative agency and individuals.[18]

According to Bradley and Ewing, the creation of administrative tribunals is indispensable because the ordinary courts are not suitable for the settlement of every dispute arising from the works and functions of modern government in general and tax administration in particular. One reason for this, according to these authors, is the need to make use of specialized knowledge which is instrumental to the resolution of disputes fairly and economically. They maintained that areas such as taxation, social security or immigration (which involve complex systems of regulation) call for numerous decisions to be made by individuals trained in those fields.[19] It is also argued that:

> Practical factors that have favored the setting up of tribunals include: the desire for a procedure which avoids the formality of the courts; the need, in implementing a new social policy, for the speedy, cheap and decentralized determination of many individuals' cases, which may include not only lawyers but also other professionals with relevant experience.[20]

The resolution of tax disputes by tribunals is also believed to encourage applicants because they get the service of administrative justice at a relatively low cost as compared to the cost incurred in ordinary court

[17] See Diane Longley and Rhoda James (1999), Administrative Justice: Central Issues in UK and European Administrative Law, Cavendish Publishing Limited, p. 95.
[18] Ibid.
[19] A W Bradley and K D Ewing (2007), Constitutional and Administrative Law, Pearson Longman, p. 695.
[20] Id, p. 696.

litigation.[21] Tribunals are also appreciated because of flexibility since they usually avoid strict legal approach which is the typical feature of ordinary courts. The flexible approach of tribunals manifests itself in relation to conducting proceedings, rules of evidence and interpretation of statutes.[22] Furthermore, administrative tribunals are best known for using the inquisitorial mode as opposed to the adversarial mode of litigation which is not suitable to cases submitted to the tribunals. When the approach is inquisitional, it is highly likely that justice is done as is the case even in ordinary litigation in the continental legal system.[23]

2. The Federal Tax Appeal Commission: Establishment, Constitutional Status and Scope of Appellate Power

2.1 Establishment and constitutional status

Modern tax history of Ethiopia has attached significant weight to the disposition of tax cases by a special tribunal.[24] The FTAC is an independent tribunal which is empowered to accept and entertain tax appeals lodged against *appealable decisions* made by the Tax Authority on taxes reserved to the Federal Government.[25] The FTAC was accountable to the Prime Minister[26] for a short period, and it is currently accountable to the Federal Attorney General (FAG) since October 2018 based on a proclamation issued to define the powers and duties of the executive organs of the FDRE Government.[27]

Owing to the absence of concrete and comprehensive tax policy that deals with tax administration in general and tax dispute resolution in

[21] Peter Leyland and Gordon Anthony (2013), Textbook on Administrative Law,7th ed, Oxford University Press, p.157.

[22] Id, p.158.

[23] Id, p.159.

[24] *See* AschalewAshagre, cited above at note 9, pp. 202-210.

[25] FTAP, cited above at note 10, Art. 86(1).

[26] During public consultations, there were individuals from among the taxpaying community who argued that the FTAC should not be accountable to the Ministry of Justice (now Federal Attorney General) alleging that the independence and impartiality of the Commission would be compromised. *See* also Aschalew Ashagre (2016), Review of the Ethiopian Income Tax Appeal System: Issues of Concern and Recommendations, unpublished, research conducted by the sponsorship of the International Financial Corporation (IFC), hereinafter cited as *Review of the Ethiopian Income Tax Appeal System*.

[27] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proc.No.1097/2019, Fed. Neg. Gaz. Year 25, No.8, Art.33(8).

particular,[28] it has remained quite easy for the Government of Ethiopia to change the accountability of the FTAC (from the Prime Minister to the FAG) without any acceptable and convincing justifications.[29] In this regard, two interviewees opined that the law-maker made the FTAC accountable to the FAG without being mindful of the fact that the FTAC was made accountable to the PM under the FTAP as there is an acute problem of institutional memory at the HoPR.[30]

Nonetheless, it may be argued that nothing is wrong with making the FTAC accountable to the FAG as long as there are legal safeguards and political commitment to ensure the independence and impartiality of the FTAC. Contrary to this line of argument, several interviewees are of the view that the FTAC has to be accountable to the PM since such arrangement enhances the independence and accountability of the FTAC.[31] There are practices in other jurisdictions as well where a tax appeal tribunal is accountable to the Attorney General. For instance, the Income Tax Appellate Tribunal in India and Taxation Review Authority in New Zealand are accountable to the Ministry of Justice of the respective countries while the Australian Administrative Appeals Tribunal (AAT) "falls within the portfolio of the Attorney General."[32]

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[28] Taddese Lencho (2014), 'Articulating Ethiopia's Current Tax Policy: Sources and Fundamental Objectives,' in Taddese Lencho and Kyle Logue (eds.), Ethiopian Tax System: Some Contemporary Issues and Problems, Ethiopian Business Law Series, Vol.VI, pp.1-26.

[29] In fact, there are individuals who argue that because the Prime Minister has different critical responsibilities, it is not appropriate to make the FTAC accountable to the Prime Minister. According to these individuals, it would be difficult for the Prime Minister to supervise and control the FTAC because of his busy schedule and high national responsibilities.

[30] Interview with Serkalem Eniyew, member of the FTAC, September 25, 2020; interview with Mulugeta Ayalew, president of the FTAC, September 28, 2020.

[31] Interview with Ali Mohammed, Consultant and attorney at law, September 20, 2020; interview with Teferra Lema, Chief Executive officer of Steely RMI PLC, Addis Ababa, September 22, 2020; interview with Tolu Fite, Manager of North West Branch, Ministry of Revenues, October 28,2020; interview with Wondiye Girma, consultant and attorney at law, September 18, 2020; interview with Husamudin Seifu, General Manager of My Wish Enterprise PLC, September 26, 2020 ; Interview with Girma Debele, tax accountant and consultant, Manager of Peak Authorized Accounting Firm, September 28, 2020.

[32] Satoru Araki and Iris Claus (April 2014), 'A Comparative Analysis of Tax Administration in Asia and the pacific,' available at

The other important issue arising in relation to tribunals in general and the FTAC in particular is the issue of constitutionality. Constitutional questions in connection with administrative tribunals usually arise in other jurisdictions although various administrative tribunals, including tax appeal tribunals, have proliferated in all continents. For instance, the Indian Constitution that entered into force in 1950 did not embody a provision regarding administrative tribunals. Therefore, the constitutionality of tribunals became controversial[33] until this gap was resolved under the amended Indian Constitution.[34] Following the amendment of the Constitution, the Indian parliament enacted the Administrative Tribunal Act in 1985 through which the central Administrative Tribunal was established with five benches. Therefore, administrative tribunals in India have firm constitutional basis and hence their status cannot be controversial so long as they exercise their adjudicative powers in accordance with the Constitution.[35] The establishment and powers of tribunals *vis-à-vis* the regular courts provoked constitutional disputes in jurisdictions such as the USA, Jamaica, Australia,[36]Canada[37] and the like.

In Ethiopia, although appeal to a tax appeal tribunal has been embodied in the Ethiopian tax dispute resolution system since the early 1940s, the FDRE Constitution does not expressly contain a clear provision regarding the status of tax appeal tribunals.[38] The issue of tribunals was raised during the discussion of the draft constitutional provisions by the members of the Constitutional Assembly. The issue of tribunals was discussed in relation to Art. 37(1) of the draft which stated "that everyone has the right to bring a justifiable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power." It was the phrase "any other competent body with judicial power" that was a source of heated debate as participants seriously questioned as to what message was conveyed by this phrase.

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https://www.adb.org/publications/comparative-analysis-tax-administration-asia-and-pacific, accessed on April 22, 2020, p. 63.

[33] Arvind P. Datar (2006), The Tribunalisation of Justice in India, 2006 Acta Juridica, p.288.

[34] Ibid , See also Indian Constitution, Arts. 323 A and 323B.

[35] K.C. Joshi (1999), 'Constitutional Status of Tribunals,' Journal of the Indian Law Institute, Vol. 41, No. 1, pp. 116-117.

[36] Ibid

[37] See David J. Mullan (1982), 'The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals,' Ottawa Law Review, Vol.14, pp. 239-269.

[38] It has to be borne in mind that the FDRE Constitution does not have express provisions dealing with the status of other administrative tribunals.

The panelists who were providing answers to the questions underscored that courts are not the only state organs that entertain cases; rather, administrative tribunals, such as the tax tribunals, could accept cases and could give binding decisions.[39] The reading of Art. 37(1) of the FDRE Constitution together with its drafting history indicate that administrative tribunals in general and tax appeal tribunals in particular were duly recognized by the makers of the Constitution although the Constitution does not unequivocally declare the status of administrative tribunals such as the FTAC. Reference to legislative intent thus shows that the words "any other competent body with judicial power" in Article Art. 37(1) of the FDRE Constitution can be interpreted as administrative tribunals including FTAC.

The status of administrative tribunals was also raised during the discussion on Art. 78(4) of the FDRE Constitution which states that "special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established." As we can see from the minutes of the Constitutional Assembly, the discussion centered on the non-establishment of special or *ad hoc* criminal courts as those that were operating during the early years of the Dergue Regime for the purpose of punishing political dissent and armed opposition groups.[40]

The Minutes show that Art. 78(4) was not meant to ban the establishment of administrative tribunals including tax appeal tribunals.[41] Therefore, it can cogently be concluded that the FDRE Constitution gave recognition to administrative tribunals such as the FTAC so long as the inherent powers of the regular courts are not affected by the existence of particular administrative tribunals. Yet, Yared argues that the establishment of various administrative tribunals in general and tax appeal tribunals in particular that are not controlled by the judiciary is an act of court stripping.[42] In this regard, Assefa Fisseha also stated that:[43]

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[39] See Minutes of the Constitutional Assembly of Ethiopia (Amharic), unpublished, Vol.3, Minutes No19, PP.13-15, available with the author in soft copy.

[40] See Minutes of the Constitutional Assembly of Ethiopia (Amharic), unpublished, Vol.5, Minutes No.27, pp.9-18 and No. 28 pp.3-11, available with the author in soft copy.

[41] Ibid.

[42] *See* Yared Legese, 'Court Stripping: A Threat to Judicial Independence, 'in Gedion Timotheows and Helen Fikre (eds.), The FDRE Constitution: Some Perspectives on the Institutional Dimension, Ethiopian Constitutional Law Series, Vol.6.,pp.91-161.

[43] Assefa Fiseha (2006), Federalism and the Accommodation of Diversity in Ethiopia, Wolf Legal Publishers, the Netherlands, pp.412-413.

> The judicial system, as compared to other federations, stands constrained in its jurisdiction. Even within the limited powers conferred by the Constitution, several internal as well as external factors seem to be at play to maintain the judiciary's law profile. Firstly, judicial powers are being taken away from regular judiciary to special other tribunals whose constitutional status is controversial. When there is legislative leeway for intervention, governments often decide to 'strip' courts of their jurisdiction to adjudicate matters in which the government of the day has vital interests or they may transfer jurisdiction over such matters from the regular courts to tribunals whose decision makers often lack the security of tenure or expertise enjoyed by the judiciary.

While Assefa's argument is basically correct in light of the establishment of certain administrative tribunals which have eroded the powers of regular courts, it is hardly possible to fully subscribe to his argument as far as the status of the FTAC is concerned as the Commission has remained to be the hallmark of the Ethiopian tax system since the early 1940s. Nevertheless, the Constitution should have expressly recognized administrative tribunals since administration of justice cannot solely be given to courts.

2.2 Scope of FTAC's appellate power

In Ethiopia, the appellate power of the FTAC is regulated by FTAP which provides that a taxpayer dissatisfied with an appealable decision or any other decision made by the Tax Authority can file a notice of appeal with the FTAC[44] seeking variation or reversal of the Tax Authority's decision. Art. 2(2) of the FTAP states that "an appealable decision is an objection decision and any other decision of the authority made under a tax law to the exclusion of a tax decision and a decision made by the authority in the course of making a tax decision." An objection decision, is a final and binding decision made by the Tax Authority, on the basis of a recommendation made by the Review Department, on any tax issues indicated under Art. 2(34) of the FTAP.[45]

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[44] FTAP, cited above at note 10, Art. 56(1) cum Art. 88.

[45] Id, Art. 2(34) of the FTAP has enumerated what tax decisions are. According to this sub-article, a tax decision is a tax assessment (other than a self-assessment), a decision on application under Art. 29, a determination made under Art. 40(2), a determination of a secondary liability or the amount of tax recovery costs payable, a determination of late payment interest payable, a decision to refuse an application for a refund under Art. 49 or Art.50, a determination of the amount of an excess credit under Art. 49, the amount of a refund under Art. 50or the amount of refund required to be repaid under Art. 50 and a determination of the amount of unpaid withholding tax under Art. 92(3) of the Federal Income Tax Proclamation (FITP).

The phrase *any other decision* of the tax authority that may be reviewed by the FTAC can be a source of confusion and uncertainty regarding the scope of the appellate power of the FTAC although the principle of certainty is one of the most important principles of a modern tax administration in general and tax dispute resolution in particular.[46] The practice is also of no help to grasp the essence of this issue since such issue has not arisen before the FTAC as indicated by the responses of members of the FTAC.[47]

It may be validly argued that the FTAC may have the power to accept and entertain any other non-tax assessment appeal lodged against the decision of the tax authority since the Proclamation has provided that a taxpayer has the right to lodge an appeal against any other decision of the Tax Authority affecting a taxpayer directly or indirectly. However, when we examine the provisions of the FTAP dealing with the powers of the FTAC as a whole, it is untenable to conclude that the FTAC is empowered to accept any complaint lodged against any decision made by of Tax Authority using its discretionary power.

For instance, the Tax Authority has the discretion to revoke Tax Identification Number (TIN),[48] order temporary closure of a business,[49] order registration for tax in general[50] and registration for VAT in particular.[51] Exercising such powers is an inherent discretion of the Tax Authority which compels us to question whether or not the FTAC has a legitimate power to review such decisions if a taxpayer is aggrieved by such decisions. At any rate, the scope of review power of the FTAC definitely exceeds the scope of Review Power of the Review Department whose recommendation that is approved by the Tax Authority can become an appealable decision.

In view of Ethiopia's current administrative law after the coming into force of the Federal Administrative Procedure Proclamation (FAPP) in March 2020,[52] it is worthwhile to evaluate the scope of appellate power of

[46] See E. W. Thomas (1999), 'Fairness and Certainty in Adjudication: Formalism v Substantialism,' Otago Law Review, Vol.9, No.3, pp. 459-488.
[47] Interview with Serkalem Enyew and Mulugeta Ayalew, cited above at note 30.
[48] FTAP, cited above at note 10, Art. 15.
[49] Id, Art.45.
[50] Id, Art.9.
[51] Value Added Tax Proclamation, Proc. No. 285/2002, Fed. Neg Gaz., Year 8,No.33, Art. 16.
[52] Federal Administrative Procedures Proclamation, Proc. No.1183/2020, Fed. Neg. Gaz., Year 26, No.33.

the FTAC in light of the relevant provisions of the FAPP. The FAPP provides that any individual, who is aggrieved by an administrative decision, has the right to take his grievance to an internal review organ of an administrative agency, the Review Department in tax case.[53] However, if he is not satisfied with the decision of the internal review organ, he has the right to appeal to the Federal High Court (FHC) for judicial review.[54] Therefore, a question arises whether taxpayers are required at all to lodge appeals to the FTAC against decisions made by the tax authority on matters of taxation which are not included under Art. 2(34) of the FTAP.

Two opposing arguments may be raised in response to this issue. One may argue that because the FAPP is applicable to any decision of a federal administrative agency and the Tax Authority is also an administrative agency, a taxpayer aggrieved by the decision of Tax Authority which is not covered by Art. 2(34) of the FTAP is not required to go to the FTAC. Instead, he has the right to lodge an appeal to the FHC for judicial review so long as the internal review organ of the Tax Authority has examined the complaint and approved the original administrative decision of the Tax Authority.

On the other hand, it may be argued that passing through the FTAC is mandatory even in non-tax assessment cases since the FTAP is special law dealing, *inter alia*, with the resolution of tax disputes while the FAPP is a general law dealing with all administrative procedural issues in general. Such controversy could have been easily avoided (i) if the FTAP had defined the cases that can be appealed to the FTAC other than objection decisions, and (ii) if the FAPP had clearly indicated its scope of application to matters that are dealt with by special administrative procedural rules in Ethiopia's tax laws.

It has to be noted that the FAPP has failed to recognize the powers granted to administrative appeal tribunals, such as the FTAC, as it has boldly provided that once an internal administrative remedy is exhausted, resort to the FHC is possible for judicial review.[55] Because of the unclear positions of these two proclamations, there could be a problem of forum shopping which results in different decisions by the FTAC and the FHC on the same legal issues. The best remedy is, therefore, to clearly define the scope of appellate

[53] Id, Arts.42-43.
[54] Id, Art. 52.
[55] Ibid.

power of the FTAC as far as disputes that do not involve tax assessment are concerned.[56]

3. Membership to the Commission

The independence, impartiality and effectiveness of a tribunal largely depends on the composition of members and the manner in which members are appointed and removed. For instance, in Tanzania members of the Tax Revenue Appeals Tribunal are appointed by the Minister of Finance[57]while the President of the tribunal is appointed by the President of the Republic after consultation with the Chief Justice.[58] In Zambia, both the chairperson and the ordinary members of the Tax Appeals Tribunal are appointed by the Minister of Finance as provided by the 2015 Tax Appeals Tribunals ACT.[59] Likewise, members of the Tax Appeal Tribunal are appointed by the Ministry of Finance in Nigeria.[60]

In Ethiopia, the FTAP states that both the President of the FTAC and members are appointed by the Prime Minister (PM).[61] Regarding the criteria to be used for eligibility to membership, the FTAP states that an individual may be appointed as a member of the Commission if he is a lawyer with a significant experience in tax or commercial matters, a member of the Institute of Certified Public Accountants with significant experience in tax matters, and if the individual has previously been engaged as a tax officer with significant technical and administrative experience in tax matters or has special knowledge, experience, or skills relevant to the function of the Commission.[62] The word '*significant*' is an extremely subjective standard for the selection and appointment of members of the Commission, and proper attention should have been given to the inclusion of clear and specific criteria of selection and appointment of members of the Commission

[56] Interview with Tekka Mehari, Consultant and Attorney at Law, September 20, 2020.
[57] See the United Republic of Tanzania Revenue Appeals Act, 2006, available at http://repository.businessinsightz.org/handle/20.500.12018/285, accessed on March 20, 2020, Art. 8(2.c).
[58] Id, Art. 8(2.c).
[59] The Tax Appeals Tribunal Act of Zambia, 2015. Available at https://zambialii.org/node/1075 (Accessed on March 20,2020)
[60] Agbonika Josephine Aladi Achor (2014), 'Tax Dispute Resolution in Nigeria: A Storm in a Tea Cup,' Journal of Law, Policy and Globalization, Vol. 29, pp. 147-156.
[61] FTAP, cited above at note 10, Art. 86(2) cum Art. 87(1).
[62] Id, Art. 87(2).

commensurate with the complicated and sensitive tax appeals arising from the federal tax laws.

In addition to enumerating the general criteria of appointment for membership to the Commission, the FTAP enumerates persons who cannot be appointed as member of the Commission. As stated under Art. 87(3) of the FTAP, *first,* the PM shall not appoint "a currently serving tax officer or an individual who has ceased to be a tax officer for a period of less than two years" which is an important prohibition because it helps to enhance the independence and impartiality of the Commission.[63] In fact, this is a very useful departure made by the FTAP as the Ethiopian Revenues and Customs Authority (ERCA) was represented by two members making it a judge on its own case which was serious source of discontent on the part of taxpayers.[64]

Secondly, an individual who has been liable for a penalty or convicted of an offence under a tax law relating to tax avoidance or evasion cannot be appointed as a member.[65] *Thirdly*, the PM shall not appoint an individual as a member of the Commission who has been convicted of a crime of corruption[66] and *finally* an individual who is an un-discharged bankrupt cannot be appointed as a member of the Commission.[67]

The composition of the members of a tribunal is an important concern.[68] However, the FTAP has failed to provide for an indicative professional mix of members relating to the number of lawyers, tax accountants or previous tax officers and individuals with special knowledge about the Commission to be appointed by the Prime Minister. This shows that determining the mix of the members of the Commission is totally left to the PM.

A closer examination of Art. 87(2) of the FTAP reveals that the law does not expressly provide for representation of the tax-paying community in the FTAC. In this regard, the FTAP has clearly regressed as compared to tax laws issued during the 1940s,[69] the 1970s[70] and Proc. No. 608/2008[71] which

[63] FTAP, cited above at note 10, Art. 83(3)(a).
[64] Aschalew, cited above at note 9, p.217.
[65] FTAP, cited above at note 10, Art. 83(3)(b).
[66] Id, Art. 83(3)(c).
[67] Id, Art. 83(3)(d).
[68] Peter Cane (2009), Administrative Tribunals and Adjudication, Oxford and Portland, Oregon, pp. 103-105.
[69] See The Personal and Business Tax Proclamation, Proc. No 107/1949, cited above at note 24, Art. 4(vii). As provided under this sub-article, of the seven members of the Tax Appeal Commission, three members would be appointed by the Emperor from among the merchants and manufacturers doing business in Ethiopia.

provided for the representation of the taxpaying community in the tax appeal commission.

In practice, one panel of the FTAC is filled with five individuals who are all legal professionals drawn from various government institutions, and this shows that there is a clear discrepancy between the law and the practice.[72] According to members of the FTAC, a member is not appointed from the business community. In fact, they argued that it is not worthwhile to include such person as he may be partial to the business community.[73] However, other professionals interviewed by this author argue that the business community should be represented since doing so makes them feel accommodated in the appellate process. They stated that such representation helps the FTAC to have enhanced awareness of balanced perspectives on tax issues and policies including views of a representative from the business community.[74]

For instance, in Zambia, the number of members to the Tax Appeals Tribunal is seven consisting of three legal practitioners with experience of ten years or more who are recommended by the Judicial Service Commission and who have sufficient knowledge and experience in tax matters, two qualified accountants certified as such by the Zambia Institute of Chartered Accountants and two persons from the business community.[75] The Tanzanian Tax Revenue Appeals Act provides that the Tax Revenue Appeals Tribunals consists of a chairman, two vice-chairmen, and four other ordinary

[70] *See* Rural Land Use Fee and Agricultural Activities Income Tax Proclamation (Proc. No. 77/1976, Neg. Gaz., Year 30, No. 19), Art. 29(2). As per this sub-article, taxpayers would be represented in the Woreda Tax Appeal Committee by the chairman of the Worda Peasant Association. Likewise, Art. 10(1) of the Urban Land Rent and Urban House Taxes Proclamation (Proc. No.80/1976, Neg. Gaz., Year 30, No. 25) clearly provides that the Tax Appeal Committee would include a representative from the cooperative societies of urban dwellers which shows that the taxpaying community was represented by such person.

[71] *See* Income Tax (Amendment) Proclamation, Proc. No.608/2008, Fed. Neg. Gaz. Year 15, No. 15 (now repealed). Art. 2 (12) states that the Tax Appeal Commission would include representatives from the business community.

[72] Interview with Serkalem Eniyew and Mulugeta Ayalew, cited above at note 30.

[73] Ibid.

[74] Interview with Yoseph Aemero, consultant and attorney at law, September 21, 2020; interview with Yohannes Woldegebriel, Director of the Arbitration Institute, Addis Ababa Chamber of Commerce and Sectorial Association, September 23, 2020.

[75] The Tax Appeals Tribunal Act of Zambia, cited above at note 59, Art.4.

members.[76] In Nigeria, each TAT (Tax Appeal Tribunal) division is composed of five tax appeal commissioners headed by a chairman who must be a lawyer with not less than fifteen years of cognate experience in tax matters while the other commissioners must be knowledgeable about tax laws, regulations, norms, practices and operations of taxation.[77]

In Ethiopia, the numbers and composition of members is to be freely determined by the PM since the FTAP has provided that the PM is empowered to "appoint such number of members to the Commission as he considers necessary having regard to the needs of the Commission."[78] This means that the PM is vested with a wide discretionary power in determining the number of members of the Commission.

With regard to tenure, members of tax administrative tribunals are appointed for three years in Tanzania although they are eligible for reappointment[79] and in Zambia members are appointed for four years.[80] In USA, administrative law judges are appointed for an indefinite period of time and can be removed only for good cause after a hearing has been conducted before the Merits System Board. Members of tribunals are appointed for a fixed period of time in England and they may be removed from office by the Lord Chancellor on account of inability or misbehavior.[81]

In Ethiopia, members of the FTAC are appointed for three years, and are eligible for reappointment provided that they meet the criteria of appointment at the time of reappointment.[82] The appointment of a member can be terminated if the member becomes employed or engaged as a tax officer, is liable to penalty or convicted of an offence under a tax law relating to tax avoidance or evasion, is convicted of a crime of corruption under the Corruption Crimes Proclamation or any other law, or if the individual becomes an un-discharged bankrupt. Other grounds of termination include resignation by notice in writing to the PM and removal by the PM for inability to perform the duties of office or for proven misconduct.[83]

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[76] The United Republic of Tanzania Revenue Appeals Act, cited above at note 55, Art. 8(1).
[77] Achor, cited above, note 60, p.148.
[78] FTAP, cited above at note 10, Art. 87(1).
[79] The United Republic of Tanzania Revenue Appeals Act, cited above at note 56, Art. 9(2).
[80] The Tax Appeals Tribunal Act of Zambia, cited above at note 59, Art. 4(3).
[81] Cane, cited above at note 68, p.101.
[82] FTAP, cited above, note 10, Art. 87(4).
[83] Id, Art. 87(5).

4. Filing Appeal before the FTAC

4.1 The time limit requirement

A taxpayer, aggrieved by the decision of the Tax Authority, has the right to lodge an appeal to the FTAC by meeting the pre-conditions stipulated by the FTAP.[84] The first precondition is that an aggrieved taxpayer should lodge an appeal to the FTAC within 30 days of service of notice of the appealable decision.[85] This time limit has remained unchanged since the 1940s.[86] However, the FTAP provides that the time limit of 30 days may be extended by the Commission where the taxpayer shows to the Commission good cause for not filing the appeal within 30 days.[87] To this end, the FTAP has made it clear that the Commission may issue a directive.[88] This is an important departure which aims at enhancing access to justice for taxpayers.

Accordingly, the Commission issued a directive which enables the taxpayer to request for extension of time before the lapse of the (30 days) timeline stated in the Proclamation.[89] When the Commission believes that the taxpayer was not able to file the appeal within the 30 days' time owing to *force majeure* or any other convincing reason, it may grant an extension of time not exceeding 15 days.[90] However, the directive does not specify the reasons that may justify the extension of the time for appeal thereby providing discretionary power to the judges of the Commission. For example, there are circumstances where the FTAC grants extension if an appellant is not able to file the appeal because of financial constraint to pay the 50% of the disputed amount of tax.[91]

Moreover, the directive has given additional chance to taxpayers to lodge appeals after the lapse of the 30 days' time limit, as is the case in civil appeals regulated by the Civil Procedure Code of Ethiopia,[92] despite the

[84] Id, Art. 56(1).
[85] Id, Art. 88(1).
[86] *See* the proclamations enumerated under foot number 24 above.
[87] FTAP, cited above at note 10, Art. 88(3).
[88] Id, Art. 88(4).
[89] Directive Issued to Define the Procedures of Extension of Time of Appeal or Appeal out of Time (in Amharic) by the Federal Tax Appeal Commission, Directive No.2/ 2011 E.C, available with the author in soft copy, Art.4. (*Hereinafter cited as FTAC Directive*)
[90] Id, Art.5.
[91] Interview with Serkalem Eniyew, cited above at note 30.
[92] See Civil Procedure Code of Ethiopia, Decree No. 52/1965, Extraordinary Issue, Neg. Gaz. Year 25, No. 3, Art. 328.

silence of the FTAP in this regard. The Directive states that the taxpayer shall file an application which requests the Commission for permission to lodge an appeal out of time in which case the Commission notifies the Tax Authority to give its opinion on such application. The Commission may also hear the parties before it gives a ruling on the application filed by the taxpayer. Having done this, the Commission may allow the taxpayer to lodge appeal out of time where the Commission is satisfied that the taxpayer was not able to lodge the appeal within the 30 days' time limit owing to *force majeure* as defined by the Civil Code of Ethiopia.[93]

4.2 The *pay-to-play rule*: Advance tax deposit requirement

The precondition of advance deposit has been an important component of the Ethiopian tax appeal system starting from the early 1940s.[94] When the draft FTAP was tabled for discussion, the amount of tax to be paid as precondition to appeal was one of the most contentious issues. Taxpayers seriously argued that since strict application of this rule was an obstacle to access to justice, it should be reduced from the hitherto 50% of the tax assessed (including basic tax, penalty and interest) to something like 25% or 30% of the disputed amount of basic tax (ፍሬ ግብር) excluding penalty and interest.[95] Taxpayers also argued that such obligation should not only be met by cash payment. Rather, they argued, the tax authority should accept other guarantees such as surety, mortgage, pledge or financial guarantee bond by citing the practice of various jurisdictions. [96]

The representatives from the Tax Authority, on the other hand, argued that reducing the amount of the hitherto 50% of disputed amount of tax to the one proposed by the taxpayers would be detrimental to government revenue and hence to the developmental endeavors of the country. They also argued that accepting other forms of securities in lieu of cash would be to the detriment of the government on two grounds. *First*, if real or personal securities were accepted in place of cash, government would lose revenues

[93] See Civil Code of the Empire of Ethiopia, Proc. No.165/1960, Neg. Gaz. Year 19, No. 2. Art. 1793 defines force majeure as "the unforeseeable act of a third party for whom the debtor is not responsible", or "an official prohibition preventing the performance of the contract", or "natural catastrophe such as earthquake, lightning or floods", or "international or civil war", or "the death or serious accident or unexpected serious illness of the debtor."

[94] *See* Aschalew, cited above at note 9, pp. 202-208. See also the tax laws enumerated under foot note number 24 above.

[95] The author observed this as he was one of the participants when the draft FTAP was tabled for discussion.

[96] Ibid.

that it can use without considerable delay; *secondly*, accepting real securities such as pledge and mortgage would be inconvenient to the tax authority since administration and/or alienation of such properties would be a difficult task requiring the mobilization of additional resource and personnel.[97]

When the draft proclamation was finally presented to the HoPR, the House determined that a taxpayer who wants to lodge an appeal to the FTAC should pay 50% of the basic tax in dispute. However, contrary to its immediate predecessors, FTAP stipulates that the 50% advance tax payment applies only on the basic tax and not to the additional late payment interest and penalty. This is an appreciable improvement because before the coming into force of this Proclamation, the penalty and interest would constitute an amount of money usually higher than the basic tax thereby making the obligation of the taxpayer very much arduous,[98] and in effect, causing serious impediment to access to justice.[99]

Despite such improvement, the 50% deposit requirement and the fact that such money should be paid only in cash have remained sources of discontent to taxpayers.[100] Professionals and taxpayers interviewed argued that the percentage should be reduced and there should be exceptional circumstances where a taxpayer can lodge an appeal by producing real securities. There should also be circumstances where an aggrieved taxpayer may lodge an appeal to the FTAC without paying tax advance deposit or furnishing a security where it is proved that the appellant does not have any means to meet the deposit requirement since justice is not a commodity that has to be bought by money.[101]

I argue that although the 50% amount of deposit may be tolerable in the interest of the general public, demanding taxpayers to meet this obligation through payment of cash under all circumstances seems to be unjust. This is because under the Ethiopian situation there are taxpayers who face financial liquidity problems to deposit this amount within 30 days from the date of the decision of the tax authority.

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[97] Ibid

[98] This problem was partly attributable to the fact that the amount of interest to be paid by a taxpayer was not capped which means that interest would continue to count regardless of the length of time the final tax liability was determined. In addition, under the FTAP, the amount of interest is capped taking into account the problem that taxpayers were facing before the coming into force of this Proclamation.

[99] See Aschalew, cited above at note 9, pp.218-219.

[100] Interviewees mentioned at note 31 above.

[101] Ibid.

4.3 Filing notice of appeal to the FTAC

A taxpayer dissatisfied with an objection decision made by the Tax Authority[102] can challenge that decision by filing a notice of appeal[103] to the FTAC having met the above conditions of appeal.[104] A notice of appeal is to be filed by the appellant or his legal representative since it is only the appellant or his representative who is a real party in interest in the outcome of the case as provided under Art. 32 of the Civil Procedure Code of Ethiopia. The notice of appeal is, *inter alia*, required to contain detailed facts on which the appeal is based, the factual and legal reasons for appeal, the copy of the appealable decision, the name of an organ of the tax authority that rendered the appealable decision, documents which serve as evidence and name of witnesses and their addresses, memorandum of association and articles of association where the appeal is filed by a legal person and evidence which shows half of the disputed amount of tax is paid.[105]

When a notice of appeal is submitted to the FTAC, the Commission scrutinizes the notice of appeal to check whether it has met the requirements provided by law. The notice of appeal is rejected where it fails to meet the requirements.[106] If we stick to the approach of the Civil Procedure Code, the registrar is empowered to scrutinize the memorandum of appeal with regard to formal requirements while the judge is empowered to examine for substantive requirements.[107]

Contrary to what the Civil Procedure Code provides, the Directive issued by the PM states that such power is reserved to the Registrar of the Commission or in his absence to a judge of the Commission.[108] Regarding formal requirements, it is appropriate to give such power to the registrar since the fulfillment or otherwise of the formal requirements cannot be as such controversial whereas giving the power to the registrar to determine

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[102] It is to be noted that the Review Department makes a recommendation. The final decision is made by Minister at head office level and by the manager at branch levels. In the final analysis, an appealable decision is not the decision of the Review Department; rather, an appealable decision is the decision of the tax authority.

[103] Note that this term is equivalent to memorandum of appeal. However, the FTAP uses notice of appeal. Such usage is influenced by the Australian tax laws as the draftsperson of the FTAP, Professor Lee Burns, came from Australia.

[104] FTAP, cited above at note 10, Art. 56(1).

[105] Id, Art. 88 cum Directive on the Working Procedures of the Tax Appeal Commission, issued by the Prime Minister, Amharic, 2011 E.C, Art.5 &6.(*Hereinafter cited as PM Directive*)

[106] Id, Art.7.

[107] Civil Procedure Code, cited above at note 92, Art.229-231.

[108] PM Directive, cited above at note 105, Arts.7 & 8.

whether the notice of appeal contains both factual and legal grounds of appeal is inappropriate. This is because it is not easy for the registrar to determine at the filing stage whether an appeal contains factual and legal grounds. Hence, granting such power to a single registrar is detrimental to the interest of the appellant who can encounter an erroneous rejection of his appeal even if the registrar might be a legal professional.[109]

Needless to say, tax cases are usually complicated containing layers of facts and legal issues making it difficult for the registrar to determine in advance whether or not the appeal has factual and/or legal grounds. The registrar should thus only be allowed to determine whether formal requirements of a notice of appeal are satisfied; and the power to determine whether the notice of appeal contains factual and legal grounds should be left to the judges of the Commission.

This argument can be substantiated by the relevant provisions of the Ethiopian Civil Procedure Code since the Directive Issued by the Prime Minister has made cross-reference to the Code.[110] According to the Civil Procedure Code, a statement of claim is rejected by the registrar where it fails to meet formal requirements specified in the Code while the power to make substantive investigation on the statement of claim is reserved to the judge.[111] The judge makes substantive examination on the statement of claim to check whether the statement of claim contains cause of action and whether it is within the jurisdiction of the court. By doing so, the judge may reject the statement of claim where he believes that it does not disclose a cause of action and if the particulars of the statement of claim show that the suit is outside the jurisdiction of the court.[112]

The Directive stipulates that if a notice of appeal is rejected by the Registrar or a judge of the Commission, the appellant has the right to lodge a complaint to the President of the Commission.[113] If the President is satisfied that the complaint of the appellant is correct, he would dismiss the ruling of the registrar or the judge and would order that the notice of appeal be filed.

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[109] At the FTAC, the author observed that the registrar of FTAC at the time of revising this work (September, 2020) is a legal professional though he does not have expertise in Ethiopian tax laws. He did not have any exposure to the tax laws of Ethiopia as he was an advisor of the Attorney General before his departure to the FTAC.

[110] Id, Art.18.

[111] Civil Procedure Code, cited above at note 92, Art. 229.

[112] Id., Art. 231.

[113] PM Directive, cited above at note 105, Art. 8(4).

On the other hand, if the President is of the view that the rejection of the notice of appeal by the registrar or the judge is correct, he should immediately notify the appellant that his complaint is rejected along with the reasons justifying the rejection.[114] In this case, the appellant has the right to file a new notice of appeal by remedying the problems which caused the rejection of appeal within the 30 days of appeal counted from the date of receipt of the appealable decision.[115]

The question, however, is: what if the 30 days' time limit for appeal lapses while the appeal is being examined by the President of the Commission? The FTAP, the FTAR and the Directive under consideration do not offer answer to this question. Hence, where such problem is encountered, we have to resort to a workable interpretation of the silence of the law. Having in mind the prime purpose of procedural rules, the healthy approach is to allow the appellant to file new notice of appeal within a certain period of time starting from the approval of the rejection of the first notice of appeal by the President of the Commission. Unless we follow this line of interpretation, the appellant's access to justice cannot be ensured.

4.4 Reply to the notice of appeal and the counter-reply

Under the Civil Procedure Code of Ethiopia, a respondent is not allowed to file a reply as of right unless the court orders him to do so.[116] However, Art. 89(1) of the FTAP provides that "when the notice of appeal is served on the Tax Authority, it has to file its reply to the Commission within 30 days of being served on the notice of appeal or within such further time as the Commission may allow."

With regard to extension of time for the appellant, the FTAP envisages that the Commission would issue a directive that would provide the grounds of extension of the 30 days' time limit.[117] However, it does not indicate whether the Commission would issue a directive regarding extension of time of reply or whether the extension of time can be granted to the Authority by the Commission. Hence, the FTAP should have defined the grounds of extension of time for filing an appeal and reply by the Commission which would be equally applicable to the Tax Authority and the taxpayer thereby ensuring procedural equality of the parties.

With regard to contents of the reply, Art. 89(1) of the FTAP stipulates that the reply is required to contain a statement setting out the reasons for

[114] Id, Art. 8(5).
[115] Id, Art. 7(2).
[116] Civil Procedure Code, cited above at note 92, Arts 338-339.
[117] FTAP, cited above at note 10, Art. 88(4).

making the appealable decision made by the Authority and any other document relevant to the Commission's review of the decision against which an appeal is made to the Commission. Art. 89(2) of the Proclamation has made it clear that if the statement filed by the Tax Authority under sub-article 1 of the same article does not contain statement of reason, the Commission has the power to require the Authority by a written notice to file a further statement of reason within the time determined in the notice.

This sub-article seems to suggest that the law is more favorable to the Tax Authority because if the taxpayer appellant fails to state reasons in his notice of appeal, his appeal would be rejected instead of getting the chance for amendment by the initiation of the Commission. Although the Tax Authority litigates before the Commission representing public interest, the same procedural rules should be applied to ensure that both parties are fairly treated[118] as we cannot claim that public interest can be treated more favorably than the interests of private individuals in tax proceedings conducted before an appeal tribunal.[119]

Although the FTAP is silent on whether the appellant taxpayer has the right to submit a counter-reply to the reply submitted by the Tax Authority, the Directive issued by the PM states that the appellant taxpayer has can file a counter-reply if he wishes to do so.[120] If the appellant taxpayer opts to file a counter-reply, he has to submit it on the date determined by the Commission which cannot be less than 10 days reckoned from the date of submission of the reply by the Tax Authority.[121] The 10 days' time limit seems to be short since there might be circumstances where giving a counter-reply may require careful analysis of the reply filed by the Tax Authority and writing a well-considered counter-reply that can successfully discredit the reply of the Tax Authority. Therefore, instead of determining such a short period of time, the Directive should have left it to the Commission so that it may determine the time on case by case basis.[122]

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[118] *See* Tom R. Tyler (1988), 'What is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures,' Law and Society Review, Vol. 22, p. 105.

[119] See Paul Stancil (2017), 'Substantive Equality and Procedural Justice, 'Iowa Law Review, Vol.102, No.4, p. 286.

[120] PM Directive, cited above at note 105, Art. 10(1).

[121] Id, Art. 10(2).

[122] In ordinary civil appeal proceedings, the appellant has the right to file a counter-reply where the respondent files a reply up on the permission of the court and the time of filing a counter-reply is to be determined by the court taking into account the complexity of the case and other relevant circumstances; See Civil Procedure Code, cited above at note 91, Art.338.

5. Appellate Proceeding before the FTAC

5.1 Appearance of the parties and effects of non-appearance

Under the Civil Procedure Code of Ethiopia, if an appellant or both the appellant and the respondent fail to appear at the time of hearing, the court shall dismiss the appeal. If, on the other hand, the respondent fails to appear, the appeal will continue *ex parte*.[123] With regard to tax appeal proceedings conducted by the FTAC, the FTAR states that "if the appellant fails to appear in person or be represented at a hearing of the appeal, the Commission may dismiss the appeal."[124] As compared to the Civil Procedure Code, the Regulation seems to be favorable to a taxpayer (appellant) as it gives the Commission a discretion to or not to dismiss the appeal despite the non-appearance of the appellant at the time of the hearing of the appeal.[125] The Directive issued by the PM, on the other hand, states that where the appellant or his representative fails to appear before the Commission at the time of hearing, the Commission may give one adjournment. If the appellant fails to appear on the adjourned date, the Commission is empowered to dismiss the appeal.[126]

There is inconsistency between the Regulation and the Directive because the former states that the Commission may dismiss the appeal where the appellant fails to appear at the time of hearing, while the latter enables the Commission to adjourn the hearing for one more time irrespective of the ground of non-appearance of the appellant. But because the Directive is below the Regulation in the hierarchy of laws,[127] the Commission is duty-bound to adhere to what the Regulation provides i.e. the FTAC has the

[123] Civil Procedure Code, cited above at note 92, Art. 69(2).

[124] Federal Tax Administration Regulation, Reg.No.407/2017,Fed.Neg.Gaz.,Year 22,No.79, Art.10(2).(*Hereinafter cited as FTAR*)

[125] Under the Civil Procedure Code, the court is obliged to dismiss the appeal if the appellant fails to at the time of hearing the appeal. The court does not have any discretionary power not to dismiss the appeal as a matter of exception. This means that the Civil Procedure Code has used an objective standard while the FTAR has used a subjective standard.

[126] PM Directive, cited above at note 105, Art. 12(1).

[127] Under the Ethiopian legal system, the Constitution is supreme to all laws followed by proclamations that are issued by HoPR and then by regulations that are issued by the Council of Ministers. Directives come at the bottom of hierarchy of laws since they are issued either by the Prime Minister or any other administrative body of the Federal Government for the proper implementation of proclamations and/or regulations as circumstance so demand. See Ayele Bogale (1999), Hierarchy of law with in the present federal legal structure of Ethiopia, LL.B thesis, unpublished, Faculty of Law, Addis Ababa University.

discretion to dismiss or not to dismiss the appeal where the appellant fails to appear at the hearing.

Although non-appearance of an appellant for no apparent reason at the time of hearing the appeal has to be seriously sanctioned by dismissing the appeal, the law gives room where the dismissed appeal may be reinstated if the appellant is able to show to the Commission that his non-appearance was attributable to a factor beyond his control. This is appreciable because it would be extremely unfair to punish an appellant who was prevented from appearing before the Commission at the time of hearing by a factor which he could not control.[128] The Civil Procedure Code also states that an appeal dismissed by the court may be reinstated where the appellant shows that he failed to appear owing to good cause even though the Code does not indicate the constituent elements of good cause.[129]

The Tax Authority is also required to appear before the Commission at the time of the hearing of the appeal as provided under the Directive.[130] If the Tax Authority fails to appear, the Commission may adjourn the hearing for another day[131] and if the Tax Authority again fails to appear at the second hearing, the Commission conducts the hearing *ex parte.*[132] A question arises whether the Tax Authority can request the setting aside of the hearing and plead for rehearing of the case by showing that it (the Tax Authority) failed to appear at the time of hearing owing to *force majeure*.

The FTAR and the Directive issued by the PM are silent on this issue, and we can argue that the Tax Authority has the right to get an order of *ex parte* proceeding set aside where it shows to the Commission that it was prevented from appearing on the hearing date because of *force majeure* or any other sufficient cause. In fact, this argument can be substantiated by the fact that the Directive issued by the PM has made cross-reference to the Civil Procedure Code[133] which allows the setting aside of *ex parte* proceedings where a respondent was not able to appear at the time of hearing an appeal because of good cause.[134]

In order to ensure equality of arms of the litigants, the opportunity available to the taxpayer should equally be available to the Tax Authority.

[128] PM Directive, cited above at note 104, Art. 12(3).
[129] Civil Procedure Code, cited above at note 92, Art. Art. 74(2).
[130] PM Directive, cited above at note 104, Art. 13(1).
[131] Id, Art. 13(2).
[132] Id, Art. 13(3).
[133] Id, Art.18.
[134] Civil Procedure Code, cited above at note 92, Art. 74(1).

This is because "procedural safeguards must be neutral and impartial in order to be fair. That is, they must provide a forum in which neither party has an inherent institutional advantage over the other."[135] The problem, however, is that the law has not stated the grounds which can be accepted by the Commission to set aside dismissal or *ex parte* order. This shows that the litigants are left to the discretionary power of the Commission.

5.2 Hearing procedure

The right to be heard is an indispensable element of fairness and procedural due process of law.[136] It is one of the fundamental elements of natural justice,[137] and it is also an important concern of national constitutional norms and human rights instruments.[138] Art. 10 of the Universal Declaration of Human Rights (UDHR) has made it clear that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations. Moreover, Art. 14(1) of the International Covenant on Civil and Political Rights (ICCPR) states that "every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal."

The jurisprudence of the Human Rights Committee (HRC) also demonstrates that litigants are entitled to a fair and open hearing in administrative proceedings and before ordinary courts of law.[139] Attention is given to an open hearing because it is this kind of hearing that is capable of enabling the public to observe that justice is actually done.[140] According to Bayles, an open hearing is an indispensable instrument to control arbitrariness on the part of the decision-makers and it helps the public to correct injustice which may result from the unjust application of just rules.[141]

In Ethiopia, the FDRE Constitution does not have a provision which expressly provides that litigants in civil proceedings in general and administrative proceedings in particular are entitled to an open hearing. Yet,

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[135] Leonard S. Rubenstein (1976),' Procedural Due Process and the Limits of the Adversary System,' Harvard Civil Rights-Civil Liberties Law Review, Vol.11, P.58.

[136] Edward J. Eberle (1987), 'Procedural Due Process: The Original Understanding,' Constitutional Commentary,Vol.4 , No.2, p.339.

[137] P. P. Craig (2003), Administrative Law, Sweet and Maxwell, p.407.

[138] Michael D. Bayles (1990), Procedural Justice, Kluwer Academic Publishers, pp.39-40.

[139] Noel Dias and Roger Gamble (2007), 'Independence, Impartiality and Scrutiny: The Essence of Fair Trial Protection', *Sri Lanka Journal of International Law*, Vol. 19, p. 302.

[140] Bayles, cited above at note 138, p.42.

[141] Ibid.

it states that international instruments to which Ethiopia is a party are part and parcel of the Ethiopian laws. This renders Art. 14(1) of the ICCPR (that has guaranteed the right to an open hearing) applicable in Ethiopia as though it were a law issued by the Ethiopian Parliament.

Open hearing is one of the most important procedural requirements (in all proceedings including appellate proceedings) under the Ethiopian Civil Procedure Code. This is applicable to tax cases by virtue of the cross-reference made to it by the PM Directive.[142] The FTAP also indicates that taxpayers are entitled to an open hearing even though there is no specific provision which expressly states that taxpayers are entitled to be heard in an open setting.[143] Furthermore, the Directive issued by the PM recognizes the right of taxpayers to an open hearing.[144]

However, there are gaps in the course of the hearing because the judges do not provide adequate time to the litigants during the hearing.[145] Lack of proper recording at the time of the hearing erodes trust of the litigants.[146] Moreover, the hearing is not an open hearing owing to problem of space as the FTAC does not have its own building.[147]

5.3 Burden of proof

Administrative tribunals are quasi-judicial adjudicative bodies which entertain cases within their competence and render binding decisions. In order to render an acceptable and binding decision, administrative agencies make use of evidence produced by the parties and evidence that may be produced under their order in the interest of justice.[148] In the normal course of circumstances, burden of proof in administrative agencies is in line with the burden of proof employed in civil proceedings, i.e.. the one who alleges the existence of a certain fact has to prove that the fact exists. However, in tax cases, the burden of proof lies on the taxpayer in many jurisdictions

[142] PM Directive cited above at note 105, Art.18.

[143] FTAP, cited above at note 10, Art.90(1).This sub-article states that the president of the Commission shall assign a member or members to the hearing of an appeal as the president considers appropriate having regard to issues raised by the appeal.

[144] PM Directive, cited above at note 105, Art. 11(1).

[145] Interview with Semaw Nigatu, Consultant and Attorney at law, September 24, 2020.

[146] Interveiw with Amare Lakew, Private Tax Accountant and Tax consultant, September 18, 2020.

[147] Interview with Girma Taffese, Tax advisor of East Africa Holding Company, September 30, 2020.

[148] See generally James E. Youngdahl (1960), 'Rules of Evidence in Administrative Proceedings,' Arkansas Law Review, Vol.15, pp.138-159.

although there are exceptional circumstances where burden of proof may be shouldered by the tax authorities.[149]

In Ethiopia, the FTAP provides that burden of proof lies on the taxpayer in proceedings before the FTAC.[150] Although issues relating to burden of proof in taxation basically arise at the internal review stage in Ethiopia, the FTAC is not confined to the record sent to it by the Tax Authority. Rather, it has the power to see a case *de novo* thereby enabling taxpayers to have the right to adduce any evidence at this stage which is relevant to the case. Hence, the taxpayer bears the burden of proof, at this stage too, by producing admissible and relevant evidence to the Commission.

The problem, however, is that there are no comprehensive rules[151] in Ethiopia that help us determine the relevance and admissibility of evidence in ordinary civil proceedings in general and tax proceeding in particular. Therefore, determining the relevance and admissibility of evidence in tax proceedings is left to the judges of the Commission. Appellants in Ethiopia are thus under the discretion of the judges of the Commission regarding the relevance and admissibility of their evidence. There are many circumstances whereby taxpayers are condemned to pay whatever is decided by an auditor due to their inability to adduce evidence particularly where tax is determined by estimation upon the rejection of books of accounts kept by them.[152]

The other issue that arises in relation to burden of proof relates to the types of evidence that may be produced by the taxpayers before the Commission. The FTAP and the FTAR have not addressed this issue. Yet, the PM Directive is of some help to taxpayers since it contains few provisions dealing with types of evidence that can be adduced by an appellant taxpayer. In this regard, Art. 15 of the Directive expressly states that an appellant taxpayer can adduce both oral and documentary evidence.

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[149] See M. Moran (1987), 'The Presumption of Correctness: Should the Commissioner be Required to Carry the Initial Burden of Production,' Fordham Law Review Vol.55, No.6, pp.1087-1108; John R. Gardner and Benjamin R. Norman(2003), Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases, Wake Forest Law Review,Vol.38, No.4, pp.1357-1358.

[150] Note that Art. 59 of the FTAP which has stated that burden of proof lies on the taxpayer is applicable both to the internal review stage and appellate proceeding before the Commission.

[151] It has to be clear, however, that are evidence rules scattered in various laws of the country such as the Law of Contracts, Family Law, Law of Succession, Law of Property and so on.

[152] Interview with Tekka Mehari cited above at note 56; interview with Teferra Lemma, cited above at note 100; interview with Dawit Teshome, consultant and attorney at law, September 17, 2020.

However, there are a number of issues that arise in relation to oral testimony and documentary evidence. As the law stands now, it is not easy to determine various issues relating to evidence including the standard of proof that is used in tax proceedings.[153]

In spite of these gaps, the PM Directive enables the Commission to order the production of evidence that may be useful for the proper determination of the appeal.[154] It states that the Commission may order the parties to produce (to the Commission) books of accounts which they deem by agreement are key to the disposition of the dispute,[155] to indicate to the Commission documents, decisions or testimonies which are in the hands of other bodies (having lawful authority to hold such documents, decisions or testimonies) and to produce expert, technical or scientific evidence that are relevant to the case.[156]

Moreover, the Commission has the power to order any person to produce any document or to appear in person and give testimony where doing so is necessary in the interest of justice.[157] The Directive also empowers the Commission to order any institution to produce a document or to send an expert or send a result of investigation to the Commission.[158] Therefore, these powers granted to the Commission by the Directive in relation to production of evidence are helpful to the taxpayer. Such powers are also helpful to promote the interest of the Tax Authority (and hence public interest) as evidence which was not produced by the Tax Authority may be produced by the order of the Commission.

6. Decision of the FTAC and Its Enforcement

6.1 Time limit to render a decision

Before the coming to force of the FTAP, no tax law of Ethiopia stipulated that the FTAC was bound to make a decision within a certain period of time reckoned from the time of filing the appeal.[159] It is indeed commendable that the FTAP requires the FTAC to render its decision within 120 days from the

[153] Normally, we expect that the preponderance of evidence may be used as tax litigations are cognate to civil litigations.
[154] PM Directive, cited above at note 105, Art. 15(3).
[155] Id, Art. 16(1.d).
[156] Id, 16(1.e).
[157] Id, Art. 16(1.f).
[158] Id, Art. 16(2).
[159] Aschalew, cited above at note 9, p.226.

notice of appeal filed with the Commission.[160] Hence, this is an important departure made by the FTAP since it helps taxpayers get timely decision. This saves money, energy and time of the taxpayer and reduces the anxiety of the taxpayer. Setting a time limit makes the Commission discharge its duties responsibly and with a sense of accountability.

Moreover, if the decision is made in favor of the taxpayer appellant, the appellant gets the refund of the 50% of the disputed amount of tax paid at the time of filing the appeal. This safeguards the taxpayer from risks such as inflation which erodes the purchasing power of money.[161] In practice, the FTAC tries to render its decision within the 120 days' time limit although there are circumstances where a case takes several months. There are even cases that extend to a year or two years. According to members of the FTAC, failure to decide within the 120 days' time limit is basically attributable to complexity of cases and inadequate number of judges.[162]

As a matter of exception, the FTAP states that the President of the Commission may extend the 120 days limit for an additional period not exceeding 60 days having regard to the complexity of the issues and the interest of justice.[163] The President of the FTAC has to inform the extension to the parties by a written notice. The problem, however, is that because the two grounds which justify extension of time –complexity and interest of justice– are susceptible to subjective standards, the President has a discretion to extend the period of deciding the case even if these grounds do not exist. Therefore, one can argue that in the absence of clear and specific guidelines that help to measure the complexity or otherwise of a tax cases and as to when the interest of justice requires extension of time, the President may arbitrarily extend the period.

