Mekelle University Law Journal

In this Issue

Articles

Case comment

Case Reports

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Articles

Remedies for Environmental Wrong-doings in Ethiopia
Dejene Girma Janka (PhD)

The Elements of Rape as a Crime of Genocide under International Criminal Law: Case Law Analysis
Awet Hailezgi Tefera

Advancing Children's Rights in Africa: the Role of the African Children's Charter and its Monitoring Body
Ayalew Getachew Assefa

The Need for Environmental Tax in Ethiopia: Economic Analysis of Law

Mebrahtom Fitiwi

Case comments

Jurisdiction and Pleading Foreign Law in Private International Law Matters: Case Comments on the Ruling of the Federal Cassation Division in the *Global Hotel plc Vs. Mr Nicola Aspapachit Zis*

Gebrehiwot Hadush

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የሰ/መ/ቁ 72824 ሐምሌ 18 ቀን 2004 ዓ.ም አመልካች፡-የቦሌ ክፍለ ከተማ ገቢዎች ፅ/ቤት
ተጠሪ፡-አቶ ሚሊዮን አሰፋ

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Message from the Editorial Committee

The Editorial Committee is extremely pleased to announce the coming of the second volume number one of Mekelle University Law Journal. Mekelle University Law Journal publishes contributions in the form of scholarly articles, case comments, comments on draft or enacted laws, book reviews, proceedings, research outputs, precedents, case briefs/index and a special corner/supplement on new developments.

The goal of the Editorial Committee is to take the journal in a direction where it serves as an outlet of the academic works to the academia and the community at large. We also cross our fingers to integrate research and publication in order to enhance quality of researches conducted in law school and other institutions and to reach the highest possible standard through the peer review mechanism of the publication process.

To make the goal reality, we need the help of authors, reviewers and readers. Therefore, the committee invites submission of contributions from the academia, practicing lawyers and researchers on legal or related inter-disciplinary issues.

Last but not least, the committee would like to thank the external, internal assessors and all the authors who contributed such a rich variety of outstanding articles, case comment and other contributions on a broad range of exciting topics. The head of Mekelle University School of Law, Mr. Mekonnen Fisseha and the Dean of College of Law and Governance, Mr. Gebrehiwot Hadush, deserve special appreciation for their unrelenting follow up and assistance in making this journal a reality.

Editorial committee

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Opinions expressed in the Journal by authors are not necessarily that of the Committee, the School of Law or the University. The Members of the Editorial Committee, the School or the University are not responsible for the statements and opinions expressed by the authors in their works published in the journal.

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Contents **page**

Articles

Remedies for Environmental Wrong-doings in Ethiopia ……...1

Dejene Girma Janka (PhD)

The Elements of Rape as a Crime of Genocide under International Criminal Law, Case law analysis.....35

Awet Hailezgi Tefera

Advancing Children's Rights in Africa: the Role of the African Children's Charter and its Monitoring Body……..……..…66

Ayalew Getachew Assefa

The Need for Environmental Tax in Ethiopia: Economic Analysis of Law…...…….……....102

Mebrahtom Fitiwi

Case comments

Jurisdiction and Pleading Foreign Law in Private International Law Matters: Case Comments on the Ruling of the Federal Cassation Division in the *Global Hotel plc Vs. Mr Nicola Aspapachit Zis*…….132

Gebrehiwot Hadush

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Case Reports

የሰ/መ/ቁ. 44561 **ሃምሌ** 28 **ቀን** 2002 **ዓ.ም አመልካች፡-** **ወ/ሮ ገነት በላይ ጠበቃ - ኮሎኔል መላኩ ካሣዬ ተጠሪ፡- አቶ ፈኔት ተክሉ - ሞግዚት ነ.ኃ ቦንገር**.....140

የሰ/መ/ቁ 72824 **ሓምሌ** 18 **ቀን** 2004 **ዓ.ም አመልካች፡-የቦሌ ክፍለ ከተማ ገቢዎች ፅ/ቤት**
ተጠሪ፡- አቶ ሚሉዮን አሰፋ.....161

Remedies for Environmental Wrong-doings in Ethiopia

Dejene Girma Janka (PhD)•

Abstract

Ethiopia has a degraded environment. In order to deal with this situation, the government has been taking various measures one of which is enacting environmental laws. These laws, among other things, provide for civil, criminal and administrative remedies that could be used when their provisions are not complied with. However, these measures can effectively facilitate the protection of the environment only if they are adequate, their application can be sought by everyone, and they are applied to everyone who fails to discharge its duties under environmental laws. In Ethiopia, however, the existing environmental laws suffer from various defects which affect their ability to promote environmental protection. This, in turn, necessitates making some changes to the existing environmental laws of Ethiopia.

