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The Unsettled Concept of Performance Bond in Ethiopia: Practical Problems in Determining the Scope of the Obligee's Right to Compensation

Gidey Belay Assefa*

Abstract

Performance bonds, most of the time, are issued to cover a small percentage of a contract price. When damage occurs, there may be a remaining damage, in excess of the performance bond, that may need to be otherwise accounted for. This raises the question of whether or not it is possible to claim the remaining amount from the principal debtor. In Ethiopia, the Federal Supreme Court Cassation Bench has passed two contradictory decisions. One is found in file number 47004, passed in 2012, which held that performance bonds are suretyship which in effect means that the obligee is entitled to claim full reparation to the stated amount in the performance bond from the issuer/surety, and the remaining from the principal debtor. The second decision is found in file numbers 69797 and 98348 which held that a principal debtor is liable and the obligee is entitled to claim only to the extent of the performance bond. This decision adversely impacts the obligee by limiting the amount of compensation that he may claim from the principal debtor. However, the decisions are contradictory and lack detailed factual and legal analysis. This article, by adopting a doctrinal research approach, examines the law and performance bonds of selected Ethiopian banks and insurance companies in order to see whether a performance bond limits the liability of a principal debtor or not. The article concludes that the limit of liability of a principal debtor and the right of an obligee depends on the terms of the underlying contract. Thus, performance bonds do not limit the liability of a principal debtor towards the obligee.

Keywords: Performance bond, Surety bond, Surety, Issuer, Principal debtor, Obligee

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1. Introduction

A performance bond is a contractual assurance by an “issuer” to an owner, also known as an “obligee,” of a project.¹ Performance bonds are, most of the time, issued to secure the obligee when the principal debtor (who is usually a contractor, seller or service provider) fails to discharge his obligations under the main contract.² The performance bond is, therefore, issued to support the performance of the main contract.

Most big construction contracts, multi-million purchasing agreements, and especially government contracts, involve the utilization of performance bonds. In Ethiopia, in government procurement agreements, it is mandatory to furnish performance bonds.³ In the private sector, however, such bonds are voluntarily furnished by the parties. Despite the prevalent use of performance bonds, they are the least governed by Ethiopian law(s). Except for the appearance of the name on few laws, the term performance bond has never been defined in Ethiopia.⁴ The absence of clear laws that clarify and govern issues pertaining to performance bonds has made it difficult to answer the question as to whether or not a performance bond limits the liability of a principal debtor towards the obligee or not. Moreover, it is not known what a performance bond is and whether it is different from a suretyship, insurance and other similar contracts.

¹Ahmed Hassan and Hamimah Adnan, ‘The Problems and Abuses of Performance Bond in the Construction Industry’, (IOP Conference Series: Earth and Environmental Science, 2018)

² Darren A. Prum and Lorilee A. Medders, ‘The Bonds That Tie: Will a Performance Bond Require that a Surety Deliver a Certified Green Building?’ (2012) 9 Hastings Business Law Journal 5.

³Federal Public Procurement Directive, Ministry of Finance and Economic Development (2010). Article 16.25.1 states that “[e]xcept for procurements executed by means of request for quotation or procurement of rental services, a Public Body has to require a supplier under contract with it to furnish performance security in any procurement.”

⁴ It appears in the Federal Public Procurement and Property Administration Proclamation, 2009 Proc. No. 649/2009, Fed. Neg. Gaz., Year 15, No.60; see also the Federal Public Procurement Directive, Ministry of Finance and Economic Development (2010).

Globally, there are different approaches in naming performance bonds. Some jurisdictions name them as contracts to be governed by the terms they outline, as well as general contract laws.⁵ Some of them categorize them as surety while others consider them to be both surety and documentary guarantees like a letter of credit depending on the wording of the performance bond.⁶ In Ethiopia, some cassation decisions have labeled performance bonds as surety.⁷ Proper characterization of performance bonds helps to determine the applicable law, which should be used to address issues that may arise in relation to them. The primary issue that this paper tries to address is whether or not a performance bond limits the total amount of damages that an obligee may claim from the principal debtor. The answer to this question requires understanding the meaning of a performance bond, and differentiating a guarantee, from an insurance policy.

In order to address the issue, thus, this article is framed into six parts. The first part gives general introduction about performance bond and related legal issues. The second part highlights the concept of performance bond in general. The third part, under the title types and nature of performance bonds, shows how far a performance bond is similar to or different from surety, an insurance policy and an indemnity agreement. The fourth part deals with the extent of liabilities of an issuer and a principal debtor in a performance bond. The fifth part is about the fate of an obligee who incurred damage greater than the amount for which performance bond is furnished. Finally, the last part offers a conclusion.

2. The Concept of a Performance Bond

A performance bond is a form of security issued to secure the performance of a

⁵Josepf Dalby, 'A Performance Bond, Deconstructed' (2010)11 Bus. L. Int'l105.

⁶ibid

⁷ See, for example, Ethiopian Insurance Corporation vs. Bale Rural Development Organization, Volume 13, File Number 47004 (Federal Supreme Court Cassation Bench, 2012).

contract.⁸ Surety Association of Canada defines performance bond as “[a] ... bond that guarantees that the bonded contractor will perform its obligations under the contract in accordance with the contract’s terms and conditions”.⁹ It is a common custom that owners, buyers, and employers may require different forms of performance securities to ensure the performance of the contract by their contractors, sellers, or employees respectively. Among the common securities are cash, cheque, insurance, and performance bonds. A performance bond is also a tripartite arrangement whereby one party, X, guarantees the performance of the contractual obligations of another party, Y, to a third party Z. If Y “fails to perform” its obligations under the concerned contract, X is responsible for paying the aforementioned amount to Z.¹⁰ This creates a tripartite relationship between the principal debtor, the obligee, and the issuer.¹¹

The purpose of a performance bond is two-fold. First, it provides security for the obligee that the contract will be performed in accordance with its terms and conditions of the contract, and that the issuer will compensate the former when the principal debtor fails to perform its obligations.¹² Secondly, performance bond establishes a third party, issuer, which can verify that the principal debtor is qualified to perform the contract.¹³ Issuers such as banks, insurance companies and surety bond companies do not issue a performance bond without evaluating the “three Cs” of the principal debtor: the “Capital”, “Capacity” and “Character”.¹⁴ The

⁸ Maureen D. Carman, *Regulatory and Transactional Bonding: A Primer on Surety Bonding for the Mineral Lawyer* (EMLF, USA, 1997) 235.

⁹ Surety Association of Canada <<https://www.suretycanada.com/SAC/Surety-Bonds/Contract-Surety/Performance-Bonds/SAC/Surety-Bonds/Performance-Bonds.aspx?hkey=3f931cd0-ada6-4735-9e17-c1fac2ff5f81>> accessed on August 25, 2021.

¹⁰ In some jurisdictions, guarantors may takeover the duties of the principal debtor instead of paying money.

¹¹ Marilyn Klinger et al., *Bond Requirements* (American Bar Association 2017) 270.

¹² Lorena Myers and Fazil T. Najafi, ‘Performance Bond Benefit-Cost Analysis’ (2011) 3 Journal of Transportation Research Board 1.

¹³ Ibid

¹⁴ Ibid

assumption is that a person who can obtain a performance bond is qualified to perform the contract. However, once a contract is signed and the principal debtor is found to be unable to perform the contract, the obligee will have the chance to recover its damage at least to the extent of the performance bond which is issued by a third party. The performance bond might not, however, be enough to cover the damage that the obligee sustains.

A performance bond is a contract.¹⁵ As such, parties are free to determine the scope and nature of the performance bond, or save for some mandatory provisions of the law. For example, in Ethiopia, the amount of a performance bond as envisaged under the Federal Public Procurement Directive shall be at least 10% of the total contract price.¹⁶ In cases of government procurement contracts, it, thus, means a performance bond to be furnished cannot be less than 10% of the total contract price. As performance bonds are agreements, parties are at liberty to determine the scope of the bond and its validity period. Once the obligations of the main contract are performed, the performance bond is returned to the principal debtor.¹⁷ A performance bond may also be returned if the obligee believes that no damage has been incurred as a result of the principal debtor's non-performance.¹⁸ However, if the principal debtor fails to perform and the performance bond has been called, the issuer will be indemnified by the principal debtor to the extent that it has incurred.¹⁹

A performance bond is not defined anywhere under Ethiopian laws. The Federal

¹⁵ Lawrence R. Moelmann, et al., the *Law of Performance Bonds* (American Bar Association 2009) 5.

¹⁶ Federal Public Procurement Directive, Ministry of Finance and Economic Development (2010), Article 16.25.2.

¹⁷ Federal Public Procurement Directive, Ministry of Finance and Economic Development (2010).

¹⁸ For example, Article 16.25.4 of the Federal Public Procurement Directive states that "notwithstanding the provision of Article 16.25.3 above, the performance security may be returned to the supplier where the Procurement Endorsing Committee ascertains that the noncompliance of the supplier does not affect the interest of, or entail additional cost on the Public Body and is not due to the fault of the supplier".

¹⁹ Klinger, et al. (n 11) 270.

Public Procurement Proclamation as well as the Directive thereunder use the word “procurement security” and “state performance bond” as a means of performance security.²⁰ Under these laws, performance security can be provided in the form of cash, a cheque certified by a reputable bank, bank guarantee, letter of credit, conditional insurance bond, or indemnity insurance as the case may require.²¹ Small and microenterprises are required to provide a letter of guarantee from the body organizing or overseeing them. Insurance companies may use their reserve in the National Bank as a performance security.²² Despite the absence of definition and detailed provisions, performance bonds are widely used in Ethiopia. Government projects as well as private transactions demand performance bonds issued by banks or insurance companies. In practice, most construction companies are required to provide performance bonds after they win a bid. Public universities and other institutions also require a performance bond from equipment suppliers.

3. Types and Nature of Performance Bonds

As an extension to the discussion on the concept of a performance bond, this section identifies the two types of performance bonds: the conditional and unconditional bonds. One of the main issues that brought a problem of understanding the concept of a performance bond is the inability to differentiate between these two types of performance bonds. A clear understanding of the two would help to know the governing law of each, and answer the questions: what are conditional and unconditional performance bonds? How are they understood in Ethiopia? What are the problems that have arisen from these bonds? How are the problems understood? Is a performance bond a surety bond, an indemnity bond, or an insurance policy?

²⁰ Federal Public Procurement Directive, Ministry of Finance and Economic Development (2010), Articles 16.25.2 and 16.16.4; 16.25.6

²¹Ibid

²²Ibid

3.1. Conditional Vs. Unconditional Performance Bonds

Depending on the agreement of the parties, a performance bond could be conditional or unconditional.²³ Conditional bonds are contracts whereby the issuer becomes liable only upon fulfillment of predetermined conditions, such as the default of the principal debtor and/or when the obligee sustains damage. Unconditional or on-demand performance bonds, however, entitle the obligee to call the performance bond without showing default unless the bond is furnished fraudulently.²⁴ Thus, only a demand by a letter is a sufficient ground to utilize an unconditional performance bond. Although it is sometimes difficult to distinguish an unconditional performance bond from a conditional performance bond due to the vagueness of the language in which they are formulated, the two are different.

Conditional performance bonds are bonds that are dependent on the main contract in order to come to fruition.²⁵ Under conditional performance bonds, the obligee is required to prove the default of the principal debtor in the main contract to call the performance bond. Moreover, the issuer is not obliged to pay the obligee unless it has become certain that the principal debtor has failed to perform its obligations as per the terms of the main contract. Thus, no payment will be made to the obligee unless the principal debtor admits its default or a court or an arbitration tribunal decides to this effect.²⁶

²³Supardi, et al., Performance Bond: Conditional or Unconditional, Construction Industry Development Board, 2009,<https://mpira.ub.uni-muenchen.de/34007/1/MPRA_paper_34007.pdf> accessed on 29 March 2021.

²⁴ Kevin Patrick Mc Guinness, *The Law of Guarantee: A Treatise on Guarantee, Indemnity and Standby Letter of Credit* (Scarborough, Ont. Carswell 1968) 383.

²⁵Azizan Bin Supardi, et al., 'Legal Comparison Between Conditional and Unconditional Performance Bond in Malaysian Construction Contract' (2011) 1 International Surveying Research Journal 45.

²⁶Ibid

Unconditional performance bonds, on the other hand, are bonds that exist independently from the main contract.²⁷ They are payable upon demand by the obligee, and do not require proof of default of the principal debtor to call a performance bond.²⁸ The issuer has no right to refuse payment if the obligee makes any of such demands except in the case of fraud.²⁹ This does not mean, however, that unconditional performance bonds exclude mention of the main contract to which they are related. They may contain statements indicating the existence of an underlying contract. Therefore, they are characterized primarily by phrases such as “...pay on your first demand”, “...guarantee...waiving all rights of objection and defense”, “...forthwith pay on demand” and so on.³⁰ Therefore, these bonds are payable by the issuer irrespective of the fact of performance or non-performance of the principal debtor’s obligations up on presenting documents.

In Ethiopia, both conditional and unconditional performance bonds are commonly used, but they have not yet been clearly defined under Ethiopian laws. While performance bonds issued by banks are titled as “unconditional performance bonds” the performance bonds issued by insurance companies are titled as “conditional performance bonds”. By law, banks can issue both conditional as well as unconditional performance bonds, but they almost invariably issue the latter. Insurance companies, however, are prohibited from issuing unconditional performance bonds.³¹

²⁷Chung-Hsin Hsu, ‘The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credits’ (2006) 3 National Taiwan University Law Review 1.

²⁸Ibid

²⁹ Mc Guinness even goes further stating that performance guarantees (unconditional performance bonds) are not guarantees in the legal sense despite their name. See Kevin Patrick Mc Guinness, *The Law of Guarantee: A Treatise on Guarantee, Indemnity and Standby Letter of Credit* (Scarborough, Ont. Carswell 1968) 383.

³⁰ Template performance bonds issued by banks. Documents on file with the author.

³¹National Bank of Ethiopia, Licensing and Supervision of Insurance Business Directive No. SIB 24/2002.

Further examining the practice(s) of banks, the contents of unconditional performance bonds issued by the banks are not always the same. Many of the performance bonds issued by banks contain the following: “.... *Bank hereby agree **unconditionally** and irrevocably to guarantee **as a primary obligatory** and **not as surety merely**, to pay to**on its first demand** without what so ever right of objection on our part and without its first claim to the seller in the amount not exceeding.....*”³² (Emphasis mine). Other bond issued by banks, however, are stated as: we----*hereby unconditionally undertake to pay you the sum not exceeding ----only **upon your simple written demand** specifying that customer has failed to perform in accordance with the contracts and if presented to us with the validity time.*³³ (Emphasis mine)

Though these are only two examples of selected performance bonds, from the above clauses, it is clear that a simple demand of the obligee suffices for the bank to effect payment under a performance bond. No objection can be raised by the bank to refuse payment. These are examples of pure unconditional performance bonds. Furthermore, they are considered to be primary obligations -- not mere surety.

Somehow different from the above stipulationis, one performance bond issued by Birhan International Bank reads as follows: “*Birhan International Bank hereby agrees **unconditionally** and irrevocably to guarantee **as primary obligatory** and **not as surety merely**, to pay to**on its first demand** without what so ever right of objection on our part and without its first claim to the seller in the amount not exceeding.....*”

³²Banks’Template Performance Bonds. Document on file with the auhor.

³³Template Performance Bonds issued by Banks. Document on file with the author.

*Payment of all due herein under will be made to..... on its written demand accompanied by a certificate signed.... stating that....has been declared in default for the contract and specifying the total amount due.*³⁴(Emphasis mine)

The content in the first paragraph aligns with the previously discussed features of unconditional performance bonds. The paragraph states that it is unconditional and payable on the *first demand* of the obligee. Moreover, it states that payment shall be made “without what so ever right of objection on our part”. The second paragraph, however, requires the demand to be accompanied by a certificate stating that the principal debtor has been declared in default. This conveys that payment will not be made unless the principal debtor fails to perform his obligations under the main contract and it is proved through a certificate. It states that the bond is “unconditional” in one sense, and conditional in another sense, as it puts conditions of showing a certificate of default. Then, how does one reconcile to these multiple characteristics?

Unconditional performance bonds are documentary guarantees. They are payable upon demand along with supporting documents in accordance with the terms of the performance bond.³⁵ Within the constraints of an unconditional performance bond, the obligee is required to strictly comply with the bond but not with any underlying contract.³⁶ The ICC Uniform Rules for Demand Guarantees indicate that documentary conditions do not change the nature of the guarantee.³⁷ Non-documentary conditions are prohibited for unconditional guarantees.³⁸ Unconditional performance bond cannot exist with a non-documentary performance bond. Documentary conditions, however, are possible as long as the issuer of the performance bond can easily determine it from its records. Therefore,

³⁴A Performance Bond issued by Birhan International Bank. Document on file with the author.

³⁵Hsu C. (n 27).

³⁶ M. Sc, Aleksander Lukich, ‘The Role and Importance of Bank Demand Guarantees in International Trade’ (2014) 5 Int. J. Eco. Res 1.

³⁷International Chamber of Commerce Uniform Rules for Demand Guarantees (URDG), Article 15.

³⁸ URDG, Article 7.

Birhan International Bank's performance bond, quoted above, can be considered an unconditional performance bond, as the conditions laid down in the bond are documentary.

Furthermore, the National Bank Directive on Financial Guarantee Bond's definition of the unconditional bond helps in understanding the concept. It explains, " [an] unconditional bond is a bond other than financial guarantee issued... that is *payable to the beneficiary on demand, without preconditions attached to such payment*".³⁹ Therefore, on-demand bonds are bonds that are payable upon demand and without preconditions attached to them.

Conditional performance bonds, like the unconditional performance ones, are not clearly defined anywhere in Ethiopian law. However, upon examining the conditional performance bonds issued by insurance companies, it becomes clear that they are bonds payable due to the non-fulfillment of the obligations specified in the underlying contract. A performance bond issued by Nib and Lion Insurance Companies reads as follows:

*"...the conditions of the forgoing obligations are such that if the Contractor shall well and truly and faithfully comply with all terms, covenants and conditions of the said contract on its part to be kept and performed accordingly to the tender of the said contract or if in default by the Contractor, the Surety shall satisfy and discharge the damage sustained by the Employer thereby up to birr....."*⁴⁰ (Emphasis mine)

The issuer becomes liable when the principal debtor fails to discharge the obligations stated under the main contract. Therefore, the issuer/surety is entitled to

³⁹Ethiopian National Bank, Licensing and Supervision of Insurance Business Directive No. SIB 24/2004.

⁴⁰Template Performance Bonds issued by Lion Insurance Co. and Nib Insurance Co. Document on file with the author.

raise the defenses available to the principal debtor under the main contract to reject payment of the money stated in the performance bond.⁴¹ It has to be noted that the issuer is described as “surety” in the above performance bonds, while the unconditional performance bonds depict them as “primary obligator and not merely as surety”.

3.2. Performance Bond Vs Guarantee/Surety Bonds

“Suretyship is a credit transaction. A surety, by providing bonds to its principal debtor, is, in reality, providing the surety’s credit to the principal debtor in order for the principal debtor to enter into a contract with the obligee.”⁴² Like a performance bond, a surety bond involves three parties: the principal debtor, the creditor and the surety.⁴³ Determining a performance bond whether it is a surety bond or not would be helpful in identifying the governing law.

All promises to pay or perform the duty of others are not suretyship.⁴⁴ It is only when the obligation of the surety emanates from the obligation of the principal debtor towards an obligee that a surety may exist. The question of whether a performance bond is a surety bond or not had reached the Ethiopian Federal Supreme Court Cassation Bench. In two cases, the bench has held that performance bonds are surety bonds.⁴⁵ A Brief description of, the commentary on the two decisions is given below:

⁴¹Defences that may be raised by the issuer include, but not limited to no default of the principal debtor, obligee has taken actions that prejudice the rights of the issuer, there was a material change to the contract, and so on. See Brian G Lust Bader, ‘Performance Bonds: Default, Defences and Discharge’ (2012) 87 New York Law Journal246.

⁴² George J. Bachrach, ‘The Surety’s Rights to Obtain Salvage Exoneration, Reimbursement, Subrogation and Contribution’ in George J. Bachrach (ed), *Salvage by the Surety* (American Bar Association, 1998).

⁴³Ibid

⁴⁴ David G.M. Marks, et al, *Rowalt on the Law of Principal and Surety* (4thedn, Sweet & Maxwell, 1982) 1.

⁴⁵ See *Ethiopian Insurance Corporation v Bale Rural Development Organization*, Volume 13, File Number 47004 (Federal Supreme Court Cassation Bench Bench, 2012); *ZerihunYeneneh et al v*

The case between Ethiopian Insurance Corporation and Bale Rural Development Organization concerns the governing law of performance bonds.⁴⁶ The issue was whether or not a performance bond is governed by the insurance provisions of the Commercial Code or the suretyship provisions of the Civil Code. The Cassation Bench held that a performance bond is in fact a surety bond to be governed by the suretyship provisions of the Civil Code. Then, the Bench reasoned four cases: (1) the parties to the bond are described as surety and contractor, and not insurer and insured; (2) as defined in Black's Law dictionary falls under the definition of a surety bond; (3) performance bond involves three parties; and (4) the bond is a conditional bond. The Bench also made a long analysis of how it is different from the insurance which is discussed in the next section of this article.

Although the court did not put considerable emphasis on the conditional nature of the bond, it is one of the most important facts of the case. The author agrees with the final decision of the Bench. Conditional performance bonds are surety bonds to be governed by the suretyship provisions of the Civil Code. Conditional performance bonds like suretyship agreements are secondary obligations, the surety may not be called to perform unless the principal debtor defaults. The parties to the contract are three: the principal debtor, the surety and the obligee. Besides, there are two contracts: the underlying contract between the principal debtor and the obligee, and the performance bond between the three. As a result, conditional performance bonds become surety bonds.

Unconditional performance bonds, on the other hand, may not be surety bonds. This is because unconditional performance bonds, unlike suretyship, put more burdensome obligations on the surety as they forget the benefit of discussion by the surety. Also, in suretyship, the default of the principal debtor is mandatory for the

Hawassa University, Volume 19, File Number 98348 (Federal Supreme Court Cassation Bench, 2015).

⁴⁶Ethiopian Insurance Corporation v Bale Rural Development Organization, Volume 13, File Number 47004 (Federal Supreme Court Cassation Bench, 2012).

surety to be obliged to cash the performance bond, as it is an accessory contract. Moreover, unconditional performance bonds are different from the joint guarantee stated under Article 1933 of the Ethiopian Civil Code. Article 1933 of the Civil Code states that “where the person undertaking the guarantee described himself as joint guarantor, co-debtor, or used equivalent terms, the creditor may sue him without previously demanding payment from the debtor or realizing his securities”. The benefit of discussion given to simple suretyship is taken away in the case of joint guarantee.

The issuers of unconditional performance bonds, who describe themselves as “primary obligators,” may fall under the “equivalent term” stated in the above provision. Additionally, both of them waive the benefit of discussion. However, the main feature of the unconditional performance bond distinguishes it from the suretyship. That is to say, in joint guarantee, although the creditor may request payment directly from the guarantor without requesting the principal debtor, the guarantor is liable only when the principal debtor fails to discharge its duties in the agreement⁴⁷ and the guarantor is entitled to setup all defenses available to the principal debtor against the obligee.⁴⁸ Unlike the joint guarantee, issuers of unconditional performance bonds are liable irrespective of the fact that the principal debtor has defaulted to discharge the obligations in the main contract, and the issuer of the bond cannot setup any defense against the obligee unless it is stated in the performance bond.

To conclude, unconditional performance bonds cannot be considered as surety bonds because they are based on more burdensome terms as they take away the rights of the issuer to setup the defenses available to the principal debtor against the

⁴⁷Civil Code of Ethiopia, 1960, Art. 1933/2 and 1920, Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2.

⁴⁸*Ibid*, Art. 1933/2 and 1926/2.

obligee and cashed on simple demand.⁴⁹ Conditional performance bonds, on the other hand, are surety bonds.

3.3. Surety Bonds Limit the Liability of the Surety, Not that of Principal Debtor

Surety contracts and the underlying contracts are governed by different provisions of the Civil Code. Although surety contracts are regulated by suretyship provisions of the Civil Code, the underlying contracts are regulated by general contract provisions and/or the relevant special contract provisions like sales contracts, construction contracts...etc. A thorough understanding of the liability of the parties also requires knowledge of the nature of the different contracts as well as the laws that govern them.

a. The Surety Bond Contract

Surety bonds are special types of contracts governed by surety contract laws. In Ethiopia, suretyship is governed by Articles 1920 to 1951 of the Civil Code. According to these provisions, suretyship contracts have the following features: First, a suretyship is an accessory contract in which the surety can be called to perform only when the principal debtor fails to discharge its obligation.⁵⁰ Unless the principal debtor fails to discharge its obligations, in accordance with the terms of the main contract, the surety cannot be obliged to effect the guarantee. Even in cases of joint guarantee, where the obligee is entitled to request payment directly

⁴⁹ According to Article 1924/1 of the Civil Code, suretyship cannot be contracted on more burdensome terms. A more burdensome term is a term that denies the surety a right or benefit that the principal debtor is entitled to.

⁵⁰ Civil Code of Ethiopia, 1960, Art.1920,1934 and 1938, Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2.

from the surety, the surety can setup all defenses that emanate from the main contract.⁵¹

Second, a surety contract shall be expressed and may not be extended beyond its contractual limits.⁵² The surety is expected to pay only the amount specified in the contract even though the damage that the obligee sustained may be more than the specified amount. Therefore, a surety contract limits the liability of the surety towards the obligee.⁵³ Moreover, the maximum limit of liability that the surety may bear according to the surety contract is the initial contract price.⁵⁴ Exceptionally, however, the surety may be liable beyond the maximum amount stated in the surety contract for legal costs incurred to bring action against the principal debtor if he had been notified to discharge the debt.⁵⁵ Third, surety contracts may be contracted in respect of only part of the underlying contract price.⁵⁶ Suretyship does not necessarily guarantee the whole debt of the principal debtor. Moreover, surety contracts may not be contracted on more burdensome terms. In fact, it may be reduced to the primary debt if it is found to be more burdensome.⁵⁷ In addition, the surety is released from liability when the main contract is performed.⁵⁸ Finally, if surety is discharged from its obligations for what ever reasons, it is left to the obligee to claim from the principal debtor.⁵⁹ Therefore, surety bonds limit the liabilities of the surety.

⁵¹ibid, Art. 1933/2 and 1926/2.

⁵²ibid, Art. 1922/2.

⁵³ibid, Art. 1922/3. It states that it shall be of no effect unless it specifies the maximum amount to which the guarantee is given.

⁵⁴ibid, Art. 1924/1 and 3 states that the guarantee which exceeds the amount of the debt is reducible to the amount of the primary debt. The exception, as envisaged under Article 1931 of the Civil Code, is the additional payments for costs if actions brought against the principal debtor provided that he has been sufficiently notified to enable him to forestall them by discharging the debt.

⁵⁵Ibid, Art. 1931.

⁵⁶Ibid, Art. 1924/2.

⁵⁷Ibid, Art. 1924.

⁵⁸Ibid, Art. 1926.

⁵⁹Ibid, Art. 1940.

b. The Main/Underlying Contract

The underlying contract is the contract entered between the principal debtor and the obligee. The nature of the contract could be construction contract, sales contract, employment contract or loan contract. The contract mainly envisages the rights and duties of both parties penalty in case of failure, and dispute settlement mechanisms. Therefore, it is this contract that indicates the extent of liabilities of both parties.

Thus, an underlying agreement may contain a provision to limit the liability of the parties. It is possible, for example, to agree on terms that limit the liability of the principal debtor only to the extent stated in the performance bond. Alternately, they may state the maximum amount of damage for which the principal debtor may be liable. This is also clearly indicated in Article 1887 of the Civil Code.

In the absence of specific agreement to limit liability, a party may claim compensation for the damage caused to him as a result of non-performance of the contract. Such compensation must be equal to the actual damage which may go beyond the foreseen liability of the principal debtor during the signing of the contract. For example, in a contract of sale, the seller may be obliged to compensate the buyer if the buyer conducts a replacement purchase with a higher price due to the failure of the seller to perform its obligations.⁶⁰ Thus, the actual damage determines the liability of the principal debtor unless they expressly agree to limit the damages.⁶¹

To conclude, terms agreed to in the underlying contract determine the extent to which the principal debtor is legally liable or the obligee is entitled to claim. In other words, the obligee is entitled to claim the amount stated in the performance bond from the issuer, and the remaining damages, if any, from the principal debtor

⁶⁰Ibid, Art. 2363.

⁶¹Ibid, Art. 1887.

unless the underlying contract specifically limits the liability of the principal debtor only to the amount stated in the performance bond.

3.4. Performance Bond Vs. Insurance Policy

Whether a performance bond is an insurance policy or not is another important issue worth addressing as it carries implications concerning which law(s) is applicable.

A performance bond is different from an insurance policy. First, an insurance contract is a contract between two persons, while a performance bond is among three persons.⁶² In a performance bond, the contract is among the obligee, the principal debtor and the issuer. In insurance, the insured and the insurer enter into a contract on the terms that the insured pays premiums and the insurer indemnifies the insured in certain circumstances. Second, the insurer of an insurance policy can expect losses in insurance, while the issuer of a performance bond does not. Third, insurance spreads risks among a pool of insured persons, while a performance bond guarantees such only for a single person. Last, an issuer has a subrogation right against the principal debtor, while the insurer, on the other hand, has no subrogation right against the insured save for some exceptions in case of liability insurance. For instance, the issuer expects no losses, as they are reimbursed by the principal debtor in the case of any loss. Insurance policy, however, does not have any subrogation rights against the insured itself.⁶³

⁶² The cassation has asserted that an insurance policy is a contract. See *Ethiopian Insurance Corporation v. Beninshangul Regional State*, Volume 7, File Number 24703 (Federal Supreme Court Cassation Bench, 2007); also, the Insurance Business Proclamation No. 746/2012, Article 2/20 defines an insurance policy as a document evidencing a contract of insurance.

⁶³David W. Slaughter, 'Introduction to the Surety's Rights' in Marilyn Klinger, George J Bachrach, and Tracey Lee Haley (eds) *The Surety's indemnity Agreement-Law and Practice* (American Bar Association 2008).

The Federal Cassation Bench in Volume 13, file number 47004, contains descriptive analyses distinguishing performance bonds from insurance policies.⁶⁴ Accordingly, performance bonds are not insurance bonds for the following reasons:

Primarily, the documents referred to in matters concerning insurance are called “policy”, and not performance bonds.⁶⁵ Secondly, insurance is based on a premium, but premiums are not paid in the case of a performance bond. Thirdly, the terms used to describe the parties are different. In insurance, the contracting parties to the policy are called insurer and insured. In a performance bond, however, they are described as guarantor, contractor, and employer – or are described in similar terms. Additionally, insurable interest is a requirement in insurance while it is not required in order to call a performance bond. Finally, the nature of the liability of insurer is different. In a performance bond, the principal debtor and the issuer are jointly and severally liable for the stated amount if the principal debtor fails to discharge its obligation. In insurance, however, the insurer is liable up to the extent stated in the policy.

The Cassation Bench has rightly pointed out the differences between an insurance policy and a performance bond. This does not mean, however, that insurance companies do not issue performance bonds. Even in the above case, the performance bond was issued by an insurance company. Only the issuance of unconditional performance bond is prohibited for insurance companies.⁶⁶

⁶⁴Ethiopian Insurance Corporation v Bale Rural Development Organization, Volume 13, File Number 47004 (Federal Supreme Court Cassation Bench, 2012).

⁶⁵Civil Code of Ethiopia, 1960, Art.1725(b), 1720, 1727, 1719(2), Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2; see also Commercial Code of Ethiopia, 1960, Art. 657(1), Proc. No. 166/1960, Neg. Gaz. (Extraordinary Issue), 19, No. 3.

⁶⁶Ethiopian National Bank, Licensing and Supervision of Insurance Business Directive No. SIB24/2002.

3.5. Performance Bond Vs Indemnity Agreement Between the Parties

By indemnity agreement between the parties, the author refers to a separate or built-in agreement that may be made between two parties to indemnify the person who sustained damage as a result of the other party's failure to perform. Such agreements are made between the parties to an underlying contract and they do not involve third parties. Be it a provision included in an underlying contract or a separate contract, an indemnity agreement is different from a performance bond. While a performance bond is issued by a third party called the issuer, indemnity agreements are not bonds; but they are agreements signed by the parties to an underlying contract. Therefore, a performance bond is not an indemnity agreement.

4. Liabilities of the Issuer and the Principal debtor in a Performance Bond

4.1. Liability of the Issuer

As stated previously, performance bonds are contracts. In a contract, parties are free to determine the extent(s) to which they are liable, save for some mandatory provisions of a law that may limit their rights. They may agree on whether the obligee can call the performance bond unconditionally or not, conditions that the obligee should fulfill in order to call the performance bond, the expiry date of the performance bond, and so on. Apart from these facts, the liability of the issuer of a performance bond is limited to the extent specified in the bond.

In case of conditional performance bonds, the Ethiopian Civil Code mandatorily requires the surety contract to specify the maximum amount to which the guarantee is given.⁶⁷ By doing so, it limits the liability of the surety to the specified amount. For instance, in a performance bond issued by Birhan International Bank, it is stated that "...Birhan International Bank as instructed by...agree to

⁶⁷Civil Code of Ethiopia, 1960, Art. 1922(3), Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2.

guarantee.....in the amount not exceeding Birr 333,750.00...”.⁶⁸ Therefore, the maximum liability issued by Birhan bank is Birr 333, 750.00. Even in cases where the guaranteed amount bears interest, the guarantor guarantees the interest only within the limits of the maximum amount stated in the performance bond.⁶⁹ However, there are certain situations in which the surety may be liable beyond the amount specified in the performance bond. An example is when a surety fails to discharge its obligation while it was sufficiently notified. In this case, the surety may be liable for the costs of any actions brought against the principal debtor.⁷⁰

In an unconditional performance bond, similar to a conditional performance bond, the liability of the issuer is determined by the terms of the bond. If the amount of liability is specified in the bond, the liability of the issuer is limited to the extent specified within the terms of the bond. Unconditional performance bonds are, therefore, documentary guarantees. The issuer guarantees the obligee that he will pay the stated amount to the obligee upon fulfillment of the required documents and/or the obligations of the involved parties outlined in said documents. Therefore, the issuer’s liability is to the extent stated in the performance bond.

Like the conditional performance bond, issuers of unconditional performance bonds may be liable beyond the maximum limit if they fail to perform their obligations and/or if an action has been brought against them. In this case, a court may decide on whether the legal costs of the obligee should be covered by the issuer.⁷¹ Therefore, the liability of the issuer of a performance bond is limited to the amount stated in the said bond -- at least in principle.

⁶⁸Performance Bond issued by Birhan International Bank. Document on file with the author.

⁶⁹Civil Code of Ethiopia, 1960, Art. 1930, Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2.

⁷⁰Ibid, Art. 1931.

⁷¹Civil Procedure Code of Ethiopia, 1965, Art.462,Decree. No. 52/1965, Neg. Gaz. (Extraordinary Issue), Year 25, No. 3. According to this provision, it is the power of the court to decide by whom and to what extent the legal costs are to be paid.

4.2.The Liability of the Principal debtor

The liability of a principal debtor depends on terms and conditions outlined in the underlying contract. The liability of a principal debtor may not be the same in all types of performance bonds. In principle, the principal debtor is liable to the extent of the actual damage that the obligee sustains. The full damage principle is enshrined under Article 1771 and 1790 of the Civil Code. It explains that any damage has to be compensated in an amount equivalent to the damage. However, parties may agree to limit the maximum amount of compensation for which the principal debtor may be liable. Article 1887 of the Civil Code states that “the parties may limit their liability under the contract...”. Accordingly, if the parties agree that the principal debtor is liable only to the amount stated in the performance bond that will then be the case.

The Ethiopian Federal Supreme Court Cassation Bench, in file numbers 69797 and 98348, has held that the performance bond is an agreement to limit the liability of a principal debtor.⁷² However, the mere fact that the main contract states is that the performance bond will be paid to the obligee if the principal debtor fails to discharge its obligation. This cannot be taken to mean that the principal debtor is liable only to that extent. Therefore, the position of the court is wrong for the following reasons: First, a conditional performance bond is a surety bond that must be governed by the surety provisions. Accordingly, the surety is liable only for amount of the debt stated in the bond which could be less than the total damage caused to the obligee. The principal debtor, however, is liable for the total amount of debt or damage that the obligee sustains due to the failure of the principal debtor to perform its obligations. Second, any agreement to limit liability must be an express agreement. The mere fact the parties state, the performance bond will be

⁷² See *Mrs. Hilal Suleyman v University of Gondar*, Volume 14, File Number 69779 (Federal Supreme Court Cassation Bench, 2012); *ZerihunYeneneh et al v Hawassa University*, Volume 19, File Number 98348 (Federal Supreme Court Cassation Bench, 2015).

paid to the obligee if the principal debtor fails does not necessarily mean the total amount of damages the obligee may claim is limited to the amount stated in the performance bond. The essence of Article 1887 of the Civil Code is that parties may expressly agree to limit their liabilities.

Concerning an unconditional performance bond, the bond is a documentary guarantee which tells that the issuer will pay the obligee such amount, as specified within the bond itself, upon demand. It is separate from the total amount of liability of the principal debtor. Therefore, the performance bond does not limit the liability of a principal debtor. The liability of the principal debtor is limited by the underlying contract. The extent of liability of a principal debtor is determined by the main contract. The main contract may stipulate that the amount of damage that the obligee may claim from the principal debtor is what is stated in the performance bond. However, a stipulation in the main contract that says, the proceeds of the performance bond shall be paid to the obligee as compensation if the principal debtor fails to discharge its obligations, cannot be understood as a provision limiting the liability of the principal debtor.

In conclusion, unless the main contract stipulates otherwise, the liability of a principal debtor is to the extent of the actual damage that the obligee sustained. Moreover, any provision intended to limit the liability must be express.

5. The Fate of the Obligor who Incurs a Damage Greater than the Amount Stated in the Performance Bond

The damage caused to the obligee, on the other hand, may be greater than the amount stated in the performance bond. In this section, therefore, the query whether an obligee may be able to claim beyond the performance bond or not is addressed. As noted previously, an issuer of a performance bond is liable to the amount specified in the performance bond. Therefore, the obligee may call the

performance bond to settle some portion of the damage caused to him. The only situation whereby an obligee may claim beyond the performance bond from the issuer is for legal costs.⁷³ The purpose of performance bond is not to limit the liability of principal debtor in advance. It is rather a means of compensating the obligee if the principal debtor may not have money or property at hand once a dispute arises.

The call for a conditional performance bond by an obligee does not relieve a principal debtor from making good from the actual damage. An obligee may call a performance bond and claim the remaining balance from the principal debtor. Additionally, in an unconditional performance bond, the terms of the contract determine the extent of the obligee's right or the principal debtor's liability. Unless there is an indication of the fact that the principal debtor may not be liable beyond the amount stated in the performance bond, unconditional performance bond does not prohibit the obligee from claiming over the amount stated in the bond.

In *Agricom International SA v. Ethiopian Trading Business Corporation (ETBC)*, the arbitral tribunal awarded the buyer (ETBC) full damages which is more than the stated amount in the performance bond.⁷⁴ The seller, Agricom, agreed to supply wheat to the buyer-ETBC but 'failed to do so'. ETBC conducted a purchase in replacement from another seller which resulted in incurring additional cost. In front of the arbitration panel, Agricom argued that it was liable only to the extent of the performance bond as the contract states that "the proceeds of performance bond shall be payable to the buyer as compensation for any seller's failure to comply with its obligation under the contract". The buyer, on the other hand, citing Article 2362 of the Ethiopian Civil Code, argued that compensation shall be paid for all

⁷³Civil Code of Ethiopia, 1960, Art 1931, Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2.

⁷⁴*Agricom International SA v. Ethiopian Trading Business Corporation*, Volume 24, File Number 155880 (Federal Supreme Court Cassation Bench, 2019). The award of the tribunal is attached with, and stated in, the cassation petition.

damage incurred as a result of the purchase in replacement. The tribunal, finally, rejected the argument of the seller, and stated that parties did not agree to limit the liability of the seller to the amount stated in the performance bond.

In a different case, the Cassation Bench, however, held an opposite stand. In the case between Mrs. Hilal Suleyman and University of Gondar, the University conducted a purchase in replacement of bread for students as Mrs. Hilal failed to deliver in accordance with the terms of the contract.⁷⁵ As a result, the University incurred additional costs of Birr 1,148,846.40 for the purchase in replacement. This amount is by far greater than the 10% performance bond agreed by the parties which is Birr 245,036.

The Bench held that the purpose of the performance bond is to compensate the University in case Mrs. Hilal fails to perform her obligation that is a compensation agreed upon in advance. For the Bench, such agreement is possible pursuant to Articles 1731 and 1889 of the Civil Code. Accordingly, it decided that payment in accordance with the performance bond is the only compensation that the University may claim from Mrs. Hilal. This means, the Bench misunderstood the concept of performance bond. Performance bonds are not agreements made to limit the liabilities of the principal debtor. In another case, file number 47004, the Bench held that a performance bond is a surety bond. If a performance bond is a surety bond, how could it be understood as an agreement to limit the liability of a principal debtor? The Bench reached the same conclusion in file number 98348.⁷⁶ In short, a performance bond is issued for the benefit of the obligee, and not to the principal debtor. It cannot be interpreted as an instrument issued to limit the rights of the obligee as well.

⁷⁵Mrs. Hilal Suleyman v University of Gondar, Volume 14, File Number 69797 (Federal Supreme Court Cassation Bench, 2012).

⁷⁶ZerihunYeneneh et al. v Hawassa University, Volume 19, File Number 98348 (Federal Supreme Court Cassation Bench, 2015).

Conclusion

The concept of a performance bond is not settled in Ethiopia as can be seen from the authoritative decisions of the Federal Supreme Court Cassation Bench. It is not clear what a performance bond is and which law governs it. This makes it difficult to determine the extent of rights of an obligee to claim damages from the principal debtor i.e. whether it is limited to the amount stated in the performance bond or it goes beyond that.

From these observations, the author recommends that a clear law that governs performance bonds must be enacted taking the nature of the performance bonds into consideration. It should be also understood, in the meantime, that a performance bond is either a suretyship contract or a documentary guarantee that indicate the amount of money that the obligee may claim from the issuer of the bond. The bond does not state the total amount of liability of a principal debtor or claim of the obligee against the principal debtor. It is simply an underlying contract that determines the limit of rights of an obligee against the principal debtor.

To conclude, the author has tried to bring the unaddressed issues of performance bond into discussion including the contradicting decisions of the Cassation Bench with the purpose of initiating lawyers to further investigate and understand the concept from the perspectives of Ethiopian laws.

Bank Merger Regulation and Enforcement in Ethiopia: The Need for Fitness or Wellness Approach

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Abstract

The current trend of deregulation, liberalization, and privatization hastened the proliferation of banking sector mergers, even though the sensitiveness of the sector urges tight regulatory and enforcement institutions. This article aims at examining how existing Ethiopia's bank merger regulatory framework and enforcement institutions regulate and enforce bank merger proposals; both already executed bank mergers and imminent future proposals. The analysis employed a qualitative approach using primary and secondary data to assess the existing Ethiopian bank merger regulatory framework. The findings indicate that the existing bank merger regulatory framework and enforcement institutions suffer from various regulatory deficiencies. The substantive legal frameworks are: incomprehensive, haphazardly chopped in different legislations, and not capable of effectively dealing with complex bank merger issues. Likewise, the existing enforcement institutions lack: clearly defined guidelines on procedures, jurisdictional interaction, transparency, accountability, and cooperation platform. These pose a risk of regulatory uncertainty, parallel decisions, and jurisdictional conflict between the enforcement organs. Therefore, it is recommended to: reform the existing bank merger regulatory frameworks in line with internationally well-adopted principles; strengthen the existing enforcement institutions; define their jurisdictional interface; and develop a mutually initiated cooperation-platform among the regulatory organs as crucial for effective regulation of the regime.

Keywords: Bank, Mergers, Prudential Regulation, Competition Regulation, NBE, TCCPA

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1. Introduction

Mergers have been considered as an intermediate to achieve various economic objectives including increasing asset and product portfolios, access to technological innovations and integrations, access to new researches and development, access to diversified market and resources that finally contribute to corporate growth and efficiency.¹ Besides the perceived advantages, bank mergers result in anti-competitive effects and are encircled with various practical and regulatory issues to deal with, including practical issues such as incompatibilities in ambition, vision, corporate governance culture, incivility of employees and shareholders could lead to hostile mergers.²

The privatization and liberalization measures, which have been adopted by the Ethiopian government since 1991, have incentivized the country to open up its financial service sector. This requires competitive banks at the international financial market.³ The National Bank of Ethiopia, herein after NBE or the Regulator, has also directed private banks to capitalize through a merger scheme and set a target of minimum paid up capital of at least 2 billion birr by June 2020.⁴ Amidst these demanding push by the Ethiopian government, there are prevalent concerns on the adequacy of the existing regulatory framework for a proper execution of mergers in the banking sector. Mainly, the limited prior bank

¹ Yadav, A.K., and Kumar, B. R, 'Role of Organization Culture in Mergers and Acquisitions' [2005] 2 (3) SCMS JM 53

² Dr. K. S. Adeyemi, 'Banking Sector Consolidation in Nigeria: Issues and Challenges' (2014) Research Gate, 2. <https://www.researchgate.net/publication/242780351_pp.11-14> accessed 22 February 2018 See also Asrat Seyoum, 'Mega Banking: Future of Ethiopian Banks', (*The Reporter Ethiopia*, May 2017 <<http://archiveen.english.thereporterethiopia.com/content/mega-banking-future-ethiopian-banks>> accessed 22 February

³ FDRE President Mulatu Teshome's, 'Keynote Address' (Joint Session of House of Peoples' Representative and House of Federation, Ethiopian Broadcast Corporation, 8 October 2018)

⁴ A circular dispatched by NBE (26 September 2015). Through this circular he NBE instructed all private banks to set a target of minimum paid up capital of at least 2 billion birr by June 2020, Interview 'Confidential' conducted within NBE, Legal Service Directorate (Addis Ababa, 01 May 2018)

merger experience of the country,⁵ exacerbated by the inadequacy of the existing regulatory framework and lack of cooperation among the enforcement bodies are considered as imminent challenges. Studies show that merger control legislations have far-reaching impact on mergers, transcend combating anti-competitive transactions and can affect merger activity even in heavily regulated sectors, such as the banking sector.⁶ Otherwise, if the anti-competition legislations are missing, banks and even the sectoral regulator may approach to undertake anti-competitive mergers in order to create giant entities that could serve as national economic figures.⁷

The Organization for Economic Cooperation and Development (OECD) recommends national regulators to proactively and clearly specify conditions, requirements and procedures of bank mergers and ensure coordinated and joint enforcement with the general competition authorities.⁸ Apart from competition review, there is a defined regulatory review by the regulator which considers financial and managerial resources, future prospects, convenience and needs of the communities, anti-money-laundering records and compliance with banking laws.⁹ However, relevance of merger provisions incorporated under the current Ethiopian Trade Competition and Consumers' Protection Proclamation No. 813/2013 (TCCPP) to regulate bank mergers and its consistent applicability on bank merger

⁵ The country's experience is confined only to the public owned bank merger of CBB to CBE on 2008 E.C

⁶ Jan-Peter Siedlerek, 'Merger Control in the Banking Sector' *Federal Reserve Bank of Cleveland*, (Cleveland, 2017) <<https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2017-economic-commentaries/ec-201710-merger-control-in-the-banking-sector.aspx>> accessed 20 November 2017

⁷ Carletti, Elena, *et al.*, 'The Impact of Merger Legislation on Bank Mergers' (2016) Federal Reserve Bank of Cleveland Working paper 16-14

⁸ OECD, *Mergers in Financial Services*, (Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, 2000) p. 33 <<http://www.oecd.org/daf/clp>> accessed 02 November 2019

⁹ Peter Lim Felton, Too Big to Manage: A Case for Stricter Bank Merger Regulation, (2012) 52(3) SCLR 1081-1109, 1089 <<http://digitalcommons.law.scu.edu/lawreview/vol52/iss3/11>> accessed 02 November 2018 *See also*, Brian W. Smith and Laura R. Biddle, 'Is the Bank Merger Regulatory Review Process Ripe for Change?' [2005] CCHI 9. Some also consider the "needs and convenience of the community to be served" and preservation of employment

reviews to be made by the NBE is disputed. As to the institutional aspect, literature shows that in the absence of cooperation between the general competition authority and sector-specific regulators, this could lead to conflict of jurisdiction, dilatoriness and inefficiency.¹⁰ To alleviate such problems, developed countries have adopted detailed rules on competence, procedures and priorities of the institutions,¹¹ since mergers in financial sector could pose particular challenges to understand and supervise effectively.¹²

Against this backdrop, the purpose of this study is to assess bank merger regulatory framework and enforcement institutions as well as jurisdictional interface of the NBE and the Trade Competition and Consumers' Protection Authority (TCCPA) or the general competition authority. To this end, doctrinal research method was employed where primary data was gathered through purposive interview, and secondary data was collected from legislations, cases, reports and literature. The following section highlights some conceptual points on bank merger in general while the second section illustrates some practical and regulatory concerns in the execution of bank merger by exploring literatures. Subsequently, the paper discusses the general trends of bank mergers in Ethiopia, and examines the relevant legal and institutional frameworks. This section also tries to show the legal and regulatory/enforcement challenges prevalent in the Ethiopian bank merger regulatory regime. Finally, a brief conclusion is offered in the last section.

¹⁰ Muhammed K. 'A Critical Appraisal of the Institution Controlling Competition in Ethiopia: Analysis of the Law and the Practice' (LLM thesis, Addis Ababa University, 2014) 68

¹¹ Strategic Priorities of Competition and Regulatory Agencies in Developing Countries <<http://www.circ.in/pdf/strategic%2520priority>> accessed 02 February 2018

¹² IMF, *Financial Sector Regulation: Issues and Gaps-Background Paper* (Monetary and Financial Systems Department 2004) 6

2. Some Conceptual Points on Bank Merger

In common parlance, a merger is a fusion between two firms into a single entity¹³ wherein at least one loses its corporate existence. The surviving company, also called the merged company, acquires both the assets and liabilities of the company that loses its existence.¹⁴ A bank merger is an occurrence when formerly separate banks are unified into one.¹⁵ It happens when an autonomous bank ceases its very existence to form part and parcel of a bank by unifying its functions, operations, and branches under a single headquarter.¹⁶ According to Weinberg, “*Merger is a marriage between two companies roughly of the same size.*”¹⁷

Legal scholars define a merger as a combination of two or more firms in which all but one ceases to exist legally; the combined organization continues under the original name of the surviving firm.¹⁸ In typical mergers, there are two companies, namely; the acquirer (bidder/acquiring company) and the second one is the

¹³ Lubna Yusuf, ‘Mergers and Acquisitions: An Insight into Its Use and Purpose in the Corporate Scenario’ <<https://www.legalserviceindia.com/article/l381-Mergers-and-Acquisitions.html>>. accessed on 27 February 2019] See also, Marshall Hargrave, ‘Guide to Mergers and Acquisitions’ (*Investopedia*, 22 March 2021) <<https://www.investopedia.com/terms/m/merger.asp>> accessed 22 March 2021

¹⁴ Agarwal, M., ‘Analyses of Mergers in India’ (M.A Thesis, University of Delhi, 2002) cited in Priya Bhalla, ‘Mergers & Acquisitions in India: A Sectoral Analysis’ (2014) 2 IJBED 120

¹⁵ Steven J. Pilloff & Anthony M. Santomero, ‘The Value Effects of Bank Mergers and Acquisitions’, *Wharton School Center for Financial Institutions, University of Pennsylvania* (1999) 99

¹⁶ Dario Focarelli, Fabio Panetta and Carmelo Salleo, ‘Why Do Banks Merge?’ (2002) 34 JMCB 1051

¹⁷ Weinberg M. A and Blank M. V., *Take-Overs and Mergers*, (5th edn., Sweet & Maxwell, 1989) 23

¹⁸ Fox B & Fox E, *Corporate Acquisitions & Mergers*, (1st, Matthew Bender & Co., 2004) 1-5

target/passive company.¹⁹ Accordingly, a merger is a mechanism by which a less important firm is absorbed by a more important one.²⁰

On the other hand, the notion of statutory merger can be defined as a mechanism in which the acquiring company assumes assets and liabilities of the target under the statutes of the state in which the combined companies will be incorporated.²¹ Maleka Femida defines a statutory merger as "*a simple, uncomplicated and effective procedure by which two or more companies may merge by agreement, with the approval of the prescribed majority of their shareholders, and without the need for any court approval.*"²² Scholars classified mergers into various categories. To name few, from an economic chain perspective, they can be roughly categorized as horizontal merger²³, vertical merger²⁴, conglomerate merger²⁵, congeneric merger,²⁶ purchase merger²⁷ and consolidation merger.²⁸

¹⁹HCL, 'Theoretical concepts of Mergers and Acquisitions' 23 <https://www.google.com/url?q=http://shodhganga.inflibnet.ac.in/bitstream/10603/100632/10/10_capter%25202.pdf&sa=U&ved=2ahUKEwiB2TViK3bAhXC2qQKHb0LA9sQFjAAegQICBAB&usg=AOvVaw2PgPbMyTDm8UqUXOnRTdFC> accessed 22 March 2018

²⁰ "Mergers and Acquisitions" <<http://legal-dictionary.thefreedictionary.com/M%26A>>Mergers and Acquisitions accessed 28 February 2018

²¹ Donald DePamphilis, *Mergers and Acquisitions Basics: All You Need to Know*, (Elsevier Inc., Burlington, USA, 2011) 12

²² Maleka Femida Cassim, 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right, University of the Witwatersrand, (2008) 20 SAMLJ 1, 32.

²³ A horizontal merger is arranged to unify two independent companies generating or provisioning of basically similar products or services and are or could be direct rivals competing to the same product or geographic market. cf HCL (n 19) 24

²⁴ A vertical merger happens where one of the two firms is the actual or potential supplier of goods or services to the other, so that the companies are both engaged in the manufacturing or provision of the same goods or services, but at different stages in the supply route. cf Agarwal (n 14) 24

²⁵ In such a merger, there are no middle universal factors between and among the companies in production, marketing, research, and development technology. cf HCL (n 19) 25

²⁶ Weston, J. F., and Mansinghka, K. 'Test of Efficiency Performance of Conglomerate Firms', *Journal of Finance*, 1971, as cited in cf Elena (n 7) 25, in a congeneric merger the bidder firm enjoys several gains by utilizing the tactical resources and access to a connected market and receives a greater reward than it would otherwise receive.²⁶

²⁷ 'Mergers and Acquisitions – M&A' <<https://www.investopedia.com/terms/m/mergersandacquisitions.asp>>. accessed 20 February 2018. This type of merger happens when one company

2.1. Reasons and Motivations for Bank Mergers

Bank merger is not a mere process of decreasing the number of banks in a given banking industry, rather it is required to improve synergy, promote efficiency, and instigate investor hub and prompt production and welfare gains.²⁹ Regardless of their category or structure, all mergers and acquisitions have a common ambition, to produce a synergy that enhances the value of the united firms greater than the sum of the two parts.³⁰ The rationales, as determined by Imala, includes: cost savings which are gained from the economics of scale and proficient allotment of resources; revenue improvement; market dominance; risk minimization; cost diversification; the emergence of deregulation that avoids many legal and regulatory taboos; globalization that stimulates a financial conglomeration and convergence throughout the globe; building a financial system that is responsive to crisis and the influence of shareholders on the management to increase profitability; and investment returns.³¹

The fundamental synergies acquired through the mechanism of merger within the banking industry could be described as follows. The primarily perceived advantage of the banking sector mergers is mostly the ability for firms in the sector to benefit from economies of scale.³² Regardless of the things to be purchased, including the purchase of stationery or technological apparatuses, a larger firm placing the orders

purchases another and the purchase is undertaken through effecting cash payment or through the issuance of debt instruments.

²⁸ Ibid. In this type of merger a genuinely new entity with a distinct legal personality will be commenced. Accordingly, both the bidder and the target company will cease to exist and lastly fused under the new firm which has distinct existence.

²⁹ Nnanna, O. J. 'Beyond Bank Consolidation: The Impact of Society', (The 4th Annual Monetary Policy Conference of the Central Bank of Nigeria. Abuja, 18th – 19th November 2004) as cited in cf Adeyemi (n 2) 6

³⁰ cf M & A (n 27)

³¹ Imala, O. I. 'Consolidation in the Nigerian Banking Industry: A Strategy for Survival and Development' (Nigerian Economics Students' Association (NESA), University of Abuja, 2005) as cited in cf Adeyemi (n 2) 6

³² cf Adeyemi (n 2) 7

can save more on costs and energy.³³ Mergers confer a company with immense purchasing power to buy various office equipment and infrastructure, as larger firms will have better bargaining power in price negotiation with suppliers or sellers.³⁴ In the international arena, size has become a central component of success so long as it grants a competitive advantage to a bank.³⁵ Many banks suffer from a lack of depth in management and, when two banks merge, the best personnel of the banks can be used to manage and develop the larger assets of the combined bank.³⁶ In other words, mergers and acquisitions enable a bank to obtain significant technology, trained and high-quality personnel, and resist financial distress by empowering banks to compete in the local, regional and international arenas.³⁷

Secondly, the motivation of mergers may be the aspiration to enlarge the capital assets of a company.³⁸ Many entities utilize mergers and acquisitions to grow in size using a shortcut since it can take a prolonged period to double its size through organic growth.³⁹ Thirdly, companies can strengthen their capacity through mergers creating a unified form and receiving more revenue than two distinct entities. Revenue enhancement may result from the consolidation of marketing or strategic gains and strong market power where an entity will be able to pool its resources thereby reducing its cost of production.⁴⁰

The fourth aspiration of a bank merger emanates from a desire to have diversified competition where banks attempt to diversify their deposits and services.⁴¹ Through merger, a bank can increase the number of its branches and or can unify

³³ cf M & A (n 27)

³⁴ Ibid

³⁵ cf Adeyemi (n 2) 7

³⁶ Earl W. Kintner & Hugh C. Hansen, 'A Review of the Law of Bank Mergers' (1972) 14 (1) BCICLR 217 <<http://lawdigitalcommons.bc.edu/bclr/vol14/iss2/1>> accessed 02 February 2019

³⁷ cf Adeyemi (n 2) 7 See also, Tadesse S, 'Consolidation, Scale Economics and Technological Change in Japanese Banking' cited in cf Adeyemi (n 2) 8

³⁸ cf Earl (n 36) 217

³⁹ cf M & A (n 27)

⁴⁰ cf Adeyemi (n 2) 7

⁴¹ Casson & Burrus, 'Federal Regulation of Bank Mergers' (1969) 18 AULR 681, as cited in cf Earl (n 36) 217

its area of expertise with another bank.⁴² On some occasions, even a large-sized bank could persuade potential competitors to merge.⁴³ The fifth advantage is that, it may serve as cost cutting strategy through staff reduction. It is clear that mergers tend to mean job losses and companies are keen on saving plenty of money by reducing the number of staff members from various sections, including accounting, marketing, and other departments, and sometimes including the former management.⁴⁴ The sixth motive behind bank mergers can be the need to acquire new technology. In order to keep on competitiveness, firms need to possess top technological and business appliances, and through mergers, a firm can transfer technologies possessed by a certain company and stay competitive in the market.⁴⁵

A seventh advantage of bank mergers can emanate from the desire to be a leader within the sector. Nonetheless, such motive could pose a potential threat to the market. Hence, it should be firmly scrutinized from an anti-competition perspective by the competition and regulatory authorities.⁴⁶ Moreover, firms use merger schemes in order to have improved market reach and industry visibility where they can buy other firms so as to access new markets and increase their revenues. Mergers can be used as a mechanism to enlarge and extend the company's marketing and distribution. This would grant better and easier access to raise capital within the investment society than small separate firms that would face harder challenges.⁴⁷ These considerations may provide ample justification for the banks' stockholders and the Comptroller.⁴⁸ Lastly, tax benefits may be a powerful incentive for mergers and acquisitions. The increased size of a firm resulting from

⁴² cf Earl (n 36) 217

⁴³ Ibid, See also cf M & A (n 27)

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ cf Earl (n 36) 217

consolidation enables it to enjoy tax gains resulting from the use of tax losses that would have resulted from separate net-operating losses.⁴⁹

3. Practical Issues Associated with Bank Mergers

The practical issues accompanying voluntary/policy-induced merger process are evaluated under two captions as pre-merger and post-merger issues.