No sanction is imposed on the Commission if it fails to decide a case within the 120 days or even within the additional 60 days. Rather, the Proclamation states that the failure of the Commission to comply with the requirement to decide within the 120 days' time limit does not affect the validity of the decision of the Commission. Therefore, the provision of a time limit for the decision of the appeal becomes meaningless since a

[160] FTAP, cited above at note 10, Art. 91(2).

[161] Interview with Husamudin Seifu, cited above at note 100; interview with Wondiye Girma, cited above at note 100.

[162] Interview with Serkalem Eniyew, cited above at note 30.

[163] FTAP, cited above at note 10, Art. 91(3). This means that the President does not extend the period for deciding the appeal for no apparent reason. Rather, he has to show to the parties that the extension is justified because of the complexity of the issues being litigated and the interest of justice so requires the extension.

decision rendered by the Commission remains valid even though it is made after a long period of delay without justification.

6.2 Decision of the FTAC

For the decision of the Commission to be valid and binding, it has to meet certain procedural requirements which include *quorum, decisional power* and *content*. The PM Directive states that there shall be a *quorum* where three judges (out of the five judges who constitute the panel of the Commission) are present and decision is to be made by majority vote. Where there is a tie, the decision supported by the chairperson of the panel is the decision of the Commission.[164]

Regarding the *decisional power* of the Commission, the FTAP stipulates that the Commission has the power to "affirm, reduce or otherwise amend the tax assessment or remit the tax assessment to the Tax Authority for reconsideration where the appeal relates to a tax assessment."[165] However, where the Commission is of the view that the amount of tax assessed should be increased, it (the Commission) shall remand the case to the Tax Authority for reconsideration in accordance with the directions of the former.[166] Where an appeal to FTAC relates to any other appealable decision (non-assessment appeal), the Commission has the power to affirm, vary, set aside the decision or remand the case to the Tax Authority for reconsideration in ascendance with the directions of the Commission.[167]

A question is likely to arise with regard to rationale behind remanding the case to the Tax Authority where the Commission finds that the tax assessment can be possibly increased. It may be argued that since the appellant lodges an appeal to the Commission for a total avoidance or reduction of his tax burden, it would be unfair to increase such burden by an appellate body which is not created to fix the tax liability of the taxpayer. It may also be argued in support of the FTAP because tax law is a matter of public policy and the Commission cannot be confined to the issues raised by the parties. If the Commission realizes that tax should be increased taking into account the applicable provisions of tax legislation and the facts verified through the proceedings, it should not remain silent since doing so would be detrimental to public interest. For example, the Tax Appeal Tribunal in Belgium is not bound by the arguments raised by the parties. Rather, it has

[164] PM Directive, cited above at note 105, Art.12.
[165] FTAP, cited above at note 10, Art. 91(5).
[166] Id, Art. 91(6).
[167] Id, Art. 91(7).

the power to decide on any other relevant ground which may result in increment of the tax liability of the appellant although an appellant lodges an appeal seeking lower tax than the one decided by the tax authority.[168]

With regard to the *content* of the decision, Art. 91(9) of the FTAP states that the decision of the Commission should be "made in writing and contain the reasons for the decision, the findings on material questions of fact and reference to evidence or other material on which findings of the Commission are based."[169] Because the FTAC gives binding decision which affect citizens, it has to give reasons. As Kendrick Lo notes, if we aspire to govern society by the rule of law, there should be ethos of justification in decision giving.[170] He states that, where society is marked by justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness.[171] It is also argued that giving reasons by administrative tribunals enhances the prevalence of rule of law since it promotes transparency and accountability.[172] In addition, giving reasons is a guarantee for better decisions by administrative tribunals.[173] As Lo noted:

> … the actual process of writing reasons forces decision makers to pay conscious attention to the logic underlying a decision, to confirm there is indeed a rational connection between an outcome reached and the basis for that outcome. It is conceivable that those decision makers, while immersed in the writing process, may come to realize that they cannot articulate an intelligible part of reasoning that leads to the anticipated result. [174]

According to Bayles, express statement of reasons is indispensable because it prevents arbitrariness and incorrect judgments, ensures uniformity of decision and helps a litigant to know why a certain decision was given and whether an appeal is reasonable.[175] It is to be noted that the right of appeal or resort to judicial review hinges on the ability to show the decision-

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[168] Caroline P. Docclo (2019), 'Belgium', in Simon Whitehead (ed.), Tax Disputes and Litigation Review, Law and Business Research, p. 23.

[169] FTAP, cited above at note 10, Art. 97(8).

[170] Kendrick Lo (2018), 'When Efficiency Calls: Rethinking the Obligation to Provide Reasons for Administrative Decisions,' Queen's Law Journal, Vol.43, p.348.

[171] Ibid. See also Beverley McLachlin (1998), 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law,' Canadian Journal of Administrative Law and Practice, Vol.12, pp. 174-75.

[172] Ibid.

[173] *See* generally, Martin Shapiro (1992), 'The Giving Reasons Requirement,' *University of Chicago Legal Forum*, Issue No. 1, Article 8, pp. 179-220.

[174] Lo, cited above at note 170, p.351.

[175] Bayles, cited above at note 138, P.75-76.

maker's error.[176] In practice, the FTAC tries to give reason for its decisions although its various decisions lack adequate legal analysis. Rather, the decisions of the FTAC are usually filled with verbatim reproduction of written statements of the parties. In most decisions, the reasoning part occupies very small space without adequate legal reasoning and analysis.[177]

6.3 Execution of the Commission's decision

The FTAP provides that the decision of the Commission is ready for execution starting from the date of the decision or on such other date as may be specified by the Commission in the notice of the decision.[178] If decision is rendered in favor of the Tax Authority, the Authority moves forward for the implementation of the decision with a view to collecting the remaining tax,[179] the penalty and the interest determined by the Tax Authority.[180] The Ethiopian Tax Authority has the power to execute the decision made in its favor by the FTAC,[181] and it executes the decision starting from the end of the 30 days (reckoned from the date of the decision of the Commission) appeal period within which the taxpayer can lodge an appeal to the FHC[182] in matters relating to legal issues. To this end, the Tax Authority is empowered to take various measures such as attaching and selling of the assets of the taxpayer, collecting money from third parties that are due to the taxpayer, and ordering banks to transfer money to the Tax Authority from the taxpayer's account.[183]

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[176] Lo, cited above at note 170, p. 352.

[177] Author's personal observation of the decisions of the FTAC.

[178] FTAP, cited above at note 10, Art. 91(10). Art. 91(8) has stated that the commission is bound to give the copy of its decision to each party within seven days of the making of the decision.

[179] 50% of the basic tax is to be paid before lodging the appeal to the Commission since such obligation is an inescapable precondition to file a notice of appeal with the Commission.

[180] It is good to note that when a taxpayer lodges an appeal to the Commission, penalty and interest remain unpaid until the fate of the basic tax is determined by the Commission.

[181] FTAP, cited above note 10, Art.38. The Tax Authority has been enjoying such power of execution since 2002 to date although such power was seriously contested at that time on the ground that the rights of taxpayers might be affected in the course of execution of tax decisions without any judicial control. It was even argued that granting such power to the Tax Authority is an act of stripping judicial power. See for instance Yared, cited above at note 42, p.147.

[182] FTAP, cited above at note 10, Art. 38(2.b)

[183] Id, Arts. 38-48.

In the course of execution, the taxpayer may be aggrieved by the action of the Tax Authority such as the valuation of an asset, the manner in which public auction is announced and conducted, the manner and type of attachment of a property and the way the attached property is sold. A question arises whether the taxpayer can lodge an application to the FTAC that rendered the decision or whether the taxpayer is required to file a fresh application to the Review Department.[184] Although there was a suggestion at the drafting stage of the FTAP that the draft include a provision dealing with the resolution of disputes arising at the time of execution of a tax decision,[185] the drafters did not include a provision in this regard. This gap has not also been addressed either by the FTAR or the PM Directive which were issued for the proper implementation of the Proclamation. The right of the taxpayer to access to justice is adversely affected owing to absence of clear legal remedy where the taxpayer is affected by the actions of the Tax Authority in the course of execution of a tax decision.

I argue that the taxpayer's right to access to justice is denied at the time of execution of a tax decisions for the following reasons. *First*, if the taxpayer takes his grievance to the Review Department, the latter may say that its power is confined to tax assessment disputes provided under Art. 2(34) of the FTAP.[186] *Secondly*, if the taxpayer takes his grievance to the FTAC, the latter may similarly decline to assume jurisdiction claiming that it is not empowered to entertain disputes arising from the execution of decision by the Tax Authority since execution of tax decision of any sort is within the sole competence of the Tax Authority.

Thirdly, it is very much unlikely that the regular courts accept such dispute since they are not given the power to accept and entertain tax execution cases. Therefore, it follows that the Tax Authority is free from any internal as well as external control if it abuses its power at the time of execution of tax decisions and such gap can also be a fertile ground for

[184] These questions were raised before the FTAP was not contemplated since the 2002 tax proclamations of the Federal Government did not address these issues. These issues were also raised when the FTAP was at its drafting stage. In this regard, see Aschalew, cited above at note 9, PP.233-234. *See* also Aschalew, 'Review of the Ethiopian Income Tax Appeal System', cited above at note 26, p. 40; Misganaw Gashaw, 'The Room for Alternative Dispute Resolution (ADR) Process in Tax Disputes: A Message to the Ethiopian Tax Administrations,' in Yazachew Belew (ed.), The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication? *Ethiopian Business Law Series*, Vol. 5, p. 49-50.

[185] Aschalew, Review of the Ethiopian Income Tax Appeal System, cited above at note 26, pp.46.

[186] See the enumerations made under note 45 above.

corruption and maladministration.[187] This problem can only be addressed by allowing the Review Department or the FTAC to accept and decide any dispute arising between the taxpayer and the Tax Authority in the course of execution of a decision.

One may argue that either the Review Department or the Commission should accept such disputes and give a ruling on such issues to ensure the right to access to justice for the taxpayer even at the stage of execution of a tax decision. According to information obtained from a member of the Review Department, taxpayers do not challenge the Tax Authority at this stage, and they rather want to get remedies from the tax authority in its administrative capacity.[188] An interviewee from the FTAC also stated that taxpayers do not bring such cases to the FTAC.[189]

When the FTAC gives a decision in favor of the taxpayer, the latter has the right to seek execution of the decision pursuant to Art. 95(11) of the FTAP which states that if the decision of the Commission is in favor of the taxpayer, the authority is duty-bound "to take such steps as are necessary to implement the decision, including serving an amended assessment within 30 days of receiving notice of the decision of the Commission." Hence, if the FTAC totally reverses the decision of the Tax Authority, the latter is expected to refund to the taxpayer 50% of the disputed amount of money deposited by the taxpayer at the time of lodging the appeal to the Commission. On the other hand, if the amount of tax determined by the Tax Authority is reduced by the Commission, the former should refund to the taxpayer an amount of money in accordance with the reduction. In the case of a decision on an appeal not relating to tax assessment, the Tax Authority is expected to execute it in accordance with the terms and conditions of the decision rendered by the Commission.

In case the Tax Authority fails to execute the decision made by the Commission in favor of the taxpayer, the FTAP is silent with regard to the remedies available to the taxpayer. One may argue that the decree-holder (the taxpayer) would remain under the mercy of the Tax Authority for the

[187] It has to be clear that corruption in relation tax administration is a serious problem in Africa. Ethiopia cannot be an exception to this problem either. In this regard, *see* Belay Worku, Good Governance and Business Tax Administration in Ethiopia: Legal and Practical Problems, LL.M Thesis unpublished, School of Law, Bahir Dar University, June 2014, p.74.

[188] Interview with Zewude Damtew, Head of the Review Department of Large Taxpayer, West Addis Ababa Branch, Ministry of Revenues, September 15, 2020.

[189] Interview with Mulugeta Ayalew, cited above at note 30.

execution of the decision of the Commission. We can also argue that if the FTAC is empowered to make a binding decision on the Tax Authority, the Commission has an undisputable power to order the Tax Authority to execute the former's decisions rendered in favor of the taxpayer. Hence, it follows that if the Tax Authority fails to refund the money to the taxpayer or to execute any other decision of the Commission, the Commission can order the payment of such money from the account of the tax authority or it may order other means of execution towards the payment of the money due to a decree-holder taxpayer. This line of argument can be buttressed by the provisions of the Civil Code of Ethiopia although the FTAP has not made any cross-reference to the Civil Procedure Code.[190]

Unless we follow such line of argument and interpretation of the law, the right of the taxpayer to get a decision executed would be seriously jeopardized while the Tax Authority would remain free from any control and supervision as far as execution is concerned. This problem indeed necessitates a legal provision which expressly stipulates that the FTAC has the power to entertain any execution application filed by a decree-holder taxpayer and give an appropriate order for the timely and proper execution of its decision. An interviewee who is a member of the FTAC stated that in practice, the FTAC executes its own decision where a decree-holder (taxpayer) seeks the assistance of the Commission.[191] However, the information from other interviews shows that because of the silence of the law, the FTAC does not have the will and the courage to strictly enforce its own decisions unlike regular courts.[192]

Concluding Remarks

Although tax is a compulsory levy imposed by the government, the power of taxation cannot be exercised arbitrarily. Rather, a modern tax system is expected to be a good tax system as tax maladministration has far-reaching economic, social and political repercussions. One of the critical features of a good tax system is creating a fair tax dispute resolution system which enhances access to justice for taxpayers, and embodies fair and clear procedural rules which are instrumental to realize procedural justice for taxpayers. A tax system should thus strive to create a fair tax dispute resolution system although the overall design of the system may vary among jurisdictions. Despite such variation, the practice of many countries shows

[190] Civil Procedure Code, cited above at note 92, see Arts. 394-455.
[191] Interview with Mulugeta Ayalew, cited above at note 30.
[192] Interviewees included in this piece informed the author.

that tax decisions of the tax authority are reviewed by a tax appeal tribunal which is outside the regular judiciary and whose decisions are final and conclusive where the dispute involves only questions of fact. Aggrieved taxpayers take their appeal to the regular courts where the decision made by the tax appeal tribunal contains an error of law.

In Ethiopia, too, the appeal to a tax appeal commission has remained one of the most important features of the Ethiopian tax dispute resolution system starting from the early 1940s in spite of change of regimes and differences in ideological orientation. Under the current FTAP, a taxpayer who is dissatisfied by a decision of the Tax Authority and who wants to challenge the decision is entitled to take his appeal to the FTAC. Comparing the provisions of this proclamation with the provisions of the previous proclamations shows that some improvements, which are meant to enhance access to justice of the taxpayers and ensure procedural fairness of the system, have been made. However, there are still gaps and problems (discussed in the preceding sections of this article) that need to be addressed.

There are critical problems regarding appellate proceedings at the FTAC. *First*, there are uncertainties and ambiguities surrounding the scope of review power of the FTAP which should be clearly defined. *Secondly*, the power of the Prime Minister with regard to determining the number and composition of members of the FTAC has to be reconsidered by the law-maker since this issue must not be left to absolute discretion of the executive organ. In this connection, the lawmaker has to provide (in future revision of the Proclamation) that the business community should be represented in the FTAC since such was the trend in Ethiopia starting from the Imperial Regime until the coming into force of the FTAP in 2016.

Third, although there is an improvement with regard to the advance tax deposit requirement as a precondition for lodging an appeal to the FTAC, it has to be further improved with regard to percentage and mode of discharging such stringent duty. In this regard, the 50% deposit requirement needs to be reduced to thresholds such as 30% and 40%[193] based on thorough economic and legal analysis concerning the impact of such reduction on the revenue needs of the Government and the right of access to justice for taxpayers. Under exceptional circumstances, the legal reform in

[193] Nearly all the interviewees have suggested this reasonable range which strikes a balance between the interest of the government and the taxpayers. Most taxpayers who participated in the public consultations on the draft PTAP suggested that the 50% deposit requirement should be reduced as low as 25% in order to realize taxpayers' right of access to justice.

this regard is also expected to allow securities for the advance tax deposit through real securities such as mortgage, pledge and financial guarantee bond so as to strike a balance between the right to access to justice of taxpayers and the need to collect tax revenues as early as possible. Moreover, a taxpayer who does not have any means whatsoever and who cannot produce any real security should be allowed to lodge an appeal to the FTAC without meeting this precondition in view of such person's right to access to justice.

Fourth, there is a need to clearly stipulate that taxpayers have the right to an open hearing which is a fundamental human right of taxpayers enshrined under international human right instruments to which Ethiopia is a party. *Fifth*, the burden of proof imposed on taxpayers under all circumstances has to be seriously revisited. To this end, the law needs to stipulate exceptional circumstances where the tax authority bears the burden of proving a fact which is beyond the knowledge and reach of the taxpayer. In the absence of such balanced burden of proof, the tax dispute resolution system becomes unfair to the taxpayers and becomes susceptible to arbitrary exercise of power by the officials of the Tax Authority.

Sixth, the FTAC is unduly silent regarding the resolution of tax disputes that arise between the tax authority and the taxpayer at the time of execution of a decision. This leaves aggrieved taxpayers under the mercy of the Tax Authority. The gap in the FTAP in this regard needs to be addressed by amending the Proclamation because disputes between the taxpayer and Tax Authority inevitably arise at the stage of executing FTAC's decisions as well. ■

The EU Maritime Regime and Challenges for Land-locked Developing States: Evidence from Ethiopia

Tessema Elias Shale ♣

Abstract

EU plays a dominant role in international maritime governance, and it has comprehensive maritime policies and strategies that have implications for third States. On the other hand, developing landlocked States (LLS) have the lowest bargaining power in the international maritime arena owing to their economic and geographic position. This article examines the implications of the EU maritime policy for developing LLS. After analysis of primary and secondary data as well as empirical evidence from Ethiopia, it is argued that the EU maritime governance such as its port State control regime and maritime market access regulations could possibly make international maritime trade through the EU waters as well as global maritime trade unaffordable for developing LLS. In view of the inherent challenges encountered by developing LLS and the economic interest of these States, it is submitted that there is a need to accord differential treatment schemes in the maritime field to these States at global and at the EU level.

Key terms:

EU Maritime Policy · Developing Landlocked States · UNCLOS · Port State Control · EU Maritime Regulations ·

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Introduction

More than 80% of the world trade is conducted by seas; and 90% of the volume of international trade in developing countries' is seaborne.[1] The European Union (EU) transports 90% of its external trade and 40% of its internal trade by sea.[2] EU ship owners control 40% of the global fleets with high competitive quality.[3] Four of the top ten ship owning countries of the world are located in Europe.[4] One third of global shipping has EU ports either as origin or destination.[5] Moreover, EU ports alone entertain 3.5 billion tons of cargos and more than 400 million passengers per year.[6] So, it can be said that the EU has a dominant share in the international shipping market as ship owning nations as well as coastal or port nations. Due to its dominant position and interests in global maritime market, the EU plays a dominant role in international maritime governance.[7]

Frequently used acronyms

ESLSE	Ethiopia Shipping Lines and Logistic Service Enterprise
IMO	International Maritime Organization
IMP	Integrated Maritime Policy for European Union
LLS	Land-locked States
UNCLOS	United Nations Convention on Law of Sea

[1] United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport*, UNCTAD Publication, UNCTAD/RMT/2015 (Geneva and New York: 2015), 48 available at: http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf, (Last Visited on 8/27/2020).

[2] The European Union, "Towards a future Maritime Policy for the Union: A European vision for the oceans and seas", Green Paper COM (2006) 275 final, 2006 Brussels

[3] Ibid.

[4] UNCTAD, *Review of Maritime Transport*, 47

[5] Oxford Economics, "The Economic Value of Shipping Industry", *A Report for European Community Ship-owners Association* (April 2014) available at: http://llsa.lt/images/articles/naudinga_info/2014-04-01%20Oxford%20Economics%20Shipping%20value.pdf (Last Visited on 8/27/20)

[6] Ibid

[7] *See* for example, Commission of the European Communities, "Progress of the EU's Integrated Maritime Policy", *Final Report from the Commission to the European Parliament* (2012), the Council, the European Economic and Social Committee and the Committee of the Region. One of the objective of EU as reflected under this official report runs, " At global level, the EU has pushed for more ambition in the resolutions on oceans and the law of the Sea and on sustainable fisheries, promoting global membership of maritime governance instruments…." See also EU, 'Commission Communication on Strategic goals and recommendations for the EU's maritime transport policy until 2018 COM (2009)8 final, 2009, Brussels. Available at: http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52009DC0008&from=EN

The EU strives to enhance a global playing field for its shipping industries, *inter alia*, through open maritime market, access to cargoes and free competition with third States. To this end, EU has passed several regulations. The EU's maritime market access strategy aims at enhancing competitiveness of its internal maritime market, ensuring development of open market worldwide and to "take the lead to promote alignment of its substantive competition law globally."[8]

The EU places high emphasis on maritime safety, security and environmental protection. In this respect, the EU is determined to remove sub-standard vessels from its waters thereby advocating progressive advancement of the standards. In order to achieve this, the EU enforces the International Maritime Organization (IMO) rules and standards thereby transposing it into its laws. The EU also exercises the jurisdictional powers of its coastal and port States and adopts its own standards to foreign vessels operating in its waters or visiting its ports. This has raised an international law of sea issue of jurisdictional balance among port, coastal and flag States. In light of this, there is debate on the legitimacy of introducing unilateral regulations to international shipping. In this regard, the EU is known for the adoption and application of its regional regulations and standards for foreign vessels in its waters or visiting its ports.

It can thus be said that the EU's maritime governance can affect global operation of shipping business. Even though the EU's regulatory activation is appreciated for bringing an effective enforcement regime to the shipping business, it is also criticized for being a challenge to the uniform adoption and application of international shipping regulations.[9] Particularly, it is imperative to examine its implications for developing landlocked States (LLS) due to their weak bargaining power in the international maritime arena owing to their economical and geographic position. This article

(Last visited August 17, 2010). One of the strategic goals stated that "the Commission will take the lead to promote alignment of substantive competition laws globally."

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ''Strategic goals and recommendations for the EU's maritime transport policy until 2018'', (COM/2009/0008)final available at: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52009DC0008

[9] *See* Philippe Boisson, "Development, impact and consequences of the EU maritime safety policy on maritime activities. A challenging time for the shipping industry", 1. available at http://www.sname.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=247f1eb7-7d17-4a26-96f5-9d2903b6562f (Last visited on 9/12/2020).

examines the implications of the EU maritime governance for developing LLS. Landlocked States from the developed world have different realities and hence are not included within the scope of the article.[10]

Relevant primary and secondary sources such as: EU acquis (the body of European Union Law), case laws, Ethiopian laws, international treaties, EU policy documents and review of scholarly literature are used in the study. Empirical data gathered through in-depth interview of experts and officials from Ethiopian Maritime Affairs Authority (EMAA) and Ethiopia Shipping Lines and Logistic Service Enterprise (ESLSE) have also been used.

The first section of the article discusses EU's Integrated Maritime Policy and highlights the organizational nature of the EU and the scope of its competence to represent Members States. The second section deals with the link between the EU's dominant position in international maritime arena and the coordination resulting from the policy and competence. This section provides general discussions on the global trends of extension of coastal and port States' sovereignty power with particular emphasis on the EU in light of international law, and possible implications for developing LLS.

Sections 3 and 4 highlight EU maritime regulations that have direct impact on third States. These sections focus on how some of these regulations can impact developing LLS. Particular focus is made on the EU Regulations on "Freedom to Provide Service"[11] and "coordinated action to safeguard free access of ocean cargos."[12] It is very important to assess the existence of general right of access to sea for the LLS as engagement in shipping business cannot be realized without due recognition to the right of access to seas.

Sections 5 and 6 assess the need for access to the sea for LLS and the theoretical background for this right. Section 7 examines whether there is internationally recognized right of access to sea for the LLS by analyzing the international legal framework with particular attention to three main conventions, i.e., the 1921 Barcelona Convention, the 1965 New York Convention and Article 125 of the UNCLOS.

In Sections 8 and 9, the implications of the EU maritime policy for developing LLS is analyzed by taking empirical evidence from Ethiopia. Under these sections, the main challenges of maritime transport sector of

[10] LLS from developed world benefit from better infrastructure and logistic services, better bargaining position, small distance from sea coasts or ports and have regional arrangements for free access to seas.

[11] Regulation (EEC) No 4055 / 86

[12] Regulation (EEC) No 4058/86

Ethiopia are assessed. Challenges, *inter alia,* international maritime transport costs and tough international competition are identified. Whether EU maritime policy can contribute to the aggravation of these challenges is highlighted by analyzing empirical data from Ethiopia and analysis of the EU maritime regulations *vis-à-vis* international rules or standards. Ethiopia has been selected (in this section) among LLS because it has 56 years' experience in international shipping transport service, and it is party to several international treaties related to the issue.

1. Overview of the EU's Maritime Policy and its Scope of Application

European States are among the major maritime nations of the world. Seas and oceans are the backbone for Europe's economy. Before the European Union (EU) developed an integrated maritime policy, each Member State had its own compartmentalized policy on maritime governance.[13] This fragmentation was said to have posed risk for sustainable use of maritime resources.[14] Hence, in 2006, with the publication of the *'Green Paper'* titled "*Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas"*, a proposal was made to integrate the EU policies on seas and oceans.[15] The document, among other things, emphasizes the economic potential of the EU maritime sector for Europeans and the EU's intention to regulate and lead sustainable maritime development agenda in an integrated manner.[16] Following the Green Paper, the EU adopted '*Integrated Maritime Policy for European Union (IMP)'* in 2007. The IMP is a comprehensive policy accompanied by a detailed action plan for implementation of the plan. As explained by Timo Koivurova[17],

> The term "IMP" is used … to denote the following three documents: The Integrated Maritime Policy (CEC 2007a), adopted via a Communication

[13] Jaun C. Suris-Reguiro et al (2013), ''Marine Economy: A proposal for its Definition in the European Union,'' *Marine Policy* 42:1.

[14] Ibid.

[15] Commission of the European Communities, "Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas" *(Green Paper)*, Volume II, COM (2006) 275 Final, 7.6.2006, Brussels.

[16] Ibid, p. 4

[17] Timo Koivurova (2012), *Integrated Maritime Policy of the European Union: Challenges, Successes, and Lessons to Learn, Coastal Management*, 40:2, 161-171, Available at http://dx.doi.org/10.1080/08920753.2012.652515 last accessed on 14.08.2020 (The source author's prescribed citation style).

(the so-called Blue Book), its accompanying Action Plan (CEC 2007b) and the "environmental dimension" (CEC 2008b) of the IMP, the Marine Strategy Framework Directive (MSFD).

The IMP is meant to consolidate the EU's power and jurisdiction in maritime areas.[18] This scenario seems to have served as a springboard for the EU's dominant position to influence international maritime affairs thereby consolidating powers that were scattered in individual member States. While the IMP has brought concrete benefit for European economy "by avoiding duplication of spending and efforts, and encouraging the sustainable development of maritime activities for member States,"[19] it is also argued that it has negative implications for third States particularly, for developing LLS.

Indeed, it gives the EU power to substantially influence international legal frameworks and institutions (like IMO) thereby making international standards very tight and unaffordable for developing LLS. The latter have the lowest bargaining power in the international maritime arena. The policy paved the way for the EU to unilaterally adopt and implement tight regulations and standards to international shipping thereby making its coasts and ports unaffordable to small countries engaged the international shipping service. Moreover, the EU's aggressive moves can result in counter actions or balance measures from other major maritime nations or regional blocks. Such trends can be the expansion of restrictive control by coastal or port States'. In the context of such tension, developing LLS might inevitably be the primary victims.

Even though the scope of the article does not include detail analysis of the institutional nature of EU and its competence to represent member States, it is important to highlight these aspects. The first reason is to assess whether the EU has legal basis (either exclusively or concurrently with its member States) to deal with third States on matters related to maritime transport. Particularly, assessing the EU's external competence in maritime affairs is relevant for the article because it has an impact on third States including developing States that have interest in EU waters.[20] Secondly, it is

[18] Id., 162

[19] EC, Directorate-General for Maritime Affairs and Fisheries, "*Progress of the EU's Integrated Maritime Policy"*, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 491.

[20] For example, EU port State control (at EU level) bounds member States uniformly to enforce at their ports the EU regulation. This in effect makes the 'port or convenience' option available for third States useless as all conditions and

claimed that the EU has influenced the international legal and enforcement framework in the maritime field. This dominant position is attributable to the power, experience and expertise housed in each Member State. These are directly linked with the organizational nature of EU and its competence to represent member States.

The organizational nature of the EU along with its competence to represent member States in maritime affairs has been unique and sometimes controversial. As Timo Koivurova explains:[21]

> Even though the EU is acting like a federal State in many ways –in some policy areas in an even more integrated manner than federal entities– its ocean powers differ from those of federal States (while federal States may have constitutionally delegated many of their powers to their sub-units in many policy areas, this does not usually apply to maritime areas, where the federal level exercises most powers affecting areas beyond the immediate coastal zone or territorial sea; this fundamental fact does not hold true for the EU, which, apart from having exclusive jurisdiction over much of fisheries, has only shared powers over many of the maritime policies).

Henrik Ringbom, describes the EU as "neither a conventional intergovernmental organization nor a State." Its power has been characterized as to be located between a sovereign State and an intergovernmental State.[22] In some respects, the EU has an exclusive competence over the Member States.[23] The Court of Justice of the European Union (CJEU) has clearly recognized this power. In *Commission v. Council* (1971),[24] the CJEU held that:

> … the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. … the Community alone is in a position to assume and carry out contractual obligations towards

requirements to be imposed on ships visiting all EU ports are similar. *See* also Henrik Ringbom, *The EU Maritime Policy and International Law* (Boston: Martinus Nijhoff Publishers, 2008), 203.

[21] Koivurova, *Integrated Maritime Policy of the European Union* , *supra* note 17, 161

[22] Ringbom, *The EU Maritime Policy and International Law*, *supra* note 20, 27

[23] Ibid , 57

[24] Commission V. Council (1971) ECR, Case no. 22/70, 263. *See* also detail analysis by Ringbom, *The EU Maritime Policy and International Law, supra* note 20, 57-70.

> third countries affecting the whole sphere of application of the community legal system … to the extent to which Community rules are promulgated for the attainment of the objectives of the treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

This ruling shows that the EU has an exclusive external jurisdiction on areas affecting common policy defined by the EU including some aspects of maritime transport.

The Treaty on Functioning of European Union (TFEU) describes the EU competence in three categories –Exclusive competence,[25] shared competence between EU and Member States,[26] and competence to support, coordinate or supplement the actions of the member States.[27] Except for "*the conservation of marine biological resources under the common fisheries policy*" which clearly falls under the EU exclusive jurisdiction, the Treaty does not expressly clarify the category of the EU's competence in the maritime field.[28] Under article 4(3) of TEFU, there is a general duty of Member States to sincere cooperation. In *Commission v. Greece* (2009) –where Greece had submitted an independent proposal to the IMO–, the European Court of Justice ruled that Greece failed to fulfill its duty to sincere cooperation obligation. So, existing case laws and practice show that the EU has full competence to adopt and implement laws, regulations and policies for the attainment of common EU objectives which may include the maritime field.

2. Implications of EU's Exercise of Port or Coastal State Jurisdiction

A port State jurisdiction refers to the jurisdiction a State may exercise over foreign vessels visiting its port.[29] In principle, according to the United Nations Convention on the Law of the Sea (UNCLOS) and Customary International Law, a flag State has principal jurisdiction over ships flying its

[25] *See* TFEU Article. 3. Under exclusive competence, only the EU may legislate and adopt legally binding acts and member States shall not do so unless authorized by the EU (See TFEU Article. 2 (1)).

[26] TEFU, Article.3.and Article 2(1). In the case of shared competence, the member States can act only if the EU has chosen not to act

[27] TEFU, Article. 6

[28] TEFU, Article. 4(d)

[29] Beven Morten (2013), 'Port State Jurisdiction in New Zealand: The Problem with Sellers'*, Wellington Law Review,* vol. 44: 559

flag.[30] Its power ranges from safety standard of ships, manning, marine safety and security and seafarer's welfare, and adopting "*laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry*" *and enforcement of the laws and regulations*.[31] The basic rationale behind making flag States a principal regulator of ships in international maritime law is to enhance the freedom of navigation without undue influence by coastal or port States.[32] Port and coastal States' jurisdiction is limited to exceptional circumstances.[33] However, the EU port State control regime seems to have taken this "exception as a principle."[34] Under UNCLOS, except for the enforcement of internationally agreed rules and standards, port States do not have the right to prescribe rules and requirements for foreign vessels.[35]

The usual justification presented by port States including the EU for the increased controls is the failure of flag States to effectively control ships flying their flags. In fact, due to expansion of artificial flag States on the pretext of flags of convenience, the flag States tend not to effectively control ships flying their flags. However, there is a clear remedy for the failure under Article 94 (6) of UNCLOS which reads:

> A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

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[30] Camille Goodman (2009), 'The Regime for Flag State Responsibility in International Fisheries Law: Effective Fact, Creative Fiction and Further Work Required.' See also UNCLOS Article. 94 and 217

[31] *See* UNCLOS, Articles. 94 , 211 (2), 217

[32] Ibid, Article. 91. In addition to the recognition of general international law principle that treats a ship as a floating territory of a flag State, enhancing freedom of navigation is the basic principle of the international law of the sea.

[33] Both prescription and enforcement of rules and requirements for a vessel principally rests under the power of the flag State (UNCLOS Article. 94 and 217 respectively). However, only part of the enforcement of internationally agreed rules and requirements that may go to a port or a coastal State jurisdiction.

[34] The common way of interpreting laws is by considering exceptions narrowly. This principle seems to have been reversed in the case of the EU port State control regime.

[35] *See* for example UNCLOS, Article. 218 and revised MARPOL Annex VI Regulation 15

According to this provision, it is clear that there is no legal room for port States to substitute the flag States' duty and what port States can do in the case of such failure on the part of the flag State. Another justfication made by the port States including the EU for their extended exercise of prescriptive jurisdiction is based on the claim that "a State generally does not have a legal right to access another State's port". [36] In fact, this position is not without challenge at least for three reasons.

First, without a right access to ports, the principle of freedom of navigation, which is enshrined in international law, would be meaningless from a shipping perspective.[37] In *Nicaragua v. USA* (1986), the International Court of Justice (ICJ) extended the right to innocent passage in the territorial sea zone to passage to and from internal water to access ports.[38] The ICJ rendered this decision based on customary international law that obliges a State "not to interrupt peaceful maritime commerce" and article 18(b) of UNCLOS.[39] The court interpreting article 18(b) of UNCLOS noted:

> … it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph I (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point.[40]

The right of access to internal waters, which is extended by the court, is not different from the right of access to ports from perspective of sovereignty right of port States.[41] Hence, according to this judgment, it can be said that port States cannot arbitrarily deny foreign vessels –engaged in a peaceful maritime commerce– access to their ports or internal waters. However, the right to access to ports can be denied if ships that claim the

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[36] Henrik Ringbom (2006), *The EU's Exercise of Port and Coastal State Jurisdiction*, Scandinavian Institute of Maritime Law, Yearbook. Henrik Ringbom and other European writers hold that port States do have a full "…right to deny ships access, or make that access dependent on the fulfi lment of certain conditions.»

[37] *See* UNCLOS Articles 17, 125, 148, 69, 38, 137 and 87. In order for land-locked States to transit, trade and enjoy the freedom of high sea (*res communis*), right to access territorial sea including access to ports of transit States is inevitable.

[38] In *Nicaragua V. USA* (1986), I.C.J. 14, para. 213, p.101. *See* also detail explanations by Bernardo Sepulveda Amor, The International Court of Justice and the Law of the Sea, 2012, p.8 available at http://www.corteidh.or.cr/tablas/r29686.pdf (Last accessed on 9/08/2020).

[39] Ibid

[40] *Nicaragua v. USA*, Id., para 214, p. 101

[41] *See* the UNCLOS Article. 2(1) *cum* Article. 18 (b)

access fail to fulfill requirements or conditions set by the port or flag states. Article 2 of the 1923 Convention on the International Regime of Marine Ports provides for a *quid pro quo* or reciprocity for the access; and if member States to this convention fail to accord reciprocal obligation, it may also be a ground for the denial of the access. Although application of this convention is limited to the member States and even if the rule has not acquired the status of customary international law, it may show a trend of international law.

Secondly, in order for landlocked States (LLS) to exercise their rights under international law of the sea, it is logical that they must have a right to access ports or there must be justifiable cause for the denial .[42] In this respect article 131 of UNCLOS provides that "*[s]hips flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.*" Thirdly, even though ports are under the exclusive jurisdiction of Sovereign States, the right to deny access to the port or impose unreasonably strict requirements to deny access cannot be justified under UNCLOS.[43] Had there been the intention to allow port States to deny access to foreign vessels, it would have been clearly provided for.

Access to ports is closely related to use of the seas and hence, the prerogatives of the Sovereignty right of a port State over its port should somehow be understood as compromised by the State by virtue of signing the Convention.[44] Given the historical and theoretical foundation of States, it seems absurd to apply, as some writers do,[45] solid territoriality or extra-

[42] UNCLOS, Article. 125, 148 and 38(1). *See* also The 1965 New York Convention 1965 On Transit Trade of Land Locked States. Most of the EU members are also members to this convention and bound to give "to ships flying the flag of that State (Land Locked) treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports…" (Preamble of the Convention)

[43] Article 217 of the UNCLOS states the power of a flag State to prohibit a vessel flying its flag or registry, the Convention does not give the same power to a port State under Article 218.

[44] *See* preamble of the UNCLOS. Even if the Convention recognizes sovereignty of member States, fairness, cooperation, equity and efficient utilization of seas and oceans resources are core principles of UNCLOS that should also be dealt with.

[45] *See*, for example, Joanne Scott (2014), "Extraterritoriality and Territorial Extension in EU Law," *American Journal of Comparative Law* 62, 1: 87-125, Nelson F. Coelho (2015), "Extraterritoriality from Port: EU's Approach to Jurisdiction over Ship-source Pollution," *SYbIL* 19: 269-284, *See* also Cedric Ryngaert and Henrik Ringbom

territoriality sovereignty principles to sovereignty rights related with use of seas. Moreover, according to principles of interpretation of treaties provided in the Vienna Convention, *good faith*, *purpose and object* of the treaties shall be taken into consideration.[46]

One of the core purposes of the UNCLOS as provided at the beginning of the preamble is, "... desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world." This presupposes that State parties to the Convention must be considerate and cooperative in the use of sea related rights including sovereignty rights over their ports. So, there is little or no legal ground for coastal or port States to arbitrarily deny access or to set unjustifiable preconditions/standards against foreign vessles engaged in peaceful commerce. Prescribing a standard by a port State exceeding international standards would likely be unjustifiable and against the principle of freedom of navigation.

With regard to the possible implications of the EU's growing prescriptive port States jursdiction or controls for developing LLS, it is an issue of concern because the EU has united interests as coastal and port States as well as union of flag States. So, If the EU continues its execcessive port or coastal State jurisdictional schemes by setting its own different standards to foreign vessles, there is a high probability that other major port or coastal States may exercise countermeasures for port control in their capacity as port States or as regional entities. The probability seems inevitable because international trade, including shipping is highly determined by competitive or bargaining position of the actors. This can also be inferred from the comment made by the International Chamber of Commerce and International Shipping Federation on the EU's Strategic Goal until 2018:-

> …we believe the Commission should think very carefully before proposing any adjustment of the current balance between flag States and coastal States rights. Other coastal States around the world could potentially use any new entitlement to override current flag State rights for motives unconnected with safety and environmental protection,

(2016), 'Introduction: Port State Jurisdiction: Challenges and Potential,'' *The International Journal of Marine and Coastal Law* 31: 379-394

[46] *See*, Vienna Convention on the Law of Treaties (1969), Article. 31.

especially where evolving geo-political circumstances may lead to new perspectives.[47]

There have already been several other regional integrations for the port State control and there are some individual powerful maritime States that have different port State control schemes.[48] If major port or coastal States or regional blocks unnecessarily expand their port or coastal State powers as EU has done, there would be severe implications on developing LLS. For example, if a certain port State takes an excessive control against another port State's ships flying its flag, then that State may counteract or retaliate by using its power as a port State on its own port by prescribing and enforcing strict requirements.[49] This may happen due to the fact that international maritime trade is, *inter alia,* dependent upon the bargaining position of the actors; and the bargaining position of States is determined by economic, diplomatic and geo-political positions of the States. But developing LLS cannot do this simply because they do not have ports or sea coasts or have the lowest bargaining position.

There is no preferential treatment or longer compliance period scheme available in the EU system for least developed LLS. So, the EU port State control system might result in ousting least developed nations, which cannot meet the standards or requirements, from using EU ports. As indicated earlier, EU's enhanced port State control may induce more port States controls from other major port or coastal States which, in effect, will adversely affect the interest of developing LLS.

[47] International Chamber of Commerce and the International Shipping Federation Comment on ''Strategic goal and Recommendations for the EU's Maritime Transport Policy until 2018

[48] For example, regional integrations like: Tokyo Memorandum of Understanding (MoU) on Port State Control (for Asia-Pacific States), Latin America MoU on port State control, Caribbean MoU on port State control, Port State Control in Mediterranean region, MoU for the Black Sea, Abudja MoU on port State control (for west Africa), Riyadh MoU on port State control for Gulf region, and at individual State level US Coast Guard and possibly other powerful port States may have its own scheme for port State control.

[49] One of the key rationales for the integrated port State control including EU PSC is competition.

3. Objectives of the EU Maritime Regulations and their Enforcement Framework

A regulation under the EU legal system is a legislation which has general application and automatic binding effect in all member States.[50] Unlike EU directives which basically need to be transposed by the national legislator of a member State, EU regulations are binding regardless of the transposing act as explained as follows:-

> Regulations are of general application, binding in their entirety and directly applicable. They must be complied with fully by those to whom they apply (private persons, Member States, Union institutions). Regulations are directly applicable in all the Member States as soon as they enter into force (on the date stipulated or, failing this, on the twentieth day following their publication in the Official Journal of the European Union) and do not need to be transposed into national law. They are designed to ensure the uniform application of Union law in all the Member States. Regulations supersede national laws incompatible with their substantive provisions.[51]

EU maritime market access regulations are aimed at enhancing competitiveness of internal maritime market and ensuring development of open market worldwide.[52] The EU has regulated the maritime market access in three dimensions: –Freedom to provide service, unfair pricing and free access to ocean trades.

The EU's internal maritime market access strategy is geared towards strengthening capacity of EU shipping industry so as sustain its 'dominance'

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[50] *See* Article. 288 of Treaty on Functioning of European Union (TFEU) which reads: "… A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

[51] Sources and Scope of European Union Law , available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf (Last visited on 9/08/2020)

[52] *See* for example, EU, 'Progress of the EU's Integrated Maritime Policy', Final Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2012. One of the objectives of EU as reflected under this official report reads: "At global level, the EU has pushed for more ambition in the Resolutions on Oceans and the Law of the Sea and on Sustainable Fisheries, promoting global membership of maritime governance instruments...". *See* also EU, 'Commission Communication on Strategic goals and recommendations for the EU's maritime transport policy until 2018 COM (2009)8 final, 2009, Brussels. (Available at: http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52009DC0008&from=EN), last visited August 17, 2020. One of the strategic goals Stated that "the Commission will take the lead to promote alignment of substantive competition laws globally".

in the global market. One of the main issues addressed by the 2009 EU strategic goal was 'EU Maritime Space without Barrier'.[53] The focus was made on EU short shipping, cabotage and competition in internal market. But the long term strategy –as can be seen from the EU strategy– is internationalization of maritime law and practice from EU perspectives. This can be seen from the position boldly provided under the strategic document. It says, *'the Commission will take the lead to promote alignment of substantive competition law globally'*.[54] So, it is possible to say that the EU's exercise at home has usually something to do with global application. This can also be seen from the EU's strategic interest in membership of International Maritime Organization (IMO) which reads, "… formalizing the EU co-ordination mechanism and granting formal observer status, if not full membership, to the EU at IMO.''[55]

The basic theme of this section is not the EU's 'indirect' policy objective and its implication. It rather focuses on the direct regulations that affect the interest of developing land-locked countries. There are three EU regulations which have direct effect on third countries. These are: *Regulation 4057/86* (unfair pricing)[56] –relating to 'dumped freight rates by shipping companies of non-EU States', '*Regulation (EEC) No 4055/86* [57]–dealing with freedom to provide service, and '*Regulation (EEC) No 4058/86* –concerning coordinated action to safeguard free access to cargoes in ocean trades.'[58]

The regulation (EEC) No. 4057/86 does not have significant immediate effect on the least developed nations for obvious reason that these States do not have capacity to dump goods and services yet. Hence, the focus is made on the latter two regulations.

4. The EU Regulations on Freedom to Provide Service, Free Access to Ocean Cargoes and Countervailing Actions

Regulations (EEC) No 4058/86 and Regulation (EEC) No 4055/86 are basically intended to act against restrictions imposed by third countries that EU believes negatively affect the community shipping industry. The

[53] EU Strategic Goals and Recommendations, 3
[54] Id., p.4
[55] Id., p. 6
[56] EU Council Regulation (EEC) No. 4057/86**,** *Official Journal L 378 , 31/12/1986 P. 0014 - 0020*
[57] EU Council Regulation (EEC) No. 4055/86**,** *Official Journal L 378 , 31/12/1986 P. 0001 - 0003*
[58] *Council Regulation (EEC) No 4058/86*

Regulation (EEC) No 4058/86 applies to nationals of member States regardless of whether they are established inside or outside the Community.[59] As explained in the legislative summary, the Regulation "applies when action by a non-Community country or by its agents restricts free access to the transport of liner cargoes, bulk cargoes or other cargoes by shipping companies of member States or by ships registered in a member State."[60] It provides for counter measures in the form of "coordinated action by the community following a request made by a Member State to the Commission. Such action might include diplomatic representation to non-Community countries and countermeasures directed at the shipping companies concerned".[61]

The aim of both Regulations is to enhance a free playing field for EU shipping industries by avoiding protectionism and restrictions from third States.[62] However, they fail to take at least two important things into consideration. First, the regulation seems to have aimed at creating internationally free market without taking into consideration different realities of third States. However, states are at different stages of liberalizing their markets including their maritime service market. Service sectors in general and maritime sector in particular have not yet been liberalized in most developing countries.[63]

Secondly, the regulation failed to take the concern of small countries into consideration. It is true that EU has shipping industries with high quality and experience capable of competing globally. But before the EU industries reached this stage, they had been protected by their respective States. Even at present, the EU has maintained a state aid scheme for maritime transport. On the other hand, shipping industries from third developing countries cannot compete globally unless they are protected either by way of subsidy or cargos reservation systems or otherwise. Even worse, the regulations may subject developing LLS that reserve cargoes to national shipping industry or otherwise protect the industry based on special needs. These countries have very infant shipping industries and transit related costs are very high. Unless

[59] Rosa Greaves (1992), 'EC Maritime Transport Policy and Regulations', *Duke Journal of Comparative and International Law*, Vol. 3:119-145

[60] Summary of EU legislations available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l24064 (Last visited on 18 August. 2020).

[61] Ibid

[62] *See* Rosa Greaves, *supra* note 59, p. 130.

[63] For example, almost all service sectors including shipping industry in Ethiopia are operated by government. Most of African States have not yet liberalized its service sector.

there is some kind of protection, they cannot compete with the EU industries. For example, Ethiopian shipping company's survival in the international shipping service is only due to subsidy from the State including reservation of imports to the company.[64]

Thus, unless the EU revisits its regulations by focusing on the EU equivalent third competitor States and unless it devises some kind of special or differential treatments to developing countries, the general approach (which may subject even the latter states to its countervailing measures) obviously have negative implications for these States. The worst impact would be inevitable for developing LLS that have the lowest bargaining power in global maritime market due to transit related challenges and economic capacity related problems.

5. The Need for Access to the Sea for LLS and Challenges

An overview of theoretical foundations and international legal frameworks (in this section and the section below) can enable us to assess implications of the EU maritime governance on developing LLS. To this end, it is very important to assess existence of general right of access to sea for the LLS. This is because we cannot talk of engagement of the LLS in shipping business without having internationally recognized right of access to seas.

A land-locked State is a State with no direct sea-coast.[65] At present, there are forty-four land-locked States (LLS) which constitute approximately 22% of the States in the world.[66] There are several developing LLS that are

[64] Interview with Ato Mekonnen Abera, director of Ethiopia Maritime Affairs Authority, June 4, 2017.

[65] Kishor Uprety (2006), "The Transit Regime for Land-Locked States: International Law and Development Perspectives", *Law, Justice and Development Series* No.34771 (2006):4. See also UNCLOS, Article. 124 (1) (a). The UNCLOS defines the LLS as '*a State which has no sea-coast.'*

[66] *See* Land Locked States available at https://www.thoughtco.com/landlocked-countries-1435421, Updated on August 8, 2020 , last accessed on August 19, 2020 Botswana, Burundi, Burkina Faso, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, South Sudan, Swaziland, Uganda, Zambia, and Zimbabwe are the 16 LLS in Africa. Andorra, Austria, Belarus, Czech Republic, Hungary, Liechtenstein, Luxembourg, Macedonia, Moldova, San Marino, Serbia, Slovakia, Switzerland, and Vatican City are the 14 LLS in Europe. Afghanistan, Armenia, Azerbaijan, Bhutan, Laos, Kazakhstan, Kyrgyzstan, Mongolia, Nepal, Tajikistan, Turkmenistan, and Uzbekistan are the 12 LLS in Asia. Bolivia and Paraguay are the two LLS in South America.

engaged in the shipping industry.[67] Most of these States are the least developed.[68] Several studies have identified transit related challenges that are faced by LLDC (Land-locked developing countries). For example, the study conducted under the World Bank by Kishor Uprety has summarized the challenges as follows:

> ... The international trade of these countries is dependent on the transit-transport infrastructures and services along the routes through their transit neighbors, over which they have little control. Furthermore, the ability of the transit countries to improve, from their own resources, transit-transport infrastructures and services in the ports and along the transit corridors is very limited because many of them are themselves developing countries... Transport costs (which include storage costs along the transit routes, insurance costs, costs due to extra documentation, and so forth) are in many cases quite significant because the facilities available are inadequate... [69]

Likewise, Uperty states the severe implications of being landlocked "because production, input use, consumption, and exportation are greatly influenced by the cost and reliability of transport to and from the outside world." He also states that "the majority of LLS are among the poorest countries of the world" and notes that "the absence of seacoast and their distance and isolation from international markets aggravate their economic situation and constitute the main reason for their underdevelopment".[70]

Another study conducted by the United Nations Conference of Trade and Development (UNCTAD) states that distance, travel time and cost (transit related problems) had been the main challenges for land-locked developing countries.[71] Michael Faye has identified transit related challenges of land-locked developing States in dimensions relating to: *dependence on sound political relations with transit States, dependence on neighbors' peace and*

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[67] For example; Ethiopia, Azerbaijan, Bolivia, Laos, Mongolia, Slovenia, Paraguay, Moldova are some of the developing LLS that have merchant vessel fleets. This, however, does not mean that LLS that do not have merchant vessel fleets do not have interest in engaging in the blue economy.

[68] Michael L. Faye , John W. McArthur , Jeffrey D. Sachs & Thomas Snow (2004), 'The Challenges Facing Landlocked Developing Countries,' *Journal of Human Development.* Vol.5, No. 1: pp. 31-32. According to this source, nine out of twelve from LLS are also least developed States with the lowest human development indices.

[69] Uprety, *Transit Regime for Landlocked States*, *supra* note 65, p. 19.

[70] Ibid

[71] UNCTAD (2013), "Securing Reliable Access to Maritime Transport for Land locked Countries," *Review of Maritime Transport*, New York and Geneva

stability, and dependence on administrative practices of the transit States.[72] It is already common knowledge that the main cause for underdevelopment in the land-locked developing States is directly linked with access to seas.

6. The Theoretical Foundations

6.1 Freedom of transit

There are two diverging views that represent those who consider States as duty bound to grant the right of transit to another State suffering from an unfavorable geographic position, and those who believe that such right depends upon the consent of the State granting the transit.[73] Supporters of the former view argue that subjecting the transit right to a sovereign State's consent is absurd. According to this view, economic interdependence of States justifies the importance of juridical basis for recognizing the transit rights.[74] Lauterpacht, as cited in Uprety, holds that "... States may legitimately claim 'the right of transit' under two fundamental conditions. First, the State claiming the right of transit must be capable of proving the merits and necessity of the right. Second, the exercise of the right must not cause disturbance or prejudice to the transit State (littoral State)".[75] In fact, 'necessity' in the case of the LLS seems so apparent and hence it can be held that, according to this view, the LLS can claim *right of transit* when such right does not cause disturbance or prejudice to the coastal State.

On the other hand, opponents of this view state that the right to transit is subject to the consent of sovereign littoral States. As cited in Uprety, "leading international lawyers like McNair and Hyde believe that the transit right of LLS is not a principle recognized by international law but rather a right governed by agreements concluded with coastal States".[76] Coastal States usually stick on their sovereign right to deny the transit freedom of LLS. As Mipazi Sinjela notes:

> The major obstacle to development of a guaranteed right of access to the sea for land-locked countries has been the claim of territorial sovereignty by coastal States. These nations have consistently argued that principles of State sovereignty allow them to approve or disallow all transit through

[72] Faye *et al*, The Challenges Facing Landlocked Developing Countries, *supra* note 68, p. 31
[73] Uprety, *Transit Regime for Landlocked States*, *supra* note 65, p. 28
[74] Ibid
[75] Ibid, 29
[76] Ibid, 28

> their territories. Their position is that rights of access for land-locked countries are not properly resolved through a single international rule, but are instead a matter for bilateral or regional agreements. Countries of transit argue that sovereign jurisdiction over all activities within their territories includes the prerogative of denying the traffic of land-locked countries as a matter of security [77]

However, this view does not have acceptance from LLS as it subjects their right to political will of the transit States.[78]

6.2 Free access and the principle of freedom of the seas

This theory opposes the idea of exclusive use of oceans by a State against the use right of another State. It is built on the premise that the oceans particularly high seas fall under *res communis* –common for all navigators of international community. Mpazi Sinjela associates 'the principle of freedom of high sea' with 'principles of natural law'.[79] As Sinjela noted:

> The claims of land-locked States were originally founded on principles of natural law. It was argued that the right of free transit was conferred on every land-locked country by its very sovereignty a necessary corollary to accepted notions of freedom of the high seas. This view maintained that, because the oceans are open to all nations, littoral and land-locked alike, the latter must be entitled to free transit in exercise of their equal rights within the *res communis.*[80]

According to this principle, in order to enjoy rights and freedom of high seas, the LLS must have right to pass through land, port infrastructure and territorial water of coastal States.

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[77] Mpazi Sinjela (1982), 'Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle of Law' *Georgia Journal of International and Comparative Law,* Vol.12, No.1:35

[78] Endalcachew Bayeh (2015), "The Rights of Land-Locked States under the International Law: The Role of Bilateral/Multilateral Agreements," *Journal of Social Sciences*. Vol. 4, No. 2: 27-30. Available at doi: 10.11648/j.ss.20150402.12. As Bayeh states, "… If they are not in a smooth relation, the transit States may not be willing to negotiate and thereby put impediments on the land-locked States' free transit."