1. Introduction

A look at the environmental profile of Ethiopia reveals that its environment is being degraded.[1] It could be said that such degradations are mainly attributable to human behavior. As such, it is possible to control these degradations by taking appropriate actions. On its part, the Federal Government of Ethiopia has so far issued a number of environmental laws which focus on different aspects of environmental protection. For instance,

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[1]For instance, soil erosion, deforestation, reduction of wetlands afro-alpine areas, loss of biodiversity, and air and water pollution are some of the environmental problems Ethiopia is facing. For more on this point, see Jonathan MCKEE (EC Delegation), ETHIOPIA: COUNTRY ENVIRONMENTAL PROFILE, Addis Ababa, August 2007, available online at http://www.google.com/search?newwindow=1&safe=off&output=search&sclient=psy-ab&q=Jonathan+MCKEE+%28EC+Delegation%29%2C+ETHIOPIA%3A+COUNTRY+ENVIRONMENTAL+PROFILE%2C+Addis+Ababa%2C+August+2007&btnG=, accessed on 8 August 2013.

some of the federal environmental laws provide for remedies that may be applied when environmental wrong-doings occur. In this article, the author used the term *remedy* to refer to a measure that could be taken when environmental laws are not complied with. As such, it refers to criminal, civil and administrative measures. Usually, most people obey the law, although there is no single answer to the question *why*; thus, it is only few people who need to be coerced to obey the law.[2] This shows that remedies are necessary for the effectiveness of laws despite the fact that only few people may be subjected to them for non-compliance. So, environmental laws must provide for remedies that will be applied when their provisions are not complied with so as to achieve their objectives. Besides, such laws must also provide for suitable conditions to employ the remedies they recognize. For instance, in the USA, the Clean Air Act recognizes civil, criminal and administrative remedies.[3] Then, with a view to facilitating the effective use of these remedies, the Act recognizes public interest litigation and the possibility to sue not only private parties but also the US Environmental Protection Authority for failure to discharge its duties under environmental laws.[4] There is, therefore, reason to believe that the remedies that the Act recognizes can contribute to environmental protection if used

[2] It is true that we cannot have enough police officers everywhere to ensure the observance of the law by force. So, the main reason why most people don't violate the law is because they obey it. However, if one wonders why most people obey the law, he will end up with various possible answers. For instance, people obey the law because they fear sanction; people may obey the law because they think what the law prescribes is a right conduct; people obey the law because they feel it is just; people obey the law because they feel they ought to obey it; etc. These are few examples of the possible answers we can get by asking the question *why*. But the fact is, regardless of the motive behind, most people obey the law. For more on this point, see for example, S.I. Benn and R.S. Peters, Social Principles and the Democratic State, Surjeet Publications, India, 2006, pp. 57-71.

[3] Steven Ferrey, *Environmental Law: Examples and Explanations*, 3rd Edition, ASPEN Publishers, New York, 2004, pp. 226-228.

[4] Ibid.

effectively. In Ethiopia, too, if the environmental laws the Federal Government has issued hitherto are really meant to facilitate environmental protection, they must provide for different remedies for environmental wrong-doings and also create suitable conditions for their effective use. Accordingly, this article has two objectives. One, it will consider some of the major environmental laws of Ethiopia to identify the possible remedies they recognize for environmental wrong-doings. Two, it will examine whether or not these laws have created suitable conditions for the effective use of the remedies they recognize. In order to achieve these objectives, the main approach the author has adopted is literature review, legal analysis and some sort of comparison.[5] Lastly, this article contains eight sections. While the first section contains an introduction, the second deals with a brief discussion on Environmental Wrong-doing (EWD). In the third section, a concise discussion is made on the possible remedies for EWDs in general. The fourth section deals with the remedies that are recognized by the environmental laws of Ethiopia for EWDs. Section five discuses highlights on some procedural matters in relation to the use of remedies for EWDs. In section six, the remedies provided by Ethiopian environmental laws for EWDs are evaluated. In section seven, a very brief discussion is made on tort law to see to what extent tort law remedies may be used to contribute to environmental protection. The article comes to an end with conclusions and recommendations.