3.1. Pre-Merger Issues

The first issue during pre-merger is time allocation in which the process of a typical merger requires a prolonged time and progressively successive events. In some jurisdictions such as the US and Nigeria, there are several conditions and procedures to be undertaken to complete the scheme successfully. These include: preparation and clearing of the Scheme document; separate shareholders' meetings of the banks be convened; publishing the notices of shareholders' meetings in the newspapers; approval of the schemes of merger by shareholders; review and approval by the prudential regulator and the general completion authority must be secured.⁵⁰

Second, as witnessed from Nigeria's policy-induced bank merger experience, bankers' limited awareness of merger transactions and shortage of human power acquainted with advanced knowledge and skill of mergers could inhibit the success of compulsory merger schemes.⁵¹ Limited exposure to bank mergers processes such as due diligence and "know your customer" investigations could be exacerbated by the absence of the Security Exchange Market and the existence of a few numbers of Asset Management Companies.⁵²

⁴⁹ cf Adeyemi (n 2) 7

⁵⁰ John V. Austin, Esq., 'The Role of Supervisory Authorities in Connection with Bank Mergers', (IMF Conference, Washington, D.C., May 7-17, 2002) 11. See also cf Adeyemi (n 2) 9-10

⁵¹ cf Adeyemi (n 2) 9-10

⁵² Ibid.

The third issue is the high cost of mergers. Executed policy-induced bank mergers such as in Nigeria show that the process is highly expensive to complete successfully. Especially the majority of the small and medium banks with weak financial capability had to sustain costs to raise funds in the capital market and needed to assume the cost of the merger transaction.⁵³ These costs include costs to comply with due diligence reports, consultant fees, costs of scheme document preparation, and related miscellaneous costs.⁵⁴

Fourth is resistance and lack of cooperation in policy-induced bank mergers, which are usually non-voluntary. Some banks may find it hard to find a strong bank or from the very start, they may have resistance to cooperate due to its involuntary nature. In some instances, there could be fundamental shareholders' identity differences or discrepancies in the corporate governance model adopted before the merger scheme, which could obstruct the process.

The fifth concern relates to employees' issue which could make the employees of the bank taking part in merger transactions feel nervous and create job insecurity. As a mechanism for economies of scale and cost reduction, banks resort to maintaining workforce reduction. This can pose an issue of job losses and lay-offs.⁵⁵ The discrepancy of the two constituent banks in terms of seniority, salary, transfers, promotion, and parity in perks are potential employment issues.⁵⁶

The sixth issue is related to the incompatibility of communication technology. Banks utilize different information and communication technologies and software

⁵³Ibid 12

⁵⁴Ibid.

⁵⁵John C. Soper, 'Consolidation in Banking and Financial Services: The Demise of Glass-Steagall', *John Carroll University* (2007) 6

⁵⁶Duvvuri Subbarao, 'Banking Structure in India – Looking Ahead by Looking Back Speaking Notes', (FICCI-IBA Annual Banking Conference Federation of Indian Chambers of Commerce & Industry - Indian Banks' Association, Mumbai, 13 August 2013) 8

which are expensive to install.⁵⁷ After the imminent merger, these banks are required to harmonize their information and communication technology platform. Otherwise, incompatibility could obstruct the success of any bank merger scheme. In a nutshell, bank mergers can create problems including technology migration issues, customer attrition issues, and high cost of implementation of the merger scheme.

3.2. Post-Merger Issues

The first major challenge in the post-merger phase is the issue of corporate governance. Once banks are merged, the material existence of the new bank is different and its ownership structure will be changed. Hence, when banks with different backgrounds in corporate governance and management appeared to merge, there is a serious potential for divergent opinions and quarrels.

The second post-merger challenge is integrating the structural and institutional units of each constituent bank. This poses a serious risk due to the divergent background experience of each bank and lack of flexibility in a certain bank involved in the merger scheme.⁵⁸ Similarly, each constituent bank develops its own peculiar corporate culture. This will be an entanglement to the newly merged bank with cultural divergence and clashes.⁵⁹ Hence, the newly merged bank should be committed to integrating the overall managerial, operational and procedural, processes, products, and services at and standstill.⁶⁰

Lastly, the issue related to the notion of Too-Big-To-Fail (TBTF) comes into the picture when an institution is constituted largely and its functions constitute a considerable segment of a nation's payment system, credit-granting process, or

⁵⁷ Saving the recent attempt by the NBE to integrate the Automated Transfer Machine (ATM), they are still not integrated.

⁵⁸ Ibid.

⁵⁹ Such cultural clashes and management squabbles are natural in any merging firm with different backgrounds.

⁶⁰ cf Adeyemi (n 2) 14

other major financial functions.⁶¹ Any disorder in that institution results in a serious impact on the entire financial system. In return, the creation of large banks would result in these large banks behaving recklessly, which is technically called a moral hazard problem.⁶² Generally, bank mergers are deemed to result in sophistication and TBTF or Too-Connected-To-Fail (TCTF) moral hazards with undesirable effects on financial stability.

4. Modus Operandi of Bank Mergers and Regulatory Concerns

In authorizing bank merger proposals, whether voluntary or policy-induced bank merger schemes, the regulator has to consider two sets of factors: banking and competitiveness.⁶³ The banking factors include (1) the financial history and condition of each of the banks involved; (2) the adequacy of its structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; and (6) whether or not the bank's corporate powers were consistent with the purpose of the law.⁶⁴ On the other hand, the competitive factor was simply defined as the effect of the transaction on competition including any tendency towards monopoly.⁶⁵ As regards the second factor, the regulator is not expected to conduct a sharp competitive litmus test since it does not confer expertise on the area, which intimately belongs to the general competition authority.

In executing bank merger schemes, the regulator could face a problem in striking a balance between risk and stability in the financial system.⁶⁶ Hence, the regulator should function in a way to promote efficiency within the financial system and at

⁶¹Gill Marcus, 'Speech on Issues for consideration in mergers and takeovers from a regulatory perspective', (Institute for International Research 9th Annual Conference, Johannesburg, 18 July 2000) 3 <<https://www.bis.org/review/r000721b.pdf>> accessed 02 March 2019

⁶²Ibid. 4

⁶³ cf Felton (n 9) 1081-1109, 1089

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶ cf Marcus (n 61) 2

the same time build public trust in the monetary system as a whole.⁶⁷ Similarly, the concern of systemic risk that poses the possibility of failure of one bank to settle net transactions with other banks will trigger a chain reaction, depriving other banks of funds and, in turn, preventing them from closing their positions.⁶⁸ This could erode the public confidence in the system. Hence, conglomeration through mergers and acquisitions within the banking industry should be managed seriously. If not, it could place the entire financial institution at risk. The regulator's capability to observe and oversee the group risk management practices within banks becomes an important concern.⁶⁹

Apart from the sector-specific concerns, the issue of competition could lead significant big banks to resort to monopolistic or oligopolistic practices that lessen competition and fair-trade practice. Moreover, big banks could tend to conduct through predatory behavior and this could hamper the financial conduction and market mechanism for efficient distribution of resources.⁷⁰

Accordingly, merger in some situations may be set up to rescue a certain bank at stake. This can be considered as a crucial way to deal with such problems and alleviate risks in the financial system. In such an instance, both the general competitions agency and the prudential regulator need to work in cooperation. Hence, several jurisdictions have a "failing firm defense" from being subjected to the application and process of the competition law review.⁷¹ Similarly, some other jurisdictions have a "regulated conduct" defense in cases when the prudential regulator impels the banking sector to merge, what is known as a government-led or policy-induced merger program.⁷²

⁶⁷Ibid

⁶⁸Ibid

⁶⁹Ibid

⁷⁰cf Subbarao (n 56)

⁷¹ cf OECD (n 8) 33

⁷²Ibid. 34

There is also a need to be cautious and take some discreet inquiry on the potential effect of bank merger proposals on public policy, particularly on employees of the proposing banks and generally to the employment regime.⁷³ These public concerns are best addressed through procedures that provide for transparency and accountability on the part of the agencies of government that deal with bank mergers. The International Monetary Fund has developed codes of *Good Transparency Practices for Financial Policies by Financial Agencies*. These codes of conduct are appropriate to financial regulators, which require clearly defined, preferably relevant legislation or regulation: financial policies should be openly communicated to the public; periodic public reports on major developments in the financial system should be made; report aggregate data on a timely and regular basis; make texts of regulations and directives readily available to the public; and publicly disclose special protections such as deposit insurance schemes and consumer protection arrangements. Moreover, bank supervisors should be accountable for their actions through reporting to public authorities, or otherwise explain the basis for actions taken and their effect on the financial system.⁷⁴

In connection with bank mergers, the principle of transparency requires members of the public and the financial industry to determine, in advance, of the filing with the Regulator of any proposal for a bank merger. This, among others, entails identifying: what information future proposers will be required to submit; what opportunities will be available for participation by the public in the process; what criteria the prudential and antitrust authorities will bring to bear on the proposal; what time frames will govern regulatory action on the proposed merger; and how persons aggrieved may obtain review and appeal on the decisions of the Regulator

⁷³ cf Austin (n 50) 211. See also, Ibid 24

⁷⁴ IMF, *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles*, (September 26, 1999). See also IMF, *Transparency in Monetary and Financial Policies* (March 2001) (Factsheet)

on the proposal.⁷⁵ Furthermore, notice to the public of the filing of a bank merger proposal should be provided in a timely fashion; members of the public and other competitors should be provided with the opportunity to inspect non-confidential portions of the filing, and to submit comments thereon for consideration by the Regulator in passing upon the proposal; and the proponents should be allowed to respond to any comments filed in this fashion.

5. Bank Merger Regulation in Ethiopia

5.1. General Trend

In 2015, the NBE instructed all banks through a circular dispatched on September 26, 2015 to set a target of minimum paid-up capital of at least two billion Birr by June 2020 upon the end of GTP II. The regulator recommended and informed professionals and corporate governance of banks to contemplate and resort to banking sector mergers in case they fail to meet the minimum capital requirement or the regulator would take the compulsive approach, and this signals the inevitability of policy-induced bank mergers. Subsequently, in 2017, the Regulator has officially introduced a national financial inclusion strategy, which states the need to strengthen the financial capability of financial institutions and increasing their competitiveness as a major strategy that would contribute to the financial sector by the year 2025.⁷⁶ Over the past twenty-plus years, the NBE has thrice set the capital requirement banks are expected to meet. A few years back, the NBE has signaled the same approach by increasing the paid-up capital of banks from 75 million birr to 500 million urging banks to comply within the time frame till June 2016, or as a way out, they would be able to merge vertically or horizontally.⁷⁷ To date, at face value, it is likely that most banks in Ethiopia currently meet that

⁷⁵ In the case of the TCCPA's decision on the merger, there is a legal recourse and appeal procedure stated under the Proc. No. 813/2013 Art. 33(2) (a) *cum*. Art. 39 (1) allows any aggrieved party by the decision of the Authority on merger proposal can appeal to the Federal Appellate Tribunal.

⁷⁶ Ethiopian National Financial Inclusion Strategy, (Addis Ababa, April 2017) 35

⁷⁷ Minimum Capital Requirement for Banks Directive No SBB/50/2011, National Bank of Ethiopia, 2011

requirement.⁷⁸ The above factual trends make the compulsory future mergers of the banking sector imminent and inevitable. To date, except for the recent statutory merger of the two state-owned commercial banks (Commercial Bank of Ethiopia and Construction & Business Bank),⁷⁹ no merger proposal is made from private banks after the 1991 economic transformation.

5.2. Bank Mergers Legislations

The current Ethiopian substantive legal framework governing mergers of banks is mainly built upon Ethiopian Commercial Code, the Banking Business Proclamation No. 592/2008, the Trade Competition and Consumer Protection Proclamation No. 813/2013, and the Public Enterprises Proclamation No. 25/1992. There are also a group of domestic legislations on which merger of firms bear ramifications including the Civil Code of 1960, the Federal Income Tax Proclamation No. 979/2016,⁸⁰ the Federal Tax Administration Proclamation No. 983/2016, the Labor Proclamation No. 1156/2019, Commercial Registration and Licensing Proclamation No. 980/2016, and the Commercial Registration and Licensing Council of Ministers Regulations No. 392/2016.

a. The Competition Law Regime

In Ethiopia, the regulation of mergers under the competition law regime was first introduced by the previous Trade Practice and Consumer Protection Proclamation No. 685/2010. Currently, this proclamation has been amended by the Trade Competition and Consumer Protection Proclamation No. 813/2013. The new

⁷⁸ To date, most of the existing banks have reached the recommended capital requirement. But it seems inevitable that the NBE will require higher requirements.

⁷⁹ The Council of Ministers has decided that the Commercial bank of Ethiopia take over the Construction and Business Bank through the Commercial Bank of Ethiopia's Takeover of the Construction & Business Bank Share Company Regulation No. 384/2016, and instantly repealed Regulation No. 203/1994, which established the CBB.

⁸⁰ Art. 35 of the Proclamation is devoted to addressing taxation of companies involved in reorganization. It provides a broad definition of the term reorganization. And Art 10 of proclamation No 983/2016 urges the firms to give notification to the Tax Authority and secure its affirmation as the scheme does not have tax avoidance as a principal objective.

proclamation provides instances that merger is deemed to have occurred; when two or more organizations, previously having independent existence, amalgamate or when such business organizations pool the whole or part of their resources to carry on certain commercial activity.⁸¹ A merger may take place through a direct or indirect acquisition of shares or securities or assets of a business organization, or taking control of the management of the business of another person by a person or group of persons jointly or the business of another person through purchase or any other means.⁸² Here, it is clear that under the proclamation, the term merger now describes and includes the term and concepts of acquisition and consolidation in its definition. One of the inherent problems of this proclamation emanates from its fusion of far different transactions within a single provision and its failure to distinctly regulate mergers from other neighboring transactions such as acquisition/takeover and consolidation.

Similar to abuse of dominance, a merger is not prohibited *per se* under the TCCPP. Instead, a merger could be prohibited if it is established that it causes or is likely to cause a significant restriction against competition or eliminates competition.⁸³

The proclamation prohibits merger to be undertaken without the prior notification and approval of the Authority.⁸⁴ The law obliges any business person to give prior notification and disclose details of the proposed merger to the Authority.⁸⁵ A failure to notify a merger to the Authority will have a consequence of a fine penalty under Article 42(4) of the TCCPP. For a detailed determination and implementation of the TCCPP, the Ministry of Trade has issued a Merger Directive No. 1/2016. This Directive introduced several alternative modes of merger application, allowing business persons to file their proposals through various

⁸¹ Trade Competition and Consumer Protection Proclamation No. 813/2013, article 9(3) (a) & (b)

⁸² Proclamation No. 813/2013, Art 9(3)(b)

⁸³ Proclamation No. 813/2013, Art 9(1)

⁸⁴ Ibid

⁸⁵ Ibid, Art 10(1)

mediums including in person, fax, post, and email.⁸⁶ However, in practice, the only medium available for business persons is to submit a proposal in person due to the absence of a currently active online delivery system. Moreover, the proclamation requires publication of a proposed merger in a newspaper of wide circulation, inviting third parties affected by the proposed merger to file their objections within 15 days of publication.⁸⁷

The TCCPP explicitly confers the power to investigate and authorize merger proposals and this simultaneous task requires the Authority to undertake investigation and make prior assessments on the potential adverse effects of a proposed merger on trade competition.⁸⁸ In assessing the competitive effect of a certain merger proposal, the Authority will be required to determine the specific relevant product and geographic market where a particular product or service is available.⁸⁹

As a principle, in pre-merger assessment, the Authority will consider the anti-competitive effect of the proposed merger on the market, including: its effect on the entry of new businesses to the market; its impact on micro industries; and finally, its impact on public interest.⁹⁰ As a general competition authority, it is wise to limit its scope of the review and factor to be considered by the Authority, but could be taken as one of the grounds not to fully rely on the TCCPP in case of bank mergers. The TCCPP is not a perfect and exclusively adequate legal instrument (is not expected to be) in case of bank mergers. That is because it does not incorporate other traditional banking factors due to its general spatial application to all sectors, and cannot address particular sector-specific issues.

⁸⁶ Merger Directive No. 1/2016, Art 12 (1)

⁸⁷ Proclamation No. 813/2013, Art 10(3) (b)

⁸⁸ Proclamation No. 813/2013, art 10(1 & 2), Art 30 (3)

⁸⁹ Proclamation No. 813/2013, art 10(2) (e)

⁹⁰ Interview conducted with Ato Neyou Bellele, Director of Merger and Acquisition Directorate in the TCCPA, dated on May 04/2018 at 8:30 am

If the Authority's assessment found a proposed merger is not likely to harm trade competition in the relevant market, it shall approve the merger or conditionally approve the merger attaching certain conditions to be fulfilled in advance.⁹¹ Otherwise, if the Authority found any proposed merger to likely affect or lessen trade competition, it shall prohibit the merger.⁹²

In some exceptional instances, the Authority may permit anti-competitive merger proposals, but the applicant must justify that gains from merger outweigh its anticompetitive effect.⁹³ These justifiable grounds that could supersede positive anticompetitive result mentioned under Art. 11 (2) states, "...where the merger is likely to result in technological, efficiency or other pro-competitive gains that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited." These enumerated grounds are very susceptible to interpretation which allows the authority to stretch its discretionary power through broader construction of the provision. However, it can be considered as a provision that exempts policy-induced bank merger schemes from being subjected to the general competition authority's review on the ground of its efficiency gain. In conducting its assessment, the Authority may require additional documents to be adduced, and examines those documents to decide on granting or denying a merger application.⁹⁴

b. The Banking Law Regime

The current Banking Business Proclamation No. 592/2008 is one of the relevant substantive legislations which introduced provisions that specifically attempt to regulate bank mergers even before the emergence of merger regulation under the general competition law of the country. Nevertheless, the proclamation only asserts

⁹¹ Proclamation No. 813/2013, Art 11 (1) & (2)

⁹² Proclamation No. 813/2013, Art 11(1)(b)

⁹³ Proclamation No. 813/2013, Art.11(2)

⁹⁴ Proclamation No. 813/2013, Art 10(3)(a)

few provisions that compel banks to secure the written approval of the regulator before executing any merger or amalgamation.⁹⁵

Let alone the absence of separate bank merger legislation in the country, the Banking Business Proclamation No. 592/2008 and its amendment do not contain a separate section to deal with bank mergers. From the proclamation, one can easily observe that there is haphazard method employed by the legislator in incorporating provisions concerning bank mergers. Those provisions are inserted under the Section titled “Licensing of Banking Business.” The assertion of bank mergers under this section seems incidental. In a true sense, such general prohibition of a merger without prior notification and authorization of the regulator could not be a sufficient legal instrument to regulate bank mergers that includes a sophisticated transaction.

To reiterate, Part two of the Banking Business proclamation Art. 3 which deals particularly with the licensing procedure of banking business, provides prohibition of any plan or arrangement to a merger between banks without securing the prior written approval of the regulator (NBE). This provision is primarily crafted to deal with licensing of banking businesses and not the particular concern of the merger procedure of banks. Essentially, Article 3(3) (d) of the banking business proclamation provides that no compromise, amalgamation, or arrangement that involves a bank as one of the principal parties to the relevant transaction, and no arrangement for the transfer of all or any part of the assets and liabilities of a bank to another person, shall have legal effect unless the consent of the National Bank of Ethiopia is conveyed in writing.⁹⁶ However, the proclamation follows a holistic approach in prohibiting any plans or arrangements that combine the assets and liabilities of banks. Article 3 (c) reads “*merge with or take over the banking business of another bank;*” and the subsequent sub-article (d) asserts “*enter into*

⁹⁵ Banking Business Proclamation No. 592/2008, art. 3 (3) (c) & (d), Art. 33 & Art. 40.

⁹⁶Ibid

any arrangement or agreement for the sale or disposal, by amalgamation or otherwise, of its business, or effect major changes in its line of business.”⁹⁷

From the above sub-articles, it can be seen that the legislators were not cognizant or at least interested in going to the bottom line by distinguishing the different modalities of bank-to-bank transactions, including acquisitions and takeovers. Moreover, it does not incorporate detailed types of merger transactions that could be direct or indirect. In contrast, in this regard, the TCCPP has attempted to firmly distinguish the possible types of transactions that are deemed to be a merger.

The banking business proclamation refrains from going further and simply asserts the various modalities and transactions that amount to bank merger. Primarily, it does not incorporate a definitional provision that gives meaning to the term merger in context to the banking sector mergers. In addition, it does not set conditions, requirements and procedures to be complied with by banks and considerations to be recounted by the regulator.

The possible consequence provided under Article 33 (1) of the banking business proclamation on default banks failed to notify and secure the regulator's approval would be getting subjected to receivership⁹⁸ and a penalty.⁹⁹ In this case, the NBE will subject any defaulting bank that transcends the red line by disregarding its duty to give prior notification as to the proposal, and merging without securing the blessing of the NBE.

As a principle, the ultimate fate of banks subjected to receivership could be winding up and termination. Though there is no clear assertion to this, the implied meaning of Article 41 states “Alternative measures to winding up” reveals that the

⁹⁷ Proclamation No. 592/2008, art 3 (3) (c) & (d), Art. 33 & Art. 40.

⁹⁸ Proclamation No. 592/2008, art 33 (1) (n) Article 33 (1) of the proclamation states that: “*The National Bank shall appoint a receiver to take possession and control of a bank if it determines that one or more of the following circumstances exist in respect of the bank*” ... “*(n) The bank is merged with another bank without the prior written authorization of the National Bank*”

⁹⁹ Proclamation No. 592/2008, Art 58

firsthand measure to be taken by the receiver under its powers and duties vested under Article 39 of the proclamation would be winding up and termination. However, these provisions lack clear measures to be taken on banks that merged without securing the prior written approval of the NBE.

Similarly, the alternative measures lined up under Article 41 of the proclamation would be irrelevant to unnoticed bank mergers. Hence, an attempt to trace the possible and ultimate outcome of bank mergers without notification to the regulator through the channel of receivership via Article 33 of the proclamation could lead to nowhere and end up with a deadlock. Through a broader construction of Article 25 (1) (b) and (d) and (2) of proclamation No. 591/2008, there is a chance that such actions could be considered as criminal offenses.

The assessment method incorporated under proclamation No. 591/2008 lacks comprehensiveness, as it mingled various provisions or failed to address the bank merger issue in detail. Generally, the proclamation does not allocate a separate section that deals with bank mergers. The provisions incorporated under Proclamation No. 592/2008 do not make a distinction between volunteer and compulsory bank merger schemes that may be introduced by the central bank. Among the differences, mostly in the case of policy-induced bank merger schemes, there is no vigorous competition review process and blockade by the general competition authority.¹⁰⁰

¹⁰⁰ For instance, when five Korean banks were in serious financial difficulty in 1998, the Korean Financial Supervisory Commission issued decrees mandating consolidation and restructuring of those banks. Hence such legally, mandated merger was excluded from any review requirement under the competition law. See cf OECD (n 8) 46

6. Bank Merger Regulatory Institutions

In bank merger transactions, the relevant institutional frameworks in Ethiopia are the Ministry of Trade,¹⁰¹ the Ministry of Revenue, the Trade Competition and Consumer Protection Authority, the National Bank of Ethiopia, and the Document Authentication and Registration Agency. In contrast, in the case of state-owned bank mergers, the Council of Ministers and the Public Financial Institutions Supervisory Agency are indispensable organs. The central question in the case of publicly owned bank mergers lies on whether other conventional enforcement bodies are involved is left unanswered. To delimit the scope and objectives of this article, the following sections are confined to discuss the TCCPA and the NBE as the main enforcement institutions in bank mergers schemes in particular.

6.1. Trade Competition and Consumers' Protection Authority

As a principle, the TCCPA as a general competition authority is empowered to review any merger proposal in the country.¹⁰² And such arrangements need to pass through the procedure specified under the TCCPP. Any business people who proposes to enter into an agreement or arrangement of a merger, or the concerned government organ responsible for the registration of the merger should give prior notification to the TCCPA.¹⁰³ After determining the type of merger and a thorough assessment of its effect on competition of the relevant product and geographic market, the Authority approves or rejects the application. Then, registration of the merger will be effectuated.¹⁰⁴ The Authority's power has been reinforced by

¹⁰¹ The Ministry of Trade that is mandated to register banks in the Commercial Register, in accordance with the Commercial Registration and Business Licensing Proclamation, 2016, Art. 5-7, proc. No. 980, Fed. Neg. Gaz., 22nd year, No. 101

¹⁰² Proclamation No. 813/2013, Art. 10 (1) and art 4 (1) of However, art 4 (3) roughly limits the scope of application of the TCCPP from affecting the applicability other regulatory functions and administrative measure to be undertaken under other laws.

¹⁰³ Proclamation No. 813/2013, Art. 10

¹⁰⁴ Proclamation No. 813/2013, Art. 11

subsequent merger directives and relatively comprehensive merger guidelines applicable in assessing mergers under the general competition regime.

6.2. The National Bank of Ethiopia

The Banking Business Proclamation prohibits any plan or arrangement to a merger between banks without securing the prior written approval of the Regulator.¹⁰⁵ It only asserts few provisions that compel banks to secure the written approval of the Regulator before executing any merger or amalgamation and the consequence of revocation and receivership for noncompliance.¹⁰⁶ Moreover, the banking business proclamation authorizes the Council of Ministers to issue Regulation and the NBE to issue a Directive for effective implementation of the Proclamation including that of the merger of banks.¹⁰⁷ Nonetheless, to date, the Council of Ministers and the NBE have failed to issue Regulation and Directives, respectively, as mandated concerning the process banks mergers.

The Banking Supervision Directorate is an office established within the internal institutional apparatus of the NBE, customarily mandated to undertake bank merger authorization process.¹⁰⁸ The directorate set three main objectives to achieve: ensuring safety and soundness of the banking sector; promotion of efficiency and ensuring compliance of banks with rules and regulations; and protection of depositors' interest.¹⁰⁹ This can be contemplated as an implied assignment of the Banking Supervision Directorate office, from the fact that there

¹⁰⁵ Proclamation No. 592/2008, Art. 3 (3) (c) & (d), Art. 33 & Art. 40

¹⁰⁶ Ibid

¹⁰⁷ Proclamation No. 592/2008, Art. 59

¹⁰⁸ cf Interview Confidential NBE (n 4)

¹⁰⁹ National Bank of Ethiopia, Bank Supervision Directorate, Circular BSD/03/11, Information Kit (Brochure).

are directives as to the conditions, requirements, and procedures required by newly establishing banks and CEOs.¹¹⁰

However, to date, there is no separate bank merger review office/board within the Banking Supervision Directorate with supporting directives on bank merger. Though there are several piecemeal directives issued by the Bank, they create difficulty to determine the specific mandate of the directorate. The Banking Business Proclamation stipulates that without the prior written approval of the NBE, merger or takeover of a bank is prohibited.¹¹¹ Moreover, it authorizes the NBE to issue a Directive for effective implementation of the Proclamation including that of the merger of banks.¹¹² However, the Regulator failed to issue a directive incorporating conditions, requirements and procedures and assigning separate merger review office/board¹¹³ that encumbers the effective administration of the bank merger process.

6.3. The Case of Merger between Commercial Bank of Ethiopia and Construction and Business Bank

The Commercial Bank of Ethiopia (CBE) and the previous Construction and Business Bank (CBB) have been established by Council of Ministers Regulation No. 202/2002 and 203/2002, respectively. The fact both banks are state-owned attracts the application of the Public Enterprise Proclamation No. 25/1992. Technically speaking, the merger between CBE and CBB, which constitutes a statutory merger, is not comprehensively addressed under the existing bank merger legal framework.

¹¹⁰ NBE Directive No.SBB/39/06, NBE, directives SBB/39/06, & circular BSD/03/11), directive SBB/40/06, directives SBB/40/06, & circular BSD/01/11, circular BSD/02/11, directives SBB/31/02, directives SBB/19/96

¹¹¹ Proclamation No. 592/2008, art 3(3)

¹¹² Proclamation No. 592/2008, art 59

¹¹³ Similar to it is made to licensing of new banks and other approval considerations to be recounted by the Directorate, NBE, Bank Supervision Directorate, Circular BSD/03/11, Information Kit (Brochure)

According to the Public Enterprise Proclamation No. 25/1992, two or more enterprises may be amalgamated by the decision of the Council of Ministers.¹¹⁴ This will be effectuated through the issuance of regulation by the Council of Ministers.¹¹⁵ Initially, the merger proposal has been made by Ethiopian Public Financial Enterprise Supervisory Agency. Upon the decision of the Council of Ministers and issuance of Regulation No. 384/2016, the two banks have been merged. The Council of Ministers passed a final decision in the affirmative for the merger of CBB with CBE and communicated the NBE by the same letter of notification of such decision to that of Public Financial Institutions Supervisory Agency.¹¹⁶ However, the aim of this communication to the NBE was not to secure prior approval and authorization of the regulator. Instead, it was for the sake of proper and effective implementation of the merger scheme already decided by the Council of Ministers, as the NBE is subordinate and accountable to the Prime Minister's Office.¹¹⁷

In this regard, whether the decision of the Council of Ministers in case of publicly owned bank mergers is self-contained or requires additional approval of the TCCPA and the NBE is not clear. The Banking Business Proclamation empowers the Council of Ministers to issue Regulation and the National Bank of Ethiopia to issue Directive for effective implementation of the provision of the Banking Business proclamation including that of merger of banks. However, both organs failed to come up with the instrument they were empowered to issue.¹¹⁸

From anti-competition perspective, the merger of CBE and CBB could create some pressure on other private banks in Ethiopia. In the first place, the CBE is

¹¹⁴ Public Enterprises Proclamation No. 25/1992, Art. 37 (1).

¹¹⁵ Proclamation No. 25/1992, art 37(2)

¹¹⁶ Letter From FDRE Office of the Prime Minister to the Public Financial Institutions Supervisory Agency, Hidar 29, 2008 E.C (Unpublished)

¹¹⁷ cf Confidential Interview NBE (n 4)

¹¹⁸ Proclamation No. 592/2008, art 59 (1) & (2); The National Bank of Ethiopia Establishment (as Amended), Proclamation, 2008, Proc. No. 591 Art. 3(4).

incomparable with other private banks even before the merger, and this is clear that the merger is detrimental to them as there is a potential for the CBE to abuse its market dominance or other predatory behaviors. This could also bring negative bearings on the formation of new banks.

Typically, the competition Authority should have been called for a separate review testing of the competitive effect of such a merger.¹¹⁹ However, the Authority did not take part in the merger authorization process of the CBE and CBB.¹²⁰ Similarly, the NBE had not been consulted (officially) or did not take part to check the prudential test.¹²¹ Rather, the regulator was merely informed after the decision had been made by the Council of Ministers, if any.¹²²

6.4. Institutional and Regulatory Challenges

a. Lack of Effective Review Procedure

Currently, there is no directive or guideline issued by the NBE to ensure transparency and accountability of the bank merger process.¹²³ The procedures of how the review is held (public hearing or in-camera), how witnesses are examined and complaints are presented on a bank merger proposal, what evidence the party would present at the hearing, and how much reasonable time and opportunity would be given for the parties to inspect the application filed by proponents to the merger are not defined.

Moreover, it is not clear whether an aggrieved party such as disappointed applicants, competitors, and customers believing themselves to be adversely affected by the decision of the Regulator on a proposal can resort to judicial review

¹¹⁹ cf Interview with Nebiyu TCCPA (n 90)

¹²⁰ Interview 'Confidential' within Merger and Acquisition Directorate in the TCCPA, Addis Ababa, 04 May 2018

¹²¹ cf Confidential Interview NBE (n 4)

¹²² Ibid. Through the letter sent to NBE cf Letter (n 116)

¹²³ Ibid

or have an appeal right. Besides, the transparency requirement in the review process, in the interest of preserving public confidence in the banking system is neglected. In particular, the procedure undertaken in the merger of the two state-owned banks (CBE and CBB) is not clear.¹²⁴ The NBE has no information as to how it was undertaken.¹²⁵ This shows the absence of transparency in the execution of two state-owned banks where the NBE does not take part at all.

b. Lack of Clarity on Allocation of Jurisdiction

Most developed economies incorporate detailed rules on competence, procedures, and priorities of the institutions that would eliminate conflict of objectives between the competition law enforcement and the application of sectoral regulation.¹²⁶ Hence, defining the jurisdictional boundaries based on a mutually supported and harmonized manner between the general competition authority and the sector-specific regulators is crucial to avert the risk of conflict and parallel decisions (or, maybe, deadlocks).

In the existing Ethiopian bank merger regime, no legislation or document is serving as a platform between the prudential Regulator and the general competition authority which defines how the two governmental agencies interact. This jurisdictional loophole can be a source of regulatory uncertainties and conflict. Though a serious dialogue was being held on the issue of jurisdiction between the NBE and the TCCPA, the latter claimed to take part in a bank merger review that presents various concerns on consumer protection law enforcement and the issue of anti-competition.¹²⁷ However, the NBE resistance comes out of the premise for the need for special expertise knowledge, and skill on the protection of its

¹²⁴Ibid

¹²⁵Ibid, Particularly the NBE has failed to comply with the requirement of transparency which is shown its dubiousness and concealed facts, reasons, and procedures followed in the takeover or acquisition/ of the CBE and the CBB which is still not disclosed to the public.

¹²⁶ cf Muhammed (n 10) 62

¹²⁷ cf Confidential Interview NBE (n 4)

customers.¹²⁸ The issue of jurisdiction is a critical problem, which is not yet clearly defined by any legal framework or internal working customs.¹²⁹ Moreover, the regulator firmly claims bank merger reviews should be conducted exclusively by the Regulator, and the need to construe Art 4(3) of the TCCPP restrictively exempting the financial sectors.¹³⁰ Further, the law should require that any challenge instituted by the competition law authority to block the merger be filed within a short time following the Regulator's approval of the transaction.¹³¹

The same problem is persistent in the jurisdictional relationship in the case of government-owned banks mergers that attract the central role of the council of Ministers and the conventional regulatory organs Viz. the NBE and TCCPA which are simultaneously entrusted with the power to review and approve bank mergers proposals within their respective legal frameworks. To date, none of these organs took initiatives to define their relationship.

c. The Possibility of Conflicting Decisions

Under the existing Ethiopian bank merger regulatory framework, there is no legal instrument that confers the NBE as a prudential Regulator to have ultimate and discretionary approval or disapproval power over any bank merger proposal. The Basle Core Principle 4 provides that: *"Banking supervisors must have the authority to review and reject any proposals to transfer significant ownership or controlling interests in existing banks to other parties."* Regardless of the division of

¹²⁸Ibid.

¹²⁹Ibid.

¹³⁰Ibid. Surprisingly, the previous Proclamation No. 685/2010 under Art 24, attempted to incorporate a jurisdiction clause by envisaging a provision that calls for a compromise approach to be utilized to resolve the conflict of jurisdiction that may arise between the Authority and other regulatory body. However, the current proclamation that vowed to fill the intricacies of its predecessor depleted the provision. Likewise, the National Bank of Ethiopia Establishment (as Amended) Proclamation No. 591/2008, tried to define the relationship of the NBE and the government (conventionally to the executive organ to whom the NBE is accountable) and its relationship with the entire financial institutions (Banks, Insurances and Micro-finance Institutions). However, this Proclamation does not incorporate governing principles in its jurisdictional or functional relationship with the general competition authority and or other sectoral regulators.

¹³¹ cf Austin (n 50) 8

responsibilities between the Regulator and other authorities and the consideration of competition law issues, the prudential regulator must have ultimate discretionary authority over any bank merger proposal.¹³² The competition law authority may seek to block, on competition law grounds, a merger approved by the Regulator, but that authority should not be able to cause a transaction opposed by the prudential Regulator to be approved.¹³³

Under the OECD, “...if a prudential regulator ever found it necessary to block a precompetitive merger, competition law would not thereby be abrogated...because competition law regarding mergers is proscriptive rather than prescriptive in nature,[thus]can be used to block but not to require mergers.”¹³⁴ Accordingly, to the level that the regulation becomes prohibitive than normative, mergers rejected by the general competition agency should not generate an outright contradiction with the sectoral regulators.¹³⁵ Besides, any challenge instituted by the competition law authority to block the merger must be filed within a short time following the Regulator’s approval of the transaction.¹³⁶ However, under the Ethiopian bank merger regime, the absence of such allocation of power could yield parallel decisions and jurisdictional conflict between these agencies.

d. Lack of Effective Coordination Mechanisms

Currently, under the Ethiopian bank merger regime, there is no such asserted legal provision calling for cooperation and coordinated action between TCCPA and NBE. Beyond this, there is not customarily developed cooperation platform

¹³² Andrews, Michael A., Addressing the Prudential and Antitrust Aspects of Financial Sector Mergers and Acquisitions, *IMF/Monetary and Exchange Affairs Department*, (2000) cited in cf Austin (n 50) 8

¹³³ cf Austin (n 50) 8

¹³⁴ cf Strategic Priorities (n 11)

¹³⁵ Ibid

¹³⁶ cf Austin (n 50) 8

between these bodies, and the area has remained blurred to the expertise of these organs.¹³⁷

Practically in most international jurisdictions, bank mergers are reviewed by both prudential regulators and competition agencies.¹³⁸ That necessitates a need for collaboration between these organs to eliminate unproductive redundancy.

In this regard, the OECD has also recommended countries to incorporate unequivocal and comprehensive procedures to guarantee the mutual evaluation is transparent and likely predictable so that it does not excessively encroach on private sector affairs.¹³⁹ Moreover, there should be a clearly defined legal provision that compels the action by the competition law authority to be coordinated with that of the Regulator to permit timely action by the latter.¹⁴⁰

Conclusion

This article scrutinized the existing relevant bank merger enforcement-regulatory frameworks. It explored the persistent institutional challenges in the enforcement of bank merger schemes. The TCCPP provisions that deal with mergers are not fully compatible to bank merger schemes in particular. These provisions are crafted only from anti-competition perspective and do not address the peculiar sector-specific and traditional bank merger factors. Though both the NBE and the Council of Ministers are empowered to issue Directive and Regulation, respectively, for the implementation of the provisions of mergers, neither of these organs issued any law to this effect to date. Specifically, the NBE needs to come up with a proactively defined set of rules, guidelines and procedures in the enforcement of bank mergers. With regard to the jurisdictional aspect, as a principle, the TCCPA is

¹³⁷ cf Confidential Interview NBE (n 4). Reveals that there is no clear cognizance as to how the two organs interact concerning the bank merger review process.

¹³⁸ cf OECD (n 8)

¹³⁹ Ibid, For instance, several OECD countries, including Australia, Canada, Norway, and the United States, have taken formal steps to promote such coordination.

¹⁴⁰ cf Austin (n 50) 8

empowered to decide on every merger scheme. On the other hand, the general proscription of the authority from impeding the applicability of other regulatory functions and administrative measures is blurred and broadly constructed.

This jurisdictional interplay under the TCCPP does not provide on what types of regulatory functions the general competition authority should abstain from and in which one it could take part. Such blurredness can be a source of conflict and jurisdictional discrepancy in case of bank mergers. Both authorities claim legitimacy in process of bank merger review and authorizations regardless of the involving bank's ownership structure though the public enterprise merger regime has special procedures wherein the NBE and the general competition authority should be involved. However, these institutions have shown abstinence and neglected in the case of a merger between CBE and CBB which was executed exclusively with the decision of the Council of Ministers. Moreover, there is no statutorily or customarily installed cooperation platform between the NBE and the TCCPA, and the Council of Ministers (in case of merger of state-owned banks). The capability of the sector-specific regulator to cope up and handle drastic changes in the corporate structure of banks after the implementation of compulsory bank mergers is critical. The indicators can be in terms of its organizational structure, adequacy of the legal framework, skill, and division of labor. These legal and institutional challenges are potential that requires due consideration in the advent of the imminent compulsory bank merger scheme in Ethiopia.

Hence, the following recommendations are forwarded to remedy the above-recognized problems. The general competition authority should take part in any bank merger review process from competition perspective and should be empowered to blockade of a bank merger on the ground of an anti-competitive effect. Likewise, the NBE as a prudential Regulator needs to issue guidelines, rulebooks, and directives that pro-actively give awareness and caveat to the bankers to make them ready by internalizing the exit strategy of a merger. These

legal framework needs to be comprehensive enough to address and set forth special requirements relating to timeline and mode of offering, announcements, documentation, and provide adequate information to shareholders to make an informed decision as to the merits of an offer, including the option of surrendering their holdings. The NBE Directive should contain a clearly defined bank merger due diligence, valuation, and community convenience factors in considering bank and an appeal procedure and judicial review for aggrieved parties on the decision of the merger proposal. The NBE as a prudential regulator needs to scrutinize any bank merger proposals, principally from traditional banking factors perspective and should be conferred with a veto power to approve/disapprove the bank merger proposal. The jurisdictional interface between the general competition authority and the prudential regulator needs to be defined based on mutually initiated coordination and cooperation platform. Clearly specifying the separate task and role of each organ is important to demark the jurisdictional boundary of these organs and alleviate the risk of illegitimate encroachment in the task of the other. Lastly, in case of state-owned bank mergers authorization, there should be a transparent procedure on how the Council of Ministers decides on mergers with due implementation of the conditions specified under Art. 37 of the Public Enterprises Proclamation.

The Legal Protection of Internally Displaced Women from Sexual and Gender-Based Violence in Ethiopia

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Abstract

Conflicts and violence have continued to result in a substantial number of internally displaced persons in Ethiopia. Even though an attempt has been made to respond to internal displacement, the protection offered to IDPs, particularly for women, is limited to life-saving assistance. Internally displaced women are more vulnerable to and highly impacted by the consequences of conflict. This study doctrinally examines whether the legislative measures taken by the government are adequate and compatible with international and regional instruments to protect IDP women from sexual and gender-based violence. The study establishes that there is inadequacy of laws and policies framework to respond to sexual and gender-based violence against internally displaced women in Ethiopia, becoming a major challenge to offer them comprehensive protection.

Keywords: Internal displacement, conflict-induced displacement, internally displaced women, sexual and gender-based violence, Ethiopia

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1. Introduction

Internally displaced persons (IDPs) is defined as " persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.¹ By the end of 2020, the total number of people living in internal displacement across the world reached 55 million out of which 40.5 million new displacements were triggered or induced by disasters and violence. According to UNHCR's March 2021 report, additional 8 million people were displaced across the globe making the total number of internally displaced people (IDPs) 48 million among whom 30 million were women and girls.² Internally displaced women in particular face violations of fundamental human rights and various challenges both within and outside camps including humanitarian needs and response; psychological trauma from the loss of family, friends, and property; security risks; and the responsibility to protect themselves, and, above all, Sexual and Gender-Based Violence (SGBV).

In a similar vein, internal displacement is not a recent experience in Ethiopia. Displacement caused by climate change such as drought and flood, locust swarm, and state's resettlement and relocation policies and conflict, i.e., inter-communal violence, ethnic tensions, and localized conflicts have been common factors.³ According to DTM Ethiopia's national displacement report number 7 (April 6, 2021), a total of 1.96 million IDPs (excluding Tigray) were identified in Ethiopia

¹ UN High Commissioner for Refugees (UNHCR), Guiding Principles on Internal Displacement, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109, Principle

²United Nation High Commissioner for Refugee Annual Report 2019, 'Global Trends Forced Displacement In 2019' P-30 available at <<https://www.unhcr.org/5ee200e37.pdf>>

³Yigzaw, GedifewSewenet and etal, 'Causes and Impacts of Internal Displacement in Ethiopia' (2019) 9 African Journal of Social Work 32, 37

(out of which 1.2 million were conflict-induced).⁴ As of May 2021, an additional 1.6 million IDPs were identified in Tigray which brings the total number of IDPs to 3.6 million.⁵ The displacements were mainly triggered by conflict, particularly ethnic, which resulted in inter-communal violence.⁶ Various reports show that more than half of the total number of IDPs in Ethiopia were women.⁷

Even though the burden of displacement seems to be shared equally among men and women in numbers, the actual impact and negative repercussions of living in internal displacement affect women more than men.⁸ Women are more vulnerable to the consequences of displacement and would probably become displaced initially.⁹ Furthermore, women are disproportionately targeted in conflict, which resulted in higher levels of sexual and gender-based violence (SGBV) due to breakdown of law and order, lack of family and community support systems, and lack of security. Particularly, rape including gang rape is common sexual violence committed against internally displaced women to dehumanize and dishonour the victim, her family, and her community. When displacement is caused by conflict, women's vulnerability is defined by the intersection of gender with other identities such as class, social status, ethnicity, religion, and sexuality, among others.¹⁰

⁴ Displacement Tracking Metrics Ethiopia National Displacement Report 7 available at < <https://dtm.iom.int/reports/ethiopia-%E2%80%94-national-displacement-report-7-december-2020-%E2%80%94-january-2021>> and DTM Emergency Site Assessment (ESA) Round 5

⁵ UNICEF Humanitarian Situation Report, May 2021 available at <https://www.unicef.org/media/102606/file/Ethiopia-Humanitarian-SitRep-May-2021.pdf>

⁶ Yigzaw, GedifewSewenet and etal, (n 3), 37

⁷ Displacement Tracking Matrix (n 4)

⁸ Christelle Cazabat, et al, 'Women and Girls in internal displacement' March 2020 available at <https://www.internal-displacement.org/sites/default/files/publications/documents/202003-twice-invisible-internally-displaced-women.pdf>

⁹ Ibid

¹⁰ Kerrie Holloway, et al, 'Gender in displacement The state of play' (December 2019) HPG Working Paper, 21

Ethiopia is a signatory to 7 core international human rights instruments and regional documents such as the African Charter on Human and Peoples' Rights,¹¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),¹² and The African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Conventions).¹³ International human rights instruments and specific IDP laws provide various obligations for state parties regarding the protection of internally displaced women, particularly protection from SGBV. They oblige states as a primary duty bearer to take all appropriate measures such as incorporating the obligations into domestic laws including policies and strategies by enacting or amending legislation, designating specific authority or bodies to coordinate activities for the protection of IDP women, and assigning budget to the extent possible.¹⁴ In the case of Ethiopia, to give effect to the treaties, the government has taken various steps, including administrative and legislative measures. Thus, it is relevant to examine whether the government's legislative measures and their implementation are adequate and compatible with the international standards.

2. Women in internal displacement

2.1 Global context of internal displacement

In the 21st century, internal displacement is a continuing reality for states. At the end of 2020, conflict, violence and human rights violations were the leading causes for the internal displacement of 55 million people.¹⁵ Push and pull factors are the

¹¹ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),

¹² African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003,

¹³ Africa Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009 entered into force 21 October 1986) (2009) 21 ILM 58 (Kampala Convention),

¹⁴ Protecting Internally Displaced Persons: A Manual for Law and Policymakers, October 2008, Brookings Institution—University of Bern, Project on Internal Displacement, 11

¹⁵ United Nation High Commissioner for Refugee Annual Report 2019 (n 2)

best ways to understand the causes of forced migrations.¹⁶ Pull-factors are the positive aspects that pull people to move, such as better job opportunities and income. Conversely, push-factors are negative things such as war, conflicts, drought, and other disasters that lead/force people to move/flee.¹⁷ Consequently, as a category of forced migration, refugees and IDPs tend to move due to push factors beyond their control.

The causes of internal displacement are categorized into two main categories: natural and man-made. Scholars broaden the categories into four: human-made disaster-induced displacement, conflict-induced displacement, natural disaster-induced displacement, and development-induced displacement.¹⁸ In some instances, GBV has been the cause of internal displacement. Hence, conflict and violence are the main causes followed by disasters and climate change which force people to leave their homes each year.¹⁹

2.2 Theorizing the Vulnerability of Internally Displaced Women

The number of both men and women IDPs shows that the burden of displacement seems to be shared equally. However, the consequence of living in internal displacement seems to affect women more than men, particularly regarding SGBV, livelihoods, food and nutrition, WASH, security, health, and education.²⁰ There are

¹⁶Mehari Taddele Maru, 'Causes, Dynamics, and Consequences of Internal Displacement in Ethiopia' (2017) SWP Berlin Working Paper FG 8/2017, 13

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Internal Displacement Monitoring Center (IDMC) Global Report On Internal Displacement May 2019, 5 available at <https://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf>

²⁰ Christelle Cazabat, 'Report on Multidimensional Impacts of Internal Displacement' October 2018 Internal Displacement Monitoring Center (IDMC) <<https://www.internal-displacement.org/sites/default/files/inline-files/201810-literature-review-economic-impacts.pdf>> see also Brookings- LSE Project on internal displacement, 'Improving the Protection of Internally Displaced Women: Assessment of Progress and Challenges' (October 2014) 4 <www.brookings.edu/wp-content/uploads/2016/06/Improving-the-Protection-of-Internally-Displacement-Women-October-10-2014.pdf> [accessed 5 May 2020]

many reasons as to why women are more susceptible, particularly to SGBV during conflict-related displacements.

First, pre-existing factors of socio-economic and socio-cultural issues, such as poverty, housing, unemployment, education, socially constructed gender norms, and the high prevalence of GBV cases, make women more vulnerable to Violence Against Women (VAW).²¹ Secondly, conflict and civil strife in particular increase women and children's vulnerability since they are targeted and experience specific forms of humiliation and violation of their human rights. It's argued that during conflict and violence, women are targeted for sexual violence and subsequently, other forms of GBV where early marriage and domestic violence are prevailing.²² This results in the breakdown of law and order, absence of rule of law and justice system, psychological trauma, and disruptions of essential services such as police, health, education, and lack of security.²³ To make it worse, the consequence of conflict-induced displacements does not stop during the conflict; it also continues into post-conflict.

Thirdly, as intersectional feminist scholars argue, when ethnic-based communal conflict occurs, women's vulnerability to SGBV will be double because they will be targeted as women who belong to specific ethnic groups and often from minorities. Papastavrou adds that women continue to be targeted in a conflict because of their gender and ethnicity, religion, or nationality.²⁴ Consequently, there is a complex intersection of race, sex, ethnicity, class, and sexuality in women's

²¹ Mireille Le-Ngoc, 'Normative frameworks' role in addressing gender-based violence in disaster settings' (2015) Disaster Law Working Paper Series Paper No. 3, 7

²² Claudia Felten-Biermann, 'Gender and Natural Disaster: Sexualized violence and the tsunami' (2006) 49 Development 82, 83

²³ Le-Ngoc Mireille (n 21) 8

²⁴ Sophia Papastavrou, 'Refugee Women, Violence, and War A Return to Transnational Feminist Praxis' (2010) 4 Minerva Journal of Women and War 6, 15

lives. She further argues that SGBV, specifically sexual violence, is often either dismissed or disregarded as part of the impact of conflict.²⁵

The UN rapporteur on VAW noted that,

*"[t]he acts of rape or sexual violence during ethnic and nationalist conflicts is not an isolated, aberrational act. It is extremely purposive and aimed not only at destroying an individual woman but also at the community's sense of ethnic purity, which many think is vested in the 'honour' of women. Linked to questions of shame and honour are issues of ethnic pollution."*²⁶

To elaborate on this issue, as ethnic or religious conflict increases women's vulnerability to SGBV, their experience should be understood in a way that accommodates their identities. The experience of violence by all women is not universal or homogeneous; thus, these notions of women's homogeneous characteristics needed to be restructured along the lines of the way violence is understood among diverse women's groups.²⁷

Furthermore, other dimensions of identities of women such as race and class often shape their experiences of violence.²⁸ For instance, "when reform efforts are undertaken on behalf of women, they neglect the fact that women of color are differently situated in the economic, social, and political worlds and are less likely to have their needs met than women who are racially privileged."²⁹ To link this with the issue, when displacement is caused due to ethnic conflict, women are

²⁵ Ibid

²⁶ Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49, E/CN.4/2002/83, 31 Jan. 2002, para 122

²⁷ Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity*.

Durham, NC: Duke University Press, 2003, 3

²⁸ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, (1989) *The University of Chicago Legal Forum* 139, 140

²⁹ Ibid

primarily at intersectional vulnerability due to their ethnicity and gender. Nevertheless, whenever there is a reform in laws or policies, women's intersectional vulnerability is dismissed, and only the gender part is echoed. Hence, SGBV perpetrated against "enemy women" who belong to the "other" ethnic or racial group is a real-life example that demonstrates intersectional subordination and discrimination.³⁰

The other factor that increases women's vulnerability is the existing gender norms and unequal power relationships between men and women.³¹ The gender norms that define and assign different roles to men and women are the root causes of GBV against women and girls as well as men and boys and those of diverse gender identities. Particularly, IDP women living in a patriarchal society exhibit patriarchal behaviors that allow perpetrators to exploit inequalities and exert power, coerce and deceive their victims. Furthermore, norms that accept/normalize violence against women as a way to resolve conflict and the notion of masculinity linked to dominance, honor, and aggression exacerbate their vulnerability to SGBV.

The other factor leading to increased vulnerability of women is the poor conditions in IDP camps and other temporary accommodations.³² These include lack of privacy and security, lack of gender-segregated sanitary facilities, overcrowded living conditions, walking long distances to fetch water and food, lack of police patrols, and continuous sexual demands from partners despite the lack of privacy.³³ However, a gender-specific outcome that impacts women and girls differently and disproportionately is often overlooked.

³⁰ Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the Experience of the Most Marginalized to the Fore' (2002). Institute for Human Rights ÅboAkademi University, Finland, 25

³¹ Jacinta Astles, 'What makes migrants vulnerable to gender-based violence?' available at <https://rosanjose.iom.int/site/en/blog/what-makes-migrants-vulnerable-gender-based-violence>

³² Le-Ngoc Mireille (n 21) 9

³³ Ibid

2.3 Sexual and Gender-Based Violence among IDP Women in Ethiopia

Definitions for SGBV have been provided under the Declaration on the Elimination of Violence against Women (DVAW), CEDAW committee General Recommendations, Maputo protocol, and by international organizations such as World Health Organization (WHO) and UN agencies such as United Nations High Commissioner for Refugee (UNCHR) and the Inter-Agency Standing Committee (IASC). This study will adopt the definition of GBV provided under the IASC Guidelines for Gender-based Violence Interventions in Humanitarian Setting³⁴ because the IASC definition combines all definitions of SGBV by the various United Nations branches. It defines GBV as "an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed (gender) differences between males and females."³⁵ It is further explained that the term GBV includes violence against women and men, but is generally used interchangeably with violence against women because it emphasizes women's subordination and the inequality of power in societies within societies.³⁶ Thus, the term GBV includes sexual and non-sexual forms of violence, and sexual violence is a subgroup of GBV. In other words, SGBV comprises rape including attempt, sexual abuse, sexual exploitation, early marriage, domestic violence, marital rape, trafficking, and female genital mutilation. SGBV have a negative impact on the victim's well-being, especially on sexual, reproductive, physical, and psychological health and participation in society.³⁷

³⁴ Inter-Agency Standing Committee, Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies, September 2005,7 available at: <https://www.refworld.org/docid/439474c74.html>

³⁵Ibid

³⁶Ibid 7

³⁷ Michelle Hynes, 'Sexual Violence against Refugee Women' (2000) 9 Journal of Women's Health & Gender-Based Medicine 819, 821

In the 2018 Gender Inequality Index, Ethiopia ranked 173 out of 189 countries with patriarchal societies and deep-rooted issues of GBV.³⁸ Intimate partner violence, domestic violence, female genital mutilation (FGMC), sexual assault, rape, marriage by abduction, and child marriage are some of the forms of GBV prevalent in Ethiopia.³⁹ Conflict-induced displacements have accentuated the already deep-rooted issues of GBV, resulting in vast protection problems for IDP women.

IDP women in Ethiopia have faced physical and emotional violence from people of other ethnic groups during displacement and at IDP sites.⁴⁰ They were slapped, kicked, and beaten, threatened, or attacked with a knife, gun, or other weapons, cut or stabbed, choked, and others were purposely burned.⁴¹ In addition to this, post-traumatic stress syndrome, depression, and anxiety are common ailments among displaced women since they often witness extreme violence levels than displaced men and non-displaced women.⁴² Furthermore, intimate partner violence is common among IDP women that includes physical violence. Economic violence is another form of violence observed among IDP women. They experience economic violence in the form of prohibition from getting a job, going to work, participating in income-generating projects, and snatching their earnings from them or controlling their money.⁴³ Besides, polygamous marriage, which is common in some parts of Ethiopia such as in Gedeo and Guji Zones and Somali region,

³⁸ United Nations Development Program (UNDP) '2019 Human Development Report Ethiopia' 4 available at http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ETH.pdf

³⁹ Marisa Cordon et al, 'Systematic Literature Review of Gender Based Violence in Ethiopia Magnitude, Policies, and Interventions' August 2018, 8 available at <https://2ed20v44ucst1ujckp24w1ks-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/GBV-in-Ethiopia-Systematic-Lit-Review-Fall-2018.pdf>

⁴⁰ Robin N. Haarr, 'Situation of Gender-Based Violence (GBV) in Internally Displaced Person (IDP) Sites and Collective Centers in Gedeo and W. Guji Zones, Final Report UN Ethiopia, April 2019, 22

⁴¹ Ibid

⁴² Naser Morina, et al. 'Psychiatric Disorders in Refugees and Internally Displaced Persons After Forced Displacement: A Systematic Review.' (2018) 9Frontiers in psychiatry 9 See also International Organization for Migration (IOM), 'Ethiopia National Displacement Report Round 18: July — August 2019,' 22 October 2019,21

⁴³Haarr N. Robin (n 40), 19

coupled with displacement has exposed IDP women in such unions for more economic violence.

The other form of violence is sexual violence, particularly, conflict-related sexual violence. It includes attempted or threatened rape including marital rape, sexual exploitation and abuse, sexual slavery, forced pregnancy, forced abortion, prostitution, enforced sterilization, transactional/survival sex and sexual harassment.⁴⁴ Sexual abuses and exploitations are commonly practiced that require IDP women to exchange sexual favors in return for humanitarian assistance, mostly food items. Furthermore, reports revealed that during displacements in Ethiopia, atrocities were committed and sexual violence was used as a weapon of war, and some of them have experienced inter-ethnic gang rapes.⁴⁵ To make it worse, women who are in intermixed ethnic marriages in some instances face more burden as their partners leave their women behind who will have to oftentimes protect their children.