[79] Mpazi Sinjela, 'Freedom of Transit and the Right of Access for Land-Locked States,' *supra* note 77, p. 32.

[80] Ibid

6. 3 Compensating for geographical inequalities

This view emanated from the spirit of the law of the sea which gives due attention to cooperation and mutual understanding among State parties.[81] Professor Rene-Gean Dupuy considers the law of the sea as a 'situationalist' law that takes particular situation of a single State into account.[82] Kishor Uprety links this view, among other things, with the UN obligation to create "…conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations".[83] The right of access to sea in this respect is particularly linked with economic development needs of developing LLS.

Article 25 of the UN Charter obliges the international community to "… pay special attention to the particular needs and problems of the least developed among the developing countries, of land-locked developing countries. …" It is also linked with the principle adopted by UNCTAD in the 1965 New York Convention which provides for "the cognition of right to every LLS to free access to the sea constitutes a principle indispensable for the expansion of international trade and economic development."[84] In short, this view justifies the recognition of right of access to sea for LLS in general and developing LLS particular based on the principle of compensating for geographic and economic imbalances.

6.4 Theory of international servitude.

An international servitude is a limitation on territorial sovereignty right of a State called 'servient State' in favor of permanent use the territory by another State called 'dominant State'.[85] It is derived from the Roman private

[81] The first paragraph of UNCLOS preamble which reads:, "… desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world."

[82] René-Jean Dupuy (1974), *The Law of the Sea: Current Problems* (Oceana Publications). See also Uprety, *Transit Regime for Landlocked States*, *supra* note 65, p. 36.

[83] Uprety, *Transit Regime for Landlocked States*, *supra* note 65, p. 36. See also UN Charter, Article 55

[84] Uprety, Ibid. *See* also Principle I in the preamble of 1965 Convention on Transit Trade of Land-Locked States (New York Convention).

[85] See also explanations by Uprety, *Transit Regime for Landlocked States*, 31-33.

law concept of a limited right of ownership of a property.[86] Sinjela illustrates the concept and its relationship with the right of access to sea as follows:

> If A's land were located in such a way that it was necessary to cross B's land before he could enjoy his own land, A was said to have a natural servitude across B's property. From this it may be argued that land-locked States have a similar servitude to traverse neighboring States, a logical and necessary extension of the sovereignty they exercise over their own territory[87]

However, it is controversial as to whether this private law concept, by analogy, applies to public international law.[88] Proponents of right of access to sea as an *international servitude* argue that LLS can claim this right against coastal State based on the fact of their geographic position.[89] Meanwhile, the opponents of this view counter argue that the theory of international servitude compromises the sovereign right of transit States.[90] They also hold that it is totally improper to use such private law concept in public law.[91] However, there is a general international law that prohibits "a State from taking any measure likely to modify the natural course of a waterway that passes through several States."[92] Some writers like, Uprety link this with the existence of right of access to sea on the ground of international servitude.[93]

7. International Legal Frameworks

As highlighted above, there have been strong theoretical bases on the right of access to sea for LLS in general and developing LLS in particular. Against these theoretical backgrounds, it is argued that there have been no strong international rules that adequately secure this right for the LLS. It is also said that international law of the sea tends to focus more on the expansion of coastal States' territorial sovereignty over seas thereby diminishing interests of landlocked and geographically disadvantaged

[86] Mpazi Sinjela, 'Freedom of Transit and the Right of Access for Land-Locked States,' *supra* note 77, p. 33.
[87] Ibid
[88] Uprety, Transit Regime for Landlocked States*, supra* note 65, p. 32.
[89] Ibid
[90] Ibid
[91] Id., 34
[92] Id., 32
[93] Ibid.

States.[94] The following discussion focuses on three main conventions that directly deal with the right of access to sea by the LLS.[95]

7.1 The 1921 Barcelona Convention

The Barcelona Convention is the pioneer convention in recognizing the freedom of transit. Particularly, article 2 of the Convention obliges States parties to facilitate the freedom of transit. However, the Member States do not have obligation to grant the freedom of transit to non-member States. The States parties also have the right to prevent the freedom of transit of passengers and goods prohibited in the territory of the States when the interest of the public, animals and plants interests so requires.[96] So, it can be said that the Convention was aimed at balancing the recognition of the freedom *vis-à-vis* sovereignty interests of transit States.

However, this Convention has been criticized for its failure to offer strong and all inclusive legal bases on freedom of transit for LLS. As Mpazi Sinjela states "[a]lthough the Barcelona Conference provided a promising start for securing an internationally recognized right of transit, from the land-locked States' point of view, several deficiencies were evident in its scope and coverage."[97] In this regard he indicated deficiencies in (i) its

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[94] Helmut Tuerk (2015), 'Landlocked and Geographically Disadvantaged States,' In *Oxford Handbook, eds.* Donald Rothwell et al (Oxford Handbook Online: Oxford University Press,) p. 327. Tuerk explains the tendency of the international law of sea in favor of coastal States as follows:

> A major shift thus occurred towards more national authority over maritime areas, leading to a diminution of the extent of the high seas and an attenuation of its freedoms, which has been called a transition from a 'law of movement' to a 'law of territory and appropriation'. This development directly affected the landlocked States as well as other States in a less favourable geographical position with respect to the seas and their resources, which would subsequently call themselves 'geographically disadvantaged States'. These two groups of countries came to realize that they would have little or nothing to gain from an extension of sovereign rights and jurisdiction over vast, valuable maritime areas. On the contrary, this trend placed them in an increasingly disadvantageous position with respect to maritime uses, as they were facing the loss of rights they had hitherto enjoyed either in practice or at least theoretically.

[95] In fact there are several other conventions like, GATT, the 1958 Convention on High Sea and other UN resolutions that directly or indirectly touch up on the right of transit for LLS. However, this study only focuses on: The 1921 Barcelona Convention, the 1965 New York Convention and the 1982 UNCLOS.

[96] *See*, the 1921 Barcelona Convention of Freedom of Transit, Article. 5

[97] Mpazi Sinjela, "Freedom of Transit and the Right of Access for Land-Locked States," *supra* note 77, p. 36.

failure to declare the universal application of the right of transit, (ii) restriction of its scope to railway and waterway transport, and (iii) "the great prominence it accorded transit problems of land-locked countries in Europe, thereby failing to take sufficient account of the distinct position of States in the new world."[98]

7.2 The 1965 Convention on Transit Trade of Land-locked States

The 1965 Convention on Transit Trade of Land-locked States (New York Convention) is the first convention that attempted to recognize the 'right'[99] of LLS of free access to sea. It sets various principles in its preamble. Principle I states that the "recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development". According to Principle VII of the Convention, "[t]he facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause."

Moreover, article 2 of the Convention provides for the freedom of transit and prohibits any discrimination based on "origin, departure, entry, exit or destination or on any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used." The Convention also prohibits imposition of custom duty on goods in transit.[100]

In light of the above principles and rules, it can be said that the New York Convention recognized the right of LLS to access seas. However, the Convention indirectly renders these rights superfluous and ineffective by making the rights subject to the consent of coastal States or by employing a *quid pro quo* system to the access. It is to be noted that five of the eight principles provided under the preamble of the Convention, directly or indirectly, subject the right in question to the consent of coastal States or reciprocal obligation of the LLS. Particularly, the Convention provides for pre-conditions such as 'common agreement'[101] and 'reciprocity'[102] in

[98] Ibid

[99] Unlike the 1921 Barcelona Convention which deals only with ''Freedom'', the New York Convention, deals with the "right" of free access.

[100] *See* New York Convention, Principle IV and Article. 3

[101] *See* New York Convention Article. 2(2) and the Principle III. According to this provision, in order the LLS enjoy the freedom of transit, it has to secure consent from the coastal States.

[102] Ibid, Principle IV clearly provides that the LLS owe reciprocal obligation to coastal States in order to claim the right of access to sea via the coastal States.

addition to common public interest exceptions.[103] These requirements incapacitate the practical application of the right of LLS to access sea.

7.3 The 1982 UNCLOS

The 1982 UNCLOS was, *inter alia,* the result of several conferences and Conventions. Particularly, three preceding conferences[104] and four consequent conventions[105] had a direct contribution to the contents of the Convention. Moreover, customary international law, international courts and arbitration tribunals, States practices and opinions of authors were also said to be core contributors to the contents of the 1982 UNCLOS.[106]

The 1982 UNCLOS is the first instrument that comprehensively regulates all parts of oceans' spaces, uses and resources in a single document.[107] Hence, it is often regarded as 'Constitution for Oceans'.[108] 168 States including the EU are parties to the UNCLOS among which 28 are from LLS.[109] Currently, there are 44 LLS and sixteen States from LLS have not yet been members to the Convention. Out of the 28 LLS, 20 members are from developing countries.[110] One of the core aims of the Convention was to

[103] The New York Convention, Article.11 and 12

[104] The three UN Conferences preceding the 1982 UNCLOS are: the 1958 First UN Conference on the Law of Sea (UNCLOS I), the 1960 Second UN Conference on Law of Sea (UNCLOS II) and The 1973-1982 third UN Conference on Law of sea (UNCLOS III)

[105] The four conventions preceding the 1982 UNCLOS are: the 1958 Convention on the Territorial Sea and the Contiguous Zone, the 1958 Convention on the High Seas, the 1958 Convention on Fishing and Conservation of Living Resources and the 1958 Convention on the Continental Shelf.

[106] Detail analysis of historical development of the 1982 UNCLOS was rightly made by Tullio Treves, 'Historical Development of the Law of the Sea,' In *The Oxford Handbook of the Law of the Sea*, eds. Rothwell et al (2015)

[107] *See* Helmut Tuerk (2015), "Forgotten Rights? Landlocked States and the Law of the Sea," In *Contemporary Developments in International Law Essays in Honour of Budislav Vukas, eds.* Wolfrum and *et al* (Boston: Martinus Nijhoff Publishers) p. 337

[108] Ibid.

[109] United Nations, "Chronological list of ratifications of, accessions and successions to the Convention and the Related Agreements," *Division for Oceans Affairs and the Law of the Sea*, available at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm , Last updated 23 may 2020, Last Accessed on 20 June 2020.

[110] Developing LLS parties to the UNCLOS are; Chad, Lesotho, Lao People's Democratic Republic, Malawi, Mali, Mongolia, Nepal, Niger, Paraguay, Republic of

strike a balance between the rights or claims of coastal States and the freedoms of seas enjoyed by all other coastal or landlocked States.[111]

The preamble of the Convention recognizes special interests and needs of developing States including LLS.[112] There are also few articles in the Convention which provide for rights of LLS and preferential treatment for developing countries. Particularly, under Part X of the Convention, articles 124-132 directly address the 'right' of access to and from the sea and freedom of transit. Article 125(1) provides for LLS' right of access to and from the sea and freedom of transit through territory of transit states by using all means of transport. In this regard, the UNCLOS avoids *quid pro quo* system that was adopted in the New York Convention.

Article 127 prohibits imposition of taxes, custom duty or other charges on traffic in transit with the exception of charges levied for specific services. Similarly, it provides that the LLS shall not be discriminated in terms of taxes or other charges levied on 'the means of transport in transit' they may use. The UNCLOS also provides for the possibility of agreement between LLS and transit States so that the transit States could grant greater transit rights than the Convention does.[113] To this effect, the Convention excludes such agreement from the application of the most-favoured-nation clause.[114] In addition, it provides that "Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports."[115]

Apart from the provision under Part X, there are several other provisions that deal with rights of LLS. For example, article 17 provides for the right of LLS to innocent passage in territorial zones of coastal States. Article 18 (1)(b) of the Convention extends the right of innocent passage to "*proceeding to or from internal waters or a call at such roadstead or port facility."* Moreover, subject to some limitations and exceptions referred therein, Article 69 of the UNCLOS grants LLS *'a right'* to participate *'on an equitable basis'* in the exploration and exploitation of the living resources of EEZs of coastal States of the same sub-region or region. According to article

Moldova, Swaziland, The former Yugoslav Republic of Macedonia, Uganda, Zambia, Zimbabwe, Armenia, Azerbaijan, Bolivia, Botswana and Burkina Faso,

[111] Helmut Tuerk (2016), 'Forgotten Rights? Landlocked States and the Law of the Sea,' In: R. Wolfrum,. M. Seršić and T.M. Šošić (eds.), Contemporary Developments in International Law, 338. *See* also paragraph four preamble of the UNCLOS.

[112] *See* The UNCLOS, Preamble par. 6

[113] The UNCLOS, Article. 132.

[114] Id., Article. 126

[115] Id., Article 131

87 of the Convention, high seas are open for all States, whether coastal or landlocked and article 90 provides for right of LLS to navigate ships flying their flags on the high sea

Article 125 of the UNCLOS is the main provision that deals with the 'right' of access to sea for LLS. However, whether it automatically grants the right of free access to and from the sea to the LLS has been controversial. Uprety argues that, "Article 125 does not grant any new rights to LLS. … This article constitutes, indeed, a clear recognition of the principle. In practice, however, the modalities called for in paragraphs (2) and (3) must involve substantial qualifications".[116] Tuerk partly shares the above interpretation stating that "the right of access is made contingent upon bilateral, sub-regional, or regional agreements between the landlocked States and transit States, laying down the terms and modalities for exercising freedom of transit."[117] But Tuerk partly departs from Uprety's position by arguing that such preconditions of the provision were made to "strike a balance between the interests of landlocked States on one hand and those of transit States on the other, (and the provision) can be considered a significant achievement by the landlocked countries."[118]

Sioussouras argued that in order to activate the right provided under article 125 of the Convention, "preliminary agreement stage –pactum *de contrahendo* or *pactum de negotiando*" between the LLS and transit States is needed.[119] But Sioussouras does not deny that the transit States are duty bound to give consent to the agreement. However, there are writers who believe that article 125 of UNCLOS automatically grants the right of free access to and from sea irrespective of the consent of transit States:

> This article (Article 125 of the UNCLOS) does four key effects. First, it guarantees the right of free access to and from the sea to landlocked states. Second, it also guarantees to them freedom of transit without any prerequisite if this freedom is to be exercised in relation to the right of free access to and from the sea. Third, it does not require a bilateral treaty with the transit state to be able to exercise the right of free access and freedom of transit. Only the derailed provisions of a technical character regarding the terms and modalities provisions of a technical character

[116] Uprety, Transit Regime for Landlocked States, *supra* note 65, p. 87
[117] Tuerk, Landlocked and Geographically Disadvantaged States, *supra* note 94, p. 335
[118] Ibid
[119] Petros Sioussouras (2001), ''The Formation of Customary Right in the International Law of the Sea,' *Revue hellenique de droit international*, Vol. 54, Issue No. 1: pp. 299-317

> regarding the terms and modalities for exercising freedom of transit have to be agreed upon with the transit state. However, the actual right to exercise this freedom is itself no longer dependent on a bilateral agreement with the transit state, fourth, breaking from the Barcelona tradition, it eliminates the requirement of reciprocity.[120]

According to the above interpretation, article 125(2) refers only to technical aspects dealing with how the right of access to and from the sea is implemented. Otherwise this sub article was not meant to set precondition for the access right itself.

In *Turkey v. Iraq* (1925), the Permanent Court of International Justice opined that, "if the wording of the treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted." Moreover, Article 31 of the Vienna Convention on Law of Treaties states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". As long as good faith and context are concerned, it is not reasonably expected from States Parties to UNCLOS to unfairly subject the right of access to consent of transit States.

Furthermore, the use of 'shall' in article 125, sub-articles (1) and (2), of the UNCLOS makes the provisions mandatory. Hence, by applying 'ordinary meaning' interpretation provided by the Article 31 of the Vienna Convention, it can be concluded that the LLS have the right of access to and from the sea, and coastal States are duty bound to agree on modalities and terms of how this right be exercised. If a coastal State and LLS fail to agree on the terms and modalities, the most probable way out could be resorting to available dispute settlement mechanisms.

To sum up, there is internationally recognized right of access to sea for LLS. And hence, there is little or no legal ground for coastal or port States to arbitrarily deny access or provide unjustifiable preconditions/standards for the access of their ports against foreign vessles engaged in peaceful commerce. Prescribing a standard by a port State exceeding international standard, as the EU does, would likely be unjustifiable and against the principle of freedom of navigation.

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[120] Ramesh Kumar Rana (2010), "Right of access of land-locked state to the sea by the example of bilateral agreement between land-locked state- Nepal and port state – India" (Master's Thesis, University of Tromsø Faculty of Law), p. 12

8. Overview of the Challenges for Ethiopia's Maritime Service Sector

Ethiopia has become a landlocked State since May 1991 when Eritrea was separated from the country and became an independent State. Ethiopia was one of the major maritime nations in the horn of Africa before it lost its outlet to the Red Sea. The country started shipping business in 1964 with a fleet of three State owned ships. Even after being landlocked, Ethiopia has not stopped its engagement in international maritime commerce. Rather, it has continued engaging in the maritime business thereby making the port of Djibouti as a main outlet to the sea through a bilateral agreement.[121]

A State owned company, Ethiopian Shipping Lines and Logistics Service Enterprise (ESLSE),[122] is operating international shipping business with eleven owned vessels[123] and by using slot chartering of vessels from major global carriers such as MAERSK, ALP and MSC. All vessels that are owned and run by the ESLSE are registered and fly Ethiopian national flag. The ESLSE is the only company in the country that renders internal, coastal and international maritime transport services.

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[121] Ethiopia and Djibouti signed and ratified a bilateral agreement in 2002 on port utilization which gave Ethiopia, *inter alia*, the right to permanent utilization of the Port Djibouti. According to the 2013 World Bank Report, 93% of Ethiopian imports and exports were carried out via the port Djibouti and 84% of the Port's traffic is in transit to and from Ethiopia. Further details can be accessed from, WB, 'Transport and Logistics in Djibouti: Contribution to Job Creation and Economic Diversification,' Final Report No. 75145, Middle Ease ad Northern African Region Transport Unit, February 2013.

[122] The ESLSE was established by the Ethiopian Council of Minister Regulation, Regulation No.255/2011. The ESLSE was established by the merger of the former three public enterprises that have until 2011 been operating separately; namely, Ethiopian Shipping Lines S.C, Maritime and Transit Services Enterprise and Dry Port Enterprise. ESLSE is entrusted with duties, *inter alia*, to render coastal and international maritime and internal water transport services, to give multi-modal transport services and provide logistics services. Further detail is available at the ESLSE's Company profile, at:
http://www.ethiopianshippinglines.com.et/companyprofile, last visited on 02 August 2020.

[123] Names of the eleven vessels owned and operated by ESLSE are: Finfine, Hawassa, Bahirdar, Assosa, Harar, Mekele, Samera, Gambella, Jigjiga, Gibe and Abay Wonz. The names of the first nine vessels correspond to names of capital cities of both the federal and regional States of Ethiopia while the names of the last two vessels correspond to the two rivers that are serving as major sources of hydroelectric power in the country.

Ethiopia is a member of IMO and has signed and ratified the 1982 UNCLOS.[124] It has acceded to several other international and regional conventions related to maritime sector.[125] Ethiopia is also a member of International Oceanographic Commission (IOC).[126] These partly show the country's efforts to participate in international maritime regulations and governance with a view to secure its interest.

However, some of the memberships like membership to MARPOL, seem to be unreasonable. MARPOL is an International Convention for the Prevention of Pollution from Ships. Ships flagged under all parties to the Convention are required to meet standards set by the Convention regardless of the parties' special circumstances. It is to be noted that one of the core principles embodied under international climate conventions, i.e., '*Common but differentiated responsibilities and respective capabilities*' (CBBDRC) is not recognized or given effect under the MARPOL Convention.

Under this Convention, developing States in general and landlocked developing States (in particular that have little contribution to marine pollution) are put under the same basket with developed maritime nations that have substantial contribution to global air pollution including the marine pollution. Specially, MARPOL Annex VI, which deals with Prevention of Air Pollution from Ships, has progressively been getting stricter from time to time through tacit acceptance amendment procedures.[127] In the tacit

[124] Ethiopia joined IMO on 3 July 1975 and signed the UNCLOS on 10 December 1982. Ratifications of some international conventions the country signed including MARPOL and the UNCLOS have not deposited in their respective depositories yet.

[125] For example, Ethiopia acceded the 1966 International Convention on Load Lines , the 1972 Convention on the International Regulations for Preventing Collusions at Sea (as amended) , the International Convention for the Safety of Life at Sea as amended and its Protocol of 1978 (SOLAS), International Convention on the prevention of Pollution from Ships 1973/78 (MARPOL) International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978 as amended (STCW), International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER, 2001), International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996), International Convention on the Control of Harmful Anti-fouling Systems on Ships (2001), The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, International Convention on Tonnage Measurement of Ships, 1969 and The Revised African Maritime Transport Charter

[126] IOC is a UN specialized in ocean science and services.

[127] For example, The MARPOL annex VI was adopted in1997 and entered into force in 2005. In 2008, substantial revision was made thereby making more significant limit on sulfur content a fuel oil used by ships which entered into force on July 1, 2010.

acceptance procedure, an amendment to a convention is deemed to have been accepted if a State party does not oppose the amendment within a time-limit provided in the convention. This clearly impedes developing States to amend technical rules under annexes including annexes of the MARPOL Convention.

The EU has been one of the major driving forces for the progressive tightening of the IMO's regulations either by implementing them in its water ahead of timelines set by the IMO or by using informal coordination mechanisms.[128] In fact, the main reasons of the EU measures are insufficiency and slow move of existing IMO rules on the one hand, and disastrous accidents that have occurred in the EU waters on the other hand.[129]

However, developing countries in general and developing LLS (that have already been trapped with transit related costs and challenges, in particular) could not easily afford these moves. Indeed, they need more time for implementation of these rules or they need to be accorded differential treatment. Hence, it seems unreasonable for landlocked developing States like Ethiopia to sign this kind of instrument that does not take special circumstances of this group of nations into consideration.

As Anene Kejela (an International Cooperation Expert in Ethiopian Maritime Affairs Authority) noted, it was a big mistake to ratify the MARPOL Convention.[130] Mekonnen Abera, Director of Ethiopia Maritime Affairs Authority (EMAA), in this regard stated, "we did not really notice or saw it in this way when we signed this particular Convention; however, we signed or acceded to international maritime related conventions including our membership to IMO with the intention … to reflect our interests."[131] In fact, this seems true in most cases of the least developed nations that are parties to this Convention.

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[128] *See* Marketa Pape, "Briefing: The IMO—for Safe, Secure and Efficient Shipping on Clean Oceans", European Parliamentary Research Service, (February 2016), 6-7, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577964/EPRS_BRI%282016%29577964_EN.pdf (Last visited July 6 2020).

[129] Id., 6

[130] Interview with Anene Kejela, International Cooperation Expert in Ethiopian Maritime Affairs Authority, June 5, 2017

[131] Mekonnen Abera, Director of Ethiopia Maritime Affairs Authority (EMAA), June 5, 2017

Ethiopia has enacted several domestic maritime legislation, directives and has established EMAA as a sectorial regulator.[132] In light of these, it is one of the few developing LLS that has relatively longer international maritime engagements.[133] Despite these efforts, it has been facing challenges in the maritime transport service sector. The following section deals with possible challenges that shipping industries from Ethiopia or other developing LLS may face as consequences of some aspects of the EU maritime policy.

9. The Main Challenges of Maritime Service Sector in Ethiopia

9.1 International maritime transport and logistics service costs

According to the UNCTAD, developing countries particularly in Africa and Oceania pay on average 40 to 70 percent more for international transport of their imports than developed countries.[134] The primary victims of the cost must be developing landlocked countries due to, *inter alia,* huge transit related cost.

Ethiopia spends more than two million USD per a day for transit related cost alone. It expends about 30% of its GDP for logistics and transit related cost.[135] In order to reduce this cost and to save time wastages in relation to trade across borders, Ethiopian government has taken measures such as

[132] *See* for example, Maritime Sector Administration Proclamation No. 549/2007 that established EMAA, Multimodal - Transport of Goods Proclamation No. 548/2007, Freight Forwarding and Ship Agency License Issuance. Council of Ministers Regulation No.37/1998, Multi-modal Transport of Goods Proclamation No. 548/2007, Ministry of Transport Directives on Training and Certification of Seafarers No.2/2015, as amended in 2016.

[133] There are also several other LLS that are actively involved in the international shipping services such as: Azerbaijan, Bolivia, Kazakhstan, Laos, Luxemburg, Moldova, Mongolia, Paraguay, Slovakia, Switzerland and Turkmenistan. Further detail explanations on LLS participation in the international maritime services are available in, Tuerk, "Forgotten Rights? Landlocked States and the Law of the Sea," 339

[134] United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport*, UNCTAD Publication, UNCTAD/RMT/2015 (Geneva and New York: 2015), 47, available at: http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf (Last Visited 2 Aug. 2020).

[135] Interview with Ato Mekonnen Abera, Director, Ethiopia Maritime Affairs Authority, June 5, 2017.

expansion of dry ports[136] and the introduction of a multimodal transport system.[137] Yet, Ethiopia preforms worse than Sub-Saharan regional average performance in terms of saving transport time and reducing transport costs for her imports.

Part of the problem, as a study found, is caused due to a high freight rate that importers pay for the carriage of goods through the State's monopolistic shipping lines (ESLSE).[138] Ato Eyasu Yimam, Commercial Department Director of the ESLSE, noted that the freight rates increment is connected with costs of operation, and stated that ESLSE "substantially focuses on imports to Ethiopia as the country's exports are very [low] and hence there are lots of occasions that [ships] sail [without cargo] relying on cargoes to be imported."[139]

In fact, the country's exports are not reserved for the national carrier (ESLSE). This gives exporters opportunity to look for and choose lower freight rates from international shipping markets. All imports to Ethiopia with few exceptions and exemptions, are reserved for the ESLSE,[140] and this gives the ESLSE not only an opportunity to enjoy monopoly over carriage of the country's imports including fixing freight rates but also a chance to stay alive in the international shipping platform as discussed below.

[136] Currently there are seven dry ports in Ethiopia. These are: Mojo, Combolcha, Semera, Mekele, Kality, Diredawa and Gelan.

[137]The multimodal system of transport was introduced by the Multimodal Transport of Goods Proclamation No. 548/2007. See also the 2012 Ethiopian Ministry of Transport Directives on Multimodal Transport of Goods.

[138] Tilahun Esmael Kassahun (2014), 'Trade Facilitation in Ethiopia: The Role of WTO Accession in Domestic Reform,' *Mizan Law Review,* Vol. 8, No. 1:145-189

[139] Interview with Ato Eyasu Yimam, Commercial Department Director of the ESLSE, February 2, 2017.

[140] *See* the 2008 Ethiopia National Bank (NBE) Directives and the 2012 Ministry of Transport Directives of Multimodal Transport (FOB Directive). In the former directive, NBE set a precondition condition for all commercial importers to use the ESLSE in order to get a letter of credit (LC) any bank in Ethiopia on which almost all importers depend. The later directive prescribes commercial importers that use ESLSE have to buy goods using a FOB term.

9.2 International competition, escalating port states controls and coastal states power and implications

In the 1980s and early 1990s, ESL used to provide international shipping services to and from Europe.[141] But since 1990s, the ESL/ESLSE has stopped direct operation to Europe and shifted to China, Korea, Japan, the Gulf and India, Singapore, South Africa and Indonesia. Under a few circumstances, ESLSE has used vessels chartered from major global carriers like Maersk, ALP and MSC, especially to Turkey and Ukraine. The main reasons pointed out by Eyasu are: high cost of operation, less availability of import cargoes as compared to countries the company shifted to and strict port requirements and controls. He stated that "European ports are so expensive, Suez Canal costs are very high, the EU controls are unreasonably strict and their required standards for a ship are very high."[142]

Zenebe Asefa, Technical Department Director of ESLSE indicated that, Ethiopia's "ships fulfill basic IMO's safety and environmental standards but EU usually requires more". He noted that "for example the EU requires vessels to use fuel with sulfur content very lower than the IMO requirement which is so expensive. Generally, a small technical fault is sufficient for prohibition of entrance to EU waters or ports particularly when they target your fleet."[143]

On the other hand, Captain Getinet Abay, who has served in ESL/ESLSE for more than 20 years as a captain argues that EU's strict PSC or requirements are not main reasons for the ESLSE's shift to the Far East, Middle East or the Indian sub-continent, and he notes that cargo volume and trends are the main factors.[144]

Mekonnnen Abera, director of EMAA, stated that "the main reason for ESLSE's survival in international shipping market is commitment of Ethiopian government thereby offering protection to it through the FOB directives."[145] The FBO directive preserves all commercial imports with few exemptions to the ESLSE.[146] According to Mekonnen, one of the main potential challenges for Ethiopian shipping industry is tough global competition as the protection could not stay forever. In fact, existing studies

[141] Interview with Eyasu Yimam, February 2, 2017
[142] ibid
[143] Interview with Zenebe Asefa, Director, Technical Department of the ESLSE, Feb 5, 2017.
[144] Interview with Captain Getnet Abay, July 4, 2017.
[145] Interview with Mekonnen Abera, June 4, 2017.
[146] See the 2008 Ethiopia National Bank Directives and the 2012 Ministry of Transport Directives of Multimodal Transport (FOB Directive)

have already shown that such protection had resulted in inefficiency and impact on importers.[147]

According to Captain Getinet, there are global trends that PSC from developed States including the EU's are getting stricter and unaffordable for small landlocked States from time to time on matters related to safety, security and environment. Even though the EU's effective mechanism of implementations of IMO rules (by transposing it to its legislation) can be considered as beneficial for the attainment of international safety, security and environmental protection, some aspects of it could be harmful for developing countries interested in international shipping.

The EU's exercise of port or coastal State jurisdiction that could make maritime trade unaffordable for developing LLS is, *inter alia*, implemented in three ways: (i) by setting more strict standards than international standards; (ii) implementing international standards ahead of timelines set for the implementations of the rules; and (iii) serving as a major driving force for timely tightening of the IMO standards.

To give a particular example for each case, let's take the IMO rules under MARPOL Convention, revised Annex VI, and the most recent EU directive 2016/802/EU (Sulfur directive). The current IMO regulation limit for sulfur content of fuel oil used by ships is 3.50%m/m[148] whereas the sulfur limit for ships at berth in the EU ports is 0.1%m/m and in "EU's territorial seas, exclusive economic zones and pollution control zones falling outside SO_x Emission Control Areas for passenger ships operating on regular services to or from any Union port" is 1.5%m/m.[149]

The second situation is when the EU implements international rules ahead of the timeline set therein. For example, EU declared phasing out of a single hull tanker ahead of the IMO deadline. The deadline for 3.50% sulfur content limit in the case of the IMO was January 1, 2020 whereas the EU's deadline was 18 June 2014. Moreover, the IMO was conducting preparatory works to regulate green gas emission cap from ships while the EU had already adopted a regulation in 2015.[150] This shows that the EU, in the IMO regulatory system, is not only reactive but also proactive.

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[147] Tilahun Esmael Kassahun, 'Trade Facilitation in Ethiopia: The Role of WTO Accession in Domestic Reform', *supra* note 138, p. 171.

[148] *See* revised MARPOL Annex VI, regulation 14 (1)

[149] Article 7(1) and 6(5) of the EU sulfur directive 2016/802/EU respectively. Note that: price of fuel oil with a low sulfur content is so expensive.

[150] *See* the EU Regulation 2015/757/EU

It is thus submitted that escalating exercises of port or coastal States jurisdictional power*, inter alia,* the EU's trends of port or coastal State jurisdictional exercise or control have negative implications for developing LLS. Particularly, the EU maritime measures such as: setting more strict standards than international standards, implementing the international standards ahead of the timeline set therein, and influencing the IMO to elevate international standards are capable of making participation of developing LLS in the international shipping service unaffordable. For instance, it has already become unaffordable for Ethiopian shipping industry to undertake direct operation of international shipping to and from EU.

Conclusion

As discussed in the preceding sections, the EU maritime policy including its port State control regime could make international maritime trade through its waters very difficult for developing LLS. Particularly, the EU's regulatory actions (such as setting more strict standards than international standards to foreign ships operating in its waters or visiting its ports, and implementing the international standards ahead of the timelines set for implementation) may, in the absence of special treatment schemes, hamper the interest of the developing LLS to trade through the EU waters. Developing LLS which are already overwhelmed by economic and transit related problems could not afford the escalating standards and do not have bargaining position comparable with developed or coastal States. And ultimately, this may lead to the withdrawal of the developing LLS from shipping business through the EU waters as it is evident from Ethiopia's experience

It is argued that increasing EU's port State controls may give rise to more port States controls from other major global port or coastal States. If the EU continues its excessive port or coastal State jurisdictional schemes by setting its own standards to foreign vessles, there is a high probability that other major port or coastal States may exercise countermeasures in their capacity as port States or regional integrations for port State control. This seems to be likely because international maritime trade is, *inter alia,* determined by the bargaining position of the actors. The bargaining position of States is mostly determined by factors such as economic, diplomatic and geo-political position. But developing LLS cannot be in these positions because they do not have ports or sea coasts and have the lowest bargaining position in the international maritime field. This, in effect, might in absence of preferential or differential treatment, frustrate the developing LLS and affect their engagement in international maritime transport service. This ultimately may result in complete withdrawal of these States from the international maritime arena.

As highlighted above, the EU, by using its coordinated power, experience in maritime field and expertise has been influencing the IMO to progressively raise safety, security and environmental protection standards. In the absence of a preferential treatment, this could make the international shipping standards unaffordable to developing LLS. EU regulations, *inter alia*, regulations on freedom to provide service and coordinated action to safeguard free access of ocean cargos are designed to apply on any third country including developing LLS. The regulations may subject developing LLS that (due to their special needs) reserve cargoes to national shipping industry or otherwise protect the industry. Due to their low competitive capacity, shipping industries from developing LLS would not be threat to EU shipping companies in terms of market size or the number of merchant vessel fleet they operate. It is thus submitted that the EU should revisit its regulations by targeting at the third competitive States or devise some kind of special or differential treatment scheme to developing LLS.

It is suggested that recognizing the inherent problems of developing LLS and the economic interest of these States in the maritime service sector, both international maritime regulations and EU maritime policy and regulations should have differential treatment schemes for the developing LLS. Particularly, maritime environmental protection related regulations should consider the fact that these States are severely affected by the global challenges caused by environmental degradation such as climate change, while their contribution toward pollution and industrial emissions is minimal. The *Principle of Common but Differentiated Responsibilities* thus envisages differential treatment scheme for these States.

Accordingly, the regulation to safeguard free access of ocean cargos should provide for exceptional clause that benefits shipping services from developing LLS. By according incentive schemes for these States in the maritime field, it is possible to bring about global sustainable development given the economic importance of seas and oceans. It is only in the context of inclusive global sustainable development that LLS can come out of the poverty and underdevelopment trap which clearly worsens overexploitation of the natural resources to the detriment of the global commons and environmental sustainability. ■

Towards Effective Models and Enforcement of Corporate Social Responsibility in Ethiopia

Alemayehu Yismaw Demamu ♣

Abstract

Corporate Social Responsibility (CSR) is a concept whereby companies regard stakeholder interests in reaching corporate decisions on voluntary basis. Even though social responsibility is not alien to Ethiopians who are known for their philanthropic and charitable activities, there is no law that expressly requires CSR standards and thresholds. Provisions of the 1960 Commercial Code and other domestic laws show that Ethiopian companies have the option to comply with CSR in their core business strategy and decision making. To that end, companies, have either individually or at sector level, developed model codes of conduct and guidelines including CSR projects and initiatives. However, they are inadequate and do not guarantee effective CSR behavior among companies. There is thus the need to adequately integrate CSR practices into their core business decisions, and meet the interests and legitimate expectations of their employees, creditors, customers, local communities, and the environment. I argue that the alternatives to ensure effective CSR regulation in Ethiopia are adopting the Enlightened Shareholder Value (ESV) which recognizes a CSR framework tighter than the existing shareholder primacy model, or the Responsible Stakeholder Model (RSM) which adopts more subtle and lighter principles than stakeholder model to demand CSR compliance.

Key terms:

Companies · Corporate Social Responsibility · Enlightened Shareholder · Regulation · Responsible Stakeholder

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Introduction

Corporate Social Responsibility[1], often abridged as 'CSR', is a very old concept, and its core features can be traced back to ancient Chinese, Egyptian and Sumerian literature.[2] CSR gives due consideration to the welfare of the society in pursuing trade and commercial activities so that business activities shall uplift the lives of the society.[3] The concept of CSR is also implicitly present in various religious texts.[4] CSR took its modern conceptual attributes in western countries and it can be traced back to the work of G. Browns, "Social Responsible Businessman," published in 1953.[5] Since then, it has gradually become clearer, consolidated, and transformed.[6]

CSR was originally a discourse of corporate philanthropy or other forms of charitable giving.[7] Now, CSR has undergone a vast development and it has evolved as "business system that enables the production and distribution of wealth for the betterment of its stakeholders through the implementation

[1] Kingsley Adeyi (2018), 'Corporate Social Responsibilty in Nigeria:Legal Framework and Nature of Obligation Owed By Companies To Undertake', *International Journal of Advanced Research and Publications*, Vol 2, Issue 12, p 22. Corporate Social Responsibility is also called Corporate Citizenship, Corporate Social Performance, Corporate Social Conscience, or Sustainable Responsible Business.

[2] Prashant Pareek (2017), 'A Study on Corporate Social Responsibility : Historical Background and Impact on Organizations & Society,' *London Journal of Research in Humanities and Social Science*s, Vol 17, Issue, 3, p.75

[3] Ibid.

[4] Firuza Madrakhimova (2013), 'History of Development of Corporate Social Responsibility,' *Journal of Business and Economics*, Vol. 4, Issue 6, p.510

[5] Institutions , National Identity , Branislav Batinic and Danijela Batinic Danijela (2017), 'Globalization and Corporate Social Responsibility,' in Emrah Doğan and Şevket Alper Koç, (eds), *Institutions, National Identity, Power, and Governance in the 21st Century*, (IJOPEC Publication, London), p.11.

[6] *See* generally Archie B. Carroll(2008), 'A History of Corporate Social Responsibility: Concepts and Practices,' *in* Jeremy Moon, Donald Siegel Andrew Crane, Abigail McWilliams, and Dirk Matten, (eds), *Perspectives on Corporate Social Responsibility*. *See* also Min Dong Paul Lee(2008), 'A review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead,' *International Journal of Management Reviews*, Vol 10, Issue 1, p.53

[7] Mei Peng Low (2016), 'Corporate Social Responsibility and the Evolution of Internal Corporate Social Responsibility in 21st Century,' *Asian Journal of Social Sciences and Management Studies*, Vol 3 , Issue 1, p. 57

and integration of ethical systems and sustainable management practices."[8] It turns to be a concept whereby companies voluntarily integrate social and environmental concerns in their business operations and in their interaction with the stakeholders.[9] Currently, it is a concept beyond philanthropic or charitable activities.

In Ethiopia, social responsibility is not alien to the people who traditionally care to their families, neighbors, friends, and the community at all times. In spite of that, there is no a well-founded legislation which integrates this practice with everyday life, particularly with business undertakings. The 1960 Commercial Code does not make express reference to CSR, and it does not indicate the duty of companies to practice CSR. Accordingly, companies are practicing CSR through their own private regulations and on voluntarily basis. Thus, companies have the option to include or set aside CSR in their core business strategy.

This has led to inadequate CSR in core business strategies and decision making. For example, most companies do not want to go farther and ensure the occupational safety and health of their employees beyond the minimum standards stipulated in labor law. They do not strive towards producing and manufacturing products which are above the quality set for customers. They do not show extra efforts to install devices and equipment's to treat and discharge chemicals, and hazardous waste beyond the requirements of the law, and keep the water bodies, soil, the air, local residents, animals and surrounding flora and fauna in safer and better position.[10] This article examines the 1960 Ethiopian Commercial Code, other laws, private regulations such as voluntary codes of conduct and private initiatives of companies based on the laws, studies conducted on CSR, and other relevant literature.

The first and second sections deal with the conceptual framework, the regulatory schemes and enforcement mechanisms. Sections 3 and 4 examine legal regulation under the 1960 Commercial Code and other laws, private regulations such as codes of conduct through private initiatives of various sectors. The fifth section examines the level of effectiveness of CSR within companies operating business in Ethiopia. Section 6 sets an agenda for

[8] Richard E Smith (2011), 'Defining Corporate Social Responsibility: A Systems Approach For Socially Responsible Capitalism', Master Thesis, University of Pennsylvania, p. 10

[9] Green paper: Promoting a European framework for corporate social responsibility (Com (2001)366), 18-07-2001, commission of the European Communities

[10] Robi Redaa (2012), 'Review of Environmental Pollution Challenges in Ethiopia,' *Ethiopian Environmental Review*, Vol. 2, pp. 137-149

regulatory paradigm shift towards a more efficient CSR framework and enforcement in Ethiopia.

1. The Concept of Corporate Social Responsibility (CSR)

Companies habitually open, and operate businesses inside the community based on permits to operate business in their jurisdiction. In return to their benefits from business activities, companies are expected to create job to residents, support the community to be a better place for living, pay tax and be sources of revenue for the community, and preserve the environment.[11] This interaction between companies and the host community establishes a tacit obligation on companies to consider the wellbeing of employees and their families, the local community as well as to act towards to societal problems, goals, and aspirations or to the benefit the society at large.[12] This demonstrates the notion of CSR.

Various diverse definitions of CSR have been proposed and set forth over the decades. Dahlsrud, for instance, has analyzed 37 published definitions of CSR set forth between 1980 and 2003.[13] He noted that many of the definitions have much in common, and found that stakeholder, social, economic, voluntarism, and environmental domains are the most frequent dimensions that constitute CSR.[14]

CSR relates to a relationship between companies and the society with which they interact. It is about fulfilling responsibilities or obligations of companies towards the society on voluntary basis, and beyond the requirements of the law.[15] This includes, *inter alia*, developing good relationship with employees, customers and their families, working in partnership with local communities, engaging in investment that have social benefits, and participating in environmental conservation and sustainability

[11] Nathan E. Hurst (2004), 'Corporate Ethics, Governance and Social Responsibility: Comparing European Business Practices to those in the United States,' A Study Conducted for the Business and Organizational Ethics Partnership, Santa Clara University, pp. 7-8

[12] Adeyi, *supra* note 1. p.22

[13] Alexander Dahlsrud (2008), 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions,' *Corp. Soc. Responsib. Environ. Mgmt.*, Vol 15, p.3

[14] *Id.*, p.5

[15] Michael Fontaine (2013), 'Corporate Social Responsibility and Sustainability : The New Bottom Line ?' *International Journal of Business and Social Scienc*e, Vol 4 , Issue 4 , p.111

practices.[16] It is an initiative whereby companies take the responsibility and stretch their hands for the impact of their activities on employees, suppliers, creditors, customers, host communities and the environment.[17]

Although CSR may entails some form of corporate philanthropy, it is not confined to such philanthropic gestures. Indeed, CSR and corporate philanthropy are expressions of the interface between the company and its societal environment. However, CSR and philanthropic initiatives of a company are not synonymous, and there is a significant difference between the two. The word *philanthropy* has generally been defined as "a concern for or love of humankind."[18] It is a voluntary private action for a charitable purpose.[19] It is a strategy that promotes and attempts to bring about social change by mainly making generous charitable gifts, aid, or donations.[20] Philanthropy does not involve promotional (and marketing) objectives. It does not also involve the direct participation of philanthropists, as philanthropists often follow up and know the impact created by their contribution in remote.[21]

This concept of corporate philanthropy can be traced back to the late 1880s and early 1990s when business people made contributions to charity and other worthy cause as well as pursued activities which improved and uplifted the community.[22] It continued to grow into the 20th century, and by the late 20th century, it had become one of the institutionalized ways by which businesses provided aid to communities, the growing number of nonprofit organizations, and other national and international groups.[23] By the first decade of 2000s, majority of the companies began to participate in various corporate charitable giving, matching programs, product and service donations, employee voluntarism, or in any kind of involvement in response to the need of the community in areas such as education, culture, art, and

[16] Maimunah Ismail (2009), 'Corporate Social Responsibility and Its Role in Community Development: an International Perspective, ' *The Journal of International Social Researc*h, Vol 2, Issue, 9. p. 199

[17] Ibid.

[18] Archie B. Carroll (2011), 'Corporate Social Responsibility (CSR),' *in* S*AGE Brief Guide to Corporate Social Responsibility*, SAGE Publications, p.15

[19] Robert L. Payton and Michael P. Moody (2008), *Understanding Philanthropy: Its Meaning and Missio*n,(Indiana University Press), p. 6

[20] Michael E. Porter & Mark R. Kramer (2002), 'The Competitive Advantage of Corporate Philanthropy,' *Harvard Business Review*, Vol. 80, Issue 12, p.2

[21] Visit https://thecsrjournal.in/difference-between-csr-and-philanthropy/ . Accessed on July 10, 2019

[22] Carroll*, supra* note 18. pp.15-16

[23] *Id.*, p.16

heath activities.[24] Therefore, although corporate philanthropy has its own distinct features, it is currently part of the concept of CSR.[25] It is one of the foremost means by which companies fulfill their social responsibilities and come to be regarded as good corporate citizens.[26]

There is debate among scholars on whether CSR shall be voluntary (left to the morality of companies), or shall be mandated by an external law.[27] Some argue that companies should regulate and enforce CSR on voluntary basis, whereas others hold that companies should be required (by an external hard law) to effectively enforce CSR. For example, based on the first strategy, the UK Government described "CSR as the business contribution to sustainable development goals. Essentially, it is about how business takes account of its economic, social and environmental impacts in the way it operates maximizing the benefits and minimizing the downsides."[28] Similarly, the European Commission stated that "CSR is a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis."[29] The Commission of the European community also indicated that "CSR is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment." [30]

Milton Friedman,[31] Fulck and Hoblich,[32] N.V. Badi,[33] and Carroll [34] have also described CSR as a voluntary concept. In general, this view holds that

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[24] *Id.*, pp 17-18

[25] *Id.*, pp 16-17. *See* also Liliana Nicoleta Simionescu (2015), 'The Gender Differences Effects on Corporate Social Responsibility *(*CSR*)*,' *Economy Series*, Issue 3. p.170

[26] Muhammad Tariq Khan et al.(2012), 'Corporate Social Responsibility (CSR) – Definition , Concepts and Scope (A Review),' *Universal Journal of Management and Social Sciences*, Vol 2, Issue 7. p. 41. He notes that "CSR does not mean just taking part in charitable activities and events; it means holding the responsibility to develop the society by envisioning future plans for socio-economic justice and be conscious about their responsibility for the welfare of society around them."

[27] Gerlinde Berger-walliser & Inara Scott(2018), 'Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening,' *American Business Law Journal*, Vol 55 , Issue 1 . p.188

[28] Catherine Turner (2009), *Corporate Governance: A Practical Guide for Accountants*, (CIMA Publishing, 1st Ed). P. 7

[29] Green paper, *supra* note 9

[30] Ibid

[31] Milton Friedman (1970), The Social Responsibility of Business is to Increase its Profits, *The New York Times Magazine*. at 1–6. For Milton, the social responsibility of business is to increase its profits. Thus, it makes CSR a n activity that companies can engage on their interests.

companies should have a prerogative power to either comply or refuse to include CSR in their core business strategy and pursue CSR practices. They expect companies to develop their own CSR codes of conduct or a set of rules, and regulate and enforce CSR on voluntarily basis.

This voluntary CSR strategy is informed by two notions: the first notion argues that companies are established solely for profit purpose, and shall be managed for the sake of shareholders only.[35] The second notion, as corollary of the first one, focuses on theory of free market, and posits that CSR should be regulated by free market forces and not by any external hard law and mandatory rules.[36]

On the contrary, there is a perspective which propounds that companies shall be mandated by external hard law to effectively pursue CSR activities. Thomas McInerney argued that there are four types of companies with respect to regulation:

> those who know the law and are willing to follow it (Group A); those who do not know the law but would like to be law abiding (Group B); those who know the law and do not want to follow it (Group C); and those who do not know the law and do not wish to be law abiding (Group D).[37]

McInerney argued that companies, particularly those under group C and D may not effectively and efficiently pursue CSR practices on voluntary

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[32] Vincent Konadu Griffith & et al(2015), 'Debate on Mandatory Corporate Social Responsibility,' *Conference paper presented at National Seminar on Strategies for Business Excellence in Global Era*.. p.1 Fulck and Hoblich defines CSR as voluntary corporate commitment to exceed the explicit and implicit obligation imposed on a company by society's expectations of conventional corporate behavior.

[33] Ibid. N.V Badi in 2012 defined CSR is an organization obligation to benefit society in ways that transcend the primary business objectives of maximizing profit.

[34] A. B. Carroll (1979), 'A Three-Dimensional Conceptual Model of Corporate Performance.,' *The Academy of Management Review*, Vol 4, No 4, P.499 *See* also Archie B.Carroll (1991), 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders,' *Business Horizons*, Vol 34, Issue 4.

[35] Archie B Carroll & Kareem M Shabana(2010), 'The Business Case for Corporate Social Responsibility : A Review of Concepts , Research and Practice,' *International Journal of Management Reviews,* Vol 12 , Issue 1, p.88

[36] Bhavesh Sarna (2016), 'Voluntary CSR Vs. Mandatory CSR –The sound of employees,' Master Thesis, Jyväskylä University. p. 19

[37] Thomas Mclnerney (2007), 'Putting Regulation before Responsibility : Towards Binding Norms of Corporate Social Responsibility,' *Cornell International Law Journal*, Vol 40, Issue 1. p 185

basis since they do not want or wish to observe it.[38] Other scholars have also indicated that there is a strong case for CSR to be regulated and be binding.[39] As Ruth Lea noted:

> CSR is about businesses and other organizations going beyond the legal obligations to manage the impact they have on the environment and society. In particular, this could include how organizations interact with their employees, suppliers, customers and the communities in which they operate, as well as the extent they attempt to protect the environment.[40]

Moreover, the World Business Council for Sustainable Development (WBCSD) in 2002 declared that "CSR is the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life."[41] Accordingly, the Council puts an obligation on company managers to protect and improve the welfare of the society, environment and the interest of organizations. Moreover, the International Council on Human Rights Policy, Consumers International and Chatham House, and Royal Institute of International Affairs consider voluntary initiatives of CSR as mostly ineffective and insufficient, and thereby, call for the government to regulate CSR.[42] This is substantiated by various compliance literature which underline that voluntary CSR standards are not self-enforcing,[43] and are not strong enough to secure responsible corporate behavior.[44]

Indeed, companies may not be responsive to CSR practices solely fearing sanction. Yet, some form of sanction is essential towards ensuring compliance. In general, the view that supports this perspective upholds that

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[38] *Id.*, pp 185-186

[39] Sarna, *supra* note 36. p.18. *See* also Oyungerel Tudev & Erhembayar Lkhagvasuren (2011), 'The implementation of Corporate Social Responsibility in Mongolian Business Sector,' *Journal on Efficiency and Responsibility in Education and Science*, Vol 4, Issue 2. p.90

[40] Low, *supra* note 7, p .61

[41] World Business Council for Sustainable Development (2002), *Corporate Social Responsibility The WBCSD's journey* , World Business Council for Sustainable Development, p. 1 *See* also Richard Holme, & Phil Watts (2000), *Corporate Social Responsibility: Making Good Business Sense*, World Business Council for Sustainable Development

[42] Arjun Adhikari (2014), 'Corporate Social Responsibility : Voluntary or Mandatory *?*' *NJA Law Journal.* p.194

[43] Mclnerney, *supra* note 37, p. 185-186

[44] Olivier De Schutter (2008), 'Corporate Social Responsibility European Style,' *European Law Journal*, Vol. 14, Issue 2, pp. 15-22

companies primarily focus on how to structure their business operation and satisfy the desires of their shareholders. It argues that if companies are left free, they may not consider stakeholder interests on voluntary basis. According to the proponents of this view, companies may not be trusted in finding solutions to ongoing problems of stakeholders and the society on their own unless they are required to do so by the law. Indeed, companies may pursue CSR voluntarily, but, the proponents of this view hold that companies will use it as a public relation or a corporate strategy tool instead of serving the stakes of their employees, customers, creditors, suppliers, local communities and the environment.[45]

In spite of this debate, recent developments suggest that CSR is not solely based on voluntary compliance. The conceptions of governments, scholars, and national or international organizations is shifting away from the notion of CSR as a purely extralegal and voluntary activity. Currently, CSR is increasingly regulated in different countries. India is one of the countries which enacted CSR legislation in 2013. Section 135(5) of the Indian Companies Act provides that a company should "spend, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy."[46] While the hard law aspect of this requirement is the obligation to devote 2% of average net profit to CSR, the voluntary (i.e. soft law) dimension is the range of options in deciding the type of CSR activity that is left to the company's CSR policy.

Increased number of countries such as UK,[47] Belgium,[48] France,[49] Australia [50] and Germany [51] have also enacted CSR laws which transform the existing traditional voluntary attributes of CSR practices. In 2011, the European Commission in its new communication announced that CSR is "the responsibility of enterprises for their impacts on society"[52] and, stated

[45] Sarna, *supra* note 36. p.19

[46] Companies Act No. 18, 2013, India, Sec. 135, p .87

[47] *Companies Act, 2006,* United Kingdom, *Sec*. 173.

[48] Jonathan Lux *et al (2005)*, 'The European Initiatives' in Ramon Mullerat (ed.), *Corporate Social Responsibility, The Corporate Governance of 21st Century* (The Hague, the Netherlands: Kluwer Law International and International Bar Association), p. 291.

[49] *Id.*, 293-294.

[50] *Id.*, p. 421.

[51] Adhikari, *supra* note 42. p.202

[52] Alexandra Horváthová (2018), 'Commercial Contracts and Corporate Social Responsibility Values: A European Perspective and an Attempt of a Normative Approach,' *in* Maren Heidemann & Joseph Lee (eds), The Future of The Commercial

that adherence to applicable legislation, and collective agreements between social partners, is a prerequisite for meeting the responsibility.[53] It required companies to meet their social responsibility by integrating social, environmental, ethical, human rights and consumer concerns in their business operations and core strategy.

In Ethiopia, there is no specific law that directly mentions and specifies the concept of CSR. The Commercial Code does not embody a provision that makes express reference to CSR. But, different provisions of the Code impliedly consider CSR as a matter of discretion and within the prerogative power of company directors. A more express recognition of CSR without mandatory standards is embodied in the new Income Tax Proclamation which recognizes charitable donations as deductible expenses if they are made to Ethiopian Charities and Ethiopian Societies or in response to call for development or an emergency call issued by the government thereby implicitly attempting to encourage companies to engage in CSR activities.[54] Therefore, there is no legislation in Ethiopia that directly enjoins companies to either incorporate CSR in their policies or enforce CSR compliance. There is no any provision upon which companies can be held accountable for the negative impact they caused on employees, local residents and the environment beyond the standard of the law.

2. Regulation of CSR

It is difficult to obtain a holistic sense on the term 'regulation' with clarity and precision,[55] and there are still contestations on the meaning and scope of the term. In its broader meaning, it encompasses "all forms of social control, whether intentional or not and whether imposed by the state or other social institutions."[56] In its narrower definition it includes "deliberate attempts by the state to influence socially valuable behavior which may have adverse

Contract in Scholarship and Law Reform: European and Comparative Perspectives (Springer, Switzerland), p. 293

[53] Ibid.