[5] The comparison is made mainly between Ethiopian laws and the laws of some countries for which, the author could find enough information.

2. Environmental Wrong-doing

One of the immediate goals[6] of environmental laws is regulating human behaviors vis-à-vis the environment.[7] Thus, EWD occurs when there is a failure to comply with environmental regulations/rules.[8] As such, EWD may be understood as non-compliance, whether it involves action or inaction, with environmental regulations although such non-compliance may not have caused harm. In this sense, EWD is broader than environmental harm or damage.

At this point, one must bear in mind that when EWD involves harm, the harm may be actual or potential. If harm has already transpired, then the harm will be actual; whereas it will be potential if it has not yet transpired but it will certainly or probably transpire. Thus, potential harm here does not refer to the likelihood of harm's occurring but to the harm that will certainly or probably happens. Similarly, it has to be noted that in order to say there is EWD and also be able to take actions against EWD, the existence of

[6] As far as the ultimate goal of environmental law is concerned, people can have different opinions. For instance, from anthropocentric perspective, one can argue that environmental law wants to ensure environmental protection to sustain the ecological basis of human life. From eco-centric perspective, one can say that environmental laws aim at ensuring environmental protection because nature has an intrinsic value worth protecting regardless of its instrumental value to human beings.

[7] See, for example, the definitions of environmental law as provided in Steven Ferrey, mentioned at note 3, p. 1; Thomas F.P. Sullivan (Editor), *Environmental Law Handbook*, 4th ed. Government Institutes Inc. 1997, Maryland, p. 1; *The New Encyclopaedia Britannica*, V.18, Encyclopaedia Britannica Inc.,Chicago/ London/ New Delhi/ Paris/ Seoul/ Sydney/ Taipei/Tokyo/, 2005, p. 468.

[8] In this article, unless their context dictates otherwise, the author uses the expression *environmental regulations* to mean *environmental rules/laws*. As such, for my purpose, it refers to all rules that are put in place to ensure environmental protection.

standards may be necessary.[9] Here, *standards* refer to objects or qualities or measures which serve as bases or examples or principles to which others conform or should conform or by which the accuracy or quality of others is judged.[10] Thus, in the absence of standards, it may not be possible to take measures against some EWDs because there will not be anything against which the correctness or otherwise of certain behavior can be checked. For instance, in default of water quality standards, the issue of water pollution can hardly arise notwithstanding that there are visible changes in the quality of a given river.[11] Of course, there are times when the existence of standards may not be indispensable for the implementation of environmental laws or to have EWD. For instance, if a given law requires prior permit to hunt wild animals, a person who hunts wild animals without securing prior permit commits EWD. Thus, there is no need for standards. Similarly, if a given environmental law requires doing EIAs for projects to be implemented in all sensitive areas, failure to do EIAs for such projects amounts to EWD and we do not need standards to say there is EWD. This shows that we can have EWD whether or not standards exist because the provisions of some environmental laws may be specific enough to render themselves directly applicable without further legislative or administrative measures thereby entailing EWD when not observed.

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[9] For more on standards, see generally, Duard Barnard, *Environmental Law for All: A Practical Guide for the Business Community, The Planning Professions, Environmentalists and Lawyers*, Impact Books Inc., Pretoria, 1999, pp. 135-136.

[10] Ibid.

[11] In Ethiopia, the Federal EPA adopted industrial emission standards (they have not yet been approved by the Environmental Council, the highest organ within the Federal EPA) which it uses for some purposes. By the way, at the time this article is being revised in line with the reviewers' comments, the Federal EPA has already been promoted to a ministerial level under the name *Ministry of Environmental Protection and Forestry*. Yet, the law establishing this Ministry is not yet available at Berhanena Selam.

3. Remedies for EWDs

When EWDs occur, three possible remedies will come into picture. These are civil remedies, criminal remedies, and administrative remedies. For the purpose of this article, criminal remedies refer to measures that can be taken in accordance with criminal law and criminal procedure law, whereas civil remedies refer to all non-criminal measures that can be taken by judicial organs. On the other hand, administrative remedies refer to all measures that can be taken by non-judicial organs such as environmental protection organs.