When it comes to the specific case in IDP sites, displaced women and girls often suffer violence when leaving IDP camps by the opposition ethnic groups or when they try to return to their villages, farms, and home to collect food, fetch water, or go to local markets because of the failure of the government to provide security.⁴⁶ In a submission to the Third Cycle Universal Periodic Review to Human Rights Council by Civil Society Coalitions, it was indicated that rape and sexual abuse had been perpetrated including by security forces that are supposed to protect the IDPs.⁴⁷ It was indicated that 295 cases of sexual violence, 742 cases of physical

⁴⁴ Haarr N. Robin (n 40), 19

⁴⁵ Nicola Jones and et al, 'Raising the visibility of IDPs: a case study of gender- and age-specific vulnerabilities among Ethiopian IDP adolescents', The Humanitarian Practice Network (HPN) , May 2019 available at <https://odihpn.org/magazine/raising-visibility-idps-case-study-gender-age-specific-vulnerabilities-among-ethiopian-idp-adolescents/>

⁴⁶ Haarr N. Robin (n 40) 25

⁴⁷ A Submission by Civil Society Coalition to the 3rd Universal Periodic Review of the Federal Democratic Republic of Ethiopia, 'State of vulnerability of internally displaced people and children

violence, and 628 cases of discrimination in service provisions to IDP women on IDP sites had been reported in the country in 201.⁴⁸

The recent case is the Tigray War commenced in November 2020 in the context of political conflict between the Federal government of Ethiopia and the regional government of Tigray (TPLF), with the Eritrean Defense Forces (EDF) involved, has aggravated the cases of sexual violence in the region perpetrated against civilians including crimes allegedly committed by security forces.⁴⁹ In late March 2021, the total number of rapes recorded in the context of the conflict in Tigray at five medical facilities in Mekelle, Adigrat, Wukro, Shire, and Aksum alone was 512–516 which then reached 829 by Mid-April.⁵⁰

Traditionally, child/early marriage is usually considered as a practice to protect girls from sexual intercourse before marriage and as a mechanism to protect them from sexual harassment and violence.⁵¹ Internally displaced adolescent girls are at heightened risk of child marriage due to the insecurity, increased risks of SGBV, and breakdown of rule of law. These factors also make families and parents see child marriage as a coping mechanism to protect girls from sexual violence,

in Ethiopia' September 2018, Para 17 available at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/ETIndex.aspx>

⁴⁸ A Submission by Civil Society Coalition to the 3rd Universal Periodic Review of the Federal Democratic Republic of Ethiopia, 'State of vulnerability of internally displaced people and children in Ethiopia' September 2018, Para 17

⁴⁹ Patten, Pramila "United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten, urges all parties to prohibit the use of sexual violence and cease hostilities in the Tigray region of Ethiopia" January 21, 2021 available at <https://www.un.org/sexualviolenceinconflict/press-release/united-nations-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-urges-all-parties-to-prohibit-the-use-of-sexual-violence-and-cease-hostilities-in-the/>

⁵⁰ Kassa, Lucy; Pujol-Mazzini, Anna 'We're here to make you HIV positive': Hundreds of women rush to Tigray hospitals as soldiers use rape as weapon of war" March 27, 2021 available at <https://www.telegraph.co.uk/global-health/women-and-girls/make-hiv-positive-hundreds-women-rush-tigray-hospitals-soldiers/>

⁵¹ EtsegenetKedir Mohammed, 'Major women's right issues in Ethiopia: examining efficiency of the law and its enforcement' (2017) 5 Int. J. Human Rights and Constitutional Studies 43,45

economic hardship, or protect the family's honour.⁵² Child marriage is also making it challenging to retain IDP women in education; for instance, in Oromia region, 368 IDP women dropped out of school because of child marriage.⁵³

In Ethiopia, both in-country trafficking and external trafficking are prevalent.⁵⁴ Even though economic migration, especially to the Middle East, was common before the conflicts and places that do not experience conflict, the U.S. Department of State 2020 report shows that ongoing displacement in Ethiopia has created vulnerability for trafficking.⁵⁵ Mainly, IDP women are vulnerable to trafficking internationally and internally due to the protracted conflict in some parts of Ethiopia and partly due to lack of access to justice and economic opportunities.⁵⁶

The above cases show that the conflicts that had happened before and the ongoing Tigray war have increased the vulnerability of IDP women in Ethiopia to different forms of SGBV such as physical, economical, phycological, and most importantly sexual violence.

3. International and Regional Legal frameworks on the protection of IDP women

International instruments that have particular relevance for the protection of displaced women from SGBV and ratified by Ethiopia are the International Covenant on Civil and Political Rights (ICCPR)⁵⁷, International Covenant on

⁵² A Girl No More: The Changing Norms of Child Marriage in Conflict, Women's Refugee Commission, March 2016 see also Haarr N. Robin (n 40)

⁵³ Ibid

⁵⁴ Zelalem Shiferaw Woldemichael, 'Criminalization and Prosecution of Human Trafficking In Ethiopia: Assessing the Legal Framework In Light of International Standards,' (2017) 4 BRICS Law Journal 110, 111

⁵⁵ U.S. Department of State, 'Trafficking in Persons Report: Country narratives - Ethiopia' (2020) 5 available at <https://www.state.gov/reports/2020-trafficking-in-persons-report/ethiopia/>

⁵⁶ Ibid

⁵⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966 entered to force 23 March 1976) 999 UNTS 171 (ICCPR)

Economic, Social and Cultural Rights (ICESCR)⁵⁸, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵⁹, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁶⁰ Thus, this paper examines human rights instruments and IDP-specific laws of Ethiopia and how they impact women in Ethiopia.

3.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The CEDAW Convention is one of the core human rights instruments that provide specific protection for women, and Ethiopia has ratified this document in 1981. The Convention stipulates better safeguarding for all women, including the elimination of discrimination against women in all matters including health care, education, work, marriage, economic and social life. Discrimination against women extends to all forms of exclusion of any act having the purpose or effect of breaching women's human rights as defined by the Convention.⁶¹

CEDAW Committee General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19, acknowledges that GBV may affect some women to different degrees due to their varying experiences and intersecting forms of discrimination based on women's ethnicity/race, indigenous or minority status, colour, socio-economic status, being lesbian, seeking asylum,

⁵⁸ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 999 UNTS 171 (ICESCR)

⁵⁹ United Nation Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979. entered into force 3 September 1981) 1249 UNTS 180 (CEDAW)

⁶⁰ United Nation Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85,

⁶¹ CEDAW Convention Art 1

being a refugee, internally displaced or stateless.⁶² Hence, it recommends states to enact appropriate laws and policies by taking women's experiences into account.⁶³

Moreover, the Committee on CEDAW has come up with a specific recommendation that addresses the situations of IDP women in conflict settings. General Recommendation No 30 on Women in Conflict Prevention, Conflict, and Post-conflict situations acknowledges that all women are not the same and homogeneous. Specifically, IDP women who experience conflict do not suffer the same level of violations in different stages of the conflict.⁶⁴ It also highlights that women such as internally displaced face common discrimination in accessing property and land, inheritance laws, policies that lack gender-sensitivity, access to educational opportunities, health services, and justice.⁶⁵ This recommendation has established that women who are displaced due to conflict are at higher risk of violations of their rights including SGBV and recommend state parties to consider these specific vulnerabilities and establish an effective accountability mechanism.⁶⁶

Even though the general recommendation is not binding, a state can use it as a guideline and act accordingly. Furthermore, the prohibition of VAW has become customary international law which conditions cannot deviate from it. Thus, it is essential to acknowledge that the CEDAW committee on its general recommendations has recognized the differences of women's experience, particularly IDP women, of violence, their intersectional vulnerability, and the need to respond accordingly.

⁶²UN Committee on the Elimination of Discrimination against Women, CEDAW General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, CEDAW/C/GC/35, Para 12

⁶³ Ibid

⁶⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, 1 November 2013, CEDAW/C/GC/30, Para 6

⁶⁵ Ibid, 20

⁶⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 30 , 17

3.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

Ethiopia ratified the Maputo Protocol in March 2018. The Protocol prohibits GBV as part of women's rights to life, integrity, and security of the person, and dignity. Article 1 defines VAW as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or war."⁶⁷ The definition provided in this protocol is comprehensive in a way that it includes acts or threats of violence in both private and public spheres, in peacetime and during war and armed conflict.

It further obliges member states to enact and enforce laws to prohibit all forms of VAW, take all necessary measures to ensure the prevention, punishment, and eradication of all forms of VAW, and providing comprehensive services for survivors of GBV.⁶⁸ The Protocol expressly provides protection for IDP women under Article 11 that requires to, "ensure IDP women are protected during armed conflict against all forms of violence, rape, and other forms of sexual exploitation, and to ensure that such acts are considered as war crimes, genocide, and/or crimes against humanity, and to bring the perpetrators to a competent court of law."⁶⁹ The protection accorded to IDP women under Maputo Protocol has particular relevance because it extends to acts or threats of violence in both private and public spheres, in peacetime and during war and armed conflict.

⁶⁷ Maputo Protocol Art 1

⁶⁸ Ibid, Art 19

⁶⁹ Maputo Protocol Art 11

3.3 United Nations Guiding Principles on Internal Displacement

The UN Guiding Principles on Internal Displacement has set out fundamental standards on internal displacement. It is also the first international framework to provide specific protection and assistance for women facing internal displacement.⁷⁰ However, unlike treaties the guideline, it is a non-binding document that sets out principles that demonstrate the existing norm towards binding laws. The guideline defines IDP and provides rights to be protected and assisted during every displacement stage (before, during, and after displacement).

The guideline further acknowledges IDP women's specific vulnerability and provides special protection and assistance in two different ways. The first one is through protecting women from SGBV, including rape, FGM, sexual torture, forced sexual slavery, and prostitution.⁷¹ The other one is through maintaining their rights to equal access and full participation in assistance programs.⁷² It specifically lays out the right to be free from discrimination and "to take account of the special needs of groups of women including expectant mothers, pregnant and lactating women, mothers of young children, and female heads of household in protection and assistance."⁷³

3.4 The African Union Convention for the Protection and Assistance of Internally Displaced Persons/ Kampala Convention

Unlike the UN guideline, the Kampala Convention is a legally binding document under the AU legal framework, and Ethiopia has ratified it under the Proclamation

⁷⁰ Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 462

⁷¹ UN High Commissioner for Refugees (UNHCR), Guiding Principles on Internal Displacement, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109, Principle

⁷² Ibid Principle 18, 19 and 23

⁷³ Ibid Principle 4 (2)

No. 1187/2020 in March 2020.⁷⁴ The Convention is a comprehensive document in protecting and assisting IDPs by stipulating IDP and member states' rights and obligations, international organizations, and armed groups. It has also extended the definition of IDP articulated under the UN guideline and incorporated international human rights, humanitarian law principles, and African norms from African regional human rights instruments.⁷⁵

The Kampala Convention has unique features in the protection of IDP women. It recognizes GBV as a cause of internal displacement under Article 4 (4) (e). This provision of the Convention is relevant in protecting women from displacement as they are at risk of displacement due to harmful traditional practices, especially in Africa.⁷⁶ Studies show that in some parts of Africa, girls displace due to the threat of FGM and early, child and forced marriages, and to avoid breast ironing – 'a practice that derives, in part, from the belief that promiscuity in young girls may be curbed through the flattening of the breasts.'⁷⁷ In addition to the general protections under the Convention, it levies two specific obligations on states to protect IDP women. Some of them are explained below.

Sexual and Gender-Based Violence: According to Article 9 (1) (c & d) of the Convention, State parties are obligated to "protect the rights of IDPs regardless of the cause of displacement by refraining from, and preventing sexual and gender-based violence in all its forms, notably rape, enforced prostitution, sexual

⁷⁴ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa Ratification Proclamation No 1187/2020

⁷⁵ Mehari Taddele Maru, 'The Kampala Convention and its Contribution to International Law' Eleven International Publishing, The Netherlands, May 2014, 7, See also, Chaloka Beyani, "A View from Inside the Kitchen of the Kampala Convention: The Modernisation of the International Legal Regime for the Protection of Internally Displaced Persons" LSE Legal Studies Working Paper No. 17/2020, 5

⁷⁶ Kampala Convention, Art 4(4)(e)

⁷⁷ Romola Adeola, 'The Kampala Convention and the right not to be arbitrarily displaced' (October 2018) Forced Migration Review Issue 59, 17

exploitation, and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour, and human trafficking and smuggling."⁷⁸

Reproductive and sexual health: According to Article 9(2) (d), States have to "take special measures to protect and provide for the reproductive and sexual health and to provide appropriate psycho-social support for victims of sexual and other related abuses."⁷⁹

The protection for IDP women under the Kampala Convention is very relevant to respond to displacement because it acknowledges that women are vulnerable to displacement, especially on SGBV. Furthermore, it imposes a primary obligation on states to incorporate obligations under the Convention in their respective national laws, policies, and strategies. It also puts out an obligation on non-state actors such as rebel groups. States are obliged to discharge their duties through enacting or amending legislation in conformity with international obligations, designing specific authority or body, assigning budget to the extent possible, and coordinating activities for protection and assistance of IDP women.⁸⁰

4. National legal protection for IDP women

Various human rights instruments impose different obligations on state parties including ensuring their national laws and policies respect and reflect their obligations under international law and take all necessary measures to implement their international legal obligations at the national level. There is no comprehensive legal framework for internal displacement in Ethiopia. Yet, there are laws scattered here and there dealing with IDP women though not sufficient. Next, this paper will briefly discuss how different Ethiopian laws and policies address the issue.

⁷⁸ Kampala Convention, Art 9 (1)

⁷⁹ Ibid Art 9 (2)

⁸⁰ Kampala Convention Art 5

4.1 The Federal Democratic Republic of Ethiopia (FDRE) Constitution

The FDRE Constitution is the supreme law of the land that provides fundamental human and democratic rights for the country's citizens and residents. This Constitution can be said to have renewed the commitment to gender policy and clearly expresses legislative support for women through its various provisions. Article 25 of the Constitution provides the right to be free from discrimination on different grounds, including gender.⁸¹ Furthermore, Article 35 affirms that women shall enjoy equal rights and protections as men; it acknowledges the historical legacy of inequality and discrimination suffered by Ethiopian women; and it entitles them to affirmative measures to remedy the persistent gender inequality.⁸² It further obliges the government to eliminate laws, customs, and practices that oppress or cause bodily or mental harm to women.⁸³

4.2 The Criminal Code of Ethiopia

The Criminal Code helps to establish criminal accountability for crimes related to SGBV, including rape, child marriage, and harmful traditional practices. To elaborate more, Article 620 defines rape as "compelling a woman to submit to sexual intercourse outside wedlock, whether using violence or grave intimidation or after having rendered her unconscious or incapable of resistance."⁸⁴ This provision of the law excludes rape in marriage (marital rape), and rape is punishable from five years to life imprisonment depending on the circumstances of the case. In addition to this, Article 553(1) of the Code criminalizes any physical and psychological violence and states that, "Whoever intentionally or by negligence causes bodily injury to another or impairs his health, by whatever means or in any manner, is punishable as per the provisions of this Chapter. These

⁸¹ Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st Year No. 1, dated 21 August 1995, Art 25

⁸² Ibid Art 35 (1)

⁸³ Ibid

⁸⁴ Criminal Code of Ethiopia, Proclamation No. 414/2004, 9 May 2005, Art 620 (1)

provisions embrace all manners of bodily assaults, blows, wounds, maiming, injuries or harm, and all damages to the physical or mental health of an individual."⁸⁵ Even though this provision failed to specify the term violence against women, it has been used to include physical and psychological violence against women.⁸⁶ Furthermore, Article 564 of the Code stipulates that the above article is also applicable to violence committed within marriage or irregular union, which is interpreted as domestic violence against women.⁸⁷ Moreover, Article 565 and 648 of the Criminal Code criminalize and prescribe punishments for Female Genital Mutilation (FGM) and early marriage.⁸⁸

Trafficking in person has also been criminalized under the Criminal Code. However, due to inadequate responses to the problem, the part that deals with trafficking in person has been replaced with Proclamation No. 1178/2020, a Proclamation to Provide for the Prevention and Suppression of Trafficking in Persons and the Smuggling of Persons. Trafficking in person is punishable with 7-15 years of rigorous imprisonment and fine. The proclamation's Article 3(3) stipulates that the perpetrator of such crime will not exculpate from liability even though the victim has consented or knows the exploitation.⁸⁹ This provision of the law is crucial for protecting IDP women because the economic hardship and conflict will force them to be vulnerable to such crimes.

4.3 Strategic Plan for an Integrated and Multi-Sectoral Response to VAWC and Child Justice in Ethiopia (2010-2015)

The CEDAW Committee under the General Recommendation 28 obliges state parties to develop and implement policies, national plans of action, strategic plans,

⁸⁵ Ibid Art 553

⁸⁶ EtsegenetKedir, 'Major Gaps on the Rights of Women in Ethiopia' JAMM04 Master Thesis, International Human Rights Law, Lund University, Faculty of Law (2016), 54 available at <http://lup.lub.lu.se/student-papers/record/8876410>

⁸⁷ Criminal Code of Ethiopia (n 90) Art 553(1)

⁸⁸ Ibid, Art 564

⁸⁹ Ibid Art 3(3)

and programs to fulfil its obligations and ensure the allocation of enough human and financial resources.⁹⁰ The government of Ethiopia has formulated different policies and strategic plans to meet its obligation such as the National Policy on Women in 1993, the National Action Plan for Gender Equality (NAP-GE) 2006-2010, the National Human Rights Policy of 2016-2020, the Strategic Plan for an Integrated and Multi-Sectorial Response to Violence Against Women and Children, and Child Justice in Ethiopia (2010) and the National Strategy on Harmful Traditional Practices (2013) by the Ministry of Women, Children and Youth Affairs.

The strategic plan for VAW aims to improve the grim situation of VAWC and child justice by addressing gaps and challenges at the policy, institutional and practical levels, and by initiating a comprehensive multi-sectoral and integrated prevention and response to VAWC and child justice.⁹¹ The plan has identified the justice, health, education, and social sectors as the most relevant stakeholders in the prevention and response to VAW, and focused on activities undertaken and coordinated by institutions in these sectors.⁹² It has five overarching pillars: (1) the adoption and implementation of protective laws and policies; (2) building organizational capacity (institutional, financial, and managerial) of the major actors in the health, justice, security, education, and social sectors; (3) Availability, accessibility, quality and comprehensive service delivery for survivors of violence; (4) community mobilization: engagement of the community, including women and children, in prevention and response efforts; and (5) coordination among different sectors.⁹³ Further, it has been supported with three years of the detailed operational plan.

⁹⁰ CEDAW Committee General Recommendation No. 28 (n 68) para 38 (a)

⁹¹ Ibid, Art 565 and 648

⁹² Strategic Plan for an Integrated and Multi-Sectorial Response to VAWC and child justice in Ethiopia, 2010- 2015

⁹³ Ibid

Even though this strategic plan provides comprehensive responses including institutional structures to addressing VAWC in general, it does not deliver substantively beyond the support for setting up one-stop centers progress on its other pillars and goals, particularly around prevention and awareness-raising activities.⁹⁴ The revision of the plan was planned to be undertaken in 2019–2020, but it has not yet been revised. In addition, the National Human Rights Policy 2016-2020 failed to identify IDPs in general and IDP women in particular as a vulnerable group and left them out. Further, it failed to put adoption of laws and measures to address GBV except for awareness creation measures.

5. Analyzing the National Legal Framework: Lacunae in the Existing Legal and Policy Frameworks

5.1 Protection from sexual and gender-based violence

SGBV is an everyday experience for internally displaced women. Particularly, conflict situations significantly increase the violence inflicted upon women and make them more vulnerable than other women.⁹⁵ IDP Women are often confronted by multiple and reinforcing layers of discrimination, leading to more disadvantage and marginalization when their gender identity is coupled with their ethnicity.⁹⁶ The intersection of multiple identities simultaneously makes IDP women more likely to be targeted for certain forms of violence. This is due to the unfavorable status they have over other women and as perpetrators know their need for assistance or difficulty to report SGBV cases they encounter/face.

Often, rape, including gang rape is a common VAW during displacement, particularly in conflict-induced displacement. It is a deliberate tactic used in war to

⁹⁴Elshaday K. Woldeyesus et al, 'Policy and legal analysis notes: a review of the strategic plan for a multisectoral response to violence against women and children in Ethiopia' Briefing papers, December 2018, 3

⁹⁵ Caroline O N Moser et al, 'Change, Violence and Insecurity in Non-Conflict Situations' Overseas Development Institute Working Paper 245, March 2005, 10

⁹⁶Anouka van Eerdewijk and et al, 'The State of African Women Report' August 2018, 132 available at <https://rightbyher.org/wp-content/uploads/2018/08/SOAW-Report-FULL.pdf>

dehumanize and dishonor a woman, her husband, and the entire community by perpetrators to express their revenge and hatred to the other ethnic group. In conflict settings, the nature of the rape crime committed is usually different from the rapes committed in normal circumstances. This is because they are committed by more than one person and used as weapons of war against the other ethnic group.⁹⁷

Although gang rape is the lived experience for most female IDPs displaced due to ethnic-based conflict in Ethiopia, the Criminal Code of Ethiopia has only criminalized rape and put gang rape only as aggravating crime of rape. However, the international norms in such countries as India, Pakistan, Kenya, Tanzania, and Philippine indicate that states have a separate law for Sex offenses that criminalize gang rape separately from rape. This is because the psychological impact of gang rape is worse than other forms of rape as it is sometimes committed in front of relatives such as husbands or families and as it involves violations by more than one person. Thus, the lack of inclusion of gang rape within the Criminal Code implicates that it assumes all kinds of rape are similar and homogenous, and ignores the fact that some women face different forms of rape with severe physical and psychological impact. Even though criminalizing rape is relevant as a first step for the protection of all women, it neglects that IDP women are differently targeted for different forms of rape than other women, and women are displaced due to other reasons than ethnic conflict.⁹⁸ The rape definition provided under the Criminal code Art 620 and the punishment provided under the same article sub art 2(d) seem to fail to consider such situations. Furthermore, the punishment provided in the code is not equivalent to the crime. Countries such as India, Pakistan, Kenya, and Tanzania provide life imprisonment as the final punishment, however, the Criminal code in Ethiopia has set 20 years of imprisonment.

⁹⁷ Rashida Manjoo et al, 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas', (2011) 44 *Cornell Int'l L.J.* 11, 14

⁹⁸ Crenshaw (n 29)

CEDAW committee in its two concluding observations (2019 and 2011) on Ethiopia states its concern on the emerging forms of violence such as acid attacks and gang rapes. It, therefore, recommends adopting a comprehensive and inclusive law on GBV, including gang rape and other forms of sexual violence.⁹⁹ Furthermore, the Committee has urged states to put intersectionality at the basis of the development of such laws. However, the FDRE Criminal Code has failed to acknowledge and take into account the intersectional identity of IDP women.

5.2 Lack of Gender Sensitivity in the Criminal Code

The Criminal Code that is supposed to protect women from violence in itself lacks gender sensitivity. There is no reference, even once, to the term violence against women, including domestic violence in the Code. Due to the lack of comprehensive laws in Ethiopia on VAW, one hence may interpret provisions of the code to govern cases related to physical and psychological violence and domestic violence. For instance, the provisions dealing with the physical and psychological well-being of individuals in general to determine the offense and its punishment have the effect of complicating things during the production of evidence mainly because it failed to take the unique nature of physical, psychological, and domestic violence against women into account. Similarly, the Code failed to include other types of violence such as economic and sexual violence except for the case of rape committed against women.

Moreover, sexual exploitation and abuse, and sexual torture, which are common forms of violence committed against IDP women, have not been addressed by any law, which is a clear legal gap. "Women often pay the price for daring to claim the integrity, security, and safety of our bodies and our living spaces".¹⁰⁰ During ethnic

⁹⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations of the Committee on the Elimination of Discrimination against Women - Ethiopia, 14th March 2019, CEDAW/C/ETH/CO/8 and July 2011, CEDAW/C/ETH/CO/6-7

¹⁰⁰ Mohanty, Talpade Chandra (n 28) 3

conflict displacement, women are the ones who will suffer most from the consequences of violence and displacement. The displacement consequences, coupled with the lack of comprehensive law on VAW, affect women's and girls' well-being more generally. Thus, the Criminal Code has critical shortcomings such as failure to provide comprehensive protection against VAW as it is prescribed under CEDAW and Maputo Protocols. The CEDAW Committee, in its concluding observation on Ethiopia, recommends adopting a comprehensive and inclusive law on GBV, addressing all forms of violence against women.¹⁰¹ This concluding remark confirms the existence of a legal gap in addressing VAW, which consequently affects IDP women. However, the government of Ethiopia has not taken action to come up with a comprehensive law or policy to close the legal lacuna and address the pervasive challenges of IDP women.

5.3 Civil Remedies

The CEDAW Committee in its recommendation No 19 and 35 provides an obligation to states to "ensure that all forms of GBV against women in all spheres, which amount to a violation of their physical, sexual, or psychological identity, are criminalized and introduce, without delay, or strengthen legal sanctions commensurate with the gravity of the offense as well as civil remedies."¹⁰² Furthermore, Maputo Protocol Article 19 obliges states to establish mechanisms and accessible services for rehabilitation and reparation for VAW victims.¹⁰³ Civil remedies have to be available to effectively redress victims of VAW. These remedies include orders of protection and compensation for damages. Protection orders are the most effective way of remedy to protect the victims from further acts of violence.¹⁰⁴ This order will guarantee women that they will be adequately

¹⁰¹ Concluding observations of the CEDAW Committee- Ethiopia (n 109)

¹⁰² CEDAW Recommendation No 35 (n 66) Para 29 and 19 Para 24

¹⁰³ Maputo Protocol Art 19

¹⁰⁴ Shazia Choudhry, 'Women's Access To Justice: A Guide For Legal Practitioners,' (October 2018) Strasbourg Cedex, 22

protected if they bring their complaints. On the other hand, compensation for the harm inflicted on the victim validates the victim's experience and reinforces the idea that the perpetrators must be held accountable for their actions.¹⁰⁵

The compensation scheme will immensely help IDP women to get them back on their feet financially, and it may help them feel better because it is at least recognized that what happened to them was wrong. Furthermore, whether it is compensation or reparation, it will reduce the suffering and the risk of staying in unsafe and unsecured places for them and their families. However, any of these civil remedies are not available for victims of VAW in Ethiopia.¹⁰⁶ Unlike other countries which provide compensation for victims of sexual violence such as rape, Ethiopia's Criminal Code does not offer any of these civil remedies¹⁰⁷. On the other hand, the Ethiopian Civil Code under the extra-contractual liability (tort) allows compensation to be paid for any offense that causes a moral injury to a person which is 1000 birr.¹⁰⁸ The compensable crimes are physical assault, unlawful restraint, defamation, and damage to spouses' rights.¹⁰⁹ However, this provision excludes other types of violence such as sexual violence. Furthermore, this amount of compensation for physical assault is very small and cannot be compared to the traumatic experience victims suffered due to the violence, and does not consider the current situation. Therefore, there are major gaps in the legal framework on civil remedies.

Furthermore, Article 12 of the Kampala Convention requires states to enact a law that provides just and fair compensation or other reparations for IDPs for damage incurred due to displacement. However, during the ratification of the Kampala

¹⁰⁵ International Commission of Jurists, 'Women's Access to Justice for Gender-Based Violence' Practitioners' Guide No. 12, February 2016, 121

¹⁰⁶ Kedir Etsegenet, (n 86)

¹⁰⁷ Tanzania: Act No. 4 of 1998, Sexual Offences Special Provisions Act, 1998 Art 8

¹⁰⁸ Civil Code of Ethiopia (1960). The Federal Negarit Gazeta Year, No. 2, Proclamation No. 165/1960. Art2116(3)

¹⁰⁹ Ibid

Convention, Ethiopia has reserved this article and provide compensation is only in case of development-induced displacements. Hence, the obligation of the government to other causes of displacement is limited to humanitarian assistance under Art 89 of FDRE Constitution. Destruction of properties is one of the consequences of conflict-induced displacement and when it's aggravated by ethnicity, the destruction will be grave and widespread. Thus, this reservation excludes women IDPs from their rights to get compensation. The compensation scheme would especially help IDP women to get them back on their feet financially and it may help them feel better because it is at least recognized that what happened to them was wrong. Furthermore, whether it is compensation or reparation, it would reduce the suffering and the risk of staying in unsafe and unsecured places for them and their families. However, there are inadequate and incompatible laws in addressing civil remedies for women IDPs in Ethiopia.

To sum up, despite the legal measures taken by Ethiopia to respond to VAW in accordance with international human rights instruments, there remains significant and pervasive gaps in the legal framework, especially for the protection of IDP women. The absence of criminalization of some forms of VAW such as gang rape, sexual exploitation and abuse, sexual torture, marital rape, and civil remedies for VAW victims are the major gaps within the legal framework to respond to the challenges of IDP women in Ethiopia.

Conclusion

The paper evaluated the vulnerability of IDP women through intersectional feminist lens. The homogenous categorization of IDP women by using a single identity of sex as women contributes to ignoring their experience to violence which involves compounded identities such as race, social status, ethnicity, gender, and religion. As a result, they are considered as if they are facing the same level and form of violence as all other women including women displaced due to other reasons apart from ethnic conflicts. This can be remedied by treating the case of

IDP women differently in each case rather than assuming them as part of the homogeneous group.

Besides, the paper identified that the existing national laws and policies do not take into account the specific vulnerability of IDP women, and are not adequate to respond to the challenges arising therefrom. The existing law that is applicable to all women also failed to include some forms of violence against IDP women. In this regard, the government has failed to fulfill its obligations under international and regional instruments.

በፍትሐ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች ምክንያታቸውና የተከራካሪ ወገኖች አለመቅረብ የሚያስከትለው ውጤት በኢትዮጵያ የፍትሐ-ብሄር ሥነ-ሥርዓት ሕግ፡- ሕጉና አተገባበሩ

ተዋቅዋ ሞላ*

Abstract

Obviously, when the aggrieved party pleads his/her case before courts, the later usually renders several adjournments to perform various tasks in a given case in which the non-appearance of parties has an adverse effect on their constitutional rights. From several years until now, there is divergence before courts in Ethiopia, over the purpose of adjournments and effect upon non-appearance of one or both parties in a civil suit. Therefore, this article aimed to clarify the disagreement between adjournments in terms of purpose and their effects upon non-appearance of one or both parties in Ethiopia. The doctrinal research type and qualitative method of study was followed. Accordingly, the author finds; first, to pass a valid judgment on a given case a civil bench is expected to render five types of adjournments with different function on each category. Second, as the court's function on each adjournment category is different, the effect upon the absentee(s) party on each adjournment is also different. This includes losing the right to be heard in writting, leading to either ex-parte proceeding, striking-out or dismissal of the suit as well as losing the right to evidence a claim by submitting witnesses testimony. The author concludes the function of court on each adjournment and effects upon non-appearance of the party(s) are different. Consequently, courts should duly and diligently perform functions of each adjournment to avoid delay, injustice, and be restrained from passing arbitrary penalty upon the absentee(s) party.

Keywords: Adjournment, Civil Litigation, Courts, Parties Non-Appearance, Ethiopia Civil Procedure Law.

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አህጽሮት-ጽሑፍ

ዜጎች ፍትሕ ለማግኘት ቅሬታቸውን ለመደበኛው ፍ/ቤት ሲያቀርቡ መደበኛው የግጭት አፈታት ሂደት የሚከተለው ሥነ-ሥርዓቶችን የማክበር ግዴታ አለባቸው። ከእነዚህም ውስጥ አንደኛው ሥነ-ሥርዓት የቀጠሮ ጊዜ ማክበር ነው። ለብዙ ጊዜ በሀገራችን ፍ/ቤቶች በቀጠሮ አሰጣጥ እና ክንዋኔዎቻቸው እንዲሁም የተከራካሪዎቹ አለመቅረብ ስለሚኖረው ውጤት አጨቃጫቂ ከመሆኑም በላይ በፍ/ቤቶችም ውጥነት የጎደለው ልምድ ሲታወቅ ቆይቷል፤ ይስተዋላልም። ይህ ደግሞ በዜጎች ሕገ-መንግሥታዊ መብቶች ላይ አሉታዊ ተፅዕኖ ያስከትላል። ለዚህ ጽሑፍ መነሻ የሆነው ይህ ችግር ሲሆን በፍትሕ-ብሄር ችሎት የፍ/ቤት ቀጠሮ ትርጉም እና ክንዋኔ እንዲሁም ከተከራካሪ ወገኖች አንዱ ወይም ሁለቱም ቀጠሮ አክብረው አለመገኘታቸው የሚያስከትለውን ውጤት ግልጽ በማድረግ በዜጎች ላይ የሚደርሰውን አሉታዊ ተፅዕኖ መቅረፍ አስፈላጊነቱን በማመን ነው። ለዚህ ጽሑፍ ዝግጅት መጽሐፍትን፣ ሕግጋትንና የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ውሳኔዎችን ጸሀፊው ዳስሷል። በዚህ ጥናት የመጀመሪያው ግኝት በሕግ ማዕቀፉ ፍ/ቤት በተያዘው የክስ ጉዳይ አስፈላጊውን ክንውን ለማድረግ አምስት አይነት ቀጠሮ ሊሰጥ እና በእያንዳንዱ ቀጠሮም የተለያዩ ክንውን እንደሚያደረግ ያሳያል። ሁለተኛው ዋና ግኝት ፍ/ቤት በተለያዩ ቀጠሮ የሚከናወነው ተግባር መለያየቱን ተከትሎ ከተከራካሪዎች አንዱ ወይም ሁለቱ ባይቀርቡ ሊከተሉ የሚችሉት ውጤቶች የተለያዩ ናቸው። እነዚህም የተከራካሪ የጽሑፍ መልስ የማቅረብ መብት መታለፍ፣ በሌሉበት የክሱ መሰማት መቀጠል፣ የመዝገብ መዝጋት፣ የክስ መዘጋት እና ማስረጃ የማሰማት መብት መታለፍ ናቸው። ሕጉ የፍ/ቤት ቀጠሮና ክንዋኔ እንዲሁም ባልቀረቡ ተከራካሪዎች ላይ የሚወሰደው እርምጃን በሚመለከቱ አንዳንድ ድንጋጌዎች ላይ ግልፅነት የጎደለው እና በቂ አለመሆኑ እንዲሁም በሕጉ እና በአተገባበሩ መካከል ልዩነት መኖሩ ሌላው ችግር ነው። ስለዚህ ፍ/ቤቶች ለፍትሕ ሲባል በያዙት ቀጠሮ የሚተገብሩት ክንዋኔና ባልቀረቡ ተከራካሪዎች ላይ የሚከተለው ውጤት የሕጉ ዓላማና ይዘትን መሠረት ያደረገ መሆኑን አላበት።

መሪ ቃላት፡ ቀጠሮ፣ የፍትሕ-ብሄር ክርክር፣ ፍ/ቤት፣ የተከራካሪዎች በቀጠሮ አለመቅረብ፣ የኢትዮጵያ የፍትሕ-ብሄር ሥነ-ሥርዓት ሕግ

1. መግቢያ

ሕግጋት በአጠቃላይ ይዘታቸው መሠረታዊ ሕግ (Substantive laws) እና የሥነ-ሥርዓት ሕግ (Procedural laws) ተብለው በሁለት ይከፈላሉ። የሥነ-ሥርዓት ሕግ በበኩሉ የወንጀል ሥነ-ሥርዓት እና የፍትሐ-ብሄር ሥነ-ሥርዓት ሕግ ተብሎ ይከፈላል። አንዳንዴም የማሠረጃ ሕግ እንደ ሦስተኛ ክፍል ይታያል። መሠረታዊ ሕግጋት የሚባሉት የሰዎችን መብትና ግዴታ የሚደነግጉ ሲሆን፤ የሥነ ሥርዓት ሕጎች ደግሞ ጥሰት ሲያጋጥም እነዚህ መብትና ግዴታዎች ሕግን ተከትለው የት እና እንዴት ሊተገበሩ እንደሚገባ አቅጣጫ ይጠቁማሉ።¹

የሥነ-ሥርዓት ሕግ ዜጎች በመሠረታዊ ሕግ የተደነገገውን መብታቸውን ለማስከበር የትና እንዴት እንደሚሄዱ እንዲሁም ክእሌቱታ አቀራረብ ጀምሮ እስከ መጨረሻው ድረጃ (ወሳኔ እና አፈፃፀም ድረስ) በሚኖረው ሂደት ሊከተሏቸው የሚገቡ የሥነ-ሥርዓት ደንቦችን የሚደነግግ ነው። የሥነ-ሥርዓት ሕግ ብቻውን የሚቆም ሳይሆን መሠረታዊ ሕግጋት ተፈፃሚ እንዲሆኑ የሚያስችል “[ዓ]ላማውም የፍትሐ-ብሄር ጉዳዮችን ፍትሐዊ፣ ኢኮኖሚያዊና ቀልጣፋ በሆነ ሁኔታ ወሳኔ እንዲያገኙ ማድረግ (...) በመሆኑ (...) እጅግ ጠቀሜታ ያለው ነው”።² የሥነ-ሥርዓት ሕጎችን ማወቅ እና አላማወቅ እንዲሁም ማክበርና አላማክበር በሕግ የተሰጠንን መብት እና ግዴታ መጠቀም እንደመቻልና አለመቻል ያህል ነው።³ “የአንድን ክርክር ውጤት ከመሠረታዊ ሕግ ልዩነት ይልቅ የፍትሐ-ብሔር ሥነ-ሥርዓት ሕግና አተገባበር ልዩነት በበለጠ እንደሚለወጠው በዘመናችን ግንዛቤ ያገኝ ጉዳይ ነው”።⁴

¹ Robert Allen Sedler, *Ethiopian Civil Procedure Law* (Faculty of Law Haile Selassie I University in association with OUP, 1968) 1, Para.1. [Here in after Sedler].

² አበበ ሙላቱ, ‘የኢትዮጵያ የፍትሐ-ብሔር ሥነ-ሥርዓት ሕግ መሠረታዊ ችግሮች’ (የኢትዮጵያ የፍትሐ-ብሔር ሥነ-ሥርዓት ሕግ መሠረታዊ ችግሮችና ማሻሻያዎቹ ላይ ያተኮረ ኮንፈረንስ, ዓለማየሁ ሃይሌ መታሰቢያ ድርጅት, 1998 ዓ.ም) 12. [ከዚህ በኋላ አበበ በማለት ተጠቅሷል]; Stuart Sime, *A Practical Approach to Civil Procedure* (10th edn, OUP, 2007) 165, Para. 12.01.

³ Jack S. Emery and others, *Civil Procedure and Litigation: A Practical Approach* (West Legal Studies, Thomson Learning, 2000) 1.

⁴ አበበ 12.

የሥነ-ሥርዓት መብቶች እንደ መሠረታዊ ሕጎች በሕገ-መንግሥቶችና አለምአቀፍ ኮቬንንቶች ታቅፈዋል።⁵ የኢትዮጵያ የፍትሐብሔር ሥነ-ሥርዓት ሕግ (የፍ/ብ/ሥ/ሥ/ሕግ) የተለያዩ የሥነ-ሥርዓት መብቶችንና ግዴታዎችን ይዘረዝራል። ነገር-ግን ተግባራዊነቱ ተቋማዊና የሕግ ችግር ተብለው የሚከፈሉ ሁለት መሠረታዊ ችግሮች እንዳሉበት ተተንትኗል።⁶ ተቋማዊ ችግር የሚባሉት የማብራሪያዎችና የዝርዝር ደንቦች አለመኖር፣ የአስፈፃሚ ተቋማት አለመቋቋም፣ የፍ/ብ/ሥ/ሥ/ሕጉን ለማሻሻል አለመቻል፣ የፍ/ቤቶች ሚና ጎልቶ አለመዉጣት፣ የዳኝነት ነፃነትና ተጠያቂነት አብረው አለመተግበራቸውና አስተዳደራዊ ችግሮች ናቸው።⁷ በሌላ በኩል ከሕጉ የሚመነጩ ችግሮች የአማረኛው ቅጅ ከእንግሊዘኛው ጋር አለመጣጣም፣ ሕጉ ሲቀዳ የተዘለሉ ወይም ያላግባብ የተጨመሩ ደንቦች መኖር፣ የአቤቱታ አቀራረብን በሚመለከት (የፍ/ቤቶች ተሳትፎ፣ የክስ አቤቱታ ምክንያት ሁኔታ፣

⁵ የኢትዮጵያ ፌዴራላዊና ዴሞክራሲያዊ ሪፐብሊክ ሕገ-መንግሥት ነጋሪት ጋዜጣ አዋጅ ቁጥር 1/1987 ቁጥር 37 (1) “ማንኛውም ሰው በፍርድ ሊወሰን የሚገባው ማንኛውም ጉዳይ ለፍርድ ቤት ወይም ለሌላ በሕግ የዳኝነት ስልጣን ለተሰጠው አካል የማቅረብና ውሳኔ ወይም ፍርድ የማግኘት መብት አለው።” ቁጥር 25 “ሁሉም ሰዎች በሕግ ፊት እኩል ናቸው”፣ African Charter on Human and Political Rights (ACHPR) 1981, Article 7(1) “Every individual shall have the right to have his case heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulation and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal; The Universal Declaration of Human Rights (UDHR) 1948, Article 8 “Everyone has the right to get an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by any other law” በማለት ይደነግጋል; International Convention on Civil and Political Rights (ICCPR) 1966, Article 2(3) “Any person whose rights or freedoms as herein recognized are violated shall have an effective remedy and “any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority(…)” Article 10 “Everyone in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.” And as it is provided under articles 9, and 14 of ICCPR such rights applies to civil and criminal proceeding. ኢትዮጵያ የአለምአቀፍ የሰባዊና ፖለቲካዊ መብቶች ኮቬንንትን አፅድቃለች እንዲሁም የአፍሪካ የሰባዊና ፖለቲካዊ መብቶች ኮቬንንት እና የ1948 የተባበሩት መንግሥታት ጠቅላላ ጉባኤ ዩኒቨርሲታል ዲክላሬሽንን አፍ ሂዩማን ራይትስ አባል መሆኗ ይታወቃል።

⁶ አበበ 16-50.

⁷ ዝኒ ከማሁ 16-29.

በፍትሐ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

የአቤቱታ አይነቶችና የአቤቱታ ማሻሻል ሁኔታ)፤ ስለ ጣልቃ ገብነት፤ ፍትሕ የማግኘት መብት፤ የማስረጃ አቀራረብና በይግባኝ ጊዜ የሚታዩ ችግሮችን እንደሚያጠቃልል ተመላክቷል።⁸

በመደበኛው የግጭት አፈታት ሂደት ፍ/ቤት ከሚከተላቸው ሥነ-ሥርዓቶች ውስጥ አንደኛው የቀጠሮ ጊዜ መስጠት ነው። ይህ ጽሑፍ በዚህ ጉዳይ ላይ ያተኮረ ሲሆን ሕጉንና አተገባበሩን መተንተንና ሕጉ በጉዳዩ ላይ ያለውን በቂነት (adequacy) መገምገም ነው። ብዙውን ጊዜ በሀገራችን ባሉ ፍ/ቤቶች በቀጠሮ አሰጣጥ እና ክንዋኔዎቻቸው የፍ/ብ/ሥ/ሥ/ሕጉ ግልፅነት መጉደልና ሙሉ አለመሆን ምክንያት የተለያዩ አሰራር የነበረ ሲሆን በፍ/ቤቶችም ዘንድ አጭቃጭቂ ሆኖ ቆይቷል። የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት (የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት) ይህን ችግር ለማስቀረትና ወጥነት ያለው የሕግ አፈፃፀም እንዲኖር ለማስቻል በፍ/ቤት ቀጠሮ አሰጣጥ እና ክንዋኔዎቻቸው እንዲሁም ባልቀረቡ ተከራካሪዎች ላይ የሚያስከትለውን ውጤት በሚመለከት የሕግ ትርጓሜ ሰጥቶ እናገኛለን። በሰር ፍ/ቤቶችም ዘንድ በአስገዳጅነት ተፈፃሚ እንዲሆን ያትታል።⁹ ሆኖም ግን ይህ ጉዳይ አሁንም በፍ/ቤቶቻችን ዘንድ በተለያዩ ጊዜ ሲያከራክርና ወጥነት በጎደለሁ ሁኔታ ሲስተናገድ ይስተዋላል። በተከራካሪ ወገኖች ላይ አሉታዊ ተፅዕኖ ማሳደሩ ደግሞ ጉዳዩ ትኩረት እንዲሻ ያደርገዋል።¹⁰ በዚህ ጽሁፍ በፍትሐ-ብሄር ችሎት የፍ/ቤት ቀጠሮ ትርጉም እና የሚተገበሩት የፍ/ቤት ክንዋኔዎች እንዲሁም ተከራካሪ ወገኖች የቀጠሮ ጊዜ አክብሮ አለመገኘታቸው የሚያስከትለውን ውጤት ግልፅ ማድረግ በዜጎች ላይ የሚደርሰውን የመብት ጥሰትና እንግልት ለማስቀረት ያግዛል። ለዚህ ጽሁፍ ዝግጅት መጽሐፍትን፤ ሕግጋትንና የፍ/ቤት ውሳኔዎችን ጸሐፊው ዳስሷል። በመሆኑም በፍትሐ-ብሄር ችሎት ክርክር የፍ/ቤት ቀጠሮ ትርጉም፤ ዓላማ እና የተከራካሪ ወገኖች በቀጠሮ አለመቅረብ ከሚያስከትለው የሕግ ውጤት ጋር በማያያዝ በዚህ ጽሁፍ ለማካተት ተሞክሯል። ሆኖም ግን ይህ ጽሁፍ በቦታና የጊዜ

⁸ ዝኒ ከማሁ 29-50.

⁹ የፌዴራል ፍ/ቤቶችአዋጅ, ቁጥር 41234/2013 ፌዴራል ነጋሪት ጋዜጣ 2013 ቁጥር 26 (3).

¹⁰ 'Appearance of Parties and Consequences of Non-Apearance' (28 August 2021) 1 <https://advocatespedia.com/APEARANCE_OF-PARTIES_AND_CONSEQUENCES_OF_NON-APEARANCE> accessed on 25 August 2021.

እጥረት ምክንያት በአፈፃፀም ወቅት ስለሚነሱ ጉዳዮች አላካተተም። በመሆኑም አንባቢያን ይህን ታሳቢ እንዲያደርጉ ጸሐፊው ለማስታወስ ይወዳል።

2. የፍ/ቤት ቀጠሮ ትርጉም እና ዓላማቸው

የፍ/ቤት ቀጠሮ ማለት አንድን ክርክር ለማየት የተሰየመው ፍ/ቤት እንድን ጉዳይ በሕግ እና ማስረጃ መርምሮ ውሳኔ ለመወሰንና የተለያዩ ክንዋኔዎችን ለመተግበር በችሎት ለተከራካሪዎች የሚይዘው ቀንና ሰዓት ማለት ነው።¹¹ የፍ/ቤት ቀጠሮ መሠረታዊ ዓላማ አንድን ክርክር በመመርመር ፍትሐዊ፣ ኢኮኖሚያዊና (የተከራካሪዎችንና የፍ/ቤቱንም ወጪን የሚቀንስ) ቀልጣፋ ውሳኔ ለመስጠት ነው።¹² የተቀላጠፈ እና ወጪን የሚቀንስ ፍትሕ መስጠት ለመቻል የክርክር ብዛትና ውስብስብነት፣ የዳኞች ቁጥር መጠን፣ የፍ/ቤቶች ወይም የችሎት ብዛት፣ የዳኞችና የተከራካሪዎች የሕግ እዉቀት እና የጉዳይ ፍሰትን የማስተዳደር ብቃት ይወስኑታል።¹³ የሥነ-ሥርዓት ሕግ ከሚያዝዘው ወጪ መተግበር ለፍትሕ መጓተት እና ለአላስፈላጊ ወጪ ይዳርጋል።¹⁴

ቀጠሮ በተለያዩ ምክንያት ሊሰጥ ይችላል። ለምሳሌ፡ በዳኞች በራሳቸው አነሳሽነት (ሳይዘጋጁ በመምጣት ወይም ጉዳዩን በደንብ ባለመመርመር ምክንያት)፣ በተከራካሪዎች ወይም በምሥክሮች አነሳሽነት (በተሰጠው ቀጠሮ ከአቅማቸው በላይ በሆነ ምክንያት መገኘት

¹¹ 'Adjournments' (Center for Public legal Education Alberta, 2021) 1 <<https://www.cplea.ca/wp-content/uploads/Adjournments.pdf>> accessed on August 20, 2021; Munir Ahmad Mughal, 'Law As To Postpone Or Adjourn Criminal Proceedings' (29 July 2012)3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119465> accessed on 20 August 2021.

¹² አበበ 12; Sime 22, Para. 12.01 ; 'Adjournments and timely decision making' (National Domestic and Family Violence Bench Book) <<https://dfvbenchbook.aija.org.au/fair-hearing-and-safety/adjournments-and-timely-decision-making/>> accessed on 22 August 2021.

¹³ Abraham Yohannes, 'The Purpose of Civil Procedure Vis-à-vis Fundamental Procedural Rules' (Ethiopian Legal Brief, 11 June 2021) <<https://chilot.me/knowledge-base/the-purpose-of-civil-procedure-vis-a-vis-fundamental-procedural-rules/>> accessed on 20 August 2021.

¹⁴ ዝኒ ከማሁ.

በፍትሕ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ባለመቻላቸው)፤ በጠበቆች አነሳሽነት (በችሎት መደራረብ፤ ባለመዘጋጀት ወይም በመቀያየር) ምክንያት ሊሆን ይችላል።¹⁵

ሆኖም ግን ፍ/ቤቱ ጉዳዩን በአግባቡ ለመጨረስ እና ፍትሕን ለማስፈን የሚያስችለውን ጊዜ ብቻ መጠቀም አለበት።¹⁶ በመሆኑም በዝግጅት ማነስ እና ሆን ተብሎ ጉዳዩን ለማጓተት በማሰብ ቀጠሮ መስጠት የለበትም።¹⁷ ፍ/ቤቱ አንድን ጉዳይ ምክንያታዊ በሆነ የጊዜ ቀጠሮ ማጠናቀቅ ካልቻለ ፍትሕን ያዘጋጃል፤ የዘገየ ፍትሕ ደግሞ እንደተነፈገ ይቆጠራል ('Justice delayed is justice denied') ከሚለው ብሄል ጋር ሲደመር በማሕበረሰቡ ውስጥ ፍትሕን ለማስፈን አስቸጋሪ የሆነ ውጤትን ያመጣል።¹⁸ ማሕበረሰቡ በፍትህ ሥርዓቱ ላይ ያለውን አመኔታም ያሳጣል፤ እንዲሁም ለማህበራዊ ቀውስ ይጋብዛል።¹⁹ ቀጠሮ ፍትሕን ከሚያጓትቱ ምክንያቶች አንዱ በመሆኑ ቀጠሮን መቀነስና አጭር ቀጠሮ መስጠት የተቀላጠፈ ፍትሕ እንዲኖር ያስችላል።²⁰ ለሚከናወነው ተግባር ቀጠሮ መስጠትና የጊዜውን እርዝማኔ በሕግ መደንገግ ፍ/ቤቶች በተወሰነ ጊዜ ብዙ ጉዳይ እንዲጨርሱ ያስችላል በተጨማሪም የዳኞችን

¹⁵ Edward Laws, 'Addressing Case Delays Caused by Multiple Adjournments' (Governance, Social Development, Humanitarian Conflict (GSDRC), Helpdesk Research Report, June 2016) 1-2 <<https://assets.publishing.service.gov.uk/media/57a9c983e5274a0f6c000006/HDQ1374.pdf>> .accessed on 22 August 2021 [Here in after Edward]; World Bank, 'Uses and Users of Justice in Africa: The Case of Ethiopia's Federal Courts' (World Bank, 2010) 78 <<https://openknowledge.worldbank.org/handle/10986/2937>> accessed on 22 August 2021[Here after World Bank].

¹⁶ Edward 7; Milosevic Fiske LLP, 'Considerations When Deciding on Motions for Adjournment' (9 May 2019). <<https://www.mlflitigation.com/media/considerations-when-deciding-on-motions-for-adjournment/>> accessed on 25 August 2021.

¹⁷ Stuart Rabner and Hon. Glenn A. Grant, 'A Practitioner's Guide to New Jersey's Civil Court Procedures' (New Jersey Courts, 2011) 15-2 <<https://www.njcourts.gov/attorneys/assets/appellate/practitionersguide.pdf>> accessed on 22 August 2021 [Here after Rabner and Grant].

¹⁸ Edward 2.

¹⁹ ዝኒ ከማሁ.

²⁰ World Bank 75-79, 83.

የአፈፃፀም ብቃት ለመገምገም እና በተግባር የቀጠሮ ብዛትና የጊዜ መራዘምን ለማስቀረት ከሚቻልባቸው አማራጮች አንዱ ነው።²¹

በፍ/ብ/ሥ/ሥ/ሕ/ቁ 192-199 ስለ ቀጠሮና የጊዜ አወሳሰን በሚመለከት ተደንግጎ እናገኛለን። በሕጉ ቁጥር 192 አንድን ክርክር ለማከናወን መደረግ ወይም መፈጸም የሚገባው ነገር ሲኖርና የሚፈጸምበት ጊዜ በሕግ ተወስኖ ካልተገኘ ፍ/ቤቱ የነገሩን አካባቢ ሁኔታ ከግምት ውስጥ በማስገባት ሊወስን እንደሚችል ይደነግጋል።²² በሕጉ የተቀመጠ ጊዜ ሲኖር ግን በተለየ ሁኔታ ካልተፈቀደ በቀር ፍ/ቤቱ ይህንን ጊዜ ማሳጠርም ሆነ ማስረዘም እንደማይችል ያስገነዝባል።²³ እንግዲህ የጊዜ ስሌቱ እንዴት ይሰላ ለሚለውም በፍትሐ-ብሄር ሕግ ቁጥር 1848 መሠረት መሆን እንደሚገባ በግልጽ ተቀምጧል።²⁴ የፍትሐ-ብሄር ሕግ ቁጥር 1848 በሕጉ አደረጃጀት ስለዉል በጠቅላላው ከሚደነግገው ክፍል ውስጥ የሚገኝ ሲሆን ስለጊዜ አቆጣጠር ይደነግጋል ይህንንም አሁን ከተያዘው ጉዳይ ጋር አጣምረን ማየት ይኖርብናል። ቁጥር 1848 ስለዉል በጠቅላላው በሚዘረዝረው በሕጉ አራተኛ መጽሐፍ ምዕራፍ ሦሥት ክፍል ሥድስት የሚገኝ ይዘቱም የዉል መብትና ግዴታ በይርጋ ጊዜ ስለሚቋረጥበት አግባብ በሕጉ የተደነገገ በመሆኑ ይህን የይርጋ ጊዜ የአቆጣጠር ስሌት መደንገግ ያለመ ነው። በዚህም መሠረት የቀጠሮ ጊዜ ስሌት የመጀመሪያውን ቀን እንደማያካትት እና የሚያበቃውም ለቀጠሮው የተወሰነው ጊዜ የመጨረሻው ቀን ካለፈ ነው።²⁵ የቀጠሮው የመጨረሻ ቀን ምናልባትም ቀጠሮውን በሰጠው ፍ/ቤት በሚገኝበት ቦታ በሕግ የሚታወቅ የበዓል ቀን የሆነ እንደሆነ የቀጠሮ ጊዜው የሚያበቃው ከበዓሉ ተከታይ በሆነው የስራ ቀን እንደሆነ

²¹ ዝኒ ከማሁ; Edward 9-10; ሚስ አኒ-ሊሴ ሲባኒ, 'የፍትሕ ሥርዓቶች የሥራ አፈፃፀም ጥራትና ዉጤት ግምገማና አላካክ' (ፍትሕ ሥርዓት ማሻሻያ ፕሮግራም ላይ የተካሄደ ሪፖርት በአቅም ግንባታ ሚኒስትር/የፍትሕ ሥርዓት ማሻሻያ ፕሮግራም, 1994) 69-70.

²² የኢትዮጵያ ፍትሐብሄር ሥነ-ሥርዓት ሕግ, ነጋሪት ጋዜጣ 1957 ቁጥር192 (1). [ከዚህ በኋላ የፍ/ብ/ሥ/ሥ/ሕግ ተብሎ ተጠቅሷል]።

²³ ዝኒ ከማሁ ቁጥር 192(2).

²⁴ ዝኒ ከማሁ ቁጥር 192(3).

²⁵ የኢትዮጵያ ፍትሐብሄር ሕግ አዋጅ ቁጥር 2/1952 ነጋሪት ጋዜጣ (1952) ቁጥር 1848(1-2).

በፍትሁብነት ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ያስገነዝባል።²⁶ በዚህም መሠረት የቀጠሮ ጊዜ ተከበረ የሚባለው እንዲከወን የተሰጠው ተግባር ቀኑ ከማብቃቱ በፊት ከተፈፀመ ብቻ ነው።²⁷

ከዚህ ጋር በተያያዘ በተወሰነ የጊዜ ገደብ ውስጥ መከናወን ያለበት ድርጊት በተወሰነው ጊዜ ውስጥ ካልተከናወነ ዋጋ ቢስ ነው። ምክንያቱም ሕጉ “አንድ ነገር እንዲፈፀም ከተወሰነው ጊዜ በኋላ ቢፈፀምም እንዳልተፈፀመ ሆኖ ይቆጠራል” በማለት ይደነግጋል።²⁸ የዚህ ድንጋጌ ዓላማ የተቀላጠፈ ፍትህ እንዲኖር ማስቻል አንዱ ነው። ይህ ድንጋጌ ተፈፃሚ የማይሆነው በፍ/ቤት ውሳኔ መሠረት ተለዋጭ ቀጠሮ ሲሰጥ ብቻ ነው። ተለዋጭ ቀጠሮ የሚሰጠው በቀጠሮው ቀን እንዲፈፀም የታዘዘ ሰው ወይም ባለጉዳይ መፈፀም ያልቻለው ከአቅሙ በላይ በሆነ ምክንያት ከሆነና መሰናክሉ ከተወገደ በአስራ አምስት ቀን ውስጥ ጉዳዩን ለሚከታተለው ፍ/ቤት ተለዋጭ የጊዜ ቀጠሮ እንዲሰጠው ሲያመለክትና ፍ/ቤቱም ምክንያቱን ሲቀበለው ነው።²⁹ ከአቅም በላይ በሆነ ምክንያት የሚያስብሉት ሁኔታዎች ምን እንደሆኑ ሕጉ አላብራራም። ይልቁንም ሕጉ የመረጠው ከአቅም በላይ ተብሎ የማይቆጠሩትን ሁኔታዎች መዘርዘር ነው። በዚህም መሠረት በሥራ ብዛት፣ በመዘንጋት፣ በቸልተኝነትና በራሱ ጉድለት መሆኑ በታወቀ ጊዜ እንደ ከአቅም በላይ የሆነ ምክንያት እንደማይቆጠርና አዲስ የጊዜ መራዘም ውሳኔ እንደማይሰጠው ሕጉ ያስገነዝባል።³⁰

በራሱ ጉድለት የሚባለው ባለጉዳዩ ሆኖ ብሎ ጉዳዩን ለማጓተት ወይም በቸልተኝነት ሳይቀርብ ወይም የታዘዘውን ሳይፈፀም ሲቀር ነው።³¹ በቂ ተብሎ የሚገመት ምክንያት እንደነገሩ ሁኔታ የሚታይ ሲሆን ከግምት ውስጥ መግባት ያለባቸው ቅድመ ሁኔታዎች አሉ። ለምሳሌ፡ ቀጠሮ ያላከበረው ባለጉዳይ ከመዘግየቱ ተጠቃሚ የማያደርግ ወይም አክብሮ የተገኘውን

²⁶ ዝኒ ከማሁ ቁጥር 1848(3).

²⁷ የፍ/ብሥ/ሥ/ሕግ ቁጥር 193.

²⁸ ዝኒ ከማሁ ቁጥር 195.

²⁹ ዝኒ ከማሁ ቁጥር 196.

³⁰ ዝኒ ከማሁ ቁጥር 196(3).

³¹ [Narayan Subramanian, Sufficient Cause](https://www.scribd.com/document/262469686/Sufficient-Cause) (Apr 20, 2015) 2 <<https://www.scribd.com/document/262469686/Sufficient-Cause>> accessed on August 22 2021.