[54] Proclamation No. 979/2016, Federal Income Tax Proclamation, *Federal Negarit Gazette Extra Ordinary Issu*e, 22nd Year, No. 104, Addis Abeba, 18th August, 2016, Art, 24

[55] Robert Baldwin, Martin Cave & Martin Lodge (2012), *Understanding Regulation: Theory, Strategy, and Practice*, (2nd ed, Oxford University Press), p.2

[56] Bronwen Morgan and Karen Yeung (2007), *An Introduction to Law and Regulation: Text and Materials,* 1st ed, Cambridge University Press, pp. 3-4

side-effects by establishing, monitoring and enforcing legal rules."[57] This article adopts the narrower definition, which in the context of CSR refers to a deliberate attempt by the state to control or monitor companies to integrate CSR into their policies and core business strategies. Thus, regulation is different from 'governance' and 'enforcement'. Governance often focuses on how and why companies operate their business,[58] whereas enforcement is not an end by itself, but a means to achieve the goals of regulation.[59]

Regulation may apply to CSR with a view to inducing companies to care for safety and welfare of employees, creditors, suppliers, local communities, and the environment.[60] However, there is variation in its application owing to different theories and interests of regulators. [61] CSR can also have sundry meanings.[62] This necessitates some discussion on soft law (self-regulation), hard law (mandatory) regulation, and co-regulation which blends the voluntary and mandatory CSR regulation approaches.

2.1. Soft law or self (voluntary) CSR regulation

In soft law or self CSR regulation, CSR rules are developed and enforced by the companies themselves.[63] This model gives companies a prerogative power to develop their own CSR codes of conduct and other set of rules,[64] and enforce CSR activities in a decentralized fashion, on their own will, and in accordance with their internal strategies.[65] Companies decide their

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[57] Ibid.

[58] Tineke E. Lambooy (2010), '*Corporate Social Responsibility : Legal and semi-legal frameworks supporting CSR developments 2000-2010 and cases studies*', PHD Thesis, University of Leiden.. p.60

[59] *Id.*, p. 260

[60] Bronwen Morgan (1976*), Cases and Materials on Economic Regulation of Business,* 1st Ed, *(*West Publishing Co*),* pp *18-20*

[61] Jennifer A. Zerk (2010), 'Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas,' *A Working Paper of the Corporate Social Responsibility Initiative, Working Paper No. 59,* p 82.

[62] Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (1st ed, Cambridge University Press), p. 32

[63] Hamed Alavi, Patrycja Hąbek & Helena Cierna (2016), 'Corporate Social Responsibility and Self-regulation,' *MM Science Journal*, p 1122 DOI: 10.17973/MMSJ.2016_10_201681

[64] Michał Jurek (2014), 'The Genesis and Evolution of CSR Self-Regulation with Special Reference to the Case of Financial Institution*s,*' FESSUD Working Pape, Working Paper Series No 70. p. 24

[65] J Jean Pascal Gond, Nahee Kang & Jeremy Moon (2011), 'The Government of Self-regulation: On the Comparative Dynamics of Corporate Social Responsibility,' *Economy and Society*, Vol 40, Issue 4. p. 644. *See* also Mia Mahmudur Rahim

priorities and responsibilities towards stakeholders' interests and the society, and they practice CSR activities on their own. Companies will not be detected and guided by the policies and laws of the government, or are not expected to observe mandatory CSR laws and rules. Instead, they often articulate 'best practices' as a benchmark or norm with an aspirational quality. The origin and semantic interpretation of CSR are in tandem with this fact.[66]

In soft law or self (voluntary) CSR regulation, market factors play a paramount role in regulating CSR practices.[67] Markets –instead of the government– drive companies to pursue CSR activities**.** The government refrains from making unnecessary interventions which distort CSR practices.[68] As a result, this model is a "voluntary, bottom-up and self-regulation"[69] of CSR by companies in contrast to mandatory, top-down and coercive regulation by the government.

The soft law model implicitly endorses the neoliberal claim that the state should play, but a limited role in economic affairs.[70] The model also endorses a pro-business standing.[71] It promotes companies to be innovative and create new business ideas on issues of CSR.[72] It, *inter alia*, encourages companies to be more flexible to meet CSR targets based on their needs and types, reduce CSR implementation costs and bring unpriced economic returns.[73]

(2013), *Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy* (Springer), p.97

[66] Pablo Nieto, 'Why Regulating? Corporate Social Responsibility is a Conceptual Error and Implies a Dead Weight for Competitiveness', *The European Enterprise Journal,* Pp.25-26.

[67] Sorcha MacLeod (2012), 'Towards Normative Transformation: Re- conceptualising Business and Human Rights,' PhD thesis, pp. 257-258.

[68] Renginee G. Pillay(2016), 'The Limits to Self-regulation and Voluntarism: From Corporate Social Responsibility to Corporate Accountability,' *Amicus Curiae*, Issue 99. p.10

[69] Ibid.

[70] Engobo Emeseh et al.(2010), 'Corporations, CSR and Self Regulation : What Lessons from the Global Financial Crisis ?' *German Law Journal*, Vol 11, No 2, pp. 233-235

[71] Nieto, *supra* note 66. p. 26

[72] Ibid.

[73] Cavaliere, Alberto (2000), 'Over-Compliance and Voluntary Agreements: A Note about Environmental Reputation', E*nvironmental and Resource Economics,* Vol 17, issue 2.

2.2. Hard law (mandatory) CSR regulation

Hard law (mandatory) CSR regulation subjects companies to government mandated CSR polices and laws.[74] In this model, the state enacts CSR legislation, and sets minimum CSR standards; specifies specific CSR behaviors, either positively or negatively; and requires companies to comply with them.[75] Thus, all companies (not only those which voluntarily choose or are pressed by brand vulnerability) engage in all legally prescribed CSR activities.[76] In hard law mandatory CSR regulation, CSR is enforced directly by state agencies (often through law or administrative oversight) even though the costs and benefits of regulation are shared by the public.[77] This demonstrates that hard law CSR regulation is a top-down, coercive and rule based CSR regulation.[78]

Even if there are mandatory thresholds of engagement, the details are left to companies, and they are expected to work in consultation with stakeholders while they develop, implement and evaluate their CSR activities.[79] Accordingly, this model ensures fair, more legitimate, and most importantly, more effective CSR in a country.[80] It avoids excesses in the exploitation of labor, bribery, and corruption. It lets companies to know what is expected of them and enhance their profitability, growth and sustainability as well as to re-address the balance between companies and their stakeholders.[81] It also penalizes rogue companies because of their lower standards.[82]

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[74] Gregory Jackson, Julia Bartosch & Emma Avetisyan (2017), 'Regulating Self-Regulation? The Politics and Effects of Mandatory CSR Disclosure in Comparison,' *SSRN Electronic Journal.* P5

[75] Rahim, *supra* note 62. p. 99. *See* also Jianling Wang et al.(2017), 'The Effect of Mandatory Regulation on Corporate Social Responsibility Reporting Quality: Evidence from China,' *Journal of Applied Business Research*, Vol. 33, No 1, p. 68

[76] Doreen McBarnet (2009), 'Corporate Social Responsiblity Beyond Law, Through Law, For Law,' *University of Edinburgh School of Law, Working Paper Serious 2009/03*, p. 27

[77] Jackson, Bartosch, and Avetisyan, *supra* note 74. p3

[78] *Id*., pp. 3-4

[79] Adhikari, *supra* note 42. p.195

[80] Bethel U Ihugba (2012), 'Compulsory Regulation of CSR : A Case Study of Nigeria,' *Journal of Politics and Law*, Vol 5, Issue 2, p. 69. *See* also McBarnet, *supra* note 76. p. 27

[81] Deborah Doane (2005), 'The myth of CSR: The problem with assuming that companies can do well while also doing good is that markets don't really work that way,' *Stanford Social Innovation Review,* Vol 3, Issue 3. p. 28. *See* also Adhikari, *supra* note 42. P.196

[82] Adhikari, *supra* note 42. p. 196

2.3. Co-regulation of CSR

In CSR regulation, various discourses of self-regulation and mandatory regulation interact and compete for dominance with varying degrees of success. Yet, none of them dominates the regulation of CSR scholarship and practice.[83] Recently, scholars are arguing that an exclusive self-regulation of CSR does not characterize CSR.[84] They are also skeptical regarding the effectiveness of mandatory CSR regulation. As a result, interest has grown for co-regulation of CSR: the hybrid or the smart mix of self and mandatory CSR regulations.[85]

Co-regulation refers to "a hybrid governance approach whereby regulations are specified, administered, and/or enforced through a combination of public and private rule-making system."[86] It is a cooperative form in which government and companies aim to regulate and enforce CSR activities jointly.[87] That is to say, the government sets mandatory CSR denominators and controls whether companies meet these minimum standards. The government also enacts soft CSR laws (i.e., voluntary standards) and encourages companies to enhance their dedication and commitment to CSR through their own codes of conduct and initiatives within the scope of the law.[88]

Thus, companies are not solely obliged to engage in CSR prescribed by the law; they can also pursue CSR voluntarily, but beyond what is prescribed by the law. [89] They assume the ethos of both voluntary and mandatory approaches.[90] In co-regulation, voluntary regulation of CSR will take the place where the mandatory approach is quickly outdated, as globalization may evolve or the government may fail to control CSR activities, or the

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[83] Rahim, *supra* note 65. p.106

[84] Jackson, Bartosch, and Avetisyan, *supra* note 74. p.5

[85] MacLeod, *supra* note 67, p.178.

[86] J Jane Lister (2011), 'Corporate Social Responsibility and the State International Approaches to Forest Co-Regulation,' *Vancouver: UBC Press,* p.23 See also Co-regulation and Corporate Social Responsibility, .p.3

[87] Reinhard Steurer (2013), 'Disentangling governance: A synoptic view of regulation by government, business and civil society,' *Policy Sciences*, Vol 46, Issue 4, p.397

[88] Ihugba, *supra* note 80. p.77

[89] Adhikari, *supra* note 42. p.202

[90] David Milman (2009), *National Corporate Law in a Globalized Market: The UK Experience in Perspective*, (Edward Elgar Publishing Limited), p. 146, See also Peter Utting (2005), 'Rethinking Business Regulation: From Self-Regulation to Social Control,' *UNRISD Program Paper TBS-15,* Issue 15, p.8; *See* also Ihugba, *supra* note 80. p. 77.

mandatory approach plays an important role in regulating CSR when corporations fail to comply with voluntary approaches. The OECD has commented that "although the two approaches both offer distinctive strengths and weaknesses, the tendency now is to look at them as largely complementary efforts." The government has roles as well as limitations in CSR regulation, as the government should not "row, but steer" by avoiding too "much control."[91] To be precise, in co-regulation, the government assumes a strong, but limited role.[92]

3. Legal Regulation of CSR in Ethiopia

Ethiopia has not yet enacted a separate CSR law that imposes specific or directly enforceable CSR obligation on companies. Yet, as highlighted earlier, there are implied expectations of CSR under laws such as the 1960 Commercial Code and the 2016 Income Tax Proclamation. Voluntary CSR standards are expressed in privately developed codes of conduct, CSR projects or initiatives.

3.1. Legal regulation of CSR under the Commercial Code

Under the 1960 Commercial Code, companies acquire legal personality upon registration before the concerned body,[93] and their establishment is publicized in a newspaper having nationwide circulation.[94] The Commercial Code provides that companies shall act through their shareholders in general meeting, board of directors, and officers (agents) appointed by or under authority derived from members' general meeting or the board of directors.[95] According to the Code, companies act through their shareholders in general meeting. [96]

In the general meeting, shareholders, *inter alia*, listen to reports of directors, and make decision accordingly; appoint or remove of directors; decide on the amount of remuneration of directors; amend the memorandum

[91] Rahim, *supra* note 65. p.109

[92] Kunnawee Thirarungrueang(2013), 'Rethinking CSR in Australia : time for binding regulation ?' *International Journal of Law and Management*, Vol 55, Issue 3, p.178

[93] Proclamation No 980/2016, Commercial Registration and Licensing Proclamation, *Federal Negarit Gazeta,* 22nd Year, No 101, Addis Abeba , 5th August , 2016, Art 5(1) cum 7(1)

[94] *Id.*, Art 7 (2)

[95] Proclamation No 166/1960, Commercial Code of The Empire Of Ethiopia, *Negarit Gazeta: Gaazette Extraordinary*, 19th Year, No 3, Addis Abeba, 5th May 1960, (here after Commercial Code), Art 347 cum 348cum 350 cum 368

[96] Commercial Code, Art 390.

or articles of associations; and decide on all other appropriate business matters.[97] Therefore, in the Code, company directors can pursue CSR practices or meet stakeholders' interests only if that is provided in the Memorandum or Articles of Association of the company, or subsequently approved by the resolution of the general meeting of shareholders. That is to say, if companies wish, and then set or approve CSR agenda, directors can voluntarily pursue CSR practices. That makes CSR a voluntary and self-regulatory activity.

Company directors, for instance, do not have the power to set and run CSR objectives by themselves. The Code lets that to be determined by companies only. This confirms that CSR activities are still managed with the interest of companies. Moreover, the Code specifies the duties of directors. These duties (similar to powers) emanate from the law (Commercial Code), Memorandum, or Article of Association, and Resolutions of shareholders meeting. Generally, the nature of these duties is took two-fold, i.e. duty to the company, and duty to the creditors.

Duty to the Company: the Code recognizes that directors owe duties to the legal person 'the company' rather to 'shareholders or potential shareholders.'[98] These duties of directors are fiduciary duty, care, and diligence.[99] Accordingly, directors are required to act with *bona fide* and in the best interests of the company. They are expected to avoid any conflict arising between their own interests and those of the company; observe the limitations of the powers of the company as well as their power limitations to act on behalf of the company; and maintain and exercise an unfettered discretion when dealing with company affairs.[100] They are expected to act with care, skill and diligence, and manage the affairs of the company as a reasonable person would manage his/her own affairs. [101]

Duty to the Creditors: creditors have their money tied up in companies. As a result, the Commercial Code requires directors to act towards the interests of creditors.[102] It enjoins directors to regard the interests of companies' creditors and take all the necessary steps to minimize loss to creditors where they ought to know that the company has no reasonable prospect of avoiding insolvent liquidation. Otherwise, they may be called to

[97] *Id.*, Art 419 cum 423
[98] Commercial Code, Art 364.
[99] *Id.*, Art 364(3)and(5)
[100] *Id.*, Art 355, 356, 357,360
[101] *Id.*, Art 364(3)
[102] *Id.*, Art 366.

account to make contribution towards the company's assets in liquidation.[103] Moreover, Articles 435, 436 and 437 of the Code recognize company directors, or representatives of company creditors; and 20% of company creditors may call a general meeting of company creditors on matters related to the effective enforcement of their rights on Debtor Company.

Generally, these duties of directors are towards the company and creditors. They mandate directors to act towards the interests of companies and rights of creditors. The Code adopts the traditional shareholder primacy (shareholder-centric) model of corporate governance. It does not require directors to consider the interests of other stakeholders such as employees, suppliers, customers, the community and environments, or to pursue CSR activities. Directors with lower levels of awareness and commitment to CSR usually consider various CSR engagements that benefit the latter stakeholders as undue depletion of capital or money that would otherwise be available as profit for shareholders.

The Draft Commercial Code (hereinafter the Draft Code) does not make a significant departure from the 1960 Commercial Code on the regulation of CSR. It does not expressly state the concept of CSR while it could have incorporated a minimum standard of it. Yet, the Draft Code amends the duty to loyalty of directors. Article 316 of the Draft Code states that directors shall consider the long-run interest of the company, rights of employees, interests of creditors, and the impacts of their activities on the local community and the environment while they take measures to make the company more effective.[104]

This provision varies from the 1960 Commercial Code because the latter only requires directors to act towards to the interests of the company and creditors. Even if Article 316 of the Commercial Code widens the scope of loyalty of directors, the Draft Code adopts the shareholder-centric model of corporate governance. Its provisions consider CSR as voluntary and leave it to the discretion and whim of companies.

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[103] Ibid

[104] The Draft of the Revised Commercial Code, Art 316. It reads
አንቀጽ 316 የመታመን ግዴታ /ታማኝነት/
1) የዳይሬክተሮች ቦርድ አባላት ማኅበሩን የበለጠ ስኬታማ ያደርጋል ብለው በቅን ልቦና ያመኑበትን እርምጃ መውሰድ አለባቸው፤ የመላው ባለአክሲዮኖችን ተጠቃሚነት ለማረጋገጥ መሥራት ይኖርባቸዋል፤
2) በዚህ አንቀጽ ንዑስ አንቀጽ (1) ሥር የተመለከተውን ኃላፊነት በሚወጣበት ጊዜ አንድ ዳይሬክተር የማኅበሩን የረጅም ጊዜ ጥቅም፣ የሠራተኞች ጥቅም፣ ከማኅበሩ ገንዘብ የመጠየቅ መብት ያላቸውን ሰዎች ጥቅም፣ የማኅበሩ ሥራ በማኅበረሰቡ እና በአከባቢው ላይ የሚኖረውን ተጽእኖ ግምት ውስጥ ማስገባት አለበት፡፡

3.2. Legal regulation of CSR under other laws and bilateral treaties

As indicated earlier, the Federal Income Tax Proclamation No 979/2016 entitles companies to deductible expenses if they make charitable donation. Article 24 of the Proclamation provides that donations and gifts made by companies shall be deductible expenses if they are made:

a) to Ethiopian charities and Ethiopian societies,
b) in response to a call for development or an emergency call issued by the government to defend the sovereignty and integrity of the country, to prevent or provide relief in relation to man-made or natural disasters or an epidemic, for any other similar cause.[105]

Moreover, the VAT Proclamation No. 285/2002 requires companies to pay VAT when they buy goods and services from VAT registered providers of goods and services.[106] The Proclamation exempts companies form payment of VAT to the extent specified by the regulation if the transaction is "the supply of goods and rendering of services in the form of humanitarian aid, as well as import of goods transferred to state agencies of Ethiopia and public organizations for the purpose of rehabilitation after natural disasters, industrial accidents, and catastrophes."[107] Although the Income Tax and VAT proclamations encourage companies to set CSR objectives and pursue responsible business conduct they are encouraged to pursue them voluntarily.

Likewise, Article 5(8) of the Investment Proclamation No. 1180/2020 states that it shall "encourage socially and environmentally responsible investments"[108] as one of its objectives. Towards this objective, Article 54(2) of the Proclamation requires "all investors to give due regard to social and environmental sustainability values including environmental protection standards, and social inclusion objectives" while they are carrying out their investment projects. Although these provisions, are indeed commendable as expectations and standards of responsible voluntary activities, they do not oblige companies to go beyond the standards and requirements of the law based on the levels of their competence and thresholds of CSR performance.

It is also to be noted that there are national laws such as environmental, labor/employment, human rights, and anti-corruption laws which set

[105] *Id.*, Art 24(1)
[106] Proclamation No. 285/2002, Value Added Tax Proclamation, *Federal Negarit Gazeta*, 8th Year, No.33, Addis Ababa, 4th July, 2002, Art 3
[107] *Id*, Art 8(2)(h))
[108] Proclamation No. 1180/2020, Investment Proclamation, *Federal Negarit Gazeta,* 26th Year, No. 28, Addis Ababa, 2nd April, 2020, Art 5(8)

minimum standards relating to the environment, labor, human rights, and other standards and thereby, require companies to comply with them. However these laws do not go beyond general standards, and fall short of requiring mandatory CSR practices.

The majority of the Bilateral Investment Treaties (BITs), to which Ethiopia is a party, do not incorporate CSR. It is only a few BITs that make some reference to CSR. For example, the preamble of the BIT between Ethiopia and Finland states that "the contracting parties are desiring for the respect of labor, health, environment, and safety measures, conclude the agreement for the promotion and protection of investment in their respective jurisdictions."[109] The BIT between Ethiopia and United Arab Emirates, as well as the BIT between Ethiopia and Qatar require investors (companies) to give due regard to standards of environmental protections, labor, health, and safety in host states.[110] Similarly, Article 14 of the BIT between Ethiopia and Brazil states that:

> investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the host state and the local community, through the adoption of a high degree of socially responsible practices, based on the principles and standards set out in this Article and the OECD Guidelines for Multinational Enterprises (MNEs) as may be applicable on the State Parties.[111]

These BITs require companies to comply with human rights, sustainable development, labor, and employment and other minimum standards set by the domestic laws or international laws and guidelines. However, they do not set CSR standards and do not expressly require compliance. They rather encourage CSR to be self-regulated by companies.

4. Private Regulation of CSR

4.1 Model Code of Ethics for Ethiopian Business

In 2014, a Model Code of Ethics (herein after Code of Business Ethics) for Ethiopian Business which engage in trading, service, and manufacturing sector was enacted by the Ethiopian Chamber of Commerce and Sectoral Associations (Herein after ECCSA).[112] The Code of Business Ethics, in its

[109] The preamble of the agreement Between Ethiopia and the Republic of Finland, 2006.

[110] The agreement to promote and protect investment between Ethiopia and UAE, 2016, Articles 11-13; The agreement to protect and promote investment between Ethiopia and Qatar, 2017, Article 14.

[111] The BIT between Ethiopia and Brazil, 2018, Article 14.

[112] ECCSA is a non-profit and Non-government organization which was established by Proclamation No 321/2003 with a mandate to promote Ethiopia's product to the

preamble, states that companies play a paramount role in improving the life of customers and employees; shaping the future of the local community; honoring obligations towards suppliers and competitor; and protecting the environment.[113] It notes that companies are increasingly violating ethical behaviors, breaching trust and becoming dishonest in the country.[114] It further underlines that companies are causing undesirable problem on their employees, consumers, suppliers, the community, and environment.[115]

To Model Code of Ethics embodies five principles and eight ethical standards, and urges companies to take urgent measures which would reverse the negative impacts of their operations. Accordingly, the Code under Principle 2.2.1 enjoins companies to devise their management practices and business conduct that respect and benefit employees, customers, the community in a manner that contributes to the national development effort of the country.[116] Moreover, the Code of Business Ethics requires companies to protect the environment and natural resources, and run their operations without compromising the ability of future generations to meet their own needs.[117]

The Code of Business Ethics also incorporates minimum ethical standards which demand companies to produce, or sell standardized products/ services; offer products/services with fair value, price, intended use, and relevant information; undertake their business without adversely affecting the health and safety of the customers, and the quality of environment; and be sensitive to the needs, dignity, privacy, culture and religion of stakeholders.[118] Article 3.3 of the Code provides that companies should be honest towards their employees; be open in communication and sharing relevant information; create equal opportunities; protect their personal information; create awareness about the laws and regulations of the country; and respect all their legal rights.

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world, develop international trade and promote investment in Ethiopia, and foster the development of a vibrant and dynamic private sector in the country. ECCSA is currently, comprised of nine Regional Chambers of Commerce and Sectoral Associations, two City Administration Chambers of Commerce and Sectoral Associations, one National Chamber Sectoral Associations and six Sectoral Associations.

[113] ECCSA(2014), Model Code of Conduct of Ethics for Ethiopian Businesses, p.1

[114] *Id.*, p.2

[115] *Id.*, P.3

[116] *Id.*, Principle 2.4

[117] *Id.*, Principle 2.5

[118] *Id.*, Article 3.1

Article 3.4 of the Code of Ethics also stipulates that companies' officials and employees should not accept or offer any gift and hospitality which can create conflict of interest; be honest, fair and conduct their business in good faith; and protect the personal information of suppliers. The Code of Ethics states that companies should operate in harmony with the interests of the community in which they operate; contribute to make the community a better place to live and do business with; raise the standards of health, education, safety, and economic wellbeing of the community; mitigate the undesirable side effects of its operation on the community livelihoods; be sensitive to the culture, religion, customs and traditions of the community; and participate in charitable donations, educational and cultural contributions, civic and other community affairs.[119]

Moreover, the Code of Business Ethics stipulates that companies should preserve and conserve all earth's resources; strive better environmental performance than specified in the law; show preference to environmental friendly products and inputs; apply the 3R principles (Reduce, Reuse and Recycle); and minimize and avoid pollution and waste including solid, liquid and atmospheric conditions.[120] Furthermore, Article 3.2 of the Code requires directors to run companies in the interests of shareholders; provide them with timely and reliable information; and treat them equally regardless of the size of their ownership interest in the company.

These principles and ethical standards demand ECCSA member companies to aspire beyond the profit-focused activities, and meanwhile pursue CSR objectives which consider stakeholder interests. Although these are commendable, the following discussion in Sections 4.2, 4.3 and 5 shows that the Code of Business Ethics has not been effectively implemented towards ensuring CSR in Ethiopia thereby showing the problems of enforcement in CSR principles and standards that fall under the voluntary (self-regulation) category of CSR.

4.2 EHPEA's Code of Practice for Sustainable Flower Production

The Ethiopian Horticulture Producers and Exporters Association[121] (here in after EHPEA) has enacted Code of Practice for Sustainable Flower

[119] *Id.*, Article 3.6

[120] *Id.*, Article 3.7

[121] Ethiopian Horticulture Producer Exporters Association is a non-profit business membership organization which is established in 2002. EHPEA is meant to promote the interest of its members which are engaged in the production and export of flowers, vegetables, fruits, herbs, and cuttings. Currently, it has 119 registered members.

Production[122] (hereinafter EHPEA Code) in 2007. The Code aims to "minimize adverse impact on the environment, the work force and local community, and to encourage further work to improve the farmer's capability in the area."[123] As a result, the EHPEA Code recognizes bronze, silver and gold levels of excellence which will be certified by EHPEA.[124]

Of these levels of excellence, the Code defines all the minimum standards of bronze level which are mandatory for all members of EHPEA, but the requirements of silver and gold levels are not finalized yet.[125] The standards of bronze level require flower firms, *inter alia*, to measure, document and evaluate their performance on water consumption, pesticides and fertilizers use, and waste management and energy consumption every month.[126] Moreover, they enjoin firms to assess and mitigate risks related to environment, health and safety of their employees and local community; refrain from purchase, store or use banned and un-registered pesticide products; implement safe pesticides use and storage; and train all their personnel on general risks of handling pesticides, correct use of protective devices and washing facilities, and general accident and emergency procedures. [127]

Annex 1 of the EHPEA Code[128] lists out different activities which flower firms shall comply with. Section 1.1 requires member firms to ensure managers are responsible and consider environmental issues in decision making. Moreover, firms are required to conduct basic assessment on environmental and labor conditions periodically, and take corrective measures; [129] abstain from using methyl bromide[130] and untreated sewage

[122] EHPEA (2007), EHPEA Code of Practice for Sustainable Flower Production – Bronze Level.
[123] *Id.*, p.2
[124] *Id.*, p.18
[125] *Id.*, p.3. The Code states that "the Silver Level will set internationally recognized standards for Good Agricultural Practices and the Gold Level will define the key elements of current agricultural best-practice within a Sustainable Production framework".
[126] *Id.*, p.8
[127] *Id.*, p.8
[128] The annex has three chapters, i.e. Production Management, Environmental Management, and Personnel, Labor and Human Resource Management which are further divided into Sub-topics together with Requirement and Compliance Criteria and Reference Documents under each topic.
[129] *Id.,* Section 1.2

water;[131] monitor and evaluate their water, pesticide, fertilizer, waste disposal and energy consumptions;[132] avoid an unhealthy treatment of employees and other human beings as well as any damage on surrounding flora and fauna.[133]

With regard to employees, the Code requires flower farms to provide training and create awareness on basic skills of first aid in the event of pesticide poisoning, HIV/Aids, environmental management, and occupational health management.[134] The Code also requires firms to fulfill hygiene and ablution facilities, ensure access to clean water, establish clean and suitable rest area, and establish permanent medical clinic and directives to manage basic accidents and emergency cases for employees.[135]

These are standards of bronze level and they expect flower companies to be socially responsible, and consider the interests of their employees, the local community and the environment in which they operate. However, this voluntary Code may not ensure firms to effectively pursue CSR activities. One of the reasons is that the EHPEA Code only applies to member firms.[136] *Second*, it cannot even be effectively enforced on member firms because it stipulates that all members '*will be required*' instead of '*shall be required*' to meet the minimum standard of bronze level, and '*will be encouraged'* instead of '*shall be encouraged'* to move on to the silver and gold level.[137]

Third, the Code indicates that "it seeks to compliment the Law of Ethiopia, but does not substitute for the Law…" The EHPEA Code lacks effectiveness because the core law on companies, i.e., the Commercial Code does not oblige companies to pursue CSR practices,. It cannot oblige EHPEA member firms to pursue CSR activities other than the firms that pursue CSR objectives and try to meet the interests of employees, local community and the environment.[138] This has been confirmed by various studies. For instance, in 2009, out of more than 86 member floriculture

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[130] *Id.*, Section 1.4 "Methyl Bromide is an ozone-depleting substance regulated under the Montreal Protocol that is used as a fumigant on crops, for pest control in structures and stored commodities and for quarantine treatments and smaller amounts are also used in the preparation of other organic compounds."
[131] *Id.*, Section 1.7
[132] *Id.*, Section 1.6, Section 2.1, Section 2.3. and 2.6
[133] *Id.*, Section 2.1, Section 2.9
[134] *Id.,* Section 3.2
[135] *Id.*, Section 3.3. cum 3.4
[136] *Id.*, p. 3
[137] *Id.*,
[138] *Id.*, p. 6

farms, only 10 observed the terms of the Code and considered stakeholder interests.[139] This shows the reluctance of most farms to pursue the CSR standards articulated in the EHPEA Code of Practice.

4.3 CSR projects and initiatives

There are companies that have developed CSR projects and initiatives. In the financial sector, for instance, a few Commercial Banks are promoting good corporate governance, and are working for the interests of their employees, customers, and the general public.[140] Similarly, few cement factories have CSR in their core values and business strategies.[141] There are also some leather industries that have been engaged in building school classrooms, constructing small scale roads and protecting the environment.[142]

Yet, these pursuits of CSR are voluntary and are left to the discretion of companies, and most companies have not developed such CSR codes of conduct, projects or initiatives. This shows that private CSR codes of conduct, projects and initiatives are not pursued at comparable levels by a significant number of companies as they are usually considered as futile for their profit objectives.

5. Current CSR Practices of Companies in Ethiopia

As noted earlier, CSR is a voluntary concept in Ethiopia. As a result, the majority of the companies do not perceive CSR as one of the engagements in their day to day pursuits and concerns, and they tend to consider that socially responsible activities are the duty of the government as long as they pay tax.[143] There are a few companies that participate in various philanthropic, economic support, environmental and other CSR activities. However, the motives behind such CSR activities primarily focus on making the local community feel good about them and collect more profit. Moreover, most

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[139] Mulugeta Getu (2009), 'Ethiopian Floriculture and Its Impact on the Environment : Regulation , Supervision and Compliance,' *Mizan Law Review*, Vol 3, Issue 2. p. 264

[140] Accessed at http://www.combanketh.et , https://www.bankofabyssinia.com/, *https://www.bunnabanksc.com*. https://dashenbanksc.com/, https://www.awashbank.com/ . visited on July 26, 2019

[141] Accessed at https://nationalcementsc.com/, https://www.messebocement.com. visited on July 26, 2019

[142] Accessed at https://elicoplc.com.et visited on July 26, 2019

[143] Asnake Menbere (2016), 'Analyzing Social Responsibility Towards Improving Labor Practice Issues in Ethiopia: A Focus on Metahara Sugar Factory,' Msc Thesis, Norwegian University of Science and Technology, pp. 46-47

CSR activities of companies fail to holistically consider the interests of their employees, customers, the local community and the environment thereby failing to live up to the expectations of the public. The following overview on selected sectors illustrates this point.

Leather and footwear companies

Although there are companies in the leather and footwear industry sector that pursue various social, environmental and economic responsibilities,[144] most leather and footwear companies are posing problems on employees, local community and the environment.[145] Even where CSR activities are conducted, there are gaps in the establishment of CSR department which is responsible to run CSR activities regularly.[146] Moreover, a separate budget is not proactively allocated for CSR activities,[147] and fund for CSR activities is raised from contingency budget or profit. As a result, there is focus on philanthropic activities that is usually upon request from the local community or individuals. These philanthropic activities are not regular and persistent, and are done arbitrarily at any time in the budget year.[148]

Moreover, leather and footwear companies do not have financial and non-financial CSR reporting schemes.[149] Even worse, the challenge in this sector involves widespread violation of the minimum legal compliance standards by discharging waste to streams and rivers without any treatment thereby polluting the environment, affecting human health, killing animals, and causing damage on surrounding fauna and flora.[150] Thus, most leather and footwear companies are not in good standing with regard to CSR, even though one of the domains of CSR is *compliance with the law* in the course of a company's operations towards production (of goods and services) and profit.

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[144] *See*, for example, Mathias Nigatu Bimir (2015), 'Corporate Social Responsibility Learning in the Ethiopian Leather and Footwear Industry,' MA Thesis, Institute of Social Studies, The Hague , Netherlands, p. 20.

[145] *Id.* p. 37

[146] *Id.* For instance, CSR in ELICO is under management information department with direct supervision of the general manager. In Sole Rebels, the owner manager decides on each aspect of CSR in consultation with the advisor.

[147] Ibid

[148] Ibid

[149] Ibid

[150] Hunegnaw Abebaw (2015), 'Leather Industry and Environmental Challenges: The Case of Haffede Tannery', MA Thesis, Addis Abeba University, p. 56

Brewery companies

Various brewery companies participate in supporting local sports, arts, education, health and cultural activities.[151] However, there are gaps in the pursuance of the minimum legal standards in waste disposal because there are many companies that do not treat and discard effluents.[152] CSR requires these companies to fulfil their responsibilities such as reducing carbon dioxide emissions, reducing energy consumption, sustainable inputs, advocating responsible consumption, and engaging in afforestation.[153] However, studies show that most brewery companies fail to accord serious attention to stakeholder interests.[154] Employees, customers and the local communities claim that most of these companies do not strive enough to protect the environment, establish strong relationship with the local communities and customers, and support, and train their employees, and key product dealers other than provided by the law.[155]

Banks

The CSR activities of banks in Ethiopia include their participation in the construction of schools and public health centers, community development, environmental protection; and their support for victims of natural disaster and other victims.[156] Yet there are gaps in various avenues such as the need for supporting green industries and healthy projects; enhanced engagement in community development; wider and inclusive lending options to low income persons and small businesses, and participation in the protection of the environment.[157]

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[151] Fentaye Kassa Hailu & K. Rama Mohana Rao (2016), 'Perception of Local Community on Corporate Social Responsibility of Brewery Firms in Ethiopia,' *International Journal of Science and Research*, Vol 5, Issue 3, P.319

[152] For instance, Bedele brewery, BGI Ethiopia, Dashen brewery, Meta Abo and Harar didn't treat and discard their effluent

[153] K Rama Mohana Rao & Fentaye Kassa Hailu(2016), 'Environmental Corporate Social Responsibility of Brewery Firms in Ethiopia,' *International Journal of Applied Research*, Vol 2, Issue 4, p.4

[154] Fentaye Kassa Hailu and Rao, *supra* note 164, p. 320. *See* also Ezana Messele (2014), 'Assessing Stakeholders Perception of Corporate Social Responsibility on Meta Abo Brewery Share Company,' MBA Thesis, St. Mary's University, p.74,

[155] Ezana Messele, *supra* note 168. pp. 72-73

[156] Mathias Nigatu (2016), 'Corporate Social Responsobility (CSR) in the Ethiopian Banking Sector: A Case Study on Commercial Bank of Ethiopia (CBE)', *Nile Journal of Business and Economics*, Vol 2, Issue 4. pp. 8-9

[157] Yeneneh Tadesse(2015), 'The Role of Private Commercial Banks on Corporate Social Responsibility in Ethiopia,' MSc Thesis, Addis Abeba University, pp. 44-47.

The Commercial Bank of Ethiopia, which is the leading commercial bank, is expected to take exemplary standards in pace setting. However, it has not yet set separate CSR plan and CSR budget. Indeed, it has participated in a few philanthropic, donation and charity activities, but that is usually when request comes from stakeholders.[158] Moreover, the beneficiaries of most of its donation are government offices rather than vulnerable groups such as persons with disabilities and elders.[159]

Floriculture companies

The flower sector brings foreign exchange and creates jobs for thousands of Ethiopians.[160] Although there are minimum legal compliance standards that should be respected with regard to employees, local communities and the environment, there are gaps in their effective enforcement. Flower farms utilize chemical fertilizers, pesticides, and there are practices of irresponsible waste disposal system that violate the standards set by the law. Such waste disposal including hazardous chemicals has caused harm to waters and sediments in high concentration. Consequently, they have adversely affected human health, the environment, and biodiversity.[161] Moreover, employees work under settings of polluted and hazardous environment.[162] Flower farms also consume huge amount of water and thereby, cause water scarcity in the communities they operate.[163] Thus, the floriculture industry has failed to even meet the minimum requirements set by the law.

This represents the CSR practice of seven private banks such as Wegagen Bank, Awash International Bank, United Bank, NIB Bank, Abay Bank, Zemen Bank, and Bunna Bank.

[158] Mathias Nigatu, *supra* note 156. p.1

[159] *Id.*, p.10

[160] Rakesh Belwal & Meseret Chala (2008), 'Catalysts and Barriers to Cut Flower Export: A Case Study of Ethiopian Floriculture Industry,' *International Journal of Emerging Markets*, Vol 3, Issue 2, . p.218 *See* also Tedla Zegeye (2013), 'Corporate Social Responsibility Programmes in Ethiopian Floriculture Indust*ry*,' MBA Thesis, St Mary's University, p.27

[161] Mulugeta Getu, *supra* note 139. pp. 242- 248

[162] Samson Mechale & Messay Shiibre (2011), 'Ethiopian Floriculture Industry from Corporate Corporate Social Responsibility (CSR) & Governance Perspective:How is CSR practiced in the Ethiopian Floriculture Industry, and does it has a linkage with the Governance System', MBA Thesis, Karlstad Business School, pp. 43-44 See also Asnake Menbere, *supra* note 143., p.29

[163] Mesay Adugna (2017), 'Review on Environmental Effects of Ethiopian Floriculture Industry,' *Asian Research Journal of Agriculture,* Vol 4, Issue 2.pp.3-4; See generally Nimona Fufa Hunde(2018), 'The Impact of Floricultural Industry on the Environment in Ethiopia,' *International Journal of Agriculture and Biological Sciences*, Vol 7, Issue 11. *See* also Tedla Zegeye, *supra* note 160. pp.28-29

Cement companies

Cement Companies are increasing in number[164] and most of cement factories are located in cities or in productive agricultural or horticulture sites.[165] The companies are indeed indispensable to Ethiopia's pursuits of development efforts but should at the same time give due attention to the safety and wellbeing of employees, the community and the environment. Emission of dust and gases above the recommended standard causes respiratory and stress related diseases on employees and local communities.[166] Most of the cement factories have harmed the surrounding farmlands by making them unsuitable for agriculture or other investments.[167] Moreover, they usually do not provide training and offer job for local communities as well as participate in local infrastructure development activities such as schools, medical facilities, road, water supply, etc.[168] The environmental harm caused by these factories include land degradation that affects vegetation, air pollution, and discharge of waste to nearby watercourses and agricultural

[164] Abera Kumie et al.(2016), 'Occupational Health and Safety in Ethiopia: A review of Situational Analysis and Needs Assessment,' *Ethiopian Journal of Health Development*, Vol 30, Special Issue 1, p. 6

[165] *Id.*, p. 26 For instance old National cement (former Dire Dawa cement) and Addis Ababa cement (now amalgamated with Mugher) are in the middle of the city whereas expansion of cities have closed the distance between factories and residences in Dejen and Messebo cement factories. Likewise, Huang Shan is located in the middle of highly valued and productive agricultural and horticulture production cites of Modjo area.

[166] Nebiyu Krishina (2013), 'Opportunities and Challenges of Cement Marketing In Ethiopia,' MBA Thesis, St. Mary's University. pp. 41-42. *See* also Mulugeta Getu, *infra* note 168, pp. 36-39. For instance, a recent study has revealed personal exposures to total respirable dust exposure to be 549 mg/m3 and 6.8 mg/m3 in the Muger factory, and 153 mg/m3 and 2.8 mg/m3 in the Mossebo factory. The respirable dust concentration was much in excess of the personal exposure limits of 1.0 mg/m3 of the recommended standard of American Conference on Governmental Industrial Hygienist (18).

[167] Samuel Estifanos & Aynalem Degefa (2012), 'Assessing the Effect of Cement Dust Emission on the Physicochemical Nature of Soil around Messebo area, Tigray , North Ethopia,' *Int. J. econ. env. geol*, Vol 3, Issue 2, P.19

[168] Mulugeta Getu (2015), 'Towards a More Sustainable Cement Production: Environmental Challenges and Regulation of Ethiopian Cement Industry,' Research paper presented at Haramaya University 32nd Annual Research and Extension Workshop, pp. 26.30

fields in violation of the law.[169] This has caused community grievances in various locations.[170]

Textile companies

The Ethiopian textile sector creates substantial employment, particularly to women. There are a number of transnational companies (TNCs) and national companies. A few TNCs are participating in CSR activities. They have CSR policies on wages, working hours, occupational safety and health, the discharge of chemicals, release of waste and water management.[171] However, the majority of textile companies do not have CSR policies and do not undertake CSR activities. The gaps in this regard include lack of established primary treatment system or inadequate storage and discharge channel for their waste that meets the requirements of the law.[172]

Such textile factories discharge solid or liquid waste to nearby agricultural lands, rivers and open spaces thereby violating the law. As a result, they pollute the environment, expose the local residents to skin allergies, stomach and other health problems, harm animals and aquatic habitats.[173] They also do not train, orient or warn their employees as well as the local residents to protect themselves, or their property from potential health risks.[174]

Oil and gas companies

Although various Oil and gas companies have pledged to participate in CSR activities in their mission statements,[175] they do not have a separate CSR

[169] *Id.*, pp. 30-36

[170] *Id.*, p. 29. For instance, there was serious dispute, grievance and public demonstration against Dejen cement factory for dust, poor working condition, land taking and absence of community benefit.

[171] Clara Alderin (2014), 'Made in Ethiopia: Challenges and opportunities in the emerging textile industry in Ethiopia', Working Paper No 951, University of UPPSALA, p.21-22

[172] Diriba Dadi *et al*. (2017), 'Environmental and Health Impacts of Effluents from Textile Industries in Ethiopia: The Case of Gelan and Dukem, Oromia Regional State,' *Environmental Monitoring and Assessment,* Vol 189, Issue 11, p. 10

[173] Abrehet Kahsay, Shewit Gebremedhin & Belayneh Ayele (2015), 'Effects of Bahir Dar Textile Factory Effluents on the Water Quality of the Head Waters of Blue Nile River , Ethiopia,' *International Journal of Analytical Chemistry*, Vol 2015, p.5

[174] Diriba Dadi et al., *supra* note 172. p. 16

[175] *See*, for example, Kobil Ethiopia website, CSR available at http://www.kenolkobil.com/corporate-social-responsibility.html/. http://libyaoilethiopia.com/index.php?option=com_content&view=article&id=7&Itemid=110/

budget line or do not include CSR activities in their annual reports.[176] Moreover, they do not work beyond or sometimes even within the limits of the law to ensure the safety of workers, protect the environment, and ensure sustainable development in the community.[177] They are causing water pollution, soil pollution, air pollution, noise, health problems and other ecological impact.[178] Therefore, oil and gas companies have minimal commitment to social sustainability and social activities in Ethiopia.[179]

Chemical and food companies

Chemical and food companies are increasingly discharging hazardous waste to nearby water bodies and land without further treatment (sometimes using primary treatment systems only).[180] This violates the minimum standards of the law; and polluted rivers, streams, surface and ground waters in turn affect vegetables, plants, aquatic species, animals, human beings, etc.[181] The release of toxic substances and noise pollution from these companies affects the lives of local residents and the environment.[182]

6. The Need for Paradigm Shift

As indicated in the preceding sections, there is no CSR legislation that makes CSR mandatory for companies. Instead, companies may voluntarily integrate CSR with their business strategies and contribute to the betterment of their employees, consumers, suppliers, community and the environment. Ethiopia's laws do not require companies to integrate CSR adequately into their core business decisions, and meet stakeholder interests. As a result, companies have not lived up to the expectations of the public. The CSR framework in Ethiopia is indeed insufficient and has failed to guarantee CSR behavior among companies thereby necessitating a paradigm shift.

I argue that there are two alternatives to ensure effective CSR regulation and enforcement in Ethiopia. The first alternative is modifying the existing soft law CSR framework that recognizes shareholder primacy model and

[176] Sultan Hassen (2016), 'Corporate Social Responsibility and its Impact on Profitability : A Case Study of Oil MNCs in Ethiopia (Total, Oil Libya, and Kobil),' MBA Thesis, St. Mary's University, p. 66
[177] Ibid.
[178] Robi Redda, *supra* note 10.
[179] Sultan Hassen, *supra* note 176. p. 65.
[180] Robi Redda, *supra* note 10, p.138
[181] Ibid.
[182] *Id.*, pp. 138 and 147-149

instead adopt an Enlightened Shareholder Value (ESV) model. ESV underlines that it is impossible to maximize the long-term market value of an organization by ignoring or mistreating important constituencies.[183] It provides that companies cannot create or maximize their value without recognizing and satisfying the interests of their employees, customers, creditors, suppliers and the communities.[184] To that end, ESV blends the paradigms of shareholder primacy and stakeholder approaches, and attempts to cope with their positives and eliminates their disadvantages.

ESV retains the paradigm of shareholder primacy and requires companies to primarily focus on maximizing their value. It allows companies to develop their own CSR rules and then, enforce CSR. However, it simultaneously requires companies to regard stakeholder interests in the course of maximizing their value. It obliges company directors to make decisions in the interests of shareholders, but with adequate regard to stakeholder interests, which is different from shareholder primacy model where company directors consider shareholder interests only.[185] Thus, ESV calls for a CSR framework which is tighter than the existing soft law CSR framework because the latter model is based on shareholder primacy premise. The ESV model indeed ensures the long-term existence of companies as well as the welfare of all stakeholders. It also maintains the strong interdependence that exists between companies and stakeholders which is beyond a simple contractual or commercial interaction.[186]

If Ethiopia opts to adopt this model, the relevant provisions of the Commercial Code should be amended so that directors shall run companies in the interests of shareholders, while at the same time balancing stakeholder interests. Moreover, the Code's provisions on strict financial or annual report and disclosure also require amendment, as they are –in current form– beneficial only to shareholders. Hence, companies should be obliged to include CSR activities in their annual financial and non-financial reports and disclosures. This may give solutions to risks or challenges that are encountered in private CSR regulations.

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[183] Michael Jensen (2001), 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function,' *Journal of Applied Corporate Finance*, Vol 12, Issue 1. p.16

[184] Ibid

[185] N. Craig Smith & David Rönnegard (2016), 'Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools,' *Journal of Business Ethics*, Vol 134, Issue 2, p. 465

[186] Gail Henderson (2009), "The Possible Impacts of 'Enlightened Shareholder Value' on Corporations' Environmental Performance," LLM Thesis, University of Toronto, pp. 25-27

It is to be noted that ESV has been adopted in many countries. For instance, section 417 of the English Companies Act recognizes this model of CSR in UK. Academics and business communities have given considerable attention to ESV,[187] and it is believed that socially responsible and ethical engagements do not contradict with the obligation to maximize shareholder value. Thus, companies shall undertake CSR although they are not expected to replace the government and NGOs in social and environmental concerns.

The other alternative is adopting Responsible Stakeholder Model (RSM). The RSM model underlines that "the business of business may still be business, only that the meaning of business itself will have to be redefined and qualified by the need to strategically implant CSR values in the business community; the business of business has to now be responsible business."[188] RSM requires that companies shall be managed to enhance the value of shareholders, but it conjunctively, mandates companies to advance the aggregate welfare of stakeholders.[189]

The first notion of the RSM envisages that companies have a legal duty to balance stakeholder interests.[190] RSM notes that shareholders initiate, give life to, and nurture the seed in companies. It also provides that it is shareholders who initially encounter problems and risks when companies are in trouble. Accordingly, RSM admits that companies exist for shareholders' wealth maximization. However, RSM simultaneously holds that it appears fair and legitimate to argue that companies may not survive, operate, function or achieve economic gains without their creditors, employees, customers, host communities and even the natural environment in long run.[191] Thus, it requires company directors to act responsibly in exercising their discretion and balance the competing interests of stakeholders in the course of enhancing shareholder wealth maximization.[192] RSM notes that

[187] Stelios Andreadakis (2012), 'Enlightened Shareholder Value: Is It the New Modus Operandi for Modern Companies'*, in* Sabri Boubaker, Bang Dang Nguyen & Duc Khuong Nguyen(eds), *Corporate Governance: Recent Developments and New Trends*, (Springer Berlin Heidelberg), p. 423

[188] Nojeem Akinjide Amodu (2017), 'A Conceptual Framework for Effective Corporate Social Responsibility for Companies in the Nigerian Extractive Industry,' PhD Thesis, University of Lagos, p.197

[189] *Id.*, p. 189. Here, stakeholders may refer to any individual or organ which may be without contract with the company but may have stakes genuinely affected by corporate decisions and relevant to the long term survival of the company.

[190] *Id.*, p. 191

[191] *Id.*, p. 192

[192] *Id.*, p. 197

shareholders still acquire slight high treatment than stakeholders because directors are agents of the company, and are under the control of shareholders.[193]

The second notion of the RSM underpins that companies shall assume a presumptive legal duty to demonstrate CSR practices.[194] Under this notion of RSM, directors shall run companies to maximize shareholders value, and should at the same time balance stakeholder interests. If stakeholders allege that their interests are injured or violated and show verifiable damage or injury, RSM requires companies to demonstrate that they have acted responsibly to stakeholders or have balanced the interests of both shareholders and stakeholders in making decision.[195] If companies violate their duty, RSM requires companies to publish apology, restitute or rehabilitate what they caused, compensate the victim/s (financially and/or non-financially), face punitive sanctions (criminal or administrative such as fine), receive injunction or give guarantee of non-repetition.[196]

Thus, RSM recognizes a default presumptive CSR framework (rule) which takes a position amidst the mandatory or permissive CSR legal frameworks. As noted earlier, RSM has an attribute of meta-regulatory nature, and adopts more subtle and lighter principles to demand CSR compliance.[197] The RSM is not a stringent external hard law initiative, as it allows companies to self-regulate and enforce CSR. On the other side, it is not solely a soft law CSR framework since it requires companies to demonstrate their CSR practice.

RSM is a model which allows companies to develop and enforce their own CSR legal framework. It is indeed stronger than shareholder primacy model, but relatively moderate as compared to the stakeholder approach. As a result, RSM will not scare off investment opportunities. For instance, this model is practiced in USA in the aftermath of the Enron probe.[198] Therefore,

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[193] *Id.*, p. 194; For instance, shareholders still assume the power to appoint and remove directors.

[194] *Id.*, p. 229

[195] Nojeem Amodu (2017), 'Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria,' *Journal of African Law*, Vol. 61, Issue 1, p.128; Companies can discharge this obligation by showing that their decision, action or inaction is not in the sole interest of shareholders, but in the interest of shareholders and all relevant stakeholders such as employees, customers, creditors, the local community and the environment.

[196] Amodu, *supra* note 188. p. 231

[197] *Id.*, p. 231

[198] Zerk, *supra* note 61. p.88

if Ethiopia opts for RSM, the present Commercial Code needs to be amended to include provisions that require companies to balance stakeholder interests, demonstrate CSR, define relevant stakeholders, and specify redress mechanisms.

Conclusion

As discussed in the preceding sections, there is soft law CSR framework which recognizes the shareholder primacy model in Ethiopia. This soft law CSR framework incorporates provisions which are inadequate and do not guarantee CSR behavior in companies. In effect, companies do not adequately integrate CSR into their core business decisions, and do not meet the interests of stakeholders such as employees, creditors, customers, local communities, and the environment. This calls for the paradigm shift highlighted in Section 6; and it is submitted that there are two alternatives in addressing the challenges in the CSR activities of companies in Ethiopia which necessitate the amendment of the relevant provisions of the Commercial Code and other domestic laws.

The first alternative is adopting the Enlightened Shareholder Value (ESV). This model recognizes a CSR framework which is tighter than soft law CSR framework adopted in the Commercial Code. ESV requires companies to manage their business in the interests of shareholders but to pay adequate regard to stakeholders. The other alternative is Responsible Stakeholder Model (RSM) which adopts more subtle and moderate principles to demand CSR compliance. RSM recognizes a default presumptive CSR framework (rule) which requires companies to run their business to the interests of shareholder, but to demonstrate proper consideration and balancing of stakeholder interests. These two models can indeed serve as mandatory thresholds and enforcement schemes towards effective CSR framework and CSR practices in Ethiopia. ■

Institutional Independence of Federal Courts in Ethiopia: Observations

Aron Degol ♣

Abstract

As one of the three organs of government, the structure and powers of the judiciary are enshrined in the 1995 FDRE Constitution. Articles 78 to 81 of the FDRE Constitution and other laws deal with the independence of the judiciary, judicial powers, jurisdiction of courts and appointment of judges. The principles enshrined in these laws include the *independence of the judiciary* which has two dimensions, i.e., *individual/professional independence* of judges and *institutional independence of courts* from other organs of the government. This article focuses on the legal regime and the practices with regard to the *institutional independence* of federal courts in Ethiopia that are inconsistent with the constitutional guarantee of judicial independence which includes empowerment in the preparation of budget, the process of budget approval, level of autonomy in using revenue generated through court fees, independent administration of support staff at courts, procurement processes and property administration. The article analyzes the relevant laws and discusses comparative experience on these avenues of concern and calls for due attention to the gaps that should be addressed.