3.1 Civil Remedies

One of the first remedies that may be used whenever EWD occurs is a civil remedy. There are also different types of civil remedies. One such remedy is compensation which refers to financial remedy that aims at granting a plaintiff monetary relief for the harm he has sustained with a view to restoring him to the position he was in prior to the occurrence of the harm. Although not all harms to the environment can be assessed in monetary terms such as loss of eco-services, it is said that where harm has already occurred, compensation may be awarded to the injured party to indemnify for the losses suffered to the environment and the services it provides as well as the expenses that have been incurred due to the environmental harm. Moreover, it is possible to claim compensation for future harm if it is proved, not just feared, that a party is exposed to risk/hazard such as toxin as a result of environmental wrong-doing.

The other civil remedy for EWD is injunction. It is said that, in environmental context, injunction is an extremely effective remedy because

it leads to the prevention of imminent EWDs from happening. Restitution and remediation are also other civil remedies. When it is possible for the injury to be wiped out and the situation restored to its pre-injury state, restitution is a preferred remedy. In environmental cases, courts often order environmental harm to be cleaned up or the damaged ecosystem be returned to a healthy state. So, as indicated above, civil remedies can have various purposes such as compensating victims, preventing harms from occurring, and restoring the damaged environment.[12]

The experiences of some countries also show that the above mentioned civil remedies are recognized. For instance, in Tanzania, civil remedies such as injunctions, compensation, restoration orders, conservation orders, easement orders, and compliance orders can be used to enforce environmental regulations.[13] In the US, in addition to seeking compensation by injured party, one can find different civil remedies recognized for environmental violations under different acts. Under the Clean Air Act, the US EPA can bring a civil action before a court against a non-complying entity to seek monetary fine or an injunctive order.[14] Under the Clean Water Act (CWA), the US EPA is empowered to institute civil suits for injunctive relief and civil penalties[15] in case violations of the Act or regulations issued there

[12] For the discussion made in this paragraph (and more on civil remedies for EWDs), see generally, Mark Wilde, *Civil Liability for Environmental Damage: A Comparative Analysis of Law and Policy in Europe and the United States*, Kluwer Law International, The Hague, London, New York, 2002, p 273-289; Dinah Shelton and Alexandre Kiss, *Judicial handbook on Environmental Law*, UNEP, 2005, pp. 54-56.

[13] See Sec. 226, The Environmental Management Act of Tanzania, 2004, Act No. 20 of 2004 (Tanzania EMA *hereinafter*).

[14] Steven Ferry, mentioned at note 3, pp. 226-228.

[15] The expression *civil penalty* may seem oxymoron because *civil* relates to civil law and *penalty* relates to criminal law. However, in the US, the term *penalty* in the expression *civil penalty* is used not to refer to criminal penalty because it is not imposed in accordance with

under happen.[16] Finally, the US Resource Conservation and Recovery Act (RCRA) also provide that the US EPA can seek civil remedies if its provisions or regulations issued there under are not observed.[17] Many European countries also recognize and use different civil remedies against EWDs.[18] Therefore, it could be said that the recognition and use of civil remedies is seen in many countries as one of the important tools to enforce environmental laws/ensure environmental protection.[19]

3.2 Criminal Remedies

In addition to civil remedies, environmental laws recognize criminal remedies to penalize EWDs with a view to expressing the public rejection of the conduct and to discourage future similar conduct. In this regard, the main criminal penalties that can be used are fine and jail even if other criminal sanctions such as community service can be applied.[20] For instance, in the US, the Clean Air Act, the CWA and the RCRA recognize the use of criminal remedies to enforce environmental regulations.[21] In Europe, countries like Austria, Belgium, Denmark, Finland and France also recognize criminal remedies for violations of environmental regulations.[22] In

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criminal law and criminal procedure but to a civil measure that is imposed by a civil court in accordance with environmental laws.

[16] William L. Andreen, *Water Quality Today-Has the Clean Water Act Been A Success?* Alabama Law Review, Vol. 55:3, pp. 549-551.

[17] Steven Ferry, mentioned at note 3, pp. 344-448.

[18] See Mark Wilde, mentioned at note 12, pp. 273-289.

[19] This should not be surprising because civil remedies can have multiple purposes.

[20] Dinah Shelton and Alexandre Kiss, mentioned at note 12, p. 56.

[21] See William L. Andreen, mentioned at note 16, pp. 549-551 and Steven Ferry, mentioned at note 3, pp. 226-228.

[22] Michael G. Faure, and Günter Heine, *Criminal Enforcement of Environmental Law in European Union*, Kluwer Law International, The Hague, 2005, p. 14.