ተከራካሪ የማይገዳ፣ ባለጉዳዩ ባይሰማ ፍትሕ የሚያዛባ (ወሳኔውን የሚለወጥ ሲሆን) ፣ ባለጉዳዩ ሆኖ ብሎ ክርክሩን ለማዘግየት ወይም በቸልተኝነት ያልቀረ መሆኑን ከግምት ውሥጥ መግባት አለበት።³² በቂ ምክንያት ነዉ ለማለት ከተሟጋቹ ቁጥጥር ዉጪ ነዉ በሚያስብል (በተፈጥሮ ወይም ሰዉ ሰራሽ አደጋ) ምክንያት መሆን አለበት።³³ “An avoidable cause for delay by due care and attention cannot be sufficient cause. Cause attributable to negligence or inaction of the party cannot be sufficient cause.”³⁴ ለምሳሌ፡ የትራንስፖርት መዘግየት ባለጉዳዩ ጥፋት ከሌለበት እንደበቂ ምክንያት ሊቆጠር ይችላል፤ የጸጥታ ችግር (ብጥብጥ) ምክንያት እንዲሁም የቀጠሮውን ቀን መሳሳት ጉዳዩን ለማዘግየት አስቦ ካልሆነ በቂ ምክንያት ሊባል ይችላል።³⁵ ጥፋት የሌለበት (ታማኝ) ባለጉዳይ ጠበቃዉ ሆኖ ብሎ ወይም በቸልተኝነት ባለመቅረቡ ምክንያት ፍትሕ ሊነፈገዉ ስለማይገባ በባለጉዳዩ ጉድለት ነዉ መባል የለበትም የሚል አተያይም አለ።³⁶ ምክንያቱም በፍትሕ ስርዓቱ መተማመን ትልቅ ቦታ ያለዉ በመሆኑ አንድ ባለጉዳይ በትጋት ጠበቃዉን መከታተል የግድ የሚባል አይደለም በሚል ነዉ።³⁷ ሥለሆነም ፍ/ቤቱ በቂ ምክንያት ነዉ አይደለም የሚለዉን ለመወሰን የቀጠሮዉ መራዘም ባልቀረበዉ ተከራካሪ ላይ እንዲሁም የተቀላጠፈ ፍትሕ ለማስፈን የሚያሳድረዉን ተጽዕኖ ከግምት ማስገባት አለበት።

አንድን የፍትሕ-ብሄር ጉዳይ ለማየት የተሰየመ ፍ/ቤት የተለያዩ ክንዋኔዎችን ለመፈጸም እና ጉዳዩን ዐይቶ ለመወሰን በርካታ እና የተለያዩ ቀጠሮዎች እንደሚሰጥ ይታወቃል። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 197 መሠረት ክርክሩ በሚሰማበት በማናቸዉም ጊዜ ፍ/ቤቱ ተገቢ መስሎ ሲታየዉ ወይም በቂ ምክንያት ሲያገኝ ለተከራካሪዎች ወይም ለአንደኛዉ ወገን ነገሩ

³² ዝኒ ከማሁ

³³ Abhavaya Rabra, ‘Appearance and Non-Appearance of the Parties’ (2018) Vol 4 Journal on Contemporary Issues of Law 328 <<https://jcil.lsyndicate.com/wp-content/uploads/2018/09/37.-Abhavaya.pdf>> accessed on 24 August 2021.

³⁴ ዝኒ ከማሁ n 34.

³⁵ ዝኒ ከማሁ.

³⁶ ዝኒ ከማሁ n 36.

³⁷ ዝኒ ከማሁ

በፍትሐ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

የሚሰማበትን ቀን በመወሰን ጊዜ ይሰጣል።³⁸ የሚሰጠውም ጊዜ ለቀጠሮው ምክንያት የሆነውን ጉዳይ ለማከናወን በቂ ሆኖ የሚገመተው ጊዜ ብቻ መሆኑ ተመልክቷል። በቂ ምክንያት እንደ ጉዳዩ አካባቢያዊ ሁኔታ የሚወሰን ሲሆን ይህም ድንጋጌ ፍ/ቤቶች የሚሰጡት የጊዜ ቀጠሮ ፍትህን ለማዳተትና ባለጉዳዮችን ለማጉላላት ባለመ መልኩ መሆን እንደሌለበት ያስገነዝባል።³⁹ ፍ/ቤቱ ቀጠሮ በሚሰጥበት ጊዜ ለቀጠሮው ምክንያት የሆነው ጉዳይ በሚገባ እንዲከናወን አስፈላጊውን ትዕዛዝ መስጠትም ይኖርበታል።⁴⁰ በመሆኑም በፍ/ቤት የሚሰጠው ቀጠሮ በቀጠሮው ቀንና ሰዓት የሚተገበረውን ክንዋኔ ለመተግበር የሚመለከታቸው አካላት ማለትም መዝገብ ቤት፣ ፌደራል ፖሊስ፣ ዳኞች፣ ተከራካሪ ወገኖች፣ የሰው ምስክሮች፣ እንዲሁም በፍ/ቤት ትዕዛዝ ስለተያዘው ጉዳይ ሙያዊ ምስክርነት እንዲሰጡ እንደነገሩ ሁኔታ የሚታዘዙ አካላት/ሰዎች/ እንደ ፍ/ቤት ትዕዛዝ ጊዜውን ጠብቀው ተገቢውን ክንዋኔ እንዲፈፀሙ ያስችላል፤ መፈፀምም ይኖርባቸዋል። በተለየ ሁኔታ ባለጉዳዮች በቀጠሮ ቀን ካልቀረቡ መብታቸውን የሚጎዳ ውጤት ስለሚኖረው ይህን በሚገባ ማክበር ይኖርባቸዋል።⁴¹

3. በፍትሐ-ብሔር ክርክር የፍ/ቤት ቀጠሮ፣ የሚከናወኑ ተግባራትና በቀጠሮ ቀን የተከራካሪ ወገኖች ፍ/ቤት አለመቅረብ የሚያስከትለው ውጤት

አንድን ጉዳይ ለማየት የተሰየመ ፍ/ቤት የተለያዩ ክንዋኔዎችን ለመፈጸም እና አንድን ጉዳይ አይቶ ውሳኔ ለመወሰን በርካታ ቀጠሮዎችን ሊሰጥ ይችላል። ከሚሰጣቸው ቀጠሮዎች ውስጥ የተከሰሱ መልስ ለመቀበል፣ ክስ ለመስማበት፣ ማስረጃ ለመስማትና ምስክሮችን ለመመርመር፣ መዝገቡን መርምሮ ተገቢውን ትዕዛዝ ለመስጠት፣ በሚቀርቡ አቤቱታዎች ላይ የሌላኛውን ወገን አስተያየት መቅረብ ለመጠበቅ፣ ማስረጃ እንዲቀርብ ለመጠበቅ፣ መርምሮ ውሳኔ ወይም ፍርድ ለመስጠት የሚሰጥ የቀጠሮ ቀንን ያጠቃልላል። ይህም

³⁸ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 197.

³⁹ ዝኒ ከማሁ. See also, [Narayan Subramanian](https://www.scribd.com/document/262469686/Sufficient-Cause), Sufficient Cause (20 April 2015) <<https://www.scribd.com/document/262469686/Sufficient-Cause>> accessed on 22 August 2021.

⁴⁰ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 198(1).

⁴¹ ዝኒ ከማሁ n36.

በፍ/ብ/ሥ/ሥ/ሕ/ቁ 127-131፣ 241፣ 258፣ 145፣ 249፣ 180፣ 181 እና በፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት ስር ተደንግጎና ትርጉም ተሰጥቶበት ይገኛል። የኢትዮጵያ የፍ/ብ/ሥ/ሥ/ሕግ የተከራካሪ ወገኖች በቀጠሮ አለመቅረብ እና የሚያስከትለውን ውጤት ለመወሰን ከሚጠቀምባቸው መስፈርቶች ተከራካሪው በቀረበት ቀጠሮ ፍ/ቤቱ ሊከውን የሚገባውን ጉዳይ አንዱ ስለሆነ⁴² በፍትሐ-ብሄር ክርክር ፍ/ቤት ስለሚሰጠው ቀጠሮና ክንዋኔ ማብራራቱ ተቀዳሚ ጉዳይ በመሆኑ በዚህ ክፍል ተብራርቷል።

ከዚህ ጋር ተያይዞ የሚነሳው ጉዳይ ከተከራካሪ ወገኖች የአንዱ ወይም የሁለቱም ፍ/ቤት በያዘው ቀን-ቀጠሮ አለመገኘት የሚያስከትለው ውጤት ምንድነው? የሚለው ነጥብም በዚህ ክፍል ተዳሷል።

የተከራካሪ ወገኖች ለችሎት የሚቀርቡበትን ሂደት በሚመለከት በፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(1) መሠረት ነገሩን ለማየት ፍ/ቤቱ በሰጠው ቀጠሮ ከሰሸ እና ተከሰሸ ራሳቸው ወይም በወኪሎቻቸው ተሟልተው መቅረብ እንዳለባቸው በግልፅ ሰፍሯል። ውክልናው ውጤታማ እንዲሆን በጽሑፍና ወካዩ ሊፈርምበት ይገባል።⁴³ ስለሆነም ተከራካሪ ወገኖች በወኪሎቻቸው ወይም አስፈላጊ በሆነ ሰዓት እራሳቸው የፍ/ቤት ቀጠሮውን አክብረው፣ እንዲያከናውኑ የታዘዙትንም ፈፅመው ለችሎት መቅረብ ተገቢ ነው።⁴⁴ የፍ/ብ/ሥ/ሥ/ሕጉ ዓላማ የፍትሐ-ብሄር ጉዳዮችን ፍትሐዊ፣ ኢኮኖሚያዊና ቀልጣፋ በሆነ ሁኔታ ወሳኔ እንዲያገኙ ማድረግ በመሆኑ የተከራካሪዎች ለችሎት መገኘትን በሚመለከት በተከራካሪዎቹ ላይ ብሎም በፍ/ቤት የሚደርሰውን ችግር ለመግታት ጠንከር ያለ አቋም አለው።⁴⁵

⁴² Balew Mersha and Mizane Abate, *Ethiopian Civil Procedure Notes, Cases and Questions*, (Bahir Dar and Jimma universities, 2010) 217, Para.3. [Here after Balew and Mizane].

⁴³ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 66(2).

⁴⁴ ዝኒ ከማሁ ቁጥር 65(1) ፣ 66፣ 75(1) ፣ 77፣ 338(1) cum 339 (3).

⁴⁵ አበበ 12; Sedler 161-162.

“An appearance involves coming before the court so that the court can adjudicate the case or take any other action it deems necessary. While a personal appearance is not ordinarily required, the court has the power to compel personal attendance of parties where the court concludes such attendance is necessary for the determination of the question in the suit, and if a party who has been ordered to appear fails without good cause, it is considered as if there was no appearance.”

በፍትሐ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ዘመናዊ የሥነ-ሥርዓት ሕግ ተከራካሪዎች ተገደው ፍ/ቤት እንዲቀርቡ ባይሻም ተከራካሪዎች መጥሪያ ደርሷቸው ካልቀረቡና ካልተከራከሩ ፍ/ቤቱ ጉዳዩን በሌላበት በማየት እነሱን የሚጎዳ ውሳኔም ሊወስን ይችላል።⁴⁶ ፍ/ቤት ያልቀረበው ተከራካሪ እስኪቀርብ ድረስ ምንም ሳያደርግ የሚጠብቅ ከሆነ ፍትህ እንዲዘገይ፤ ቀጠሮውን አክብሮ የሚገኘው ተከራካሪ ጥቅም እንዲጎዳ ያደርጋል።⁴⁷ ይህ እንዳይሆን እንዲሁም በፍ/ቤት ደጋግሞ ቀጠሮ መስጠቱ የሚያስከትለውን መጨናነቅ (case load) ለመቀነስ ሲባል ሕጉ የተከራካሪዎች በፍ/ቤት አለመገኘትና የሚያስከትለውን ውጤት በጥብቅ መደንገጉ አስፈላጊ ነው።

ፍ/ቤቱ የጉዳዩን ሂደት ለመቆጣጠር፣ የሚሰጠው ትዕዛዝ እንዲፈፀም እና በክርክር ሂደቱ ላይ ሙሉ ቁጥጥር እንዲኖረው አግባብነት ያለው የማስገደድ ሀይል ሊኖረው ያስፈልጋል።⁴⁸ በፍ/ብ/ሥ/ሥ/ሕግ መሠረት ፍ/ቤት በቀጠሮ ቀን አለመቅረብ ከሚስከትላቸው ውጤቶች መካከል መዝገብ መዝጋት፣ ክስ መዝጋት፣ በጽሑፍ የመከራከር መብት መታለፍ፣ ተለዋጭ ቀጠሮ መስጠት እና የቀረው ወገን በሌላበት የክሱ ጉዳዩ መሰማት መቀጠል ናቸው። የባለጉዳዮች ወደ ፍ/ቤት መቅረብና አለመቅረብ የሚያስከትለውን ውጤት ምን እንደሆነ በሕጉ ከቁጥር 65 እና ተከታይ ድንጋጌዎች ተመላክቷል።

እስካሁን የተሰጠውን መንደርደሪያ መሠረት በማድረግ በሚከተሉት አራት ንዑስ ክፍሎች በፍትሐ-ብሄር ክርክር ፍ/ቤት ስለሚሰጣቸው ቀጠሮዎችና በእያንዳንዱ ቀጠሮ ስለሚተገብረው ክንዋኔ እንዲሁም ከተከራካሪዎቹ አንዱ ወይም ሁለቱም በቀጠሮ ቀን ባይቀርቡ ስለሚያስከትለው ውጤት ተብራርቷል።

The code is strict on the requirement of appearance.” It aimed to avoid delay and occurrence lots of problems both to the parties and to the court.

⁴⁶ *American Jurisprudence* (2nd ed., Vols. 16A, 26 & 59, the Lawyer Cooperative Publishing Co., 1972) 1033.

⁴⁷ ዝኒ ከማሁ.

⁴⁸ Sime 351.

3.1. የተከሳሽን መልስ ለመቀበል በተሰጠ ቀጠሮ ቀን

በዚህ ንዑስ ክፍል የተከሳሽን መልስ ለመቀበል በተሰጠ ቀጠሮ የፍ/ቤቱን ክንዋኔ እና ከተከራካሪዎቹ አንዱ ወይም ሁለቱ ቢቀሩ ስለሚከተለው እርምጃ ተብራርቷል። በፍ/ብ/ሥ/ሥ/ሕግ ክርክሩ ፈር የሚይዘው በጽሑፍ ክርክር ሲሆን ፍ/ቤት ለወሳኔው ጭብጥ ለመያዝ፣ ክሱ መሰማት በሚጀምርበት ጊዜ ግራቀኙ የሚሰጡት ምላሽ ፍ/ቤቱ የጽሑፍ ክርክር ላይ ተመሥርቶ በሚያቀርብላቸው ጥያቄ በመሆኑ በፍርድ ሂደቱ ትልቅ ሚና ይጫወታል።⁴⁹ መልስ ለመቀበል ቀጠሮ የሚያዘው በአንድ ጉዳይ ክስ የተመሰረተበት ሰው በጉዳዩ ላይ የቀረበበትን ክስ ያምን ወይም ይክድ እንደሆነ ክርክሩን ወይም መልሱን በጽሑፍ እንዲያቀርብ ማስረጃም ካለው የማስረጃውን ዝርዝር እና ማስረጃዎችን ለፍ/ቤቱ በማቅረብ የጽሑፍ ክርክሩን እንዲያሟላ ለማድረግ ነው።⁵⁰ በዚህ ቀጠሮ ተከሳሽ የጽሑፍ መልሱን ይዞ ከቀረበ ፍ/ቤቱ የጽሑፍ መልሱን ከማህደሩ ጋር በማያያዝ ጉዳዩን ለተከታዩ ክንውን ማለትም ለክስ መስማት ይቀጥራል።⁵¹ በዚህ ቀጠሮ በልዩ ሁኔታ ትዕዛዝ ካልተሰጠ በስተቀር ከከሳሽ በኩል መልስ ከመቀበል በተጨማሪነት የሚከወን ተግባር የለም።⁵² በፍ/ብ/ሥ/ሥ/ሕ/ቁ 223(2) እና 234 መሠረት የክሱ ማመልከቻና ከማመልከቻው ጋር ተያይዘው የቀረቡት የጽሑፍና ሌሎች ማስረጃዎች እንዲሁም የምስክሮች ዝርዝርና ማንኛውም ለፍ/ቤቱ የደረሱትን መግለጫዎች ትክክለኛ ግልባጮች ለተከሳሹ ሊደርሰው እንደሚገባ ሁሉ ተከሳሹም የሚያቀርበው መልስና የመከላከያ ማስረጃ (የሰነድ ወይም የምስክሮች ዝርዝር) ለከሳሽ ሊደርሰው እና ሊከራከርበት ይገባል።⁵³ በመሆኑም የጽሑፍ መልስ ለመቀበል

⁴⁹ በታምራት ኪዳነማርያም, 'በኢትዮጵያ የፍትሐብሔር ጉዳዮች የቅድመ ችሎት መግት ሥርዓት (ክስ መስማት፣ ጭብጥ መያዝ)' (የፍትሐብሔር ሥነ-ሥርዓት ሕግ መሠረታዊ ችግሮችና ማሻሻያዎች ላይ ያተኮረ ከንፈረንስ, ዓለማየሁ ሃይሌ መታሰቢያ ድርጅት, 1998 ዓ.ም) 79-80 [ከዚህ በኋላ በታምራት ኪዳነማርያም ተብሏል።].

⁵⁰ ዝኒ ከማሁ; see also የፍ/ብ/ሥ/ሥ/ሕ/ቁ 80-93, 182(2), 222, 241, 248, 233.

⁵¹ መንበረፀሃይ ታደሰ, *የኢትዮጵያ ሕግና የፍትህ ገፅታዎች* (አዲስአበባ 1999) 78 [ከዚህ በኋላ መንበረፀሃይ ተብሏል]; Sedler 161.

⁵² ዝኒ ከማሁ.

⁵³ እነ ፕሮፌሰር ረዳ ተ/ኃይማኖት v አቶ ልመንህ ተፈራ [2002] 9-የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት መ/ቁ 45984, 290.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

በተቀጠረበት ቀን ከሳሽ ምናልባት ተከሳሽ ባይቀርብ መጥሪያ በአግባቡ ማድረሱን ከማያሳወቅ በቀር አንዲፈጽም የሚጠበቅበት ተግባር የለም።

በአንፃሩ ክስ ለመስማት በተሰጠ ቀጠሮ ፍ/ቤቱ ብዙ ክንዋኔዎችን የሚፈፅምበት (በፍ/ብ/ሥ/ሥ/ሕ/ቁ 248 (ሐ) መሠረት ጭብጥ መመሥረት፣ በሕጉ 242 መሠረት በታመነው መጠን ሙግቱን መግታት ወይም በከፊል ውሣኔ መሥጠት፣ ተከሳሹ በክሱ ላይ የተዘረዘረውን እና በመልሱ ላይ በቀጥታ ወይም እንደ ነገሩ አካባቢያዊ ሁኔታ እንደተካደ የሚቆጠረውን ነገር የሚያምን ወይም የሚክድ መሆኑን የሚጠይቅበት) ፣ አንዱ ወገን ስለባላጋራው ክርክር ግልጽ ያልሆነ ካለ እንዲብራራለት ጥያቄ የሚጠይቅበት በመሆኑ ከከሳሹም ሆነ ከተከሳሹ ብዙ ይጠበቃል።⁵⁴ ክስ ለመስማት ስለሚሰጥ ቀጠሮ ከታች በንዑስ ክፍል 2.2 ስለተብራራ አሁን የዚህ ክፍል ርዕሰ ጉዳይ ወደሆነው ሌላው ጉዳይ እንመለስ።

ይህም ከተከራካሪዎች አንዱ ወይም ሁለቱ መልስ ለመቀበል በተሰጠ ቀጠሮ ዕለት ባይቀርቡ ስለሚከተለው ውጤት ነው። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 233 መሠረት ተቀባይነት ያገኘ ክስ ከተመሠረተ ፍ/ቤቱ ክሱን ተቀብሎ የቀረበለትን ክስ፣ ማናቸውም አስረጅና የጽሑፍ ግልባጭ ከመጥሪያው ጋር ለተከሳሽ እንዲደርሰውና ተከሳሽም የመከላከያ መልሱን በጽሑፍ እንዲያቀርብ ቀጠሮ ይሰጣል። ካልቀረበ ግን ጉዳዩ በሌለበት እንደሚሰማ (default in pleading) ይገለፅለታል ይላል። የዚህን ቀጠሮ ክንውን እንዲሁም ፍ/ቤት ባልቀረቡት ወገኖች ላይ ስለሚከተለው ውጤት የሚደነግግ ይህ አንቀጽ ሲሆን የአማርኛና የእንግሊዘኛ ቅጂው መለያየት በጉዳዩ ላይ ብዥታ እንዲኖር አድርጓል። መልስ ለመቀበል በሚሰጥ ቀጠሮ ላይ የፍ/ቤቱ ክንውን ምን እንደሆነና የተከራካሪዎች አለመቅረብ የሚያስከትለውን ውጤት አስመልክቶ ሕጉ ግልፅነት የጎደለው ወይም የሚለው ነገር የሌለው መሆኑ ሌላው ምክንያት ነው። ይህ ጉዳይ በተግባር የበለጠ መወሰንብን ፈጥሯል። ለምሳሌ በሽል ኢትዮጵያ አ/ማ እና

⁵⁴ መንበረፀሃይ 78; በታምራት ኪዳነማርያም 80-81.

በወ/ሮ አስቴር ብርሃነ ስላሴ⁵⁵ መካከል በነበረው ክርክር የፌዴራል ከፍተኛ ፍ/ቤት ተከላከል መልስ በተቀጠረበት ቀን የክስ መልሱን አዘጋጅቶ ፍ/ቤት ማቅረብ ባለመቻሉ ይህን ቀጠሮ ክስ ለመስማት እንደተቀጠረ በመቁጠር ክስ መስማተን የሚመለከቱ የፍ/ብ/ሥ/ሥ/ሕጉ ድንጋጌዎች ተግባራዊ በማድረግ ተከላከል በሌለበት ክስ እንዲሰማ ወስኗል። እንዲሁም በአቶ ውረንባ ታደሰ እና አቶ መለሰ ተካ⁵⁶ መካከል በነበረው ክርክር መልስ ለመቀበል በተቀጠረ ቀጠሮ ከሳሽ ባለመቅረቡ የፌዴራል ከፍተኛ ፍ/ቤትና የፌዴራል ጠቅላይ ፍ/ቤት መዝገቡን ዘግቶ አሰናብቷል። በእነዚህ ሁለት ምሳሌዎች የተግባር ችግር የተፈጠረው የሕጉ መልስ ለመቀበል በሚሰጥ ቀጠሮ ላይ የፍ/ቤቱ ክንውን ምን እንደሆነ ግልፅነት የጎደለው በመሆኑ ነው።

በመሆኑም ተከላከል በዚህ ቀጠሮ ባይቀርብ ውጤቱ ምን ሊሆን ይችላል የሚለውን ግልፅ ማድረግ ያስፈልጋል። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 233 መሠረት ተከላከል የክስ መልስ ይዞ እንዲቀርብ ያዘል፤ ካልቀረበ ወይም መከላከያ መልሱን ሳይዝ የቀረበ እንደሆነ ጉዳዩ በሌለበት እንደሚሰማ መጥሪያው ላይ እንደሚገለፅለት ይደነግጋል።⁵⁷ የዚህ ድንጋጌ የአማረኛና እንግሊዘኛ ቅጂ የተለያዩ አንድምታ አለው። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 233 የአማረኛ ቅጂ ከሕጉ ቁጥር 70(ሀ) በሚመሳሰል ሁኔታ ተከላከል በዚህ ቀጠሮ የጽሑፍ መልስ ይዞ ሳይቀርብና ክስ በሚሰማበት ቀጠሮ ሲቀር የሚወሰደው እርምጃ እኩል ሆኖ የጉዳዩ መሰማት በሌለበት (ex-parte proceeding) መቀጠል የሚመስል መሆኑ ነው። ይህ ድንጋጌ በከፊል “(...) ተከላከል መከላከያውን ለፍ/ቤቱ ሳይቀርብ የቀረ ወይም እራሱ መከላከያ ሳይዝ የቀረበ እንደሆነ ክርክር በሌለበት የሚታይ መሆኑ በመጥሪያው ላይ ይገለፅለታል” ይላል።⁵⁸ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 233 የእንግሊዘኛው ቅጂ በሌላ በኩል ተከላከል በዚህ ቀጠሮ መልሱን ይዞ ባይቀርብ የክስ መልስ የማቅረብ መብቱ ታልፎበት ክርክሩ እንደሚቀጥል ማለትም ቀጣዩ

⁵⁵ [1997] 1-3 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 60 (ከዚህ በኋላ ሼል የኢትዮጵያ አ/ማ v በወ/ሮ አስቴር ብርሃነ ስላሴ ተብሏል)።

⁵⁶ [1997 ዓ.ም] 1-3 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 47 (ከዚህ በኋላ አቶ ውረንባ ታደሰ v አቶ መለሰ ተካ ተብሏል)።

⁵⁷ ሼል የኢትዮጵያ አ/ማ v በወ/ሮ አስቴር ብርሃነ ስላሴ።

⁵⁸ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 233።

በፍትሕ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

የፍ/ቤት ሥነ-ሥርዓት (የክስ መሰማት) ሂደት እንደሚቀጥል ያለመ መሆኑን መረዳት ይቻላል። በሕግ አተረጓጎም ሂደት የአማርኛና እንግሊዘኛ ቅጂ መካከል ልዩነት ሲፈጠር የአማርኛ ቅጂ ሊተገበር እንደሚገባ የሚታወስ ነው።⁵⁹ ይህ ደግሞ ጉዳዩን ይበልጥ ያወሳሰበዋል።

ሆኖም ግን የሕጉን መንፈስ ስንመረምርና የፌ/ጠ/ፍ/ሰ/ሰ/ችሎት የሰጠውን ዉሳኔ በመመልከት መልስ ለመቀበል በተሰጠ ቀጠሮ የፍ/ቤቱ ዋና ክንዋኔ የተከሰሽን መልስ መቀበልና ከሰሽ ከቀረበ የተከሰሽን የጽሑፍ መልስ ለከሰሽ መስጠት መሆኑን እንረዳለን። ቀጥሎምክስ የሚሰማበትን ቀን ለተካራካሪዎች ማሳወቅ ነው። በመሆኑም ተከሰሽ በዚህ ቀጠሮ ፍ/ቤት ባይቀርብ የክስ መልስ የማቅረብ መብቱ ብቻ ታልፎ (default proceeding or default in pleading) የክስ ሂደቱ እንደሚቀጥል እንገነዘባለን። ለዚህም አንደኛው ማሳያ በፍ/ብ/ሥ/ሥ/ሕጉ የክስና መልስ ዝግጅትና የክስ መስማት የሚመለከቱ ድንጋጌዎች በተለያዩ የሕጉ ክፍል መደንገጉ ነው። ከሕጉ አደረጃጀትም መገንዘብ እንደሚቻለው የክስና የመከላከያ ጽሑፎች (ከቁጥር 222-240 የፍ/ብ/ሥ/ሥ/ሕጉ ድንጋጌዎች መሠረት) ልውውጥ ከተከናወነ በኋላ ነው ክሱ የሚሰማው (241-273 የፍ/ብ/ሥ/ሥ/ሕጉ ድንጋጌዎች መሠረት)።⁶⁰ ሁለተኛው ማሳያ ደግሞ የሕጉን መንፈስ (notion of the law) መሠረት አድርጎና ወጥነት (consistencency) ባለው መልኩ በመተርጎም ነው። ለምሳሌ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 78 ላይ በአማርኛውም ሆነ በእንግሊዘኛው ቅጂ በተመሳሳይ ሁኔታ ‘ተከሰሽ በጉዳዩ ላይ ክስ በሚሰጥበት ቀን ቀርቦ መልስ ሳይሰጥ’ (ex-parte) ወይም ‘ተገቢውን መከራከሪያ ሳይቀርብ’ (default in pleading) በማለት ያስቀመጠ በመሆኑ ሁለቱ ክንዋኔዎች የተለያዩ እንደሆኑ መረዳት ይቻላል። በመሆኑም ተከሰሽ መልስ ለመቀበል በተሰጠ ቀጠሮ ቢቀር መልስ በጽሑፍ

⁵⁹ የፌዴራል ነጋሪት ጋዜጣ ማቋቋሚያ አዋጅ አዋጅ ቁጥር 3/1995, ፌዴራል ነጋሪት ጋዜጣ 1995 ቁጥር 2(4).

⁶⁰ የጽሑፉን ልውውጥ የሚመለከተው የሕጉ ክፍል "ስለክስና ስለመከላከያ ጽሁፍ" በሚል ርዕስ ራሱን የቻለ አንድ ክፍል ሲሆን በዚህ የጽሁፍ ልውውጥ በኋላ የሚከተለው ክንውን ደግሞ "ክስን ስለመስማት" በሚል ርዕስ ራሱን በቻለ በሌላ ምዕራፍ የምናገኘው ነው።

የማቅረብ መብቱ ብቻ ከሚታለፍበት በቀር በሌለበት ክስ ይታይ መባሉ የሕጉን መንፈስና ወጥነት የሚጎዳ ነው።

በሼል ኢትዮጵያ አ/ማ እና በወ/ሮ አስቴር ብርሃነስላሴ መካከል በነበረው ክርክር የፌ/ጠ/ፍ/ሰ/ሰ/ችሎት በሕጉ ቁጥር 70 (ሀ) እና 233 መካከል ያለውን ብዥታ ለማስወገድ እንደሚከተለው አብራርቷል፡

የጽሁፍ መልሱን ሳያቀርብ የቀረ ተከሣሽ በ233 መሠረት በሌለበት ጉዳይ እንደሚሰማ ጉዳዩ ለመስማት በተቀጠረበት ቀን ያልቀረበ ተከሣሽም በተመሳሳይ ሁኔታ ጉዳዩ በሌለበት እንደሚሰማ በቁጥር 70(ሀ) መሠረት ትዕዛዝ የሚሰጥበት ይመስላል። የሁለቱም ድንጋጌዎች የአማርኛ ቅጂ ለመልስ በተቀጠረበት ቀን መቅረትና ጉዳዩ እንዲሰማ በተቀጠረበት ቀን መቅረት አንድ አይነት ውጤት ያላቸው እንደሆነ የሚገልጹ ቢሆኑም የሁለቱም የእንግሊዝኛ ቅጂዎች ግን የተለየ ጽንሰ ሃሳብ የሚያስተላልፉ ናቸው። የእንግሊዝኛ የ70 (ሀ) የእንግሊዝኛ ድንጋጌ ስለ Ex-parte ሲናገር የ233 ግን የሚደነግግው ስለ default proceeding ነው። ሁለቱም የተለያዩ ይዘት የተለያዩ ውጤት ያላቸው ናቸው።⁶¹

ይህ የሚያሳየው በሁለቱ ቀጠሮዎች ፍ/ቤቱ የተለያዩ ክንውን ነዉ መተግበር ያለበት። መልስ ለመቀበል በተሰጠ የቀጠሮ ዕለት ፍ/ቤት ክሱን የሚሰማበት አይደለም። በመሆኑም ከሣሹ በዚህ ቀጠሮ ባይቀርብ እንዲፈጽመው የታዘዘው ነገር ስለሌለ ፍ/ቤቱ ቀጠሮን ክንውን አስመልክቶ ትዕዛዝ የሚሰጥ ሲሆን የከሣሹን መዝገብ መዝጋት አይገባም። ከላይ እንደተብራራው የፍ/ብ/ሥ/ሥ/ሕጉ የተከራከረዎች አለመገኘትና ውጤቱን በሚመለከት ሲደነግግ መሠረት ካደረጋቸው ውስጥ አንዱ በቀጠሮው ዕለት የፍ/ቤቱ ክንውን ወይም ተግባር ነዉ። በሁለቱም ቀጠሮዎች የተከሳሽ አለመቅረብ ውጤቱ ተመሳሳይ ነዉ ማለቱ ከአመክንዮ የራቀ ነዉ። አንድ ሰዉ የጽሑፍ መልስ ካላቀረበ አግባብነት የሚኖረዉ የ default proceeding መሠረተ-ሃሳብ ሲሆን ይህም “አንድ ተሟጋች እንዲፈፀም የታዘዘውን ነገር

⁶¹ ሼል የኢትዮጵያ አ/ማ v በወ/ሮ አስቴር ብርሃነስላሴ 63.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ሳያሟላ ቢቀር ዕድሉ እንዳመለጠዉ የሚቆጠር ነዉ።”⁶² “ከክርክር እንዲወጥ ግን አይደረግም።”⁶³ “A default judgment can be obtained against a party who has failed to respond, i.e., “plead” (...):”⁶⁴ በዚህ ቀጠሮ የፍ/ቤቱ ክንዋኔ የተከሰሽን የጽሑፍ መልስ መቀበል እና ለሌላኛዉ ተከራካሪ ወገን መስጠት ነዉ።

ሥላሆነም ፍ/ቤቱ ተከሰሹ ያልቀረበው መጥሪያ በአግባቡ ደርሶት በቂ ባልሆነ ጉድለት መሆኑን ከተረዳ ተከሰሽ በጽሑፍ መልስ የማቅረብ መብት እና ክርክርን በጽሑፍ ከማቅረብ ጋር ተያይዘዉ የሚመጡ ጥቅሞች ወይም መብቶች ይታለፉበታል። ከጽሑፍ መልስ ጋር ተያይዘው ከሚነሱ ጥቅሞች የመጀመሪያዉ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 244(3) መሠረት የመጀመሪያ ደረጃ መቃወሚያዎችን ለክርክር ማንሳት ነዉ። የመጀመሪያ ደረጃ መቃወሚያዎች በተቻለ መጠን በቶሎ መቅረብ ያለባቸው ሲሆን ይህም የሚሆነው በጽሑፍ መልስ ላይ በመሆኑ የጽሑፍ መልስ አለማቅረብ ይህንን መብት ያሳጣል። ሌላኛዉ ደግሞ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 234 (1) መሠረት የጽሑፍ መልስ ሊይዛቸው ከሚችላቸው ውስጥ ለቀረበው ክስ መከላከያ የሚሆኑትን የሰነድም ሆነ የሰው ማስረጃዎችን መዘርዘር ያለበት በመሆኑ መልስ አለማቅረብ ይህንንም ያሳጣል።⁶⁵ በመሆኑም ተከሰሽ በዚህ ቀጠሮ ቀን ካልቀረበ ክርክሩን በጽሑፍ የማቅረብ፣ የማስረጃ ዝርዝር የማቅረብ እና የመጀመሪያ ደረጃ መቃወሚያ ክርክር የማቅረብ መብቱን ያጣል። ነገር ግን ክሱ በሚሰማበት ቀን በክርክሩ ውስጥ ይቀጥላል።⁶⁶ ከዚህ ዉጪ “እንደከሰሹ ሊጠየቅ ይችላል፣ መስቀለኛ ጥያቄ ሊያቀርብ ይችላል ወ.ዘ.ተ።”⁶⁷

⁶² መንበረፀሐይ 79.

⁶³ ዝኒ ከማሁ.

⁶⁴ Rabner and Grant 12-1.

⁶⁵ መንበረፀሐይ 80.

⁶⁶ ዝኒ ከማሁ.

⁶⁷ ዝኒ ከማሁ.

ከዚህም በመነሳት የፍ/ብ/ሥ/ሥ/ሕ/ቁ 67፣ 70፣ 73 እና ሌሎች ተዛማጅ ድንጋጌዎች እንደሚያመለክቱት ከተከራካሪዎች አንዱ ወይም ሁለቱም ጉዳዩ ለመሰማት (hearing) በተቀጠረበት ቀን ያልቀረቡ እንደሆነ ብቻ ተፈፃሚ ስለሚሆኑ ጉዳዩ መልስ ለመቀበል በተቀጠረበት ቀን ከሰሽ (እንደነገሩ ሁኔታ ይግባኝ ባይ) ወይም ተከሣሾ (እንደነገሩ ሁኔታ የይግባኝ መልስ ሰጪ) ሳይቀርብ የቀረ እንደሆነ ፍ/ቤቱ ለሚሰጠው ትዕዛዝ መሠረት የሚሆን ሌላ የሕግ ድጋፍ መኖር ይኖርበታል። የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የመ/ቁ.14184 እና 15835 ስር መልስ ለመቀበል በተቀጠረ ጊዜ ፍ/ቤት ለክንዋኔው መሠረት ማድረግ ያለበት የፍ/ብ/ሥ/ሥ/ሕ/ቁ ከ222-240፣ 192-199 ያሉት ድንጋጌዎች በተለይ 233፣ 194፣ 199 መሆኑን አስገንዝቧል።⁶⁸ የፍ/ብ/ሥ/ሥ/ሕ/ቁ ከ222-240 ያሉት ድንጋጌዎች በፍ/ቤት የመጀመሪያዉ ክርክር ሂደት የክርክሩን የክስና መልስ አቤቱታ ተከራካሪዎች እንዲያዉቁት ማድረግ ነዉ። የሕጉ ቁጥር 199(1) «ለቀጠሮው ምክንያት የሆነው ጉዳይ ሳይፈጸም የቀረው ከተከራካሪ ወገኖች በአንደኛው ጉድለት የሆነ እንደሆነ የጉዳዩን መፈጸም ሳይጠብቅ በዚያው ቀን ቀጠሮ የመሰለውን ውሳኔ ለመስጠት ይችላል» ይላል። እንዲሁም የሕጉ ቁጥር 194 “በተወሰነ የጊዜ ገደብ ውስጥ መከናወን ያለበት ድርጊት በተወሰነው ጊዜ ውስጥ ካልተከናወነ ዋጋ እንደሌለው ይገልፃል።” የሕጉ ከቁጥር 192 እስከ ቁጥር 199 ያሉት ድንጋጌዎች ከቁጥር 233 ጋር አብሮ ሲነበብ ለመልስ በተቀጠረበት ቀን ተከሳሹ መልሱን ካላቀረበ ፍ/ቤቱ የጽሑፍ መልስ ለመቀበል ሌላ ቀጠሮ ሳይሰጥ ወደሚቀጥለው ደረጃ መቀጠል አለበት ወደሚለው ድምዳሜ ይወስደናል።⁶⁹ በዚህም መሠረት በተወሰነ ጊዜ ውስጥ መልሱን እንዲያቀርብ የታዘዘ ተከሣሽ መልሱን ከማቅረብ ጋር ተያይዘው የሚነሱ ጥቅሞች ይቀርባሉ እንጂ ከክሱ እንዲወጣ አይሆንም። እንዲሁም ቁጥር 233 ስር የተደነገገው default proceeding ለዚሁ ዓላማ እንደሚዉል የእንግሊዘኛው ቅጂ የተሻለ ግልፅነት እንዳለዉም በፌ/ጠ/ፍ/ሰ/ሰ/ችሎት ተመላክቷል።⁷⁰ ሌላዉ ጉዳይ ተከሳሽ መልስ ባለማቅረቡ ወይም እራሱ ባለመቀረቡ የከሰሽን

⁶⁸ አቶ ውርጌሳ ታደሰ ሃ አቶ መለሰ ተካ; ሼል የኢትዮጵያ አ/ማ ሃ በወ/ሮ አስቴር ብርሃነ ስላሴ.

⁶⁹ መንበረፀሐይ 79.

⁷⁰ ሼል የኢትዮጵያ አ/ማ ሃ በወ/ሮ አስቴር ብርሃነ ስላሴ.

በፍትሕ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ክስ እንዳለ መቀበል(ቀጥታ ወደ ዉሳኔ መሄድ) ተገቢ ስላልሆነና የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 241 በአጭር ሥነ ሥርዓት ከሚታዩ ጉዳዮች ዉጪ ተግባራዊ ስለሚሆን የከሳሽ ክስ የሕግ ድጋፍ ያለዉ መሆኑን ማረጋገጥ ይጠበቅበታል፡፡⁷¹ በዚህ ክፍል በሦስተኛነት መዳሰስ ያለበት ሌላዉ ጉዳይ መልስ ለመቀበል በተሰጠ ቀጠሮ ከሳሽ ቢቀር ዉጤቱ ምን ሊሆን ይችላል የሚለዉ ነዉ፡፡ ቀደም ብሎ እንደተዳሰሰዉ ሕጉ ጉዳዩ ለመሰማት በተያዘ ቀጠሮ ተከራካሪዎች ባይቀርቡ ስለሚወሰደዉ እርምጃ ከሚደነግግ በቀር ክስ ለመቀበል በተሰጠ ቀጠሮ ተከራካሪዎች ባይቀርቡ ስለሚወሰደዉ እርምጃ የሚለዉ የለም፡፡ በተግባር ፍ/ቤቶች በዚህ ቀጠሮ ከሳሽ ሳይቀርብ በሕጉ ስለ ክስ መስማት የሚመለከቱትን ድንጋጌዎች በመጠቀም በቁጥር 69 (2) መሠረት የክሱን መዝገብ መዝጋት ወይም በቁጥር 73 መሠረት ጉዳዩን(ከሱን) መዝጋት እንደ ችግር የሚነሳ ነዉ፡፡ ከላይ እንደተገለፀዉ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 67፣ 70፣ 73 እና ሌሎች ተዛማጅ ድንጋጌዎች ከተከራካሪዎች አንዱ ወይም ሁለቱም ጉዳዩ ለመሰማት (hearing of parties) በተቀጠረበት ቀን ያልቀረቡ እንደሆነ ብቻ ተፈፃሚ ስለሚሆኑ ጉዳዩ መልስ ለመቀበል በተቀጠረበት ቀን ከሳሽ ሳይቀርብ የቀረ እንደሆነ ፍ/ቤቱ ለሚሰጠዉ ትዕዛዝ መሠረት የሚሆን ሌላ የሕግ ድጋፍ መኖር ይኖርበታል፡፡ የፍ/ብ/ሥ/ሥ/ሕጉ 192-199 ባሉት ቁጥሮች ፍ/ቤት እንዲፈፀሙ ያዘዘቸዉ ጉዳዮች ሳይፈፀሙ ሲቀሩ ስለሚሰጡ ትዕዛዞች የተለያዩ ድንጋጌዎችን አስቀምጧል፡፡ በቁጥር 199 ሥር ያለዉ ድንጋጌ አሁን ለያዝነዉ የክስ መልስ ለመቀበል ስለተሰጠ ቀጠሮ በተለይ አግባብነት ያለዉ ነዉ፡፡ በዚህ የሕጉ አንቀጽ ለቀጠሮዉ ምክንያት የሆነዉ ጉዳይ ሳይፈፀም የቀረዉ ከተከራካሪዎቹ ወገኖች በአንደኛዉ ጉድለት የሆነ እንደሆነ ፍ/ቤቱ የጉዳዩን መፈፀም ሳይጠብቅ በዚያዉ ቀን ቀጠሮ የመሰለዉን ውሳኔ ለመስጠት ይችላል በማለት ይደነግጋል፡፡ የዚሁ ቁጥር ንዑስ ቁጥር (2) ደግሞ ለቀጠሮዉ ምክንያት የሆነዉ ጉዳይ ሳይፈፀም የቀረዉ በተከራካሪዎቹ ወገኖች ጉድለት ያልሆነ እንደሆነ ግን ፍ/ቤቱ ሌላ ቀጠሮ ይሰጣል ይላል፡፡ እነዚህ ድንጋጌዎች ፍ/ቤቱ እንዲፈፀም ያዘዘዉ ነገር ሁሉ ፍ/ቤቱ ባስቀመጠዉ ጊዜ ዉስጥ

⁷¹ መንበረፀሐይ 80; Mary Kay Kane, *Civil Procedure* (4th edn, West Publishing Co., 1996) 165 [Here after Kane].

መከናወን እንዳለበት እና ፍ/ቤቱ አሳማኝ ምክንያት ካልቀረበለት በስተቀር ተጨማሪ ጊዜ እንደማይሰጥ ማሳያ ናቸው፡፡⁷²

በዚህ ቀጠሮ በልዩ ሁኔታ ትዕዛዝ ካልተሰጠ በስተቀር ከከሳሽ በኩል መልስ ከመቀበል በቀር የሚከወን ተግባር አለመኖሩ፤ ከሳሽ መልስ አለመቀበሉ በፍ/ቤቱ ስራ ላይም የሚያደርሰው መስተጓጎል ባለመኖሩ በቁጥር 69(2) መሠረት የክሱን መዝገብ መዝጋቱ ወይም በቁጥር 73 መሠረት ጉዳዩን (ክሱን) መዝጋቱ ተክክል አይደለም፡፡⁷³ ምክንያቱም ቁጥር 69(2) ክስ በሚሰማበት ቀን ሁለቱም ወገኖች ካልቀረቡ የሚፈጸም እና ቁጥር 73 ክስ(ጉዳዩ) በሚሰማበት ቀን ከሳሽ ካልቀረበ የሚመለከት በመሆኑ ነው፡፡⁷⁴ በአቶ ውርጌሳ ታደሰ እና አቶ መለሰ ተከ መካከል በነበረው ክርክር መልስ ለመቀበል በተቀጠረ ጊዜ ከሳሽ ባለመቅረቡ የፌዴራል ከፍተኛ ፍ/ቤትና ጠቅላይ ፍ/ቤት የፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 መሠረት መዝገቡ እንዲዘጋ መወሰኑ በተግባር ለሚታየው ችግር በምሳሌነት የሚጠቀስ ነው፡፡ ይህም የሕጉን ድንጋጌ በተቃረነ መልኩ የተሰጠ ነው፡፡ በዚህ ጉዳይ በመ/ቁ 14184 የስር ፍ/ቤቶችን ዉሳኔ በመሻር የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት እንደሚከተለው የሕግ ትርጉም ሰጥቷል፡፡

« በመሠረቱ መልስ ለመቀበል ቀጠሮ የሚያዘው በአንድ ጉዳይ ክስ የተመሠረተበት ሰው በጉዳዩ ላይ የቀረበበትን ክስ ያምን ወይም ይክድ እንደሆነ ሃሳቡን በጽሁፍ እንዲያቀርብ ማስረጃም ካለው የማስረጃውን ዝርዝር ለፍርድ ቤቱ እንዲያቀርብ ለማድረግ ነው፡፡ በመሆኑም ከከሳሹ የሚጠበቅ ክንዋኔ የለም፡፡ ከሳሹ ሳይቀርብ ቀረ እንኳን ቢባል በፍርድ ቤቱ የሥራ ሂደት ላይ የሚያስከትለው መስተጓጎል ሊኖር አይችልም፡፡ በመሆኑም መልስ ለመቀበል ቀጠሮ በተያዘበት ቀን ከሳሹ ባይቀርብ የተከሳሹን መልስ ተቀብሎ ለተከታይ ክንውን ጉዳዩን ከማዘጋጀት አልፎ መዝገቡን ለመዘርጋት በቂ ምክንያት የለም (emphasis added by the author)፡፡»⁷⁵

⁷² ዝኒ ከማሁ 79.

⁷³ ዝኒ ከማሁ 78.

⁷⁴ ዝኒ ከማሁ.

⁷⁵ አቶ ውርጌሳ ታደሰ ህ አቶ መለሰ ተከ 53.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ከሳሽ መልስ ለመቀበል በተቀጠረ ቀን ባለመቅረቡ ክሱ (ጉደዩ) ሊዘጋበት አይችልም ይልቁንም የክስ መልሱን በመጣበት ቀን መዉሰድ ይችላል። ምክንያቱም በዚሁ ቀጠሮ በልዩ ሁኔታ ትዕዛዝ ካልተሰጠ በስተቀር መልስ ከመቀበል ሌላ የሚከወን ተግባር አለመኖሩ፤ ከሳሽ መልስ አለመቀበሉ በፍ/ቤቱ ስራ ላይም የሚያደርሰው መስተጓጎል ባለመኖሩ ነው።⁷⁶ ሥለዚህ ክሱ በሚሰማበት ቀጠሮ ተፈፃሚ እንዲሆኑ የተደነገጉትን የሕጉ ደንቦች የተለየ ባህሪና ዓላማ ባለው የተከሳሽን መልስ የመቀበል ቀን ቀጠሮ ተፈፃሚ ማድረግ አግባብነት የለውም። በመሆኑም የሕጉን ክፍተት ለመሙላት አግባብነት ያለው በሕጉ ቁጥር 192-199 ይመስላል።⁷⁷ ፍ/ቤቱም እነዚህን ድንጋጌዎች እንደሁኔታው መጠቀም ይኖርበታል።

በመጨረሻም መልስ ለመቀበል በተቀጠረ ቀን ተከሳሽና ከሳሽ ሁለቱም ፍ/ቤት ባይቀርቡ ምን ዉጤት ያስከትላል የሚለውን እናያለን። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 192-199 በተለይም ቁጥር 199 እና ከላይ በተሰጠው ማብራሪያ መሠረት በዚህ ቀጠሮ ሁለቱም ተከራካሪዎች ፍ/ቤት ባይቀርቡ ፍ/ቤቱ የመሰለውን ዉሳኔ መስጠት ከሚችል በቀር ሌላ የሕግ ድንጋጌ የለም። እነዚህ ድንጋጌዎች ፍ/ቤቱ እንዲፈፀም ያዘዘው ነገር ሁሉ ፍ/ቤቱ ባስቀመጠው ጊዜ ዉስጥ መከናወን እንዳለበት እና ፍ/ቤቱ አሳማኝ ምክንያት ካልቀረበለት በስተቀር ተጨማሪ ጊዜ እንደማይሰጥ ይደነግጋሉ። ለምሳሌ ከሳሽ ጉዳዩን ለመከታተል እንዳልፈለገ ተቆጥሮ መዝገቡን መዝጋት ወይም ፍ/ቤቱ ቀጠሮውን ሊያራዝም ይችላል። ይህ ሚሆንበት አግባብም ከሳሽ ቢቀርብ ኖሮ ተከሳሽ ባይቀርብም ፍ/ቤቱ ተከሳሽ መጥሪያ ደርሶት ያልቀረበ መሆኑን በመገንዘብ ክሱ የሚሰማበትን ቀጠሮ ለመስጠት ያስችለው ስለነበር ነው። ከሳሽ በዚህ ቀጠሮ ባይቀርብ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2) መሠረት መዝገብ አይዘጋም። ምክንያቱም በዚሁ ቀጠሮ በልዩ ሁኔታ ትዕዛዝ ካልተሰጠ በስተቀር ከከሳሽ በኩል መልስ ከመቀበል በተጨማሪ የሚከወን ተግባር አለመኖሩ ከሳሽ መልስ አለመቀበሉ በፍ/ቤቱ ስራ

⁷⁶ መንበረፀሐይ 78.

⁷⁷ ዝኒ ከማሁ.

ላይም የሚያደርሰው መስተዳጎል ባለመኖሩ ነው።⁷⁸ ሌላኛው ምክንያት የፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2) ክስ ለመስማት የሚሰጥ ቀጠሮን ብቻ የሚመለከት በመሆኑ ነው።

3.2. ክስ የሚሰማበት ቀን ቀጠሮ

በዚህ ክፍል ክስ(ጉዳዩ) ለመስማት በተሰጠ ቀጠሮ የፍ/ቤቱ ክንዋኔ ምንድን ነው የሚለው ተብራርቷል። እንዲሁም በዚህ ቀጠሮ ከተከራካሪዎቹ አንዱ ወይም ሁለቱ ባይቀርቡ የሚከተለውን ዉጤት ተመላክቷል። ክስ የሚከፈትበትና የሚሰማበትን ሥነ-ሥርዓት ሥንመለከት በፍ/ብ/ሥ/ሥ/ሕ/ቁ 241 እና ተከታይ ድንጋጌዎች መሠረት በርካታ ክንዋኔዎች ይፈፀማሉ። በዚህ ቀጠሮ ተከራካሪዎች ስለጉዳዩ በራሳቸው አንደበት የሚያብራሩበት፣ ፍ/ቤቱም የተከራካሪዎችን የመሰማት(የመደመጥ) መብት በጉልህ የሚተገብርበት ነው። በዚህ ቀጠሮ ፍ/ቤት ከሚያከናውናቸው ተግባራት የተወሰኑት በዚህ ጽሑፍ ተዳሰዋል። ፍ/ቤቱ በመጀመሪያ ባለጉዳዮች ወይም ተወካዮቻቸው ለችሎት መቅረባቸውን ያረጋግጣል። በመቀጠልም ክሱን እና መልሱን ለግራ ቀኙ በንባብ ያሰማል። ይህም ተግባር በዋነኝነት ተከራካሪ ወገኖች ክስና መልሱ ትክክለኛው ግልባጭ እንደደረሳቸው ለማረጋገጥ ይረዳል። በሶስተኛ ደረጃም በተሟላቸው የጽሑፍ ክስ እና መልሱ ላይ በቀጥታ ወይም በነገሩ አካባቢ ሁኔታ እንደተካደ የሚቆጠረውን ነገር የሚያምን ወይም የሚክድ መሆኑን ተከሳሹን ወይም ወኪሉን በጥያቄ ይመረምራል።⁷⁹ ክስ የሚሰማበት ቀጠሮ ፍ/ቤቱ አከራካሪውን ጉዳይ(ጭብጥ) የሚለይበት፣ በተካደው ላይ ማመንን የሚያገኝበት፣ አላስፈላጊ ጉዳዮችን የሚቀንስበትና ሙግቱን የሚያሳጥርበት እንዲሁም ጉዳዩን ለሙግት (trial) ለማድረስ የመጨረሻው ደረጃ ነው።⁸⁰

የዚህ ቀጠሮ ሕግ መሠረታዊ ዓላማ ተከራካሪ ወገኖች በጽሑፍ ያቀረቡትን ክርክር ለማብራራትና በፍ/ብ/ሥ/ሥ/ሕ/ቁ 446-448 መሠረት ጭብጥ ለመመስረት እንዲያግዝ

⁷⁸ ዝኒ ከማሁ.

⁷⁹ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 241(1).

⁸⁰ Balew and Mizane 234.

በፍትሁብነት ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

መሆኑን የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በሙሉ ኤሌክሮኒክስ ኢንጂነሪንግ ኃ/የተ/የግ/ማሕበር እና ጥቁር አንበሳ ስፔሻላይዝድ ሆስፒታል/ኢ.ኢ/ መካከል በነበረው ክርክር ላይ አብራርቷል።

⁸¹ በዚህ የቃል ምርመራ ፍ/ቤቱ ማንኛውንም እምነት እና ክህደት በመዝገብ ላይ በጽሑፍ እንዲሰፍር ያደርጋል። በመቀጠልም አከራካሪ የሆነውን ፍሬ ነገር፣ ጭብጥ በመለየት ተከራካሪ ወገኖች እንዲያወቁት ብሎም በማስረጃ አንጥሮ ለመወሰን ለቀጣዩ ቀጠሮ ያዘጋጃል። የአንድ ጉዳይ አከራካሪ ጭብጥ ከሳሽ በክስ የገለጸውና ተከሳሽ ክዶ የተከራከረበት ነጥብ ነው።⁸² ከዚህ በተጨማሪ ተከራካሪዎች ክርክራቸውን የሚያስረዳ ማስረጃ እንዲያቀርቡ የሚገደዱበትና ፍ/ቤቱ በተከራካሪዎች የቀረበውን ማስረጃ ተዓማኒነትና ክብደት የሚመዝነው ግራ ቀኙ ተካክደው በሚከራከሩበት ጭብጥ ላይ ብቻ ነው። ከሳሽና ተከሳሽ ያልተካካዱበትና ከሳሽ በክሱ ገልፆ ተከሳሽ ባመነው ነጥብ ላይ ፍ/ቤቱ ጉዳዩን ማስረጃ በመመዘን ሣይሆን ተከሳሹ በሰጠው የእምነት ቃል ወይም መልስ መሠረት መወሰን እንዳለበት በፍ/ብ/ሥ/ሥ/ሕ/ቁ 242 እና ተከታይ ድንጋጌዎች ይዘትና መሠረታዊ ዓላማ በመመርመር መረዳት ይቻላል።

ይህም ክስ ለመስማት በተያዘ ቀጠሮ ፍ/ቤት የመጨረሻ ውሳኔ ሊሰጥ እንደሚችል ያስገነዝባል። በዚህ ቀን ቀጠሮ ፍ/ቤቱ የመጀመሪያ ደረጃ መቃወሚያ በጽሑፍ መልሱ ላይ ተከሳሹ አቅርቦ ከሆነ በቅድሚያ የከሳሹን አስተያየትና ክርክር በማዳመጥ ብይን ይሰጣል።⁸³ በታመኑት ጉዳዮች ላይ እንዲሁ ውሳኔ ይሰጣል። ተከራካሪ ወገኖች በሕግም ሆነ በፍሬነገሩ የሚለያዩበት ወይም የሚያከራክሩባቸው ጉዳይ ያለመኖሩን ፍ/ቤት የተገነዘበ እንደሆነ ወይም ተከራካሪ ወገኖች ነገሩን በስምምነት የፈቱት እንደሆነ ተጨማሪ ማስረጃ ማስቀረብ ሳያስፈልግ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 253-254 መሠረት በዚህ ቀጠሮ ቀን ውሳኔ ይሰጣል። ተጨማሪ ማስረጃ የሚያስቀርብ ከሆነ ይህ ሂደት ፍ/ቤቱ ባለጉዳዮችን ጭምር በማነጋገር

⁸¹ [2005 ዓ] 15 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 160

⁸² በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 246.

⁸³ ዝኒ ከማሁ ቁጥር 244(1).

ጉዳዩን ለዋናው ክርክር እና የማስረጃ መስማት ደረጃ የሚያዘጋጅበት በመሆኑ የከሳሹና ተከሳሹ (ወኪሎቻቸው) መገኘት አስፈላጊ መሆኑ ይታመናል።⁸⁴

በተያዘ ቀጠሮ የቃል ክርክር ማድረግና የመልስ ሰጭን የጽሑፍ መልስ መቀበል በክርክር ሂደት ሁለቱም እራሳቸውን የቻሉ ሥርዓቶች እንጂ አንዱ ሌላውን ሊተካ የሚችል ወይም ተመሳሳይ የክርክር ደረጃዎች አይደሉም። የሁለቱም ሥርዓት አፈፃፀም የሚያስከትለው ውጤት የተለያየ ነው። በመሆኑም በአንድ ቀጠሮ የቃል ክርክር ማድረግና የመልስ ሰጭን የጽሑፍ መልስ መቀበል ሥነ-ሥርዓታዊ አይደለም።⁸⁵

በዚህ ክፍል የተዳሰሰው ሌላው ጉዳይ ክርክሩ (ክሱ) በሚሰማበት ቀጠሮ የተከራካሪዎቹ አንዱ ወይም ሁለቱም በችሎት አለመገኘት የሚያስከትለው ውጤትን መለየት ነው። ሕጉን ስንመለከት የክስ መስማት የሚመለከተው የሙግት ሂደት ፍ/ቤቱ ባለጉዳዩችን በማነጋገር ጉዳዩን ለዋናው የሙግት/trial/ ደረጃ የሚያዘጋጅበት በመሆኑ የከሳሹና ተከሳሹ ወይም የወኪሎቻቸው መገኘት በጣም አስፈላጊ ነው።⁸⁶ ከሁለቱ የአንዱ አለመገኘት ለሂደቱ መስተጓጎል የሚኖረው ተፅዕኖም ከፍተኛ ነው።⁸⁷ በመሆኑም ከሌሎች ቀጠሮዎች በተለየ መልኩ ባለጉዳዩች ጉዳዩ እንዲሰማ ቀጠሮ በተያዘበት ዕለት ባይቀርቡ የሚከተለው ውጤት ከሌላው የበለጠ ጠንካራ መሆኑ አስፈላጊ ነው።⁸⁸ ከላይ ካየነው መልስ ለመቀበል ከሚሰጠው ቀጠሮ ይልቅ ሕጉ ጥብቅ እርምጃ አስቀምጧል። በፍ/ብ/ሥ/ሥ/ሕግ ምዕራፍ 2 (ከቁጥር 241 - 273) ያሉት ሁሉም ድንጋጌዎች የተሟላቸው አለመገኘት የሚያስከትለውን ውጤት

⁸⁴ Sedler 183, Para. 2.

“In general, at first hearing, the court reads the statement of defence, examines both parties to determine their respective positions, rules on any preliminary objections, and frames the issues for trial. In certain circumstances, the court may adjudicate the case at the first hearing without requiring a full-scale trial. If the proceeding is transferred to the trial stage, the court sets a date for the trial and at the trial it hears evidence and decides the issues.”

⁸⁵ የመንግስት ቤቶች ኤጀንሲ ህጽኑ ሥርዓት ገ/ፃዱ [2001] 9 ፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት, መ/ቁ 36380, 16.

⁸⁶ መንበረፀካይ 78.

⁸⁷ ዝኒ ከማሁ.

⁸⁸ ዝኒ ከማሁ.