Key terms:

Judicial independence · Federal courts · FDRE Constituiton · Ethiopia

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የዳኝነት ተቋማዊ ነፃነት በኢትዮጵያ ፌደራል ፍርድ ቤቶች፣ አጭር ምልከታ

አሮን ደጎል*

"ፈታሒ ይኩን ግዑዘ እስመ ዘኢኮነ ሥሉጠ ላዕለ መግቦተ ነፍሱ ኢይትከሀሎ ከመ ይመግብ ካልአኒሁ"

"ዳኛ ነፃነት ያለው ይሁን፡፡ ራሱን ለማስተዳደር ሥልጣን ያለው ያልሆነ ሰው ሌሎቹን ሊያስተዳድር አይቻለውምና"

ፍትሐ ነገሥት አርዓ ሃስተኛ አንቀጽ ቁ. 1፣ 420

"A Judge must be a free man, because he who has no power over himself has no power over others"

Fetha Negest CH. XLIII Sec. I

አህጽሮተ ይዘት (Abstract)

መንግሥትን ከሚያቋቁሙት ሦስት ሕገ መንግሥታዊ አካላት መካከል አንዱ የሆነው የዳኝነት ተቋም በኢፌዲሪ ሕገ መንግሥት ከአንቀጽ 78 እስከ 81 ባሉት ድንጋጌዎች እና በሌሎች አዋጆች የተደራጀ መሆኑ ይታወቃል፡፡ በተለይም የዳኞች ግለሰባዊና ውሳኔአዊ ነፃነት እንዲሁም ተቋማዊ ወይም አስተዳደራዊ ነፃነት በሕገ መንግሥቱም ሆነ በፌደራል ፍርድ ቤቶች አዋጅ ቁጥር 25/1988 በጉልህ የተቀመጠ መርህ ነው፡፡ ነገር ግን በተለይም ተቋማዊ ወይም አስተዳደራዊ ነፃነቱን በተመለከተ በአተገባበር ላይ ሕገ መንግሥቱን በግልጽ የሚጣረስ አሠራር ይስተዋላል፡፡ በበጀት አወሳሰን፣ አጸዳደቅና አጠቃቀም፣ በውስጥ ገቢ አጠቃቀም፣ በድጋፍ ሰጪ የሰው ኃይል አስተዳደር እንዲሁም በግዢና ንብረት አስተዳደር ላይ ፌደራል ፍርድ ቤቶች አሁንም ድረስ ኢ-ሕገ መንግሥታዊ በሆነ መልኩ በአስፈጻሚው ቁጥጥር ሥር እንዲሆኑ ተደርጓል፡፡ ይህ ኢ-ሕገ መንግሥታዊ አሠራር በምን መልኩ የፌደራል ፍርድ ቤቶችን ነፃነት እየገደበ እንዳለና በምን መልኩ ሊፈታ እንደሚገባው ከሌሎች ሀገራትን ተሞክሮና ዓለም አቀፍ መርሆችን ከያዙ ሰነዶች አንፃር በዚህ ጽሁፍ ለመዳሰስ ተሞክሯል፡፡

ቁልፍ ቃላት፡-

የዳኝነት ነፃነት፣ የፌደራል ፍርድ ቤቶች፣ የኢፌዴሪ ሕገ መንግሥት፣ ኢትዮጵያ

* አሮን ደጎል (ኤል ኤል ቢ፣ ኤል ኤል ኤም፣ ኤም ቢ ኤ), ሌክቸረር፣ ቅድስት ማርያም ዩኒቨርሲቲ፣ ቃላትንና ዐረፍተ ነገሮችን በማረም ያገዙኝን ወ/ሮ ፍቅሬ አያሌውና አቶ አስቻለው አሻገሬ (ረ/ፕሮፌሰር) ማመስገን አወዳለሁ፡፡

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መግቢያ

ፍርድ ቤቶች ሕገ መንግሥታዊ ተልዕኳቸውን ለመወጣት ሊመሩባቸው ከሚገቧቸው መሠረታዊ መርሆች አንዱ የዳኝነት ነፃነት ነው። የዳኝነት ነፃነት ሲባል ፍ/ቤቶች የማንኛውም አካል እንዲሁም ማንኛውም ዓይነት ጣልቃ ገብነት ሳይኖርባቸው ውሳኔ የሚሰጡበት ጽንሰ ሓሳብ ነው። የዳኝነት ነጻነት በዋነኛነት ተቋማዊና ግለሰባዊ ተብሎ ይከፈላል። ተቋማዊ ነፃነት በተቋም ደረጃ ፍርድ ቤቶች አስተዳደራቸውና መዋቅራቸው ከማንም አካል ተጽእኖ ነፃ መሆን እንዳለበት የሚደነግግ ሲሆን፣ ግለሰባዊ ነፃነት ማለት ደግሞ ዳኞች በግላቸው ማንኛውም አካል ጣልቃ ሳይገባባቸው ውሳኔ የመስጠት ሥራቸውን የሚሠሩበት ሥርዓት ነው። የዳኝነት ነፃነት መርህን በሚገባ ተግባራዊ ለማድረግ በቂ የሕግ ማዕቀፍ (legal framework) መኖር አለመኖሩን፣ የመርሁ ምንነትና ገፅታዎች፣ የመርሁ አስፈላጊነት እነዲሁም የመርሁ ተግባራዊ አፈፃፀም ግልፅ መደረግ አለባቸው። በተለይም የዳኝነትን ተቋማዊ ነፃነት በሕገ መንግሥቱ መንፈስ መሠረት ተግባራዊ ለማድረግና ጥራትና ቅልጥፍናን ባገናዘበና ፍትሐዊ በሆነ መልኩ ሕግ ተርጓሚው አካል ኃላፊነቱን እንዲወጣ ለማስቻል፣ የፍርድ ቤቶችን የሰው ኃይል፣ ገንዘብና ንብረት አስተዳደር በተመለከተ ውሳኔ መሰጠት ያለበት በራሳቸው በፍርድ ቤቶች ብቻ ነው። በተለይም የአስፈጻሚው እጅ በቀጥታም ሆነ በተዘዋዋሪ እንዳይገባበት ማድረግ አስፈላጊ ነው።

የፌዴራል ፍርድ ቤቶች በመዋቅርም ሆነ በተግባር በሁለት መሠረታዊ ዘርፎች የተከፈሉ ናቸው። አንደኛው ዘርፍ የፍርድ ቤቶች ዓላማ አስፈጻሚ የሆነው ዋነኛው አካል የዳኝነት ዘርፍ (the core/main judicial wing/staff) ሲሆን የፍርድ ቤቱ ተልዕኮ የሆነውን ባለጉዳዮችን አከራክሮ ውሳኔ የሚሰጡትን ዳኞችን የሚመለከት ነው። ሁለተኛው ደግሞ ድጋፍ ሰጭ (support staff/wing) ተብሎ የሚታወቀውን አስተዳደራዊ ዘርፍ ነው። ይህ ዘርፍ ፍርድ ቤቶች ተልዕኳቸውን ለማሳካት የሚያስፈልጉ አስተዳደራዊ ድጋፎችን የሚያሟሉና በተለያየ መልክ ድጋፍ የሚያደርጉ ሠራተኞችን ያቀፈ ነው።

ዋነኛው የዳኝነት ዘርፍ በሕገ መንግሥቱ አንቀጽ 79(6) እና በተሻሻለው የዳኞች አስተዳደር ጉባኤ ማቋቋሚያ አዋጅ ቁ. 684/2002 አንቀጽ 6 መሠረት የዳኞችን ደመወዝ፣ ዲሲፕሊን፣ ጥቅማ ጥቅም፣ ምደባ፣ ዝውውርና ሌሎች ጉዳዮችን በፌዴራሉ የዳኞች አስተዳደር ጉባኤ አማካኝነት የፍርድ ቤቶችን ነፃነት ባማከለ መንገድ የሚፈጸም ነው። በአንፃሩ ደግሞ፣ የድጋፍ ሰጪ ክፍሎች ስምሪትና አስተዳደር የሚመራው በመደበኛው የሲቪል ሰርቪስ ሥርዓት ነው። ይህም ከዳኝነት ተቋማዊ ነፃነት ጋር በሚጣረር መልኩ ተቋሙን ለሁለት በመከፋፈል፣ ለዳኝነት አገልግሎት የሚያስፈልጉ ግብዓቶችን በሚመለከት ኃላፊነት ያላቸውን ሥራ ክፍሎች ከዳኝነት ዘርፍ አውጥቶ በአስፈጻሚው አካል እንዲተዳደሩ አድርጓል። የበጀት ጥያቄ አቀራረብ፣ አፈቃቀድና አደላደል፣ የግዢ አፈጻጸምና ንብረት አወጋገድ እንዲሁም ሌሎች አስተዳደራዊ ጉዳዮችም በፍርድ ቤቶች በራሳቸው የሚወሰኑ ሳይሆኑ፣ በተለያዩ የአስፈጻሚ አካላት ውሳኔ የሚሰጥባቸው ጉዳዮች ናቸው። ይህም በሕገ መንግሥቱ ከተረጋገጠው የዳኝነት ነፃነት መርህ ጋር የሚጣረስ ነው። ምንም እንኳን ከዚህ በፊት የፍርድ ቤቶችን ሥልጣን የሚሸረሽሩ ሕግጋት ወጥተው ሥራ ላይ የዋሉ ቢሆንም የዚህ ጽሁፍ ዋነኛ ዓላማ የዳኝነት ተቋማዊ ነፃነት መሠረታዊ መርሆዎች፣ ዓለም ዓቀፍ መለኪያዎችና ተሞክሮዎችን በመዳሰስ በኢትዮጵያ በተለይም በፌደራል ፍ/ቤቶች ያለውን ሁኔታ በአጭሩ ማሳየት ነው።

1. የዳኝነት ነፃነት ምንነት ጠቀሜታና ገጽታዎች

የዳኝነት ነፃነት ምንነትና ጠቀሜታ ወይም አስፈላጊነት ብዙ የተባለበት ጉዳይ ነው። የዘርፉ ምሁራን በተለያየ መንገድ ለዚህ መርህ ትርጉም ለመስጠት ሞክረዋል። መርሁ በብዙ ሀገራት ሕገ መንግሥታዊ ሥርዓቶች ውስጥም ቦታ የተሰጠውና ጥበቃ የተደረገለት ነው። ፕሮፌሰር ሮዘን እንደገለጹት የዳኝነት ነፃነት ሲባል ዳኞች ጉዳዮችን/ክርክሮችን ማስረጃዎችን መርምረውና መዝነው በሕግና በርትዕ መሠረት ከማንኛውም ተጽእኖ፣ ሙገሳ፣ መንግሥታዊም ሆነ ግላዊ ጣልቃ ገብነቶች ነፃ ሆነው የመወሰን አቅም ማለት ነው።[1] በተመሳሳይ ሁኔታም የዳኝነት ነፃነት ሲባል ዳኞች ከማንኛውም መንግሥታዊ/ ውጫዊ ቁጥጥር፣ ግፊትም ሆነ ስጋት ነፃ በመሆን የዳኝነት ሥራቸውን የሚከውኑበት ሥርዓት ነው ብሎ መውሰድ ይቻላል።[2] በአጠቃላይ የዳኝነት ነፃነት ማለት ዳኞች ካለምንም ውጫዊና ግላዊ ጣልቃ ገብነት፣ ተዕዕኖና ግፊት የቀረበላቸውን ጉዳይ ሕጉንና ማስረጃ ብቻ መሠረት በማድረግ ለመወሰን ያላቸውን ነፃነት እንደሆነ መረዳት ይቻላል።

በእርግጥ የዳኝነት ነፃነት የሚያጠነጥነው በዳኞች ግላዊ/ውሳኔያዊ ነፃነት ላይ ነው። ሆኖም የዳኝነት ነፃነት በዳኞች ግላዊ/ውሳኔያዊ ነፃነት ብቻ የተወሰነና በቂ ነው ብሎ ማሰብ ስህተት ነው። ምክንያቱም ዳኞች ግላዊ/ውሳኔያዊ ነፃነታቸውን ተጠቅመው ፍትሓዊ ውሳኔ ሊሰጡ የሚችሉት ይህንን ለማድረግ የሚያስችል ጠንካራ የዳኝነት ተቋም ውስጥ መሥራት ሲችሉ ብቻ ነው። ይህም ማለት በዘመናዊ የዳኝነት ነፃነት ጽንሰ ሓሳብ መሠረት የዳኝነት ነፃነት ባለቤት ዳኞች ብቻ ሳይሆኑ ፍ/ቤቶችንም እንደ ተቋም የሚያጠቃልል ነው። የዳኝነት ነፃነት ሲባል ፖለቲካዊ ዓላማ የሌላቸው፣ ጉዳዮችን ገለልተኛ በሆነ መንገድ የሚያስተናግዱና በአንድ ተቋም ሥር በመሆን የመንግሥትን እንቅስቃሴ ሕጋዊነት ተቋማዊ በሆነ መንገድ የሚቆጣጠሩ ዳኞች ያሉበት ሥርዓት ነው የተባለውም ለዚህ ነው።[3]

በአጠቃላይ ከዚህ መረዳት የምንችለው የዳኝነት ነፃነት ባለቤቶች ዳኞችና ፍ/ቤቶች መሆናቸውንና የዳኝነት ነፃነት ቀደም ሲል ይሰጠው የነበረው ትርጉምና በአሁኑ ዘመን ያለው አረዳድ አንድ ዓይነት አለመሆኑን ነው። ሀገሮችም ከሚከተሉት የሕግ ሥርዓትና ሊያሳኩት ካሰቡት ግብ አኳያ ለዳኝነት ነፃነት የተለያዩ ትርጉሞች ሊሰጡ ይችላሉ። ነፃ የሆነ ፍ/ቤት የሕግ በላይነት መከበሩን የሚያሳይ መሠረታዊ ገጽታና ለዲሞክራሲያዊ ሥርዓት መኖር ቅድመ ሁኔታ ነው። የዲሞክራሲያዊ ሥርዓት ዋነኛ ባህሪ የሰብዓዊ መብቶች መከበርና መረጋገጥ ሲሆን መብቶችና ነፃነቶቹ በሕገ መንግሥት ወይም በሌላ ሕግ መደንገጋቸው ብቻ በራሱ ለመብቶች መረጋገጥ ዋስትና ሊሆን አይችልም። እነዚህ መብቶች እውን የሚሆኑት እና የሕግ የበላይነት

[1] Keith S. Rosenn (1987). *The Protection of Judicial Independence in Latin America*, International American Law Review Vol. 19, No. 1.

[2] Penny J. White (2002). "Judging Judges: Securing judicial independence by use of judicial performance evaluation", *Fordham Urban Law journal*, Vol. 29

[3] Christopher Larkins (1996), "Judicial independence and Democratization: A theoretical and conceptual analysis", *American Journal or Comparative Law*, Vol. 44 # 4

የሚከበረው ነፃነቱ የተረጋገጠ የዳኝነት አካል ወይም ፍ/ቤት ሲኖር ብቻ መሆኑን ብዙዎች ይስማማሉ።[4]

ከዚህ በተጨማሪም የሌሎቹን የመንግሥት አካላት የሥልጣን አጠቃቀም ከሰብዓዊ መብቶች አከባበር ጋር እንዲያያዝ በማድረግ የመንግሥት ሥልጣን ገደብ እንዲኖረውና ከገደቡ እንዳያልፍ ቁጥጥር በማድረግ ረገድ የፍ/ቤቶች ሚና ከፍተኛ እንደሆነ ይታመናል። ለዚህም ይመስላል ከዛሬይቱ ሀገረ አሜሪካ መሥራች አባቶች መካከል አንዱ የሆኑት ሃሚልተን በፌደራሊስት ጽሑፍ ትንታኔ ውስጥ የመንግሥትን ሥልጣን በመቆጣጠርና የዜጎችን መብት በማስከበር በኩል ከፍርድ ቤቶች በላይ የተሻለ ሥርዓት ማሰብ አይቻልም በማለት የገለፁት።[5]

ነፃነት የሌለው ፍ/ቤት የሰዎችን መሠረታዊ ሰብዓዊ መብቶች እንዲረጋገጥ ሊያደርግ አይችልም። በዜጎችና በመንግሥት እንዲሁም በሰዎች መካከል ባለው ግንኙነት ሳቢያ የሚነሱ የፍትሐ ብሔር ወይም ወንጀል ክርክሮችን ገለልተኛና ነፃ ሆኖ እልባት ሊሰጥ የሚችል ፍ/ቤት በሌለበት የሕግ በላይነት ሊረጋገጥ አይችልም። የሕግ የበላይነት ባልተረጋገጠበት ሁኔታ ደግሞ ዲሞክራሲያዊ ሥርዓት ግንባታና መልካም አስተዳደር እውን ሊሆኑ አይችሉም። ሰላምና ዘለቄታዊነት ያለው ልማትም ዋስትና አይኖረውም።

በአጠቃላይ የዳኝነት ነፃነት ጠንካራ የዳኝነት ተቋም እንዲኖር ቁልፍ መሣሪያ ብቻ ሳይሆን ጎብረተሰብአዊ ግብን፣ የሰው ልጆች ነፃነትን፣ ዘላቂ ልማትንና ብልጽግናን ለማረጋገጥ እንደዚሁም ለኢንቬስትመንትና ለአጠቃላይ የኢኮኖሚ ዕድገት መሠረት ነው። ሕዝቡና ባለሀብቱ በፍርድ ቤቶችና በዳኞች ላይ እምነት እንዲኖረው በአንድ አገር ውስጥ የዳኝነት ነፃነት መስፈንና መረጋገጥ ወሳኝ ነው።[6] የዳኝነት ነፃነትን በርካታ ምሁራን በተለያየ መንገድ ከፍለው ያዩታል። አንዳንዶቹ ግለሰባዊ፣ ውስጣዊና ተቋማዊ በማለት ለሦስት ከፍለው ሲመለከቱት[7] በአብዛኛው ግን ይህንን ጽንሰ ሓሳብ ምሁራን በሁለት ዋና ዋና ገጽታዎች ከፍለው ይመለከቱታል።[8] የመጀመሪያው ግላዊ ወይም ግለሰባዊ ነፃነት ሲሆን ሁለተኛው ደግሞ ተቋማዊ ነፃነት ነው።

1.1 ግላዊ/ግለሰባዊ ነፃነት

የዳኞች ግላዊ ነፃነትን በሁለት ከፍለን ማየት እንችላለን። እነዚህም ውሳኔያዊ ነፃነት (decisional/functional independence) እና ግላዊ ነፃነት (personal/private

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[4] Das, Cyrus and Chandra, K., (Eds.), (2003), *Judges and Judicial Accountability*, Universal Law Publishing Co. Pvy. Ltd, New Delhi, India, p. 89

[5] Alexander Hamilton, The Federalist No. 78 (cited in Das, Cyrus and Chandra, K., Eds. Id., p. 89),

[6] ዝኒ ከማሁ

[7] Shimon Shetreet, (1994). *Justice in Israel: A study of the Israeli Judiciary*, Martinus Nijhoff publishers, Boston,

[8] በተጨማሪም የዳኝነት ነጻነት ውጫዊና ውስጣዊ *(Internal and External)* ወይም በእንገሊዘኛው አገላለጽ *Moral Autonomy and Inistitutional autonomy* በመባልም ይታወቀል። ጠለቅ ላለ ማብራሪያ Yared Legesse M. (Dr.), "Court-Stripping: A Threat to Judicial independence", in Gedion Thimothewos and Helen Fikre (Eds), The FDRE Constitution: Some perspectives on the institutional dimension, *Ethiopian Constituional Law Series,* Vol. VI, College of Law and Goverance, School of Law, AAU, p. 104 ይመልከቱ

independence) ናቸው። ውሳኔያዊ ነፃነት ሲባል ዳኞች የዳኝነት ሥራቸውን ሲያከናውኑ ያላቸውን ነፃነት የሚመለከት ነው።

> Decisional independence means that in the making of judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law.
>
> ውሳኔያዊ ነፃነት ማለት ዳኞች የዳኝነትም ሆነ ሌሎች በሕግ የተሰጣቸውን ሥልጣናቸውን በአግባቡ ሥራ ላይ በሚያውሉበት ወቅት ከማንኛውም አካል ተጽእኖና ቁጥጥር ነፃ ናቸው ማለት ነው።[9] (ትርጉም የጸሐፊው)

ዳኛ በአንድ ጉዳይ ላይ ውሳኔ ለመስጠት ከተከራካሪ ወገኖች በኩል ከሚቀርብ ክርክር፣ ከፍሬነገር ከማስረጃና ለጉዳዩ አግባብነት ካለው ሕግ በስተቀር ሌሎች ነገሮች ተጽዕኖ ሊያሳድሩበት አይገባም። በዚሁ መሠረት ውሳኔያዊ ነፃነት፣ በውሳኔ አሰጣጥም ሆነ በውሳኔ አሰጣጥ ሂደት ከማንኛውም የመንግሥት አካል፣ ባለሥልጣንና ግለሰብ አላግባብ ጣልቃ ገብነት፣ ተጽዕኖና ግፊት ነፃ መሆንን የሚጠይቅ ነው። ዳኛ የቀረበለትን ጉዳይ ሲወስን ከእነዚህ አካላት ትዕዛዝ ወይም መመሪያ መቀበል የለበትም። በተጨማሪም ውሳኔያዊ ነፃነት ከዳኛው የግል ፍላጎት ስሜትና አድሎ ነፃ መሆንን የሚጠይቅ ነው። ዳኛ በሚቀርብለት ጉዳይ ላይ ምንም ፍላጎት የሌለው (disinterested party) ገለልተኛ ውሳኔ ሰጪ መሆን አለበት። ሕዝቡ በዳኞችና በፍርድ ቤቶች ላይ እምነት እንዲኖረው ዳኛ በሚወስነው ጉዳይና በፍርድ ሂደቱ ላይ ግልጽ የሆነ ገለልተኝናትና ነፃነት (apparent independence) ሊኖረው ይገባል። ዳኛ ገለልተኛነቱን ጥያቄ ውስጥ ሊያስገቡ ከሚችሉ ተግባራት ሁሉ መቆጠብ ወይም ራሱን ማግለል ይጠበቅበታል።

የውሳኔያዊ ነፃነት አስፈላጊነት የበለጠ የሚጎላው ከተከራካሪ ወገኖች ውስጥ አንዱ የመንግሥት አካል ወይም ጉዳዩ የመንግሥትን ጥቅም በቀጥታም ሆነ በተዘዋዋሪ መንገድ የሚነካ ወይም ከፖለቲካ ጋር ተያያዥነት ያለው ሲሆን ነው። ዳኛ በጉዳዩ ላይ የሚሰጠው ትዕዛዝ ወይም ውሳኔ ሕጉን ብቻ መሠረት በማድረግ ከመንግሥት ጥቅምና ፍላጎት ነፃ ሆኖ፣ የፍርድ ቤቱን ተቋማዊ ነፃነትና የራሱን የዳኛውን ግላዊ ነፃነት እንዲሁም ገለልተኝነት የሚጠብቅና የሚያስጠብቅ መሆን አለበት። ዳኛ የእኩልነት መርህን ተግባራዊ በማድረግ በዳኝነት ሥራ ሂደት ውስጥ የሕግ የበላይነትን የማረጋገጥ ግዴታ አለበት። ይህ ማንኛውም ዳኛ ሊመራበትና ሊተገብረው የሚገባው መርህ ነው። ግላዊ ነፃነትን ስንመለከት ደግሞ ከዳኞች የሥራ ዘመን ዋስትና፣ ምልመላ፣ ሹመት፣ ዕድገት፣ ዝውውር፣ የዲሲፕሊን እርምጃ፣ ከሥራ ማሰናበትና ከክፍያ ጋር የተያያዘ ነው።

የዳኞችን የሥራ ዘመን ከሕግ አስፈጻሚው ወይም ከሕግ አውጪው ፍላጎት ላይ እንዲመሠረት ማድረግ ከዳኝነት ነፃነት መርህ ጋር የሚጋጭ ነው። ዳኛ የቀረበለትን ጉዳይ በፍሬ ነገር፣ ማስረጃና አግባብነት ካለው ሕግ ላይ ብቻ ተመሥርቶ እንዲወስን ሁኔታዎች መመቻቸት አለባቸው። ከዚህ ውስጥ የዳኞች ግላዊ ነፃነት ዋስትና እንዲኖረው ማድረግ አንዱ ነው። እንደ አንድ ምሁር አገላለጽ፣ "ግላዊ ነፃነት የዳኞች

[9] ዝኒ ከማሁ

የሥራ ዘመን ከሌሎች የመንግሥት አካላት አላግባብ ተጽእኖና ከፖለቲካ አካላት ቁጥጥር ነፃ እንዲሆን የሚጠይቅ ነው።"[10] (ትርጉም የጸሐፊው)

1.2 ተቋማዊ ነፃነት

የመንግሥትን ሥልጣን በሦስት ማለትም ሕግ አውጪ፣ ሕግ አስፈጻሚና ሕግ ተርጓሚ ብሎ መከፋፈል የተለመደ ነው። ከሦስቱ ዋና ዋና የመንግሥት አካላት ውስጥ አንደኛውን ዘርፍ የሚይዙት ፍርድ ቤቶች ሕግ የመተርጎም ሥልጣን የተሰጣቸው ናቸው። የፍርድ ቤቶች ተቋማዊ ነፃነትም ከዚሁ የመንግሥት ሥልጣን ክፍፍል ጋር የተያያዘ ነው። ከዚህ አንፃር አንድ ምሁር ተቋማዊ ነፃነትን እንደሚከተለው ገልፀውታል።

> Institutional independence of the judiciary means that the judiciary is not subject to pressure from either the executive or legislature and is not subordinate to either of them particularly in the area of administration of courts.
>
> የፍርድ ቤቶች ተቋማዊ ነፃነት ሲባል የዳኝነት አካላት ከሕግ አስፈጻሚውም ሆነ ከሕግ አውጪው መዋቅራዊ ተጽዕኖ ነፃ መሆናቸውን፣ እንዲሁም ራሳቸውን በራሳቸው በማስተዳደር ረገድ ከሁለቱም አካላት ሥር አለመሆናቸውን የሚያስገነዝብ ነው።[11] (ትርጉም የጸሐፊው)

ከዚህ አገላለጽ እንደምንረዳው ተቋማዊ ነፃነት ፍርድ ቤትን እንደ ሦስተኛ የመንግሥት አካል መቋቋምና መኖር ብቻ የሚመለከት ሳይሆን ከሕግ አውጪና ክሕግ አስፈጻሚው ተጽዕኖ በተለይም ፍርድ ቤትን ማስተዳደር በተመለከተ ነፃ መሆን የሚጠይቅ ነው። በሌላ አነጋገር ተቋማዊ ነፃነት ፍርድ ቤት እንደ ተቋም ከሕግ አውጪውና ከሕግ አስፈፃሚው አካል ተዕዕኖ ነፃ ሆኖ የራሱን የውስጥ ጉዳይ ለመወሰን ያለውን ነፃነት የሚመለከት ነው።

የፍርድ ቤት የማስተዳደር ነፃነትም ሁለት ዐበይት ክፍሎች አሉት። እነሱም ዳኞችንና ድጋፍ ሰጪ ሠራተኞችን የማስተዳደር ነፃነትና የፋይናንስ ወይም የበጀት ነፃነት ናቸው። ዳኞችን የማስተዳደር ነፃነት የዳኞች ምልመላ፣ ሹመት፣ ዝውውር፣ ዕድገት፣ ዲሲፕሊን፣ ከሥራ ማሰናበት፣ ደሞዝና ሌሎች ጥቅማ ጥቅሞችን ይመለከታል። ከዚህም በተጨማሪ ድጋፍ ሰጪ ሠራተኞችን መቅጠርና ማሰናበት ደሞዝና ሌሎች ጥቅማ ጥቅሞቻቸውን በተመለከተ ፍርድ ቤት እንደ ተቋም ሊኖረው የሚችለውን ነፃነት የሚመለከት ነው።

የፋይናንስ ወይም በጀት አስተዳደር ነፃነት ፍርድ ቤቶች የሚያስፈልጋቸውን በጀት መጠን አዘጋጅተው ለሚመለከተው አካል እንዲጸድቅ ማቅረብና በጀቱም ከጸደቀ በኋላ ከሥራ አስፈጻሚው አካል ጣልቃ ገብነት ውጪ በጀቱን የማስተዳደር ነፃነትን የሚያጠቃልል ነው። ነገር ግን ከፍርድ ቤቶች የተቋማዊ ነፃነት ጋር ተያይዞ አሁንም

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[10] ዝኒ ከማሁ
"By personal independence of judges is to mean the enjoyment by individual judges of judicial terms of office and tenure free from the undue or improper influence and control of the political branches".

[11] ዝኒ ከማሁ

ድረስ ሀገራት አንድ ዓይነት አካሄድ አይከተሉም። ፍርድ ቤቶችን ማን ያስተዳድር የሚለውን መሠረታዊ ጥያቄ ለመመለስ ወይም ፍርድ ቤቶችን የማስተዳደር ኃላፊነትን በተመለከተ የተለያዩ ሞዴሎች አሉ። ከነዚህ ውስጥ መሠረታዊ የተባሉትን አራት ሞዴሎች እንደሚከተለው እንመለከታለን።[12]

አንደኛው *የፍርድ ቤቶች ራስን በራስ የማስተዳደር ብቸኛ ሥልጣን ሞዴል* (the exclusive judicial responsibility model) የሚባለው ነው። በዚህ ሞዴል ፍርድ ቤትን የማስተዳደር ኃላፊነት ሙሉ በሙሉ ለራሱ ለፍርድ ቤት የተተወ ነው። ይህ ሞዴል ሁለት ንዑስ ሞዴሎች አሉት። አንደኛው ግለሰባዊ ንዑስ ሞዴል (Individual sub-model) ተብሎ የሚጠራ ሲሆን በዚህ ንዑስ ሞዴል መሠረት ፍርድ ቤትን የማስተዳደር ኃላፊነት ለአንድ ዳኛ የተተወ ነው። ለምሳሌ በአሜሪካ የኒውዮርክ ክፍለ ግዛት ይህንን አካሄድ ትከተላለች።[13] ሁለተኛው የጋራ ወይም የቡድን ንዑስ ሞዴል (collective sub-model) ተብሎ የሚጠራው ሲሆን በዚህ ንዑስ ሞዴል ፍርድ ቤትን የማስተዳደር ኃላፊነት ከፍርድ ቤት ተውጣጥቶ ለተቋቋመ አካል የሚሰጥ ነው። ለምሳሌ የአሜሪካ ፌዴራል ጠቅላይ ፍርድ ቤትንና ፓርቱጋልን መጥቀስ ይቻላል።[14]

ሁለተኛው *አስፈጻሚው አካል ፍርድ ቤቶችን የማስተዳደር ብቸኛ ሥልጣን ሞዴል* (the exclusive executive responsibility model) የሚባለው ነው። ይህ ሞዴል የመጀመሪያው (*ማለትም የፍርድ ቤቶች ራስን በራስ የማስተዳደር ብቸኛ ሥልጣን ሞዴል*/ the exclusive judicial responsibility model*)* ተቃራኒ ነው። በዚህ በሁለተኛው ሞዴል መሠረት ፍርድ ቤትን የማስተዳደር ኃላፊነት የሕግ አስፈጻሚው አካል ድርሻ ነው። ለምሳሌ ኖርዌይ፣ አስትሪያና ፈረንሳይ ይህንን ሥርዓት ይከተላሉ።[15] በእርግጥ ይህ አካሄድ ከአጠቃላይ ከፍርድ ቤቶች ነፃነት ጋር የሚጣረስ ይመስላል።

ሦስተኛው ሞዴል *የፍርድ ቤቶች በጋራ የማስተዳደር ሥልጣን ሞዴል* (shared executive-judicial model) የሚባለው ነው። በዚህ ሞዴል መሠረት ፍርድ ቤትን የማስተዳደር ኃላፊነት በሕግ አስፈፃሚውና በፍርድ ቤት የተከፋፈለ ነው። ለምሳሌ፣ በጀርመንና ካናዳ የላይኛዎቹን ፍርድ ቤቶች የማስተዳደር ኃላፊነት የፍርድ ቤቶች ሲሆን፣ የታችኞቹን ፍርድ ቤቶች የማስተዳደር ኃላፊነት ደግሞ የሕግ አስፈጻሚው ሥልጣን ነው።[16]

አራተኛው ሞዴል *በዘርፈ ብዙ ተቋማት ፍ/ቤቶችን የማስተዳደር ሥልጣን ሞዴል* (multi-branch responsibility model) የሚባለው ሲሆን በዚህ ሞዴል መሠረት ፍርድ ቤትን የማስተዳደር ኃላፊነት ከፍርድ ቤትና ከሌሎቹም ማለትም ከሕግ አውጪ ሕግ አስፈጻሚና እንዲሁም ከሌላ አካል (ለምሳሌ፡- ከጠበቆች ማህበር ወይም ከሌሎች

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[12] ዝኒ ከማሁ

[13] Harvey S. (Ed.), (2002). *Developing a court leadership and management curriculum*, the judicial education reference, information and technical transfer project, (unpublished), p. 55

[14] ዝኒ ከማሁ በተጨማሪም Maan, B., (2009). *Past and Future of management of courts*, International journal of Court Administration, p. 7 ይመልከቱ።

[15] ዝኒ ከማሁ

[16] ዝኒ ከማሁ

ጎብረተሰብ ክፍል የተወከሉ ሰዎች) ለተውጣጣ አካል የተሰጠ ነው። ይህ አካል ቦርድ፣ ኮሚሽን፣ ኮንፈረንስ፣ ዳኞች ጉባኤ ተብሎ በተለያየ ስም ይጠራል። ለምሳሌ፦ ሀገራችን ኢትዮጵያን፣ ከላቲን አሜሪካ ሀገሮች አርጀቲናና ብራዚልን፣ ከምዕራብ አውሮፓ ደግሞ ስፔንና ጣልያንን መጥቀስ ይቻላል። በምዕራብ አውሮፓ ሀገሮች የዳኞች ጉባኤ ሕግ አስፈጻሚው በፍርድ ቤቶች ላይ ያለውን ሥልጣን ለመገደብ የተቋቋመ ነው። በዚሁ መሠረት የዳኞችን ሹመትና እድገት ከሕግ አስፈጻሚው ሥልጣን ውጪ በማድረግ ራሱን ለቻለ ተቋም እንዲሰጥ ተደርጓል። ሀገሮች በራሳቸው ልዩ ሁኔታ፣ የሕግ ሥርዓትና ታሪክ ላይ በመመሥረት ከላይ የተጠቀሱትን አንዱን ወይም በማጣመር ወይም ሌሎች ተመሳሳይ ያላቸው ሞዴሎችን ሊመርጡ ይችላሉ። ሆኖም ግን የሞዴሎቹ ምርጫ ፍርድ ቤቶች ሊኖራቸው በሚችለው ነፃነት ላይ አሉታዊ ወይም አዎንታዊ ተጽዕኖ ሊኖረው ይችላል።

የዳኝነት ተቋማዊ ነፃነትን ለመጠበቅ ሌሎች ሊተገበሩ የሚገባቸው መሠረታዊ መርሆች አሉ።[17] ከእነዚህ ውስጥ ከመደበኛ ፍርድ ቤት ውጭ ጊዚያዊ ፍርድ ቤቶች ማቋቋምን የሚከለክል መርህ (the principle against ad hoc courts) እና ድህረ-ውሳኔ የዳኝነት ነፃነት መርህ (the principle of post-decisional independence) ሊጠቀሱ የሚችሉ ናቸው። ድህረ-ውሳኔ የዳኝነት ነፃነት መርህ በሦስቱም የመንግሥት አካላት የሥልጣን ክፍፍል መሠረት የሕግ አስፈጻሚ አካል የፍርድ ቤት ውሳኔን በመፈጸምና በማስፈጸም ረገድ ያለበትን የሚመለከት ነው። ይህም በፍርድ አፈጻጸም ሂደት አስፈፃሚው አካል ምንም ዓይነት መሰናክል እንዳይፈጠር ግዴታ የሚጥል መርህ ነው። ለማጠቃለል፣ የራሳቸውን የሰው ኃይል ካለማንም ጣልቃ ገብነት ማስተዳደራቸው፣ እንዲሁም በጀታቸውን ካለማንም ጣልቃ ገብነት (ም/ቤትን ብቻ በማስፈቀድ) የሚያስተዳድሩና በበጀታቸው ላይ የሚያዙ መሆናቸው የፍርድ ቤቶች ዋነኛ ተቋማዊ ነፃነት መገለጫዎች ከሚባሉት ውስጥ የሚገኙ ሥርዓቶች ናቸው።

2. ዓለምአቀፍ መለኪያዎችና ተሞክሮዎች

ቀደም ሲል እንደተጠቀሰው የዳኝነት ነፃነት በዓለም አቀፍ ደረጃ ከፍተኛ ተቀባይነትና ትኩረት ያገኘ መርህ ነው። አስፈላጊነቱን በሚመለከት ዓለም አቀፍ መግባባት (global consensus) ያለ ስለመሆኑ የተለያዩ ዓለም አቀፍ፣ አህጉራዊና ብሔራዊ የሕግ ሰነዶችን ማየቱ በቂ ነው። በሌላ በኩል ከላይ ለመጥቀስ እንደተሞከረው በሀገሮች መካከል ካለው የፖለቲካ፣ የሕግና የኢኮኖሚ ልዩነቶች አኳያ የመርሁ ይዘት፣ ስልትና ተግባራዊ አፈፃፀም ደረጃ ይለያያል። ያም ሆኖ ግን፣ በዓለም አቀፍ ደረጃ ይብዛም ይነስ የጋራ መግባባት የተደረሰባቸው የዳኝነት ነፃነት መሠረታዊ መርሆዎች አሉ። በዚህ ረገድ የተዘጋጀው ረቂቅ (The United Nation's Draft Principles on the Independence of the Judiciary of 1981) በመግቢያው ውስጥ ይህን መሠረታዊ መርህ እንደሚከተለው ይገልፃል፦

[17] Alemayehu Tegene (2007), *Independence and Accountability of Oromia Regional State Judiciary in light of the Judicial Reform Program*, (Unpublished), LLM Thesis, AAU, Faculty of Law, p. 16

በሀገሮች መካከል የፖለቲካና የሕግ ሥርዓት ልዩነቶች እንደተጠበቁ ሆነው ስለዳኝነት ነፃነት መርህና ስለ መመዘኛዎች መነሻ ወለል መሠረታዊ የሆነ መግባባት አለ። እነዚህ የዳኝነት ነፃነት መሠረታዊ መርሆችና መመዘኛዎች በሚከተሉት ዓለም አቀፋዊ ይዘት ባላቸው ሰነዶች ውስጥ ተካተው ይገኛሉ።[18]

1. የተባበሩት መንግሥታት የፍርድ ቤት ነፃነት መርሆች ረቂቅ (The United Nations Draft Principles on the Independence of the Judiciary, 1981)
2. የዓለም አቀፍ ጠበቆች ማህበር የዳኝነት ነፃነት መመዘኛዎች መነሻ ወለል (The International Bar Association and Minimum Standard of judicial Independence 1982 /New Delhi Standards)
3. የፍትሕ ነፃነት ሁል-አቀፍ የሞንትሪያል መግለጫ (The Montreal Universal Declaration on the Independence of Justice of 1983 /Universal Declaration)
4. የተባበሩት መንግሥታት የፍርድ ቤት ነፃነት መሠረታዊ መርሆች (The United Nations Basic Principles on the Independence of the Judiciary of 1985)
5. ስለዳኝነት ሥራ አካሄድ በባንጋሎር የወጡ መርሆዎች (The Bangalore Principles of Judicial Conduct of 2002)
6. የፍርድ ቤት ነፃነትና ገለተኝነት ሁል-አቀፍ መግለጫ ረቂቅ (Draft Universal Declaration on the Independence and Impartiality of the Judiciary of 1989)[19]

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[18] USAID, (2009), *Guide to Court Reform and the role of Court Personel*, (Unpublished), p. 17

"Notwithstanding the diversities of political system and legal mechanism in different countries there is a basic and substantial consensus on the principles and minimum standards relating to the independence of justice in the constitutions and legal systems of world."

[19] ከነዚህ በተጨማሪ ሌሎች ዓለም አቀፍና አህጉር አቀፍ ሰነዶችም ይገኛሉ። እነዚህም 1. Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1981 (በተለምዶ የሲራኩስ መርሆች ረቂቅ ተብሎ የሚጠራው) ፣ 2. Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982. 3. Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") United Nations Special Rapporteur on the Study on the Independence of the Judiciary, 1989. 4. The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997. 5. The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles,

የዳኝነት ነፃነት መስፈኑን ለማረጋገጥ የሚረዱ መስፈርቶች በእነዚህ ሰነዶች ውስጥ ተካተው ይገኛሉ። እነዚህ ሰነዶች የአስገዳጅነት ባህሪ ባይኖራቸውም የዳኝነት ነፃነትን ለማስፈን ሊወሰዱ የሚገባቸውን እርምጃዎች ወይም ሀገሮች ሊከተሉ የሚገባቸውን ስልቶች የሚጠቁሙ በመሆናቸው ጠቀሜታቸው የጎላ ነው። በተጨማሪም የፍርድ ቤቶችን ማሻሻያ ፕሮግራም እየተገበሩ ያሉ ሀገሮች የማሻሻያ ፕሮግራማቸውን ውጤታማነት ለመመዘን እነዚህን መስፈርቶች ይጠቀማሉ። በእነዚህ ሰነዶች ውስጥ የተካተቱት ዓለም አቀፍ የዳኝነት ነፃነት መመዘኛ ወለሎች (minimum standards) የሥራ ዋስትና፣ በቂ ክፍያና ሕገ መንግሥታዊ ጥበቃ፣ የውሳኔ አሰጣጥና ሂደት ከበላይ አለቆች ጣልቃ ገብነት ነፃ መሆን፣ የፍርድ ቤትን ውሳኔ በማስፈጸም ረገድ የሕግ አስፈጻሚ እገዛ፣ ወደኋላ ተመልሶ የሚሠራ ሕግ አለመኖር፣ ግልጽ የሆነ የሥነ ምግባር ደንብ፣ አስተዳደራዊ ነፃነት፣ ዝውውር፣ ግልጽና ተጨባጭ የእድገት መመዘኛዎች እና ሌሎች ይገኙበታል። ከነዚህ በርካታ ነጥቦች መካከል አንዱ ለዚህ ጽሁፍ መነሻ የሆነው የተቋማዊ/አስተዳደራዊ ነፃነት መርህና አሠራር ነው።

ተቋማዊ ነፃነትን በሚመለከት ዓለምአቀፍ ተሞክሮዎች

ተቋማዊ ነፃነት ፍርድ ቤት እንደ ተቋም ዳኞችና ድጋፍ ሰጪ ሠራተኞችን እንዲሁም በጀትን በማስተዳደር ረገድ ያለውን ነፃነት በዋነኝነት እንደሚመለከት ቀደም ሲል ተመለክቷል። በተባበሩት መንግሥታት የዳኝነት ነፃነት መርሆዎች እንደተገለፀው፣ ፍርድ ቤትን የማስተዳደር ዋናው ኃላፊነት ድጋፍ ሰጪ ሠራተኞችን ጨምሮ ለፍርድ ቤት ወይም ከፍርድ ቤትና ከሌሎች አካላት ለተውጣጣ አካል መሰጠት አለበት።[20] በዚህ አካል ውስጥ ከፍርድ ቤት የሚወከሉ ሰዎች አብላጫውን ቁጥር መያዝ አለባቸው። ይህም ከላይ ለመጥቀስ እንደተሞከረው *የዘረፈ ብዙ ተቋማት ሥልጣን ሞዴል* (multi-branch responsibility model) የተሰኘው አካሄድ ከሀገራት አልፎ ዓለምአቀፍ ዕውቅና ያገኘ ስልት መሆኑን ያሳይል። በዚህ መመዘኛ መሠረት የዳኞች ምልመላ፣ ሹመት፣ ዝውውር፣ እድገት፣ ዲሲፕሊን፣ ከሥራ ማሰናበት እንዲሁም ድጋፍ ሰጪ ሠራተኞችን መቅጠርና ከሥራ ማሰናት ከሕግ አስፈጻሚው አካል ቁጥጥር የራቀ መሆን አለበት።

በሌላ በኩል የቆየ የዲሞክራሲ ታሪክና ልምድ ባላቸው ሀገሮች የዳኞች ሹመትና እድገት ከፍርድ ቤት ውጪ በሆነ አካል እንዲከናወን መደረጉ ከዳኝነት ነፃነት መርህ ጋር ያለው ተዛምዶ በዓለም አቀፍ ጠበቆች ማህበር የዳኝነት ነፃነት መመዘኛ ወለሎች (minimum standards) ውስጥ ተመልክቷል። ይህ ማለት ግን የዲሞክራሲ ባህል ባልዳበረባቸው ሀገሮች ሌሎች የመንግሥት አካላት በፍትህ አስተዳደር ውስጥ አይሳተፉም ማለት አይደለም። በፍትሕ አስተዳደር ውስጥ የመንግሥት አካላትን ተሳትፎ ማስቀረት አይቻልም። ሆኖም ግን የዳኝነት ነፃነትን ለመጠበቅ የፍርድ ቤትን የውስጥ ጉዳይ በተመለከተ የሕግ አስፈጻሚው ወይም የሕግ አውጪው አካል ተሳትፎ የመንግሥት ሥርዓቱ የግድ በሚላቸው ጉዳዮች ላይ ብቻ የተገደበ መሆን አለበት

1998. (*Commentary on The Banglore Principles of Judicial Conduct,* UN Office of Drug and Crime, September 2002, p. 12 ይመለክቷል)

[20] International Commission of Jurists (2007). *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (Practioners Guide No. 1), Geneva, Switherland, p. 21

ተብሎ ይታመናል።[21] ለዚህም የዳኞችን ሹመትና ከሥራ ማሰናበት እንዲሁም በጀትን ማጽደቅ እንደ ምሳሌ መጥቀስ ይቻላል።

የፍርድ ቤቶች ተቋማዊ/አስተዳደራዊ ነፃነት ዋነኛው መገለጫ የበጀትና የፍርድ ቤቶች የድጋፍ ሰጪ ሰው ኃይል አስተዳደር ነፃነት ነው። በተለይም የበጀት አስተዳደር ነፃነት ለፍርድ ቤቶች ተቋማዊ ነፃነት ወሳኝ እንደሆነ የበርካታ ሀገራት ልምድና የዓለም አቀፍ የዳኝነት ነፃነት መርህ ሰነዶች ይገልፃሉ። የዓለም አቀፍ የዳኝነት ነፃነት መመዘኛ ወሰል እንደሚያሳየው ፍርድ ቤቶች በፍትሕ አስተዳደር ውስጥ የሚጠበቅባቸውን ሚና ይጫወቱ ዘንድ በቂ በጀት ሊመደብላቸው ይገባል። የፍርድ ቤቶች በጀት አግባብነት ካለው አካል ጋር በመቀናጀት የሚዘጋጅ ነው። በዚህ ውስጥ ፍርድ ቤቶች ተገቢውን ተሳትፎ ማድረግና በጀትም ሲፈቀድ የማስተዳደር ሥልጣን ሊኖራቸው ይገባል።

የበጀት ነፃነትን በተመለከተ የሀገሮች ልምድ የተለያየ ነው። ለምሳሌ፣ አሜሪካ፣ ህንድ፣ ጃፓንና ፊንላንድን ብንወስድ ፍርድ ቤቶች የራሳቸውን በጀት ግምት አዘጋጅተው ለሕግ አውጪው በቀጥታ ያቀርባሉ። ሲፈቀድም የተፈቀደላቸውን በጀት ካለ አስፈጻሚ አካል ጣልቃ ገብነት የማስተዳደር ነፃነት አላቸው። በአሜሪካን የፍርድ ቤቱን በጀት ያለአስፈጻሚ አካል ጣልቃ ገብነት አዘጋጅቶ ማቅረብ የተቋማዊ ነፃነት መሠረታዊ ገጽታና ሕገ መንግሥቱ ካስቀመጠው የሥልጣን ክፍፍል የሚመነጭ ነው። አንድ አሜሪካዊ ዳኛ እንደገለፁት የአስፈፃሚ አካል የፍርድ ቤቶችን በጀት እንዲያዘጋጅ ማድረግ በሕገ መንግሥቱ ከተደነገገው የመንግሥት አካላት የሥልጣን ክፍፍል ጋር የሚጋጭ ነው።[22]

የጀርመን፣ ፈረንሳይ፣ እንግሊዝ፣ ኔዘርላንድስ፣ ብራዚል፣ ደቡብ አፍሪካና የካናዳ ልምድ ከአሜሪካ፣ ህንድ ጃፓንና ፊንላንድ ተቃራኒ ነው። በእነዚህ ሀገሮች ፍርድ ቤቶች የራሳቸውን በጀት ቀጥታ ለሕግ አውጪው አካል አቅርበው የማስጸደቅ ሥልጣን የላቸውም። የፍርድ ቤቶች በጀት ለሕግ አውጪው የሚቀርበው በሕግ አስፈጻሚው በኩል ነው። በእነዚህ ሀገሮች የጸደቀውን በጀት በማስተዳደር በኩልም አስፈጻሚው አካል ከፍተኛ ሚና አለው።[23]

ሀገራት የፍርድ ቤቶች የበጀት ነፃነትን ለማስከበር በርካታ ፈተናዎች ገጥሟቿል። በተለይም የአስፈጻሚው ፖለቲካዊ ክንፍ ለዳኝነት አካሉ በጀት በመመደቡና በመፍቀዱ ሂደት ላይ ለፍርድ ቤቶች ያለው አመለካከትና ግንኙነት ይወስነዋል። ለምሳሌ በፖላንድ፣ ስሎቬኪያ፣ ቡልጋሪያ፣ ዩክሬንና ሩሲያ ፌዴሬሽን ፍርድ ቤቶች በቂ በጀት አይመደብላቸውም ብቻ ሳይሆን በየጊዜው እያሽቆለቆለ በሚሄድ የበጀት አመዳደብ ምክንያት ፍርድ ቤቶቹ ከሚሰበስቡት የዳኝነት ክፍያ (court fee) ወጪያቸውን ለመሸፈን ተገደዋል፤ ግላዊ የገንዘብ ምንጮች እስከ ማማተር ድረስ የተደረሰበትም

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[21] Rekosh, Edwin, (2002). *Emrging lessons from reform efforts in Eastern Europe and Eurasia*, p. 53 and p. 72 in Office of Democracy and Governance, *Giudance for promoting Judicial Independence and Impartiality*, Technical publication series, Washington, USA

[22] "… It is in conflict with the division of power which the constitution contemplates to allow the executive department to formulate the budget for the judiciary".
Sarviilina, S., (2010), *Court Administration in Finland*, Stocholm Institute for Scandinevian Law, (unpublished), p. 596

[23] Rekosh, Edwin, *supra* note 21., p. 74

ዘመን ነበር፡፡ በቡልጋሪያ የዳኝነት አስተዳደር ጉባኤው በጀት በማዘጋጀትና በመቆጣጠር ረገድ ሥልጣን ያለው ቢሆንም በጀቱ በፓርላማው እንዲጸድቅ የሚላከው በካቢኔው (በሚኒስትሮች ምክር ቤት) በኩል ነው፡፡ በፍርድ ቤት በጀት ላይ የቡልጋሪያ ፍትሕ ሚኒስቴር ወሳኝ ሚና ያለው ሲሆን፣ የራሱን የበጀት ስሌት የማቅረብና በፍ/ቤቱ የዳኝነት አስተዳደር ጉባኤ የቀረበውንም የበጀት ረቂቅ የመቃወም ሥልጣን አለው፡፡

በፖላንድም የሥር ፍ/ቤቶች፣ የጠቅላይ ፍ/ቤቱንና የጠቅላይ አስተዳደር ፍ/ቤቱን በጀት በአብዛኛው የሚቆጣጠረው የሀገሪቱ ፍትሕ ሚኒስቴር ነው፡፡ በአንፃሩ በጂኦርጂያ ያለው አሠራር የፍ/ቤቶችን ነፃነት ከሌሎቹ የምሥራቅ አውሮፓ ሀገራት በተሻለ የሚያስጠብቅ ይመስላል፡፡[24] የበጀት አስተዳደሩ ሙሉ በሙሉ በፍ/ቤቱ ቁጥጥር ሥር ያለ ሲሆን በፍ/ቤቱ አደረጃጀት ውስጥ የሚገኘው የሎጂስቲክስ የሥራ ክፍል ከጠቅላይ ፍ/ቤቱ ፕሬዚደንት በሚሰጠው መመሪያና አቅጣጫ መሠረት የበጀት ረቂቁን ያዘጋጃል፤ ይህ ረቂቅ በፕሬዚደንቱ በኩል ለፍትህ አስተዳደር ጉባኤው (Council of Justice) ቀርቦ ከጸደቀ በኋላ ለመጨረሻው ማጽደቅ በጠቅላይ ፍ/ቤቱ ፕሬዚደንት በኩል ለፓርላማው ይቀርባል፡፡[25]

በአፍሪካም ያለው ቀደም ብለን ካየነው ከምሥራቅ አውሮፓና የሬሺያ ልምድ ብዙም አይለይም፡፡ ለምሳሌ ኮመን ሎው የሕግ ሥርዓት የሚከተሉና እንግሊዘኛ ተናጋሪ የሆኑ ሀገራት (ኬኒያ፣ ናይጀሪያ፣ ኡጋንዳ፣ ዛምቢያ፣ ዚምባብዌ፣ ቦትሷናና ታንዛኒያ) ላይ በተሠራ አንድ ጥናት በነዚህ ሀገራት ፍርድ ቤቶች በበጀት አመዳደብ ላይ ያን ያህል ትኩረት እንደማያገኙና ዘወትር በበጀት እጥረት እንደሚያማርሩ ተገልጧል፡፡[26] ይህንን የበጀት ችግር ለመቅረፍና የፍርድ ቤቶችን የበጀት ነፃነት ለማስጠበቅ እነዚህ ሀገራት እንደመፍትሔ የወሰዱት አማራጭ በሕግ አውጪው በኩል ለፍርድ ቤቶች ጥቅል በጀት (consolidated fund) እንዲመደብ ማድረግ ነው፡፡ ለምሳሌ በአፍሪካ ከላይ የተጠቀሱትና ሌሎች ሀገራት ፍርድ ቤቶች ለሀገሪቱ ከሚመደበው ጥቅል በጀት ውስጥ በመቶኛ ድርሻ እንዲኖራቸው ተደርጎ ይህም በጀት ያለማንም ጣልቃ ገብነት በዳኝነት ጉባዔው እንዲተዳደር የሚደረግበትን ሥርዓት ዘርግተዋል፡፡[27]

በሀገረ ህንድ ደግሞ ያለው አሠራር ከዚህም ጠንከር ይላል፡፡ የህንድ ፍርድ ቤቶች በጀትም ሆነ ድጋፍ ሰጪ ሠራተኞች ደመወዝ፣ ጥቅማጥቅምና ሌሎች አስተዳደራዊ ወጪዎች የሚሸፈኑት ለሀገሪቱ ከተመደበውና የሕግ አውጭው ም/ቤትም ቢሆን ሊያሻሽለው ወይም ሊለውጠው ከማይችለው የፍርድ ቤት ድርሻ ከሆነው ጥቅል በጀት ነው፡፡[28] በህንድ ከበጀት አስተዳደሩ በተጨማሪ የድጋፍ ሰጪው የሰው ኃይል አስተዳደር ሙሉ በሙሉ በፍርድ ቤቱ ቁጥጥር ሥር ነው፡፡[29]

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[24] ዝኒ ከማሁ ገጽ 63- 65

[25] ዝኒ ከማሁ

[26] Widner, Jennifer, (January 2002). "Judicial Independence in Common Law Africa", in Office of Democracy and Governance, *Giudance for promoting Judicial Independence and Impartiality*, Technical publication series, Washington, USA, **ገጽ** 48

[27] ለምሳሌ የዩጋንዳን 2006 (እ.ኤ.አ) ሕገ መንግሥት አንቀጽ 128 (5) እና የኬኒያን 2010 (እ.ኤ.አ) ሕገ መንግሥት አንቀጽ 173 መመልከት ይቻላል፡፡

[28] M.P. Singh (2000). *Securing the Independence of the Judiciary-The Indian Experience*, Indian International & Comparative Law Review, Vol 10 No. 2, **ገጽ** 253