Africa, countries like Tunisia,[23] Tanzania[24] and South Africa[25] use criminal sanctions to enforce environmental regulations.[26] Thus, criminal remedies are also seen as important means environmental laws employ to achieve their objectives.

3.3 Administrative Remedies

The use of civil and criminal measures alone will not suffice to effectively implement environmental regulations. As a result, different countries recognize the important roles administrative bodies can play in the enforcement of environmental regulations.[27] One of the roles they can play is imposing various types of administrative remedies[28] when non-compliance with environmental regulations occurs. For instance, in Tanzania, administrative bodies are empowered to take necessary administrative

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[23] See Batir Wardam*, New Stringent Law Against Pollution In Tunisia,* available at http://www.arabenvironment.net/archive/2007/9/334707.html*, accessed on 13 September 2010.*

[24] See Sec. 226, Tanzania EMA.

[25] See, for example, Sec. 51 and 52, National Environment Management: Air Quality Act, Act No. 39 of 2004, 2004 (US Air Quality Act *hereinafter*).

[26] There are also regional and international agreements which call for the use of penalties to deter violations of environmental regulations. For instance, *UNCLOS,* the *Paris Convention for the Prevention of Land-Based Pollution*, and the *Basel Convention on transboundary Movement of Hazardous Wastes* require contracting parties to ensure compliance by taking appropriate measures to not only prevent but to punish conduct in contravention of the provisions of the agreement. The *Bamako Convention on Waste Trade in Africa* goes further in requiring that the penalties be sufficiently high to both punish and deter illegal traffic. The 1994 Lusaka *Agreement on Cooperative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora* supplements earlier provisions regarding the illegality of such trade by requiring states parties to investigate and prosecute such cases. For more on this, see Dinah Shelton and Alexandre Kiss, mentioned at note 12, p. 57.

[27] It is said that administrative bodies can play important role in the enforcement of environmental laws because they are usually the first to discover non-compliance by using their powers to inspect. Moreover, they can apply administrative sanctions, which are objective specific and hence can serve their purposes. For more on these points, see Michael G. Faure, and Günter Heine, mentioned at note 22, pp. 17 and 49.

[28] By *administrative remedies*, the author is referring to all measures that are and can be taken by non-judicial bodies.

measures such as specific performance orders, restoration orders, conservation orders, and compliance orders to bring violators of environmental regulations into compliance with them.[29] Most members of the EU also provide for different administrative measures that can be imposed by administrative bodies when environmental regulations are not observed.[30] In the US, the Clean Air Act, the CWA and the RCRA mandate the US EPA to take certain types of administrative measures. For instance, in accordance with the CWA, the US EPA may issue administrative compliance orders, impose administrative sanctions, cause the termination or modification of certain permits, or order cleaning-up operation or payment for such operation.[31] Therefore, like civil and criminal remedies, different jurisdictions recognize the use of various administrative remedies when EWDs occur in order to ensure environmental protection.

[29] See Sec. 226, Tanzania EMA.
[30] Michael G. Faure, and Günter Heine, mentioned at note 22, pp. 17 and 49.
[31] For the information on the administrative remedies the above US environmental laws recognize, see generally, Steven Ferry, mentioned at note 3, p. 226-228, and William L. Andreen, mentioned at note 16, pp. 549-551.

4. Remedies for EWDs under Ethiopian Environmental Laws[32]

4.1 Civil remedies

At the moment, Ethiopia has various general and sector specific laws in the field of environment some of which contain express stipulations on civil remedies for EWDs. For instance, the Environmental Pollution Control Proclamation prohibits any person from polluting the environment.[33] Then, it empowers the Federal EPA to take administrative or *legal* action in case its stipulations are violated.[34] As we can understand from the Proclamation, the term *legal action* refers to all non-administrative actions. As such, it may include suits for injunctive relief, suit for obtaining an order requiring the restoration of polluted environment, or even causing prosecution to take place if the EWD that has occurred constitutes a crime. Thus, the Federal EPA (FEPA) can choose and seek any civil remedy it deems necessary in relation to a given EWD.