በፍትሕ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ከመሰማት ሂደት ጋር ተያይዞ የቀርቡትም በከፊል በዚህ ምክንያት ነው። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2) እና ተከታይ ድንጋጌዎች በመሰማት ሂደት ከተሟጋች አንዱ (ሁለቱም) አለመገኘት የሚያስከትለውን ውጤት በሚመለከት አግባብነት አለው። ይህም እንደሚቀጥለው ተብራርቷል።

በመጀመሪያም ክሱ በሚሰማበት ቀጠሮ ተከላክሎ ካልቀረበ ውጤቱ ምን ይሆናል የሚለው ተመላክቷል። በዋናነት ተከላክሎ ክስ በሚሰማበት ቀን ካልቀረበ ክርክሩ በሌለበት እንዲሰማ ፍ/ቤቱ እንደሚያዝ በሥነ-ሥርዓት ሕጉ ቁጥር 70 ላይ በግልፅ ተደንግጓል። ይህ ሲሆን ፍ/ቤቱ በቅድሚያ ለተከላከለ መጥሪያ በተገቢው ሁኔታ መድረስ አለመድረሱን ያረጋግጣል። ተከላክሎ ያልቀረበው መጥሪያ ደርሶት መሆኑ ከተረጋገጠ ክርክሩ በሌለበት መሰማት ይቀጥላል። ይህም በእንግሊዘኛው ቅጂ Ex-parte Proceeding ተብሎ ይጠራል። ክርክሩ ተከላክሎ በሌለበት ይከናወናል ስንል ተከላክሎ ከክርክር ሂደቱ ውጭ ይሆናል ማለት ነው። ይህም ማለት በቃል መከራከር፣ ምስክር የማሰማት፣ መስቀለኛ ጥያቄ የመጠየቅ እና የመሳሰሉት መብቶችን ያጣል።⁸⁹ ተከላክሎ ወይም ተጠሪ በሌለበት ጉዳዩ እንዲታይ ብይን መስጠቱ ፍርዱ ለከላክሎ በሚጠቅም መንገድ የመወሰኑን ሁኔታ በአስገዳጅነት የሚያስከትል እንዳልሆነ ከፍ/ብ/ሥ/ሥ/ሕ/ቁ 70(ሀ) ድንጋጌ ይዘትና ዓላማ መረዳት ይቻላል።⁹⁰ በመሆኑም ጉዳዩ ተከላክሎ በሌለበት ይታይ ሲባል ክርክር በአንድ ወገን ብቻ ይሆንና ፍ/ቤቱ የከላክሎን አቤቱታ ካደመጠ በኋላ ሕግን መሠረት አድርጎ ለከላክሎ የሚገባው መብት ካለ ይወሰንለታል፤ ካለሆነ ግን ለተከላክሎ ሊወሰንለት ይችላል።⁹¹ “The mere absence of the defendant does not of itself justify the presumption that the plaintiff claim or case is true.”⁹² በሌላ አገላለጽ

⁸⁹ ዝኒ ከማሁ 80.

⁹⁰ በዩሊስ ቡራሌ ሲጋል የራይስ ጫት ላኪዎች ማህበር v አቶ አብዲ አልሚ መሐመድ [2005] 14 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 144.

⁹¹ Danishah Farudnji, Mulla, *Code of Civil Procedure Act V of 1908* (12th ed., the Eastern Law House, 1953) 566. [Here after Mulla]; Kane 167; Sedler 163-164.

⁹² Mulla 566.

ክሱ ተከሳሽ በሌለበት እንዲሰማ ብይን ተሰጦ ማለት ክርክሩ ለከሳሽ ይወሰናል ማለት አይደለም፡፡⁹³

የሥነ-ሥርዓት ሕግ ቁጥር 70(ሀ)) መግቢያ ('ክርክሩ እንዲሰማ' ስለሚል) የሚያመለክተው ተግባራዊነቱ በመጀመሪያ የክስ መሰማት ክንውን እንጂ በሌላ የፍ/ቤቱ ቀጠሮዎች ተግባራዊ ሊሆን እንደማይችል ነው፡፡⁹⁴ በመሆኑም ዓላማው ክስ ለመስማት ካልሆነ ፍ/ቤቱ በሚሰጠው ማንኛውም የፍ/ቤት ቀጠሮ ተከሳሽ ወይም መልስ ሰጪ ባይቀርብ በሌለበት (ex-parte) ክሱ ይሰማ ሊባል አይችልም፡፡⁹⁵ በተግባር ግን ፍ/ቤቶች ከዚህ በተቃራኒው ሲተገብሩ ይስተዋላል፡፡

⁹⁶ ለምሳሌ በወይዴ ሎንዶም እና ዘዉዲቱ ተክለገደርጊስ መካከል በነበረው ክርክር የቀደዳ ገመል ወረዳ ፍ/ቤት ማስረጃ ለመመርመር (ክስ ለመመርመር) በያዘው ቀጠሮ ተከሳሽ ባለመቅረቡ ምክንያት ክሱ በሌለበት እንዲሰማ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 70(ሀ) መሠረት ብይን ሰጥቷል፡፡⁹⁷ የፌዴራል ጠቅላይ ፍ/ቤት በይግባኝ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 70(ሀ) ተግባራዊ የሚሆነው ክሱን ለመስማት በተያዘ ቀጠሮ ነው በማለት የስር ፍ/ቤትን ዉሳኔ ሽሮታል፡፡ እንዲሁም በሼል ኢትዮጵያ አ/ማ እና በወ/ሮ አስቴር ብርሃነስላሴ ክርክር ጉዳይ በፌዴራል ከፍተኛ ፍ/ቤት መልስ ለመቀበል በተያዘ ቀጠሮ ተከሳሽ ባለመቅረቡ ክሱ በሌለበት እንዲታይ በመወሰኑ ተመሳሳይ ችግር ተስተውሏል፡፡⁹⁸

ከላይ እንደተገለፀው ተከሳሽ በሌለበት ክርክር እንዲቀጥል ብይን ለመስጠት ተከሳሽ መጥሪያ በአግባቡ የደረሰው መሆኑ መረጋገጥ አለበት፡፡⁹⁹ ነገር ግን መጥሪያ በትክክል መድረሱ ያልተረጋገጠ ከሆነ ፍ/ቤቱ ሁለተኛ መጥሪያ ለተከሳሹ ያዘጋጃል ወይም ተከሳሽ መጥሪያው

⁹³ Sedler 163-164.

⁹⁴ Balew and Mizane 219.

⁹⁵ ዝነ ከማሁ 200; መንበረፀሓይ 78-79.

⁹⁶ Kane 167.

⁹⁷ [1990] 14 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት.መ/ቁ 74/90.

⁹⁸ ሼል የኢትዮጵያ አ/ማ v በወ/ሮ አስቴር ብርሃነ ስላሴ. የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ይህን ዉሳኔ ሽሮታል.

⁹⁹ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 70 (ሀ).

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ዘግይቶ የደረሰው ከሆነ ተለዋጭ ቀጠሮ ይሰጣል።¹⁰⁰ ሆኖም ግን በተግባር ፍ/ቤቶች ለተከሰሽ መጥሪያ በአግባቡ መድረስ አለመድረሱን ሳያረጋግጡ በዚህ ቀጠሮ ካልቀረበ በሌለበት እንዲታይ ብይን ሲሰጡ ይስተዋላል። ለምሳሌ በዳዊት ተስፋይ እና አሚና መሃመድ¹⁰¹ እንዲሁም በፀሐይ ባህታ እና አዛላች ችነሬ¹⁰² መካከል በነበረው ክርክር የስር ፍ/ቤት ተከሰሽ በችሎት ያልቀረበው መጥሪያ በአግባቡ ደርሶት መሆን አለመሆኑን ሳያረጋግጥ በሌለበት እንዲታይ ብይን ሰጥቷል። ፍ/ቤት ተከሰሽ ያልቀረበው መጥሪያ በአግባቡ ሳይደርሰው የሆነ እንደሆነ ሁለተኛ መጥሪያ ለተከሰሽ እንዲደርሰው ወይም መጥሪያ የደረሰው መልስ ለማዘጋጀት በቂ ባልሆነ ቀን ከሆነ የቀጠሮ ቀኑን በማራዘም ጉዳዩ በሌላ ቀን እንዲታይ ከማድረግ በቀር ተከሰሽ በሌለበት ክስ አይሰማም።

ከዚህ ጋር በተያያዘ ሌላው ማብራሪያ የሚያሻው ጉዳይ ተከሰሽ በሌለበት ጉዳዩ እንዲታይ ብይን ሲሰጥ ለተከሰሹ ምን አማራጮች አሉት የሚለው ነው። ተከሰሹ በቀጠሮው ባለመቅረቡ ምክንያት በሌለበት ክርክሩ እንዲሰማ ከተደረገ በኋላ ጉዳዩ በመታየት ላይ እያለ (while the case is pending) በሚቀጥለው ቀጠሮ ቀርቦ በቀዳሚው ቀጠሮ ለመቅረብ ያልቻለው በቂ ሆኖ በሚገመት እክል (sufficient cause) ምክንያት መሆኑን ያስረዳ እንደሆነ፣ ፍ/ቤቱም ከተቀበለው በቀረበበት ቀን መከላከያውን አቅርቦ እንዲከራከር ሊፈቅድለት እንደሚችል በፍ/ብ/ሥ/ሥ/ሕ/ቁ 72 ላይ ተደንግጓል። የሕጉ ዓላማ ተከሰሽ ከአቅሙ በላይ በሆነ ምክንያት ከክርክሩ ውጪ እንዳይሆን፣ እራሱን እንዲከላከል ማስቻል ነው። “The right to be heard in a suit is one of the important principles of the natural justice.”¹⁰³ የኢትዮጵያ የፍ/ሥ/ሥ/ሕግ ይህን መርህ በአግባቡ አካቷል። በዚህ ሕግ አንቀፅ 72 በአማርኛና እንግሊዘኛ ቅጂው መካከል ልዩነት ያለ ሲሆን የአማርኛ ቅጂው ተከሰሹ የክስ

¹⁰⁰ ዝኒ ከማሁ ቁጥር 70 (ለ-ሐ)።

¹⁰¹ [1988] የፌዴራል መጀመሪያ ፍ/ቤት የመ/ቁ 2132/99።

¹⁰² [1988] የፌዴራል ጠቅላይ ፍ/ቤት የመ/ቁ 1658/88።

¹⁰³ [Naresh Kumar](https://www.lawnotes4u.in/ex-parte-decree-and-its-remedies-order-9-rule-13-cpc/), ‘Ex parte Decree and its remedies || Order 9 Rule 13 || CPC ||’ (August 19 2019) <<https://www.lawnotes4u.in/ex-parte-decree-and-its-remedies-order-9-rule-13-cpc/>> accessed on August 24 2021.

መልስ ያላቀረበ ከሆነም እንዲያቀርብ በመፍቀድ በግልፅና በተሻለ ሁኔታ የተከሰሱን ሙብት ያስጠብቃል።

በተጨማሪም ጉዳዩ በሌለበት ታይቶ ዉሳኔ ወይም ትዕዛዝ ተሰጥቶበት ከሆነ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 78(1-2) መሠረት በቃል ለመከራከር በቂ ሆኖ በሚገመት ምክንያት አለመቻሉን ዉሳኔዉ ወይም ትዕዛዙ መሰጠቱን ካወቀ ከአንድ ወር ባልበለጠ ጊዜ ዉስጥ ለፍ/ቤቱ በማስረዳት ይህን ዉሳኔ ወይም ትዕዛዝ ማስነሳት ይችላል። ይህ በሆነ ጊዜ ፍ/ቤቱ ለከሰሽ ጉዳዩን ማሳወቅና ስለወጪ የመሰለዉን በመወሰን ዉሳኔዉን ወይም ትዕዛዙን ያነሳዋል።¹⁰⁴ በዚህ ሕግ የአንድ ወር ጊዜ ገደቡ የሚሰላዉ ተከሰሹ ዉሳኔ ወይም ትዕዛዝ መሰጠቱን ካወቀበት ቀን ጀምሮ እንጂ የዉሳኔዉን ወይም የትዕዛዙን ይዘት ማወቅ አለማወቅ አላግባብ ለፍትህ መዘግየት እንዳይዳርግ ሲባል ከግምት አይገባም።

በተግባር በዚህ ጉዳይ የተለያዩ ልምድ በፍ/ቤቶች ዘንድ አጋጥሟል። ለምሳሌ፡ በራሄል ወልደማርያም እና በእነ ዝናየነሽ እና ሌሎች መዝገብ የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ተከሰሽ በሌለበት የተላለፈዉን ዉሳኔ እንዲሰረዝ ያመለክታል። ሆኖም ግን የተከሰሽ ጠበቃ ዉሳኔ እንደተሰጠ ካወቀ ከአራት ወር ስለበለጠዉ ፍ/ቤቱ የአንድ ወር የጊዜ ገደቡ አልፏል በማለት የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ማማልከቻዉን ዉድቅ ሲያደርገዉ የፌዴራል ከፍተኛ ፍ/ቤት የስር ፍ/ቤቱን ዉሳኔ የተከሰሽ ጠበቃ ዉሳኔዉን የሰማበትን ትክክለኛ ቀን አልተረጋገጠም በማለት ይሸረዋል።¹⁰⁵ የፌዴራል ጠቅላይ ፍ/ቤት በበኩሉ የአንድ ወር የጊዜ ገደቡን ለማስላት ተከሰሽ ስለዉሳኔዉ መስማቱ ከተረጋገጠ በቂ ነዉ፤ የዉሳኔዉን ይዘት አላወቅሁም ነበር በሚል ማስተባበል ያላግባብ ፍትህ እንዳይዘገይ ያግዛል ሲል ወስኗል።¹⁰⁶ በሌለበት ዉሳኔ የተሰጠበት ተከሰሽ ያለው አማራጭ ይግባኝ ማቅረብ ነዉ።¹⁰⁷

¹⁰⁴ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 78(2).

¹⁰⁵ በራሄል ወልደማርያም v በእነ ዝናየነሽ እና ሌሎች የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት የመ/ቁ 19087.

¹⁰⁶ በራሄል ወልደማርያም እና በእነ ዝናየነሽ እና ሌሎች የፌዴራል ጠቅላይ ፍ/ቤት የመ/ቁ 015084.

¹⁰⁷ የኪራይ ቤቶች አስተዳደር ኤጀንሲ v ሙሉጌታ ተስፋኮረስ የፌዴራል ጠቅላይ ፍ/ቤት የመ/ቁ 13839.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

በሦሥተኛ ደረጃ ክርክሩ (ክሱ) በሚሰማበት ቀጠሮ የከሰሽ ፍ/ቤት አለመቅረብ የሚያሰክትለውን ዉጤት እናያለን። የተከራካሪ ወገኖች ቀጠሮ አለማክበርን በሚመለከት የሚደነግግ ሕግ ፍትሐዊ፣ ኢኮኖሚያዊና የተቀላጠፈ ፍትሕ እንዲሰፍን ያለመ ነው። በመሆኑም ተከሰሽ ቀርቦ ከሰሽ ክሱ በሚሰማበት ቀጠሮ ካልቀረበ ፍ/ቤቱ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 መሠረት ችሎቱ ሁለት አይነት ውሳኔ ሊያስተላልፍ ይችላል። አንደኛ ተከሰሽ ቀርቦ በተከሰሰበት ፍሬ ነገር ላይ በሙሉ ወይም በከፊል ያመነ እንደሆነ ፍ/ቤቱ ተከሰሹ በሙሉ ወይም በከፊል በታመነው ጉዳይ ላይ የፍርድ ውሳኔ ይሰጣል።¹⁰⁸ ሁለተኛ ተከሰሹ በሙሉ የካደ እንደሆነ ከሰሽ ከፍ/ቤቱ ለማግኘት የጠየቀውን መብት የተወው መሆኑን በመረዳት ክሱን ይዘጋጃል (dismissal of the case) ።¹⁰⁹ ምክንያቱም ከሰሽ የጉዳዩን ክርክር ወደሚሰማበት ችሎትበመቅረብ የበኩሉን አልተወጣም፣ በቀጠሮው አልተገኘም እንዲሁም ጉዳዩ እንዲዘገይ አድርጓል።¹¹⁰ ክስ ያቀረበ ሰው ክርክሩ እንዲሰማ በተወሰነው ቀጠሮ ካልቀረበ እና ተከሰሹ ቀርቦ የተከሰሰበትን ጉዳይ በሙሉም ሆነ በከፊል ካመነ ከሰሽ በሌለበትም ቢሆን ፍ/ቤቱ ተከሰሹ ባመነው ጉዳይ የፍርድ ውሳኔ ለመስጠት እንደሚችል እና ተከሰሹ የካደ እንደሆነ ግን መዝገቡን በመዝጋት እንደሚያሰናብተው በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 73 ላይ ተመልክቷል። ይህ ድንጋጌ በይግባኝ ክርክር ላይ ጭምር ተፈፃሚ መሆኑ በቁጥር 32(2) ድንጋጌ ስለተመለከተ የይግባኝ ቅሬታው በሚሠማበት ቀጠሮ ይግባኝ ባይ ካልቀረበ ተፈፃሚነት ያለው ይኸው የፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 ነው። ስለዚህ

¹⁰⁸ የኢትዮጵያ ልማት ባንክ ህ ሰላም የቴክኒክና የሙያ ማሰሌጠኛ ማዕከል [2002] 9 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 280 (ከዚህ በኋላ የኢትዮጵያ ልማት ባንክ ህ ሰላም የቴክኒክና የሙያ ማሰልጠኛ ማዕከል ተብሏል)፡

«..... በተያዘው ጉዳይ ክርክር በሚሰማበት ቀኑ-ቀጠሮ ይግባኝ ባይ የነበረው አመልካች ሳይቀርብ ተጠሪ ቀርቧል።በዚህ መሠረት ክስ ያቀረበ ሰው ክርክሩ በሚሰማበት ቀኑ-ቀጠሮ ሳይቀርብ ተከሰሹ ቀርቦ ክሱን በከፊል ወይም በሙሉ ያመነ ከሆነ ለመነው ጉዳይ ፍ/ቤቱ ውሳኔ መስጠት እንደሚችልና ከካደ ደግሞ መዝገቡ እንደሚዘጋ የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 73 ያመለክታል። በዚህም ምክንያት አግባብነት የሚኖረው የፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 እንጂ ቁጥር 69(2) አይደለም። በሌላ በኩል የፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2) አግባብነት የሚኖረው ክርክር በሚሰማበት ቀኑ-ቀጠሮ ሁለቱም ተከራካሪዎች ያልቀረቡ ከሆነ ነው።» ሲል ወስኗል።

¹⁰⁹ ዝኒ ከማሁ.

¹¹⁰ Kane 169.

የክሱ መዝገብ መዘጋት የሚወሰነው ተከላኝ ለቀረበበት ክስ ከሚሠጠው መልስ አኳያ ታይቶ ነው ማለት ነው። በመሆኑም ተከላኝ የቀረበውን ክስ መካድ ማመኑ ሳይረጋገጥ መዝገቡ እንዲዘጋ በመጠየቁ ብቻ መዝገቡ ሊዘጋ እንደሚችል ድንጋጌው አያመለክትም።¹¹¹

ሆኖም ግን በተግባር ከሕጉ መንፈስ ዉጪ ሲከወን ይስተዋላል። ለምሳሌ፡ በኢትዮጵያ የእህል ንግድ ድርጅት እና ትግራይ ዱቄትና የምግብ ዝግጅት ፋብሪካ¹¹² መካከል በነበረው ክርክር የትግራይ ክልል ጠቅላይ ፍ/ቤት ክስ ለመስማት በሰጠበት ቀጠሮ ሁለቱም ተከራካሪዎች ቀርበው ተከላኝ ጉዳዩን በስምምነት እንደፈቱት በማሳሰብ ስምምነቱን ለማቅረብ ተለዋጭ ቀጠሮ እንዲሰጥ ጠይቆ በተሰጠው ተለዋጭ ቀጠሮ ዕለት ከላኝ ባለመቅረቡ ፍ/ቤቱ የተከላኝን የእምነት ክህደት ቃል ከአቤቱታዉ ሳያገናዝብ ክሱን ይዘጋዋል። ይህ ተግባር ከሕጉ ድንጋጌ የራቀ በመሆኑ የፌዴራል ጠቅላይ ፍ/ቤት ይህን ዉሳኔ ሽሮታል።¹¹³ ከዚህ ጋር በተያያዘ የሚነሳው የክስ መዘጋት ብይን ለመስጠት ፍ/ቤቱ በቅድሚያ የተከላኝን የእምነት ክህደት ቃል መቀበል እንዳለበት ተመለክቷል። ነገር ግን በፍ/ብ/ሥ/ሥ/ሕጉ ተከላኝ ያቀረበውን አቤቱታ የሚክድበትና የሚያምንበት ሁለት ዕድል አለው። የመጀመሪያው የክስ መልስ አቤቱታዉ ላይ በጽሑፍ¹¹⁴ ሲሆን ሁለተኛው በክስ መሰማት ቀን በቃል ነው።¹¹⁵ ነጥቡ ተከላኝ በክስ መልስ አቤቱታዉ ላይ በጽሑፍ ያመነውን ጉዳይ በክስ መሰማት ቀን የከላኝን አለመቅረብ እንደ ዕድል ተጠቅሞ ያልተገባ ጥቅም ለማግኘት ቢክድ ፍ/ቤቱ ለሚወስነው ብይን መሠረት ማድረግ የሚገባው መቼ የተሰጠውን የተከላኝ የእምነት ክህደት ቃል ነው የሚለው ነው። በዚህ ጊዜ እንግዲህ ፍ/ብ/ሥ/ሥ/ሕ/ቁ 235 እና 241 ስንመለከት ቀድሞ በመልሱ ላይ የታመነ ጉዳይ ሊካድ እንደማይችልና በክስ መሰማት ቀን ተከላኝ የእምነት

¹¹¹ የኢትዮጵያ መንግሥት ባለስልጣን ህ እነ ወ/ሮ ትዕግስት ወንድይፍራው (ሁለት ሰዎች) [2001] 8 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 73.

¹¹² የኢትዮጵያ እህል ንግድ ድርጅት ህ ትግራይ ዱቄትና የምግብ ዝግጅት ፋብሪካ [1992] የትግራይ ክልል ጠቅላይ ፍ/ቤት የመ/ቁ.1/92.

¹¹³ የኢትዮጵያ እህል ንግድ ድርጅት ህ ትግራይ ዱቄትና የምግብ ዝግጅት ፋብሪካ [1992] የፌዴራል ጠቅላይ ፍ/ቤት የመ/ቁ.5023/92.

¹¹⁴ በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 235.

¹¹⁵ ዝኒ ከማሁ ቁጥር 241.

በፍትሁብነት ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ክህደት ቃሉ የሚጠየቀው ቀድሞ በተካደው ጉዳይ ላይ ብቻ ነው።¹¹⁶ ሥለሆነም ተከላክሎ የከላከለ በዚህ ቀጠሮ አለመቅረብ ተጠቅሞ ቀድሞ ያመነውን መካድ አይችልም፤ ከላከ በዚህ ቀጠሮ በመቅረቱ ስለሚከተለው ውጤት ለመወሰንም ከግምት አይገባም።¹¹⁷

በፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 መሠረት የሚሰጥ የክስ መዝጋት ውሳኔ (order of dismissal of the suit) የሚተገበረው ክስ ለመስማት በተሰጠ ቀጠሮ ከላከ ሲቀር በመሆኑ በሌሎች የፍ/ቤቱ ቀጠሮዎች ላይ ተግባራዊ አይሆንም። ምክንያቱም ክስ ለመስማት የሚሰጥ ቀጠሮ ፍ/ቤቱ ለክርክሩ መሰላጥ ወሳኝ ተግባራትን ለመከወን የተከራከረ ወገኖች መገኘት ቀጥተኛ ተፅዕኖ በመኖሩ የተከራከረዎች በዚህ ቀጠሮ ፍ/ቤት አለመቅረብ ጠንከር ባለ እርምጃ መደንገግ አስፈላጊ በመሆኑ ነው።¹¹⁸ ሆኖም ግን በተግባር የፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 መሠረት የክስ መዝጋት ብይን በሌሎች የፍ/ቤት ቀጠሮዎች ከላከ ሲቀር ሲጠቀሙት ይስተዋላል። ለምሳሌ፡ በናስር መሀመድ እና እነ የገቢዎች ቢሮ መካከል በነበረው ክርክር የአዲስ አበባ ከፍተኛ ፍ/ቤት ጉዳዩ በድህነት እንዴት ሊቀርብ እንደቻለ ለመመርመር በተያዘ ቀጠሮ ከላከ በመቅረቱ ክሱ (ጉዳዩ) እንዲዘጋ የሰጠውን ውሳኔ መመልከት ይቻላል።¹¹⁹ እንዲሁም በወርጊሳ ታደሰ እና መላሰ ተካ እና ሌሎች መካከል በነበረው የይግባኝ ክርክር የተጠረን የይግባኝ መልስ በጽሑፍ ለመቀበል በተያዘ ቀጠሮ አመልካች ባለመገኘቱ ክሱ እንዲዘጋ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 73 መሠረት የፌዴራል ከፍተኛ ፍ/ቤትና ጠቅላይ ፍ/ቤት የሰጡት ውሳኔ ሌላው ምሳሌ ነው።¹²⁰

ሌላው ነጥብ ክሱ የተዘጋበት ከላከ ክሱን ለማስቀጠል ምን የመፍተሌ አማራጮችን አሉት የሚለው ነው። ክሱ ከተዘጋ በኋላ ከላከ ለክሱ መነሻ የነበረውን ጉዳይ መሠረት በማድረግ በድጋሜ አዲስ ክስ ለማቅረብ እንደማይቻል በፍ/ብ/ሥ/ሥ/ሕ/ቁ 74 ላይ ተገልጿል። ይህ ክልከላም ከላከ በአንድ ሰረ-ነገር ሁለት ጊዜ ክስ ማቅረብ አይቻልም ከሚለው ዋና መርህ ነው

¹¹⁶ ዝኒ ከማሁ ቁጥር 233-234, 223.

¹¹⁷ ዝኒ ከማሁ ቁጥር 241.

¹¹⁸ መንበረፀሐይ 78.

¹¹⁹ በናስር መሀመድ ህ በእነ የገቢዎች ቢሮና ሌሎች የፌዴራል ጠቅላይ ፍ/ቤት በመ/ቁ.1624.

¹²⁰ በወርጊሳ ታደሰ ህ መለሰ ተካ እና ሌሎች.

የወጣው።¹²¹ ነገር ግን ከሳሹ ያልቀረበው ከአቅም በላይ በሆነ ምክንያት መሆኑ ከተረጋገጠ የተዘጋው ከስ እንደገና ተከፍቶ ከቆመበት እንዲቀጥል ሊደረግ እንደሚችል በፍ/ብ/ሥ/ሥ/ሕ/ቁ 74(2) ተደንግጓል። ይህ ድንጋጌ የተፈጥሮ የፍትሕ መርሕ የሆነውን የመሰማት መብት የሚያንፀባርቅ ነው።

በተጨማሪም ከአቅም በላይ በሆነ እክል ምክንያት ፍ/ቤት በቀጠሮው መቅረብ ያልቻለ ከሳሽ እና በቸልተኝነት ወይም ሆን ብሎ ያልቀረበን ከሳሽ እኩል ማስተናገድ የሕግ ዓላማ እንዳልሆነ ያስገነዝባል። ከሳሹ በቀዳሚው ቀጠሮ ያልቀረበው በቂ ሆኖ የሚገመት እክል ምክንያት በመግለጽ ከሱ በተዘጋ በአንድ ወር ጊዜ ውስጥ መዝገቡ ተከፍቶ ክርክሩ እንዲቀጥል ጥያቄውን ማቅረብ ይችላል። ፍ/ቤቱ አቤቱታውን ከተቀበለው ስለኪሳራው እና ስለወጪ አከፋፈል ከወሰነ በኋላ የተዘጋው ክስ እንዲቀጥል ትዕዛዝ መስጠት ይችላል።¹²² ይህ ድንጋጌ ከሳሹ በቀጠሮው ያልቀረበው በቂ ሆኖ የሚገመት እክል ምክንያት መሆን እንደሚገባው ከመግለጽ ውጪ በቂ ሆኖ የሚገመት እክል ውስጥ የሚካተቱት ሁኔታዎች ምን ምን እንደሆኑ የሚጠቁመው ነገር የለም። ይልቁንም ሕጉ የመረጠው ከአቅም በላይ የማያስብሉትን ሁኔታዎች መዘርዘር ነው። በዚህም መሠረት በስራ ብዛት፣ በመዘንጋት፣ በቸልተኝነትና በራሱ ጉድለት መሆኑ በታወቀ ጊዜ እንደ ከአቅም በላይ የሆነ ምክንያት እንደማይቆጠርና አዲስ የጊዜ መራዘም ውሳኔ እንደማይሰጠው ህጉ ያስገነዝባል።¹²³ ይህም የሚቀርብላቸውን አቤቱታ ከድንጋጌው ይዘት እና ዓላማ አንፃር መርምሮ ተገቢውን ዳኝነት የመስጠት ኃላፊነት ለፍ/ቤቶች የተተወ መሆኑን የሚያመለክት ነው።

ሆኖም ግን ይህን አስመልክቶ በተግባር ብዙ ችግር ይስተዋላል። ለምሳሌ፡ በተክለብርሃን ተክለሃይማኖት እና ደብረምህረት ቅድስ ሚካኤል ቤተ-ክርስቲያን¹²⁴ መካከል በነበረው

¹²¹ Mulla 570.

¹²² የፍ/ብ/ሥ/ሥ/ሕ/ቁ ቁጥር 74(2).

¹²³ ዝኒ ከማሁ ቁጥር 196(3).

¹²⁴ በተክለብርሃን ተክለሃይማኖት v ደብረምህረት ቅድስ ሚካኤል ቤተ-ክርስቲያን የድሬዳዋ ፌዴራል የመጀመሪያ ፍ/ቤት በመ/ቁ. 96189.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ክርክር የድሬዳዋ ፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ከሰሸ ከስ በሚሰማበት ቀን በመቅረቱ ክሱን የዘጋው ቢሆንም ከሰሸ ያልቀረበው ከአቅም በላይ በሆነ ምክንያት መሆኑን ስለሰረዘ ብይኑ ተነስቶለታል። ነገር ግን የክስ መዘጋት ብይን ይነሳልኝ አቤቱታው የቀረበው የአንድ ወር የጊዜ ገደቡ ካለፈ በኋላ ነበር። በሕጉ ቁጥር 74(2) የአንድ ወር ጊዜ ገደብ እና በቂ ምክንያት ቅድመሁኔታዎች አብረው (complementary conditions) መሟላት አለባቸው።

በመሆኑም ፍ/ቤቱ ሕጉ ከሚፈቅደው ዉጪ ተግባራዊ። በፍ/ቤቶች በልማድ እንደ በቂ ምክንያት የሚቆጠሩ ሁኔታዎችን በሚከተሉት ምሳሌዎች ማየት ይቻላል። በአዋሽ ኢንተርናሽናል ባንክ አ.ማ እና በአበበች ዘዉዱ¹²⁵ መካከል በነበረው ክርክር የትራፊክ መዘጋጋት እንደ በቂ ምክንያት /sufficient cause/ አይቆጠርም በማለት የአመልካችን የክስ መዘጋት ብይን ይነሳልኝ አቤቱታ የኦሮሚያ ጠቅላይ ፍ/ቤት ዉድቅ ቢያደርገውም የፌዴራል ጠቅላይ ፍ/ቤት የትራፊክ መጨናነቅ እንደ በቂ ምክንያት ይቆጠራል ሲል የኦሮሚያ ጠቅላይ ፍ/ቤት ዉሳኔን ሸሮታል።¹²⁶ በሌላ ጉዳይም በእነ ወ/ሮ ብዙ ሰንበታ/ሁለት ሰዎች/ እና አቶ ታደሰ ሰንበታ¹²⁷ መካከል በነበረው ክርክር አመልካች በኦሮሚያ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በነበራቸው ክርክር መዝገቡ በ4:00 ሰዓት ተዘግቶ አመልካች በዚያኑ ቀን በ4:30 ሰዓት ፍ/ቤት የደረሱ መሆናቸውን እና በሰዓቱ መንገድ በመዘጋጋቱ ምክንያት መሆኑን ገልጸው ቢከራከሩም በቂ ምክንያት አላቀረቡም በማለት ፍ/ቤቱ አቤቱታውን ውድቅ አድርጓል። ሆኖም ግን የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በሰጠው ዉሳኔ አመልካች ጉዳዩ እንዲንቀሳቀስላቸው አቤቱታ ያቀረቡት መዝገቡ በተዘጋ አንድ ሰዓት ባልሞላ ጊዜ ውስጥ መሆኑ ሲታይ ጉዳያቸውን በአግባቡ በመከታተል ላይ የነበሩ መሆኑን እና በሰዓቱ በቀጠሮው ሳይገኙ የቀሩትም በቂ ሆኖ በሚገመት እክል ምክንያት (መንገድ መዘጋጋት) በመሆኑ

¹²⁵ በአዋሽ ኢንተርናሽናል ባንክ አ.ማ v በአበበች ዘዉዱ የኦሮሚያ ጠቅላይ ፍ/ቤት የመ/ቁ 1218/95.

¹²⁶ በአዋሽ ኢንተርናሽናል ባንክ አ.ማ v በአበበች ዘዉዱ, የፌዴራል ጠቅላይ ፍ/ቤት, የመ/ቁ 12654.

¹²⁷ በእነ ወ/ሮ ብዙ ሰንበታ/ሁለት ሰዎች/ v አቶ ታደሰ ሰንበታ [2007 ዓ.ም] 17 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 13.

በፍ/ብ/ሥ/ሥ/ሕ/ቁ74(2) መሠረት ተቀባይነት ሊሰጠው እንደሚገባም ወስኗል። ይህም የፍ/ሥ/ሥ/ሕ/ቁ 74(2) ለመተርጎም አንዱ ምሳሌ ነው።¹²⁸

በተጨማሪም በወ/ሮ ሳኒያ ከድረ እና የኮሪያ ዘማችቸው ቤተሰቦች ሽመናና ስጋጃ ስራ¹²⁹ መካከል በነበረው ክርክር አመልካች /የስር ከሳሽ/ ክስ ለመስማት በተቀጠረበት ቀን እንደሚገኘውም ሰው በፍ/ቤት ቅጥር ጊቢ ውስጥ ተራዋን በመጠባበቅ ላይ እያለች በስህተት የሌላ ሰው መዝገብ ሲጠራ ወደ ችሎት ገብታ የእርሷ ያልሆነው መዝገብ ሲዘጋ የእርሷ ጉዳይ የተዘጋ መስሏት ወደቤት በመሄዷ የእርሷ መዝገብ ሲጠራ መቅረብ አልቻለችም። የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ተከራካሪዎች በንቃት መከታተል ያለባቸው በመሆኑ ይህ አይነቱ ምክንያት እንደበቂ እክል አይቆጠርም፤ መዝገቡም ሊንቀሳቀስ አይገባም ብሎ ይወሰናል። የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በበኩሉ ይህ አይነቱ አጋጣሚ በቸልተኝነት ወይም ሆነ ብለው ጉዳያቸውን ትተው የሄዱ ናቸው ወደ ሚላው ድምዳሜ የሚያደርስ አለመሆኑን በመገንዘብ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 74(2) ድንጋጌ መሠረት እንደ በቂ የእክል ምክንያት ተቆጥሯል። በዘን ሁለት የገንዘብ ቢሮ እና በአቶ ከበደ ሙስጦፋ¹³⁰ መካከል በነበረው ክርክር የፌዴራል ከፍተኛ ፍ/ቤት ጠበቃው ባለጉዳዩን ሳያሳውቅ ውሉን በማቋረጡ ከሳሽ ቢቀር ጠበቃው ባለጉዳዩን አለማሳወቁ ከሳሽ ለመቅረቱ እንደ በቂ ምክንያት እንደሚቆጠር አሳይቷል።

አንድ ተከራካሪ ወገን ፍ/ቤት በቀጠሮ ቀን በችሎት ሰዓት መቅረት ወይም ዘግይቶ መገኘቱ በቂ በሆነ የእክል ምክንያት ነው ለማለት ተከራካሪው ወገን ሆኖ ብሎ ነው ወይም በራሱ ቸልተኝነት ነው በሚያስብል ሁኔታ መሆን የለበትም። ሥለዚህ ተከራካሪ ወገን በቀጠሮ ቀን የቀረው ከአቅሙ በላይ በሆነ ምክንያት ከሆነና በቀጠሮ ቀን ፍ/ቤት ለመድረስ በቂ የሚባል ጥረት ካሳየ ይህ እንደ በቂ ምክንያት የሚቆጠር ነው። ሆኖም ግን ሕጉ አሁን ካለው ድንጋጌ በተለየ እንዴት መወጣት ነበረበት የሚለው የሕግ አወጣጥ መርሆችን መመርመር አስፈላጊ

¹²⁸ ዝኒ ከማሁ .

¹²⁹ በወ/ሮ ሳኒያ ከድረ v የኮሪያ ዘማችቸው ቤተሰቦች ሽመናና ስጋጃ ስራ [2006 ዓ.ም] 16 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 15.

¹³⁰ በዘን ሁለት የገንዘብ ቢሮ v በአቶ ከበደ ሙስጦፋ, የፌዴራል ከፍተኛ ፍ/ቤት, መ/ቁ. 1052/98.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ቢሆንም ሕጉ ከአቅም በላይ የሆነ እክል የሚባሉትን ነገሮች ለመዘርዘር አለመሞከሩ ለትርጉምና በዳኞች ይሁንታ ላይ እንዲንጠለጠል መፍቀዱ ከባድ ችግር ፈጥሯል።

በአራተኛነት ክሱ በሚሰማበት ቀጠሮ የከሳሽና ተከሳሽ ሁለቱም ፍ/ቤት አለመቅረብ የሚያስከትለው ውጤት ምንድነው የሚለው ነው። ሁለቱም ተከራካሪዎች ካልቀረቡ በከሳሽ ወይም ተከሳሽ በአንደኛው ላይ ብቻ እርምጃ ለመውሰድ ያስችግራል።¹³¹ ሁለቱም ተሟጋቾች ክርክሩ በሚሰማበት ቀጠሮ ያልቀረቡ እንደሆነ ፍ/ቤቱ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2) መሠረት መዝገቡን መዝጋት ይችላል። ክስ በሚሰማበት ቀጠሮ ፍ/ቤቱ ሁለቱንም ወገን በማነጋገር ለዋናው የሙግት ጊዜ ዝግጅት ስለሚያደርግ የተከራካሪዎች የሁለቱም አለመገኘት ብዙ ነገር ያስተዳጉላል።¹³² ሆኖም ግን በተግባር አንዳንድ ችግሮች እንዳሉ ባይዘነጋም የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በኢትዮጵያ ልማት ባንክ እና ሰላም የቴክኒክና ሙያ ማሰሌጠኛ ማዕከል መካከል በነበረው ክርክር ሁለቱም ተከራካሪዎች ያልቀረቡ እንደሆነ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2) አግባብነት እንዳለው አመለካከቷል፤ ውጤቱም ክሱን መዝጋት ነው።¹³³ ለዚህ ዋናው ምክንያትም ተከሳሽ ቢቀር እንኳ ከሳሽ ቀርቦ የክሱን ውጤት አለመከታተሉ፤ እንዲፈረድለት ያመለከተውን ጉዳይ ላይ የሚሰጠውን የፍርድ ውጤት አለመፈለጉን ስለሚያመለክት ነው። በዚህ ቁጥር መሠረት የመዝገቡ መዝጋት የሚያስከትለውን ውጤት ቀደም ብሎ ስለተብራራ እዚህ ላይ መድገሙ አስፈላጊ አይደለም።

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በመጨረሻም ከክስ/ጉዳዩ/ መዘጋት ጋር ተያይዞ ግልፅ ማድረግ የሚያስፈልገው የክስ መዘጋት (order of dismissal) እና የመዝገብ መዘጋት (struck out) መካከል ያለውን ልዩነት ነው። የክስ መዘጋትን በተመለከተ በዚህ ንዑስ ክፍል ከላይ በሠፊው ስለተብራራ መድገሙ አስፈላጊ ስለማይሆን የመዝገብ መዘጋት መቼ ይሰጣል የሚለውን በመመልከት ልዩነታቸውን

¹³¹ Sime 353.

¹³² መንበረፀሐይ 78.

¹³³ የኢትዮጵያ ልማት ባንክ ህሳም የቴክኒክና ሙያ ማሰሌጠኛ ማዕከል.

¹³⁴ የፍ/ብ/ሥ/ሥ/ሕ/ቁ 71.

እናያለን። ለዚህ መሠረት የምናደርገው የፍ/ብ/ሥ/ሥ/ሕ/ቁ 69(2)፣ 70(መ)፣ 71፣ 73፣ 74 ድንጋጌዎች በማየት ነው። የሕጉ በእነዚህ ድንጋጌዎች የአማረኛና እንግሊዘኛ ቅጂ መለያየት ለችግሩ መንስኤ ነው። የአማረኛው ቅጅ የመዝገብ መዘጋትን ብቻ ነው የሚጠቀመው። “(...) ፍ/ቤቱ መዝገቡን ይዘጋጃል።”¹³⁵ “(...) የክስ መዝገብ ዘግቶ/የይግባኙን መዝገብ ለመዝጋት ይችላል።”¹³⁶ “የክስ መዝገብ መዝጋት”¹³⁷፣ “(...) መዝገቡን በመዝጋት ያሰናብተዋል”¹³⁸ በማለት የእንግሊዘኛውን ቅጂ “dismissal” and “Struck out” በተመሳሳይ ቃል መተካቱ በክስ (ጉዳዩ) መዘጋት (dismissal) እና በመዝገብ መዘጋት (struck out) መካከል ያለው ልዩነት ብዥታ ፈጥሯል።

የመዝገብ መዘጋት (struck out) ብይን የሚከተለው በሁለት ምክንያቶች ነው። አንደኛው በቁጥር 69(2) መሠረት ጉዳዩን ለማየት ፍ/ቤቱ በሰጠው ቀጠሮ ሁለቱም ተከራካሪ ወገኖች ያልቀረቡ እንደሆነ ሲሆን ሌላኛው በቁጥር 70 (መ) መሠረት ከሰላም ለተከሰሰ በቸልተኝነት ወይም በራሱ ጉድለት (ለምሳሌ፡ ባለጉዳዩ ሆኖ ብሎ ክርክሩን ለማዘግየት ወይም በቸልተኝነት) መጥሪያ ያልሰጠው እንደሆነና ተከሰሰ በቀጠሮው ካልቀረበ ነው። የመዝገብ መዘጋት (struck out) የሚያስከትለው ውጤት በጊዜያዊነት መዝገቡ ተዘግቶ እንዲቆይ ሲሆን ከሰላም በቂ ምክንያት ካቀረበ ያለተጨማሪ የፍ/ቤት ክፍያ ክርክሩ ይቀጥላል።¹³⁹ ከሰላም በቂ ምክንያት ማቅረብ ካልቻለ የፍ/ቤት ክፍያ በመክፈል ክሱን በአዲስ መዝገብ መጀመር ይችላል።¹⁴⁰

ስለዚህ በመዝገብ መዘጋት (struck out) ጊዜ ከሰላም በቂ ምክንያት አቀረበ አላቀረበም ድጋሜ በጉዳዩ ላይ አዲስ ክርክር እንዳያቀርብ አያግደውም፤ ብቸኛ ልዩነቱ የፍ/ቤት ክፍያ ድጋሜ መክፈሉ ላይ ነው። አዲስ መዝገብ የሚከፈት ከሆነ የተዘጋው መዝገብ እንዳልተከፈተ

¹³⁵ ዝኒ ከማሁ ቁጥር 69(2).

¹³⁶ ዝኒ ከማሁ ቁጥር 70(መ).

¹³⁷ ዝኒ ከማሁ ቁጥር 71.

¹³⁸ ዝኒ ከማሁ ቁጥር 73.

¹³⁹ ዝኒ ከማሁ ቁጥር 71(2).

¹⁴⁰ ዝኒ ከማሁ ቁጥር 71(1).

በፍትሐ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ተቆጥሮ አዲሱ ክስ የይርጋ ጥያቄ ሊነሳበት ይችላል።¹⁴¹ በአንፃሩ በክስ (ጉዳዩ) መዘጋት (dismissal) ፣ ክስ በሚሰማበት ቀጠሮ ከሳሽ ባይቀርብ የሚከተል ዉጤት ሲሆን በዚህ ጊዜ ከሳሽ በቂ ምክንያት አልቀረበም\አላቀረበም በተመሳሳይ ጉዳይ አዲስ ክስ (fresh suit) እንዲያቀርብ አይፈቀድለትም።¹⁴² በክስ መዘጋት ጊዜ ከሳሽ ሊያደርግ የሚችለዉ በቂ ምክንያት ካለዉ በአንድ ወር ጊዜ ዉስጥ በማቅረብ የፍ/ቤትና ሌላ ወጭም ካለ በመክፈል ጉዳዩ እንዲቀጥል ማድረግ ነዉ።¹⁴³

3.3. ማስረጃ ለመስማትና ምስክሮችን ለመመርመር በተሰጠ ቀጠሮ

በዚህ ክፍል ማስረጃ ለመስማትና ምስክሮችን ለመመርመር በተሰጠ ቀጠሮ የፍ/ቤቱ ክንዋኔ እንዲሁም ከተከራካሪዎች አንዱ ወይም ሁለቱ ባይቀርቡ የሚያስከትለዉ ዉጤት ተብራርቷል። የፍ/ቤት ክንዋኔን በተመለከተ በዚህ ቀጠሮ ቀደም ሲል የተመለከተዉን ሂደት እና በሥነ-ሥርዓት ሕጉ ላይ የተጠቀሱትን ዝርዝር ሁኔታዎች ተግባሮ አከራካሪውን ጉዳይ መፍትሔ መስጠት ሳይችል ሲቀርና አከራካሪ የሆነውን ፍሬ ነገር በጭብጥ መልኩ ከያዘ በኋላ እልባት ለመስጠት ማስረጃ በማስቀረብ የሚሰማበት እና የሚመረምርበት ቀጠሮ ሲሆን ማስረጃ እንዲያሰማ የተፈቀደለት ተሟጋች ማስረጃዉ የሚሰማበትን ነጥብ ለይቶ ለችሎቱ ያሰማል።¹⁴⁴

¹⁴¹ Sedler 165. “Moreover, it is as if the first action had not been instituted, so if the statute of limitations has expired before he institutes the second suit, that suit will be barred by limitations.”

¹⁴² የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 74(1).

¹⁴³ ዝኒ ከማሁ ቁጥር 74(2). See also, Sedler 166:

“[The applicant] may apply, within one month from the date of the dismissal, for an order to set the dismissal aside, and if he can show that there was sufficient cause for his non-appearance, the order of dismissal is set aside, and the court will proceed with the suit by holding the hearing originally scheduled. In other words, where there was sufficient cause for the non-appearance, the court will hold the hearing originally scheduled and proceed therefor. But, if he does not apply in time or the court finds that there was not, sufficient cause for his non-appearance, he is forever barred from prosecuting the claim.”

¹⁴⁴ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 258-59.

በአንድ የፍትሐ-ብሄር ክርክር ማስረጃ የሚሰማውና ፍሬ ነገሩ እንዲለይ የሚደረገው እና ማስረጃ የሚደመጠው ተከራካሪ ወገኖች የተለያዩበት (ያልተስማሙበት) ነጥብ ላይ ነው። ይህም ለዳኝነት አሰጣጡ እጅጉን አስፈላጊና የግድ ሆኖ ሲገኝ ስለመሆኑ ከፍ/ብ/ሥ/ሥ/ሕ/ቁ 246፣ 247፣ 248፣ 256፣ እና ሌሎች ስለማስረጃ አቀራረብና አመዛዘን ከሚደነግጉት ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው። በሌላ አገላለፅ ማንኛውም የክርክር ጭብጥ ሁልጊዜ በማስረጃ እንዲነጥር የሚደረግበት አግባብ የለም። ማስረጃ ለጉዳዩ አግባብነት ያለው ሆኖ ተከራካሪ ወገኖች በተለያዩባቸውና ዳኝነት በሚሹ ነጥቦች ላይ ከሚሰማ በስተቀር በማንኛውም ፍሬ ነገር ላይ እንዲሰማ የግድ የሚል የማስረጃ አቀራረብና አመዛዘን ደንብ የለም። ከሁሉም በላይ ማስረጃ እንዲሰማለት የሚፈልግ ተከራካሪ ወገን ማስረጃው የሚሰማበትን ጭብጥ ለይቶ የማስረጃውን አይነትና የሚገኝበትን ቦታ ሁሉ በመጥቀስና በእጁ ላይ ያለውን ማስረጃም አያይዞ ማቅረብ እንዳለበት የፍ/ብ/ሥ/ሥ/ሕ/ቁ 223፣ 234፣ 137(3)፣ 145፣ 256 እና ሌሎች ድንጋጌዎች ያሳያሉ።¹⁴⁵

አንድ ሰው ክስ የማስረጃ ወይም የመከላከል ሕጋዊ መብት ያለው ሲሆን ፍ/ቤት ይህንኑ መብቱን ሊያልፍ የሚገባው ተከራካሪው ወገን የቆጠረው ማስረጃ ለጉዳዩ አግባብነት የሌለው መሆኑን እርግጠኛ ሲሆን ስለመሆኑ ከፍ/ብ/ሥ/ሥ/ሕ/ቁ 223፣ 234፣ 137፣ 249 እና 256 ድንጋጌዎች ይዘትና መንፈስ ያሳያል።¹⁴⁶ በመሆኑም ፍርድ ሊሰጥ የሚገባው የማስረጃ አቀራረብና ምዘና ሥነ-ሥርዓቱ በሚያስቀምጠው መንገድ ተከናውኖ መሆኑን እነዚህ ድንጋጌዎች ያስገነዝባሉ። ተከራካሪ ወገን ለጉዳዩ አግባብነት ያለውን ማስረጃ ቆጥሮ እያለ ማስረጃ ሳይሰማ ፍርድ መስጠት የመከራከር መብቱን የሚያጥብብ ነው፤ ውሳኔውም ሕጋዊ ሥርዓቱን ተከትሎ ተሰጥቷል ሊባል የሚችል አይደለም። በተከራካሪ ወገን የተቆጠረውን ምስክር ሁሌ ፍ/ቤቱ እንዲሰማ የማይገደድ ስለመሆኑ በፍ/ሥ/ሥ/ሕ ስለማስረጃ አቅራቢ እና አቀባበል የተደነገጉት ድንጋጌዎች ይዘት የሚያስገነዝቡን ነጥብ ሲሆን ፍ/ቤቱ ይህንኑ

¹⁴⁵ እነ አቶ እንድረስ አደም/5 ሰዎች/ v ወ/ሮ አስናቀች ጥላሁን [2005] የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት, የመ/ቁ 77983, 87.

¹⁴⁶ It is related to the concept of relevance and admissibility of evidence.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ስልጣኑን መተግበር ያለበት በዘፈቀደ ሊሆን አይገባም። በዚህ መሠረት ክሱ ወይም መልሱ ላይ የተዘረዘሩት የሰውም ሆነ የሰነድ ማስረጃዎች አግባብነት እና ተቀባይነት የለውም ካልተባለ በስተቀር በማስረጃ የሚነጥረው ፍሬ ነገር ለዳኝነት አሰጣጡ እጅጉን አስፈላጊና የግድ ሆኖ ከተገኘ፣ ማስረጃ እንዲሰማ የሚፈልግ ተከራካሪ ወገንም ማስረጃው የሚሰማበትን ነጥብ ለይቶ ካቀረበ ማስረጃ ወይም ምስክር ሳይሰማ የሚታለፍበት አግባብ የለም።

ሆኖም ግን በተግባር ፍ/ቤቶች ይህን ስለማስረጃ የተሰጡ ድንጋጌዎች ሲጥሱ ማየት የተለመደ ነው። ለምሳሌ የገቢዎችና ጉምሩክ ባለስልጣን እና ጌታይዳ ኃ/የተ/የግል ማህበር¹⁴⁷ መካከል በነበረው ክርክር የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት የግራ ቀኙን ክርክር በመስማት የአመልካችን ማስረጃ (የዋጋ ዝርዝር መረጃ በጉዳዩ አግባብነት የሌለው መሆኑን፣ ጉዳዩን ለማስረጃት የተቆጠሩት ምስክሮችንም) መስማት አስፈላጊ አለመሆኑን ገልፆ ጉዳዩን በመመርመር የተከሰሽን ክርክር ውድቅ አድርጎ የክርክሩ ባለዕዳ አድርጎታል። ሆኖም ግን የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በተከራካሪ ወገን የተቆጠሩ ምስክሮች ሳይሰሙ የሚቀሩት ለጉዳዩ የሚሰጡት ምስክርነት አግባብነት /relevance/ የሌለው መሆኑ ሲረጋገጥ ብቻ በመሆኑ ተከራካሪዎች በሥነ-ሥርዓቱ መሠረት ማስረጃዎቻቸውን ዘርዝረው አቅርበው እያለ የቆጠሯቸው የሰነድና የሰው ምስክሮች ሳይታዩና ሳይሰሙ ማስረጃ አልቀረበም በሚል በዘፈቀደ ውሳኔ ሊሰጥ አይገባም በማለት ሽሮታል።

በእነ መንበረ መንግስት ቅዱስ ገብርኤል ገዳም ት/ቤት (ሁለት ሰዎች) እና መምህር ሲሳይ ደጃጌ ጥላሁን¹⁴⁸ መካከል በነበረው የአሰሪና ሰራተኛ ክርክር ተከሰሽ የስራ ውል የተቋረጠበትን ምክንያት በመከላከያ መልስ ማመልከቻው ላይ ከመግለፃቸውም በተጨማሪ ይህንኑ ፍሬ ነገር ለማስረጃት የሰነድና የሰው ማስረጃዎቻቸውን በመከላከያ ማስረጃው መግለጫ ዝርዝር ላይ ጠቅሰው፣ የሰነድ ማስረጃዎችንም አያይዘው እያለ የቆጠሯቸውን የሰው ምስክሮች

¹⁴⁷ [2002 ዓ.ም] 9 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 320.

¹⁴⁸ [2002 ዓ.ም] 9 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 50.

ለማቅረብ ያልቻሉ መሆኑ ሳይረጋገጥ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት በደፈናው ማስረጃ አላቀረቡም በማለት ወስኗል። የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት ተከሳሽ የስንብት ደብዳቤው ላይ የገለፀውን ምክንያት ለማስረዳት የቆጠረውና አግባብነት ያለው ማስረጃ ሊሰማለትና ሊመዘንለት ሲገባ ይኸው ሥርአት ሳይከናወን የሚሰጥ ፍርድ የተሟላ አካሄድ ተከትሎ የተሰጠ ነው ሊባል የማይችልና መሠረታዊ የሆነ የሕግ ስህተት ነው በማለት ሽሮታል፡

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ይህንን በሚመለከት ዶ/ር መንበረፀሃይ ታደሰ የፍ/ቤቶች አሰራር ሕጉ ከሚለው ያፈነገጠበት ሌላው ዓብይ ጉዳይ የምስክሮች አቀራረብ መሆኑን ገልፀዋል።¹⁴⁹ ከችግሮች ውስጥ አንደኛው ምስክሮችን በመስማት ሂደት በከፊል ፍ/ቤቶች ምስክር ከመጥራታቸው በፊት ጭብጥ አለመያዛቸው የማስረዳት ሽክም ማን ላይ እንደሚወድቅ አለመለየት፣ ባለጉዳዮች የሚጠሩዋቸው ምስክሮች በሙሉ የመጥራትና ጭብጥ ባልሆነ ጉዳይ ላይ እንዲመሰክሩ መደረጉ ነው።¹⁵⁰ ከዚህ በተጨማሪ ምስክር የሚሰማው በተለያዩና በጣም በተራራቀ ጊዜ መሆኑ (የከሳሽ መስክር መጀመሪያ ይቀርብና የተከሳሽ ደግሞ ሌላ ጊዜ መሆኑ) ፣ የአንዱ ወይም የሌላው ምስክር ተሟልቶ አልቀረበም እየተባለ የሚሰጠው ተጨማሪና ተደጋጋሚ ቀጠሮ እና ለምስክሩ በቂ አበል አለማስያዝን የሚመለከት ነው።¹⁵¹ ይህም ልማድ ከፍ/ብ/ሥ/ሥ/ሕጉ ድንጋጌዎች ጋር መጣረሱ ሳያንስ የፍርድ መዘግየት፣ የተዛባና አድላዊ ፍርድ እንዲሰጥ ያደርጋል።¹⁵²

ከዚህ በመቀጠል ማስረጃ ወይም ምስክር በሚሰማበት ቀን የአንዱ ወይም የሁለቱም በፍ/ቤት ቀጠሮ ሳይገኙ መቅረት የሚያስከትለው ውጤት በሚመለከት ተብራርቷል። በመጀመሪያ የከሳሽ ምስክሮች በሚሰሙበት ቀጠሮ ከተካራካሪዎች የአንዱ ወይም የሁለቱም አለመቅረብ ምን ውጤት ይኖረዋል? የሚለውን ጥያቄ መመለስ ተገቢ ነው።

¹⁴⁹ መንበረፀሃይ 74.

¹⁵⁰ ዝኒ ከማሁ 75-76.

¹⁵¹ ዝኒ ከማሁ 74, 76.

¹⁵² ዝኒ ከማሁ.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

አንደኛ ፍ/ቤቱ የከሰሽን ምስክሮች ለመመርመር ቀጠሮ በያዘበት ዕለት ከሰሽ ምስክሮችን አቅርቦ ሳለ ተከሰሽ ካልቀረበ ተከሰሹ መስቀለኛ ጥያቄ የመጠየቅና በጥያቄ አቀራረቡ ሂደት መቃወሚያ/objection/ የማንሳት መብቱን ብቻ ያጣል።¹⁵³ ይህም ተከሰሽ የክርክሩ አሸናፊ የመሆን እድሉ ይጣበባል። በፍ/ብ/ሥ/ሥ/ሕ/ቁ 263(3) መሠረት መስቀለኛ ጥያቄ በመጠየቅ ምስክሩ የሰጠውን ቃል ሀሰት ማስባል ወይም እውነታነቱን በሚያጠራጥር ሁኔታ ፍ/ቤቱ እንዲረዳው የማድረግ መብቱ ይቀርበታል።¹⁵⁴ ከዚህ በተጨማሪም በምስክሩ የጥያቄ አቀራረብ ላይ የሚቀርበውን መቃወሚያ የማንሳት መብቱም ይቀርበታል።¹⁵⁵ በክርክር ሂደት ውስጥ መቃወሚያ ከሚነሳባቸው ምክንያቶች ምስክር ያቀረበው ተከራካሪ ወገን መሪ ጥያቄ (leading questions) ለምስክሩ በመጀመሪያ ጥያቄ ባቀረበ ጊዜ ነው።¹⁵⁶ መሪ ጥያቄ የሚባለው ተከራካሪው በተዘዋዋሪ ምስክሩ ምን ማለት እንዳለበት ሲነግር (መልሱን የሚያመለክት ጥያቄ) ነው። ይህ እውነትን የሚደብቅ፣ የፍትህ ስርዓቱንም የሚያዛባ ጥያቄ አይነት በመሆኑ ከመግቢያ ጉዳዮች እና ፍ/ቤት በሚፈቅደው መሠረት ሌሎች ውስን ጉዳዮች ካልሆነ በቀር መሪ ጥያቄ መጠየቅ ሕጉ ይከለክላል።¹⁵⁷ ለዚህ ምክንያቱም ምስክሩ በስሜት ህዋሱ የተገነዘበውን ብቻ ለፍርድ ቤቱ ስለጉዳዩ በራሱ አንደበት እንዲያስረዳ ለማስቻል ነው።¹⁵⁸

ሁለተኛ የከሰሽን ምስክር ለመመርመር በተቀጠረበት ቀን ከሰሽ በእርሱ ጉድለት (ሆን ብሎ ወይም በቸልተኝነት) መስከሮችን ለችሎቱ ካላቀረበ ምን ሕጋዊ ውጤት ይኖረዋል? የሚለው

¹⁵³ የፍ/ብ/ሥ/ሥ/ሕግ - ቁጥር 199(1).

¹⁵⁴ Sedler 203-204. “During cross-examination, the opponent tries to discredit that testimony of witnesses and persuades the court that it should not believe their testimony.” It is about “impeaching credibility” of witness testimony.

¹⁵⁵ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 270.