[29] ዝኒ ከማሁ

የበጀትና የድጋፍ ሰጪው የሰው ኃይልን በተመለከተ በደቡብ አሜሪካ ያለውን አተገባበር ስንመለከት፣ ቀደም ብለን ካየናቸው በተለይም ከምሥራቅ አውሮፓ ሀገራት የተሻለ የዳኝነት ተቋማዊ/አስተዳደራዊ ነፃነት ያለባቸው ሀገራት እንደሚገኙ ማወቅ ይቻላል። ለምሳሌ በኮስታሪካና በኤልሳልቫዶር ፍ/ቤቶች ከሀገሪቱ ጥቅል በጀት ውስጥ የስድስት (6) በመቶ ድርሻ ያላቸው ሲሆን በጉዋቲማላና በፓናማ ደግሞ የሁለት (2) በመቶ ድርሻ እንዲኖራቸው ተደርጓል።[30] በቦሊቪያ፣ በፓራጓይና በቺሊም በተመሳሳይ ሁኔታ ፍ/ቤቶች በሚመደብላቸው ጥቅል በጀት ዳኞችን ብቻ ሳይሆን ድጋፍ ሰጪ ሠራተኞቻቸውንም ከአስፈጻሚው አካል እጅና ጣልቃ ገብነት ነፃ በሆነ መልኩ ያስተዳድራሉ።[31]

3. የዳኝነት (ፍርድ ቤት) ታሪካዊ ዳራና አመሠራረት በኢትዮጵያ

ፍ/ቤቶች የተቋቋሙት ለሚነሱ ማናኛውም ክርክሮች እንዲሁም በሥርዓቱ ላይ ለሚደርሰው ችግር በሥልጣናቸው ሥር ተገቢ ውሳኔ (ፍርድ) ለመስጠት ነው። ከዚህ በተጨማሪና ከዚህም ጋር ተያይዞ የጎበረተሰቡ አባላት መብታቸውና ግዴታቸው እንዲከበር፤ ግንኙነታቸው ሳይናጋ ተከባብረው እንዲኖሩ፤ የአገሪቱ ሰላምና ደህንነት ተጠብቆና ተረጋግቶ እንዲቀጥል፤ የሕግ የበላይነት እንዲረጋገጥ እና ዲሞክራሲ እንዲሰፍን ፍርድ ቤቶች ከፍተኛ ኃላፊነት አለባቸው። በኢትዮጵያ መደበኛ ፍርድ ቤቶች በአዋጅ ከመቋቋማቸው በፊትና የተፃፈ ሕገ መንግሥት ባልነበረበት ዘመን (ቅድመ 1923) ሕዝቡ ይዳኝ የነበረው ባህሉን፣ ወጉን እና እምነቱን መሠረት አድርጎ በሚመረጡ ዳኞች እንደነበረ ከታሪክ እንረዳለን።[32] በ15ኛው ክፍለ ዘመን የዳኝነት ሥርዓቱ በተለይ በዘመነ ፍትሐ ነገሥት በሕግ መሠረት እንዲሠራ ጥረት የተደረገ ቢሆንም ያስመዘገበው ውጤት አመርቂ አልነበረም። ከዚህ በኋላ በተለይም ከአፄ ኃይለሥላሴ ዘመነ መንግሥትና ከ1923 የመጀመሪያው የተጻፈ ሕገ መንግሥት ጀምሮ የተለያዩና ዘመናዊ የሆኑ ከዳኝነት ጋር የተያያዙ ሕጐች ወጥተዋል። በዚህም መሠረት፡-

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[30] Margaret Popkin (January 2002). *Efforts to inhance Judicial independence in Latin America: A Comparative perspective*, in Office of Democracy and Governance, *Giudance for promoting Judicial Independence and Impartiality*, Technical publication series, Washington, USA, ገጽ 122

[31] ዝኒ ከማሁ ገጽ 123

[32] በዚህ ረገድ ጠለቅ ያለና ዝርዝር መረጃ ለማግኘት Aberra Jembere, (2012 G.C).*An Introduction to the Legal History of Ethiopia (1434-1974), Some Aspects of substantive and procedural laws*, Shama Books and Master Printing Press plc, Addis Ababa, Ethiopia ከገጽ 213-235፣ አበራ ጀምበሬ, (የካቲት 1984 ዓ.ም) *ተጠየቅ ሙግት ልማዳዊው የኢትዮጵያ የክርክር ስልት የኢትዮጵያ ሕግ መጽሔት*, መግቢ 15 አዲስ አበባ ዩኒቨርሲቲ የሕግ ትምህርት ቤት ከገጽ 219-236 እንዲሁም Muradu Abdo, *Legal History and Tradition*, (Unpublished material) Addis Ababa University, Faculty of Law, p. 256-267 ይመልከቱ

ሀ) በ1934 ዓ.ም የዳኝነት አካሄድን የሚደነግግ አዋጅ ቁጥር 2/34 የወጣ ሲሆን ይህ አዋጅ ስለዳኝነት ሥራ አካሄድና ስለዳኝነት አከፋፈል እንዲሁም ስለ አጥቢያ ዳኝነት የሚደነግጉ ደንቦችን[33] የያዘ ነበር፡፡

ለ) በ1943 ዓ.ም ፍ/ቤቶች ከጠቅላይ ንጉሠ ነገሥት ፍ/ቤት እስከ ወረዳ ወይም ቀበሌ ፍ/ቤት ድረስ የተቋቋሙ መሆኑን የሚደነግግ አዋጅ ቁጥር 155/1943 ወጥቷል፡፡

ሐ) በ1955 ዓ.ም የፍ/ቤቶችን አደረጃጀት ያሻሻለና የዙፋን ችሎት መቋቋምን ያካተተ አዋጅ ቁጥር 195/1955 ወጥቶ ሥራ ላይ ውሏል፡፡[34]

መ) የዳኞችን ምደባ፣ የደመወዝ ደረጃ፣ እንዲሁም ሥነ-ምግባር በሚመለከት የዳኞች አስተዳደር ጉባኤን ለማቋቋም የወጣው አዋጅ ቁጥር 323/65 እና የሕግ ክፍል ማስታወቂያ ቁጥር 438/65 ለመጀመሪያ ጊዜ ታውጆው በሥራ ላይ የዋሉት በ1965 ዓ.ም ነው፡፡[35]

የሌሎቹን ዝርዝር ሕጎች ይዘት ትተን የሁለቱን ንጉሣዊ ሕገ መንግሥቶች እንኳን ለመመልከት ብንሞክር፣ ለምሳሌ የ1923 ሕገ መንግሥት ከአንቀጽ 50 እስከ አንቀጽ 54 ድረስ ስለዳኞችና ስለ ፍርድ ቤቶች አደረጃጀት፣ ውሳኔ አሰጣጥና በቀጥታም ባይሆን ስለዳኝነት ነፃነት በዘመኑ ተራማጅ ሊባል በሚችል መልኩ የተደነገጉ ሲሆን፣ በተመሳሳይ መልኩ የ1948 የተሻሻለው ሕገ መንግሥት ከአንቀጽ 108 እስከ አንቀጽ 112 ድረስ ነፃነታቸውን ባጎናጸፈ መልኩ እንደሚደራጁ ተገልጧል፡፡[36]

የንጉሠ ነገሥቱ ቀዳማዊ አፄ ኃይለሥላሴ መንግሥት በደርግ መንግሥት ሲተካ ቀደም ብለው የዳኝነቱን አካሄድና የዳኞች አስተዳደር ጉባኤ ለማቋቋም የወጡት አዋጆችና ደንቦች ተሽረው እነዚህኑ ጉዳዮች የሚመለከተው አዋጅ ቁጥር 52/68 በ1968 ዓ.ም ታውጇል፡፡ በ1980 ዓ.ም ደግሞ የኢትዮጵያ ሕዝባዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት ቁ 1/80 መታወጅን ተከትሎ የሪፐብሊኩ ጠቅላይ ፍ/ቤት ራሱን ችሎ እንዲቋቋም፣ እንዲሁም በአገሪቱ የበላይ የሆነ የዳኝነት አካል ሆኖ እንዲደራጅና እንዲቋቋም፣ በመጀመሪያ አዋጅ ቁጥር 9/1980 በመቀጠልም ይህንን አዋጅ ያሻሻለው አዋጅ ቁጥር 24/1981 ወጥተዋል፡፡[37]

በ1980 ሕገ መንግሥት ላይ የሁሉም ፍ/ቤቶች የዳኞች የሥራ ዘመን የብሔራዊ ወይም የአካባቢ ሸንጐዎች የሥራ ዘመን እንዲሆን፣ እንዲሁም በሁሉም ፍ/ቤቶች በሕዝብ የሚመረጡ እማኝ ዳኞች (People's assessors) እንዲኖሩ በሚል ተደንግጐ ይገኛል፡፡[38] በእርግጥ ይህ የኢ.ሕ.ዲ.ሪ ሕገ መንግሥት የፍርድ ቤቶችን ነፃነት

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[33] ሐምሌ 9 ቀን 1923 ዓ.ም የታወጀው የመጀመሪያው ንጉሠ ነገሥታዊ ሕገ መንግሥት፣ አንቀጽ 53

[34] ይህ ሕግ የወጣው የ1923 ሕገመንግሥት ባሸሻለውና በ1948 ዓ.ም በወጣው ሁለተኛው ሕገመንግሥት አንቀጽ 109፣110 እና 111 ነበር፡፡

[35] ዝኒ ከማሁ አንቀጽ 111

[36] ቃለአብ ታደሰ ስጋቱ (2011), *ሕገመንግሥት በኢትየጵያ፣ ክፍትሐ ነገሥት እስከ ኢ.ፌ.ዲ.ሪ፣* ሜጋ አሳታሚና ማከፋፈያ፣ ገጽ 113

[37] መስከረም 1 ቀን 1980 ዓ.ም የጸደቀው የኢትዮጵያ ሕዝባዊ ዴሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት አንቀጽ 63(3)/ሐ/ የሪፐብሊኩን ጠቅላይ ፍ/ቤት የማቋቋም ሥልጣን የብሔራዊ ሸንጎ እንደሆነ ይደነግጋል፡፡

[38] ዝኒ ከማሁ አንቀጽ 100-107

በተመለከተ በአንቀጽ 104 ላይ ዳኞችና እማኝ ዳኞች የዳኝነት ተግባራቸውን በሙሉ ነፃነት እንደሚያከናውኑና ከሕግ በስተቀር በማንኛውም ሌላ ሥልጣን እንደማይመሩ ቢደነግግም፣ በሌላ በኩል ደግሞ ይህንን ድንጋጌ ትርጉም ሊያሳጡ የሚችሉ ድንጋጌዎች በሕገ መንግሥቱ ይገኛሉ። በተለይ የሕገ መንግሥቱ አንቀጽ 86(1)(መ) እና 101 አስፈጻሚው በተለይም የሪፐብሊኩ ፕሬዝደንት በፍ/ቤቶች ሥራና እንቅስቃሴ ላይ እጁን ሊያስገባ እንደሚችል የሚያሳዩ ናቸው። ከላይ ለመጥቀስ እንደተሞከረው የፍርድ ቤቶች/ዳኞች የሥራ ዘመን በፖለቲካዊ ተቋማት ላይ በተለይም በብሔራዊ ሸንጎው የሥልጣን ዘመን ላይ ጥገኛ መሆኑንን በቀላሉ መረዳት ይችላል።

ኢ.ህ.አ.ዴ.ግ የደርግ መንግሥትን ሲተካ ጊዜያዊ መንግሥት ለማቋቋም የሽግግር መንግሥት ቻርተር ጸደቀ። በቻርተሩ መሠረትም ዳኝነት ባልተማከለ መልኩ ይካሄድ ዘንድ የማዕከላዊ እና የክልል ፍርድ ቤቶች በሚል ራሳቸውን ችለው እንዲደራጁ ተደርጎ ይህንኑ የቻርተሩን መሠረተ ሓሳብ በመያዝ የፍትሕ አስተዳደር ከማንኛውም ዓይነት ተጽእኖ ነፃ እንዲሆን ለማስቻል አዋጅ ቁጥር 23/1984 እና ይህንኑ አዋጅ ያሻሻለው አዋጅ ቁ. 40/1985 (የማዕከላዊ የሽግግር መንግሥት ፍርድ ቤቶችን ለማቋቋም የወጣው አዋጅ/እንደተሻሻለ) ታውጆው ሥራ ላይ ውለዋል።[39]

የኢ.ፌ.ዲ.ሪ ሕገ መንግሥት በ1987 ዓ.ም. በቁጥር 1/87 ሲታወጅ፣ ፍ/ቤቶች ከማንኛውም ተጽዕኖ ነፃ ሆነው በመደራጀት የፍትሕ ሥራ እንደሚያከሂዱ ተደንግጓል።[40] ከዚህ በተጨማሪም ፍርድ ቤቶች ከማንኛውም የመንግሥት አካል፣

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[39] የኢትዮጵያ የሽግግር ወቅት ቻርተር ቁ. 1/1983 ዓ.ም፣ አንቀጽ 9(ረ)፣ (የኢትዮጵያ ሰላማዊና ዴሞክራሲያዊ ሽግግር ጉባኤ ነጋሪት ጋዜጣ፣ ሐምሌ 15 ቀን 1983 ዓ.ም 50ኛ ዓመት ቁ. 1

[40] የኢ.ፌ.ዲ.ሪ. ሕገ መንግሥት አንቀጽ 78(1) በግልጽ ነፃ የዳኝነት አካል በዚህ ሕገ መንግሥት ተቋቁሟል በማለት ይደነግጋል። የእንግሊዘኛው ቅጂም *an Independent Judiciary is established by this Constitution* ይላል። ይህ ሕገመንግሥታዊ ድንጋጌ ከ1981 የኢሕዲሪ ሕገ መንግሥት አንቀጽ 63(3)/ሐ/ እና 100 (1) እንዲሁም ከ1948 የተሸሻለው የንጉሠ ነገሥቱ ሕገ መንግስት አንቀጽ 108 እና109 በተለየና በተሻለ መልኩ የተቀመጠ ድንጋጌ መሆኑ ይታመናል። ምክኒያቱም የኢፌዴሪ ሕገ መንግሥት የዳኝነት አካላት በሌሎች ተቋማት በሚወጡና በሚሻሩ ሕጎች እንዲቋቋም ሳይሆን በራሱ በሕገ መንግሥቱ ማቋቋሙ በተራ የበታች ሕግ እንደፈለገ ማቋቋም ወይም ማፍረስ እንዳይቻል ሕገ መንግሥታዊ ዋስትና ይሰጣል። ከላይ የተጠቀሱት የቀድሞ ሕገ መንግሥቶች ግን ይህንን ወሳኝ ተቋም እንዲያቋቁሙ ለሕግ አውጪ ምክር ቤቶች ሥልጣን የሰጡ ሲሆን ም/ቤቶቹም በየጊዜው የዳኝነቱን አካል በአዋጅ ሲያቋቁሙና ሲያሻሽሉ ቆይተዋል። ይህም ይብዛም ይነስ የዳኝነት ነፃነት ላይ የራሱ ተጽእኖ እንዳለው ግልጽ መሆን አለበት። በእርግጥ ይህ ንዑስ አንቀጽ ሲረቀቅ አንድ የአርቃቂው ኮሚሽን አባል "……ተቋቁሟል" የሚለው አሁን የተቋቋመ ስለሚያስመስለው በየጊዜው በሚደረጉት ምርጫዎች የሚቋቋምበትም ሁኔታ እንዳለ በመግለጽ ልክ እንደቀድሞዎቹ ሕገ መንግሥቶች "…..ይቋቋማል" በሚል እንዲስተካከል አስተያየት አቅርበው ተቋቁሟል የሚለው ቃል የሕግ ቋንቋ ስለሆነና ሕገ መንግሥቱም የሕጎች የበላይና ምንጭ በመሆኑ ከአሁኑ ነጻ የዳኝነት አካል መቋቋሙን መደንገግ አስፈላጊ መሆኑንን መልስ እንደተሰጠበት ከሕገ መንግሥት አርቃቂ ኮሚሽን ቃለ ጉባዔ መረዳት ይቻላል። (የኢትዮጵያ ሕገ መንግሥት ጉባኤ ቃለ ጉባኤ ቁጥር 27 እና 28 /ህዳር 21-24 1987 ዓ.ም፣ አዲስ አበባ ኢትዮጵያ/ ገጽ 13)። በእርግጥ ህገ መንግሥቱ አንቀጽ 78(1) ላይ ነፃና ገለልተኛ ዳኝነት ማቋቋሙን በይፋ ቢደነግግም ነፃ ዳኝነት እና ገለልተኛ ዳኝነት ሲባል መገለጫዎቹ ምንድናቸው የሚለውን ዝርዝር ምላሽ አይሰጥም።

ከማንኛውም የመንግሥት ባለሥልጣንም ሆነ ከማንኛውም ሌላ ተጽዕኖ ነፃ እንደሆኑ ተገልጧል።[41] ማንም ሰው ከዚህ መረዳት የሚችለው የኢፌዴሪ ሕገ መንግሥት የዳኝነት አካሉን ማቋቋሙ ብቻ ሳይሆን ለነፃነታቸውም ሕገ መንግሥታዊ ከለላና ዋስትና መስጠቱን ነው። የፍ/ቤቶችም አደረጃጀት የኢትዮጵያን ፌዴራላዊ ሥርዓት ተከትሎ የፌዴራልና የክልል ፍ/ቤቶች በሚል እንዲዋቀሩ ተደርጓል።[42] በዚህ መሠረት ከላይ በጥቅሉ የተቀመጠውን የዳኝነት ነፃነት ድንጋጌ ተከትሎ በተለይም የዳኞችን ግለሰባዊና ውሳኔያዊ ነፃነት ለማስከበር፣ ዳኞች ተግባራቸውን በሙሉ ነፃነት እንደሚያከናውኑ፣ ከሕግ በስተቀር በሌላ ሁኔታ እንደማይመሩና ሌሎች ጥበቃዎችን ተግባር ላይ ለማዋል የፌዴራል የዳኞች አስተዳደር ጉባኤ ወሳኝ ሚና እንዳለው ሕገ መንግሥቱ ይገልፃል።[43] ይህንኑ መሠረት በማድረግ፣ በአዋጅ ቁጥር 24/1988፣ በመቀጠልም አሁን በሥራ ላይ ባለው በአዋጅ ቁጥር 684/2002 መሠረት የፌዴራል የዳኞች አስተዳደር ጉባኤ በማቋቋምና ዝርዝር ሥልጣንና ተግባሩን በማስቀመጥ ሥራውን እንዲሠራ ተደርጓል።

የፍርድ ቤቶችን በተለይም የዳኞችን ነፃነት እውን ለማድረግ የዳኞች ምልመላ፣ ዝውውርና የዲሲፕሊን እርምጃ የዳኞች አስተዳደር ጉባኤ ኃላፊነት መሆኑን ደንግጓል። ጉባኤውም በፌዴራል ደረጃ ብቻ ሳይሆን ክልሎች ሕገ መንግሥታቸውን መሠረት በማድረግ የራሳቸውን የዳኞች አስተዳደር ጉባኤ እንዲያቋቁሙ ተደርጓል። ከፌዴራልና ከክልል የዳኞች አስተዳደር ጉባኤ ማቋቋሚያ አዋጆች መረዳት እንደሚቻለው የጉባኤው አባሎች ቁጥር የተለያየ ነው። ለምሳሌ፤ የጉባኤ አባላት በፌዴራል ዘጠኝ፣ በትግራይ 17፣ በኦሮሚያ 9፣ በደቡብ ብሔር ብሔረሰቦችና ሕዝቦች ክልል 11፣ በጋምቤላ 16፣ በአማራ ክልል 12 ናቸው።

የጉባኤው አባላት ስብጥርም ይለያያል። በፌዴራል ደረጃ የተቋቋመው ጉባኤ፣ ከፍርድ ቤትና ከፌደራሉ የሕዝብ ተወካዮች ምክር ቤት፣ ከጠቅላይ ዐቃቤ ሕግ፣ ከሕግ ባለሙያዎች ማህበር፣ ከታዋቂ ግለሰቦች የተወከሉ አባላት ያሉትና የሕግ መምህር ያለበት ነው። በክልል በሚቋቋሙ ጉባኤዎችን በሚመለከት ለምሳሌ በትግራይ ከፍርድ ቤት፣ ከሴቶች ማህበር፣ ከገበሬ ማህበር፣ ከፍትህ ቢሮ፣ ከጠበቆች ማህበር እና ከአስተዳደርና ፍትህ ዘርፍ አባላት ይወከላሉ። የኦሮሚያ ክልል የዳኞች አስተዳደር ጉባኤ ከፍርድ ቤትና ከምክር ቤት፣ በደቡብ ክልል ደግሞ ከፍርድ ቤትና ከክልል ምክር ቤት የሚወከሉ ናቸው።[44] እነዚህ የፌዴራል ክልል ዳኞች አስተዳደር ጉባኤያትም የዳኞች ምልመላ፣ ደመወዝ፣ ዲሲፒሊን፣ ዕድገት፣ ዝውውር፣ አበልና ሕክምና የመወሰን ሥልጣን አላቸው። የፌደራሉን ዳኞች አስተዳደር ጉባኤ አደረጃጀት በተመለከተ የሕግ ጥያቄዎች ያሉ ቢሆንም የዚህ ጽሑፍ ዋነኛ ዓላማ በፌደራል ፍርድ ቤቶችን ተቋማዊ ነፃነት ላይ የሚያተኩር ነው።

ከባህሪውም አንጻር መስጠትም አይጠበቅበትም። በሌሎች ሀገራት ልምድ እነዚህና ሌሎች ከሕገመንግሥቱ በተሻለ ዘርዝር ከሌሎች ሕግጋት ጋር ሲነጻጸር ደግሞ ጠቅለል ብለው በተዘጋጁ የዳኝነት ፖሊሲ ሰነዶች ውስጥ እንዲካተት የሚደረግባቸው አሠራሮች አሉ።

[41] የኢ.ፌ.ዲ.ሪ. ሕገ መንግሥት፣ አንቀጽ 79 (2)

[42] ዝኒ ከማሁ፣ አንቀጽ 78 (2) እና (3) ይመለከቷል።

[43] ዝኒ ከማሁ፣ አንቀጽ 79 (4) ፣ አንቀጽ 81 (2) እና (4) - (6) ይመለከቷል።

[44] በዚህ ረገድ የየክልሎቹ ህግጋተ መንግስታትና የዳኞች አስተዳደር ጉባኤ መቋቋሚያ አዋጆች መመልከት ይቻላል።

4. የሕገ መንግሥቱና የአዋጅ ቁጥር 25/1988 መርሆዎችና በተግባራዊ አፈጻጸም ረገድ የሚታየው ችግር

ፍርድ ቤቶች የሚያስፈልጋቸውን የበጀት መጠን በቀጥታ በሕገ መንግሥቱ መሠረት የፌደራሉ መንግሥት ከፍተኛና የመጨረሻ የሥልጣን አካል ለሆነው የፌደራሉ መንግሥት የሕዝብ ተወካዮች ም/ቤት በማቅረብ እንደሚያስጸድቁ የኢፌዴሪ ሕገ መንግሥት በግልጽ ይደነግጋል።[45] ከፌዴራል ፍ/ቤቶች አዋጅ ቁጥር 25/1988 ስያሜ እንደምንረዳው፣ ይህ አዋጅ የፌደራል ፍርድ ቤቶችን ለማቋቋም የወጣ ሳይሆን፣ አስቀድሞ በሕገ መንግሥቱ የተቋቋመውን ነፃ የዳኝነት ተቋም ዝርዝር ዳኝነታዊና አስተዳደራዊ ሥልጣን የሚመለከት ሕግ ነው።[46]

የአዋጁ ክፍል አምስት አንቀጽ 16 የፌደራል ጠቅላይ ፍ/ቤትን ፕሬዚደንት ሥልጣኖች ይገልፃል። ይህ አንቀጽ የፌደራሉ ጠቅላይ ፍ/ቤት ፕሬዚደንት በሕግ መሠረት የፌደራል ፍ/ቤቶችን ለማስተዳደር ኃላፊ እንደሆነ በጥቅሉ ደንግጎ፣ በዝርዝር ደግሞ በአንቀጹ ንዑስ ቁ. (2) ሥር ከፊደል ተራ (ሀ) እስከ (ተ) ድረስ አሥራ አንድ የሚሆኑ አስተዳደራዊ ኃላፊነቶችን ይዘረዝራል። ከነዚህ አስተዳደራዊ ኃላፊነቶች መካከል፣ በፊደል ተራ (ሐ) ላይ የተሰጠው የፌደራል ፍ/ቤቶችን ዕቅድና በጀት በማዘጋጀት ለሕዝብ ተወካዮች ም/ቤት የማቅረብና ሲጸድቅ ተግባር ላይ የማዋል ሥልጣንና ኃላፊነት ይገኛል። ይህም ማለት በሕገ መንግሥቱና በዚህ አዋጅ ጭምር ማናቸውም አካል በተለይም የአስፈጻሚው አካል በዳኝነት በጀት ሥራ ውስጥ ጣልቃ እንዳይገባ ተደንግጓል ማለት ነው። ከዚህ በተጨማሪም በዚሁ በአንቀጽ 16(2) ፊደል ተራ (ለ) እና ፊደል ተራ (ረ) መሠረት ከሥር ፍ/ቤቶች ፕሬዚደንቶች ጋር በመመካከር ከዳኞች ውጪ ያሉትን ድጋፍ ሰጪ ሠራተኞች የመቅጠርና ትምህርትና ሥልጠና የሚካሄድበትን ሁኔታ የማመቻቸት ሥልጣን ተሰጥቶታል። ስለዚህም በዚህ አዋጅ መሠረት ድጋፍ ሰጪ ሠራተኞችን መቅጠርና ማስተዳደር እንዲሁም ሌሎች አስተዳደራዊ ሥራዎችን ማከናወን የፌደራሉ ጠቅላይ ፍርድ ቤት ፕሬዚዳንት ኃላፊነት እንደሆነ ግልጽ ነው።

4.1 የፌደራል ፍ/ቤቶች መዋቅራዊ አደረጃጀትና የድጋፍ ሰጪ ሠራተኞች አስተዳደር

በሦስቱም ፌደራል ፍርድ ቤቶች የሚገኘው የሰው ኃይል በሁለት ታላላቅ ምድቦች (categories) የተከፈለ ሲሆን፣ የመጀመሪያው አስፈጻሚ/ዋናው የሰው ኃይል ምድብ (core/main staff wing) ተብሎ የሚጠራው ነው። ይህም የየፍርድ ቤቶቹን ዳኞች፣ ሬጅስትራሮችና ም/ሬጅስትራሮችን የሚመለከት ሲሆን፣ ምልመላቸው፣ ደመወዛቸው፣ ዝውውራቸው፣ እድገታቸው፣ የዲሲፕሊን ጉዳዮቻቸው፣ ሥልጠናቸው፣ የሥራ

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[45] የኢ.ፌ.ዴ. ሪ ሕገ መንግሥት አንቀጽ 79 (6) ይመለከቷል።

[46] በርካታ አካላትና የመገናኛ ብዙሃን ተቋማት አዋጁን የፌደራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ በማለት ሲጠሩት ይሰማል። ነገር ግን ይህ ስህተት እንደሆነ መገንዘብ ያስፈልጋል። ምክኒያቱም አዋጁ የፌደራል ፍርድ ቤቶች አዋጅ ቁጥር 25/1988 (Federal Courts Proclamation No. 25/1996) እንጂ የፌደራል ፍርድ ቤቶች *ማቋቋሚያ* አዋጅ (Federal Courts Establishment Proclamation) አይደለም። ምክንያቱም ፍርድ ቤቶች በሕገ መንግሥቱ የተቋቋሙ በመሆናቸው ሌላ ማቋቋሚያ አዋጅ ማውጣት አስፈላጊም ሕገ መንግሥታዊም ስላልሆነ ነው።

አፈጻጸማቸው፣ ጥቅማ-ጥቅሞቻቸውና ሌሎች አስተዳደራዊ ጉዳዮቻቸው የሚከናወኑት በፌደራል ዳኞች አስተዳደር ጉባኤ ማቋቋሚያ አዋጅ ቁጥር 684/2002 መሠረት ነው።

ሁለተኛው የሰው ኃይል ምድብ የድጋፍ ሰጪው ምድብ ወይም የሲቪል ሰርቪሱ ሠራተኛ ምድብ (civil service employee category) ነው። ይህ የሰው ኃይል ክፍል ከተሰጠው ስያሜ በቀላሉ መረዳት እንደሚቻለው ለዋናው የዳኝነት ሥራ ድጋፍ የሚያደርጉ ሠራተኞችን የያዘ ምድብ ነው። ይህ ምድብ የሚተዳደረው ከላይ ከጠቀስነውና ዳኞች ከሚተዳደሩበት ሕግ በይዘቱም ሆነ በዓላማው ፈጽሞ በተለየና በራሱ በፍርድ ቤቱ በወጣ ሕግ ወይም ደንብ ሳይሆን በሌሎች የአስፈጻሚ አካላት በወጣ መመሪያ ነው። በመጀመሪያ ደረጃ የፌደራል ፍ/ቤቶች የሲቪል ሰርቪሱ ክንፍ የሚተዳደርበት ዋናው የሕግ ማዕቀፍ የፌደራል የመንግሥት ሠራተኞች አዋጅ ቁጥር 1064/2010 ነው።[47] በዚህ አዋጅ መግቢያ ላይ በግልጽ እንደምንመለከተው የአዋጁ ዓላማ በሜሪት ላይ የተመሠረተና ብዝሃነትን ያረጋገጠ ጠንካራ የሲቪል ሰርቪስ ሥርዓት መገንባት እንደመሆኑ፣ የመንግሥት ሠራተኞች ቅጥር፣ ደረጃ ዕድገት፣ ዝውውር፣ ስንብት፣ የዲሲፕሊንና ሥነ-ምግባር፣ ደመወዝና ጥቅማጥቅም ዝርዝር ድንጋጌዎች በዚህ መርህ መሠረት የሚተረጎሙና የሚፈጸሙ መሆን አለባቸው። ይህ ሕግ ተፈጻሚ የሚሆንባቸው እነዚሁ የመንግሥት ሠራተኞች በሕዝብ ተወካዮች ምክር ቤት በሚወጣ/በወጣ አዋጅ ወይም አስፈጻሚ አካል በሆነው በሚኒስትሮች ምክር ቤት ደንብ መሠረት በተቋቋመ የመንግሥት መሥሪያ ቤት በቋሚነት ተቀጥረው የሚሠሩ ሠራተኞች መሆኑን አዋጁ በግልጽ ያስቀምጣል። ይህም ማለት አዋጁን ተፈጻሚ ለማድረግ በመጀመሪያ ደረጃ መረጋገጥ ያለበት ጉዳይ ተቋሙ የመንግሥት መሥሪያ ቤት የሚለውን ትርጉም ማሟላት ይጠበቅበታል ማለት ነው።

አንድ ተቋም የመንግሥት መሥሪያ ቤት ሊባል የሚችለው ከላይ እንደተጠቀሰው በአዋጁ አንቀጽ 2(3) *መሠረት ራሱን ችሎ በአዋጅ ወይም በደንብ የተቋቋመና ከመንግሥት በሚመደብለት በጀት የሚተዳደር የፌደራል ተቋም* (አጽንኦት የጸሐፊው) ሆኖ ሲገኝ ነው። በዚህ ድንጋጌ መሠረት ተቋሙ የመንግሥት መሥሪያ ቤት ለመባል ሁለት መሠረታዊና ጣምራ መስፈርቶችን ማሟላት ይጠበቅበታል ማለት ነው። የመጀመሪያው "... *በአዋጅ ወይም በደንብ የተቋቋመ*..." የሚለው ሲሆን ማንኛውም የመንግሥት መሥሪያ ቤት ወይም በሕዝብ ተወካዮች ምክር ቤት በሚወጣ አዋጅ ወይም በሚኒስትሮች ምክር ቤት በሚወጣ ደንብ መሠረት መቋቋም አለበት።[48]

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[47] የኢትዮጵያ የመንግሥት ሠራተኞች አስተዳደር ሕግ እና የሲቪል ሰርቪስ ሥርዓት ረጅም ታሪክ ያስቆጠረ ሲሆን በየዘመኑ በነበሩት የመንግሥት ሥርዓቶችና ርዕዮተ ዓለማዊ ፍልስፍናቸው መለዋወጥን ተከትሎ ሕጎቹም እየተቀያየሩ መጥተዋል። አሁን ባለንበት ዘመን እንኳ በተለይም ከኢፌዴሪ ሕገ መንግሥት መውጣትና ከፌደራል ሥርዓቱ መመሥረት በኋላ እንኳ ያለውን ብንቆጥር አሁን ያለው አዋጅ ሦስተኛው ሲሆን ተቋማዊ ማዕቀፉ ደግሞ ለአራተኛ ጊዜ ተቀያይሯል።

[48] በእርግጥ ከ2003 ዓ.ም ጀምሮ በአዋጅ ቁጥር 691/2003 አንቀጽ 34 መሠረት የሚኒስትሮች ምክር ቤት የፌደራሉን መንግሥት አስፈጻሚ አካላት እንዲያደራጅ (አዲስ ማቋቋም፣ ማጠፍ፣ ማዋሃድ ወይም መክፈል) በግልጽ ሥልጣን የተሰጠው በመሆኑ የሕዝብ ተወካዮች ምክር ቤት በቀጥታ የአስፈጻሚ አካላትን ማቋቋም አቁሟል። ይህ አካሄድ በአሁኑ ወቅት ሥራ ላይ ባለው የኢፌዴሪ አስፈጻሚ አካላትን ሥልጣንና ተግባር ለመወሰን የወጣው አዋጅ ቁጥር 1097/2010 አንቀጽ 34 መሠረትም የቀጠለ ነው።

በአንፃሩ ግን፣ ፍርድ ቤቶች በተወካዮች ምክር ቤት በሚወጣ/በወጣ አዋጅ የተቋቋሙ ወይም በሚኒስትሮች ምክር ቤት በወጣ ደንብ የተቋቋሙ ሳይሆኑ በቀጥታ በኢፌዲሪ ሕገ መንግሥት አንቀጽ 78(1) መሠረት የተቋቋሙ ናቸው።[49] ሁለተኛው መሥፈርት የበጀት ምደባ ሲሆን ይህ ብዙም የሚያከራክር አይደለም። ምክንያቱም ሁሉም ተቋማት በመንግሥት በሚመደብላቸው በጀት የሚተዳደሩ እንደመሆናቸው ፍርድ ቤቶችም በዚሁ ማዕቀፍ ውስጥ የሚካተቱ መሆኑን መገንዘብ አያዳግትም።[50] ስለዚህ ቢያንስ በመጀመሪያው መሥፈርት መሠረት ፍርድ ቤቶች የመንግሥት መሥሪያ ቤት የሚለው ስያሜ ሊሰጣቸው አይገባም በማለት መከራከር ይቻል ይሆናል።

ይህንን አዋጅ እንዲያስፈጽም ሥልጣን የተሰጠው የአስፈጻሚው ኣካል ተቋም (ቀድሞ የሲቪል ሰርቪስ ሚኒስቴር፣ በመቀጠልም የፐብሊክ ሰርቪስና ሰው ሀብት ልማት ሚኒስቴር በአሁኑ ሰዓት ደግሞ) የኢፌዴሪ ሲቪል ሰርቪስ ኮሚሽን ነው። ኮሚሽኑ ከተጣሉበት ተግባርና ኃላፊነቶች አንዱ የሆነውና በአዋጁ ክፍል ሁለት ሥር በአንቀጽ 5(1) የተደነገገው የመንግሥት መሥሪያ ቤቶችን አደረጃጀትና መዋቅር የመወሰንና የማጽደቅ ሥልጣን ጉዳይ ነው። በዚህም መሠረት የመንግሥት መሥሪያ ቤቶች (በተግባር እንደሚታየው የፌደራል ፍርድ ቤቶችንም ጨምሮ) አደረጃጀታቸውን አጥንተውና መዋቅር ሠርተው እንዲሁም በዚሁ ባጠኑት አደረጃጀትና በሠሩት መዋቅር መሠረት የሚያስፈልጋቸውን የሰው ኃይል ብዛት ደልድለው እንዲጸድቅላቸው ለኮሚሽኑ ይልካሉ።

ኮሚሽኑም የቀረበለትን የአደረጃጀት ጥናትና የመዋቅር ጥያቄ የማጽደቅ፣ የማሻሻል ወይም ሙሉ በሙሉ ውድቅ የማድረግ ሥልጣን እንዳለው በቀላሉ መረዳት ይቻላል። ከዚህም በተጨማሪ ተስማሚ የሆነ የሥራ ምዘና ዘዴ በመምረጥ በማንኛውም የመንግሥት መሥሪያ ቤት (ፌደራል ፍርድ ቤቶችንም ጨምሮ) ተግባራዊ የማድረግ፣ የመንግሥት ሠራተኞችን ደመወዝ ስኬል እና አበል እያጠና በሚኒስትሮች ምክር ቤት የማስወሰን/የማስጸደቅ፣ የመግቢያና የብቃት ማረጋገጫ ሥርዓት የመዘርጋትና በሚኒስትሮች ም/ቤት የማስወሰን፣ የማስጸደቅና በመንግሥት መሥሪያ ቤቶች ላይ ተግባራዊ የማድረግ፣ የመንግሥት ሠራተኞች ምልመላና መረጣ (ቅጥር፣ ደረጃ እድገትና ዝውውር እንዲሁም ድልድል) መመሪያ ማውጣትና የመንግሥት ሠራተኞችን የዲሲፕሊን ጉዳይ በዳኝነት የማየት ሥልጣንና ኃላፊነቶች ተሰጥተውታል።

ከላይ ለመጥቀስ እንደተሞከረው የፌደራል ፍ/ቤቶች የድጋፍ ሰጪው ዘርፍ በዚህ በሲቪል ሰርቪስ ሥርዓት መሠረት በወጡ ሕጎችና ደንቦች እንዲሁም መመሪያዎች የሚተዳደር ነው።[51] ነገር ግን የሲቪል ሰርቪሱ ሠራተኛውን በማስተዳደር ብቻ

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[49] ከላይ በግርጌ ማስታወሻ ቁ. 40 የተጠቀሰውን ይመልከቱ። ከፍርድ ቤቶች በተጨማሪ ሦስቱ ም/ቤቶች (የሕዝብ ተወካዮች ም/ቤት፣ የፌዴሬሽን ም/ቤትና የሚኒስትሮች ም/ቤት) እንዲሁም የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤም በቀጥታ በሕገ መንግሥቱ የተቋቋሙ አካላት ናቸው።

[50] በመሠረቱ ፍ/ቤቶች የመንግሥትን በጀት የሚጠቀሙ ብቻ ሳይሆኑ ለመንግሥትም መጠኑ የማይናቅ ገቢ ከሚያስገቡ ጥቂት ተቋማት ውስጥ የሚመደቡ መሆናቸው ከግምት ውስጥ መግባት አለበት።

[51] ከአዋጅ ቁጥር 1064/2010 በተጨማሪ የመንግሥት ሠራተኞች የቅሬታና የዲሲፕሊን አቀራረብ ሥርዓት የሚኒስትሮች ምክር ቤት ደንብ ቁ. 77/1994ን ጨምሮ ኮሚሽኑ ያወጣው

ሳይወሰን የፌደራል ፍርድ ቤቶችን አስተዳደራዊ አደረጃጀትና መዋቅር የመወሰንና የማጽደቅ ሥልጣን ያለው እንደመሆኑ፣[52] ሁለት ጊዜ የፌደራል ፍ/ቤቶች አደረጃጀትና መዋቅር ጥናት ቀርቦለት አጽድቋል።[53] አደረጃጀቱን ማጽደቅ ብቻ ሳይሆን የሥራ መደቦቹ ዓይነትና ደረጃም የሚመዘነውና የሚወጣው በዚሁ ኮሚሽን ስለሆነ አንዳንድ መደቦች በተለይም እንደ ችሎት ጸሐፊ፣ ፋይል ከፋች፣ ትራንስክራይበርና ሌሎች በፍርድ ቤት ብቻ የሚገኙና ከፍርድ ቤት ሥራ ጋር ብቻ የሚገኛኙ መደቦችን ለማስመዘንና የሚገባቸውን ደረጃ ለማሰጠት እጅግ አስቸጋሪ ነበር። ምክንያቱም የኮሚሽኑ የአሠራር ሂደትና የግንዛቤ ጉዳይ እነዚህን የሥራ ዘርፎች በአግባቡ ተረድቶ ፍ/ቤቱ በሚፈልገውና ብቃት ያለው የሰው ኃይል ሊስብ በሚችል መልኩ ደረጃ እንዲሰጣቸው ማድረጉ ላይ ችግር ስለነበር ነው።[54]

ከዚህ በተጨማሪ በተለያየ ምክንያት በተለይም በአስፈጻሚው አካል ውስጥ የአደረጃጀት ለውጥ ሲኖርና የአስፈጻሚ አካላት መዋሃድ ወይም መክሰምን ተከትሎ ትርፍ የሰው ኃይል ሲኖር ያንን የሰው ኃይል ቦታ ለማስያዝ፣ ኮሚሽኑ ለሁሉም የመንግሥት መሥሪያ ቤቶች (ፌደራል ፍ/ቤቶችን ጭምሮ) ለጊዜው ቅጥርም ሆነ ከሌላ ተቋም የሚደረግ ዝውውርን የከለከለበትም አጋጣሚ አንደነበር ይታወሳል።[55] ኮሚሽኑ ባወጣው መመሪያ መሠረት የተፈጸሙ ቅጥሮች፣ ዝውውሮችና ዕድገቶችን በተመለከተ በየዓመቱ ከኮሚሽኑ የሚላኩ የሰው ሀብት ኦዲትና ኢንስፔክሽን (human resource audit and inspection) ባለሙያዎች ፍርድ ቤቶችን ኦዲት ያደርጋሉ፤

የተሻሻለው የፌደራል መንግሥት ሠራተኞች የምልመላና መረጣ መመሪያን ጨምሮ በርካታ መመሪያዎች ሥራ ላይ ይገኛሉ።

[52] አዋጅ ቁጥር 1064/2010 አንቀጽ 5 (1) ይመለከቷል።

[53] የመጀመሪያው በ1994 ዓ.ም ሲሆን ሁለተኛው ደግሞ የፌደራል ፍ/ቤቶች እስከአሁን እየተጠቀሙበት የሚገኘውና በ2005 ዓ.ም ጥር ወር ላይ የጸደቀው መዋቅር ነው። (ከፌደራል ጠቅላይ ፍ/ቤት የሰው ሀብት ልማትና አስተዳደር ዳይሬክቶሬት ማህደር የተገኘ መረጃ)

[54] ከፌደራል ከፍተኛ ፍ/ቤት ዳኛና ከፌደራል ጠቅላይ ፍ/ቤት የአስተዳደር ዘርፍ ዋና ዳይሬክተር (ኮርት ማናጀር) ጋር የተደረገ ቃለ መጠይቅ (ግንቦት 15 ቀን 2012 ዓ.ም ከረፋዱ 4 ሰዓት ከሩብ በጽ/ቤታቸው)

[55] ለምሳሌ የኢፌዴሪ ሲቪል ሰርቪስ ኮሚሽን በመጀመሪያ የኢፌዴሪ መንግሥት በ2011 ዓ.ም ባደረገው የአስፈጻሚ አካላት አደረጃጀት ማሻሻያ መሠረት በአዋጅ የፈረሱና የተቀላቀሉ የፌደራል ተቋማት በሥራቸው የያዟቸው ሠራተኞችን በተመለከተ በመንግሥት ተቋማት እንዲመደቡ ለማስቻል ፌደራል ጠቅላይ ፍ/ቤት ጎዳር 14 ቀን 2011 ዓ.ም በደብዳቤ ቁጥር ፕ/ሰ/ሚ30/ጠ5/14/230 በጻፈው ደብዳቤ የመንግሥት መሥሪያ ቤቶች (ፌደራል ፍ/ቤቶችን ጨምሮ) ቅጥርና ዝውውር የከለከለበትን ሁኔታ ይመለከቷል። ይህ ክልከላ ለዘጠኝ ወራት ቆይቶ በመስከረም 2012 ዓ.ም ነው የተነሳው። እስከዛን ጊዜ ድረስ ከኮሚሽኑ በምደባ የተላኩ 2 ሠራተኞች ብቻ ሲሆኑ ፌደራል ፍ/ቤቶች በጣም አስቸኳይ እና አጣዳፊ የሚሏቸውን ቅጥሮች በልዩ ሁኔታ ኮሚሽኑን በደብዳቤ እያስፈቀዱ ከቀጠሯቸው ሠራተኞች ውጪ ቅጥርም ሆነ ዝውውር ሙሉ በሙሉ አቁመው እንደነበር ይታወሳል። በተመሳሳይ ሁኔታም ሚያዚያ 14 ቀን 2012 ዓ.ም ከኮሚሽኑ በተጻፈ ደብዳቤ አሁንም የሰው ኃይል ሽግሽግ ለማድረግ በሚል ምክኒያት ፌደራል ፍ/ቤቶች አዲስ ቅጥርም ሆነ የደረጃ ዕድገት እንዲያቆሙ ኮሚሽኑ ትዕዛዝ ማስተላለፉን ይመለከቷል። (ከፌደራል ጠቅላይ ፍ/ቤት የሰው ሀብት ልማትና አስተዳደር ዳይሬክቶሬት ማህደር የተገኘ መረጃ) በተጨማሪም ከፌደራል ጠቅላይ ፍ/ቤት በሰው ሀብት ልማትና አስተዳደር ዳይሬክቶሬት የሰው ሀብት ሥራ አመራር ቡድን መሪ ጋር የተደረገ ቃለ መጠይቅ (ሰኔ 3 ቀን 2012 ዓ.ም)

የመመሪያ ጥሰት ተፈጽሟል ብለው ባመኑባቸው ክንዋኔዎች ላይ ግኝት በመመዝገብ ፍርድ ቤቱ እነሱ በሰጡት የማስተካከያና የእርምት አቅጣጫ መሠረት እንዲያስተካክል ትዕዛዝ ይሰጣሉ፡፡ በዚህም በሰጡት ትዕዛዝ መሠረት ማስተካከያ ተሠርቶ ሪፖርት ካልተደረገ እርምጃ እስከመውሰድ ድረስ ሥልጣን እንዳላቸው ከተቋሙ አስተዳደር ጋር ከተደረገው ቃለ መጠይቅ በተጨማሪ ከአዋጅ ቁ. 1064/2010 አንቀጽ 94(4)ና አንቀጽ 96(3) መገንዘብና ማረጋገጥ ይቻላል፡፡

ከዚህ በላይ በዝርዝር ለማብራራት እንደተሞከረው ፍርድ ቤቶች የድጋፍ ሰጪ የሰው ኃይላቸውን ያስተዳድራሉ የሚለው ቢኖርም፣ ይህ የማስተዳደር ሥልጣን በሌሎች ሕጎችና ተቋማት በእጅጉ ተሸራርፎ ያለና በሕገ መንግሥቱ የተቀመጠውንና ምሉዕ ሆኖ እንዲተገበር የሚፈለገውን የዳኝነት አካል ተቋማዊና አስተዳደራዊ ነፃነት መርህ በእጅጉ የሚቃረን ነው፡፡ አንድን ተቋም እንደ ተቋም መውሰድና ዕውቅና ሰጥቶ ነፃነቱን ማክበር ሲገባ፣ ለውስጥ አሠራር እንዲያመች የተፈጠረውን የድጋፍ ሰጪና የዳኝነት ዘርፍ የሥራ ክፍፍል እንደመነሻ መጠቀም፣ የፍ/ቤቶችን ነፃነት መግፈፍ ሕጋዊና ሕገመንግሥታዊ አይደለም፤ ከሥነ አመክንዮ (logic) ጋርም የሚጋጭ አካሄድ ነው፡፡

ለምሳሌ፣ የቀድሞው የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን የራሱን የአስተዳደርም ሆነ ዓላማ አስፈጻሚ ሠራተኞች በራሱ ማለትም ያለ ሲቪል ሰርቪሱ ጣልቃ ገብነት ካቢኔ በሚያወጣለት ደንብ ብቻ እንዲያስተዳድር የማቋቋሚያ አዋጁ ማለትም አዋጅ ቁጥር 587/2000 አንቀጽ 19(1)(ለ) ይፈቅድለታል፡፡ በዚህም መሠረት የሚኒስትሮች ም/ቤት በዚሁ ድንጋጌ በተሰጠው ሥልጣን መሠረት ደንብ ቁጥር 155/2000 በማውጣት የሠራተኞቹን አስተዳደር ከመደበኛው የሲቪል ሰርቪስ ሥርዓት ማውጣቱ ይታወሳል።[56] በተመሳሳይ ሁኔታም የፌደራል ዋናው ኦዲተር መሥሪያ ቤት ድጋፍ ሰጪ ሠራተኞች ከሲቪል ሰርቪስ ሥርዓት ወጥተው በራሳቸው የሚተዳደሩበት ደንብ ቁጥር 8/2010 በኢ.ፌ.ዴ.ሪ የሕዝብ ተወካዮች ም/ቤት ወጥቶላቸው በዚያ በመተዳደር ላይ ይገኛሉ፡፡

በፍ/ቤቶችም በተመሳሳይ መልኩ ይህንን ችግር ለመፍታት በቅርቡ ሁለት ረቂቅ ሕጎች ለሕዝብ ተወካዮች ምክር ቤት ቀርበዋል፡፡ አጠቃላይ የዳኝነት ተቋሙን ለማሻሻል ሁለቱ መሠረታዊ ሕግጋት ማለትም ላለፉት አሥር ዓመታት ሲሠራበት የቆየው የዳኞች አስተዳደር ጉባዔ ማቋቋሚያ አዋጅ ቁጥር 684/2002 እና ላለፉት ሃያ አራት ዓመታት ከጥቃቅን ማሻሻያዎች በስተቀር ሥር ነቀል ለውጥ ሳይደረግበት የቆየው የፌደራል ፍ/ቤቶች አዋጅ ቁጥር 25/1988 የማሻሻያ ረቂቅ ለፌደራሉ የሕዝብ ተወካዮች ም/ቤት ተልከዋል፡፡ እነዚህ ሁለት ረቂቅ ሕግጋት ካካተታቸው ለውጦችና አዳዲስ ድንጋጌዎች ውስጥ፣ የፌዴራሉ የዳኝነት አካል ዳኞችን ብቻ ሳይሆን ሌሎች

[56] በእርግጥ ለበርካታ ጊዜያት አወዛጋቢ የነበረውና በአንድ ወቅትም ለፌዴሬሽን ም/ቤት ሕገ መንግሥታዊ ጉዳዮች አጣሪ ቀርቦ ሕገ መንግሥታዊ ነው ተብሎ ጸንቶ የነበረው የደንቡ አንቀጽ 37 በቅርቡ ማለትም የካቲት ወር 2011 ዓ. ም. በድጋሚ ለሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ቀርቦ ከሕገ መንግሥቱ ጋር የሚጣረስ ድንጋጌ እንደሆነ በመስማማት የውሳኔ ሓሳቡን ለፌዴሬሽን ም/ቤት አቅርቦ ም/ቤቱም በሙሉ ድምጽ ድንጋጌውን ብቻ በመለየት እንዲሻር ወስኗል፡፡

የድጋፍ ሰጪ ሠራተኞቹንም አስተዳደር በሚመለከት ደንብ የማውጣት ሥልጣን የሚሰጡት ድንጋጌዎች ተጠቃሽ ናቸው።[57]

4.2 የፌደራል ፍ/ቤቶች የበጀትና የንብረት አስተዳደር

ሌላው ሕገ መንግሥቱና አዋጁ ካስቀመጡት መርህ ጋር የሚጣረሰው የፌደራል ፍርድ ቤቶች የበጀት ነፃነትና አስተዳደር ጉዳይ ነው። የፌደራል ጠቅላይ ፍርድ ቤት ፕሬዚደንት ለሥራ ማስኬጃና የፌደራል ፍርድ ቤቶችን ለማስተዳደር የሚያስፈልገውን በጀት በማዘጋጀት ለሕዝብ ተወካዮች ምክር ቤት በቀጥታ በማቅረብ እንደሚያስወስንና ሲፈቀድም በሥራ ላይ እንደሚያውል በሕገ መንግሥቱም ሆነ በፌደራል ፍርድ ቤቶች አዋጅ ላይ በግልጽ ተደንግጎ ይገኛል።[58] ይህ ድንጋጌ በሕገ መንግሥቱ በዚህ መልኩ እንዲደነገግ የተደረገው ፍርድ ቤቶች በጀታቸውን በቀጥታ ለምክር ቤት አቅርበው ያለምንም ውጣ ውረድ እንዲፈቀድላቸውና በዚህም የዳኝነትን ነፃነት ለማረጋገጥና የዳኝነት ሥራ በተቀላጠፈ መንገድ እንዲከናወን ይረዳ ዘንድ ታስቦ መሆኑን መረዳት ይቻላል።[59] ከላይ እንደተገለፀው በዚህ ረገድ ሀገራት የተለያየ ልምድ ያላቸው ሲሆን ከኢ.ፌ.ዲ.ሪ ሕገ መንግሥት አንቀጽ 79(6) ጋር ሊጣጣም የሚችለው የጥቅል በጀት አፈቃቀድ (consolidated fund/budget) ስልት ነው። ይህም ማለት ለምሳሌ ለኢ.ፌ.ዴ.ሪ መከላከያ ዘርፍ ከሀገሪቱ ጥቅል በጀት እንደየሁኔታውና እንደየጊዜው የሚሻሻል በመቶኛ ይህን ያህል በጀት ተይዟል እንደሚባለው በተመሳሳይ ከሀገሪቱ አጠቃላይ በጀት በጥቅሉ (በአስፈላጊነት ጥናት የተደገፈ) ለዳኝነት ዘርፉም ሊያዝ የሚገባው መሆኑን ነው።

በሥራ ላይ ያለው አተገባበር ግን ከዚህ የተለየና ከሕገ መንግሥቱም ሆነ ከአዋጅ ቁጥር 25/1988 ጋር የተጣረሰ ነው። የፌደራል ፍርድ ቤቶች የበጀት ጥያቄያቸውን ከማቅረባቸው በፊት በመጀመሪያ የበጀት ጣሪያቸው ምን ያህል እንደሆነ ከኢ.ፌ.ዲ.ሪ ገንዘብ ሚኒስቴር ትሬዠሪ ዘርፍ ይገለጽላቸዋል።[60] ከዚያም በዚሁ በተሰጣቸው ጣሪያ መሠረት የፍርድ ቤቶች የበጀት ጥያቄ በሕገ መንግሥቱና በአዋጁ መሠረት ለሕዝብ ተወካዮች ምክር ቤት ሳይሆን ለገንዘብ ሚኒስቴር ይቀርባል። ሚኒስቴሩም በሚወስነው ቀንና ቦታ የበጀት ማስረዳት (budget defense session) መድረክ ተዘጋጅቶ የፌደራል