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[32] The FDRE Constitution recognizes the right to clean and healthy environment. On the other hand, it is obvious that EWD could impair the enjoyment of this right. Therefore, environmental protection has to be ensured to facilitate the enjoyment of this constitutional right. Yet, whose duty is ensuring environmental protection? The Constitution is very clear on this issue. Under article 9(2), it recognizes the duty of all citizens, organs of the state, political organizations, other associations, as well as their officials to obey and ensure the observance of its provisions. Thus, these entities must, in addition to obeying the Constitution, try to ensure the observance of its provisions; and, in this context, the observance of the right to clean and healthy environment. Moreover, under article 13(1), it recognizes the duty of all the three branches of government to enforce the right it recognizes which includes the right to clean and healthy environment. Thus, these organs must take measures to enforce this right. So, the measures that could be taken in accordance with article 9(2) and article 13(1) of the Constitution could be part of remedies for EWDs though they will be applied only to enforce article 44 (1) of the Constitution. See articles 9(2), 13(1, 44(1), 92(2), Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 1st Year No.1, Addis Ababa, 21st August, 1995 (FDRE Constitution *hereinafter*).

[33] Article 3(1), Environmental Pollution Control Proclamation, Proclamation No. 300/2002, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 9th Year No.12, Addis Ababa, 3rd December 2002 (Environmental Pollution Control Proclamation *hereinafter*).

[34] Id., article 3(2).

Another piece of legislation with express provision on civil remedies is the Solid Waste Management Proclamation. It was issued with the objective of preventing the adverse impacts of solid waste. [35] In relation to civil remedy, it stipulates that any owner of solid waste disposal site should be civilly liable, regardless of fault, for any damage caused to the environment, human health or property in the course of its operation or after its closure.[36] Thus, for example, a court may order such person to clean up the pollution he has caused or to restore the environment to its previous position or to pay compensation to those who are victimized by his operation.

However, unlike the Solid Waste Management Proclamation, many of the other sector-specific environmental laws do not contain express stipulations on what possible civil remedies may be adopted when EWDs occur contrary to their provisions. Of course, this does not mean violating the provisions of these laws will not entail civil liability.[37] First, if the violation of these laws causes pollution, the FEPA can take legal action against such violation in accordance with the Environmental Pollution Control Proclamation. Second, those individuals who have sustained harm by the acts of others in violation

[35] See article 3, Solid Waste Management Proclamation, Proclamation No. 513/2007, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 13th Year No.13, Addis Ababa, 12th February 2007 (Solid Waste Management Proclamation *hereinafter*).
[36] See Id., article 16.
[37] For example, under article 3(4)&(5), the EIA Proclamation, stipulates that the approval of EIA report or the granting of authorization by the Federal EPA or Regional Environmental Agencies does not exonerate a proponent from liability for damage unless it is caused by the victim or a third party for whom he/it is not responsible. See Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 9th Year No.11, Addis Ababa, 3rd December 2002 (EIA Proclamation *hereinafter*)). This means, failure to do EIA or doing it improperly by itself does not entail civil liability. However, if failure to do EIA or doing it in a manner contrary to the existing stipulations entails damage to any person, then the proponent can be civilly liable.

of any environmental law can bring civil actions against the violators to obtain appropriate reliefs, such as injunction or compensation, under tort law.[38]

4.2 Criminal remedies

One of the most important features of environmental laws in Ethiopia (both general and sector-specific) is the recognition of criminal remedies for acts contrary to their provisions. For instance, the Environmental Pollution Control Proclamation,[39] the EIA Proclamation,[40] the Water Resources Management Proclamation,[41] the Public Health Proclamation,[42] the Animal Disease Control Proclamation,[43] the Development, Conservation and Utilization of Wildlife Proclamation,[44] and the Solid Waste Management Proclamation,[45] to mention only a few, recognize the use of criminal sanctions for conducts violating their provisions. Thus, any person who

[38] See article 2035 cum. with article 2028, Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960, Negarit Gazeta, Gazeta Extraordinary, 19th Year No. 2, Addis Ababa, 5th May 1960 (Civil Code *hereinafter*). The major problem here may be establishing causal link between a given EWD and the harm sustained. If a person succeeds to establish the link, he will probably get the relief he wants.

[39] See articles 12ff, Environmental Pollution Control Proclamation.

[40] See article 18, EIA Proclamation.

[41] See article 29, Water Resources Management Proclamation, Proclamation No. 197/2000, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 6th Year No.25, Addis Ababa, 9th March 2000 (Water Resources Management Proclamation *hereinafter*).

[42] See article 20, Public Health Proclamation, Proclamation No. 200/2000, , Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 6th Year No.28, Addis Ababa, 9th March 2000 (Public Health Proclamation *hereinafter*).