¹⁵⁶ ዝኒ ከማሁ ቁጥር 163(2) «ፍርድ ቤቱ ካልፈቀደ በቀር በማናቸውም ሁኔታ ለሚመሰክረው ጉዳይ መሪ የሚሆን ጥያቄ ማቅረብ አይቻልም።»

¹⁵⁷ ዝኒ ከማሁ. See also, Sedler 203. Sedler mentions situations the court may at times permit the asking of leading questions. 1) When the witness is being examined as to what are called ‘introductory matters’, 2), to refresh the memory of witnesses, 3) to assist child witness.

¹⁵⁸ Sedler 203, Para. 4. The testimony must genuinely be that of the witness and not the examiner; the examiner cannot put words in the mouth of the witness, so to speak.

ነው። የከሳሽን ምስክር ለመመርመር በተቀጠረበት ቀን ከሳሽ ምስክሮችን ለችሎቱ ካላቀረበ እና ይህም በእርሱ ጉድለት የሆነ እንደሆነ ምስክር የማሰማት መብቱ ይታለፍበታል።¹⁵⁹ የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በአቶ ውረጌሳ ታደሰ እና አቶ መለሰ ተካ ጉዳይ ላይ በሰጠው የሕግ ትርጓሜ ፍ/ቤት እንዲፈፀም ያዘዘው ጉዳዮች ላይ ስለሚሰጡ ትዕዛዞች በፍ/ብ/ሥ/ሥ/ሕ/ቁ ከ192 እስከ 199 ባሉት ቁጥሮች መሠረት መሆኑን አመለክቷል።

በቁጥር 199(1) መሠረት ለቀጠሮው ምክንያት የሆነውን ጉዳይ ሳይፈፀም የቀረው ከተከራካሪዎቹ ወገኖች በአንደኛው ጉድለት የሆነ እንደሆነ መፈፀም ይገባው የነበረው ጉዳይ ያልተፈፀመ ቢሆንም እንኳን ፍ/ቤቱ የጉዳዩን መፈፀም ሳይጠብቅ በያዘው ቀጠሮ የመሰለውን ውሳኔ ለመስጠት እንደሚችል ይደነግጋል። ፍ/ቤቱም ምስክር ማቅረብ የነበረበት ባለጉዳይ በራሱ ጉድለት (ባለጉዳዩ ሆኖ ብሎ ክርክሩን ለማዘግየት በማሰብ ወይም በቸልተኝነት) ምክንያት ምስክሮችን አስቀርቦ ካላስመሰከረ ምስክር የማሰማት መብቱ ይታለፍበታል። በዚህ ጉዳይ ምሳሌ ማቅረብ ይቻላል። በእነ ወ/ሮ ሸዋዬ ገ/እግዚአብሔር እና ወይንሸት መንግስቱ¹⁶⁰ መካከል በነበረው ክርክር ሁለቱም ተከራካሪዎች በተገኙበት ምስክር ለመስማት በተያዘው የቀጠሮ ቀን ሌላ ቀጠሮ ነበረኝ በሚል ምክንያት የአንድ ወገን ጠበቃ አለመቅረብ በቂ ምክንያት እንዳልሆነ ፍ/ቤቱ ብይን ሰጥቷል። ከዚህ መረዳት የምንችለው ከሳሽ ማስረጃ በሚያቀርብበት ቀጠሮ ያለበቁ ምክንያት ካልቀረበ ማስረጃ የማቅረብም ሆነ ምስክር የማሰማት መብቱ ይታለፍበታል የሚለውን ነው። እንዲሁም ተከሳሽ ክዶ ከተከራከረ የከሳሽ ክስ ዉድቅ ይደረግበታል። ተከሳሽ ካመነ ግን ባመነው መሠረት ፍ/ቤቱ ውሳኔ ይሰጣል። ለዚህ ውሳኔ መሠረት የሆነው የሕግ ድንጋጌም የፍ/ብ/ሥ/ሥ/ሕ/ቁ 199(1) ነው።

¹⁵⁹ በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 199(1).

¹⁶⁰ [2010] 22 የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት 60.

¹⁶¹ የፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 199(1) ሥር እንደተደነገገው “ለቀጠሮ ምክንያት የሆነው ጉዳይ ሳይፈፀም የቀረው ከተከራካሪዎቹ ወገኖች በአንደኛው ጉድለት ሆኖ እንደሆነ መፈፀም ይገባው የነበረው ጉዳይ

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ቀደም ሲል የከሰሽ ምስክሮች በሚሰሙበት ቀጠሮ ከተካራካሪዎች የአንዳቸው መቅረት ምን ዉጤት እንዳለዉ አይተናል። ከዚህ በመቀጠል የተከሰሽ ምስክሮችን ለመስማት በተያዘ ቀጠሮ ከተካራካሪዎች የአንዳቸው መቅረት ምን ዉጤት እንዳለዉ እንደሚቀጥለዉ ተብራርቷል። አንደኛ ፍ/ቤቱ የተከሰሽን ምስክሮች ለመመርመር ቀጠሮ በያዘበት ዕለት ተከሰሽ እና ምስክሮቹ ቀርበው ከሰሽ ካልቀረበ ፍ/ቤቱ የተከሰሽ ምስክሮችን ከሰሽ በሌለበት የምስክርነት ቃላቸው በመቀበል ይመረምራል። ይህም ከሰሽ የክርክሩ አሸናፊ የመሆን እድሉን ያጥብባል። ምክንያቱም ተከሰሽ የሆነ ሰዉ የከሰሽ ምስክሮች በሚሰሙበት ጊዜ አለመገኘቱ ምስክሮችን መስቀለኛ ጥያቄ (Cross Examination) የመጠየቅ እንዲሁም በጥያቄ አቀራረቡ ሂደት መቃወሚያ (objection) ማንሳት እንደማይችል ሁሉ ከሰሽ የሆነ ሰዉ የተከሰሽ ምስክሮች በሚሰሙበት ቀጠሮ አለመገኘቱ ምስክሮችን መስቀለኛ ጥያቄ የመጠየቅ እንዲሁም በጥያቄ አቀራረቡ ሂደት መቃወሚያ ማንሳት አይችልም ማለት ነዉ። ይህም ከሰሽ መስቀለኛ ጥያቄ በመጠየቅ ምስክሩ የሰጠውን ቃል ሀሰት ማስባል ወይም እውነታነቱን በሚያጠራጥር ሁኔታ ፍ/ቤቱ እንዲረዳው የማድረግ መብቱ ይቀርበታል።¹⁶² እንዲሁም በምስክሩ የጥያቄ አቀራረብ ላይ የሚቀርበውን መቃወሚያ የማንሳት መብቱንም ያጣል።¹⁶³

ሁለተኛ የተከሰሽን ምስክር ለመመርመር በተቀጠረበት ቀን ተከሰሽ ምስክሮችን ለችሎቱ ማቅረብና ማስመስከር ሲገባዉ ካላቀረበ እና ይህም በእርሱ ጉድለት የሆነ እንደሆነ ምስክር የማሰማት መብቱ ይታለፍበታል።¹⁶⁴ የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በመ/ቁ 14814 ላይ በሰጠው የሕግ ትርጓሜ ፍ/ቤቱ እንዲፈፀሙ ያዘዛቸው ጉዳዮች ላይ ስለሚሰጡ ትዕዛዞች በፍ/ብ/ሥ/ሥ/ሕ/ቁ 192-199 ባሉት ድንጋጌዎች መሠረት መሆኑን እና በቁጥር 199 (1)

ያልተፈፀመ ቢሆንም እንኳ ፍ/ቤቱ የጉዳዩን መፈፀም ሳይጠብቅ የመሰለውን ውሳኔ መስጠት እንደሚችል ተመልክቷል።”

¹⁶² ዝኒ ከማሁ ቁጥር 263.

¹⁶³ ዝኒ ከማሁ ቁጥር 270.

¹⁶⁴ ዝኒ ከማሁ ቁጥር 199(1).

መሠረት ለቀጠሮው ምክንያት የሆነውን ጉዳይ ሳይፈፀም የቀረው ከተከራካሪዎቹ ወገኖች በአንደኛው ጉድለት የሆነ እንደሆነ መፈፀም ይገባው የነበረው ጉዳይ ያልተፈፀመ ቢሆንም እንኳን ፍ/ቤቱ የጉዳዩን መፈፀም ሳይጠብቅ በያዘው ቀጠሮ የመሰለውን ውሳኔ ለመስጠት እንደሚችል ይደነግጋል።

ፍ/ቤቱም ምስክር ማቅረብ የነበረበት ባለጉዳይ በራሱ ጉድለት (ባለጉዳዩ ሆኖ ብሎ ክርክሩን ለማዘግየት ወይም በቸልተኝነት) ምክንያት ካለመሰከረ ምስክር የማሰማት መብቱ ይታለፍበታል። በመሆኑም ፍ/ቤቱ ተከሳሽ በጽሑፍ መልስ እና በቃል ክርክር ወቅት በሰጠው የእምነት ክህደት ቃል መሠረት ፍርድ ይሰጣል። ለቀጠሮው ምክንያት የሆነው ጉዳይ ሳይፈፀም የቀረው በተከራካሪዎቹ ወገኖች ጉድለት ካልሆነ ግን ፍ/ቤቱ ሌላ ቀጠሮ ሊሰጥ እንደሚችል ሕጉ አመለካከቷል።¹⁶⁵ በመሆኑም ተከሳሽ በዚህ ቀጠሮ ዕለት የቀረው በራሱ ጉድለት (ሆኖ ብሎ ክርክሩን ለማዘግየት ወይም በቸልተኝነት) ያልሆነ እንደሆነ ፍ/ቤቱ ተከሳሹ ምስክሮቹን እንዲያሰማ ሌላ ቀጠሮ ሊሰጠው ይችላል።

3.4. የፍ/ቤት ትዕዛዝ ለመፈፀም በተሰጠ ቀጠሮ

በኢትዮጵያ ፍ/ሥ/ሥ/ሕግ በተለያዩ የሕግ ድንጋጌዎች መሠረት ፍ/ቤት አንድን የተያዘ ክርክር በተገቢው ሁኔታ መርምሮ ፍትሐዊ የሆነ ውሳኔ ለመወሰን እንደአስፈላጊነቱ ትዕዛዝ ሊሰጥ እንደሚችል ይደነግጋል። ለምሳሌ ያክል የተወሰኑትን እንመልከት። 1) ፍ/ቤት የአንድ ጉደይ ጭብጥ ከመመሥረቱ በፊት ቃላቸውን መቀበል ወይም መርምሮ ለመገንዘብ አስፈላጊ የሆኑ ምስክሮችን እና ማስረጃዎችን እንዲቀርብለት ቀጠሮ ሊሰጥ ይችላል።¹⁶⁶ 2) ፍ/ቤቱ ከሌሎች ፍ/ቤቶች ወይም ከሌላ ክፍል ዘንድ የሚገኝ ሰነድ፣ ማስረጃ ወይም ፍርድ የተሰጠበትን መዝገብ አስቀርቦ ለመመርመር በፈለገ ጊዜ ይህ ሰነድ፣ ማስረጃ፣ ጽሑፍ እንዲቀርብለት ቀጠሮ ሊሰጥ ይችላል።¹⁶⁷ 3) ፍ/ቤቱ የባለሙያ ምስክርነት ቃል ወይም ጽሑፍ ለመቀበል

¹⁶⁵ ዝኒ ከማሁ ቁጥር 199(2).

¹⁶⁶ ዝኒ ከማሁ 249.

¹⁶⁷ ዝኒ ከማሁ 145.

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ነገሩን የሚያውቅ ወይም ለክርክሩ ጠቃሚ የሆነ ጽሑፍ በእጁ ያለ ሰው ፍ/ቤት ተገኝቶ የምስክርነት ቃሉን እንዲሰጥ ወይም በእጁ የሚገኘውን ጽሑፍ እንዲያቀርብ በቀጠሮ ትዕዛዝ ሊሰጥ ይችላል።¹⁶⁸ ሌሎችም ፍትህን ለማስፈን አስፈላጊ የሆኑ ተግባራትን ለማከናወን እንደአስፈላጊነቱ በትዕዛዝ ቀጠሮ ይሰጣል። በዚህ የቀጠሮ ቀን ፍ/ቤቱ በትዕዛዙ መሠረት ያከናውናል።

ሆኖም ግን በዚህ ቀጠሮ ከተከራካሪዎቹ አንዱ ወይም ሁለቱ ካልቀረቡ ስለሚከተለው ዉጤት፤ ፍ/ቤት እንዲፈፀሙ ያዘዘቸው ጉዳዮች ላይ ስለሚሰጡ ትዕዛዞች በፍ/ብ/ሥ/ሥ/ሕ/ቁ 192-199 ባሉት ቁጥሮች መሠረት መሆኑን እና በቁጥር 199(1) መሠረት ለቀጠሮው ምክንያት የሆነውን ጉዳይ ሳይፈፀም የቀረው ከተከራካሪዎቹ ወገኖች በአንደኛው ጉድለት የሆነ እንደሆነ መፈፀም ይገባው የነበረው ጉዳይ ያልተፈፀመ ቢሆንም እንኳ ፍ/ቤቱ የጉዳዩን መፈፀም ሳይጠብቅ በያዘው ቀጠሮ የመሰለውን ውሳኔ ለመስጠት እንደሚችል ይደነግጋል።¹⁶⁹ ፍ/ቤቱ እንዲፈፀም የሰጠውን ትዕዛዝ መፈፀም የነበረበት ባለጉዳይ በራሱ ጉድለት (ባለጉዳዩ ሆኖ ብሎ ክርክሩን ለማዘግየት ወይም በቸልተኝነት) ምክንያት ካልፈፀመ እንደሁኔታዊ በፍ/ቤቱ ይቀጣል። ለቀጠሮው ምክንያት የሆነው ጉዳይ ሳይፈፀም የቀረው በተከራካሪዎች በአንዱ ወይም በሁለቱም ወገኖች ጉድለት ያልሆነ እንደሆነ ግን ፍ/ቤቱ ሌላ ቀጠሮ እንደሚሰጥ ሕጉ አመለካከቷል።¹⁷⁰

ማጠቃለያ

የሥነ-ሥርዓት ሕግ ሰዎች በመሠረታዊ ሕጎች የተደነገገውን መብታቸውን ለማስከበር የትና እንዴት እንደሚሄዱ እንዲሁም ከአቤቱታ አቅራቢ ጀምሮ እስከ መጨረሻው ደረጃ ድረስ በሚኖረው ሂደት ሊከተሏቸው የሚገቡ የሥነ-ሥርዓት ደንቦችን የሚደነግግ ነው። ከፍትሁ-ብሔር ክርክር ሥነ-ሥርዓት አንደኛው የፍ/ቤት ቀጠሮን ይመለከታል። ውሳኔ ላይ ለመድረስ

¹⁶⁸ ዝኒ ከማሁ 264

¹⁶⁹ አቶ ውርጌሳ ታደሰ v አቶ መለሰ ተክ.

¹⁷⁰ ፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 199(2).

ሲባል ፍ/ቤት እንደአስፈላጊነቱ ቀጠሮ ሊሰጥ ይችላል። የሥነ-ሥርዓት ሕጎችን በተለይም ስለ ፍ/ቤት ቀጠሮና ከንዋኔ እንዲሁም ቀጠሮን አክብሮ አለመገኘት ያለውን ጉዳት ባለማወቅ ምክንያት ግለሰቦች መብታቸውን ማስከበር ሲሰናድ ይስተዋላል። ይህን ለመታደግ በፍትሐ-ብሄር ክርክር ሂደት ስለሚሰጥ ቀጠሮ፣ ከንዋኔ እና ቀጠሮን አክብሮ አለመገኘት ያለውን ጉዳት ወይም የሚያስከትለውን ውጤት ማስገንዘብ ትኩረት የሚሻ በመሆኑ የዚህ ጽሑፍ ዋና ዓላማ ሆኗል። በኢትዮጵያ ፍትሐ-ብሄር ሥነ-ሥርዓት ሕግ በቀጠሮ ቀን የፍ/ቤቶች ክንውንን፣ ተከራካሪዎች በተወካይ ወይም ባለጉዳዩ በአካል የፍ/ቤቱን ትዕዛዝ አሟልተው መቅረብ እንዳለባቸውና አለመቅረባቸውም የሚያስከትለውን የሕግ ውጤት ወይም ጉዳት ደንግጓል። የፍ/ቤት ቀጠሮ መሠረታዊ ዓላማ አንድን ክርክር በመመርመር ፍትሐዊ፣ ኢኮኖሚያዊ፣ ያለአግባብ ያልዘገየ (ቀልጣፋ) ወይም ያልተቻለ ፍትሕ ለማስፈን ነው። ከዚህ ጋር በተያያዘ በፍ/ብ/ሥ/ሥ/ሕጉ በተወሰነ የጊዜ ገደብ ውስጥ መከናወን ያለበት ድርጊት በተወሰነው ጊዜ ውስጥ ካልተከናወነ ዋጋ እንደሌለው አመለካከቷል።

ውሳኔ ላይ ለመድረስ ሲባል በፍ/ቤት ከሚሰጠው ቀጠሮ አንዱ የክስ መልስ ለመቀበል የሚሰጥ ቀጠሮ ነው። በዚህ ቀጠሮ ፍ/ቤቱ ተከሳሽ የጽሑፍ መልሱን ይዞ ከቀረበ በመቀበል ጉዳዩን(ክሱ) ለመስማት ቀጠሮ ይሰጣል። ተከሳሽ መልሱን ይዞ ካልቀረበ የ default proceeding ጽንሰ ሐሳብን ተግባራዊ በማድረግ በጽሑፍ የመከራከርና ተያይዘው የሚመጡ መብቶችን (ለምሳሌ የማስረጃ ዝርዝርና ማስረጃ ማቅረብ፣ የመጀመሪያ ደረጃ መቃወሚያ ማንሳት) ያጣል፤ በክርክሩ ግን ይቀጥላል። ከሳሹ በዚህ ቀጠሮ ባይቀርብ ግን የሚመጣበት ጉዳት የለም። ሁለቱም ባይቀርቡ ግን መዝገቡ በጊዜያዊነት (struck out) ይዘጋል ወይም ፍ/ቤቱ የመሰለውን ብይን ይሰጣል። ይህ በሆነ ጊዜ ከሳሹ ያልቀረበው በቂ በሚባል እክል መሆኑን በማስረዳት ያለተጨማሪ የፍ/ቤት ክፍያ ክሱ ይቀጥላል ወይም በቂ ምክንያት ከሌለው የፍ/ቤት ክፍያ በመክፈል አዲስ ክስ ያስከፍታል። ይህም በአንድ ጉዳይ ድጋሚ ክስ አንደቀረበ (res judicata) አይቆጠርም። ሆኖም ግን በተግባር ፍ/ቤቶች ከዚህ በተለየ ሲያከናውኑ ይስተዋላል። ለማሳሌ ተከሳሽ መልስ ይዞ ካልቀረበ ጉዳዩ በሌለበት እንዲታይ

በፍትሕ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ይደረጋል፤ ከሳሽም በዚህ ቀጠሮ ካልቀረበ ክሱን መዝጋት ከጉድለቶች መካከል የሚጠቀሱ ናቸው።

ፍ/ቤት የሚሰጠው ሌላኛው ቀጠሮ ጉዳዩ (ክሱ) የሚሰማበት ሲሆን በዚህ ቀጠሮ ፍ/ቤቱ ብዙ ተግባራትን ያከናውናል። በመሆኑም የተከራካሪዎች የሁለቱም መገኘት አስፈላጊ ሲሆን ሳይቀርቡ ቢቀሩ ጠንከር ያለ ውጤት ይከተላል። በዚህ ቀጠሮ ተከራካሪዎች ስለጉዳዩ በራሳቸው አንደበት ያብራራሉ፤ አንዱ ተከራካሪ ባላጋራው ባቀረበው ክርክር ላይ ግልጽ ያልሆነለትን ይጠይቀዋል፤ ፍ/ቤቱ ተከሳሹ በጽሑፍ መልሱ ላይ በቀጥታ ወይም በነገሩ አካባቢ ሁኔታ እንደተካደ የሚቆጠረውን ነገር የሚያምን ወይም የሚክድ መሆኑን ተከሳሹን ወይም ወኪሉን በጥያቄ ይመረምራል፤ አከራካሪውን ጉዳይ በመለየት ጭብጥ ይይዛል፤ በታመነው ጉዳይ ላይ ውሳኔ ይሰጣል እንዲሁም ሌሎች መሰል ተግባራትን ይፈፀማል። በዚህ ቀጠሮ ተከሳሽ ካልቀረበ ጉዳዩ በሌለበት (ex-parte) ይታያል።

በመሆኑም ተከሳሽ ምስክር የማሰማት፣ መስቀለኛ ጥያቄ የመጠየቅ፣ መቃወሚያ ካለ የማንሳት መብቱን ስለሚያጣ ክርክሩን የማሸነፍ ዕድሉ ይጣበባል። ከሳሽ በዚህ ቀጠሮ ባይቀርብ ጉዳዩ (ክሱ) ስለሚዘጋ (dismissal of the suit) በተመሳሳይ ጉዳይ ሌላ አዲስ ክስ ማቅረብ አይችልም (የ resjudicata ፅንሰ ሐሳብና የሕጉ ቁጥር 5 ተፈፃሚ ይሆናል)። በቂ ምክንያት ካለውና የክሱን መዘጋት ከሰማ በሰላሳ ቀን ውስጥ የክሱ መዘጋት ይነሳልኝ አቤቱታ ካቀረበ ጉዳዩ ይቀጥላል። በቂ ምክንያት የሚባለው ከባለጉዳዩ ቀጥጥር ውጭ የሆነ እና የተፈጥሮ ወይም ሰው ሰራሽ አደጋ ሲያጋጥም ሊሆን ይችላል። ባለጉዳዩ ሆኖ ብሎ ጉዳዩን ለማዳተት በማሰብ ወይም በችልተኝነት ምክንያት መሆን የለበትም። ሆኖም ግን በተግባር ጉድለቶች አሉ። ለምሳሌ ፍ/ቤቱ ተከሳሽ በችሎት ያልቀረበው መጥሪያ በአግባቡ ደርሶት መሆን አለመሆኑን ሳያረጋግጥ በሌለበት እንዲታይ ማድረግ፣ እንደ በቂ ምክንያት የሚቆጠሩ እክሎች አንዲሁም የሰላሳ ቀን የጊዜ ገደቡን አተገባበር በተመለከተ ልዩነት መኖሩ፣ ክስ ለመስማት ባለተያዘ ቀጠሮ ከሳሽ ሲቀር ጉዳዩን መዝጋት ከሚስተዋሉት ጥቂቶቹ ናቸው።

ሦስተኛው ምስክር የሚሰማበት ቀጠሮ ሲሆን ፍ/ቤቱ በዚህ ቀጠሮ በሥነ-ሥርዓት ሕገ መሠረት አከራካሪ የሆነውን ፍሬ ነገር በጭብጥ መልክ ከያዘ በኋላ አከራካሪው ጉዳይ ላይ ውሳኔ ለመስጠት ምስክር ወይም ማስረጃ በማስቀረብ ይሰማል፤ ይመረምራል። ማስረጃ እንዲያሰማ የተፈቀደለት ተሟጋች ምስክር የሚሰማበትን ነጥብ ለይቶ ለችሎቱ ያሰማል። በሁሉም ጭብጥ ላይ ማስረጃ መመርመር ወይም ምስክር መስማት አስፈላጊ ባይሆንም አንድ ተከራካሪ ክስ የማስረዳት ወይም የመከላከል ሕጋዊ መብት ያለው በመሆኑ ፍ/ቤት ይህን መብቱን ሊያልፍ የሚገባው ተከራካሪው ወገን የቆጠረው ማስረጃ ለጉዳዩ አግባብነት የሌለው መሆኑን እርግጠኛ ሲሆን ብቻ ነው። ነገር ግን በተግባር ፍ/ቤቶች ከዚህ በተለየ መልኩ ተሟጋቹ ስለቆጠረው ማስረጃ አግባብነት ምንም ሳይሉ የተሟጋችን ማስረጃ በዘፈቀደ ሳይቀበሉ ማለፍ ተጠቃሽ ጉድለት ነው። ተከራካሪ ወገን ለጉዳዩ አግባብነት ያለውን ማስረጃ ቆጥሮ እያለ ማስረጃ ሳይሰማ ፍርድ መስጠት የመከራከር መብቱን የሚያጣብብ ነው፤ ውሳኔውም ሕጋዊ ሥርዓቱን ተከትሎ ተሰጥቷል ሊባል የሚችል አይደለም።

በተጨማሪም ምስክሮችን በመስማት ሂደት በከፊል ፍ/ቤቶች ምስክር ከመጥራታቸው በፊት ጭብጥ አለመያዛቸው የማስረዳት ሽክም ማን ላይ እንደሚወድቅ አለመለየት፤ ባለጉዳዮች የሚጠሩዋቸው ምስክሮች በሙሉ የመጥራትና ጭብጥ ባልሆነ ጉዳይ ላይ እንዲመሰክሩ ማድረግ፤ ምስክር የሚሰማው በተለያዩና በጣም በተራራቀ ጊዜ መሆኑ፤ የአንዱ ወይም የሌላው ምስክር ተሟልቶ አልቀረበም እየተባለ የሚሰጠው ተጨማሪና ተደጋጋሚ ቀጠሮ እና ለምስክሩ በቂ አበል አለማስያዝን በሚመለከት በተግባር ካሉት ችግሮች እንደምሳሌ ይነሳሉ። ተከሳሽ ምስክር እንዲያሰማ በታዘዘበት ቀጠሮ ካልቀረበ ምስክር የማሰማት መብቱን ያጣል። በዚህ ቀጠሮ ከሳሽ ካልቀረበ የተከሳሽ ምስክሮችን ቃል በመስቀለኛ ጥያቄ ማስተባበልና በምስክር መስማት ሂደቱ ላይ መቃወሚያ የማንሳት መብቱን ያጣል። ከሳሽ ምስክር እንዲያሰማ በታዘዘበት ቀጠሮ ካልቀረበ ምስክር የማሰማት መብቱን ያጣል። በዚህ ቀጠሮ ተከሳሽ ካልቀረበ የከሳሽ ምስክሮችን ቃል በመስቀለኛ ጥያቄ ማስተባበልና በምስክር መስማት ሂደቱ ላይ መቃወሚያ የማንሳት መብቱን ያጣል።

በፍትሁ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

ጠቅላል ባለ መልኩ በፍትሁ-ብሄር ሕጉ ድንጋጌዎች መሠረት ፍ/ቤቱ የሚሰጠው ቀጠሮ የተከሰሽን መልስ ለመቀበል፣ ክሱን ለመስማት ፣ ክርክር ለመስማትና ምስክሮችን ለመመርመር፣ ማሰረጃ መርምሮ ተገቢውን ትዕዛዝ ለመስጠት፣ በሚቀርቡ አቤቱታዎች ላይ የሌላኛውን ወገን አሰተያየት መቅረብ ለመጠበቅ፣ ያልቀረበ ማስረጃ እንዲቀርብ ለመጠበቅ፣ መርምሮ የመጨረሻ ውሳኔ ወይም ፍርድ ለመስጠት ዓላማ የሚሰጥን የቀጠሮ ያጠቃልላል። የተከራካሪዎች አንዱ ወይም ሁለቱ እንደየሁኔታው በተሰጠው ቀጠሮ አለመቅረብ ከሚያስከትለው ውጤት መካከል መልስ በጽሑፍ የማቅረብ መብት መታለፍ (default proceeding) ፣ ማስረጃ ወይም ምስክር የማሰማት፣ መስቀለኛ ጥያቄ እና መቃወሚያ የማንሳት መብት መታለፍ ፣ የመዝገብ መዘጋት (struck out) የክስ(ጉዳዩ) መዘጋት (dismissal)፣ ተለዋጭ ቀጥሮ መስጠት እና ተከሰሽ በሌለበት ለቀጠሮው ምክንያት የሆነውን ጉዳዩ መስማት መቀጠል (ex-parte proceeding) ናቸው።

ከአቅም በላይ በሆነ ምክንያት የሚያስብሉት ሁኔታዎች ምን እንደሆኑ ሕጉ አልጠቀሰም። ይልቁንም ሕጉ በስራ ብዛት፣ በመዘጋት፣ በቸልተኝነትና በራሱ ጉድለት (ባለጉዳዩ ሆኖ ብሎ ክርክሩን ለማዘግየት ወይም በቸልተኝነት) መሆኑ በታወቀ ጊዜ እንደ ከአቅም በላይ የሆነ ምክንያት እንደማይቆጠርና አዲስ የጊዜ መራዘም ውሳኔ እንደማይሰጠው ያስገነዝባል። ፍ/ቤቶችም እንደ በቂ ምክንያት የሚቆጠረውን ጉዳይ ለመለየት ሲችሉ ይስተዋላል። በፍ/ቤቶች በተግባር በቂ ምክንያት ናቸው ከተባሉት ውስጥ በጠበቃ መቀየር ምክንያት ጠበቃ ለባለጉዳዩ ሳያሳወቅ ውሉን መሰረዙ፣ መንገድ መዘጋት፣ በራሱ ባልሆነ ችሎት ተሳስቶ ገብቶ በእሱ ችሎት አለመገኘት ይጠቀሳሉ። በቂ ምክንያት እያለው መዝገብ የተዘጋበት፣ ክስ (ጉዳዩ) የተዘጋበት እና በሌለበት ክሱ የተወሰነበት ተከራካሪ በፍ/ሥ/ሥ/ሥ/ሕ/ቁ 71፣ 74፣ 78 የተመለከቱትን መፍትሔዎችን በቅደም ተከተል በመጠቀም መብቱን ማስከበር ይችላል።

ሕገ በቀጠሮ ከተከራካሪ ወገኖች አንዱ ወይም ሁለቱም ፍ/ቤት በያዘው ቀጠሮ አለመገኘት ስለሚያስከትለው ውጤት ቢደነግግም ክፍተት የለበትም ማለት አይቻልም። ለምሳሌ፡ የሕገ የአማረኛ እና የእንግሊዘኛው ቅጂ ልዩነት፣ ግልፅነት መጉደል፣ ክስ ለመስማት ከሚሰጥ ቀጠሮ ውጪ በሌሎች ቀጠሮዎች የተከራካሪዎች መቅረትን በሚመለከት ግልጽ ድንጋጌ አለመኖር እና ለትርጉም የሚጋለጡ ቃላቶች መጠቀሙ (ለምሳሌ ‘በቂ ምክንያት’፣ ‘በራሱ ጉድለት’) እንደ ክፍተት ማንሳት ይቻላል። ሕገ ከስልሳ አመት በላይ ለዚህ ጽሑፍ ዓላማ በሆነው ጉዳይ ላይ ማሻሻያ አለመደረግ ችግሩን ያባብሰዋል። ይህን የሕጉን ክፍተት ለመቅረፍ ሕጉን ማሻሻል አንዱ የእረጅም ጊዜ መፍትሔ ነው። በፍ/ቤቶችም በኩል በክርክር ሂደት ከሕገ በተለየ መልኩ መተግበራቸው ጉልህ ችግር ነው። ከእነዚህም መካከል ፍ/ቤት በሚሰጠው ቀጠሮ የሚተገብረው ክንዋኔ፣ በቀጠሮ ባልቀረበ ተከራካሪ(ዎች) ላይ የሚወስደው እርምጃ በተደጋጋሚ ከሕገ ውጪ መሆኑ እንደምሳሌ ይጠቀሳል። ይህ ፍትሐዊ፣ ቀልጣፋና ኢኮኖሚያዊ የፍትህ ሥርዓት እንዳይኖር ያደርጋል፤ የዜጎችንም ሕጋዊ መብት ያሳጣል።

በመጨረሻም ሁሉም የፍትሕ-ብሄር ክርክር ባለጉዳዮች የፍ/ቤት ቀጠሮ (ቀን እና ሰዓት) በማክበር እንደ ፍ/ቤቱ ትዕዛዝ መፈፀም እንዳለባቸውና አለማክበራቸው የሚያስከትለው ጉዳት እንዳለ መገንዘብ ይኖርባቸዋል። ጉዳዩን ለማየት የተሰየመው ፍ/ቤትም ነገሩን ላለማዳተት እና ፍትህን ለማረጋገጥ በፍ/ሥ/ሥ/ሥ/ሕግ እና በፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በተሰጠው የሕግ ትርጓሜ መሠረት ተገቢውን ሥነ-ሥርዓት በመከተል ውሳኔ ላይ መድረስ ይኖርበታል።

በፍትሕ-ብሄር ጉዳዮች ክርክር ሂደት በፍ/ቤት የሚሰጡ ቀጠሮዎች...

Transitional Justice through 'Reconciliation Commission' in Post-2018 Ethiopia: A Critical Examination on its Viability

Yidnekachew Mitiku Mekonen*

Abstract

In a country that has been beset by gross human rights violation, repression, and violent conflict, transitional justice measures constitute a powerful tool to promote reconciliation, end impunity, and ensure peace. However, if transitional justice measures are to achieve their objective, their design, implementation, and administration must correspond with specific realities on the ground. On the 25th day of December 2018, the Ethiopian parliament ratified a 'Reconciliation Commission' proclamation, which acclaimed by many as a landmark. Yet a big question is: how far the move corresponds with the country's specific realities? The alignment of the measures with Ethiopia's historical and socio-political specificities remains an unsettled issue. Thus, this article, through a theoretical analysis and interpretative perspective, critically examines the viability of the measure in light of the specific realities that are unfolded in the country. The article argues that the 'nature of post-2018 regime', 'contested past', and the problem of 'sequencing and politicization' of the transitional justice measures are specific contexts that could derail the effectiveness of the measures and hence, require closer scrutiny.

Keywords: Transitional Justice, Human Rights Violation, Authoritarian Regime, Ethiopian Reconciliation Commission

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1. Introduction

Although international and domestic criminal justice for violations against human rights started with the Nuremburg and Tokyo trials and arguably even prior to that¹, the contemporary practice of transitional justice (TJ) is generally understood to have begun in response to drastic political changes in the form of democratic transitions in Latin America in the 1980s and in Eastern Europe after the fall of the Union of Soviet Socialist Republics (USSR) in the 1990s.² As such, the concept, in its early usage, is used to refer to the judicial process of addressing human rights violations committed by dictatorial or authoritarian regimes and in the course of democratic transition. It, in particular, laid its focus on countries in transitions from one political system to another.³

Following the United Nations' (UN) involvement in the aftermath of the Balkan wars and the Rwandan genocide, scholars on TJ began to focus on post-conflict justice.⁴ Thereafter, the field and its practice expanded dramatically. The term has become to be used for processing war crimes and massive human rights abuses committed in violent conflicts.⁵ It was normatively adopted and expanded by international agencies working on the field and applied to a far wider range of

¹Mouralis G., The Invention of "Transitional Justice" in the 1990s. In: Israël L., Mouralis G. (eds) *Dealing with Wars and Dictatorships*. (T.M.C. Asser Press, The Hague, 2014), available at https://doi.org/10.1007/978-90-6704-930-6_6, Retrieved 20 December 2020; Domingo, P., *Dealing with legacies of violence: transitional justice and governance transitions*, (Overseas Development Institute Background Note, 2012) available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7686.pdf>, Retrieved 20 December 2020; International Centre for Transitional Justice (ICTJ), 'What is transitional justice,' New York, NY: ICTJ (2009), available at <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>, Retrieved 20 December 2020; Kritz, N. J. (ed.), *Transitional justice: how emerging democracies reckon with former regimes* (Washington, DC: US Institute of Peace, 1995, Vol. I: General Considerations)

² Though abundant literatures suggest that the contemporary practice of TJ has begun in the late 1980s and early 1990s, TJ has a long history that predates even the twentieth century forms. For that matter, writers like Jon Elster dates the origin of TJ back to ancient Greece (see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004). Ruti Teitel, on the other hand, suggests that the origins of modern transitional justice can be traced to World War I (see Ruti G. Teitel, 'Transitional Justice Genealogy,' (2003), *Harvard Human Rights Journal* 16 (Spring): 70

³Mouralis n1

⁴Bassiouni, M Cherif (ed.), *Post-Conflict Justice*. (Ardsey: Transnational Publishers, 2002)

⁵*Ibid*

contexts than those characterized by regime transformation. Since then, the term has come to describe an ever-expanding range of mechanisms and institutions.⁶ This expansion was rooted in rapidly shifting Post-Cold War global politics and international norms.⁷ In line with this, Teitel has identified three generations of TJ: the first generation is the one that begins and ends with the Nuremburg Military Tribunals; the second generation is characterized by a move toward national-level prosecutions as well as a shift from retributive justice to questions of restorative justice; and the third generation is characterized by the move of TJ discourse from exception to the mainstream.⁸ Today, international legal frameworks dictate that TJ is an 'almost automatic response to conflict and human rights violations'.⁹ It covers wide range of activities including the establishment of tribunals, truth commissions, lustration of state administrations¹⁰, and settlement on reparations. It also includes political and societal initiatives devoted to fact-finding, reconciliation and cultures of remembrance.

Above all, TJ is used to build a shared national identity. In building same, it endeavors to overcome the legacies of repression and domination usually associated with a past that should be rectified. The methods to achieve these aims, over time, have shifted as new voices that have entered the field calling for more holistic approaches. Now a days, the concept is increasingly gaining importance,

⁶Andrieu, K., *Civilizing Peacebuilding: Transitional justice, civil society and the liberal paradigm*, (2010) *Security Dialogue*, 41 (5): 537–58, available at <http://dx.doi.org/10.1177/0967010610382109>

⁷ *Ibid*

⁸ Teitel n 2

⁹ United Nations, 'Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies' S/2004/616 UN. (New York: United Nations, 2004).

¹⁰Lustration in its broader usage in TJ refers to a measure of barring officials and collaborators of a former regime from positions of public influence in a country. It is somehow related to the process of "vetting", which is, in general terms, evaluation and examination process in order to eliminate abusive and corruptive officials through due procedure. As a rule vetting is used as the tool in post-conflict situations in order to rebuild the society based on democratic values. Various states adopted various laws relating to lustration, some of which were significantly stricter than others. For a further reference on the issue see Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, (2003) *Law & Social Inquiry*, 28(2):387-439

and is being widely discussed by peacebuilding agencies engaged in war-torn societies.¹¹ In general, the contemporary TJ constitutes an umbrella term for an ever-expanding field of approaches to redress legacies of human rights violations, repressions and violence.¹²

Like wise, in Ethiopia, the concept has been given a nod at different times. Following the regime change in 1991, for instance, the Transitional Government of Ethiopia (TGE) established the Office of the Special Prosecutor (SPO) in an attempt to prosecute those guilty of human rights abuse and to bring those criminally responsible for human rights violations and/or corruption to justice.¹³ However, despite the change of regime and formal TJ process, the process hardly succeeded in creating lasting peace and restoring victims' losses.¹⁴ Moreover, systematic violations of human rights and abuses have widely continued.¹⁵ Once again, following the change in the political landscape in the country in April 2018, the concept has gained momentum in the country's political and public discourse. However, given the loftiness of the task, its success hinges on a thoughtful consideration of a wide array of measures. In light of such context, this article examines the effectiveness of the TJ mechanisms adopted by the country in bringing about the reconciliation necessary to facilitate democratization and respect for human rights. It shall be viewed, in particular, within the framework of the

¹¹In line with that, president of the International Center for Transitional Justice (ICTJ), Juan M'endez, has described TJ as becoming 'a sort of term of art to describe how we help societies leave behind a legacy of massive and systematic human rights violations and start on the path to a more humane dispensation of rights and a more democratic society.' See Juan M'endez, Lou Henkin, *Transitional Justice, and the Prevention of Genocide*, (2007) *Columbia Human Rights Law Review* 38 (3): 479.

¹² Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, Friederike Mieth (eds.), *Transitional Justice Theories*, (Routledge Publication, 2014)

¹³Dadimos Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: the Case of Ethiopia*, (Leuven, Leuven University Press, 2000:31-33).

¹⁴ *Ibid*

¹⁵ See Amnesty International, *Ethiopia: 25 Years of Human Rights Violation*. (Index number: AFR 25/4178/2016, June 2016). Available at: <http://www.amnesty.org/en/documents/afr25/4178/2016/en> Retrieved 20 January 2021. See also Divide, Develop, and Rule: Human Rights Violations in Ethiopia (Center for International Human Rights Law and Advocacy University of Wyoming College of Law, June 2018).

country's historical and socio-political specificities as well as the difficult transition process that has been already characterized by multifaceted factors.

In order to arrive at a sound conclusion, the study employed a theoretical analysis and interpretivist methodology. Thus, the viability of the TJ mechanism which has been given a shot in post-2018 in Ethiopia is examined through a rigorous analysis of pieces of literatures on TJ vis-a-vis the historical and socio-political specificities.

2. Conceptual Clarification and Basic Pillars of TJ

2.1. Definition

The definition of TJ is not a settled concept because the boundaries of TJ change constantly in response to conceptual developments, country-specific experiences of TJ and the ever-changing expectations of victims and other actors about what it should comprise. In line with this, Rhot-Arriaza notes that the term TJ itself may be misleading simply because TJ deals incidents that may/may not take place in the immediate period after conflict.¹⁶ She discusses that there is no blanket model of TJ that can be applied to every post conflict society; every society and every conflict is different, thus yielding a different set of circumstances for transitioning to peace and stability.¹⁷ Consequently, TJ has been defined in various instruments and literatures in different forms, but the widely used definition is provided by UN. The United Nations Secretary General's (UNSG) report on the rule of law and TJ in conflict and post conflict societies broadly defines TJ as:

The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms and individual

¹⁶Roht-Arriaza, Naomi, The new landscape of transitional justice, In Naomi Roht-Arriaza& Javier Mariezcurrena (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. (New York: Cambridge University Press, 2006, 1-16).

¹⁷Ibid

*prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissal, or a combination thereof.*¹⁸

The definition by the UNSG gives the understanding that TJ comprises both judicial and non-judicial processes and mechanisms. Moreover, one can also grasp from the definition that TJ is both backward and forward looking in the sense that addressing the past is used as a political measure to construct the political and social infrastructure of the society for a better future. Olsen et al, on the other hand, define TJ as ‘the array of processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict.’¹⁹ What is beneath in this definition is that it encompasses different transitional settings and is modestly descriptive, but it also avoids the pitfalls of making causal assumptions about the outcomes of TJ. This definition also does not limit the scope of TJ to situations where the state is seen as the only relevant violator of rights or the only provider of justice.

Today, TJ as a discourse has become globalized. It is concerned primarily with gross human rights violations such as torture, summary executions, forced disappearances, prolonged arbitrary detention, genocide, and serious violations of the laws and customs applicable in armed conflicts, whether of national or international character.²⁰ It includes a series of actions or policies, which may be enacted at a point of political transition from violence and repression to societal stability.²¹ Furthermore, the International Center for Transitional Justice (ICTJ) message on state duty reads that: *...because systemic human rights violations affect not just the direct victims, but society as a whole, in addition to*

¹⁸ United Nations (2004) n 9

¹⁹ Olsen, T., Payne, L. and Reiter, A. (eds), *Transitional justice in the balance: comparing processes, weighing efficacy*. (Washington, DC: US Institute of Peace, 2010).

²⁰ Patel, Ana Cutter, "Transitional Justice and DDR" in Muggah, Rubert (eds.): *Security and Post-conflict Reconstruction: Dealing with the fighters in the Aftermath of War*, (Taylor & Francis e-Library, Routledge Publisher, 2008)

²¹ Cobban, H. *Amnesty After Atrocity: Healing Nations after Genocide and War Crimes*. (Boulder: Paradigm Publishers, 2007).

*satisfying these obligations, states have duties to guarantee that the violations will not recur, and therefore, a special duty to reform institutions that were either involved in or incapable of preventing the abuses.*²²

In this thought, TJ appears as ‘a common lens to examine democratizing states.’²³ The UN has also acknowledged the increased focus on questions of TJ and rule of law in post-conflict and post-transition societies.²⁴ This acknowledgment is founded on the assumption that in the wake of gross human rights violations, victims have well-established rights to find out the truth, to see the perpetrators punished, and to be compensated for their sufferings and losses.

2.2. Basic Pillars of TJ

Countries emerging from periods of state repression and violent conflict have pursued a variety of processes intended to address past human right violations and impunity. As stated above, the array of mechanisms available to states consists of be both judicial and non-judicial processes and mechanisms. However, determining which TJ mechanism or combination of mechanisms is appropriate for a given country depends on the specific objectives to be achieved through the process, the society seeking justice, and by popular priorities and demands.²⁵

Each of these and other local context specificities may play an important part of an overall TJ. It appears, therefore, for a given TJ to achieve its objective the most important point shall be a careful assessment about the historical and socio-political specificities, the positions and interests of the victims, leaders, and the general public.²⁶ In this regard, the United States Institute of Peace has noted that:

²²ICTJ (2009), n 1

²³ See Simon Robins, ‘Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-conflict Nepal,’ (2011), *International Journal of Transitional Justice* 5(1): 75.

²⁴ United Nations (2004), n 9

²⁵ ICTJ (2009), n 1

²⁶ Olsen et al. (2010), n 19

‘the best way to determine different groups’ needs and positions is thorough consultations and, ideally, public debate about different transitional justice options.’²⁷ In this process, the UN Secretary General Guidance Note identifies four substantive pillars of TJ: the right to justice, the right to truth, the right to reparations, and the guarantees of non-recurrence of violations.’²⁸ Even though, this article acknowledges that the pillars are neither exhaustive nor independently exclusive, the following section devotes to a brief discussion of these four pillars.

a. The Right to Criminal Justice:

This is a case where the TJ process aims to hold perpetrators of human rights violations criminally accountable in a court of law.²⁹ In other words, it refers to a judicial investigation of those accused of human rights violations. Advocates of this legalist approach to TJ basically emphasise on criminal justice as a means to deter future human rights violations and to support peacebuilding.³⁰ They also support their argument in that criminal justice will stigmatise the elites who perpetuate conflict, and help separate individual from collective guilt, breaking the cycle of violence.³¹ In this regard, criminal trials during TJ can be pursued through national courts, including ordinary courts, special courts/procedures and hybrid courts.³² Moreover, during the process of criminal

²⁷ United States Institute of Peace, September, *Transitional Justice: Information Handbook*, (September 2008)

²⁸ United Nations Approach to Transitional Justice Guidance Note of the Secretary General, (March 2010)

²⁹ Olsen et al. (2010), n 19; ICTJ (2009), n 1; Roht-Arriaza (2006), n 16

³⁰ See Bell, Christine. *Peace Agreements and Human Rights*. (Oxford: Oxford University Press. 2000). See also Minow, Martha. *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*. (Boston: Beacon Press. 1998).

³¹ Ibid

³² For investigating and prosecuting violations perpetrated during the Dergue regime, for instance, Ethiopia established a special prosecution office in the aftermath of the fall of the regime in 1991. Cote d’Ivoire established the special investigative unit for investigating and prosecuting violations perpetrated during the 2010 post-election violence. A hybrid court was used in Africa for the first time in Sierra Leone so that to address past violations. Most recently, Central African Republic initiated the establishment of a hybrid court in 2016 and such a court is proposed as part of the TJ component of the 2015 South Sudan peace agreement. For a further reference on same, see Study on

prosecution, prosecutors are generally supposed to emphasise investigations of the “big fish”; suspects considered most responsible for massive or systematic crimes.³³ Critics to this approach, however, are skeptical if criminal prosecution can achieve all this.³⁴ The earlier debate especially see bargains and amnesties than criminal prosecutions as the best ways to achieve peace because of the need to contain ‘spoilers’ in many post-conflict regions.³⁵ Later advocates of TJ nonetheless have come to reject the idea of total amnesties and began to emphasise that amnesties, if applied at all, should be introduced as partial and conditional.³⁶

b. The Right to Truth /Truth Commissions/

Currently, truth commissions have been promoted as important mechanisms for counteracting cultures of denial.³⁷ A truth commission, especially after violent conflicts between ethnic and religious groups, is considered as a means ‘to engage and confront all of society in a painful national dialogue, with serious soul-searching, and attempt to look at the ills within society that make abuses possible.’³⁸ Otherwise, a country has ‘merely a nice history lesson, destined for the bookshelf.’³⁹ Those who argue for truth commissions suggest that it can foster a common understanding and acknowledgement of an abusive past, and if they are effectively embedded in a comprehensive justice perspective, they can provide a foundation for building a strong and lasting peace. It has been also argued that

Transitional Justice and Human and Peoples’ Rights in Africa. African Commission on Human and Peoples’ Rights. (2019)

³³Olsen et al. (2010), n 19; ICTJ (2009), n 1; Roht-Arriaza (2006), n 16

³⁴ In South Africa, for instance, criminal prosecution was not the main mechanism of TJ. It was envisaged only as a conditional measure to be used for those who did not apply to receive amnesty or to whom the Truth and Reconciliation Commission (TRC) refused to grant amnesty.

³⁵ See Marthina Fisher. *Transitional Justice and Reconciliation. Theory and Practice*. In B. Austin, M. Fischer, H.J. Giessmann (eds.). *Advancing Conflict Transformation*. (The Berghof Handbook II. Opladen/Framington Hills: Barbara Budrich Publishers. 2011).

³⁶Hayner, Priscilla. *Negotiating Justice: Guidance for Mediators*. Geneva: Humanitarian Dialogue Centre. 2009. Available at www.hdcentre.org/files/negotiating%20justice%20report.pdf. Retrieved 15 February 2021)

³⁷Olsen et al. (2010), n 19; ICTJ (2009), n 1; Roht-Arriaza (2006), n 16

³⁸Kritz, n 1

³⁹Ibid

public and official exposure of truth provides redress for victims and may contribute to individual and social healing and reconciliation.⁴⁰ Its importance has been particularly advocated for divided societies where nationalist myth-making, based on historical distortion, regularly fuel violence. Hence, efforts to prevent the instrumentalisation of facts and history are needed to prevent a vicious cycle of violence.⁴¹

On the other hand, scholars have also revealed considerable limitations to truth commissions and what needs to be done so that truth commissions yield some fruits. It has been particularly propagated on the importance of establishing strong civil society as well reliable governments and administrations who are willing to engage in institutional reforms and establish the rule of law.⁴² The existence of a transparent and participatory process in the establishment of such commissions is very crucial.⁴³ In the absence of such transparent system, the success of a truth commission would be in vain. Here, many of the transitional arrangements in Africa have given rise to a truth recovery process either in the form of a truth commissioner, in some instances, to a truth commission operating side by side with a criminal justice mechanism.⁴⁴ How far they have given regard to those recommendations is, however, dubious. To the contrary, establishing truth commissions in many transitioning countries has become an almost routine and standard practice without analysing the context. Kritz notes that many countries in

⁴⁰ See Hayner, Priscilla. *Unspeakable Truths. Confronting State Terror and Atrocity*. (New York/London: Routledge. 2001).

⁴¹ Mendeloff, David. Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding. *Curb the Enthusiasm?*, *International Studies Review*. (2004) 6 (3): 355-380.

⁴² Marthina, n 35

⁴³ *Ibid*

⁴⁴ Yasmin Sooka, *Dealing with the past and transitional justice: building peace through accountability*. *International Review of the Red Cross*. (June 2006) 88 (862)

transition decide to have truth commissions merely based on instinct than research without any clear understanding of what such endeavours are about.⁴⁵

c. The Right to Reparations and Compensation Programmes

Currently, the idea of reparations for victims of human rights violations has garnered more interest especially in response to the growing number of international, regional and national frameworks attempting to recognise reparations programmes. Reparations programmes are, in general, systematic compensations for those who have suffered from wide spread human rights abuses or victims of violent conflict.⁴⁶ These cover a range of measures including official initiatives to provide material or symbolic reparations to victims or relatives of victims (e.g. financial compensation or official apologies), memorialization activities, such as museums and memorials to preserve the memory of victims and raise awareness about past abuse.⁴⁷ It, generally, consists of civil remedies (as opposed to criminal remedies) that are designed to redress harm resulting from an unlawful act that violates the rights of a person. Actually, reparations typically distribute a mix of material and symbolic benefits to victims that help repair the material and moral damages of past abuse.

Found in several multilateral treaties, the right to reparation is well established in international law. Internationally, the recognition of the right to reparation has been solidified most notably in 2005 when the United Nations General Assembly (UNGA) approved the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and

⁴⁵Kritz, Neil J. Policy Implications of Empirical Research on Transitional Justice, in: Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.). *Assessing the Impact of Transitional Justice. Challenges for Empirical Research.* (Washington DC: USIP. 2009: 13-22).

⁴⁶Olsen et al. n 19; ICTJ n 1; Roht-Arriaza n 16

⁴⁷*Ibid*

Humanitarian Law’.⁴⁸ At regional level, the African Charter on Human and Peoples’ Rights in its General Comment No. 4 can be read noting that, the right to redress encompasses “the right to an effective remedy and to adequate, effective and comprehensive reparation.”⁴⁹ Furthermore, on February 2019, the Africa Union (AU) adopted a transitional justice policy (TJP) that is conceived as a continental guideline for African Union (AU) Member States to develop their own context-specific comprehensive policies, strategies and programmes.⁵⁰ Accordingly, the Member States are expected to develop comprehensive and holistic policy frameworks that not only provide for public reparation programmes, but also encourage non-governmental reparation initiatives along with transparent and administratively fair procedures to access reparation, and institutions to administer them effectively.⁵¹ Today, at national level, not less than 14 countries in Africa have prescribed reparation initiatives.⁵²

While these frameworks indicate, the acceptance of the imperative of reparation, the design and implementation of reparation regimes is often fraught with challenges. In line with this, different studies reveal that, when seen through the victims’ point of view, few reparations programmes are fully satisfactory.⁵³ Some studies even go to claim that such programmes may have ‘unintended consequences that frustrate or even exacerbate the struggles of communities

⁴⁸ United Nations. ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law’, U.N. Doc. A/RES/60/147, 21 March 2006.

⁴⁹ ACHPR, “General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).” (2017).

⁵⁰ Transitional Justice Policy. Assembly/AU/Decl.1 (XXVII) Rev.1. Adopted February 2019.

⁵¹ *Ibid*

⁵² See Study on Transitional Justice and Human and Peoples’ Rights in Africa. (2019), n 32

⁵³ Waterhouse, C.M. ‘The Good, the Bad and the Ugly: Moral Agency and the Role of Victims in Reparations Programs’, *University of Pennsylvania Journal of International Law*, (2009). 31 (1): 257–294.

emerging from mass violence or from a period of repression.’⁵⁴ This especially happen due to the fact that most TJ experiences per se are not victim friendly or even victim centric.⁵⁵ There is also challenge of determining the criteria for identifying the category of people entitled to reparation.⁵⁶ Determining the nature and scope of reparation as well as the process and the necessary considerations for making such a determination is another challenge observed from different countries experiences.⁵⁷ Hence, it has been suggested for a careful design on what stage the reparation justice aims to reach, and then to clearly articulate the goals.⁵⁸ A failure to do so could mean that the programmer’s public message may not match the actual results, resulting in victim frustration and rejection of programmes.

d. The Guarantees of Non-recurrence of Violations

The Guarantees of Non-recurrence of Violations include policies that seek to cleanse or purge the government structures and institutions of the individuals or parties that were responsible for a violence, repression, or human rights abuses.⁵⁹ Hence, it basically can be put as an effort to spread institutional reform and remove individuals associated with human rights abuses from office so that abuses are not repeated. This can involve the mass disqualification of those associated with abuses under a previous regime, which is known as ‘lustration’.⁶⁰ These policies do not necessarily determine individuals' responsibility for specific acts, they may, however, hold them accountable for groups with which they are associated (for

⁵⁴ Fletcher, L.E. ‘Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation’, *Law and Contemporary Problems*. (2009:52). 72 (2): 51–55

⁵⁵ See Lisa J. Laplante. *The Plural Justice Aims of Reparations*. In *Transitional Justice Theories* (eds), edited by Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, (Routledge publication, 2014).

⁵⁶ See Study on Transitional Justice and Human and Peoples’ Rights in Africa n32

⁵⁷ Ibid

⁵⁸ Lisa n 55

⁵⁹ Olsen et al. n 19; ICTJ n 1; Roht-Arriaza n 16

⁶⁰ Ibid

instance, their association with political party, ethnic or religious group, membership in the security forces etc).

3. TJ in Ethiopia

3.1. Brief Historical Overview

Post-2018 Ethiopia is not the first time where TJ was given a shot in Ethiopia. There was an attempt to deal with past human rights wrongs in the country after 1991. Following the down fall of the *Derg* regime in 1991, the Transitional Government (TG), for instance, established a special prosecutor's office (SPO) to investigate and prosecute the massive human right violations during the seventeen years of *Derg* rule.⁶¹ The Office of the Special Prosecutor was mandated (1) to bring those criminally responsible for human rights violations and/or corruption to justice, and (2) to establish for public knowledge and for posterity a historical record of the abuses of the *Derg* regime.⁶² The Transitional Government of Ethiopia (TGE), therefore, chose the 'prosecution model'/judicial approach/closing all other alternatives and without, at least publicly, discussing other models of transitional justice, not to mention amnesty and reconciliation.⁶³ After its establishment, the SPO instituted charges against members of the ousted regime before the Federal High Court and Regional Supreme Courts through delegation.⁶⁴

From the reading of the preamble of the proclamation establishing the SPO, one can fairly deduce that among many drives to employ the prosecution model

⁶¹Girmachew Alemu Aneme, 'Apology and trials: The case of the red terror trials in Ethiopia,' (2006) African Human Rights Law Journal 6(1) : 67

⁶² Proclamation No. 22/1992, A Proclamation for the Establishment of the Special Prosecutors Office, Negarit Gazeta, (1992, Article 6).

⁶³Chuck Schaefer, The *Derg* Trial Versus Traditions of Restorative Justice in Ethiopia, in Kjetil et al. (eds.), The Ethiopian Red Terror Trials: Transitional Justice Challenged, (Oxford, James Currey Publishers, 2008:88)

⁶⁴ See Alebachew Birhanu Enyew, Transitional Justice and the Creation of a Human Rights Culture in Ethiopia, Norwegian Centre for Human Rights, (Law Faculty, LL.M thesis, University of Oslo, 2008).

included, the need to bring the perpetrators to trial so as to educate the people and make offenders aware of their heinous and horrendous offences to prevent recurrence of fascist rule of the previous government.⁶⁵ Dadimos, on the other hand, wrote on the contributory factors for the choice of criminal prosecution: the legacy of the past, the entire shift of balance of power and the international context of at time of the transition.⁶⁶ In general, though the success of the effort in ushering a viable democratic order in the country has been remarked by many to the negative, the type of justice it has attempted to meet out to perpetrators of human rights abuse has been described as 'fascinating'.⁶⁷ In this regard, Tronvoll said that: 'the Red Terror Trials of Ethiopia are considered as Africa's glaring example of retributive justice; as the Truth and Reconciliation Commission (TRC) was Africa's contribution to restorative justice.'⁶⁸

3.2. TJ through 'Reconciliation Commission' in Post-2018 Ethiopia: A Viable Option?

Since January 2018, Ethiopia has experienced a head-spinning series of events. In January 2018, the former ruling party, the Ethiopian People's Revolutionary Democratic Front (EPRDF), declared that it would pursue reforms in response to intensifying antigovernment protests that began in November 2015. In April 2018, a new Prime Minister sworn in and he introduced different reform agendas, which included releasing political prisoners, revising repressive laws, admitting systemic human rights violations and rallying for national consensus and reconciliation.

⁶⁵Girmachew, n 61

⁶⁶Dadimos Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: the Case of Ethiopia*, (Leuven, Leuven University Press, 2000:31-33).