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[57] የፌደራል ዳኝነት አስተዳደር ረቂቅ አዋጅ አንቀጽ 8(14) እና የፌደራል ፍርድ ቤቶች ረቂቅ አዋጅ አንቀጽ 23(2) እና አንቀጽ 38ን ይመለከቷል። ነገር ግን እንደ ጸሐፊው እምነት እነዚህ ረቂቅ ሕግጋትም ቢሆኑ በመካከላቸው የሥልጣን መደራረብና መጣረስ ስለሚስተዋል ሊስተካከሉ ይገባል።

[58] የኢ.ፌ.ዲ. ሪ ሕገ መንግሥት አንቀጽ 79 (6) እና የፌደራል ፍርድ ቤቶች አዋጅ ቁ. 25/1988 አንቀጽ 16 (2) /ሐ/ ይመለከቷል።

[59] የኢትዮጵያ ሕገ መንግሥት ጉባኤ ቃለ ጉባኤ ቁጥር 27 እና 28 / ጎዳር 21-24 1987 ዓ.ም፣ አዲስ አበባ ኢትዮጵያ/ ገጽ 19 እና 21 ይመለከቷል።

[60] የኢ.ፌ.ዲ.ሪ ገንዘብ ሚኒስቴር በአዋጅ ቁጥር 1097/2010 አንቀጽ 16(1)/ሠ/ እና /ሰ/ አማካኝነት በተሰጠው ሥልጣን መሠረት *የፌደራል መንግሥትን የበጀት፣ የሒሳብ አያያዝ፣ የክፍያና የውስጥ ኦዲት ሥርዓት ይዘረጋል*። በሥራ ላይ መዋሉን ይከታተላል። የፌደራል መንግሥቱን በጀት ያዘጋጃል። በተፈቀደው በጀት መሠረት ክፍያ ይፈጽማል። የበጀቱን አፈጻጸም ይገመግማል። ይህንንም ተከትሎ ሚኒስቴሩ ለሁሉም የመንግሥት ተቋማት (ፍርድ ቤቶችንም ጨምሮ) በተሰጠው የበጀት ሥርዓት መዘርጋት ሥልጣን መሠረት የተመደበላቸውን የበጀት ጣሪያ ይልካል። ማንኛውም ተቋም ከዚሁ ከተቀመጠለት የበጀት ጣሪያ በማለፍ የበጀት ጥያቄ ማቅረብ አይችልም።

ፍርድ ቤቶች አመራሮች ከሌሎች የፌደራል አስፈጻሚ ተቋማት ጋር በመሆን ያቀረቡትን የበጀት ጥያቄ ምክንያታዊነት ለሚኒስቴሩ ወይም እርሱ ለሚሰይመው አካል ማብራሪያ ይሰጣሉ፡፡ ለሚቀርብላቸውም ጥያቄ በቂና አሳማኝ መልስ እንዲሰጡ ይጠበቅባቸዋል፡፡

ይህ ሂደት ካበቃ በኋላ ሚኒስቴሩ የቀረበውን ማብራሪያና የተሰጡትን ምላሾች ተቀብሎ ካመነባቸው የቀረበውን የበጀት ጥያቄ በማሻሻል ወይም እንዳለ በመቀበል ለሕዝብ ተወካዮች ምክር ቤት ከሚቀርበው አጠቃላይ በጀት ውስጥ እንዲካተት ያደርጋል፡፡ በተቃራኒው የተሰጠውን ማብራሪያና ምላሽ ሚኒስቴሩ ካልተቀበለ የቀረበውን የበጀት ጥያቄ ውድቅ በማድረግ፣ በራሱ አስተያየትና የፌደራል ፍርድ ቤቶችን ያለፈ የበጀት አፈጻጸም መሠረት በማድረግ በቂ ነው ብሎ ያሰበውን በጀት እንዲመደብ ያደርጋል፡፡[61] ከዚህም በተጨማሪ በዚህ ሁኔታ ሕገ መንግሥቱም ሆነ አዋጁ ካስቀመጠው ውጪ በአስፈጻሚው አካል ተወስኖና ተፈቅዶ የተመደበው በጀትም ሙሉ በሙሉ በቀጥታ ወደ ፌደራል ፍርድ ቤቶች የባንክ ሒሳብ መግባት ሲገባው በሦስቱም ፍርድ ቤቶች የበጀትና ፋይናንስ ዳይሬክተሮች በየወሩ ስላለፈው ወር አፈጻጸም ሪፖርት ካቀረቡ በኋላ ብቻ ለቀጣይ ወር የሥራ ማስኬጃ በጀት ይለቀቅላቸዋል ወይም ወደ ባንክ ሒሳባቸው እንዲገባ ይደረጋል፡፡[62]

በዚህ ጉዳይ ሚኒስቴሩ ብዙ ጊዜ የሚሰጠው ምክንያት የሀገሪቱ የበጀት ቋት አንድ መሆኑንና ይህንንም ቋት ለማስተዳደር በአዋጅ ሥልጣን የተሰጠው መሆኑን ነው፡፡[63] ነገር ግን፣ አንደኛ፣ በሕገ መንግሥቱና በአዋጁ በተገለፀው መርህ መሠረት ሚኒስቴሩ ጣልቃ የመግባትም ሆነ የማዘዝ ሥልጣን የሌለው በመሆኑ፣ ሁለተኛ፣ በምክር ቤቱ እንዲፈቀድ የተባለው በጀት የግድ የተለየ ቋት የሚያስፈልገው ሳይሆን በጥቅል በጀት መልክ ከጠቅላላው የሀገሪቱ በጀት ላይ ተቆርሶ እንዲመደብ ማድረግ የሚቻል በመሆኑ በሚኒስቴሩ በኩል የሚቀርበው ምክንያት ብዙም የሚያሳምን አይደለም፡፡

ከሌሎች ሀገራት ልምድ በተጨማሪ በዚሁ በሀገራችን የክልሎችን ልምድ እንኳ ብንመለከት ለምሳሌ በኦሮሚያ ብሔራዊ ክልላዊ መንግሥት ጠቅላይ ፍ/ቤት በሥሩ የሚገኙትን የ22 የዞን ከፍተኛ ፍ/ቤቶችና የ304 የወረዳ ፍ/ቤቶች የሚያስተዳድርበት በጀት በጥቅሉ ለክልሉ መንግሥት ከሚመደበው በጀት 2.1 በመቶ ሲሆን ይህም በጥቅል በጀትነት ከክልሉ መንግሥት ያለ ፋይናንስ ቢሮ ጣልቃ ገብነት ተመድቦለት

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[61] በዚህ መልኩ የፌደራል ጠቅላይ ፍርድ ቤትን ብቻ እንደ ምሳሌ ብናነሳ ለ2010 ዓ. ም 264,327,320 ብር ተጠይቆ በሚኒስቴሩ የተፈቀደው ግን 87,730,000 ብር ነው፡፡ ለ2011 በጀት ዓመት የተጠየቀው ደግሞ ብር 171,062,104 ሲሆን በሚኒስቴሩ የተፈቀደው ግን ብር 94,034,000 ብቻ ነው፡፡ ለ2012 በጀት ዓመትም ተጠይቆ የነበረው የበጀት ብር መጠን 126,425,907 ሲሆን በሚኒስቴሩ የተፈቀደው ግን ብር 125,000,000 ነው፡፡ ለ2013 ዓ. ምም የተጠየቀው የበጀት መጠን ብር 211,425,800 ሲሆን የተፈቀደው ግን ብር 165,195,028 ብቻ ነው፡፡ (ከፌደራል ጠቅላይ ፍርድ ቤት የፋይናንስና በጀት አስተዳደር ዳይሬክቶሬት ዳይሬክተር ጋር የተደረገ ቃለ መጠይቅ፣ ሰኔ 9 ቀን 2012 ዓ.ም)

[62] ዝኒ ከማሁ

[63] ዝኒ ከማሁ

ይሠራል።[64] በሌሎች ክልሎችም ቢሆን የመቶኛው መጠን ይለያይ እንጂ የበጀት አመዳደብ ሥርዓት ከኦሮሚያ ጋር ተመሳሳይ ነው።[65]

ሌላው ከበጀትና ከፋይናንስ አስተዳደር ነፃነት ጋር ተያይዞ የሚነሳው ፍርድ ቤቶች የውስጥ ገቢያቸውን በመጠቀም ይህን ገቢ ለውስጥ አቅም ማጠናከሪያ እንዲያውሉ የማስቻል አስፈላጊነት ነው። ሌሎች ተቋማት መንግሥት ከሚመድብላቸው መደበኛም ሆነ የካፒታል በጀት በተጨማሪ ከተለያዩ ምንጮች የሚያገኟቸውን ገቢዎች ያለውን መዋቅርና የሥልጣንና የአሠራር ተዋረድ በመከተል እያስፈቀዱ መጠቀም የሚችሉበት የሕግ ሥርዓት ተዘርግቷል።[66] በዚህ ረገድ፣ ከፍተኛ የመንግሥት የትምህርት ተቋማትን (ዩኒቨርሲቲዎችን) ለአብነት መጥቀስ ይቻላል።

ፍርድ ቤቶችም በርካታ የውስጥ ገቢዎች ያሏቸው ሲሆን በተለይም በፍትሐ ብሔር ጉዳዮች ወይም ክርክሮች ላይ በፍትሐ ብሔር ሥነ ሥርዓት ሕጉ አንቀጽ 215 (1) መሠረት የሚከፈለው የዳኝነት ክፍያ (court fee) ትልቁን ድርሻ ይወስዳል።[67] የዳኝነት ክፍያ ፍርድ ቤቶች ለሚሰጡት የዳኝነት አገልግሎት የሚከፈል የአገልግሎት ክፍያ ሲሆን በፍትሐ ብሔር ክሱ ውስጥ የተመለከተው የገንዘብ መብት ጥያቄን መሠረት አድርጎ የሚወሰን ነው። በዚህም የፌደራል ፍ/ቤቶች በየዓመቱ ከዳኝነት ክፍያ ከፍተኛ ገቢ ለመንግሥት ፈሰስ ያደርጋሉ።[68] ሆኖም ግን ይህ የውስጥ ገቢ ለሌሎች ተቋማት በተፈቀደውና በተዘረጋው የሕግ ሥርዓት ልክ ለፌደራል ፍርድ ቤቶች ተግባራዊ አልተደረገም።

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[64] ከቀድሞ የኦሮሚያ ጠቅላይ ፍ/ቤት የዕቅድና በጀት መምሪያ ኃላፊ ጋር የተደረገ ቃለ መጠይቅ፣ ዓርብ ታህሳስ 23 ቀን 2013 ዓ.ም.

[65] ዝኒ ከማሁ

[66] በዚህ ረገድ የኢፌዴሪ አስፈጻሚ አካላትን ሥልጣንና ተግባር ለመወሰን የወጣው አዋጅ ቁጥር 1097/2010 አንቀጽ 14(15) እና በኢፌዲሪ መከላከያ ሠራዊት አዋጅ ቁ. 1100/2011 አንቀጽ 69(2) መሠረት የኢፌዴሪ መከላከያ ሚኒስቴር ከተለያዩ የውስጥ ምንጮች የሚያገኘውን ገቢ በሕግ መሠረት እያስፈቀደ ሊጠቀም እንደሚችል በግልጽ ተደንግጎ ይገኛል። ከዚህ በተጨማሪ ከፍተኛ የመንግሥት ትምህርት ተቋማት (ዩኒቨርሲቲዎች) መንግሥት ከሚመድብላቸው ጥቅል በጀት በተጨማሪ ሕጋዊ ሥርዓቱን ተከትለው የውስጥ ገቢ ፈንድ በማቋቋም ራሳቸው ያመነጩትን ገቢ መጠቀም እንደሚችሉ በአዋጅ ቁጥር 650/2001 አንቀጽ 67 የተደነገገ ሲሆን ይህ አዋጅ ከመጽናቱም በፊት የተለያዩ የመንግሥት ከፍተኛ የትምህርት ተቋማት የውስጥ ገቢያቸውን የመጠቀም ሥልጣን የተሰጣቸው መሆኑን ልብ ይሏል። ለምሳሌ የባህር ዳር ዩኒቨርሲቲ ማቋቋሚያ የሚኒስትሮች ም/ቤት ደንብ ቁ. 60/1992 አንቀጽ 14፣ የመቀሌ ዩኒቨርሲቲ ማቋቋሚያ የሚኒስትሮች ም/ቤት ደንብ ቁ. 61/1992 አንቀጽ 14፣ የደቡብ (የዛሬው ሃዋሳ) ዩኒቨርሲቲ ማቋቋሚያ የሚኒስትሮች ም/ቤት ደንብ ቁ. 62/1992 አንቀጽ 14 እና የጅማ ዩኒቨርሲቲ ማቋቋሚያ የሚኒስትሮች ም/ቤት ደንብ ቁ. 63/1992 አንቀጽ 14ን መመልከት ይቻላል።

[67] ከዚህ በተጨማሪ ከተለያዩ ቅጣቶች፣ ከዋስትና ገቢዎች፣ ከፍርድ አፈጻጸም ሂደቶች እንዲሁም ሌሎች ምንጮች ፌደራል ፍርድ ቤቶች ከፍተኛ ገቢ ለመንግሥት ያስገባሉ።

[68] ለምሳሌ በ2012 ዓ.ም ከፌደራል ጠቅላይ ፍ/ቤት ብቻ ከዳኝነትና ከሌሎች አገልግሎቶች የተሰበሰበና ለመንግሥት ገቢ የተደረገ የብር መጠን 16,147,003.02 (አሥራ ስድስት ሚሊዮን አንድ መቶ አርባ ሰባት ሺ ሶስት ብር ከሁለት ሳንቲም) ነው። (ከፌደራል ጠቅላይ ፍርድ ቤት የፋይናንስና በጀት አስተዳደር ዳይሬክቶሬት ዳይሬክተር ጋር የተደረገ ቃለ መጠይቅ፣ ሰኔ 9 ቀን 2012 ዓ.ም.)

ፌደራል ፍርድ ቤቶች በበጀትና ፋይናንስ አስተዳደራዊ ነፃነት ብቻ ሳይሆን በንብረት አቅርቦት ግዢም ሆነ በንብረት ማስወገድ ጉዳይ ከአስፈጻሚው ጥገኝነት የተላቀቁ አይደሉም። በዚህም ረገድ በማዕከላዊነት የንብረትም ሆነ የተለያዩ አገልግሎቶችንና ግንባታዎችን ግዢና የንብረት ማስወገድ ሥራ እንዲያከናውኑ የተቋቋሙ የመንግሥት መሥሪያ ቤቶች ያሉ ሲሆኑ እነዚህም የመንግሥት ግዢና ንብረት አስተዳደር ኤጀንሲና የመንግሥት ግዢና ንብረት ማስወገድ አገልግሎት ተቋም ናቸው።[69] ለፌደራል ፍርድ ቤቶች ከሚመደበው ዓመታዊ በጀት ውስጥ ከ60 በመቶ በላይ የሚውለው ለተለያዩ ዓይነት ግዢዎች ሲሆን፣ ይህም ዓመቱን ሙሉ የሚከናወን ተግባር ነው።[70] ሆኖም ግን ማንኛውም የግዢ ሥራዎች የሚካሄዱት (አዋጁ በሚያስቀምጠውና በአዋጁ በተሰጠው ሥልጣን መሠረት) የገንዘብ ሚኒስቴርና የግዢና ንብረት አስተዳደር ኤጀንሲ በሚያወጧቸው መመሪያዎች መሠረት በመሆኑ፣ ፌደራል ፍርድ ቤቶች ለዳኝነት አገልግሎት የሚውሉ የሎጅስቲክስ እና ሌሎች ቁሳቁሶች ወይም የምክር አገልግሎቶች ወይንም ግንባታዎች ለመግዛት ረጅምና ውጣ ውረድ የበዛበት አካሄድ ለመሄድ ይገደዳሉ።

ለምሳሌ የኤሌክትሮኒክስ ዕቃዎች እንደ ድምጽ መቅረጫ ማሽን፣ ካሜራ፣ ሲ.ሲ.ቲቪ፣ ኮምፒዩተር ዴስክ ቶፕ፣ ላፕቶፕና ሌሎች ቁሳቁሶች አጀንሲው በራሱ ጨረታ አውጥቶ ተዋውሎና ዋጋ ተምኖ ለሦስት ዓመት ውል በመፈጸም ጨረታውን ካሸነፈው ድርጅት ግዢ እንዲፈጽሙ ለሁሉም የመንግሥት ተቋማት (ፍርድ ቤቶችን ጨምሮ) መረጃውን ይልካል። ነገር ግን የተባለው ድርጅት ምንም እንኳን ጨረታውን ያሸነፈ ቢሆንም የተለያዩ ምክንያቶችን በመፍጠር ዕቃውን ወይም አገልግሎቱን ለማቅረብ ፈቃደኛ ሳይሆን ወይም ሳይችል የሚቀርባቸው ጊዜያት በርካታ ናቸው። ይህንንም ለኤጀንሲው በማሳወቅ መፍትሔ እንዲያቀርብ ሲጠየቅ ሁለተኛ ወይም ሦስተኛ ከወጡት ድርጅቶች ግዢው እንዲፈጸም ትዕዛዝ ያስተላልፋል ወይም በዚህ ሁሉ ሂደት ውስጥ የባከነው ጊዜ ከግምት ውስጥ ሳይገባ ኤጀንሲው ተቋማት በራሳቸው ጨረታ አውጥተው እንዲገዙ የመጨረሻ ውሳኔ ያስተላልፋል።[71]

በጊዜውና በታቀደው መሠረት በተለይም ለዳኝነት አገልግሎት የሚውሉ ቁሳቁሶችን በወቅቱ በማቅረብ ሂደት ላይ የሚፈጠረው ችግርና የዕቅድ መዛባት ፍትህ በመስጠት አገልግሎት ላይ የሚያስከትሉት መጓተትና ቅሬታ ግልጽ ነው። ምክንያቱም ፍ/ቤቶች የሚሰጡት የዳኝነት አገልግሎት ለጥቂት ሰዓታትም እንኳ ሊቋረጥ የማይገባው እንደሆነ ይታወቃል። ይህ አገልግሎት ቢቋረጥ በዚሁ ምክንያት ብቻ ቀጠሮዎች ይራዘማሉ፣ ባለጉዳዮች ለተጨማሪ ወጪና ጊዜ እንዲሁም ጉልበት ይዳረጋሉ፣ በማረፊያ ቤት የሚገኙ ተከሳሾች በተራዘመ ቀጠሮ ምክንያት ሊያገኙ የሚገባቸው ፍትሕ ይዘገያል። ስለዚህ ለፍርድ ቤቶች ሎጅስቲክስ እና ሌሎች አገልግሎቶች መሟላት ከሌሎች ተቋማት በላይ ቅድሚያ ሊሰጥ ወይም በራሳቸው ግዢ የሚያከናውኑበት ሁኔታ ሊፈጠር ሲገባ፣ አሁን ያለው መጓተት ከውስጥ አቅም ውሱንነት ጋር ተደምሮ ለፍርድ ቤቶች አገልግሎት አሉታዊ ነው።

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[69] የኢ.ፌ.ዲ.ሪ መንግሥት ግዢና ንብረት አስተዳደር አዋጅ ቁጥር 649/2001 ይመለከቷል።

[70] ከፌደራል ጠቅላይ ፍርድ ቤት ግዢና ንብረት አስተዳደር ዳይሬክቶሬት ዳይሬክተር ጋር የተደረገ ቃለ መጠይቅ (ሰኔ 10 ቀን 2012 ዓ.ም)

[71] ዝኒ ከማሁ

በንብረት ማስወገዱም በኩል ያለው ተመሳሳይ ችግር ነው። ከላይ በተገለፀው አካሄድ እንደ መከላከያ ባሉ ተቋማት ሕጋዊ ሥርዓት ተበጅቶላቸው የራሳቸውን ግዢ ራሳቸው እንዲፈጽሙ እና እንዲያስወግዱ ሥልጣን ተሰጥቷቸዋል።[72] ይህ የተደረገው የመከላከያ ጉዳይ የሀገር ደህንነትና ሰላም እንዲሁም የሕዝብን ፀጥታ የማስከበር ጉዳይ በመሆኑ ነው።[73] በመሠረቱ ይህ አሠራርና መነሻ ምክንያቱ አግባብነት አላቸው። በተመሳሳይ ሁኔታም፣ የሀገር ደህንነትና ሰላም እንዲሁም የሕዝብ ፀጥታና መረጋጋት ከውጭ ሊመጣ ከሚችል ወረራ ወይም ጥቃት ጋር ብቻ የተያያዘ ሳይሆን፣ ከሕግ የበላይነትና የዜጎች መብት መረጋገጥ ጋር ተያያዥነት ያለው በመሆኑ ፍርድ ቤቶችን በሚመለከት የሚነሳው የአቅምና የነፃነት ጥያቄ በቂ ምላሽ ሊሰጣቸው ይገባል።

በመሠረቱ አዲስ በተዘጋጀው የፌደራል ፍርድ ቤቶች ረቂቅ አዋጅ አንቀጽ 35(1) ላይ በግልጽ የፌደራል ፍ/ቤቶች ከመንግሥት በጀት ላይ ጥቅል የሆነ የፍርድ ቤት ፈንድ ይመደብላቸዋል የሚል ድንጋጌ እንዲካተት ተደርጓል። ይህም ከላይ በዝርዝር ለማስቀመጥ እንደተሞከረው መሠረታዊ የሆነውን የፍርድ ቤቶችን የበጀት ነፃነት ጥያቄ የሚፈታ መሆኑ ቢታመንበትም የፌደራል ፍርድ ቤቶችን የውስጥ ገቢ አጠቃቀም በተመለከተ ረቂቅ አዋጁ ያለው ነገር የለም። በተጨማሪም ከላይ ለመጥቀስ እንደተሞከረው የፌደራሉ የዳኝነት አስተዳደር ጉባኤ ማቋቋሚያ ረቂቅ አዋጅም ሆነ የፌደራል ፍርድ ቤቶች ረቂቅ አዋጅ በረቂቅነት ደረጃ ላይ ያሉ እንደመሆኑ፣ የዳኝነት ተቋሙን አስተዳደራዊና መዋቅራዊ ነፃነት ለማስጠበቅ እና ለማሰከበር ገንቢ ሚና ገና መጫወት አልጀመሩም።

4.3 ሌሎች አስተዳደራዊ ጉዳዮች

የፌደራል ፍርድ ቤቶች ከላይ ባየናቸው ዋና ዋና የሰው ኃይል፣ የበጀት፣ የግዢና ንብረት አስተዳደር ጉዳዮች ብቻ ሳይሆን በሌሎች አስተዳደራዊ ጉዳዮችም ሕገ መንግሥታዊ የሆነው ተቋማዊ ነፃነታቸው እንዲጣስ ተደርጓል። በዚህ ረገድ በዋነኝነት የሚጠቀሱት አንደኛ እንደ ተቋም የአሠራር ሥርዓት ለመዘርጋት የሚያስችል መመሪያ ለማውጣት ፍርድ ቤቶች ያላቸው ሥልጣንና፣ ሁለተኛ፣ ከአደረጃጀት ጋር ተያይዞ የሚነሳው የውስጥ አዲት ሥራን የሚመለከት ነው።

በአዋጅ ቁጥር 25/1988 አንቀጽ 16(1) ላይ በግልጽ እንደተደነገገው የፌደራል ጠቅላይ ፍ/ቤት ፕሬዚደንት በሕግ መሠረት የፌደራል ፍርድ ቤቶችን ለማስተዳደር ኃላፊ ይሆናል። ይህም የሚያሳየው የፌደራል ጠቅላይ ፍርድ ቤት አንደ አንድ ማንኛውም ተቋም መሪ የአሠራር ሥርዓት ዘርግቶ በማቀድ፣ በማደራጀት፣ ብቃት ያለው የሰው ኃይል በመመደብ፣ አመራር በመስጠትና ድጋፍና ክትትል በማድረግ የማስተዳደር ሥልጣን እንደተሰጠው ነው። ማስተዳደርን (administration) ከማቀድ ጀምሮ እስከ ድጋፍና ክትትል ማድረግ ድረስ ካሉት የሥራ አመራር (management) ሂደቶች ውጪ ማሰብ አይቻልም። ይህንን ኃላፊነቱን ለመወጣት ደግሞ የፌደራል ጠቅላይ ፍ/ቤት ፕሬዚደንት መመሪያ ማውጣት እንደሚያስፈልገው እሙን ነው።

የፌደራል ፍርድ ቤቶችን አዋጅ ቁ. 25/1988 ባሻሻለው አዋጅ ቁ. 454/1997 አንቀጽ 2(4) መሠረት የፌደራል ጠቅላይ ፍ/ቤት በሥራ ላይ ያሉ ሕጎችን ሳይቃረን አስፈላጊ የሆኑ የሥነ ሥርዓት መመሪያዎችን የማውጣት ሥልጣን እንዳለው

[72] በኢፌዴሪ መከላከያ ሠራዊት አዋጅ ቁ. 1100/2011 አንቀጽ 70ን ይመለከቷል።

[73] የኢ.ፌ.ዴ.ሪ መንግሥት ግዢና ንብረት አስተዳደር አዋጅ ቁጥር 649/2001 አንቀጽ 3(2) እና የኢፌዴሪ መከላከያ ሠራዊት አዋጅ ቁ. 1100/2011 አንቀጽ 70 እና 71ን ይመለከቷል።

ተደንግጓል።[74] ነገር ግን፣ በተግባር እንደሚታየው የፌደራል ጠቅላይ ፍርድ ቤት ከላይ በተጠቀሱት የሕግ ማዕቀፎች መሠረት አስተዳደራዊ መመሪያዎችን ለማውጣት በሚሞክርበት ወቅት ፍ/ቤቶች መመሪያ ማውጣት ሥልጣን እንደሌላቸው የሚገልጽና፣ በዚህ ረገድ ያላቸው ሥልጣን ለሌሎች የአስፈጻሚ አካላት በመላክ ማስጸደቅ እንጂ በራሳቸው የማስፈጸም ሥልጣን የላቸውም የሚል ከፍተኛ ተቋውሞ ይቀርባል።[75] በመሠረቱ ይህ ሥልጣን በቂ፣ ሁሉ-አቀፍና ግልጽ የሆነ ሕግ ማዕቀፍ የሚያስፈልገው ቢሆንም፣ ከላይ የተጠቀሱት የሕግ ማዕቀፎችን በመጠቀም እንደ አንድ ራሱን የቻለ ተቋም መመሪያ በማውጣት ሥራዎችን ማከናወን መቻልና ተቋሙን ለመምራት መንቀሳቀስ ሊያስመሰግንና እንዲታገዝ ሊያደርግ የሚችል እንጂ ሊያስወቅስ የሚገባው አልነበረም።

ሁለተኛው ጉዳይ የፌደራል ጠቅላይ ፍ/ቤት ውስጥ የሚገኘው የውስጥ ቁጥጥር (አዲት) ሥርዓትና አደረጃጀት ነው። በመሠረቱ በፌደራል ፍ/ቤቶች ብቻ ሳይሆን በማናቸውም ዘመናዊ የአስተዳደርና አደረጃጀት ሥርዓት በሚከተሉ የግልም ሆነ መንግሥት ተቋማት ውስጥ በሥራ አመራርና ተቋማዊ አደረጃጀት ሳይንስና መርህ (modern organizational management science and principles) መሠረት ሥራዎችን ለይቶ፣ ዘርዝሮና አደራጅቶ በማከፋፈልና የውስጥ የሥራ ክፍሎችን በማደራጀት መምራት የሚገባ መሆኑ ይታወቃል። ይህንንም በመከተል የፌደራል ፍ/ቤቶች በ1994 ዓ.ም. ከዚያም በ2005 ዓ.ም. ተቋማዊ አደረጃጀታቸውን አጥንተውና አዘጋጅተው ለሚመለከተው አካል በመላክ አስጸድቀው ሥራ ላይ አውለዋል። ሆኖም ግን በ2008/2009 ዓ.ም ከገንዘብ ሚኒስቴር በተላለፈ ሰርኩላር፣ ከዚያም ይኸው ሰርኩላር የኢፌዲሪ አስፈጻሚ አካላትን ሥልጣንና ተግባር ለመወሰን በወጣው አዋጅ ቁጥር 1097/2010 አንቀጽ 16(1)(ሰ) ተጠናክሮ የገንዘብ ሚኒስቴር "የፌደራል መንግሥትን የበጀት፣ የሒሳብ አያያዝ፣ የክፍያና የውስጥ አዲት ሥርዓት ይዘረጋል፣ የአፈጻጸሙን ውጤታማነት ይከታተላል፤" በሚል ተደንግጓል።

ይህን መነሻ በማድረግ፣ የፌደራል ጠቅላይ ፍ/ቤት የውስጥ አዲት ዳይሬክቶሬት ዳይሬክተርም ሆነ ሌሎች የሥራ ክፍሉ ሠራተኞች ቅጥር፣ ምደባ፣ እድገት፣ ዝውውርና የሥራ አፈጻጸም ሥራ የሚከናወነው የሥራ ክፍሉ በተቋቋመበትና በሚገኝበት በፍርድ ቤቱ መዋቅር ሳይሆን በገንዘብ ሚኒስቴር ነው። ለዚህም የተሰጠው ምክንያት ከዚህ በፊት የአንዳንድ ተቋማት የውስጥ አዲት የሥራ ክፍሎች ኃላፊዎችና ሠራተኞች የተቋማቸውን የሒሳብ አያያዝ ችግርና ጉድለት በማሳየታቸው በተቋማት የበላይ ኃላፊዎች ከሥራ እስከመፈናቀል ድረስ የሚደርስ በደልና ተጽእኖ ስለደረሰባቸው

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[74] ይህ የአዋጁ ድንጋጌ በግልጽ እንደሚያስቀምጠው ፍ/ቤቱ የሥነ ስርዓት መመሪያዎች እንደሚያወጣ ቢሆንም የሥነ ስርዓት መመሪያ ማለት ምን ማለት ነው? ምን ምን ጉዳዮችንስ ነው የሚሸፍነው? የሚሉት ጥያቄዎች አወዛጋቢነት እስካሁን ድረስ ቀጥሏል።

[75] ለምሳሌ በ2011 ዓ.ም የፌደራል ጠቅላይ ፍ/ቤት በፌደራል ፍ/ቤቶች ተፈጻሚ የሚሆን የፌደራል ፍ/ቤቶች ድጋፍ ሰጪ ሠራተኞች የሥራ አካባቢ ጤንነትና ደህንነት አጠባበቅ መመሪያ ለማውጣት እና ወጥ ተቋማዊ ሥርዓት ለመዘርጋት ባደረገው ጥረት ከቀረቡት ተቃውሞዎች አንዱ ይኸው መመሪያ ማውጣት ሥልጣን ጉዳይ ነበር። በተመሳሳይ መልኩ ፌደራል ፍርድ ቤቶች የተከሳሾችን ሥነ ሥርዓታዊ ፍትሕ ለማስከበር እንዲረዳቸው የችሎት ቋንቋ አስተርጓሚ አበል አከፋፍልን በተመለከተ ወጥነት ያለው መመሪያ በሚዘጋጅበት ጊዜ ዋነኛ የክርክር ምክንያቶች ከነበሩት ውስጥ አንዱ ይኸው የፍርድ ቤቶች በተለይም የፌደራል ጠቅላይ ፍ/ቤት መመሪያ የማውጣት ሥልጣን ጉዳይ ነው።

ይህንኑ ለመቅረፍና የኦዲት ሥራ ክፍሎችን ነፃነትና ደህንነት ለማረጋገጥ የሚል ነው።

በመሠረቱ የኦዲት ሥርዓት ከስሙ መረዳት እንደሚቻለው፣ ተቋማት የውስጥ ቁጥጥር ሥርዓት ዘርግተው የገንዘብ፣ የአፈጻጸምና የንብረት ሥርዓታቸውን ግልጽ፣ ከብክነት የፀዳ እና ውጤታማ እንዲሆን ማድረግ ይገባቸዋል። ማንኛውም የተቋም አመራር/ባለሥልጣን ወደ ኃላፊነት ሲመጣ ወይም በዚያ ከፍተኛ የአመራር ቦታ ሲመደብ ይህንን ተግባር በኃላፊነት መንፈስ እንደሚወጣ፣ እንዲሁም በተጠያቂነትና በአገልጋይነት መንፈስ እንደሚሠራ ታምኖበት ሊሆን ይገባል። ስህተትና ጉድለት በማሳየት የእርምት እርምጃ እንዲወሰድ ምክረ ሓሳብ የሚያቀርብን ሠራተኛ ወይም ኃላፊ ማበረታታትና መደገፍ፣ እንዲሁም በውስጥ ኦዲት መረጃ መሠረት እርምጃ በመውሰድ ስህተትን ማስተካከል የማንኛውም የሥራ ኃላፊ ግዴታ ነው። ነገር ግን ይህ ሳይሆን ቀርቶ ኃላፊነቱን በአግባቡ በተወጣው የውስጥ ኦዲት ኃላፊ ወይም ባለሙያ ላይ በተቃራኒው ሕገ ወጥ እርምጃ የሚወስድ የተቋም ኃላፊ ወይም አመራር ከኃላፊነት እንዲነሳ በማድረግ የተቋሙን ነፃነትና ተጠያቂነት በተገዳኝ ለማረጋገጥ የሚያስችል የአሠራር ሥርዓት መዘርጋት ይገባል። ከዚህ ግልጽ መፍትሔ ይልቅ፣ በፌዴራል ፍ/ቤቶች የውስጥ አስተዳደራዊ ሥራ ላይ የአስፈፃሚውን ጣልቃ ገብነት በሚያጎላ መልኩ አንድን የሥራ ክፍል ነጥሎ ለሌላ አካል ተጠሪ ማድረግ ሊስተካከል የሚገባው መሠረታዊ ስህተት ነው።

የፌደራል ፍርድ ቤቶች በተለይም አስገዳጅ የሕግ ትርጉም ለመስጠት ሥልጣን የተሰጠው የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በዚህ ረገድ በአንድም ሆነ በሌላ መልኩ ሚና ሊኖረው ይገባል የሚል እምነት ቢኖርም የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎቶች እስከዛሬ በሚሰጧቸው ውሳኔዎች የዳኞችን ግለሰባዊ/ውሳኔያዊ ነፃነት በሚያረጋግጥ መልኩ እንጂ ተቋማዊ ነፃነቱን በተመለከተ አቋም ሲይዙ ወይም በቀጥታም ሆነ በተዘዋዋሪ መንገድ ውሳኔያቸው ላይ ሲያንፀባርቁ ብዙም አይስተዋልም። ለዚህም እንደ ምክንያት የሚነሳው ምንም እንኳ በዳኞችም ሆነ በችሎቶቹ የፌደራል ፍ/ቤቶች ተቋማዊ ነፃነት ሊጎናጸፉ እንደሚገባ ግንዛቤው ቢኖርም፣ ፍ/ቤቶች ተቋማዊ ወይም አስተዳደራዊ ነፃነታቸው ሊረጋገጥ የሚችለው በሕግ እና በአደረጃጀት እንጂ ችሎቱ በሚሰጣቸው ውሳኔዎች ወይም ችሎቱ በውሳኔው በሚይዛቸው አቋሞች ሊሆን አይችልም የሚል እምነት ስላለ እንደሆነ ይጠቀሳል።[76]

መደምደሚያ

ከላይ በመግቢያው መጀመሪያ ላይ የተጠቀሰውና ለኢትዮጵያ ዘመናዊ ሕጎች እንደመነሻ የሚወሰደው ፍትሐ ነገሥት ብሔረ ሕግ ወቀኖናት፣ "ዳኛ ነፃነት ያለው ይሁን፤ ራሱን ለማስተዳደር ሥልጣን ያለው ያልሆነ ሰው ሌሎቹን ሊያስተዳድር አይቻለውምና" በማለት ያስቀመጠው ያለ ምክንያት አይደለም። የዳኝነት ነፃነት ሲባል የዳኞች ከማንኛውም አካል ጣልቃ ገብነት ነፃ ሆነው በሕግና በህሊናቸው ብቻ ይመራሉ ማለት ብቻውን በቂ አይደለም። በዋነኛነት እነዚሁ ዳኞች የሚሠሩበት ተቋም አስተዳደራዊ ነፃነት ከሌለውና በሌሎች በተለይም በአስፈጻሚው አካል ላይ በእጅጉ ጥገኛ ከሆኑ ሥራቸውን በአግባቡ ሊያከናውኑና ጥራት ያለው ዳኝነት በቀላጠፈ

[76] ከፌደራል ጠቅላይ ፍ/ቤት ዳኛ ጋር የተደረገ ቃለ መጠይቅ፣ ሐሙስ ታህሳስ 22 ቀን 2013 ዓ.ም.

መንገድ ሊሰጡ እንደማይችሉ እሙን ነው። በአሁኑ ወቅትም የዳኝነት ሥርዓቱን ሥር ነቀል በሆነ መልኩ ለማሻሻል በሚደረገው ጥረት ከላይ በችግርነት የተጠቀሱትን የሰው ኃይል አስተዳደር፣ የበጀትና ንብረት አስተዳደር፣ የውስጥ ቁጥጥርና ተቋማዊ አደረጃጀት ጉዳዮች ከአስፈጻሚው አካል ነፃ ሆነው፣ በሕገ መንግሥቱ ድንጋጌዎች ደረጃ የሕግ ማዕቀፉን በማሻሻል የፍርድ ቤቶችን ነፃነት ማረጋገጥ ያስፈልጋል።

ከላይ የተጠቀሱትን የዳኝነት ተቋማዊ ነፃነት መገለጫ ጉዳዮች አዲስ በሚሻሻሉትና የፍ/ቤቶችን ነፃነት በተሻለ መንገድ ያስከብራሉ በተባሉት ሁለት ረቂቅ አዋጆች ውስጥ አንድ በአንድ በመርህ መልክ ማካተት የግድ አስፈላጊ ነው። ለዚህም የሕግ አውጭው አካል ወሳኝና የማይተካ ሚና አለው። የአስፈጻሚው አካልም የዳኝነት ነፃነት ሕገ መንግሥታዊ መርህ መሆኑን በመገንዘብ እና በዴሞክራሲያዊ ሥርዓት መዳበር ረገድ ትልቁን ድርሻ እንደሚወስድ በማጤን ትርጉም ያለው ፖለቲካዊ ቁርጠኝነት ሊያሳይ ይገባል። ያንኑ ያህል ደግሞ፣ ፍ/ቤቶች ነፃነታቸውን በማስከበርና በማስጠበቅ ረገድ ጉልህ ሚና አላቸው።

በአሁኑ ወቅት አዋጅ ቁጥር 25/1988 እና ተከታዮቹን ማሻሻያ አዋጆች በሙሉ የሚተካ አዲስ የፌደራል ፍ/ቤቶች አዋጅ ረቂቅ ሰፊ ውይይትና ግብዓት ተጨምሮበት ከመጽደቅ ጫፍ ላይ ደርሷል። ይህ የሕግ ረቂቅ በርካታ አዳዲስ ምናልባትም በፍ/ቤቶች ታሪክ የመጀመሪያ ሊባሉ የሚችሉ የአሠራርና የአደረጃጀት ለውጦችን የያዘ ሲሆን በዚህ ጽሑፍ የተሰነዘሩትን አብዛኛዎቹን አስተያየቶችና የመፍትሔ ሓሳቦች ያካተተ ነው። በተለይም የድጋፍ ሰጪ የሥራ ክፍሉን አደረጃጀት በተመለከተ ይበል የሚያሰኝ እመርታ አሳይቷል ማለት ይቻላል። ቀሪዎችንም እንደ ነፃ የአዲት ሥርዓት፣ ነፃ እና ጠንካራ የበጀት አደላደልና አወሳሰን ሥርዓት፣ ከውስጥ ገቢ የመጠቀም አሠራር፣ ነፃ የግዢና ንብረት ማስወገድ እንዲሁም ንብረት አስተዳደር ሥርዓትና ሌሎችንም ጉዳዮች በቀጣይ ሊያስብባቸው የሚገቡ መሠረታዊ ጉዳዮች ናቸው።

የሕግ ማሻሻያዎቹ በሕዝብ ተወካዮች ምክር ቤት ከፀደቁ በኋላ፣ የፌዴራል ፍርድ ቤቶች በተደረጉት ማሻሻያዎች መሠረት አደረጃጀታቸውን በማስተካከልና ነፃና ገለልተኛ ፍ/ቤትን የሚመጥን መዋቅር በመዘርጋት በአዋጁ የተቀመጠውን ለውጥ በተግባር ማሳየትና ነፃነታቸውን ማስጠበቅ ይጠበቅባቸዋል። በተለይም፡-

ሀ) የፌደራል ፍርድ ቤቶች የድጋፍ ሰጪ ባለሙያዎችን አስተዳደር በተመለከተ ለፍ/ቤቱ ደረጃ የሚመጥኑ ብቃት ያላቸውን ባለሙያዎች ቅጥር፣ ምደባ፣ ዝውውር፣ ልማት፣ ዕድገት፣ ደመወዝና ጥቅማጥቅም እንዲሁም ማንኛውንም አስተዳደራዊ ጉዳዮችን አሁን አዲስ በተረቀቀው አዋጅ መሠረት ራሳቸው በሚያወጡት ደንብና መመሪያ መሠረት እንዲሆን ማድረግ፣

ለ) የፌደራል ፍርድ ቤቶች የበጀትና ፋይናንስ አስተዳደርን በተመለከተ በተረቀቀው አዋጅ መሠረት ከሀገሪቱ አጠቃላይ በጀት ላይ ጥቅል በጀት እንዲመደብ ለማድረግና በረቂቅ አዋጁ ላይ ባልተካተተውና ከላይ በምሳሌነት ለተገለፁት ተቋማት በተፈቀደው አግባብ መሠረት ፍ/ቤቶችም የውስጥ ገቢን እንዲጠቀሙ የሚያስችል የሕግ ማዕቀፍ እንዲወጣ ማድረግ፣

ሐ) ፌደራል ፍ/ቤቶች የሚያስፈልጓቸውን ሎጂስቲክስ አቅርቦት ከአስፈጻሚው አካል እጅ ነፃ በሆነ መልኩ በራሳቸው እንዲገዙና ንብረቶችንም እንዲያስወግዱ የሚያስችል ሕግ ማዕቀፍ እንዲኖር ማድረግ፣

መ) ፌደራል ፍ/ቤቶች አሁን አዲስ በተረቀቀው አዋጅ መሠረት ራሳቸውን ችለው የሚመጥናቸውንና ጥራት ያለው ቀልጣፋ የዳኝነት አግልግሎት ለመስጠት

የሚያመች አደረጃጀት በማጥናትና በቀጥታ ለተወካዮች ምክር ቤት ወይም እንዳስፈላጊነቱና ተገቢነቱ ለዳኝነት አስተዳደር ጉባኤ በማቅርብና በማስጸደቅ ተግባር ላይ እንዲያውሉ ማድረግ፣

ሠ) ፌደራል ፍ/ቤቶች እንደማንኛውም ተቋም የአሠራር ሥርዓት ዘርግተው ግልጽነትና ተጠያቂነት ያለው ወጥ አካሄድ ለማስፈን የሚያስችሏቸውን መመሪያዎች ለማውጣት የሚያስችል ሥልጣን እንዲኖራቸው ማድረግ፣

ረ) እነዚህን ከላይ የተጠቀሱ መሠረታዊ ለውጦችና ሌሎች የዳኝነት ተቋማዊም ሆነ ግላዊ ነፃነቶችን ሊያስከብሩ የሚችሉ መርሆዎች የተካተቱበትና በአጠቃላይ የዳኝነት ሥርዓቱ ሊመራበት የሚችል የዳኝነት ፖሊሲ (Judicial policy) እንዲኖር ማድረግ

አስፈላጊ ነው።

ፌደራል ፍ/ቤቶቻችን በእውነትና በሕግ ላይ ተመሥርተው፣ ትክክለኛ፣ ጥራት ያለውና፣ ቀልጣፋ ዳኝነት በመስጠት የኅብረተሰቡን እርካታና አመኔታ (public satisfaction and trust) ያገኙ ተቋማት እንዲሆኑልን በምንመኘው መጠን፣ ይህን ተግባራዊ ማድረግ ቀላል ሥራ ባይሆንም የማይቻል ግን አይደለም። የዚህ አጭር ምልከታም ዋነኛ ዓላማ ሰፊና ጥልቅ የሆነውን የዳኝነት ነፃነት በሙሉ መዳሰስና ማብራራት ሳይሆን በተለይም የፌደራል ፍ/ቤቶች ተቋማዊና አስተዳደራዊ ነፃነት አሁን ላይ ምን እንደሚመስል፣ ምንስ መምሰል እንደሚገባው ያሉት የወደፊት ተስፋዎችና ተግዳሮቶች ምን እንደሆኑ ማመላከት ነው። እስከዛሬ ይህንን ርዕሰ-ጉዳይ መሠረት አድርገው የተጠኑት ጥናቶች በአብዛኛው (ምናልባትም በሙሉ በሚያሰኝ ሁኔታ) ያተኮሩት በዳኞች ግለሰባዊና ውሳኔያዊ ነፃነት ላይ ሲሆን፣ ተቋማዊና አስተዳደራዊ ነፃነታቸውን በተለይም ከሰው ኃይል አስተዳደርና ከበጀት ጋር በተያያዘ ሰፋ ባለ መልኩ ማጥናት እና ጉዳዩን በደንብ ማብሰል ለሚፈልጉ ተመራማሪዎችና ባለሙያዎች ይህ ጽሑፍ መንደርደሪያ ይሆናል ተብሎ ይገመታል።

COMMENT

Ethiopia`s Ongoing Criminal Justice Reform: Modus Operandi, Methodology and Observations

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Abstract

This Comment relates to activities undertaken by the Criminal Justice Working Group (WG) under the auspices of the Legal and Justice Affairs Advisory Council (AC). It covers the period between 17 August 2018 and December 2020. The Comment highlights factors calling for reform of Ethiopia`s criminal justice, institutional arrangement for the ongoing legal and justice reform in Ethiopia and three principal tasks carried out by the WG. It also briefly forwards issues of concern and expression of gratitude.

Key terms

Criminal justice · Law reform · Criminal Procedure · Evidence · Prisons

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Introduction

In July 2018, Professor Tilahun Teshome, who was then in charge of putting together various law reform working groups, approached me to assume coordination of the affairs of the Criminal Justice Reform Working Group (WG) under formation. The first question I asked him was to mention names of experts who assented to join the WG. He mentioned names. I realized that

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Frequently used acronyms

AC	Legal and Justice Affairs Advisory Council
AG	Attorney General
CPEC	Criminal Procedure and Evidence Code
HoPR	House of Peoples Representatives
WG	Criminal Justice Reform Working Group

everybody else would be an expert in the field in one way or another. I would be the only soul in the team who would not be a specialist in criminal justice. The only acquaintance I had with criminal law was courses that I had taken close to twenty years ago at the Law School, leaving me with only a faint memory of the area.

My professional passion lies in elsewhere. Yet, Professor Tilahun presented the matter in a way that would give little chance for me to decline. I focused largely on the governance side of the WG, leaving my discomfort zone of criminal justice to my good colleagues. Even after working with the WG for well over two years, I still remain adamant about my smatter of knowledge of criminal justice. At any rate I have been honored to serve in this capacity. The experience has given me the opportunity to make new friends and acquaintances. That remains close to my heart forever.

1. The Need for Reforming Criminal Justice System in Brief

Dr. Abiy Ahmed, upon swearing in as a prime minister in April 2018, initiated a spate of reform measures broadly regarded as opening up the political, economic and justice arenas. His administration characterized the justice reform endeavors of its predecessor as a fiasco due primarily to lack of genuine participation of the public and pertinent professionals, vowing to rectify these alignments. Issues in Ethiopia`s criminal justice system, and violent and repressive recent past went far beyond the absence of public and expert participation pre-existing reform process. There have also been outcries regarding major defects in design, compliance and implementation of the substantive, procedural and institutional components of criminal justice of the nation as a whole with a material impact on the rule of law, institution building, human rights, democracy and federalism.

2. Mandate of the Working Group

As an endeavor to overhaul the justice sector, the Federal Attorney General (AG) set up the Legal and Justice Affairs Advisory Council (AC) composed of academics and lawyers in June 2018. The overall responsibility of the AC is to advise the Government of Ethiopia both on the design and implementation of legal and justice sector reform. In order to discharge this responsibility effectively, apart from a secretariat, the AC has formed several working groups composed of professionals drawn from law and related fields.

The Criminal Justice Working Group (WG) is one of such working groups. The WG is presently composed of 23 independent academics and practitioners drawn from law and other disciplines to provide *pro bono*

service.[1] Former judges and prosecutors, law teachers, researchers, human rights advocates, consultants, practicing lawyers, social work experts, and lawyers *cum* criminologists form part of the WG. Its formation was formally announced on August 17, 2018 with the mandate to work on assignments including initiating or reviewing draft laws which the AC might refer to it and undertaking diagnostic studies in the area of criminal justice system with a focus on the police, prosecution, judiciary and penitentiary system taking into account constitutional and international standards, state policy objectives and global good practices[2].

The WG set itself to actual work forthwith with a work plan which enabled it to organize itself to (i) sub-working groups, expand and strengthen its membership and volunteer base[3], (ii) fix a date and regular venue for regular bi-weekly meetings and share resources among members, (iii) reach a shared understanding of the mandate of the WG as embodied in the TOR and (iv) finding modalities of creating institutional linkages and reform alignments.[4]

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[1] At present the members of the WG are: Ato Abraham Ayalew, Ms. Bieza Nigussie, Ato Cherinet Hordofa, Dr. Dagnachew Assefa, Ato Eyob Awash, the late Major Fekadu Tolera, Dr. Meseret K. Desta, Dr. Muradu Abdo, Ato Nuru Seid, Ato Shebru Belete, Dr. Simeneh Kiros, Ms. Tedenekialesh Tesfa, Dr. Wondemagegn Tadesse, Ato Yoseph Amero, Dr. Marshet Tadesse, Ms. Akilile Solomon, Ms Eyerusalem Teshome, Ato Worku Yaze, Dr. Alemu Meheretu, Ato Betemariam Alemayehu, Ato Abdulkader Mohammed, Ato Kelemework Mideksa and Ato Daniel Aregawi while the volunteers are Dr. Wondowssen Demissie, Dr. Elias Nour, Ato Adi Dekebo, Dr. Abdi Jibril, Dr. Commander Demelash Kassaye, Ato Tibeso Bezabeh and Ato Desalegn Kebede.

[2] As per the TOR, the specifics of the tasks of the WG are to: adopt evaluative frameworks, which means constitutional and international standards, policy objectives and best practices relevant to its thematic area; undertake diagnostic studies on the basis of the evaluative frameworks; conduct public consultations on the findings and recommendations of the diagnostic studies; prepare draft laws (where necessary) based on recommendations emanating from the diagnostic studies and prepare background document where drafting new or revised law is thought necessary.

[3] The WG`s membership expansion initiative brought on board Dr. Marshet Tadesse, Ms. Akilile Solomon, Ms Eyerusalem Teshome, Ato Worku Yaze, Dr. Alemu Meheretu, Ato Kelemework Mideksa, Ato Betemariam Alemayehu, Ato Abdulkader Mohammed and Ato Daniel Aregawi.

[4] Personal observations, experience and quick scanning of Ethiopia`s criminal justice sector helped members of the WG learn the existence of ongoing reform initiatives in institutions such as the federal correctional administration. The WG also realized that the existence out there of vital documents (e.g., draft laws, reform reports, codes of conduct for and organizational structures) in possession of pertinent government institutions but might be difficult for the WG to get access those documents. Hence in

3. Three Core Activities and modus operandi of the WG

The WG has so far made three contributions to the reform of criminal justice system of Ethiopia.

a) *Reviewing a Draft Prison Proclamation:*

The WG`s first contribution was to overhaul a draft Prison Proclamation prepared by experts of the Federal Prison Administration (FPA), currently Federal Prisons Commission. The draft was meant to revise about fifteen years old prison law. Upon receiving the draft prison bill, the WG set up an ad hoc sub-working group to look into it.[5] The sub-working group`s cursory reading of the draft proclamation revealed it was much to be desired in terms of protecting the dignity and human rights of prisoners as well as their rehabilitation and reintegration. However, it was short of contemporary constitutional, continental and global standards and good practices regarding the treatment of prisoners and rearrangement of prison as an institution. Notably, the sub-working group realized that even if the draft presented by the FPA contained innovative ideas concerning operational and financial autonomy of the institution, it nevertheless was crafted from the perspective of easing the functions of the prison administration through custodian

order to avoid duplicity of efforts, to obtain relevant documents and information timely and to pave the way for smooth implementation of reform measures and efficient discharge of its responsibilities, the WG needed to have some kind of working relation with these institutions. This included creating mechanisms of reaching out to regional law enforcement institutions as well as pertinent professionals based in the regions. The working relation forged assumed different forms. The first form involved just writing a letter of cooperation to the institution concerned. This in particular involved in the AC Secretariat writing standing letters of cooperation, for instance, to most relevant federal criminal law enforcement institutions to provide information and pertinent documents. The second method was identifying and designating a focal contact person in each key institution to generally facilitate communication of the WG with that institution and particularly to provide it with information. The third modality, which the WG thought to be the preferred one, was creating workable institutional relation that should go beyond getting data. It envisaged a kind of relationship characterized by embedded independence –making a relevant person formally part of the WG from the outset without compromising the independence of the WG. This should perhaps be preceded by a formal briefing of the mandates of the AC and the working groups set up under it to a set of main government institutions. The WG used this last method to some degree. This method further entailed mapping stakeholders both within and outside government institutions to help align the reform initiatives in the criminal justice sector with the works of the WG and identify available resources.

[5] The main movers of this assignment were: Ato Cherninet Hordofa, Ato Abdulkader Mohammed and Ato Yalelet Teshome.

approach rather than building on an approach which ensures the human rights of prisoners, rehabilitation and reintegration.

The WG had to bring the experts and leadership at the FPA on-board in the course of changing the orientation of the draft law. Yet, that had to be accomplished cautiously without antagonizing them because it would be the FPA who would defend the draft law during the discussion and consultations in the legislative process and that would implement it upon enactment as proclamation. The WG was able to bring them on board asking them to rewrite the draft jointly. Fortunately, they were quite willing and receptive of key changes. Thus, exchange of views with the experts and top leadership of the FPA ensued quickly. In the shortest possible time the draft was transformed beyond recognition.

The WG convened two meetings to deliberate on the draft legislation. Those members of the WG who were unable to attend such meetings turned in written comments. The WG also held a consultation with the AC to enrich the draft statute. The joint deliberations made between the WG, and FPA experts and officials, between the WG and AC validated and considerably improved the draft law. Hence, those exchanges of thoughts helped the draft bill sail through the legislative process –from the AG all the way to the House of Peoples Representatives. In the end, the law has been enacted in the Federal *Negarit Gazete* as the Federal Prison Proclamation 1174 of 2019.