⁶⁷ See Sarkin Jeremy, "Transitional justice and the Prosecution model: The experience of Ethiopia." *Journal of Law, Democracy and Development* 3(20) (University of the Western Cape (1999:252-266), See also Mayfield JF., "The prosecution of war crimes and respect for human rights: Ethiopia's balancing act" (Fall 1995) *Emory International Law Review* 9 (553)

⁶⁸KjetilTronvoll et al, 'The Red Terror Trials: the Context of Transitional Justice in Ethiopia', in Kjetil et al. (eds.), n 13

As part of the reform agenda, on 25th December 2018, the Ethiopian parliament ratified a proclamation to establish a reconciliation commission.⁶⁹ The proclamation was referred as a landmark because it is the first-ever such institution in Ethiopia.⁷⁰ With the objectives of maintaining peace, justice, national unity, consensus and also reconciliation among Ethiopian peoples the commission has been made to compose members from diverse background, in terms of religion, ethnicity, experience, age and gender.⁷¹ Though the measure can be lauded as one of the concrete steps the current government is taking in order to address the national issues, the viability of the measure in light of certain specificities remains an unsettled issue. For that matter, the success or failure of the TJ measure in the country hinges strongly on whether or not Ethiopia's complexities are accurately mirrored. This part, by critically examining the historical and socio-political realities in the country vis-à-vis the theoretical set marks, attempts to scrutinize the possible effectiveness of the measure thereof.

a. Problem with the Post-2018 'regime nature'

It has been implied in the preceding section that there is no one size fit all TJ mechanism. TJ mechanisms in post-conflict scenario, for instance, might not fit to TJ mechanisms in post-authoritarian states. Some interventions may require a focus on restoring trust in state institutions and their capacity to re-establish the rule of law while some other interventions, like in post-authoritarian states, may aim at overcoming societal divisions as opposed to forgiveness with the old regime.⁷² According to Sarkin, the type of TJ that is pursued in a given country is dependent

⁶⁹ Proclamation No.1102 /2018, Reconciliation Commission Establishment Proclamation, Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, (25th Year No. 27, Addis Ababa 5th, February 2019)

⁷⁰ See Solomon AyeleDersso, Ethiopia's Experiment in Reconciliation. (USIP, September 2019). Available at: <https://www.usip.org/publications/2019/09/ethiopias-experiment-reconciliation> Retrieved 22 December 2020

⁷¹ Proclamation No.1102 /2018, n 69

⁷² Clara Ramírez-Barat and Roger Duthie, Transitional justice and education: learning peace, edited by Clara Ramírez-Barat and Roger Duthie, (2018) Democratization 25(4) 747-748)

on the nature of the transitions which fall under three broad types: Overthrow, reform and compromise.⁷³ Overthrow is described as a case where opposition forces become stronger and finally topple the old order.⁷⁴ In this regard, the new government is understood that it is playing the critical role in the shift to democracy. In the case of reform, the old government is regarded as playing the critical role in the shift to democracy.⁷⁵ In countries where change is the result of compromise, the existing regime and opposing forces are equally matched and cannot make the transition to democracy without each other. The South African case was mentioned here as a typical example.⁷⁶

In this regard, the problem in Ethiopia relates to the nature of the 2018 political transition. The present situation in Ethiopia can be put as defying the conventional theoretical constructions of transition as it does not fit well into any of the prominent models as described above. Although the post-2018 government ascribes itself as a 'reformist', it is difficult to set a clearly defined status between the pre-2018 regime and post-2018 regime. PM Abiy's rise to power in 2018 did not engender clear regime status.⁷⁷ Despite the political liberalization and the removal of numerous state officials, seen beyond that, however, it appears hardly possible to draw a clear cut status between the 'new regime' and the 'old regime'. Suspects of human rights abuses either remained in power, or continue enjoying a

⁷³Sarkin J. "The trials and tribulations of South Africa's Truth and Reconciliation Commission" (1997) South African journal on Human Rights 12 (61)

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ As to the nature of the post-2018 transition in Ethiopia some prefer to put it as a 'hybrid transition' to mean it is a transition that resulted from the ad hoc alliance of members of society who mobilized in public protest against the prevailing regime of the ruling EPRDF and a portion of the membership of the EPRDF. As such, they qualify it as a transition which is not a negotiated transition like the transition in South Africa in the early 1990s or not either a transition that resulted from the overthrow of the old regime like the transitions Ethiopia witnessed in 1974 and in 1991. See Solomon n 70

considerable amount of political and economic influence.⁷⁸ The setup of institutions and those in office have also largely remained the same.⁷⁹

These create a hindrance to effective TJ because a thorough confrontation with the past and an honest reflection of present actions become a difficult balancing act, especially in view of key actors' political stakes. This in turn undermines the political consensus about the TJ mechanism which is an essential prerequisite for the success of the mechanism and their contribution to stability and peace. That is so because, as Opalo notes, attaining mass buy-in to particular measures of TJ necessitates key political actors' agreement and commitment.⁸⁰ Given the specific realities as discussed above, the situation in the Ethiopia's case hardly enables the same. It rather is most probable that it increases the likelihood of a social and political cost of non-compliance to the measure. Politicians and civil servants accused of wrongdoings and injustices are unlikely to support TJ mechanisms, let alone participate. A lack of political consensus, on the other hand, risks counteracting efforts of reconciliation and unification, thereby destabilizing fragile societies instead.

Furthermore, given the blurred line on the nature of Ethiopia's transition, institutions that either perpetrated violence under the pretext of government order or neglected their duties to citizens out of ignorance may constitute obstacles for successful interventions. This complicates efforts to build national reconciliation as well as to hold those responsible for human rights violations accountable. With all

⁷⁸Mekonnen, D. R. Ethiopia's transitional justice process needs restoration work. Ethiopia Insight (2019) available at: <https://www.ethiopia-insight.com/2019/02/01/ethiopias-transitional-justice-process-needsrestoration-> work, Retrieved 25 December 2020

⁷⁹Allo, A. K. Why Abiy Ahmed's Prosperity Party could be bad news for Ethiopia. Aljazeera (2019b) available at: [https://www.aljazeera.com/indepth/opinion/abiy-ahmed-prosperity-party-bad-news-ethiopia-](https://www.aljazeera.com/indepth/opinion/abiy-ahmed-prosperity-party-bad-news-ethiopia-191204130133790.html) 191204130133790.html, Retrieved 20 December 2020

⁸⁰Opalo, K., 'The Contingent Role of Political Parties in Transitional Justice Processes' in Duthie, R. and Seils, P. (eds.) Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies. (New York: International Centre for Transitional Justice, 2017:278-301)

these notes, one could plausibly argue that the present political situation in Ethiopia renders effective TJ very problematic.

b. The contested past

It goes without saying that truth is a central component of the concept of TJ. With that regard, Susanne Buckley-Zistel notes that:

*Truth provides the basis for judgments in court. Truth helps to establish a historical record of human rights abuses during violent conflicts or repressive regimes. It plays a key role in the acknowledgment of victims' suffering. Truth may serve as a foundation for future coexistence.*⁸¹

So, when a country aspires to find the truth during a TJ process, the aim thereunder is to ascertain the facts and causes of systemic abuse in the most objective way possible. In other words, it meant to serve as a way for all of society to explore exactly what kind of abuses occurred and why, and how to prevent their recurrence in the future.⁸² Creation of a common narrative is, therefore, crucial for a country to start rebuilding a new social solidarity.

But the big question is what the truth about the past is? It is a difficult question because the truth about the past is subject to an argument. There are often competing and conflicting memories about the violent events of the past.⁸³ The word 'truth' is also misleading as it is often interpreted as the finding of a single

⁸¹ Susanne Buckley-Zistel, 'Narrative Truths On the Construction of the Past' in truth commissions. In *Transitional Justice Theories* (eds), n 55.

⁸² With this regard the preamble of the proclamation that established the 'Reconciliation Commission in Ethiopia' (proclamation No. 1102 /2018, n 69) reads on the reason for the establishment of the Commission as: WHEREAS, it is necessary to reconcile based on **truth** and justice the disagreement that developed among peoples of Ethiopia for years because of different societal and political conflict...

⁸³ Jelin, E., Public memorialisation in perspective: truth, justice and memory of past repression in the southern cone of South America. *International Journal of Transitional Justice*, (2007). 1: 138–156.

truth of what happened? Who was responsible? And why?⁸⁴ But, in the actual set up, memories and ‘truths’ are frequently interpreted and re-interpreted through the often highly politicised lens of the present thereby invoking its own tension.⁸⁵

Moreover, though searching for truth about the past are generally assumed to have a positive impact on conflict torn societies by promoting reconciliation and peaceful coexistence⁸⁶, some have cautioned against over-optimism. Hence, it is necessary to question on the appropriate timing to grapple with this potentially divisive and challenging issue. In line with that Mendeloff has wrote that:

*Truth telling is likely to be most effective when states are relatively stable; truth-seeking is more likely to be effective if states have a minimum level of democracy to sustain public debate; truth-telling is likely to be most effective when groups want to discuss the past-it cannot be forced and finally truth-telling probably needs to be accompanied by an apology or some form of restitution.*⁸⁷

Examining the specific socio-political realities in Ethiopia in light of the assertions made above, none of the pre-requisites seems to exist leaving a huge mark on the possible effectiveness of the measure. It is undeniable fact that post-2018 Ethiopia is marked by upsurge of violent conflicts throughout the country, arguably as never seen before.⁸⁸ While many factors could attribute to the plethora of violent conflicts in post-2018 Ethiopia, one thing clear is in no measurement it is possible to put the country at state of ‘relative stability’. For that matter, it is important to consider that such missions (‘truth’ seeking) may in certain cases even have a detrimental impact on peace. The argument here is that when a truth commission is

⁸⁴ Michael Ignatieff, “Overview: Articles of Faith” (Index on Censorship, 1996. Vol. 25)

⁸⁵ Brewer, J. D. Peace processes: a sociological approach. (Cambridge: Polity, 2010).

⁸⁶ Susanne n 55

⁸⁷ Mendeloff, n 41.

⁸⁸ See Semir Yusuf, Drivers of ethnic conflict in contemporary Ethiopia, (ISS, Monograph 202, 2019)

held in polarized political contexts marked by strong group identities it would make the commission to overlook the grey zone in which the lines between perpetrators and victims are blurred. In other words, such scenarios might make the search to overlook that there were victims and perpetrators possibly on more than one side. With that, it can potentially inflame pre-existing ethnic prejudices and exacerbate social divisions, thereby threatening the peace and stability of the state.⁸⁹

What actually defines the contemporary Ethiopian state is nothing short of those elements that call for a caution against optimism. The country is characterized by highly polarized political landscape; the society is fragmented and marked by division (which is defined by strong group identities) more than ever.⁹⁰ What is creating violence and mistrust between different ethnic groups is also the result of this polarization.⁹¹ As such, an attempt to seek for a 'truth' which is an elusive concept by itself could further exacerbate social division which is why the article calls for a caution against optimism.

The need to have a minimum level of democracy to sustain public debate cannot be put separately from the above stated fact. It shall be only in the presence of 'relative stability' that one may speak of a democracy that could sustain public debate. Another very crucial issue here would be the fact that 'truth' is not something that we could force it and hence, requires groups' willingness to discuss the past. In the absence of such willingness there would be little chance for a society to confront and address the legacy of its troubled history in a

⁸⁹Subotic J, *Hijacked justice: dealing with the past in the Balkans*. (Cornell University Press, Ithaca, 2009:55)

⁹⁰Addisu Lashitew, *Ethiopia Will Explode if It Doesn't Move Beyond Ethnic-Based Politics* (2019), available at <https://foreignpolicy.com/2019/11/08/ethiopia-will-explode-if-abiy-ahmed-doesnt-move-beyond-ethnic-based-politics/> Retrieved 28 December 2020; see also Merera Gudina, *Party Politics, Political Polarization and the Future of Ethiopian Democracy*, International Conference on African Development (Archives, Paper 108, 2007).

⁹¹ See Alemseged Abbay, *Diversity and Democracy in Ethiopia*. (Journal of East African Studies, (2009). 3 (2): 175-201. See also Merera Gudina (2007), Ibid

comprehensive way and understand what, how and why abuses occurred.⁹² The problem becomes concrete especially in a country where every ethnic group has their own narratives, making it hardly possible to come up with a truth acceptable to all. Meaning, each group's version of the truth happens to be limited to its own victimization, possibly denying the reality of abuses committed against others. The reality on the ground in the Ethiopian context with this regard unfortunately helps little. The interpretation of the Ethiopian past is dominated by widely un-matching discourses⁹³ leaving little room to come in to a common ground.

So, one of the key challenges the Commission faces in envisaging truth and reconciliation would be with regard to history of the past and groups' willingness to discuss the past. While a TJ is envisaged so as to trace gross human rights violations and violence in the effort to acknowledge past abuses, to what moment can the country's social and political conflicts and gross human rights violations be traced remains an unsettled point. For instance, if the formation of the unitary state structure in Ethiopia is a key point of departure as some contemplate, then it may be necessary to consider human rights violations as far back as the late 19th and early part of the 20th century. But given the wide contestation on the interpretation of the country's past and a deeply divided society on history, it will be logical to be skeptical on the possibility of creating a common memory that can be acknowledged by all groups of the society. It goes without saying, therefore, that this deep contestation on the past leaves little room to allow the people of Ethiopia

⁹² Cheryl Lawther, *Truth, Denial and Transition Northern Ireland and the Contested Past*, (Routledge Publication, 2014), See also Cheryl Lawther, 'Let Me Tell You': Transitional Justice, Victimhood and Dealing with a Contested Past, (2020) *Social and Legal Studies*, XX (X)

⁹³ The history of modern Ethiopia was recorded for some as glories of victory and conquest and hence, was all a normal process of 'nation building'; while for some others it is a history of exclusion and marginalization. Some political elites even went further to state that it must be seen as a form of 'internal colonialism'. See Bahru Zewde, *The History of Modern Ethiopia, 1855–1974*. (London: James Carrey, 1991); Teklestadi, M., *AtseYohannesena Ye Ethiopia Andinet* (Amharic, 1982 E.C); Assefa, J., *Oromo Nationalism and Ethiopian Ethnocratic Politics*, (2002) *Horn of Africa*, 20 (5), 11-45; Markakis, J., *Ethiopia: Anatomy of a traditional polity*, (Oxford: Clarendon Press, 1974); C. Clapham, 'Rewriting Ethiopian history', *Annalesd'Éthiopie*, 18, 38 (2002); D. Crummey, 'Ethiopian historiography in the latter half of the twentieth century: a North American perspective', (2008) *Journal of Ethiopian Studies*, 34 (8)

to look the past in terms of a shared suffering and collective responsibility. Reconciliation, on its part, must be accompanied by acknowledgement of the past, the acceptance of responsibility and steps towards (re-) building trust.⁹⁴ But within this difficulty of creating a common memory, restoring the confidence in the society, which is among the prime purpose of the reconciliation commission proclamation, appears improbable.

c. Problem with 'Sequencing' and 'Politicization' of the Commission

Another important but often-neglected consideration of TJ in a given country is the issue of 'sequencing.' In the normal course of things, sequencing describes situations in which states deal on the idea of 'what comes first' or the selection of one instrument over another, or perhaps in tandem with another. Sequencing is a concept borrowed from the democratization literature and a democratic sequentialism considers that it is a mistake to assume that democratization is always a good idea.⁹⁵ The argument is, that when countries are poorly prepared for it, democratization can and often does result in bad outcomes. Thus, it is recommended that certain preconditions especially the rule of law and a well-functioning state should be in place before a society democratizes to prevent such bad results.⁹⁶ When brought to the realm of TJ, the idea is that TJ involves a 'difficult, sensitive, perhaps even agonizing, balancing act between the need for justice to victims and the need for reconciliation and rapid transition to a new future'.⁹⁷ Thus, it actually requires a careful sequential activity in dealing with the past and building peace and reconciliation for the future. A careful sequencing of

⁹⁴ United Nations n 28

⁹⁵ Carothers, Thomas "How Democracies Emerge: The 'Sequencing' Fallacy."(2007) *Journal of Democracy* 18 (1) 12-27

⁹⁶ Ibid

⁹⁷ Azanian Peoples Organization (AZAPO) and Others v The President of the Republic of South Africa, CCT 17/96 Constitutional Court, 25 July 1996 (Chief Justice of South Africa, Justice Mohamed, writing for the South African Constitutional Court)

activities has also been promoted by the former United Nations Secretary General Kofi Anan where he argued that:

*Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile ... settings requires **strategic planning, careful integration and sensible sequencing of activities**. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.*⁹⁸ (Emphasis added)

Subsequently, the important discussion is how and when TJ measures should take place or a conversation as to the design, implementation and administration of TJ should take a central stage. This, however, does not mean that there is an agreed magic step that equally applies in all settings. Nevertheless, a general perception could be held that a sequence of activities ‘each with its own logic’ and the ‘ingredients’ of which are ‘assembled one at a time’ rather than storming everything at a time. While one can safely deduce from the preamble of reconciliation proclamation (proclamation No. 1102 /2018) that it meant to advance all the aspects of TJ in the country,⁹⁹ but, little regard seems to have been given to sequencing of activities in general, and possibly putting its mark on the effectiveness of the measures. This can also be viewed together with the frequent and sweeping changes the country has witnessed in post 2018 and the confusion

⁹⁸ United Nations n 9

⁹⁹ With that regard, a reading can be made to the preamble of the proclamation where it depicts the purpose statement of the reconciliation proclamation so as to advance justice, democracy as well as peace in the country. While a note could be made on the intertwined nature of justice, peace and reconciliation in general, there can be witnessed, however, fuzziness in determining the specific path to take the particular TJ measure in contexts of the needs, expectations and experiences of the perpetrators, victims, survivors and other members of society directly affected by the ‘gross human rights abuses’ as implied in the Proclamation.

and division it has brought among the high government officials as well the ordinary citizens.¹⁰⁰

A discussion on 'what comes first' is also important so as to protect the process from later politicization and de-prioritization. For that matter, TJ justice processes are inherently political in that they involve often-contentious decisions and actions based on power, interest and prudence.¹⁰¹ Politicians may have an interest in a given TJ mechanism; let's say on truth commission, only to delegitimize their opponents or to delegate responsibility for difficult tasks, or to avoid pursuing criminal prosecutions. That is also why due care should be taken from giving rise to the perception that a TJ in a given country is just a political agenda. Such fears can be minimized, if not eliminated, only if there is a chance to generate public ownership of the process, able to foster full transparency or participation. In the absence of proper protection, politicization of the TJ could appear as a proper knock to the success of the measure. Experience from Africa and other parts of the world also shows that for a TJ approach to be successful as well as legitimate in delivering its objectives, the process of its design and implementation has not only to be transparent and independent but also in compliance with the minimum requirements of due process.¹⁰²

¹⁰⁰ An important explanation for same, among others, could be the tension created in the country following the rift between Prime Minister Abiy Ahmed and the then defense Minister, Lemma Megerssa, due to the move taken by the Abiy government to transform Ethiopian Peoples' Revolutionary Front (EPRDF) in to Prosperity Party (PP). The 'sequencing of tasks' was one of the major claims aired by the latter in his interview with VOA (December 2019) as well as the once dominant party under EPRDF, Tigray People's Liberation Front (TPLF), for not buying the EPRDF's move towards PP. See <https://amharic.voanews.com/a/5168431.html>, (17 December 2019), Retrieved on 02 January 2021; See also Lemma Megerssa dismisses Medemer, Prosperity Party (Translation of the full Interview), (November 29, 2019), available at: <https://addisstandard.com/news-alert-lemma-megerssa-dismisses-medemer-prosperity-party/>, Retrieved on 02 January 2021

¹⁰¹ Vinjamuri, Leslie and Snyder, Jack L., *Law and Politics in Transitional Justice*, (May 2015). Annual Review of Political Science, 18 (1) 303-327, available at SSRN: <https://ssrn.com/abstract=2605446> Retrieved 26 December 2020

¹⁰² In line with that, Freeman notes that, such commissions tend to enjoy much public and international support where its members are selected via a wider process of consultation aimed at

In this regard, selecting the members of the reconciliation commission in the Ethiopian case has proved controversial,¹⁰³ with the process can be put as non-transparent and rushed, giving way to perceptions of political manipulation and possible illegitimacy. There was no public participation in the development of the commission's enabling law, nor in the nomination and appointment of the commission's members. As a result, it has left huge assignment on the commission to win the trust of Ethiopia's diverse social and political groups. The Ethiopian government also favored direct selection process than a more transparent and participatory process of selection.¹⁰⁴ Even in an environment with little debate on the integrity of the selected commissioners, it is important to take note that the political nature of the selection process by itself might impact the commission's effectiveness and legitimacy.

Furthermore, as can be read from the preamble as well as article 5 of the 'reconciliation commission' proclamation, the commission was established with very broad objectives including achieving lasting peace, justice, national unity and reconciliation among Ethiopian Peoples. This indicates the absence of clarity on whether the focus of TJ in Ethiopia's case is on perpetrators of violations, and hence punishment; or the political system and hence building a system of governance based on constitutionalism, rule of law and respect of the rights of all; or on victims and hence recognition of the injustice they suffered and healing; or combinations of them. It is important to take note here that, while seeking the truth, as discussed above, is daunting enough, seeking to go further and aim to reconcile

securing fair balance in the representations of political constituencies, ethnic or religious groups or gender. Furthermore, Hayner advises on involving the public in the form of public debate and discussion in crafting the terms of reference for the truth commission as well as in selecting the commission's members. See Freeman M., *Truth Commissions and Procedural Fairness* (Cambridge University Press: New York, 2006); Hayner PB, *Fifteen-Truth Commissions-1974 to 1994: A Comparative Study*. (1994) *Human Rights Quarterly* 16 (4)

¹⁰³ See Ethiopia Press Agency, Scholars raise concern on some members of reconciliation commission, (February 17, 2019), available at <https://www.press.et/english/?p=2628#>, Retrieved 02 January 2021

¹⁰⁴ Proc. No. 1102/2018, n 69, Article 4

like adding a task of immeasurably greater complexity. Consequently, reconciliation is by nature inter-subjective and multiple as well as a very long and complex process.¹⁰⁵ Furthermore, it is important to note that such commission needs to be formed on the basis of extensive public consultations and often work best when their activities include significant public outreach and engagement.¹⁰⁶ The question, therefore, remains on how far this was done with regard to the establishment of the reconciliation commission in the Ethiopian case. Within this complexity and given a very broad objective, the commission assumed, the quest for a balancing act between the need for justice to victims of past abuses and the need for reconciliation and rapid transition to a new future appears improbable. Therefore, 'sequencing' appears relevant as it, for instance, allows amnesties to be granted to facilitate peace agreements or democratic transitions without abandoning the idea of justice.

Concluding Remark

TJ as an approach to deal with the past in the aftermath of violent conflict or authoritarian regimes has gained a global significance. It is becoming common to see countries promoting a TJ mechanism in their vow towards democracy, preventing conflict and building sustainable peace. However, TJ should not happen just as routine and standard practice. While it can be argued that TJ approaches are based on a fundamental belief in universal human rights, any TJ mechanism, however, need to consider realities on the ground in a given country. At the same time, it appears essential to identify a suitable starting point (sometimes there may be sound reasons not to create one or to delay its establishment) which is dependent

¹⁰⁵ With this regard, Lederach has argued that reconciliation requires the presence of four ingredients: truth, mercy (or forgiveness), justice, and peace. If we have to look in to the "peace" element, for instance, Lederach intends the notion of "positive peace" as an important ingredient for reconciliation. The argument, therefore, is that a peace beyond the mere absence of direct violence but also of structural violence is one of the important ingredients for reconciliation to take effect. In other words, in the absence of same the effectiveness of an attempt of reconciliation in a given country would be futile. See Lederach, J. P., *Building peace: Sustainable reconciliation in divided societies*, (Washington, DC: United States Institute of Peace, 1997).

¹⁰⁶ United Nations (2010), n 28

on the specific situation in a society. In the end, each society, should indeed, must choose its own path basing on specific contexts on the ground. The post-2018 Ethiopian case should be viewed with same note. When the Ethiopian government decided to establish a reconciliation commission in February 2019, a question not to miss is how far the TJ measure was free from mere instinct and bases on clear understanding of such endeavors. This is because of certain options that are more viable than others depending on the specific local contexts in the country. If justice has to be sought to the multi-layered realities of the Ethiopian case, context analyses need to be done. Not only that there need to determine different groups' needs and positions in the country, a chosen TJ measure needs consideration and alignment with the specific contexts for its palpability. That would be possible through assessment of the various realities on the ground as possible. This applies to the capturing and interpretation of the complex and interdependent factors at play in the country's pre and post-2018. In this regard, this article argued that the TJ measures in the country lacked detailed context analysis in light of 'the post-2018 regime nature' as well as 'the contested past'. It also implicated issues like lack of focus to 'sequencing' and possible 'politicization' of the TJ mechanism as having all the potential to impact the viability/effectiveness of the process.

Therefore, if the TJ measure in the country has to end up with a success story, first, conceptualizing it in light of the post-2018 regime nature in the country appears imperative. This requires acknowledging the unique nature of the post-2018 political change in the country and devising a system where social and political compliance to the measure can be best achieved. Second, it is important to make a rational judgment of realities on the ground and caution against optimism. This necessitates setting the ground where public debate can be sustained with a minimum level of democracy in the country. This in turn urges to look for the right, if not the perfect, opportunity by ensuring 'relative stability' in the country. Third, careful sequencing of tasks and rendering a mechanism that potentially

minimizes the politicization of the process also appear vital. The later especially is impending given the challenge the democratic transformation process is already facing from different actors in the country's political landscape.

Non-derogable Rights during State of Emergency: Evaluation of the Ethiopian Legal Framework in Light of International Standards

Marew Abebe Salemot*

Abstract

Human rights are entitlements everyone enjoys merely for being human. These rights are inter alia, inalienable, irreducible and inherent in every human being who lives in society by its nature. Yet, the claims of the individual members of the society to exercise these inherent rights cannot be treated in isolation for human kind is a social being. Rather, it is conceived in the light of the network of rights and duties within the society at large, and thus, there are also potential conflicts between the claims of individuals and society at large. This requires the need to have, at least, temporal suspension on fundamental human rights and freedoms for the sake of social interests, the claims of other members of the society, and to make the exercise of such claims (rights) meaningful. However, there are certain human rights (non-derogable) that may never be suspended or restricted even during a state of emergency. This article deals with how the Ethiopian Constitution addresses these non-derogable human rights during a state of emergency. Accordingly, the only non-derogable [human] rights under the Ethiopian Constitution are the prohibition against inhuman treatment (Art.18), and the rights to equality (Art.25). The Ethiopian constitutional listing of non-derogable rights is far less than what the core international human rights instruments enumerate. Remarkably, the Ethiopian Constitution includes a set of rights–nomenclature of the state and self-determination– as non-derogable rights that are not recognized as non-derogable under the core international human right instruments.

Keywords: Human rights, State of emergency, Non-derogable rights, Ethiopian Constitution

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1. Introduction

Human right is a concept derived from the doctrine of natural rights, which holds that individuals, by virtue of their humanity, possess fundamental rights beyond those prescribed by law.¹ Thus, the natural law approach asserts that human rights emanate from the fact of being human and are, therefore, inherent in individuals² whereas legal positivists do not agree on the view that human rights are rooted in the natural law and natural rights.³ Currently, it is widely accepted that natural law played a dominant part in the development of the notion of human rights.

Several scholars have developed alternative definitions of human rights. For example, Jacques Maritain, in his book “The Right of Man”, stated that the human person possesses rights because of the fact that is a person a whole master of himself and of its acts, and which consequently is not merely a means to an end.⁴ Henry defined human rights as every one’s minimum reasonable demands up on the rest of humanity....enjoyment of them is essential to the enjoyment of all other rights.⁵ The reason for this variance of the definition of human rights in modern times seems to be the ideological,⁶ moral, economic, legal and other differences existing among nations and individuals.

¹George, W. *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, (Transnational Publishers 2003) <<https://www.semanticscholar.org/paper/Human-Rights-in-Africa%3A-Enhancing-Human-Rights-the-Mugwanya/096b8426160276be9c20baa8aae77955970e2c45>> accessed 27 July 2021.

²Paul, S. *The International Law Human Rights, Human Rights Committee* (Clarendon Press · Oxford 1983) <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1148&context=yjil>> accessed 02 January 2021.

³ Ibid

⁴Jacques M., *The Man and the State*, (CUA Press, 1998) <https://books.google.com.et/books?id=7Pv_GF8ofGwC&printsec=frontcover&source=gbg_ge_summary_r&cad=0#v=onepage&q&f=false> accessed 12 February 2021.

⁵Henry, S. *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (1980).

⁶ Indeed, a number of theories can be identified on the nature of rights. Prominent among these are the will theory, the interest theory, the claims theory, the entitlement theory and entitlement- plus

Despite some divergence of definitions on the nature of human rights, there are commonly accepted concepts pertaining to human rights. Currently, the notion that human rights are grounded in natural law has got significance. Thus, human rights are, by definition, rights in the strict sense of the term, entitlements that one has simply for being human. The term human rights points to a source of humanity, human nature, being a person or a human. Thus, apparently human rights have humanity or human nature as their source.

Although everyone has the right to enjoy human rights, there may be conditions that necessitate suspending the enjoyment of such (derogable) rights temporarily so as to protect the interests of the public, the moral fabrics of the society and the state itself. However, there are fundamental human rights, under international human rights law that cannot be suspended even during a state of emergency and these rights are non-derogable rights. Signatory states (including Ethiopia) to these international legal instruments are also obliged to ensure the protection of fundamental rights and freedoms.

The current Constitution of Ethiopia, promulgated in the year 1995, contains *inter alia* a bill of rights that provides for the protection and promotion of fundamental rights.⁷ In addition to the Constitution, Ethiopia has ratified different regional and international human right instruments including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (hereafter the African Charter) and other standards.⁸ The Ethiopian

theory. For summary and the details of their difference from one another, see James W. Nickel, *Making Sense of Human Rights* (2nd ed, Oxford: Blackwell publishing 2006).

⁷ The Constitution of the Federal Democratic Republic of Ethiopia (Ethiopia Constitution) of 1995. See Ethiopian Constitution from Art.14 —28 for Human Rights and from Art. 29-44 for Democratic Rights. <https://www.wipo.int/edocs/lexdocs/laws/en/et/et007en.pdf>.

⁸ Ethiopia has signed up to six of the core international human rights instruments. These are the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural

Constitution, under Article 9, recognizes all these international agreements ratified by Ethiopia to be an integral part of the law of the land. The Ethiopian Constitution, under Article 13, also reaffirms that fundamental rights and freedoms of the Constitution shall be interpreted in a manner conforming to the principles of such international instruments.

The constitutional guarantee of human rights and fundamental freedoms, however, are not without derogations. Such derogations have been provided in the constitutional provisions due to various considerations such as protection of rights, human dignity, national security, public health and protection of democratic values on which the state is founded.⁹ Derogations to fundamental human rights are not made arbitrarily but should be justifiable within the established grounds and there are fundamental rights—*non-derogable human rights*— that cannot be suspended even during a state of emergency and remain non-derogable. The crux of this research is to evaluate the Ethiopian constitutional protection of non-derogable human rights and compare its (in) compatibility in light of the international standards.

2. Protection of Non-Derogable Rights under the International and Regional Legal Frameworks

The 1948 Universal Declaration of Human Rights (UDHR) is the first international instrument that affirms the inviolable, inalienable and indivisible nature of human rights. The UDHR reaffirms that these rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations. It further states, “nothing in the declaration may be interpreted as implying for any state,

Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Convention on the Rights of the Child.

⁹ The International Human Rights Instruments, HRI/CORE/ETH/2008, Core Document Forming the Initial Part of the Reports of States Parties Ethiopia <<https://www.refworld.org/docid/4ad57afd0.html>> accessed 12 February 2021.

group or person any right to engage in any activity or perform any act aimed at the destruction of any the rights and freedoms set forth herein” (UDHR, Art. 29(3) and 30). The UDHR does not have any such derogation clause aiming to permanently suspend those fundamental human rights but UDHR under Article 29(2) has a general limitation provisions which unequivocally stipulate that human rights can be limited on the ground of safeguarding due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. However, UDHR, under its Article 29(3) and 30, specifically imposed duties on states to observe the extent of limitations, which are provided in the covenant and limit the power of a state from abusing the extent of limitations so as to destroy any of the rights and freedoms recognized in the instrument.

Since the adoption of the UDHR, several global and regional human right instruments have been devised and incorporated non-derogative clauses in their provisions. One of the commonly cited legal frameworks,¹⁰ which include non-derogable provisions, is ICCPR. ICCPR incorporated derogation clause under Art 4 and prohibits derogation from Art 6 (right to life), Art 7 (prohibition of torture), Art 8 (prohibition of slavery and servitude), Art 11 (prohibition of imprisonment for inability to fulfill contractual obligation), Art 15 (prohibition of retrospective criminal law), Art 16 (right to be recognized as a person), and Art 18 (freedom of thought, conscience and religion).

The UN Human Rights Committee, in its General Comment Number 29, identified additional non-derogable provisions, including: Article 2(1) (non-discrimination);

¹⁰ Actually, the first (regional) legal document that included non-derogable human rights in its provision is the European Convention on Human Rights. Adopted in 1950, the European Convention on Human Rights enumerates exclusively non-derogable rights. Article 15 of the Convention prohibits derogation from Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 7 (prohibition of retrospective criminal law).

Article 3 (the right to an effective remedy); Article 14 (right to fair trial); and the right to take proceedings before a court to challenge the lawfulness of detention (Article 9(4) on *habeas corpus*). Unlike the previous international human right legal frameworks, the African Charter does not have any derogation clause at all.¹¹ Regarding the implication of the absence of derogation clauses under the African Charter, Heyns argues that the absence of a derogation clause is one of the weaknesses of the charter because it contains no restraining mechanism if states disregard it.¹² However, Abdi Jibril argues that the omission of the derogation clause under the African Charter is a deliberate positive move for the better protection and promotion of human rights and is neither a mistake nor a defect.¹³

3. The Principles Governing State of Emergency

Derogation of human rights is the common feature of a state of emergency. The above international and regional human right instruments, however, do not provide a *carte blanche* to state's parties. These treaties (with slight variations) lay down the following conditions and requirements for a valid state of emergency and any government's resort to emergency powers must ascertain, among other, the existence of an exceptional threat to the security of the state or its people. As a governing principle, there should not be incompatibility of all emergency measures

¹¹ Ouguergouz, F. *The African Charter on Human and Peoples' Rights A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) <<https://brill.com/view/title/8983?language=en>> accessed 22 August 2020.

¹² C Heyns, *The African regional human rights system: In need of reform?* (2001)155, (1) AFRICAN HUMAN RIGHTS LAW JOURNAL <https://www.ahrlj.up.ac.za/images/ahrlj/2001/ahrlj_vol1_no2_2001_shadrack_gutto.pdf>accessed 23

Septemeber 2020. See also L Sermet, *The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion*, (2007)7 African Human Rights Law Journal 142

¹³ Abdi Jibril, *Derogation from Constitutional Rights and its Implication under the African Charter on Human and Peoples' Rights* (2013) 17 Law Democracy and Development 78 <<https://law.uwc.ac.za/all-publications/ldd-items/derogation-from-constitutional-rights-and-its-implication-under-the-african-charter-on-human-and-peoples-rights-pg-78> > accessed 27 February 2021.

with the state's other international obligations and that the emergency measures should not be used in a discriminatory manner. There will not also be derogation from fundamental rights, listed as non-derogable rights under Article 4 of the ICCPR. The other principle is that the emergency measure must be proportional to the threat posed. Essentially, proportionality requires a court to ultimately determine whether a measure of interference which is aimed at promoting a legitimate public policy is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals.¹⁴ The principle of strict necessity is one of the basic requirements that any state party intending to invoke the right to derogate from human rights has to fulfill.¹⁵ Necessity requires a balancing act to be made of the rights of the individual on the one hand and the state or the community interests on the other. In order to make that assessment, the government should justify its actions by making them establish that interference is necessary in a democratic society. International mortification is also a governing principle that a derogating state must notify other state parties of the derogations through the depositary of the instrument, the U.N Secretary-General in the case of ICCPR.¹⁶ This requirement is useful to ensure international supervision over derogation measures by other state parties or treaty monitoring organs.

4. State of Emergency as a Ground for Derogation of Human Rights under the Ethiopian Constitution

Emergency situations, which cannot be brought under control using the regular law enforcement mechanism, might happen either in the whole country or a particular

¹⁴ In General Comment 31, the Human Rights Committee has affirmed the notion of proportionality to the application and implementation of the ICCPR, adding that, "In no case may the limitations be applied or invoked in a manner that would impair the essence of a Covenant right."

¹⁵ Art. 4 of ICCPR, Art. 15 of ECHR and Art.27 of the American Convention of Human Rights.

¹⁶ ICCPR Art.4

locality. Such emergency situations require the action of the state in question to declare a state of emergency. Under such circumstances, the state is excused from complying with some of its constitutional and international provisions that are necessary to avert the imminent danger the country faces.¹⁷ The Paris Minimum Standards of Human Rights¹⁸ defines ‘state of emergency’ as an exceptional situation of crisis or public danger, actual, or imminent, which affects the whole population of the area to which the declaration applies and constitutes threat to the organized life of the community. With the notable exception of the African Charter, the ICCPR recognizes the right of states to suspend human rights’ norms during the state of emergency that threatens the life of the nation.¹⁹

Then, there comes the duty of a state to weigh between an individual’s rights to exercise his or her fundamental right and social (national) interest at large because the interest of citizens cannot be independent and self-sufficient apart from the state. In a condition where the state's foundation is shaken and its very existence is threatened, there is a need to declare a state of emergency and derogate most rights until the normalization of the situation.²⁰

The conditions that can rationalize derogations– as per the Ethiopian Constitution under Article 93– are breakdown of law and order, which cannot be controlled by the regular law enforcement agencies, incidence of an external invasion or the occurrence of a natural disaster or an epidemic. The Ethiopian Constitution gives the Council of Ministers the power to decree a state of emergency should external

¹⁷Joan, H. *Derogation from Human Rights Treaties in Public Emergencies* (1981).

¹⁸ The Paris Minimum Standards of Human Rights Norms in a state of Emergency which is meant to help States and human rights monitoring bodies to better appreciate the meaning, scope, and effects of states of emergency on human rights obligations of states.

¹⁹Nicolas, H, *State of Emergency in the Post-Apartheid South Africa* (1990) 21 Colum. Hum. RTS. L Rev 139- 142.

²⁰ Scott, P. *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics* (2013) 34 MICH. J. INTL L. 491 <<https://repository.law.umich.edu/mjil/vol34/iss3/1/>> accessed 09 January 2021.

invasion, breakdown of law and order, which endangers the constitutional order, and which cannot be controlled by regular law enforcement agencies and personnel; and natural disasters, or an epidemic occurs.²¹ While the Ethiopian Constitution refers to ‘breakdown of law and order which endangers the constitutional order’ to justify declaring a state of emergency, the Constitution does not demonstrate what these vague phrases mean. As a result, the Council of Ministers which has the power to declare a state of emergency has used this ground as a pretext to suspend fundamental rights ‘to the extent necessary’ to avert the conditions.²² Being a subjective interpretation and left for a political organ, the Council of Ministers has so far manipulated it to decide on its whims and protected the existing regimes at the expense of basic human rights. In practice, a breakdown of law and order could include public disturbance or violence caused by riots or rebellions.²³

During a state of emergency, the Ethiopian Constitution under Art 93 authorizes the Council of Ministers to suspend most fundamental human rights (including the right to life) under the guise of ‘*the extent necessary*’ to avert the situation. Only few rights, less than what ICCPR and other international legal instruments decree, remain non-derogable during a state of emergency. The exclusive listing of non-derogable rights during a state of emergency under Article 93 of the Ethiopian Constitution are: Article 1 which describes the nomenclature of the state ‘the Federal Democratic Republic of Ethiopia’; Article 18 which prohibits inhumane

²¹ The Council of Ministers has the power to decree a state of emergency. The decree should be presented to the House of Peoples’ Representatives within forty-eight hours if it is in session and within fifteen days if it is not in session. After consideration, the Council of Ministers’ decree has to be accepted by a two third majority of the House of Peoples’ Representatives to remain in effect through a State of Emergency Proclamation, see Ethiopian Constitution, Art.93.

²² Ethiopia Constitution Art 93(3)(C) states that in the exercise of its emergency powers the Council of Ministers can suspend or limit all fundamental rights except those rights provided under Articles 1,18,25 and sub-articles land of Article 39 of this Constitution.

²³Abdi, Jibril, ‘*Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case*’ (2013) Haramaya Law Review 1(2) <<https://www.ajol.info/index.php/hlr/article/view/98577>> accessed 10 December 2020.

treatment; Article 25 which guarantees equality of everyone before the law and equal protection of the law, and Article 39 which guarantee every Nation, Nationality and People in Ethiopia to have an unconditional right to self-determination, including the right to secession.

Although the ICCPR under Article 4(3) obliges state parties (including Ethiopia) to give international notification and about its legality, the Ethiopian Constitution does not have any provision that puts the responsibility to do so. When it comes to the Ethiopian practical experience, the requirement of official proclamation and publicity was partially fulfilled. The 2016 State of Emergency Proclamation and Regulation had been published on the official Federal Negarit Gazette²⁴ but not the 2018 State of Emergency Proclamation.²⁵ Nevertheless, the approval Proclamation of the 2018 State of Emergency was published in the Federal Negarit Gazette.²⁶ However, all the publication on the official Negarit Gazette came days after the emergency decree took effect. For example, the 2016 state of emergency proclamation was published on the Negart Gazette on 25th October 2016 while its effective date started on 8th October, 2016. Ethiopia also did not give a letter of notification to the UN when it derogated even fundamental rights including freedom of speech, movement, the right to peaceful assembly and demonstration during the last 2016 and 2018 state of emergencies.²⁷ Article 14(5) of State of Emergency Proclamation No.1/2016 required the Prime Minister to declare the promulgation of the State of Emergency Proclamations through mass media and it was practically done accordingly.²⁸

²⁴ Proclamation No. 1/2016; Regulation 391/2016.

²⁵ Proclamation No.1/2016; Ratification Proclamation No. 984/2016.

²⁶ Proclamation No.1083/2018

²⁷United Nations Treaty Collection (2018).

<http://www.treaties.un.org/pages/showDetails.aspx?objid=0800000280004bf5>

²⁸ Proclamation No.1/2016, art. 14(5)

The principle of legality requires that laws shall be available and accessible to the public. Apart from reports in the media, the exact content of the State of Emergency Proclamation was not immediately officially available to the public, in violation of this principle of legality. The failure to make the text publicly available also fails to meet requirements of national law, specifically, the requirement that all legal proclamations be published in Ethiopia's Gazette.

The fact that the Constitution under Article 93(5) empowers the House of Peoples' Representatives (Ethiopia's lower House), while approving the declared state of emergency to establish a State of Emergency Inquiry Board having seven persons from its members and legal experts, there had practically been a 'State of Emergency Command Post' established. It gives sweeping powers to the Command Post such as to arrest suspects without a court warrant; determine the measures to be taken on perpetrators of prohibited acts; issue directives which further restrict human rights and freedoms; and put arrested individuals into the so-called 'rehabilitation centers'.²⁹ Of course, the legal establishment of such a State of Emergency Command Post is unconstitutional. The detailed establishment benchmarks on the neutrality and integrity of the members of the Inquiry Board, and their work procedure is neither indicated in the Constitution nor referred as a matter to be determined by subsidiary laws.³⁰ The Constitution is also silent on the proportion of the Inquiry Board members to be chosen from the members of the House of Peoples' Representatives and legal experts.

²⁹See Proclamation No. 1/2016, art 4; Proclamation 2/2018, art 6; Regulation No. 391/2016, art 3; Directive No.1 for the Execution of the State of Emergency Issued by the State of Emergency Command Post, art 31; Proclamation 3/2020, a State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact 2(6).

³⁰Yibeltal Assefa, *Upholding International Human Rights Obligations during a State of Emergency: An Appraisal of the Ethiopian Experience* (2019) Addis Ababa University, MA thesis unpublished <<http://213.55.95.56/bitstream/handle/123456789/16609/Yibeltal%20Assefa%20LLM%20Thesis.pdf?sequence=1&isAllowed=y>> accessed 20 October 2020.

The Constitution states that a state of emergency decreed by the Council of Ministers, if approved by the two-thirds majority vote of the House of Peoples' Representatives, can remain in effect up to six months and there is a possibility that the state of emergency will be renewed every four months successively. The wording of 'renewing successively' may give the Council of ministers, the political body, to have unlimited power to extend the state of emergency eventually paving the way for entrenched emergencies. This is because the Ethiopian Constitution neither puts a maximum limit on the number of renewals of an emergency decree nor mentions circumstances to extend emergency declarations.³¹ The extensions of state of emergency, according to the Paris Standards, should be subjected to a priori legislative approval. However, the 2016 state of emergency declared in Ethiopia – that had been in force for ten months – was extended without prior legislative approval and did not meet majority support of the parliament.³²

In terms of proportionality, both in 2016 and 2018, the government violated the requirement of proportionality by declaring a nationwide state of emergency while its causes took place in some parts of the country. The 2016 state of emergency proclamation provided contradictory statements by stating, under its preamble provision, that "illegal activities [are] committed in some parts of the country" but

³¹ According to Article 93(3) of the Ethiopia Constitution 'a state of emergency decreed by the Council of Ministers, if approved by the House of Peoples' Representatives, can remain in effect up to six months. The House of Peoples' Representatives may, by a two-thirds majority vote, allow the state of emergency proclamation to be renewed every four months successively'.

³² Ethiopian Human Rights Project (EHRP), *The State of Emergency (2016-2017): Its Cause and Impact*, (2018); Human Rights Council (HRCO), 142nd Special Report: Human Rights Violations committed during the State of Emergency in Ethiopia, (2017), [hereinafter HRCO, Special Report 142], (available at https://www.uwyo.edu/law/_files/docs/international%20human%20rights/reports/ethiopia-human-rights-report-2-july18.pdf), (accessed on June 12, 2020); Human Rights Watch, *Legal Analysis of Ethiopia's State of Emergency*, (2016), <http://www.hrw.org/report/2016>, (accessed July 30, 2020); Amnesty International, *Commentary on Ethiopian State of Emergency*, (2018) available at <https://www.amnesty.org/download/Documents/AFR2579822018ENGLISH.PDF> (accessed on May 3, 2020).

under Article 3(1) it states that “[Emergency] Proclamation shall be applicable in all parts of the country.”³³

Thus, State of Emergency Provisions under the Ethiopian Constitution fail to meet the requirements of legality, notification, necessity and proportionality set out in the ICCPR and the country has failed to uphold some of the fundamental requirements while exercising its emergency powers. Generally, unless the Ethiopian Constitution is compatible with the international legal instruments when it comes to state of emergency, the government may violate even those fundamental rights under the guise of state of emergency. This is because there is a plethora of evidence that shows the direct correlation between state of emergency and gross human rights violations.

5. Non-Derogable Human Rights under the Ethiopian Constitution

The Ethiopian Constitution under Article 9 accepts all international agreements ratified as an integral part of the law of the land. Hence, those non-derogable human rights under ICCPR are supposed to be non-derogable under the Ethiopian Constitution as well. Hence, the Ethiopian Constitution recognizes the following rights as non-derogable rights during a state of emergency: the right to equality and prohibition of inhuman treatment, the nomenclature of the state and self-determination. The Ethiopian Constitution does not recognize the generally recognized non-derogable human rights in international instruments of human rights which include the right to life, freedom of religion, thought and conscience, the non-imprisonment for contractual obligation, non-retroactivity of a criminal law and recognition as a person before the law as non-derogable rights. Despite this, the Constitution under Article 93 adds to the list a set of rights that are not non-derogable embodied in the ICCPR: the nomenclature of the state and self-

³³See the Preambular Provision of Proclamation No.1/2016 & art 3(1).

determination. But the very right to life³⁴ with its pre-eminence nature having a value of infusing the entirety of other human rights is not provided in the list of non-derogable rights under the Ethiopian Constitution. This is in violation of ICCPR as Ethiopia is a state party to it and the Ethiopian Constitution under Article 13(2) states that the bill of rights will be interpreted in a manner conforming to the principles of international instruments adopted by Ethiopia.³⁵

The Human Rights Committee, whenever legal inconsistencies exist between the international legal frameworks and states; require such states to change even their constitutions when the latter allows derogation from rights that are listed under Article 4 of the ICCPR as non-derogable. For example, the Constitution of Tanzania expressly allows derogation from the right to life.³⁶ In its concluding observation on Tanzania's report, the Human Rights Committee observed that "[c]oncern is expressed over the constitutional provisions allowing derogations from the right to life, which are not compatible with Article 4 of the Covenant. In this regard, changes are clearly necessary."³⁷ This is because the ICCPR in Article 4(1) and 5(2) expressly prohibits derogations, which are inconsistent with other obligations under international law. Thus, it is unjustifiably making the right to life as a derogable right under the Ethiopian Constitution in violation of its commitment to the international and regional human rights legal instruments. This is because it is, of course, self-evident that without the right to life, it is not possible to enjoy other human rights.

³⁴ The right to life is fundamental and non-derogable. The right to life is given particular pre-eminence in international law because all other rights are rendered meaningless in its absence. The pre-eminence nature of the right to life is recognised as a value which then infuses the entirety of human rights. See Building Human Rights Into Practice A Training Manual on International Human Rights Law The Bingham Centre for the Rule of Law London, UK, February 2012.

³⁵ Ethiopian Constitution under Article 13(2)

³⁶ Constitution of the United Republic Of Tanzania (as amended), passed on 25 April 1977, Art. 31(1).

³⁷ *Concluding Observation ICCPR*, United Republic of Tanzania, A/48/40 vol. I (1993) 35 at para 171.

Another right that should have been non-derogable even during a state of emergency is child rights. Since the Convention on the Rights of the Child (CRC) to which Ethiopia is a state party³⁸ has no derogation clause, the state shall accord special protection to children and all actions (including state of emergency) undertaken by the state shall be to the best interest of the child. Accordingly, the [right of Children] under Art 36 of the Ethiopian Constitution should have been non-derogable status but one cannot, in fact, find the right of children under the lists of non-derogable rights from the Ethiopian Constitution.

Concerning non-derogable rights, one can easily read two self-contradictory constitutional provisions from the Ethiopian Constitution i.e. Art 13 and 93. While the former accepts all non-derogable rights set under ICCPR, the latter restricts these rights only to four non-derogable rights. This section examines these non-derogable rights recognized by the Ethiopian Constitution and the justifications provided.

One of the four non-derogable rights listed under Article 1 of the Ethiopian Constitution is the nomenclature of the state ‘the Federal Democratic Republic of Ethiopia’. Under the nomenclature of the state, the Ethiopian Constitution declares the type of ‘state’ to be established ‘a federal and democratic Republic of Ethiopia’. This implies that a state of emergency will not, in any way, affect the federal structure of Ethiopia. Question will arise if, at all, this is human right. The Ethiopian Constitution, unlike ICCPR and the African Charter, remarkably deviates from the generally agreed legal frameworks and allows each ethnic group to exercise their self-determination. But one may still ask how the group rights of ‘self-determination, including secession’ can be achieved during a state of

³⁸ Ethiopia ratified the Convention on the Rights of the Child (CRC) on 14 May 1991. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed on 13 September 2020).

emergency as far as fundamental rights including the right to movement is restricted.

The second non-derogable right, according to the Ethiopian Constitution, is ‘the prohibition of inhuman treatment’. The Constitution under Article 18 provides that everyone has the right to protection against cruel, inhuman or degrading treatment of punishment. The Constitution, under Article 18, provides for the prohibition of slavery or servitude including forced or compulsory labor. Unlike the ICCPR,³⁹ prohibition of trafficking is a non-derogable right under the Ethiopian Constitution. With regard to forced labor, though it is listed under Article 18, service exacted during an emergency or calamity threatening the life or wellbeing of the community falls under the exception of forced labor. The ICCPR, similarly, provides for the prohibition of forced labor except for certain practices.

The third non-derogable right, unlike any other regional and international human rights frameworks, designated under the Ethiopian Constitution is the right to ‘self-determination, including secession’. The Ethiopian Constitution under Article 39 allows each nation, nationality and people to have the right to self-determination. The Constitution further goes to give unconditional rights to these different groups to exercise the right of secession.⁴⁰ Although the right to self-determination is provided under the ICCPR and other human rights instruments, the unconditional right to secede is not incorporated in the conventions. The African Charter under Article 20 allows the right to self-determination; which states that all people have the inalienable and unquestionable right to self-determination. Although self-determination is not included in the list of non-derogation rights under the ICCPR

³⁹ In the drafting process of the ICCPR it was suggested that trafficking be included in the definition of slavery but was suggested that it should only deal with slave trade.

⁴⁰ Haile believes that the right to self-determination until secession is copied from the Soviet Union which eventually disintegrated. Minasse Haile, 'comparing human rights in two Ethiopian constitutions: The Emperor's and the Republic's';--Cucullus non facit monachum'13 (2005) Cardozo Journal of International and Comparative law.

and the African Charter, the Ethiopian Constitution listed [self-determination including secession] as one of the non-derogable rights during a state of emergency. This is due to Ethiopia, as a federal state, proclaims self-determination including secession as the two important pillars of the current Constitution. States can give a wider protection of rights by expanding the list of absolute rights in their respective constitutions and the inclusion of self-determination and secession under the Ethiopian Constitution as non-derogable is commendable. Of course, exercising secession is practically impossible during a state of emergency while other rights, including the right to life and movement, are derogated by the Ethiopian Constitution. However, it can be understood as the framers of the Ethiopian Constitution tried to signify the place and position of Art 39 by making it non-derogable, even knowing the exercise might be difficult in times of emergency.

The fourth and the last non-derogable right under the Ethiopian Constitution is the ‘the right to equality’. The Ethiopian Constitution under Article 25 affirms equality of all persons before the law and equal protection of the law without any discrimination based on race, nation, nationality or other social origin color or sex, language, religion, political or other opinion, property, birth or status. The African Charter under Article 3 states that everyone is equal before the law and is entitled to equal protection of the law.⁴¹ Despite the fact that equality is not included as one of the non-derogable rights under the ICCPR, the United Nations Human Rights Committee (UNHRC) has opined that there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstance.⁴² In line to this, the Ethiopian Constitution to make the right to equality as non-derogable right is appreciable.

⁴¹African Charter Art. 3, which provide the right against discrimination, by providing a general equality requirement.

⁴² Human Rights Committee General Comment (1982) 8(16) Article 9 adopted at its 378th meeting sixteen sessions.

Generally, the above analysis depicts that the government, when declaring state of emergency, always disregards Article 9 and 13 of the Ethiopian Constitution, which oblige all international agreements ratified by Ethiopia to be an integral part of the law of the land and the fundamental rights to be interpreted in a manner conforming to the principles of UDHR and ICCPR. The reliance of Ethiopia on its whims and domestic provisions to derogate human rights contravenes international human rights norms. The government uses the state of emergency as a pretext to silence dissent and evading legal responsibility for doing so. As a result, the government violates even those fundamental rights under the guise of a state of emergency. Of course, the government officially admitted its own wrongdoings (mainly its rampant human right abuses) during the state of emergency against the people over the years and offered a public apology.⁴³ Human Rights Watch also rightly noted that the state of emergency directive in Ethiopia imposes sweeping and vaguely worded restrictions on basic rights beyond what is permitted by international law.⁴⁴ Thus, the Ethiopian Constitution fails to comply with ICCPR's norms when it comes to the non-derogable human rights during a state of emergency.

⁴³ Prime Minister Abiy Ahmed, Inaugural Address to the HoPR, (Apr. 2, 2018) *available at* <https://www.opride.com/2018/04/03/english-partial-transcript-of-ethiopian-prime-minister-abiy-ahmeds-inaugural-address/> (accessed on May 13, 2020.)

⁴⁴ Ethiopian Human Rights Project (EHRP), *The State of Emergency (2016-2017): Its Cause and Impact*, (2018); Human Rights Council (HRCO), *142nd Special Report: Human Rights Violations committed during the State of Emergency in Ethiopia*, (2017), [hereinafter HRCO, Special Report 142], (available at https://www.uwyo.edu/law/_files/docs/international%20human%20rights/reports/ethiopia-human-rights-report-2-july18.pdf), (accessed on June 12, 2020); Human Rights Watch, *Legal Analysis of Ethiopia's State of Emergency*, (2016), <http://www.hrw.org/report/2016>, (accessed Aug 30, 2020); Amnesty International, *Commentary on Ethiopian State of Emergency*, (2018) *available at* <https://www.amnesty.org/download/Documents/AFR2579822018ENGLISH.PDF> (accessed on March 3, 2020).

Conclusion

The Ethiopian Constitution accepts all international agreements ratified as an integral part of the law of the land but the Constitution does not incorporate the most generally recognized non-derogable rights as *non-derogable rights*. The Ethiopian Constitutional listing of non-derogable rights is far less than what the core international human rights instruments enumerate under Art 4. Under the Ethiopian Constitution, the right to life is recognition as a person before the law and the non-imprisonment for contractual obligation is absent from the set of non-derogable rights. The Ethiopian Constitution recognizes only two human rights as non-derogable rights during a state of emergency: the right to equality and prohibition of inhuman treatment. Remarkably, the Ethiopian Constitution includes a set of rights – nomenclature of the state and self-determination (group rights)–as non-derogable rights that are not recognized as non-derogable under the core international human rights instruments. Of course, these rights are not human rights. Although the core international human rights instruments oblige state parties (including Ethiopia) to give international notification, the Ethiopian Constitution does not have any provision that puts the responsibility to do so. As a result, Ethiopia did not give a letter of notification to the UN when it declared a state of emergency and derogated fundamental rights.

A *bona fide* proclamation of the public emergency permits derogation from specified obligations in the ICCPR, but does not authorize a general departure from international obligations. Therefore, Art. 93 (4)(C) of the Ethiopian Constitution needs to be amended since it fails to list those non-derogable rights envisaged by international human rights instruments to which Ethiopian is a party. In the meantime, the failure of the Ethiopian Constitution to list explicitly all non-derogable rights as envisaged by core international human rights instruments can be solved by citing Art. 9(4) and 13(2) of the Constitution, which accepts

international agreements to be an integral part of the law of the land. The fundamental rights also should be interpreted in a manner conforming to the principles of those core international human rights instruments adopted by Ethiopia.

Appraising the Interplay of Ethiopian Cassation Division's and House of Federation's Jurisprudence on (In)applicability Discourse of Period of Limitation to Rural Land: Case Analysis

Fesseha Negash Fantaye*

Abstract

This analysis aims to appraise the nexus between Cassation division's and House of Federation (HoF) 's jurisprudence on (in)applicability discourse of prescriptive limitation to rural land claims. The Federal Supreme Court Cassation Division is the highest bench of Ethiopian regular court whilst the HoF is an institution empowered to interpret the constitution. While their decisions serve as laws, the decisions of the latter bind those of the former. Yet, both are established to guard constitutionally granted rights, and a right to land is one spectrum of these rights. In Ethiopia, land is a common property that could not be provided for sale. Thus, rural land law has exhaustively listed and limited schemes of access to rural land. Nonetheless, it is penumbra whether prescriptive limitation is applicable to rural land claims. As a result, different cases have been decided by these institutions at different time. The author assessed some of these institutions' decisions to appraise whether they have similar jurisprudence or not. The assessment reveals that cassation division has not yet developed clear jurisprudence, whilst the HoF has developed peasants' right of non-eviction jurisprudence. Thus, cassation division must develop clear jurisprudence that acknowledges the HoF's jurisprudence, and the legal and policy frameworks pertaining to land.

Keywords: Cassation Division, House of Federation, Prescriptive Limitation, Rural Land

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1. Introduction

In Ethiopia, property rights are constitutionally protected. The constitution and its subordinate rural land laws incontrovertibly and strictly control scheme of access to rural land. Hence, these laws have acknowledged only government grant, inheritance, gift and lease as the only modes of access to rural land.

However, the constitution and rural land law, except that of Amhara regional state¹, have not answered whether prescriptive limitation² could be used as scheme of access to rural land is permitted or prohibited. This silence paves the way for the persistence of controversies regarding the applicability of prescriptive limitation to rural land claims. Due to the controversies, cases with this issue have been repeatedly flooding to Cassation Division, and, to the HoF for interpretation of the constitution.

However, cassation division has not yet developed straightforward and catches-all-basket jurisprudence on the (in)applicability of prescriptive limitation to rural land claims. On some cases, it opines that prescriptive limitation is applicable to rural land, while on other cases, it argues that prescriptive limitation is inapplicable to

¹Amhara Regional State Rural Land Proclamation No.252/2017, article 55. This provision clearly states that anyone who is found using to rural land without lawful acquisition could not cling to statutory defense when he is required to leave it.

² Basically, prescriptive limitation refers to a legal principle that either abrogates existing rights or bestows non – existing rights, especially property rights. However, there is no consensus among scholars on the justification for inclusion and exclusion of this principle. Some open the battle of controversies over prescriptive limitation stating that one hundred years ago and century latter, we are searching for a satisfactory answer to the quest what is the justification for depriving a man of his rights, pure evil as far as it goes, in consequence of lapse of time. See Tyler T. Ochea and Andrew Wistrich, ‘The Puzzling Purpose of Statute of Limitation’ (1997) 28 Pacific Law Journal 453, 454. Moreover, there are ‘for, against and intermediate’ arguments over the applicability of prescriptive limitations to limit property rights. It is argued that the interplay of these arguments contributes for the development of other three categories of arguments; viz. plaintiff interest argument, defendant interest argument, and public interest argument to justify (in)applicability debates of prescriptive limitation. See [Ireland] Law Reform Commission, Report, ‘Limitation of Actions’ (December 2011) 18-22. Hence, it is understood that prescriptive limitation is the product of the interplay among plaintiff interest, defendant interest and public interest arguments

rural land. Nonetheless, the HoF is consistently declaring that the application of prescriptive limitation to rural land claims contravenes constitutionally granted right against eviction, for peasants and pastoralists, from their possession of land.

Thus, even though the jurisprudence of these institutions ought to have been convergent, the Cassation Division's and the HoF's jurisprudence on the administration of prescriptive limitation are practically tracking to divergence.

With this issue in mind, this commentary is structured into five sections. The subsequent section will assess whether prescriptive limitation is applicable to rural land in Ethiopia. Then, section two and three will present the analysis of the jurisprudence of cassation division and the HoF on the (in)applicability discourse of prescriptive limitation to rural land claims. The penultimate section deals with the nexus between HoF's and cassation division's jurisprudence on applicability of prescriptive limitation to rural land claims. The last one is set for conclusions and recommendations.

2. The Legal Status on applicability of Prescriptive Limitation to Rural Land in Ethiopia

2.1.Prescriptive Limitation

Prescriptive limitation refers to the statutory rule that limits the various period of time available to a person to initiate different claims, which, unless otherwise commenced timely, statutory bars and extinguishes procedural and substantive rights. Law of limitation can be categorized into two main sorts. The first Sort is limitation, where the expiration of the time prescribed for the right itself is barred, and the second one is the expiration of the time the remedy is barred, but not the

substantive right itself.³ Sometimes the latter category is known as statutory limitation, while the former one is known as period of prescription.⁴

Notwithstanding to this cataloging, some argue since rule of limitation signifies a rule that allows person to bring claims [within] specific amount of time, running from specified date, within which to bring an action against the defendant and if does not begin proceedings within the time allowed, the action will be statutory barred. In here, the rule of limitation operates as a procedural defense to claim that has been brought outside the specified time⁵.

Yet, this does not seem a water holding postulation of the concept. Ethiopian cassation division,⁶ as showcase, had interpreted statutory and prescriptive limitations as they are conceptually two different things. Continuing its analysis, the division held that prescriptive limitation does not serve as a procedural defense like statutory limitation but as merit whether the defendant holds a given property according to the law for prescribed period of time.

On top of this, prescription *per se* has two categories – liberative and acquisitive prescription.⁷ While the former bars lawsuit, the latter serves as the acquisition of title to things [immovable property] by open and continuous possession over statutory period.⁸ Moreover, it is worth noting the concept of prescription is broader than that of statutory limitation. Statutory limitation is statute that

³ Ogbonah Medobic C. And C. C. Wigwe, 'Statute Of Limitation Vis-À-Vis Compulsory Acquisition In Nigeria' (2018) 8(1) Journal of Property Law and Contemporary Issues 406, 406

⁴ Biruk Haile, 'Period of Limitation Applicable To Claims over Immovable Property under Ethiopian Law: Gateway to Hindsight Scrutiny of Legality of Nationalization of Immovable? Case Analysis' (2012) 4(1) Jimma University Journal Of Law 178, 183-185

⁵ [Ireland] Law Reform Commission (n 2)1-2

⁶ Abdul Mohamed Vs Zebeay Haile (Federal Supreme Court, 2010, Cassation Civil Case No. 53328, Federal Supreme Court Cassation Division Decision, Vol.11, 536 – 538)

⁷ Tilahun Teshoma, Basic Principle Of Ethiopian Contract Of Law (Amharic version, 3rd ed., AAU Printing Press, 2007) 181

⁸ Black's Law Dictionary (7th ed., West Publishing Co., 1979,) 1201

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establishes time limit for suing,⁹ while prescriptive limitation affects substantive [ownership] rights.¹⁰

Nonetheless, some note that these two notions have no difference in concept, rather their difference is only in the vernacular of different jurisdictions. Thus, for example, in English – statute of limitation, in Dutch – *verjaring*, in French – *prescription*, in Germany – *verjährung*, in Italian – *prescrizione*, and in Spanish – *prescripcion*.¹¹ At this juncture, it is better to look beyond the terminology game and conjure up that statutory limitation could either be the one that affect substantive rights or one that affect procedural rights only. Moreover, ordinary period of limitation is considered as procedural defense whilst prescriptive limitation is entertained as a merit of the case.

2.2. De Jure Schemes of Access to Rural Land in Ethiopia: Since 1991

Constitutionally, the federal government is empowered to enact the framework of land law, while regional states are entrusted to administer land according to federal laws.¹² Consequently, the federal Government issued framework rural land proclamation.¹³ Pursuant to this framework law, all regional states enacted their own rural land laws.¹⁴

As per these laws, rural landholder could not enjoy full ownership right over his/her land. Full ownership rights over land refers to ‘human territorial

⁹ Ibid 1201~1422, Medobic and Wigwe (n 3) 406

¹⁰ Biruk (n 4) 184 – 5

¹¹ R.A. Kok, ‘Statutory Limitation In International Criminal Law’ (PHD Dissertation, University Of Amsterdam 2007) 24

¹² Federal Democratic Republic Of Ethiopian Constitution Proclamation, 1995, Article 51(5) Cum 52(2)(D), Proclamation No.1/1995, *Fed Neg. Gaz.*, Year 1, No.1

¹³ Federal Rural Land Administration Proclamation, 1997, Proclamation No. 89/1987, *Fed Neg. Gaz.*, Year 3, No.54 (repealed). Now, Federal Democratic Republic Of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proclamation No. 456/2005, *Fed. Neg. Gaz.*, Year 11, No.44.

¹⁴ As an example, one can take Oromia Regional state's Proclamation to Amend the Proclamation No.56/2002, 70/2003, and 103/2005 of Oromia Rural Land Administration and Use Proclamation, 2007, Proclamation No.130/2007, Megaleta Oromia, Year 15, No. 12-138/1999.

imperative’, which denotes, ‘this land is mine, mine to use and enjoy’, ‘mine to treat as I wish’.¹⁵ However, access to rural land in Ethiopia is determined by rural land laws. These laws exhaustively list de jure schemes of access to rural land and these schemes are limited to government grant, inheritance and gift¹⁶ and lease.¹⁷ Save these schemes, access to rural land through other means is an unconstitutional act.

2.3. The Status of Legal Framework on (in)applicability of Prescriptive Limitation to Rural Land in Ethiopia

The federal and regional states rural land laws, except that of Amhara regional state,¹⁸ do not provide clear answer on whether prescriptive limitation is applicable to rural land or not. This silence paved the way for the persistence of polarized arguments on the (in)applicability of prescriptive limitation to rural land. Some scholars argue that period of limitation for all civil claims are a principle, while exclusionary rule is an exception by its nature. Thus, the failure of a given law to provide special period of limitation for certain civil claims does not mean that they are automatically excluded from the subject of period of limitation, rather they will be governed by the ten years’ general period of limitation that is stipulated under article 1845 of the Ethiopian civil code¹⁹.

According to this position, period of limitation is a default rule. However, cassation division in *Dawit Mesfin Vs Governmental Housing Agency* reversed the lower courts’ decisions that upheld default rule; arguing that Ethiopian law does not

¹⁵ Neil Meyer, ‘Introduction To Property Rights’ In Neil Meyer (ed.), *Property Rights: A Primer*, (University of Idaho, 2001) 4

¹⁶ Article 5 Of Both Federal and Oromia Regional State Rural Land Proclamation (Government Grant), Article 2(4) Of Federal Rural Land Proclamation, and Article 6(1) Cum 9 Of Oromia Regional State Rural Land Proclamation.

¹⁷ Article 2(4) Of Federal Rural Land Proclamation and Article 10 Of Oromia Regional State Rural Land Proclamation

¹⁸ Article 55 of Amhara Regional State Rural Land Proclamation No.252/2017

¹⁹ Andualm Eshetu, ‘Revisiting The Application Of The Ten Years General Period Of Limitation: Judicial Discretion To Disregard Article 1845 Of The Civil Code’ (2015) 6(1) *Bahir Dar University Journal Of Law* 1, 45

provide period of limitation for some claims over immovable property. The Division, then, decided prescriptive limitation is inapplicable to claims over immovable property.²⁰ Yet, this decision did not convince some scholars. Biruk, for instance, argues against this decision stating that not only civil action but also criminal actions except grave crimes like genocide and crimes against humanity are limited by time.²¹

3. Cassation Division's Jurisprudence on Applicability of Prescriptive Limitation to Rural Land in Ethiopia

Cassation division²² is established to prop up uniform application of law in the country.²³ In effect, a precedent system is introduced in which all cassation division's decisions get a binding effect on all subordinate courts. Simply put, the Federal Supreme Court cassation division's decisions serve as a law. Some scholars even have the courage to opine that cassation division not only has the final judicial power in Ethiopia, but also makes laws.²⁴ Consequently, cassation division's decision is not only the business of parties to a case at cassation division, but it also involves public interest at large.

²⁰ Dawit Mesfin Vs Governmental Housing Agency (Federal Supreme Court, 2010, Cassation Civil Case No. 43600), Federal Supreme Court Cassation Division Decisions, Vol.10, 225-229); See also Governmental Housing Agency Vs Gizew Mengeta (Federal Supreme Court, 2007, Cassation Civil Case No. 28686, Federal Supreme Court Cassation Division Decisions, Vol.6, 251-253); Birhane Tesema Vs Temirat Ayane (Federal Supreme Court, 2009, Cassation Civil Case No. 42824, Federal Supreme Court Cassation Division Decision, Vol.11, 539 – 541); Tsehay Haile et al Vs Felka Begna (Federal Supreme Court, 2010, Cassation Civil Case No. 44025, Federal Supreme Court Cassation Division Decisions, Vol.10, 95 – 96). Assessing these cassation division's decisions reveal that, in Ethiopia, statutory limitation is not a default rule rather some claims are out of the reach of the effect of period of limitation.

²¹ Biruk (n 4)185

²² Constitution (n 12) article 78 cum 80

²³ Federal Court Proclamation Reamendment Proclamation, 2005, Proclamation No. 454/2005, *Federal Neg. Gaz.* Year 11, No.42. See also Hussein Tura, Uniform Application of Law in Ethiopia, <https://heinonline.org/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/ajls7§ion=14> accessed on 10 July 2021, and Muradu Abdo, 'Review Of Decision Of State Courts Over State Matters By The Federal Supreme Court' (2007) 1 (1) Mizan Law Review 60

²⁴ Aschalew Ashargre, 'Effect Of Non-Renewal Of Registration Of Contract Of Mortgage Under Ethiopian Civil Code: A Case Comment' (2010) 24(1) Journal Of Ethiopian Law 242

Since it is establishment, cassation division has interpreted rural land laws in relation to period of limitation on various cases. Yet, strict scrutiny its decisions reveal that cassation division's interpretation of rural land laws in relation to issue under consideration is riddled with inconsistent jurisprudences.

To begin with, in relation to private rural land holding rights, cassation division on Abdella Ibrahim Vs Uso Abdi ²⁵ held that period of limitation could not applicable to claims to invalidate unlawful rural land related contract (disguised rural land sale). As per this decision, prescriptive limitation could not be used as a defense against rural land claims. Furthermore, it clearly sets that request for invalidation of unlawful contract could not be statutory barred.

Similarly, in relation to communal and state land holding right, the cassation division on Maniahiloh Anteneh Vs Mechal District Environmental Protection and Land Administration Office²⁶ held that no one could appeal to period of limitation

²⁵ Abdella Ibrahim Vs Uso Abdi (Federal Supreme Court, 2012, Cassation Civil Case No. 79394, Federal Supreme Court Cassation Division Decisions, Vol.14, 199 – 201.). In this case, Uso borrowed Birr 500 from Abdel after giving his farmland to Abdel by antichresis contract. Abdela was using to the farmland for 11 years and raised defense of period of limitation when he was required to leave the land. Lastly, cassation division held that period of limitation is inapplicable to unlawful contract. Similar position was held by the cassation division on Getinet Tarko Vs Jamila Ali (Federal Supreme Court, 2015, Cassation Civil Case No. 100671, Federal Supreme Court Cassation Division Decisions, Vol.18, 198 – 203), Jemal Aman Vs Tewabech Ferede (Federal Supreme Court, 2011, Cassation Civil Case No. 69291, Federal Supreme Court Cassation Division Decisions, Vol.13, Pp. 423 – 425), Hailu Kidanu Vs Kechenu Duguma et al (Federal Supreme Court, 2018, Cassation Civil Case No. 150773, Federal Supreme Court Cassation Division Decisions, Vol.23, Pp. 205 – 209), and Demeketch Niri'a Vs Galeme Rabiso (Federal Supreme Court, 2008 EC, Cassation Civil Case No. 110549, Federal Supreme Court Cassation Division Decisions, Vol.19, 352 –56)

²⁶ Maniahiloh Anteneh Vs Mechal District Environmental Protection and Land Administration Office (Federal Supreme Court, 2016, Cassation Civil Case No. 112906, Federal Supreme Court Cassation Division Decisions, Vol.19, 357 –259). In this case, Maniahiloh was given farm land by kebele administration and he had used to it for more than 10 years. Latter when he was requested to leave the said land, he raised issue of period of limitation and others. However, the cassation division held that as far as the land in dispute was not given by appropriate organ, he could not appeal to the defense of period of limitation. Similar position was held by the cassation on Kuta-Ber Woreda Kebele 13 Administration Vs Habtamu Molla, Gishe Woreda Land Administration and Use Office V Getu Terefe, Chekol kume Vs north achefer Land Administration and Use Office cases, Cited in Daniel W. Ambaye, Applicability Of Period Of Limitation In Rural Land Dispute: Case Comment, (2014) 5(1) Bahir Dar University Journal Of Law 222, 235, 237, 239.

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for defense as far as initially s/he accessed land unlawfully. Here, unlawful accessed to rural land means occupying rural land in extra – de jure schemes of access to rural land that has no recognition in Ethiopian rural land laws.

However, cassation division on Shelema Negesa Vs Fayisa Mengistu²⁷ held that period of limitation against the interferer of rural land holding rights is not provided either by the Constitution or rural land laws. Then, it decided that in such case, the court should apply article 1845 of civil code – the ten years general period of limitation. Likewise, on Worku Tadese Vs Jirata Elfata²⁸ cassation division interpreted and decided that if the entry of the occupation of rural land is not unlawful agreement, the one who has used the land for more than twelve years could not be evicted from the land he has occupied.

The foregoing appraisal of cassation decisions demonstrates that cassation division follows different jurisprudence based on the category of land holding system and the method in which the land was accessed. Consequently, prescriptive limitation is inapplicable to the land in state and communal holding whilst cassation division has not held straightforward position regarding rural land in private holding.

In one hand, it held that where rural land in private holding is occupied via unlawful contract prescriptive limitation is inapplicable, on the other hand, it construed that where land is not occupied through unlawful contract, prescriptive limitation is applicable. However, the cassation division fails to set what constitute

²⁷ Shelema Negesa Vs Fayisa Mengistu (Federal Supreme Court, 2012, Cassation Civil Case No. 69302, Federal Supreme Court Cassation Division Decisions, Vol.13, 426 – 429). In this case, the proved fact was Shelema bought Eucalyptus grown on the land in dispute from Fayisa's father and occupied it for more than 12 years thereof. This proved fact indicates the contract for sale of trees was a disguised contract of land sale.

²⁸ Worku Tadese Vs Jirata Elfata (Federal Supreme Court, 2017, Cassation Civil Case No. 140538, Federal Supreme Court Cassation Division Decisions, Vol.22, 445 – 449). In this case, the proved fact was the land in dispute was registered in the name of respondent (Jirata Elfata) and the applicant (Worku Tadese) was using to the said land only for grazing purpose for more than twelve years. While the lower courts decided in favor of respondent (Jirata Elfata), cassation division decided in favor of the applicant (Worku Tadese) stating prescriptive limitation is applicable.

unlawful contract. On Shelema Negesa Vs Fayisa Mengistu's case, the land was occupied via disguised land sale contract which was called Eucalyptus sale contract. However, cassation division simply passes over without assessing whether the land in dispute was occupied via unlawful contract or not, and they rushed to identify the applicable statutory limitation.

Similarly, on Worku Tadesse v. Jirata Elfata's case, Worku was using rural land registered by Jirata for grazing purpose for more than twelve years. The act of intentionally and unlawfully bringing or permitting herds or flocks to pasture or stray on the property of another, and occupying private or public land are crime of causing damage to other's property by Herds or Flocks and Disturbance of Possession, respectively.²⁹ Thus, the act of Worku, using Jirata's land for grazing, is a criminal act. Nonetheless, cassation division did not consider this criminal act as an unlawful occupation of other's land, rather they capitalize on whether the land was occupied via unlawful contract or not and the time passed. However, failure to recognise criminal act as unlawful act was the critical mistake of the cassation division.

Thus, these cases' decisions make cassation division's prescriptive limitations (in)applicability jurisprudence regarding rural land in private holding unpredictable and penumbra. Moreover, Cassation Division has not yet developed clear jurisprudence on (in)applicability discourse of prescriptive limitation to rural land claims.

4. House of Federation's Jurisprudence on applicability of Prescriptive Limitation to Rural Land in Ethiopia

Takele argues that the powers of the HoF are analogous to the cassation powers of state and federal supreme courts, where the court almost exclusively entertains questions of law as opposed to questions of fact, scrutinising whether a

²⁹ The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, article 685, 686

fundamental error has been made in legal interpretation. Thus, the HoF does not have the power to apply the Constitution or other legislation to factual situations.³⁰ Put otherwise, the HoF scrutinizes only the constitutionality issue of law or decisions from the constitution's perspective. However, some research found that the public tends to consider the HoF as an appellate body after the Cassation Division rejects cases.³¹

In executing its power, the HoF has been repealing some laws and reversing cassation decisions. It, for instance, repealed article 8(1) of proclamation No.25/1988 and half wording of article 7(1) of proclamation No.434/2005 by stating that they are unconstitutional.³² In similar approach, the HoF has been reversing Cassation decisions that it considered were in conflict with the constitution. (In)applicability discourse of prescriptive limitation to rural land, if not the only, is one of the serious issues that have been observed by the HoF time after time. Regarding this issue, assessing different rural land related decisions of the HoF reveals that HoF, unlike cassation division, developed the jurisprudence of 'peasants' non-eviction from their possession.³³ The house makes article 40(4) of the constitution – peasant's rights to protection against eviction from their possession – a ground for its decisions. Pursuant to the HoF's jurisprudence, except for public purpose, any act that evicts peasants from their rural land possession is

³⁰ Takele Saboka, 'Judicial Referral Of Constitutional Disputes In Ethiopia: From theory To Practice' In Assefa Fiseha and Getachew Assefa (eds.) *Institutionalizing Constitutionalism and Rule Of Law: Towards A Constitutional Practice In Ethiopia*, (Ethiopian Constitutional Series, Vol.III, AAU Printing Press 2007) 78

³¹ Anchinesh Shiferaw, 'The Jurisprudence and Approaches Of Constitutional Interpretation By The House Of Federation In Ethiopia' (2019) 13(3) *Mizan Law Review* 419, 422

³² Melaku Fanta Vs Federal Ethics and Anti – Corruption Commission Prosecutor Team, (2018) 1(1) *Constitutional Issues Journal* 131 – 134. See also the analysis made by Dessalegn Birhanu, All about Words on the Procedure of Constitutional Interpretation in Ethiopia: A Comment On Melaku Fant Case, *Oromia Law Journal*, Vol.4, No.1, Pp. 207 – 221.

³³ Those cases decided by cassation division by upholding the applicability of prescriptive limitation and were taken to the HoF, HoF reversed the decision by assessing the decision from this jurisprudence. These cases will be assessed latter.

considered as an unconstitutional act. Prescriptive limitation is one of the acts that evict peasants from their possession.

HoF's jurisprudence is in line with the constitution and rural land laws as well as policy rationales behind making land a common property of state and people. The main rationale for making land a constitutional matters and a common property of state and people is to prevent the accumulation and concentration of land in the hands of a small number of urban and bourgeois land owners, who acquire large tracts of land through distress sales by poor peasants, which would lead to (a) subsequent peasant eviction and poverty, (b) the resurgence of exploitative tenancy institutions, and (c) undesirable rural-urban migration of the then landless peasantry.³⁴ To implement this policy reason, rural land laws exhaustively list and regulate schemes of access to rural land. Upholding the applicability of prescriptive limitation to rural land, since it evicts peasants from their possession, defeats this policy justification to make land a common property.

The HoF has been deciding cases with the issue under discussion adhering to this policy reasons. Appraising its decisions clearly indicate the jurisprudence of the house. In *Alemitu Gebre's (applicant) Vs Chane Desalegn's (respondent)*³⁵ case, the applicant rented his land to respondent for five years. On expire of the contract, the respondent made the land in his name, and was using and paying its tax for more than 16 years. When he was requested to return the land after 16 years, he argued that the land was rented for 50 years and applicant's right is barred by period of limitation as per article 1168(1) and 1145 of the civil code. Admitting the

³⁴ Wibke Crewett & Benedikt Korf, 'Ethiopia: Reforming Land Tenure' (2008) 116 *Review of African Political Economy* 203, 205

³⁵ *Alemitu Gebre Vs Chane Desalegn*, (2018) 1(1) *Journal of Constitutional Issues* 26 – 27, similarly, in *Tsahay Doyo Vs Tinsae Utale et al*, *ibid* 34 – 34, *Bancheamlak Dereselegn Vs Ababaw Molla*, *ibid* 10-13, and *Kebele Tesfa Vs Ayelign Deribew*, *ibid* 63-65; and *Defar Asefa Vs Diriba Ayane*, The House Of Federation, 5th Round Parliament, 4th Year, 1st Regular Meeting, 29 – 1 – 2011. In these cases, while the cassation division held prescriptive limitation is applicable, the HoF reversed cassation divisions' decision based on the right of peasant not to be evicted from their possession.

defense of prescriptive limitation, the case was decided in favor of the respondent at all level of the lower courts.

Lastly, the applicant took this case to the HoF. Council of constitutional inquiry received the application and recommended the house that the courts' decision, since it evicts applicant from her possession, contradicts with article 40(4) of the constitution. The house also affirmed the recommendation. In other similar cases, the house held the same position. Thus, as per the jurisprudence of the HoF, prescriptive limitation is inapplicable to rural land claims and the avenue access to rural land through prescriptive limitation is clearly blocked.

5. The Interplay Between House of Federation's and Cassation Division's Jurisprudence on applicability of Period of Limitation to Rural Land

Nowadays, Ethiopia has two types of precedents that have legal status, viz. cassation division's judicial precedent and the HoF's constructional interpretation precedent.³⁶ Hierarchically, judicial precedent could be overturned either by legislature's legislations or the HoF's decisions or latter cassation division's decision whereas the HoF's precedent will be reversed only either by the latter interpretation of the HoF or by the act of Constituent power holders.³⁷ Thus, the HoF's precedent is superior to judicial precedent as well as all laws save the

³⁶ See Federal Courts Proclamation Reamendment Proclamation, 2001, Art. 2(4), Proclamation No. 454/2001, Fed. Neg. Gaz. Year 11, No. 42, and Consolidation of the House of the Federation and Definition of Its Powers and Responsibilities Proclamation, 2001, Art. 11, Proclamation No. 251/2001, Negarit Gaz. Year 7, No. 41. Article 2(4) of this Federal Courts confers power of interpreting of laws and reversing its own decision on latter time. Implementing this very article, Federal Cassation Division, is rendering a different legal interpretation some other time in the language of this proclamation but repealing, in conventional term, its prior interpretation. For instance, National Mineral Corporation Plc. Vs Dani Drilling Plc. (Federal Supreme Court, Addis Ababa 2009, Civil Case No- 42239, FDRE Supreme Court Cassation Decision Vol.10, 350. In this case, the cassation division expressly replaced its prior interpretation given on case No. 21849 in its judgment, which is act of express repealing.

³⁷ Constituent power resides in the people of a given state. It is the power of establishing and abolishing any form of government and constitutions. In other word, it signifies the unlimited power of the people.

Constitution. Thus, borrowing the aphorism of article 9 of the constitution, any law, customary practice or decision of any organ of state or a public official, which contravenes the HoF's precedent, shall be of no effect.

All the same, these institutions are constitutionally established to guard the constitution itself and constitutionally granted rights. To recap, the Cassation Division is established to defend and help the right to equality before the law of all human being everywhere within Ethiopian territory by developing jurisprudence that helps to uniformly apply laws. For better protection of this right, the constitution established dual cassation system – federal and regional states cassation system. In addition, the Federal Supreme Court cassation division is empowered to review all decisions of regional states' cassation divisions.³⁸

Likewise, in relation to constitutional interpretation, Ethiopian constitution adopted dual constitutional controlling system; and this poses the possibility of jurisdictional overlap, of federal and regional states, over constitutional adjudication.³⁹ Some authors maintain, in the structural adjustment of regional states of Ethiopian federalism, save the South Nation Nationalities and People (SNNP), and the Harari regional states, all other regional states have unicameral legislative house.⁴⁰ Thus, while the SNNP established council of nationalities to interpret the SNNP regional state constitution, other regional states have established the commission of constitutional interpretation.⁴¹

The very purpose of establishment of these two institutions dictates the need for congruency of the decisions of these institutions. Otherwise, their very establishment is superfluous. Therefore, the development of clear jurisprudence on

³⁸ Article 80(3) of FDRE constitution.

³⁹ Getahun Kassa, 'Mechanism Of Constitutional Control: A Preliminary Observation Of The Ethiopian System' (2007) 20(1-2) *Afrika Focus* 75, 95

⁴⁰ Zemelak Ayitenew, 'The Politics Of Sub-National Constitutionalism and Local Government' 'In Ethiopia' in Giacomo Delledonne et al (eds), *Re-Exploring Sub – National Constitutionalism (Perspective On Federalism, Vol.6, Issue 2, 2014)* 89, 92 -93

⁴¹ Kassa (n 39) 95

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the application and interpretation of law by these institutions is imperative. Moreover, the positive interplay between these two institutions has an essential and multidimensional significance on the development of Ethiopian legal system.

As has been discussed so far, the HoF's precedents and Cassation Division's judicial precedents have the relationship of higher and lower-level laws. The relationship between higher and lower level laws, in Hans Kelsen words, is the relation of determining or binding.⁴² Cassation Division's judicial precedent is subordinate to the HoF's precedent. Consequently, the HoF's precedents determine Cassation Division's judicial precedent. Thus, at this juncture, one may get sight of clue to identify binding and non-binding decisions of Cassation Division. This entails that subordinate courts do not have a duty to be bound by all Cassation Division decisions unconditionally, rather selectively - only those consistent with the HoF's precedent and pertinent laws.

Then, we have to select the binding decisions of the Federal Supreme Court cassation division and implement them accordingly, but not, as some say, all Cassation Division's decisions have unconditional binding force over all subordinate courts. Therefore, this chokes off the conventional argument, in Ethiopia, that all federal cassation division's decisions have unconditional binding force over all federal as well as regional states' subordinate courts.

Back to issue under discussion, cassation division has not yet developed a clear and straightforward jurisprudence for the application of prescriptive limitation to rural land. As was discussed, on some cases it held that prescriptive limitation is applicable to rural land claims, while on other cases, it held the opposite stance. In case where the land was accessed via unlawful contract, it held the view that prescriptive limitation is applicable to rural land claims. However, it has failed to

⁴² Hans Kelsen, *Introduction To The Problems Of Legal Theory* (Clarendon Press – Oxford, 1992) 77 – 78

give catch – all – basket definition for what constitutes access to rural land via unlawful contract. Fact constitutes unlawful contract in some cases is not considered similarly in others. Consequently, it has been holding fickle position on the issue under consideration.

On the other hand, the HoF's has developed straightforward and catch-all jurisprudence for the administration of prescriptive limitation in relation to rural land. Since it evicts peasants from their possession, as per HoF's jurisprudence, prescriptive limitation could not applicable to rural land. Thus, it is clearly put that prescriptive limitation is not applicable to rural land claims.

The above discussion highlights that there is a hole between these two institutions' jurisprudence on the (in)applicability discourse of prescriptive limitation apropos rural land. On top of this gap, the constitution and rural land laws, in non-confusing approach, have granted to peasants the rights against non-eviction from their possession. This right stretches to the extent of being protected against self-evictions, which stated in rural land laws.

The federal rural land proclamation, for example, states that peasant farmers, semi-pastoralists and pastoralists who are given holding certificates can lease land to other farmers or investors from their holding of a size sufficient for, the intended development in a manner that 'shall not displace them, for a period of time to be determined by rural land administration laws of regional states' based on particular local conditions.⁴³ Pursuant to this expression, Oromia rural land proclamation, for instance, empowers peasants, semi Pastoralist and pastoralist to lease 'half of their plot of land' for three years and fifteen years for traditional farming and mechanized farming, respectively.⁴⁴ As per these laws' expression, peasants have no right to waive their rural land holding right as they like by renting/leasing their entire plot of land for an unspecified period of time.

⁴³ Article 8(1) Of Federal Rural Land Proclamation No.456/2005

⁴⁴ Article 10(1-2) Of ORS Rural Land Proclamation No.130/2007

From this right perspective, while the HoF has insightfully developed jurisprudence in accordance of the constitution as well as rural land laws, Cassation Division has not yet developed consistent jurisprudence on the issue under discussion. Thus, Cassation Division should adhere to HoF's jurisprudence to resolve the (in)applicability discourse of prescriptive limitation to rural land claims. This is not only for the reason that the HoF's decision supersedes that of the cassation division, but also because its jurisprudence is in congruent to constitution, rural land policy and laws.

Conclusion

This commentary analyzed the jurisprudence of the HoF and Cassation Division on (in)applicability discourse of prescriptive limitation to rural land. The analysis divulges the (in)applicability discourse is the result of the status of rural land laws. Rural land laws, except that of Amhara regional state, silently pass over the (in)applicability of prescriptive limitation to rural land. This silence paves the way to controversial debates over the use of prescriptive limitation. Consequently, cases have been flooding the Cassation Division and the HoF to solve this discourse.

Cassation Division is the highest bench of regular courts established by the constitution to assist and preserve the uniform application of law in Ethiopia. Likewise, the HoF is an institution established to settle constitutional dispute and interpret the constitution.

Regarding the issue under discussion, to date Cassation Division has not yet developed consistent and convincing jurisprudence on the (in)applicability of prescriptive limitation to rural land – particularly in case of private rural land holding. On some cases, where it held that the land is occupied via unlawful contract, prescriptive limitation is inapplicable. On the contrary, it failed to clearly define what constitute unlawful contract. As a result, what is considered unlawful contract has not been consistently elaborated. Unlike Cassation Division, the HoF

has developed straightforward and catches-all jurisprudence that prescriptive limitation could not serve as one scheme of access to rural land. The HoF's jurisprudence is non-eviction of peasants from their possession. Consequently, since application of prescriptive limitation evicts peasants from their possession, it is inapplicable to rural land. On top of this, these two institutions' jurisprudence, rather than being complementary, has unfortunately become incompatible. Hence, litigants seem to invariably considering the HoF as an appellate court.

In recommendation, the Federal Cassation Division should revisit and develop clear jurisprudence on the administration and application of prescriptive limitation to rural land claims, and make its jurisprudence consistent and in line with the spirit of rural land laws and the HoF's jurisprudence. Moreover, the HoF should make its jurisprudence on the applicability of prescriptive limitation to rural land easily accessible to all public organs and the public at large – especially electronically. In the long run, a legislative intervention might be necessary in order to clarify and fill gaps that pertain to rural land.

The Interface between Trademark and Trade Name in Ethiopia

Yirgalem Germu Berega*

Abstract

The main purpose of trademark is to guarantee a product's genuineness, which is used by a manufacturer or seller to distinguish its product from those of others. On the other hand, a trade name is a means of identifying a business or its products or services to establish goodwill. Trade name symbolizes the business's reputation. However, in many cases, it is difficult to distinguish a trade name from a trademark, especially when the mark or the name is printed on a certain product. Using a similar sign or word as trade name and trademark by different parties has the capacity to create likelihood of confusion misleading the consumer. The trademark proclamation has also failed to address the issue in an explicit manner. Thus, this commentary is aimed at addressing the legal gaps with respect to administering the issue. To this end, the following questions are posed in order to distinguish between the two concepts: what is the interface between trademark and trade name in Ethiopia? Whether trademark bars subsequent registration of the same mark as a trade name, if so what is the notion for the restriction?

Keywords: Trade name, Trademark, Intellectual Property, Competition

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1. Introduction

This commentary is devoted to discussions related with the interface between trademark and trade name. Companies own trademarks to distinguish their goods and services from those of their competitors or similar products. In the same manner, they also distinguish the business itself from other companies or enterprises. Trade name plays this role of distinguishing the business itself. There is always a problem concerning registration of trademark and trade name as both are fixed on packages of products. It is also difficult to distinguish the name from the mark when there is similarity.

However, there is no ground of refusal of registration of trademarks based on preexisting trade names in Ethiopian context. Ethiopian trademark law failed to enumerate a preexisting trade name as a ground for refusal of registration for subsequent trademarks. Similarly preexisting trademark is not mentioned as a ground for refusal for registration of trade name under the commercial registration and licensing proclamation. Moreover, the institutions are different for the registration of trade name and trademark. Ministry of trade and industry is administering trade name,¹ but trademark is under the Ethiopian Intellectual Property Office. Therefore, it can be inferred that the gap created by the law and the lack of administration cooperation are the main problems of the existing scenario in the area. There is no mechanism between the Ministry of Trade and Industry and Ethiopian Intellectual Property Office to share information concerning the registration of trade name and trademark at respective offices.

In order to understand the issue from different perspectives, this review addresses the following major question: what is the interface between trademark and trade name in Ethiopia? On the basis of this major research question, the specific research questions are: what is the blurred area under Ethiopian Intellectual

¹ Ethiopian Commercial Registration and Licensing Proclamation (Amendment), 2019, Art. 3, Proclamation No. 1150/2019, Fed. Neg. Gaz., Year 25, No. 77.

Property law concerning the interface between trademark and trade name? What is the basis for this restriction whether a word or a sign being used or registered as a trade name bars subsequent registration of a trademark with the same content?

2. Trademark and Trade Name Laws

2.1. General overview

There are diverging views about the protection of Intellectual property rights under main aspects of modern trade and economic cooperation agreements. While many argue in favor of the protection, it is a determinant factor and an indispensable precondition for innovation and growth, and hence for development. On the contrary, many others believe that it is an obstacle to growth and development for developing countries.²

The legal instruments in the area prefer to define intellectual property in terms of enumeration of protected works under the regime. For instance, Trade Related Intellectual Properties (TRIPS) agreement referred intellectual property with respect to the categories of intellectual property that are the subject of Sections 1 through 7 of Part II.³ This part of the agreement provides the type of rights protected under the instrument as intellectual property rights. For the purpose of this writing, the definition provided by the publication of WIPO (World Intellectual

²Hannes Schloemann, *TRIPS Plus and TRIPS Minus in EPAs An Article-by-Article Analysis of the 2007 Draft SADC EPA*, (2008), p.7

Presenting the detailed account of the debate on IPRs is not the concern of this writing. However, esteemed readers may find various literatures devoted for arguments presented for and against protection of the rights. Among these, the work of Errol D'Souza and Peter de Souza is the prominent one. They have provided that: "There are various levels and arguments involved in the debate on Intellectual Property Rights (IPRs). Four aspects have merited attention, the consequentialist, where the dispute is shown to be primarily empirical, the intrinsic, where the disagreement concerns the norms of a free society, the incentive, where IPRs are seen as incentives that are socially beneficial, and the desert, where the inventor's desert is the basis of dispute." See Errol D'Souza and Peter de Souza Source (1990), "Restating Arguments on Intellectual Property Rights", *Economic and Political Weekly*, Vol. 25, No. 21, pp. 1163-1168.

³TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], Art. 1(2).

Property Organization) as a working definition is taken. In this publication it is provided that: *“Intellectual property (IP) refers to creations of the mind – everything from works of art to inventions, computer programs to trademarks and other commercial signs”*.⁴

Intellectual property is divided into two categories: industrial property and copyright. Patents for inventions, trademarks, industrial designs and geographical indications fall under the first category. Literary and artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design remain under the domain of the second category. In addition to the list enumerated, copyright includes the right of performers, producers and broadcasters, as they are neighboring right holders.⁵ Ethiopian law defines intellectual property as *“a legal right over a creative works of the human intellect and includes patent, trademark, registration certificate and copyright.”*⁶ This definition indicates that the right emanates from the legal protection accorded under the state laws and the protection extended to *creative works of the human intellect*, in addition to the generic expression, the law also provides for a list of protected items.

It is worth mentioning the justification for protection of intellectual property rights. One is to give expression to the moral sentiment that a creator should enjoy the fruits of their creativity; the second is to encourage the investment of skills, time, finance, and other resources into innovation in a way that is beneficial to the society.⁷ This is an indication of the role of Intellectual Property Rights systems in

⁴WIPO, What is intellectual property?, available at:

https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf accessed on 22 July 2021.

⁵World Intellectual Property Organization, What is Intellectual Property?, WIPO Publication No. 450, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf accessed on 30 Oct. 2018

⁶Ethiopian Intellectual Property Office Establishment Proclamation, 2003, Art. 2(1), Proclamation No. 320/2003, Fed. Neg. Gaz., Year 9 No. 40.

⁷WIPO Intellectual Property Handbook, Policy, Law and Use, WIPO Publication No. 489, available at: <http://www.wipo.org/about-ip/en/iprm/pdf/ch1.pdf> accessed on 30 Oct. 2018

the promotion of technological progress.⁸ The justifications provided may be categorized under either right-based justification or public interest based justification.⁹

2.2. Trademark and Trade Name under Ethiopian Law

The Ethiopian trademark registration and protection proclamation defined trademark as any visible sign capable of distinguishing goods or services of one person from those of other persons. In doing so, the law made enumeration of trademarks to be protected.¹⁰ In the same fashion, Black's Law dictionary defines it as *"a word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others"*. In addition to the definition, the purpose of trademark as a means to assure *"product's genuineness,"*¹¹ is also stated. Hence, we can say that the purpose of trademark is to enhance the awareness of the consumer on where the source of production of the item is.¹² The dictionary also defined and stated the purpose of trade name in the following manner:

*"...trade name is a name, style or symbol used to distinguish a company, partnership or business, under which a business operates. A trade name is a means of identifying a business or its products or services to establish goodwill. It symbolizes the business's reputation."*¹³

⁸Carlos A. Braga & Carsten Fink, (1996), "The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict, The Implications of the New Regime for Global Competition Policy", Chicago Kent Law Review, Vol. 72, Issue 2, p. 439 Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss2/8>: accessed on 27 Oct. 2018

⁹ For further understanding on this issue please see Justin Hughes, (1988), "The Philosophy Of Intellectual Property", Geo. L.J. Vol. 77 No. 287, p. 291

¹⁰Trademark Registration and Protection Proclamation, 2006, Art. 2(12), Proc. No..501/2006, Fed. Neg. Gaz. year 12No. 37.

¹¹Bryan A. Garner (ed), Black's Law Dictionary, West Group, (7th ed. 1999), p. 1500.

¹² Oscar A. Geier, Patents, Trademark and Copyrights law and Practice, (17th ed. 1934), p. 70.

¹³ A. Garner (ed), cited above at note 11, p. 1501

The Ethiopian Commercial Registration and Licensing Proclamation defined a trade name as “a name that a given business person uses for his business or known by the society as such”.¹⁴

Concerning administration of the rights under Ethiopian laws, trade name is protected mainly under Commercial Registration and Licensing Proclamation Number 980/2016. On the other hand, trademark falls under the scope of intellectual property laws stipulated under Proclamation Number 501/2006 and Regulation Number 273/2012. The protection is accorded as economic incentive. In other words, the justification for the protection is not originated from the intent of incentivizing innovation or creativity. Protection on the base of incentivizing innovation or creativity might be raised as justification for other intellectual property rights, such as copyright and patent protection.¹⁵

2.3. Registration of trademark: the requirements and its implication

“International Registrations” is a system of Registrations obtained under the Madrid Agreement or Madrid Protocol.¹⁶ A Madrid System registration can reduce filing expenses and facilitate renewals, among other things. However, the rights obtained through Madrid System registrations are not greater than the rights obtained through a national registration, because of the application of the concept of territoriality of trademark registration rights.¹⁷ Hence, the owner of an International Registration must go before national courts to enforce its rights.¹⁸

¹⁴ Ethiopian Commercial Registration and Licensing Proclamation, 2016, Art. 2(10), Proc. No. 980/2016, Fed. Neg. Gaz. Year 22 No.101.

¹⁵ Stanley M. Besen and Leo J. Raskind, “An Introduction to the Law and Economics of Intellectual Property”, (1991), *The Journal of Economic Perspectives*, Vol. 5, No. 1 p. 21

¹⁶ Madrid Agreement Concerning The International Registration of Marks of April 14, 1891, as amended on September 28, 1979, hereinafter Madrid Agreement, Art. 1(2) cum 3 and Protocol Relating To The Madrid Agreement Concerning The International Registration Of Marks Adopted at Madrid on June 27, 1989, as amended on October 3, 2006, and on November 12, 2007, hereinafter Madrid Protocol, Art. 2

¹⁷ Madrid agreement Art. 3bis and Madrid Protocol Art. 3bis

¹⁸ Lanning G. Bryer, *International Trademark Protection*, International Trademark Association, (2015), pp. 3-4

Registration of trademark at the concerned authority is a requirement to get protection but this requirement is not mandatory in all legal systems of countries. For example, in the United States, parties are not required to register their marks to obtain protectable rights. The interested party may establish “common law” rights in a mark; without registration, the rights are based solely on use of the mark in commerce. However, registration provides a number of advantages over common law rights, including a legal presumption of ownership of the mark and exclusive right to use the mark; public notice claim of ownership of the mark; the ability to record the U.S. registration with U.S. Customs and Border Protection to prevent importation of infringing foreign goods; and the ability to bring an action concerning the mark in federal court.¹⁹

However, the Ethiopian trademark registration and protection proclamation requires the registration of the trademark to get the protection of the law as stated under article 4 of the proclamation. Ownership of the mark and its effect on third parties emanates from the very fact of registration,²⁰ save protection of trademark that can be established to be used in Ethiopia as an exception.²¹

Ethiopian Trademark Registration and Protection Proclamation provide various requirements to get the registration of the mark. Among others, the trade mark shall be capable to distinguish goods or services of a person from those of other persons, distinctive rather than merely descriptive;²² it may not be contrary to public order; and it may not infringe the right of others. Other grounds are listed under article 5, 6 and 7 of the proclamation. Article 7(1) of the Proclamation provides that the authority shall refuse the registration of a trademark when it is identical with an earlier trademark of another person in respect of the same goods or services or

¹⁹United States Patent and Trademark Office, *Protecting Your Trademark Enhancing Your Rights Through Federal Registration*, Pp. 10 & 11 available at <http://www.uspto.gov/trademarks>, accessed on 25 Oct. 2018.

²⁰ Trademark Registration and Protection Proclamation, 2006, cited above at note 10, Art. 4.

²¹ Id. Art. 7(2.)

²² Id. Art. 5(1) cum 6(1) (c).

closely related goods or services, or nearly resembles trademark if it is likely to deceive or causes confusion.²³

The provision also stipulates the refusal grounded on the fact that the trademark is identical with earlier trademark. However, the proclamation has failed to indicate the similarity between earlier trade name and the trademark submitted for registration.²⁴ We may argue that the stated likelihood of causing confusion has the tendency to include earlier registered or known trade name of others. However, the framing of the provision does not seem to cover such scenarios. Trademarks liable for likelihood of confusion are not capable of registration and protection under international instruments. For instance, the Paris Convention for the Protection of Industrial Property allows the member states to prohibit the registration of trademarks when the mark is capable to create likelihood of confusion with other trademarks.²⁵ Article 15 of the Trademark Law Treaty obliges the contracting parties to obey the requirements provided under the Paris Convention for the Protection of Industrial Property.²⁶ In addition to this, the TRIPS Agreement provides that the right holder has the right to prevent others from using of signs that may have the possibility to create likelihood of confusion.²⁷ Ethiopia is not a party to this treaty, but the standing of the agreement has a persuasive nature because of its wide acceptance.²⁸

²³ Id. Art. 7(1).

²⁴ Article 16 of commercial registration and licensing proclamation provides list of causes preventing registration of trade name but preexisting trademark is not mentioned as a ground for refusal for registration of trade name.

²⁵ Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Stockholm on July 14, (1967), Art. 6^{bis}

²⁶ Trademark Law Treaty Done at Geneva on October 27, 1994, Art. 15.

²⁷ TRIPS Agreement, Art. 15 cum 16 (1).

²⁸ The WTO has 164 members and 25 observer governments. See the detailed information on member states at WTO website: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#collapseE accessed on 21 July 2021.

3. The Decision of the Federal Supreme Court Cassation Division

The Federal Supreme Court Cassation Division of Ethiopia is empowered to interpret the laws of the country,²⁹ and the interpretation³⁰ comes into picture when there is ambiguity or vagueness in the law.

A case has been presented to the Cassation Division by the applicant (applicant at the Cassation).³¹ The applicant has stated that the Ethiopian Intellectual Property Office has registered a Trademark of the second respondent (respondent at the Cassation, the Ethiopian Intellectual Property Office is referred as first respondent at the Division) that is similar with the applicants trade name and have a possibility to create a likelihood of confusion because both parties are traders registered to supply cement. The Ethiopian Intellectual Property Office has rejected the opposition presented by the applicant mentioning that the trade name has not been registered as a trademark and the word registered for the second respondent has additional stars surrounding the word, which is claimed as a trade name, by the applicant.

The Cassation Division ruled on the issue at hand and stated that the Ethiopian Intellectual Property Office shall take into account the relevant laws, pursuant to article 6(1) of its establishment proclamation³² at the time of examination of applications for trademark registration. The court has pinpointed two major grounds to be considered by the office: the first one is the possibility of creating a likelihood of confusion to the public and the second one is the tendency of creating

²⁹ Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 80(3) (a), Proc. No. 1/1995, Fed. Neg. Gaz., Year 1, No. 1. See also Federal Courts Proclamation, 2021, Art, 10(1), Proc. No. 1234/2021, Fed. Neg. Gaz., year 27, no. 26.

³⁰ “*Lawyers and judges often use ‘interpretation’ to find out the meaning of the laws’ language and to find out its legal content*”. William Baude & Stephen E. Sachs, (2017), *The Law of Interpretation*, Harvard Law Review, vol. 130, no. 4, pp. 1085-1086.

³¹ *Ethio-Ceramic Vs. Ethiopian Intellectual Property Office and Avorgiga Technology Ltd.*, Federal Supreme Court Cassation Division, File No. 57179, 22 Yekatit 2003 Eth. C., *The Ethiopian Federal Supreme Court Cassation Division decisions’ publication book*, Vol. 12, p. 544-548.

³² Ethiopian Intellectual Property Office Establishment Proclamation, cited above at note 6, Art. 6(1).

unfair competition among the business community.³³ This section of the writing is devoted to the grounds mentioned by the court and discussion on the practical importance of the decision.

3.1. Protection against Unfair Competition and Protection of Trademarks

Ensuring the freedom of traders to use their resource at their own choice and at the price they choose is the pillar of competition in product market. Product market competition increases efficiency and productivity by providing incentives for managers to reduce costs, innovate, and improve the institutional arrangements in production.³⁴ States enact competition regimes so as to maintain free market economic system and protect consumers from anticompetitive acts of traders or firms; however, it is inevitable that the existence of some differences between the regulatory regimes to the content and number of specific objectives to be achieved.³⁵ Trade Practice and Consumer's Protection Law regulate trade practices by protecting businesses from anti-competitive and unfair trade practices to ensure a competitive business environment.

As stated under the preamble of Trade Competition and Consumers Protection Proclamation, the objective of competition law is, among other things, ensuring free market policy and protection of the business community from anti-competitive practices.³⁶ The same proclamation prohibits carrying out any dishonest, misleading or deceptive act that harms or is likely to harm the business interest of a competitor.³⁷ The proclamation also precludes the business community from engaging in any act that causes or is likely to cause confusion regarding products

³³ *Ethio-Ceramic vs. Ethiopian Intellectual Property Office and Avorgiga Technology Ltd.*, cited above at note 31.

³⁴ The World Bank, *Building Institutions for Markets World, Development Report Overview*, (Washington, D.C., 2002), p. 133.

³⁵ Kahsay G. Medhn, "Ethiopian Competition Law: Appraisal of Institutional Autonomy", (2016), *International Journal of Innovative Research & Development*, Vol. 5 Issue 3. p. 77.

³⁶ Trade Practice and Consumers' Protection Proclamation, 2013, Proc. No. 813, Fed. Neg. Gaz., Year 20, No. 28 Preamble para. 1&2.

³⁷ *Ibid.* Art. 8(1)

being supplied.³⁸ This condition on prohibition of creating confusion can be extended to cases concerning trademark similarity and other elements of business that have a tendency to resemble to trademark, such as trade name. Not only this prohibition, but also the proclamation provided that Commercial advertisements about goods and services announced by any means may not be misleading in any manner particularly on trademark and the source of the product.³⁹ This means trademark is implicitly protected under the competition law of the state so as to avoid anti-competition practices. In other words, a person who is affected by trademark piracy has the possibility to resort to unfair competition law other than traditional trademark law.⁴⁰

It is worth noting that the function of trademarks is to provide rules of orderly marketing by identifying products and their sources.⁴¹ The quality of a product and the public familiarity with such quality increases value of the trademark; hence, a trademark establishes a reputation for the producer of the product.⁴² Furthermore, such reputation is protected under competition laws. For instance, Ethiopian Trade Competition and Consumers Protection Proclamation states that any false or unjustifiable allegation that may have the potential to discredit another business person or its activities is considered as unfair competition.⁴³ The Ethiopian Criminal Code also provides that infringement of marks in such manner as to deceive the public, shall be punishable with rigorous imprisonment not exceeding ten years.⁴⁴

³⁸Ibid. Art. 8(2)(a)

³⁹Ibid. Art. 19(1)&(7)

⁴⁰World Intellectual Property Organization (WIPO), Introduction To Trademark Law &Practice: The Basic Concepts, A WIPO Training Manual, Geneva, (2nd Ed. 1993), p. 12

⁴¹ Fikremarkos Merso, The Ethiopian Law of Intellectual Property Rights: Copyright, Trademarks, Patents, Utility Models and Industrial Design, (2012), P. 161.

⁴² M. Besen and J. Raskind, cited above at note 15, p. 21.

⁴³Trade Competition and Consumers Protection Proclamation, cited above at note 35, Art. 8(2)(c).

⁴⁴ Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, Art. 720(1), Proc. No. 414/2005, Fed. Neg. Gaz, year 10, No. 58.

3.2. The Interface between Trademark and Trade name and “Likelihood of Confusion”

The Ethiopian commercial code makes both trade name and trademark an incorporeal element of a business.⁴⁵ Likewise, some companies tend to use their trade name as a trademark and this scenario has a possibility to create confusion against business owners and consumers. Coca-Cola is among these types of companies.⁴⁶ However, the problem arises when the trade name of a company becomes a trademark of another business. We have strong reason to make a distinction between trade names and trademarks. This is required whenever a business starts to employ its trade name to establish the identity of its products and services; in such a case, the trade name is functioning as a trademark.⁴⁷ The question is that whether such scenario infringes the right of an existing trademark or not.

As noted in a case entertained by an American court, trademark may not give the exclusive right to prohibit others from using word or words. The right holder could be prohibited only if using the word or words has a potential to deceive the public. This is allowed to protect his good-will from being affected by such use.⁴⁸ This means preventing third parties from the use of such word would be allowed only if it represents “*a business good-will that the attributes of property attach to it*”.⁴⁹ Therefore, we may say that the prohibition is laid on creation of likelihood of confusion between signs that distinguish the product and the business. To avoid

⁴⁵ Commercial Code Federal Democratic Republic of Ethiopia, 2021, Art. 109(2), Proc. No. 1243/2021, year 27.

⁴⁶ Russell Huebsch. "Difference Between Trade Name and Trademark" available at <http://smallbusiness.chron.com/difference-between-trade-name-trademark-3219.html>. Accessed 25 October 2018.

⁴⁷ Caron Beesley, Contributor, The Difference Between a Trade Name and a Trademark – And Why You Can’t Overlook Either, U.S. Small Business Administration, available at <https://www.sba.gov/blogs/difference-between-trade-name-and-trademark-and-why-you-cant-overlook-either> accessed on 01. Nov, 2018.

⁴⁸ *Prestonettes Inc., Vs .Coty*, 264 U.S. 359, 368. Cited in Frank I. Schechter, (1999), the historical foundations of the law relating to trade mark law, p. 155.

⁴⁹ *Id.* p. 157

likelihood of confusion, the marks shall be first examined for their similarities and differences. When marks sound alike when spoken, are visually similar, have the same meaning (even in translation),⁵⁰ similarity in sound, appearance, and/or meaning may be sufficient to support a finding of likelihood of confusion, depending on the relatedness of the goods and/or services.⁵¹

When we come to the issue of the possible likelihood of confusion between trade name and trademark under Ethiopian law, there is no expressly provided provision under the relevant laws. Moreover, Article 7 of the Trademark Registration and Protection Proclamation failed to state prior registered trade name as a ground for refusal of a trademark registration. However, Article 27(1) of the Trademark Regulation states that any interested person can oppose a registration of a trademark.⁵² The referred interested person may include the person who got the registration of his trade name. Additionally, sub article 2 (a) of the same regulation does not mention specific grounds of opposition rather it has left it open and be subject to the evidences submitted by the opposing party.⁵³ In such condition, the prior registered trade name may be submitted as supporting evidence for the opposition. This line of argument may help us to refuse a registration of a trademark for the protection of prior rights emanated from a trade name.

If we look into the experience of other countries like U.S.A, a state's authorization to form a business with a particular name does not also give that person trademark rights and other parties could later try to prevent the use of the business name if

⁵⁰ Trademark Registration and Protection Proclamation, 2006, cited above at note 10, Art. 7(2) & (3).

⁵¹United States Patent and Trademark Office, Protecting Your TrademarkEnhancing Your Rights Through Federal Registration p. 3 available at <http://www.uspto.gov/trademarks>, accessed on 25 Oct. 2018

⁵²Trademark Registration and Protection Council of Ministers Regulation, 2012, Art. 27(1), Reg. No, 273, Year 19 No. 10.

⁵³ Id. Art. 27(1), (2)(a)

they believe a likelihood of confusion exists with their trademarks.⁵⁴ The basic notion is that “the touchstone of trademark infringement is *‘likelihood of confusion’*”⁵⁵

There is also wide understanding of this assertion in the WIPO system, where the use of the trade name is likely to create confusion as to the origin of the goods or services that the entity offers under that name considered as infringement of a prior trademark. In a similar manner, the use of a trademark can infringe a prior trade name. Likelihood of creating confusion is the central point to determine the infringement and its effect.⁵⁶ As noted earlier, this standard is provided under Article 6^{bis} of Paris Convention for the Protection of Industrial Property, cross referred under Article 15 of Trademark Law Treaty of Geneva; Article 3^{bis} of Madrid Agreement; Article 3^{bis} Madrid Protocol and Article 16(1) of the TRIPS Agreement. The first four treaties are being administered under the WIPO and the TRIPs agreement is part of the WTO system. Ethiopia is party to neither of the treaties but joined WIPO in 1998.⁵⁷

3.3. Practical value of the decision

The Ethiopian Intellectual property Office frequently encounters problems associated with registration of a trademark, which is registered as a trade name at Ministry of Trade and Industry.⁵⁸ The main reasons for this problem are, among others, there is no mechanism of information exchange between the two offices, but the initial understanding has been the offices work together to achieve the objective of the laws. The second reason is that applicants tend to imitate or build

⁵⁴United States Patent and Trademark Office, cited above at note 50, p. 2

⁵⁵ Arthur R. Miller and Michael H. Davis, Intellectual Property: Patents, Trademarks And Copyrights In A Nutshell, (3rd ed. 2000), p. 260

⁵⁶ WIPO Training Manual, Cited above at note 39, p. 94

⁵⁷See the details on Ethiopia’s status at https://www.wipo.int/members/en/details.jsp?country_id=56 accessed on 21 July 2021.

⁵⁸Interview with Wondwosen Herpo, Lawyer, Intellectual Property Related Cases, 13 Nov. 2018.

upon the existing signs, names and marks of others.⁵⁹ In addition to these problems, the trademark registration and protection proclamation does not have a clear provision on refusal of registration of a trademark on the base of prior trade name.⁶⁰

Some decisions of the Federal Supreme Court Cassation Division are instructive in this regard. For instance, in the case between Nice Paper Works Factory and Gelan Paper Works Factory, the word ‘Nice’ was being used by Nice Paper Works Factory as a trade name but later on Gelan Paper Works Factory came up with a trademark which is the trade name of the former.⁶¹ The question here is what the fate of trademarks which have been registered before the decision of the Cassation Division should be. This question is posed because there is no provision under the Federal Courts Proclamation Number 1234/2021 which require the retroactive application of the decisions of the division. However, the interested party may seek the invalidation of the registration pursuant to Article 36 of the trademark registration and protection proclamation. The provision states that “a registration of a trademark may be invalidated by written request of any interested person or by the initiative of the office itself, when it is proved not to have initially fulfilled the conditions” provided under the law.⁶² Hence, the interested party may request the invalidation of the registration by invoking the likelihood of confusion and proving his prior registration. Note that the effect of the invalidation is prospective concerning benefits acquired based on the invalidated registration.⁶³

⁵⁹ Interview with Samson Tesfaye, trademark registration and administration team leader at Ethiopian Intellectual Property Office, 13 Nov. 2018.

⁶⁰ Wondwosen, cited above at note 57.

⁶¹ Interview with Endale Deboch, trademark examination team leader at Ethiopian Intellectual Property Office, 13 Nov. 2018.

⁶² Trademark Registration and Protection Proclamation, 2006, cited above at note 10, Art. 36.

⁶³ Id. Art. 37(2)

Conclusion

Under this commentary, we have seen that the gap of the trademark proclamation and the commercial registration and licensing proclamation in providing a clear ground of refusal of registration of trademark and trade name respectively. In addition there is information asymmetry between the offices mandated to register trademark and trade name.

To prevent likelihood of confusion and to protect the reputable trademark and trade name from unfair competition, we have to refuse the registration of trademark based on preexisting/prior-registered trade name, and vice versa. In addition to this, to align our laws on trademark registration with the international standard and the TRIPS agreement, it is better to adopt a law that clearly prohibits the registration or use of a trademark or a trade name for the protection of either of the two which has been registered or in use prior. This means article 16 of the commercial registration and licensing proclamation and Article 7 of the trademark registration and protection proclamation shall be amended in such a way that ensures the protection of the trademark and trade name. The amendment may help to avoid different interpretation by the cassation bench on the same issue in the future because Article 26 (1&4) of the Federal Courts Proclamation Number 1234/2021 allows the bench to vary its interpretation, even a decision rendered by seven judges have a possibility to be reviewed. Additionally, for the sake of information symmetry of the two offices, Ministry of Trade and Ethiopian Intellectual Property Office shall have a mechanism to communicate data of registration.

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