It is hoped that this prison legislation would serve as a stepping stone to overhaul regulations, directives and rearranging institutional structures of the federal penitentiary system. It is also hoped that regional correctional administrations would emulate it. Above all, the bill would hopefully help the entrenchment of the dignity of prisoners, their rehabilitation and reintegration.

b) *Reviewing a Draft Criminal Procedure and Evidence Code:*

The second task of the WG was to rework the draft Criminal Procedure and Evidence Code (CPEC) which is intended to revise well over half a century old Criminal Procedure Code. This time around, the WG also created an ad hoc sub-working group consisting of some of its highly knowledgeable and experienced members to revisit the draft CPEC.[6] Even if such a sub-working group took upon itself primary responsibility, every other member of the WG was tasked to go through the document for suggestions. The sub-working group members rose to the occasion. The sub-working group as

[6] Dr. Alemu Meheretu, Ato Cherinet Hordofa, Dr. Simeneh Kiros, Ato Kelemework Midkesa and Ato Yalelet Teshome were part of the special team.

well as the rest of membership reviewed the draft CPEC to check whether it has:

i. reflected constitutional principles including federalism,
ii. integrated into one coherent whole the various criminal procedure related statutes passed for the last several decades,
iii. included principles and rules of evidence relevant to criminal proceedings and provisions meant to humanize the death penalty,
iv. conformed with continental and international human rights standards and good practices,
v. incorporated issues such as reconciliation, customary criminal rules and institutions and plea bargaining to ease court burdens and ensure the efficacy and legitimacy of criminal proceedings,
vi. taken into account the need to abolish practices observed at the various stages of criminal proceedings with the effect of hampering the rights of the suspects, accused and convicted,
vii. eliminated outdated provisions and
viii. ensured completeness and clarity.

Having undertaken a preliminary review of the draft document in light of the preceding points, the WG organized a-two-day workshop in Addis Ababa for an in-depth review. The event focused broadly on the document`s conformity to international and constitutional standards, contextualization, completeness, clarity and simplicity of arrangement. The findings of this WG level workshop were incorporated in the draft document.

The in-house scrutiny was followed by another two-day Bishoftu workshop at which members of the WG, those of the AC and experts drawn from the federal police, prosecution, judiciary and penitentiary, scholars and practicing lawyers attended. Quality feedback was obtained from the event. Again the special sub-working group reflected on the findings and recommendations of the Bishoftu consultation in the draft bill.[7] This was

[7] In the course of the revision, the WG took into account feedback generated during our March 16 retreat at Jupiter International Hotel, inputs gathered from the joint discussions the WG had with the AC (12-14 April) in Bushoftu, comments and suggestions forwarded to the WG by Setaweet on May 22 and those forwarded subsequently from representative of the Ethiopian Women Lawyers Association as well as the Women and Children Affairs Department of the Office of the Federal Attorney General. The team also consulted a specialist in and long-time serving federal court judge with regard to juvenile offenders' treatment chapter of the CPC. Needless to say, that the draft benefited immensely from the mix of knowledge and experiences of members of the focal group - judicial, teaching, research, prosecutorial, court practice and legal drafting. The several expert presentations organized by the

followed by the WG`s formal submission of the reworked draft CPEC to the AG[8] which in turn submitted it to the Council of Ministers after conducting final in-house review. The Council of Ministers, which apparently deliberated on an Explanatory Note rather than on the actual draft CPEC in its entirety, sent it to the House of Peoples' Representatives (HoPR) in the summer of 2020. After the first reading of the HoPR, the draft CPEC was (on October 8, 2020) referred to the Legal, Justice and Democracy Affairs Standing Committee for further scrutiny. The HoPR will hopefully enact it in one of the upcoming sessions. In addition to HoPR`s standing committee level review, it is hoped that this last leg of the legislative process would trigger public consultations, both public and institution based, as well as provide some opportunity for the WG to further improve the document which is hoped to serve the nation for the coming decades.

c) *Conducting a diagnostic study*

Undertaking a diagnostic study is the third core accomplishment of the WG. Despite tight involvement in the above two bill making processes, the WG returned to and completed the criminal justice system assessment study. To this effect, the WG developed terms of reference.

The WG thought that the assessment study is called for good reasons, which are articulated in the terms of references. Some highlights here (of the terms of reference for the diagnostic studies) would be sensible. *Firstly*, the WG concluded that the ongoing reform should build on an inventory of criminal justice system reforms attempted so far –what has worked well, what has not, and why. That kind of comprehensive inventory dedicated exclusively to past reform initiatives as well as assessing the present state of the criminal justice system of Ethiopia is lacking. Literature review conducted by the WG reveals that past reforms and studies in the area remain piecemeal, outdated, and fragmentary and hence unable to provide a full picture of the criminal justice system of Ethiopia.

WG on the different dimensions of the criminal justice system of our country also played no fewer roles in the revision process. Hence, the synthesis of all this was injected into the latest rendition of the document meant to serve the country for the coming decades. Such synthesis has served to produce a better document in terms of inclusiveness of multifarious interests and voices, contemporary thinking in criminal procedure, and putting together fragmented rules and principles coherently in a single document and drafting technicalities.

[8] The WG received the Draft CPEC from the AG on 23 February 2019, and the WG submitted its final revised draft to the AG on June 22, 2019.

Secondly, it is necessary to identify major reform issues, their nature and scope methodically. Thus, rather than rushing to utilize one or another reform tool, the study helped identify whether a problem relates to law design, compliance with the law and court decisions or quality implementation of the law or a combination thereof to make recommendations accordingly.

Thirdly, there is a need to come up with basis for prioritizing the principal reform issues - which should come first in the order of things. *Fourthly*, it is suggested to identify reform matters which can go for implementation in the form of quick wins or those needing legislation or administrative measure or those warranting in-depth study. *Finally*, as international experience tells, opting for a diagnostic study of this sort is a wise course of action to kick-off informed law or institutional reform initiative.

The above reasons in essence boil down to the need to base the reform of the criminal justice system on empirical data, a systematic and methodologically sound analysis of its strengths and shortcomings, and a comparatively and theoretically informed decision-making with regards to what needs to be done. The diagnostic study falls under the rubric of 'Reforming the Criminal Justice of Ethiopia'. It has covered the following seven topics.

While the ultimate responsibility of the integrity of each diagnostic study lies in and credit goes to the WG as a whole, it is customary to mention the principal researchers for each topic, which is indicated in the parenthesis against each topic.

i. Evaluating the Existing Criminal Law: Proposed Subjects and Manners of Revision (Dr. Simeneh Kiros),
ii. Ethiopian Federal Police Reform in the Context of Criminal Justice (Dr. Alemu Meheretu),
iii. Assessment of the Prosecutorial Role and Functions in Ethiopia (Ato Adi Dekebo),
iv. Prison Reform in Ethiopia: Normative Gaps, Challenges in Practice, and Recommendations (Dr. Wondemagegn Tadesse),
v. Assessment of the Ethiopian Judiciary (Ato Yalelet Teshome),
vi. Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia (Dr. Marshet Tadesse) and
vii. Compensation for Human Rights Violations in Criminal Proceedings in Ethiopia: Legal and Institutional Framework (Dr. Abdi Jibril).

More than two years of data gathering ensued. The WG collected data by:

i. inviting around eight experts[9] to its different sessions to learn from their knowledge, experience and expertise as captured through documentation of their presentations and deliberations that ensued;
ii. receiving written comments from professionals[10];
iii. gathering pertinent legislation, documents, reports and literature in the field which culminated in literature review workshop and proceedings thereof[11];
iv. gathering empirical evidence through focus group discussions with key informants drawn from different criminal justice institutions[12];
v. getting information from officials and criminal justice experts during revision of the Prison Proclamation and the CPEC highlighted above;

[9] The names of and dates of presentations by the experts are as follows: Ato Mandefrot Belay (22 December 2018) spoke on the intricacies of the 2005 comprehensive justice sector reform; Dr. Elias Nour (8 December 2018) talked about findings of recent research evaluation of the comprehensive justice sector reform; Ato Worku Yaze (16 February 2019) briefed the WG the criminal law practices and processes regarding police, prosecution and courts in the Ethiopian setting; Ato Abraham Ayalew (12 October 2019) presented on recent reform initiatives in respect of juvenile justice, crime prevention strategy, etc.; Ato Abdulfetha Abdullah (12 October 2019) focused on traditional criminal justice in Ethiopia; Ato Adi Dekebo (25 May 2019) considered the prosecution as an institution tied to human rights and police oversight function, the late Major Befekadu Tolera (2 March 2019) addressed the inner sides of police crime investigation; and Ms. Loza Tsegaye from Setawit (25 May 2019) presented on gender based violence in the context of Ethiopia`s criminal justice system of today. All of these speakers shared their slides with the WG and the deliberations were recorded as minutes.

[10] For instance, the WG received written comments from Dr. Wondwossen Demissie (Addis Ababa University, School of Law) and Ato Abebe Assefa (Dean, School of Law, Gondar University).

[11] A-two-day literature review workshop was held at Getfam Hotel, August 31 and September 1, 2019.

[12] On 3 November, FGD was held at Kaleb Hotel, which brought together federal court judges, prosecutors, investigating police officers, those working at Federal Public Defenders` Office, practicing lawyers, human rights advocates and experts working at the Federal Prison Administration. The key informants were categorized into four groups and the proceedings thereof documented and used as an input for the diagnostic studies.

vi. conducting internal WG level virtual consultations on the first drafts of each of the studies[13] and
vii. convening public consultation.[14]

Having collected data and materials needed to draft the diagnostic study using methods enumerated above, the WG moved to data analysis and write-up. The write-up part of the work was carried out by seven selected members, as indicated above, drawn from the WG based on their especial expertise and exceptional dedication to the success of the reform.[15]

The special team embarked upon drafting an assessment report which covers the entire criminal justice system of Ethiopia including national and international substantive, procedural criminal laws, pertinent institutions and their practices. Institutionally the study covers the police, the prosecution, the judiciary, and the prison system; it has also included such kindred areas such as core issues of compensation for violation of human rights in criminal proceedings and translational justice. Thus, the team analyzed, synthesized and interpreted the data listed above and collected supplementary data and identified major problems in Ethiopia`s criminal justice system and recommended implementation modalities and indicated reform issues which require institutional capacity building, institutional rearrangement, enactment of legislation and taking administrative measures or conducting in-depth studies.

The underlying common assumption behind the seven research reports is that where a country`s substantive and procedural criminal laws are designed appropriately, complied with fully, and consistently and implemented as intended, the criminal justice system of such a country can meaningfully contribute to the prevalence of the rule of law, human rights and democracy. The broader finding of the research reports is that the existing criminal justice system of Ethiopia shows significant deficits in all the three counts:

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[13] The in-house consultations went as follows; 10 August 2020 was dedicated to the presentation of diagnostic studies on substantive criminal law, and compensation for human rights violations which occur during criminal proceedings; on 18 August 2020 two presentations prosecution and transitional justice were organized; on 29 September, 2020 a presentation on prison reform was conducted; on October 19, 2020 a presentation on Federal Police was made and on October 26, 2020 assessment research on Ethiopia`s judiciary was delivered.

[14] That took place on 21-22 November 2020 at Mado Hotel brought together participants from the judiciary, prosecution, prison commission, federal police, civil societies and lawyer community.

[15] Dr. Simeneh Kiros, Dr. Wondemagegn Tadesse, Dr. Marshet Tadesse, Dr. Alemu Meheretu, Ato Adi Dekebo, Dr. Abdi Jibril and Ato Yalelet Teshome.

there are (i) normative design defects, (ii) non-compliance with criminal principles and rules and court decisions, and (iii) implementation gaps. The combination of these shortcomings makes Ethiopia`s current criminal justice system below constitutional and established international human rights standards. Thus, this calls for a concerted action on the part of relevant actors to remedy these deficits by taking legislative, administrative and institutional reform measures in line with the recommendations.

Another common thread that runs through the diagnostic study is a focus on the institutional side of criminal justice. The WG assumed that identifying the deficiencies of the institutional dimensions of the criminal justice system of Ethiopia and forwarding appropriate strategies would be more relevant. The WG assumed that a robust institutional element, if put in place rightly, would take care of the normative side of the criminal justice system reform.

The diagnostic reports tend to be comprehensive which set them apart from past piecemeal studies. The reports are exclusively dedicated to exploring criminal justice issues without mixing them up with other justice reform questions. New topics such as reparation schemes for violations of human rights during criminal proceedings and transitional justice are made part of the diagnostic study.

The claim for comprehensiveness of the research reports should nevertheless be taken with a pinch of salt. The reports are far from being complete covering every conceivable dimension of criminal justice. They have inevitably left multitude of questions un-researched. Few of them can be mentioned here. Degree of police coercion, public trust in the criminal justice system, juvenile justice, crime prevention strategy, role of customary criminal justice practices, rules and institutions, the relationship between criminal justice and politics, etc are issues awaiting researchers.

4. Some observations

a) *Taking implementation of law reform with a pinch of salt:*

The AC and WG are expected to have some kind of role in the implementation of legislation or research-based reform measures that they suggest to the Government. This sounds good. Karl Marx has famously remarked that "The philosophers have only *interpreted* the world, in various ways. The point, however, is to *change* it." So far the Ethiopian criminal justice system has been researched including by the WG; the key point is to actually change it for the good of citizens, in ways that positively contribute to the prevalence of human rights, the rule of law and democracy. However, it appears that the *modus operandi* of the implementation face of the

ongoing reform arrangement has been left prominently dwarfed by preparing draft legislation and undertaking diagnostic studies. This side thus remains un-clarified.

The question of implementation is a material concern for the WG. The Prison Proclamation is out.[16] Seven diagnostic studies are finalized.[17] The CPEC is on the verge of parliamentary adoption. Hence, the business of implementation looms large and clear. Undoubtedly, implementation entails mobilization of resources to ensure that relevant officials and experts have properly digested the nature and underlying assumptions of the two bills and the recommendations emanating from the diagnostic studies. Beyond being fully understood, there is a need to check that the bills and research recommendations are being actually translated into action. The actual implementation effort doubtlessly requires knowledge of and skills in substantive and procedural criminal law, and proper understanding of the workings of the pertinent institutions; equally important in the implementation schema is disposition on the part of the WG to connect with the personnel working at criminal law enforcement institutions.

However, I believe the roles of both the AC and WG in the implementation phase of the law reform are least articulated. To my understanding, a sensible starting point for implementation of the recommendations of the studies is to develop an implementation plan to be refined and endorsed by the AC and perhaps by the leadership of core criminal justice enforcement institutions. The implementation plan should cover, on the top of recommendations emanating from the studies, the two pieces of legislation mentioned above to the enactment of which the WG contributed so much. Attempting to bring the AC and these institutions on the same wavelength by organizing a platform for them to contribute to and validate the findings and recommendations of the diagnostic studies can be one of the activities to be included in the implementation plan.

In terms of approach, I think, by any standard, the role to be played by AC through its WG is not to actually implement its own reform

[16] The WG has witnessed a sign of hope in the leadership of the Federal Prison Commission, who appear to be quite receptive of changing the attitude of the prison apparatus towards prisoners and their human rights and dignity. However, it is doubtful if there is the same level of enthusiasm for reform proposals coming from the WG on the part of expert level at the institution.

[17] The diagnostic study on transitional justice – started being implemented in its own way – hopefully would lead to revision of the proclamation that has established the Reconciliation Commission. The lead researcher of the WG regarding transitional justice is also leading the revision of such a proclamation.

recommendations and bills but to act as a facilitator, offer technical support and perhaps follow up the implementation of those reform ideas by the concerned institutions. A pushy approach to implementation of the reform measures would lead the AC to clash with institutions which tend to zealously guard their mandate. It would not be helpful.

On the contrary, sticking to a loose implementation approach which is confined to organization of seminars on the laws and diagnostic studies to the relevant institution would be less effective. Under this approach, the reform initiative would solely be confined to knowledge generation.

A middle ground could be forged which includes bringing decision makers and key experts from the relevant institutions fully on board by making them understand and embrace the suggested policy, legal and administrative reform measures. Design of the middle ground should take the following factors into account: nature and history of the particular legislative drafting process, extent of reform receptivity of the leadership of and experts at the relevant institutions and their degree of involvement in the law reform and research process sought to be implemented. For instance, the WG has attempted to involve experts from relevant criminal justice institutions, as contributors, participants and informants, in the course of conducting the diagnostic studies. However, the WG thinks that the degree of participation involved in this regard was not adequate.

The AC needs to give serious thought to the approach and content of implementation reform recommendations and legislation. If the implementation stage is taken lightly, some law reform measures could easily be undone through legislative amendment or selective implementation or by issuing non-compliance regulation or directives, or resorting to a combination of these. In doing so, the relevant authorities can invent multitude of excuses to ultimately defeat or dilute the rigors of the reform program. The forces of inertia within government bureaucracy may be stronger and more entrenched than those of change.

b) *Responsible consideration of law reform advice*

Frank discussion is needed on the level of expectation of acceptance of reform proposals forwarded by the AC through its WG. The AC is there to advice, as the name suggests. The advice on a given law reform measure may be based on well considered opinions and studies. Given this, the AC expects its advice to be taken seriously and responsibly by the Government; the government is at liberty to reject or modify the advice; but that should be done with good reasons. That should also be done transparently; continued engagement with members of WG who toil on the reform proposal is advisable.

But the WG should note that the service it provides is advising, not making a final decision. It should also note that there are so many actors in the decision making process on the government side. These organs include the AG, Council of Ministers, HoPR and an implementing institution. The reform bill might involve other critical government institutions in multi-sectoral laws, which is often the case. It is to be noted that each of them might have genuinely differing perspectives on a given law reform issue.

This issue of the WG`s expectation of acceptance on the part of the Government to whom advice is offered is raised here with a good reason. The issue arose in connection with the Draft CPEC. In the AG`s final round of internal review, several provisions the WG (included in the Draft CPEC in the form of substantive and procedural safeguards, e.g., provisions on bail and frequency of adjournments for police investigation, admissibility of evidence and plea bargaining) were thought to have been made lax in favor of the police and the prosecution implying some reform backsliding as some of these spots being very sensitive and source of public uproar in the past.

However, the extent and nature of reform retraction in connection with the Draft Code cannot be ascertained at this stage. Now the bill is with the HoPR. It is hoped that this last phase of the legislative process would not be rushed. The draft law is already triggering intense debates and consultations by various institutions within and outside the government. Some members of the WG are seen to have been involved in explaining and refining the provisions of the draft document. The HoPR has already conducted one public consultation. However, the broader issue considered here remains. I suspect the question of the need for responsible consideration of reform ideas may have arisen in connection with law reform proposals forwarded by other working groups as well.

c) *Alignment of law reform efforts*

The WG witnessed lack of reform alignments among relevant criminal justice institutions. During the period of writing the research reports of the WG, several government institutions have been conducting independent studies of their own on the very issues the WG was researching. Many non-government institutions have also ventured into a similar research activity. Multiplicity of law reform initiatives are carried out at the same time by many actors with the motive to exercise institutional mandates and competition for resources including donor funding. Non-aligned law reform efforts are driven both institutionally and externally. In the process, concepts like coordination, integration and reform alignments become rhetoric. This suggests the need to carefully examine the advisability of entertaining duplicate and parallel reform initiatives. To put it straightforwardly, it seems

to me sound to inquire whether it is feasible to centralize law reform in the setting where law reform is taking place at large scale and faster pace.

d) *Technocratic versus public consultation*

In Ethiopia`s ongoing reform, public consultation is made a perquisite in the process of any law reform proposal or a diagnostic study. Public consultation is presented as a mark which distinguishes current law reform from past exercise of the same kind. This is indeed commendable. In introducing public consultation, the idea seems that law reform initiatives should move beyond institutional and professional circles to be inclusive of ordinary citizens. Citizens have the right to be consulted in matters that affect them. Meaningful consultation has an instrumental value; it is thought to aid in the implementation of law reform.

The spirit of this movement away from technocratic approach to law reform is laudable. Yet, the concept of public consultation needs to be further explored. There seems to be lack of uniform understanding of public consultation. Under misconstrued approaches in the organization of public consultation, there is a tendency to fall back to the habit of consultation among technocrats, rather than authentic involvement of citizens. Whether we have actually moved an inch from technocratic approach to law reform craft is an issue which requires exploring.

e) *Inscribing law reform memory*

Ethiopia`s attempt to obtain inputs from experts *pro bono* cum public model is a new experiment. This paradigm has brought about a spate of foundational legislative reforms with consequential impact on human rights, democracy, democratic institutions, the rule of law and economic order. It has allowed law experts to peep the working of the government; it a potential for indigenization of law reform. It is sound to appreciate the underlying principles, values, contribution to development and legitimacy of the legal system of these law reform measures.

It is high time to engage in a proper documentation of the processes of such legislative initiatives and diagnostic studies, national, regional and international actors involved therein, and objectives pursued by each of them. Inscribing the contents of the law reform endeavour alone is insufficient although it is necessary. It is trite to say that documentation of the process and forces which took part in it is part and parcel of the legal history of the country. In the absence of documentation, individual memories would fade; documents might scatter; critical forces could disperse or some of them loose interest soon. It would lead to loss of a critical bit of the institutional memory of the legal system of the country as whole.

5. Concluding Remarks: Gratitude to Kind Souls

The ongoing law reform initiative of Ethiopia has revealed to me that there are so many legal professionals who are on the giving end if harnessed wisely. It is a country of professionals on the *giving* rather than receiving end. It is time to record gratitude to these kind souls. Several people and institutions cooperated with the WG in good spirit. Appreciation goes to colleagues who moderated sessions, made presentations, provided written suggestions.

Moreover, credit should go to institutions that funded some of our activities and most importantly colleagues who did actual research and drafted legislation. Gratitude is extended to Lawyers for Human Rights which covered communication and transportation cost for members of the write-up as well as covering expenses attendant to the two-day public consultation on the diagnostic studies. We are also grateful to the Ethiopian Lawyers Association that managed external funding that covered the cost for some of the WG's workshops. The WG remains appreciative of all other individuals and institutions that helped the realization of its work plans. The WG is eternally thankful to you all. ■

Muradu Abdo (Chair, Criminal Justice Reform Working Group)
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COMMENT

AfCFTA's Notification Options to WTO: Enabling Clause or Article XXIV Exception

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Abstract

Since the formation of the Organization of African Unity (OAU), African countries envisage regional integration to enhance trade among themselves. This effort was preceded by the formation of the sub-regional economic groups which serve as building blocks towards a larger integration. Africa Continental Free Trade Agreement (hereinafter AfCFTA) came into force in May 2019. As per the procedural requirements of the WTO, AfCFTA should be notified either to WTO's Committee on Trade and Development (CTD) if AfCFTA opts to use enabling clause exception; or it should be notified to the Committee on Regional Trade Agreement if AfCFTA opts to use Article XXIV of GATT/WTO exception. This comment examines under which exception AfCFTA should notify its integration. I argue that it is better for AfCFTA to notify its integration under Article XXIV of GATT/WTO to the Committee on Regional Trade Agreement rather than under enabling clause to the Committee on Trade and Development.

Key terms

WTO · AfCFTA · Enabling Clause · Article XXIV Exception · Procedural requirements · Substantive requirements

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Frequently used acronyms

AfCFTA	Africa Continental Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
OAU	Organization of African Unity
RTAs	Regional Trade Agreements
WTO	World Trade Organization

1. Historical Background to AfCFTA

The Organization of African Unity (OAU) was formed in 1963[1] with the view to promote regional integration among African countries.[2] Promoting unity and solidarity, to coordinate and intensify the coordination, to defend their sovereignty, to eradicate all forms of colonialism[3] and to promote international cooperation were envisaged as the main purposes of the organization.[4] In response to the economic crisis in Africa[5], in 1980 the OAU came up with comprehensive developmental strategy called the Lagos Action Plan which stressed the need to have independent economy and self-reliance that can eventually lead to the formation of the Africa Economic Community in 2000.[6]

The realization of this grand project was envisaged through the vehicle of regional economic community.[7] The OAU heads of state meeting in 1991 adopted the treaty establishing the African Economic Community.[8] As stipulated under Article 4(1) of the Treaty, one of the main objectives of the Economic Community is "to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development."[9] This, *inter alia*, envisaged abolishing tariff (customs duties imposed on import and export) and non-tariff barriers among member states of regional economic communities.[10]

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[1] The year 1960 is also called Africa's year of freedom since around 17 African countries got their independence in this Year. *See* 1960: The year of Independence available at https://www.france24.com/en/20100214-1960-year-independence (Accessed 15 April 2020)

[2] Marina Sharpe (2013), 'Organization of African Unity and African Union Engagement with refugee protection: 1963-2011', *Africa Journal of International and Comparative Law*, Vol. 21 p. 53

[3] This objective completed in 1990 when Namibia got its independence.

[4] *See* Article 3 of the Founding Charter of the Organization of African Union. The full version on the charter is available at: https://www.blackpast.org/global-african-history/primary-documents-global-african-history/founding-charter-organization-african-unity// (Accessed 15 April 2020)

[5] Jane L. Parpart (1986) , 'Women's rights and the Lagos Plan of Action', *Human Rights Quarterly*, Vol. 8, p. 180

[6] D. G. Anglin (1984), 'Independent Black Africa: Retrospective and prospect', *International Law Journal*, Vol. 39 p. 497

[7] Ibid

[8] *See*, Volume 3 of African Journal of International and Comparative Law(1991)

[9] Ibid

[10] Article 4(2)(d) of the Treaty established African Economic Community

Currently, there are several regional integration initiatives in Africa[11] which serve as a building block. However, they impeded the aspirations of integration because of multiple membership, ambitious targets and poor implementation.[12] In 2001 the Constitutive Act of the African Union (AU) was adopted by the Assembly of Heads of Government of the then OAU.[13] The Constitutive Act entered into force in the same year and the AU became fully operational and replaced the OAU.[14] One of the main objectives of the AU is to accelerate socio-economic integration of the continent.[15]

In 2012, the 18th ordinary session of the Assembly of the heads of government of the AU agreed to establish a Continental Free Trade Area and launched formal negotiation in 2015.[16] In reaching such milestone decision, the heads of government believe that the free trade area will boost trade between and among African countries. The summit concurrently adopted the Action Plan on Boosting Intra-Africa Trade (BIAT) which identified seven key clusters: trade policy, trade facilitation, production capacity, trade-related infrastructure, trade finance, trade information and factor market integration.[17]

2018 was another phenomenal year in terms of regional integration in Africa. In Kigali at the 10th extraordinary session of the AfCFTA, three separate agreements were signed: the AfCFTA, the Kigali Declaration and

[11] COMESA (Common Market for Eastern and Southern Africa), EAC (Eastern Africa Community), ECCAS (Economic Community of Central African States), IGAD (Inter Governmental and Authority on Development), CEMAC (Economic Community of Central Africa States), UEMOA (West African Economic and Monitory Union WAEMU, MRU (Mano River Union), CEN-SAD (Community of Sahel-Saharan States), ECOWAS (Economic Community of Western Africa States), SADC (Southern Africa Developmental Community), UMA (Arab Maghreb Union) and WAMZ (West African Economic Institution)

[12] Trudi Hartzenberg (2011), 'Regional integration in Africa', *WTO Staff Working Paper* ERSD-2011-14, p. 1

[13] The Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15. The can be available at http://hrlibrary.umn.edu/africa/auconst-act2001.html (Accessed 15 April 2020)

[14] Jonathan D. Rechner (2006), 'From the OAU to the AU: A normative shift with implication for peacekeeping and conflict management or just a name change', *Vanderbilt Journal of Transnational Law*, Vol. 39, p. 559

[15] Art. 3(c) and Article 17 of the Constitutive Act of the African Union , *supra* note 13

[16] *See* the official website of AU which is available at https://au.int/en/ti/cfta/about(accessed 16 April 2020)

[17] UN Economic Commission for Africa Action Plan for Boosting Intra-Africa Trade available at https://www.uneca.org/pages/action-plan-boosting-intra-africa-trade/ (Accessed 16 April 2020)

the protocol on free movement of persons, right to residence and right to establishment.[18] The agreement that established AfCFTA entered into force on 30 May 2019 after achieving the minimum number of ratification. On this submit alone, 44 out of the 55 African countries signed the AfCFTA.[19] By August 16 2019, AfCFTA was signed by all African countries except Eritrea. This makes AfCFTA the biggest regional trade agreement in the world since the establishment of the WTO in 1995.[20]

The UNCTAD envisages the positive impact of AfCFTA in welfare gain, output and employment expansion.[21] Although UNCTAD also predicts the possible losses of revenue from reduction of tariffs, in the long run AfCFTA will enhance intra-trade between and among African countries.[22] AfCFTA is expected to enhance Africa's economic integration by creating a single market for goods and services which will be accompanied by free movement of persons.[23] This process will culminate in the creation of a custom union which in turn leads to "an integrated, prosperous and peaceful Africa."[24]

2. Overview of the Nexus between Regional Trade Arrangements and WTO

The big concern from the very start was how to reconcile the interests of the developed and developing countries in one legal system[25] under the WTO,

[18] TRALAC 10th Extra Ordinary Session of the Assembly of the African Union on AfCFTA held in Kigali(2018) :https://www.tralac.org/news/article/12865-10th-extraordinary-session-of-the-assembly-of-the-african-union-on-afcfta-held-in-kigali.html (Accessed 16 April 2020)

[19] H Wasserman South Africa will be one of the biggest beneficiaries from the new African Free Trade Area (2018) available at https://www.businessinsider.co.za/sa-to-benefit-most-from-africa-free-trade-area-2018-3 (Accessed 16 April 2020)

[20] Sheila Kairu (2019), *The AfCFTA, the benefits, the TBTs Challenges, the opportunities and the role of the ARSO.* Available at https://www.arso-oran.org/the-afcfta-the-benefits-the-tbts-challenges-the-opportunities-and-the-role-of-arso// accessed 16 April 2020/

[21] UNCTAD (2018), 'African Continental Free Trade Area: Challenges and opportunities on tariff reduction', *UNCTAD Research Paper*, No. 15. Available at https://unctad.org/en/PublicationsLibrary/ser-rp-2017d15_en.pdf (Accessed 16 April 2020)

[22] Ibid

[23] Article 3(a) of the Agreement Establishing the AfCFTA

[24] Article 3(a) cum Article 3(d) of the Agreement Establishing the AfCTA

[25] Jennifer L. Stamberger (2003) , 'The legality of conditional preferences to developing countries under the GATT enabling clause'*, Chicago Journal of International Law*, Vol. 4 No. 2 p. 607

and the latter constitute 75% of the WTO membership. One of the core principles of the WTO's system is the principle of non-discrimination which is embodied under two tools: national treatment[26] and most-favoured nation standard of treatment.[2728] Article 1 of the General Agreements on Tariffs and Trade (GATT) states that "… any advantage, favour, privilege or immunity granted by any Contracting Party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[29] This being the principle, the GATT/WTO has exceptions for this rule by way of enabling clause[30] and Regional Trade Agreements (hereinafter RTAs).[31]

2.1. Enabling clause

At the inception of the GATT, there was neither an enabling clause nor Article XXIV exception; however, the need to have such clause was a bone of contention. For instance, in 1948 the USA requested waiver of the non-discrimination principle to grant duty free treatment for Pacific Island. Likewise, Italy and Austria requested waiver to grant different treatment for Libya and Papua New Guinea respectively.[32] Although there was no clear reason provided by Italy for such waiver, Austria made it clear that trade preference is an effective mechanism to enhance the economic growth of least developed countries.[33]

Furthermore, Austria made a point that developed nations are in a much better position than the free market principle to select products which suit to facilitate the economic growth of the least developed nations.[34] Although

[26] Article 3 of GATT/WTO
[27] Article 1 of the GATT/WTO
[28] For more enlightened discussion on this point please see K Bagwell and W Staiger (1997), 'Reciprocity, non-discrimination and preferential agreement in the multilateral trade system', *Working Paper 5932 National Bureau of Economic Research*
[29] Article 1 of the GATT/WTO
[30] Article 1 of Differential and More Favoured Treatment, Reciprocity and Full Participation of Developing Countries
[31] Article 24 of the GATT/WTO
[32] Ibid
[33] Elisa Patterson (2005), 'Rethinking the Enabling Clause' *Journal of World Investment and Trade*, Vol. 6 No. 5 p. 733
[34] Ibid

there were opposition and suspicion as to preference trade[35], in 1979 the member states come up with a comprehensive agreement on differential and more favoured treatment, reciprocity and full participation of developing countries commonly known as "enabling clause".[36] This was implemented through the Generalised System of Preference (GSP).[37]

The policy justification behind this clause is the need for leeway as a means to enhance the economic development of least developing countries and ultimately enhance trade liberalization.[38] The need to have different treatment for developing countries is well recognized under paragraph two of the preamble of the establishment document of WTO which indicates that positive effort should be exerted to enable developing and least developing countries to secure fair share of participation in international trade.[39] This is reaffirmed by the Doha Ministerial Declaration which states that "…we agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations."[40]

Enabling clause can be applied among developing countries on the one hand and between developing and developed countries on the other.[41]. Under Paragraph 2(a) of the enabling clause, the presence of two blocks of countries is contemplated: preference-granting countries (developed countries) and preference-receiving countries (developing countries).[42]

Generally, the type of preference given by developed countries to the developing world under the enabling clause should be generalized, non-reciprocal and non-discriminatory in nature.[43] However, the general trend

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[35] The objection for preference system was mainly based on the premise tha such exception by way of elastic interpretation may end up swallowing the rule and undermine WTO system.

[36] The full version of this agreement is available at https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm(accessed 13 March 2020)

[37] Article 2(a) of the enabling clause

[38] Stamberger, *supra* note 25 p. 733

[39] The full version of the established document is available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (Accessed 13 March 2020)

[40] Doha Ministerial Declaration (2001) November 14. The full version of this document is available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (Accessed 13 March 2020)

[41] Paragraph two of the Enabling clause

[42] Patterson, *supra* note 33, p. 739

[43] This came from the 1971 waiver decision. *See* K Moss (2006), 'The consequences of the WTO appellate body decision in EC-Tariff preference, for the African Growth

shows that developed nations usually embody conditions which the developing countries should comply to benefit from the preferential regime. For instance, many of US preference regimes to the benefit of developing countries are dependent upon conditions which range from human rights compliance to intellectual property protection.[44] And the president of the US may revoke the special benefit at any time if a preference receiving country deviates from the condition set forth.[45] This ultimately becomes contingent upon the political consideration of the preference giving country.[46]

Developing countries do not usually object such conditionality, even where various preference arrangements tend to be more of political than a legal issue. Developing countries want to keep their good relationship with donor countries and do not want to express their objection before the WTO Panel since "developing countries that receive preferences want to retain them, and developing countries that do not receive such preferences are fearful of jeopardizing their chances of receiving them in the future."[47]

However, India had challenged the condition and discriminatory preference given by the European Union alleging that it is contrary to the enabling clause. This occurred when European Union came up with five different types of generalized tariff preferences: general arrangement, special incentive arrangement for the protection of labour rights, special incentive arrangement for the protection of the environment, special arrangement for least developing countries, and special arrangement to combat drug production and trafficking.[48]

Opportunity Act and Sub-saharan Africa', *New York University Journal of International Law and Politics,* Vo. 38 No. 3 p. 688

[44] P. Sima-Eichler, J Tobin and M Busch, No no they can't take that away from me: why friends of the U.S are more likely to use the Generalized System of Preference (pdf) at 3. Available at http://www.petersima-eichler.com/uploads/5/6/5/0/56508149/why_friends_of_the_us_are_more_likely_to_use_the_gsp.pdf (Accessed 16 April 2020). *See* also R Howse (2003), "India's WTO Challenge to Drug enforcement conditions in the European community generalized system of preferences: a little known case with major repercussion for 'political' conditionality in US trade policy", *Chicago Journal of International Law*, Vol. 4 No.2

[45] Ibid

[46] K. Bagwell, C. Mavroidis and W. Staiger (2002), 'It's a question of market access', *America Journal of International Law*, Vol. 96 at 72

[47] Stamberger, *supra* note 25 p. 610

[48] *See* Article 1 of Council Regulation (EC) No. 2501/2001. This regulation is available at https://publications.europa.eu/en/publication-detail/-/publication/bd2cff5c-27c9-49ef-a6f9-3e9d41bc1d82/language-en (Accessed 16 April 2020)

The general arrangement was open for all developing countries.[49] However, the remaining tariff preferences were only for selected countries and for those that meet the different criteria;[50] and India did not benefit from drug combating and trafficking arrangement.[51] The Appellate body while reversing the finding of the panel on non-discrimination, stated that the preference giving country can determine the development, financial and trade need of developing countries based on individual country needs because to consider the need of developing countries collectively "is simply unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future.''[52]

Some argue that the enabling clause is the only applicable preference amongst developing countries. Under Paragraph 2(c), "Regional[53] or global arrangements[54] may be entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the Contracting Parties." Moreover, Paragraph 2(d) envisages "special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries."

2.2. The Exception under Article XXIV of GATT/WTO

The other exception is Article XXIV of GATT/WTO. Various negative adjectives have been employed: extremely elastic, unusually complex, full of holes, full of ambiguity, vague absurdity, contradictory even mysterious.[55]

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[49] *See* Article 7 of the Council Regulation (EC). Ibid.

[50] This is evident by the very title of the benefits. For instance special incentive for least developed countries only target least developed countries, special incentive arrangement for protection of labor rights put conditionality of labor rights to get the benefit.

[51] WTO DS246 European Communities-condition for the granting of tariff preferences to developing countries available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm (Accessed 16 April 2020)

[52] WTO Appellate body decision WT/DS246/AB/R (2004) Para. 160 page 65. The full version of this decision is available at https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdispu_e%2F246abr_e.doc (Accessed 16 April 2020)

[53] This means those RTAs formed between member countries of the same geographical location like AfCFTA

[54] This means those RTAs formed between member countries of different geographical region like EU-China

[55] Kerry Chase (2006), 'Multilateralism compromised: the mysterious origins of GATT Article XXIV', *World Trade Review*, Vol. 5 No. 1 p. 1

However, from the very start, GATT tolerates formation of customs union and free-trade areas in spite of Most Favoured Nation (MFN) principle.[56]

The USA had at an early stage, raised its concern that customs union and free trade areas arrangements need clarification.[57] The US had firmly believed that customs union has the effect of trade diversion whereas Regional Trade Agreements (RTAs) have the contrary effect, until it eventually pursued a different course as it was expressed in the following official document: [58]

> Customs Union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production, and raise planes of living. A preferential system, on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand."[59] However, USA changed its policy stance when the then Secretary of State, Foster Dulles, said "… the United States has taken a different and generally favoured attitude, however, toward customs union and free trade areas….

Under Article XXIV of GATT/WTO we have customs union and free trade area exceptions. The close reading of Article XXIV of GATT reveals that RTAs can be custom unions, free trade areas and interim agreements. Customs union is when two or more independent countries adopt a common external tariff to third parties and substantially reduce the tariff between and among themselves.[60] Free Trade Areas on the other hand emerge when two or more countries come together and substantially reduce the tariff between and among themselves with the view to facilitate trade; however each

[56] Y. Devuyst and A. Serdarvic (2007), 'The World Trade organization and regional trade agreements: bridging the constitutional credibility gap', *Duke Journal of Comparative and International Law*, Vol. 18 p. 17

[57] Chase, *supra* note 55 p. 3

[58] Circular Airgram from the secretary of state to certain diplomatic mission(1986) at 450 as quoted by Devuyst and Serdarvic, *supra* note 56, p. 19

[59] C. Wilcox (1949) , A Charter of World Trade p. 70 as quoted in Zakir Hafez (2003), 'Weak discipline: GATT Article XXIV and the emerging WTO Jurisprudence on RTAs', *North Dakoto Law Review*, Vol. 79 p. 882

[60] Article XXIV 8(a)(i) and (ii) of the GATT available at https://www.wto.org/english/tratop_e/region_e/region_art24_e.htm/ accessed 17 April 2020/ for more detailed and enlighten discussion please see P Steve(1996), *Living in sin*: *Legal integration under the EC-Turkey customs union, European Journal of International Law*, Vol. 7 No. 3

country is allowed to retain their tariff rate to third parties.[61] These two arrangements assume they will enter into force immediately after the conclusion of the agreement.[62] However, under Article XXIV, members of GATT envisage the possibility of a gap between the conclusion of the agreement and entry into force of the same agreement and this is called interim agreement.[63]

Generally speaking, Article XXIV has both substantive and procedural requirements.[64] It imposes two substantive requirements. According to the *first* substantive requirement indicated under Article XXIV(5), the general incident of tariff should not be more restrictive or higher than before the formation of RTAs; and the *second* substantive requirement obliges contracting parties to eliminate tariff with respect to "substantially all the trade between the constituent territories."[65] The procedural requirements are: *notification* and *negotiation* with third parties. Any contracting party intending to enter into customs union or free trade agreements should notify and make available necessary information to the WTO.[66]

The purpose of *notification* is to enhance transparency and assist the Committee on Regional Trade agreement examine its compliance with Article XXIV.[67] In principle, the general incident on tariff should not be higher or more restrictive than what was before the formation of RTAs for third parties.[68] However, if the RTAs increase the tariff contrary to Article II, then they should provide compensatory adjustment.[69] As envisaged under Article XXIV, *negotiation* should be conducted in "good faith with the view to achieving mutually satisfactory compensatory adjustment."[70]

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[61] Article XXIV 8(b) of GATT for more detail discussion please see P Hilpold (2003) , *Regional Integration according to Article XXIV GATT-between Law and Politics*, Max Planck Yearbook of United Nations Law

[62] Hafez, *supra* note 59 p. 886

[63] Article XXIV 8

[64] WTO (2003), *Legal note on regional trade arrangements under the enabling clause*

[65] Article XXIV (a)(i) cum (b)

[66] Article XXIV 7(a) of GATT

[67] WTO WT/L/671 Transparency mechanism for regional trade agreements(2006) available at http://ptadb.wto.org/docs/pta_transparency_rta_en.pdf (Accessed 17 April 2020)

[68] Article XXIV 5(a) cum (b)

[69] Article XXIV 6

[70] Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 available at https://www.wto.org/english/tratop_e/region_e/region_art24_e.htm/ accessed 17 March 2020/

3. The Better Option for AfCFTA's Notification to WTO

I argue that that AfCFTA will be better off if it is notified under Article XXIV of GATT/WTO to the Committee on RTAs rather than invoking the enabling clause to the Committee on Trade and Development (CTD) as highlighted in the following sub-sections.

3.1 The opportunity for WTO member and non-member states

The close reading of Paragraph 2(c) of the enabling clause reveals that such regional or global arrangement should be "…. amongst developing countries contracting parties..." The wording of Paragraph 1 and other provisions of Paragraph 2 does not have any qualification but simply discuss developing countries.

On the contrary, Paragraph 2(c) requires the member to be contracting party, i.e. a member state of GATT/WTO.[71] As per Article 31 of the Vienna Convention on the Law of Treaty (hereinafter VCLT),[72] a treaty should be construed in line with the very purpose it wants to achieve. The prohibition of non-WTO members to join and form RTAs under the enabling clause is very consistent with the purpose of enabling clause as reflected under Paragraph 1.[73]

This presupposes all members of such arrangement to be members of the WTO at the same time.[74] Among members of the AfCFTA, there are a lot of non-WTO members, such as Ethiopia, and this reality cancels out the possibility of registering under the enabling clause. However, under Article XXIV of the WTO, RTAs can be formed between members and non-member states of the WTO. Paragraph 4 of Article XXIV states that "… Free Trade Area should be to facilitate trade between constituent territories. …" Unlike the enabling clause, there is no qualification that the arrangement should be between contracting parties (i.e., between WTO members).[75]

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[71] Louise E. Mossner (2014), 'The WTO and regional trade: a family business? The WTO compatibility of regional trade agreements with non-WTO-members', *World Trade Review* p. 646

[72] Article 31(2) of VCLT state that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes '24' at 309

[73] C. Won-Mon and L. Youg-Shik (2012), 'Facilitating preferential trade agreement between developed and developing countries: a case for 'enabling' the enabling clause' *Minnesota Journal of International Law*, Vol. 21 No. 1 p. 7

[74] Ibid

[75] *See* the above discussion on enabling clause

Furthermore, as per purposive rule of interpretation, the RTAs envisaged under WTO are meant to enhance regional grouping which is believed to be the building block for further trade liberalization. Thus, this is possible when RTA is formed between member and non-members.[76] This is well supported by the practical application in the sense that countries such as the USA, China and Russia conclude various RTAs with non-WTO member states which is notified under Article XXIV.[77] European Union is also a party to 11 RTAs with non-WTO members.[78]

It is to be noted that even the most vehement objector of RTAs between member and non-WTO member states, Mossner, accepts the fact that most of the countries which are yet to accede to WTO (around 50 countries) are developing countries and hence concluding RTAs with non-WTO member states will enhance their economy and bring trade liberalization in the long run.[79] One can thus safely conclude that AfCFTA should notify under Article XXIV rather than the enabling clause.

3.2 The features of tariff rate reduction under the two options

As per Paragraph 3 of the enabling clause exception, for such arrangement to be qualified under enabling clause, the member states should eliminate or reduce the tariff rate between themselves. In comparison to substantial elimination of all trade barriers requirements under Article XXIV,[80] the requirement under enabling clause is very loose in such a way that reduction of tariff even in a *de minimis* fashion will qualify as tariff reduction. To put it differently, this arrangement does not fully enhance trade liberalization. For instance, under South Asian Free Trade Agreement (SAFTA)[81], which was notified to WTO under enabling clause for its establishment, reduction of only 0%-5% tariff within ten years is envisaged.[82]

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[76] Marceau and others (2001), 'When and how is a regional trade agreement compatible with the WTO?' *Legal Issues of Economic Integration*, Vol. 28, No.3 p. 303

[77] Mossner, *supra* note 71 p. 635

[78] The main reason is that such arrangement will help EU to reduce tariff, and it is believed to be a good completion strategy in the major market. *See* European Commission annex to global Europe competing in the world: a contribution to the EU's growth and job strategy (2016) at 16

[79] Id. p. 635

[80] Article 24 of GATT

[81] The member states are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. This information is available at https://aric.adb.org/fta/south-asian-free-trade-area (Accessed 13 May 2020)

[82] The full version is available at https://aric.adb.org/fta/south-asian-free-trade-area (Accessed 13 May 2020)

On the other hand, the agreement between the government of the Islamic Republic of Pakistan and the Government of Malaysia for a closer Economic Partnership was notified to WTO under enabling clause, and it shows insignificant tariff reduction.[83] On the contrary, one of the substantive requirements under Article XXIV is that member parties should eliminate substantially all trade barriers between themselves but without defining what "substantially all trade'' means. Article XXIV[84] does not say anything about the threshold regarding what is meant by 'substantial'. In the absence of a clear-cut figure or conceptual framework in the WTO, we are compelled to look for the answer from other areas.

As per Article 38(d) of ICJ Statute, decision of court is one of the sources of international law.[85] Accordingly, the appellate body under Turkey-Textile case ruled that "substantially all trade is not the same as all trade and also is something considerably more trade than some trade."[86] The proposed definition under the Treaties that established EEC and Atomic Energy Community (commonly known as ECT) state that "a free trade should be considered as having achieved for substantially all the trade when the volume of liberalized trade reached 80% of total trade."[87]

Unlike many other similar concepts,[88] one typical feature of Free Trade Areas like that of AfCFTA is that member states should abolish all types of trade barriers while they can still maintain external tariff to non-member states.[89] Although there is no clear-cut answer to what is 'substantial', the expectation of tariff reduction under Article XXIV is clearly higher than what the enabling clause envisages. Under Article 4 of the AfCFTA establishment treaty, it is indicated that one of the objectives is to

[83] The full version of this agreement is available at https://wits.worldbank.org/GPTAD/PDF/archive/Malaysia-Pakistan.pdf (Accessed 13 April 2020)

[84] Please see Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. The full version of this document is available at https://www.wto.org/english/docs_e/legal_e/10-24_e.htm (Accessed 14 April 2020)

[85] Please see ICJ statute which is available at https://www.icj-cij.org/en/statute (Accessed 17 July 2020)

[86] Turkey-restrictions on imports of textile and clothing products WT/DS34/AB/R(22 October 1999) Paragraph 48. The full version of the decision of appellate body is accessible at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm (Accessed 14 April 2020)

[87] Won-Mog and Yong-shik, *supra* note 73 p. 3

[88] Generally speaking there are five types of regional trade preferences: preferential arrangement, free-trade area, custom union, economic union and political union

[89] Marceau and others, *supra* note 76

progressively eliminate tariff and non-tariff barriers which can eventually lead to the formation of customs union. To enhance trade liberalization by removing tariff barriers 'substantially' and to realize this objective, AfCFTA should be notified under Article XXIV than the enabling clause.

3.3 Membership opportunities for least developed and other states

The rationale behind Paragraph 2(c) of the enabling clause is to enhance protection for a specific group, i.e., less developed countries.[90] Some argue that the phrase less-developing countries under Paragraph 2(c) of the enabling clause can be interpreted as synonymous with developing countries.[91] However, this argument is not plausible because the enabling clause is the exception to the general rule, and it should be construed very narrowly.[92] Thus, all members of enabling clause arrangement should be least developed countries. This implies that if one of the member states is not among the least developed countries, the agreement will not qualify under the enabling clause, even if all of the member states are members of the WTO.

As things stand, the Republic of South Africa,[93] for example, which has signed AfCFTA,[94] does not seem to fall under this category of least developed countries. On the other hand, there is no such requirement under Article XXIV exception. Therefore, AfCFTA should be notified under Article XXIV exception because developed, developing and least developing countries can, without distinction, utilize Article XXIV exception.

3.4 Binding commitment beyond mere aspiration

The first two lines of paragraph 2(c) of the enabling clause reveal that contracting parties enter into such arrangement "for the mutual reduction or elimination of tariff." This is more of aspiration than obligatory, in the sense that the main thing expected from the contracting parties is their intention to

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[90] Won-Mog Choi (2005), 'Legal Problem of Making Regional Trade Agreements with non-WTO Member States', *Journal of International Economic Law,* Vol. 8 p. 855

[91] Ben Sharp (2010) , 'Comparing preferential trade agreement scrutiny under GATT Article XXIV and the enabling clause: Lessons learned from the Gulf cooperation council', *Manchester Journal of International Economic Law*, Vol. 7, No. 1 p. 61

[92] On the narrow rule of interpretation, *see* H Lauterpacht (1949), 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties', *British Yearbook of International Law*, Vol. 26

[93] *See* https://www.worldbank.org/en/country/southafrica/overview (Accessed 17 April 2020)

[94] For more information about this please see https://www.tralac.org/news/article/13216-sa-signs-african-continental-free-trade-area-agreement.html/ accessed 18 April 2020/

reduce or eliminate tariff between and among themselves.[95] In other words, although the application is arduous, such arrangement can still be qualified under the enabling clause.

However, such arrangement will not benefit AfCFTA because what is needed is a binding commitment rather than mere aspiration. On the contrary, Article XXIV(8)(b) embodies strongly obligatory words such as "substantially all the trade". I argue that the best option for Africa that has leaders and tendencies who are very protectionist, is by putting in place binding and mandatory provision rather than aspiration clause. Therefore, the viable option for Africa, from a pragmatic point of view, is notifying AfCFTA to WTO under Article XXIV rather than enabling clause.

3.5 Rules of origin as protection against trade deflection

The last line of Paragraph 2(c) of the enabling clause requires member states to reduce or eliminate non-tariff measures on "products imported from one another." This provision does not have any indication of rule of origin, and this gap will be counterproductive because it exposes member states to problems such as tariff gap and trans-shipment/trade deflection.[96]

If a number one coffee producer company in a non-member state exports its product to the subsidiary company in a member state which maintains lower tariff for non-member states, the subsidiary company in a non-member country will, in effect, export the coffee without adding any value to countries which have reduced their tariff for member states. The difference between the tariff to be paid for a given product had there been rules of origins and the tariff actually paid is called *tariff gap* and the fact that a company in a non-member state accesses a market through the instrumentality of a member state of RTAs is called *trans-shipment* or *trade deflection*. Thus, if AfCFTA is registered under the enabling clause, it can be susceptible to free riding which adversely affects its effectiveness.

On the other hand, Article XXIV seems to have provisions which deal with rules of origin.[97] Generally, under the WTO system, ROs can be

[95] *Supra* note 93 at 64

[96] William E. James (2010), 'Rules of origin in emerging Asia Pacific Preferential trade agreements: will PTAs promote trade and development?' *Working paper series No. 19 Asia-pacific Research and Training Network on Trade,* p. 3. Also *see* N Harilal and L Beena (2003) , 'The WTO agreement on rule of origin: implications for South Asia', *Working Paper* No. 352, p. 12

[97] J. Garray and D. Lombaerde (2005) , 'Preferential rules of origin: EU and NAFTA regulatory Models and the WTO', *Journal of World Investment and Trade*, Vol. 6 p. 990

broadly classified into non-preferential and preferential ROs. Non-preferential ROs are designed by each member country of the WTO but not party to RTAs whereas preferential ROs are those which emanate from RTAs.[98] Although there is no explicit mention of ROs under Article XXIV of the GATT, a close reading of Article XXIV(5) and (8) indicate the implicit recognition of the concept. Paragraph 8(a) makes reference to "... products originating in such territories. ..." Moreover, the words "... broken down by WTO country of origin....'' in Paragraph (5)(2) are relatively clear. Thus, notification of AfCFTA under Article XXIV can address the problem of trade deflection or trans-shipment.

4. Concluding Remarks

The need to have regional economic integration was one of the pressing demands to bring economic development and enhance intra-Africa trade since the formation of OAU. This was well reflected under the OAU Constitutive Act. In 1991, the OAU established the African Economic Community as a suitable platform for the formation of various sub-regional economic blocks. However, the proliferation of building blocks, poor implementation and double even triple membership have impeded its effectiveness. After the formation of AU, however, African countries have expressed their commitment to form the largest continental free trade area in the world (effective May 2019) although its effectiveness is yet to be seen.

The AfCFTA is meant to operate under the umbrella of the WTO and hence should comply with both the substantive and procedural requirements of the WTO. Although the WTO legal system upholds the principle of non-discrimination in international trade, there is also some 'breathing space' by way of exceptions. The most notable exceptions are the enabling clause and Article XXIV exception that deviate from the principle of Most-favoured-Nation Treatment and established free trade areas. With the view to secure transparency and compliance, one of the procedural requirements is that the contracting parties should notify and provide relevant documents to WTO's Committee on Trade and Development or to WTO's Committee on Regional Trade Agreement. Although AfCFTA can be notified to WTO in either exceptions, it will be beneficial to make the notification under Article XXIV exception to the Committee on Regional Trade Agreement. ■

[98] Ibid

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MIZAN LAW REVIEW

ST. MARY'S UNIVERSITY

Cultural Problems in Research and Publications

Source:
Reform Document on Legal Education and Training in Ethiopia (2006) § 2.4.1/A

1. Lack of research, reading, and writing culture
   - Complacence with our work merely as teachers.
   - No sense of urgency about the need to engage in research and turn up research products.
   - No '*publish or perish*' attitude.
   - No attempt to work beyond the positive laws.
2. Lack of Institutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. Lack of team spirit for Research and Publications
   - Among staff members;
   - Between staff and students;
   - Lack of collaboration among institutions.
4. Lack of innovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. Lack of tradition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
7. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

Mission of law schools

Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

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