[43] See article 21, Animal Disease Control Proclamation, Proclamation No. 267/2002, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 8th Year No.14, Addis Ababa, 31st January 2002 (Animal Disease Control Proclamation *hereinafter*).

[44] See article 16 (1) and (2), Development, Conservation and Utilization of Wildlife Proclamation No. 541/2007, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 13h Year No.41, Addis Ababa, 21st August 2007 (Development, Conservation and Utilization of Wildlife Proclamation *hereinafter*).

[45] See article 17, Solid Waste Management Proclamation.

violates the provisions of these laws may be subjected to either fine or imprisonment or both, as the case may be. If the perpetrator is a juridical person and the proper punishment for its EWD is imprisonment, such penalty will be converted to fine in accordance with the conversion methods of the Criminal Code as they cannot be jailed.[46]

There is one point worth mentioning. Although virtually all environmental laws of Ethiopia contain criminal remedies for EWDs, the Criminal Code contains provisions dealing with crimes against the environment.[47] Hence, one may resort to the provisions of the Criminal Code in case gaps exist in any environmental legislation in respect of criminal remedies for EWDs. Alternatively, when the Criminal Code recognizes more serious penalties for EWDs, it will be applied as most of the environmental laws recognize the precedence of the provisions of the Criminal Code over their provisions in case the Code's penalties are more serious.

4.3 Administrative remedies

The application of administrative remedies when environmental laws are violated is one of the ways of ensuring environmental protection. Cognizant of this fact, virtually all environmental laws of Ethiopia recognize the use of various administrative remedies for EWDs. These remedies include suspension or revocation of permits, confiscation of tools employed to violate environmental laws/causing EWD, requiring cleaning-up or paying for cleaning-up operation, and requiring the restoration of the injured environment. For example, in accordance with the Environmental Pollution

[46] See article 90, The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, 9th of May 2005, Addis Ababa (Criminal Code *hereinafter*).
[47] Id., articles 514 and the following.

Control Proclamation, the FEPA can require the installation of sound technology to remediate EWDs, order the cleaning-up of polluted environment or payment for such operation, or seek the closure or relocation of an enterprise that is causing environmental problem.[48] In accordance with the EIA Proclamation, environmental protection organs can require the rectification of environmental problems that are created, or seek the suspension or cancellation of authorizations or permits to engage in activities causing environmental problems.[49] The Water Resource Management Proclamation also allows the revocation or suspension of permits of persons infringing its provisions or regulations issued there under.[50] The other laws also provide for different administrative measures that are pertinent to their objectives. In this regard, we may mention the Public Health Proclamation,[51] the Animal Disease Control Proclamation,[52] the Development, Conservation and Utilization of Wildlife Proclamation,[53] and the Solid Waste Management Proclamation[54] which provide for various administrative remedies that can facilitate the achievement of their respective objectives.

5. Procedural Matters to Use Remedies for EWDs

The recognition of different types of remedies for EWDs, however adequate they may be, does not guarantee the effective protection of the environment. If environmental protection is to be effective, these remedies have to be regularly applied whenever situations giving rise to their application exist.

[48] Article 3(2), Environmental Pollution Control Proclamation
[49] See article 12, EIA Proclamation
[50] Article 17, Water Resources Management Proclamation
[51] See article 7, Public Health Proclamation
[52] See article 8, Animal Disease Control Proclamation
[53] See article 16 (3) and (2), Development, Conservation and Utilization of Wildlife Proclamation
[54] See article 14(4), Solid Waste Management Proclamation

That is to say, actions must be brought by those who are entitled to do so against any person engaging in EWD. This raises two important procedural issues: first, who can bring action for EWD? Second, who can be sued for EWD? For instance, if anyone can seek remedies for EWDs, then, the implementation of environmental laws will be facilitated as the impacts of different activities on the environment will be under ever watchful eyes of everyone. Moreover, if any person can be sued such as government organs for failing to discharge their duties under environmental laws, the enforcement of environmental laws will be facilitated as they will adopt or be forced to adopt necessary measures to ensure the effective application of environmental statutes. Therefore, issues of standing and determination of possible defendant are very important to the practical and effective application of remedies for EWDs.

However; as principles of criminal law provide, criminal charges can be brought only against those who commit crimes. Moreover, administrative bodies are not criminally liable. Thus, criminal charges can be instituted only against non-governmental bodies.[55] This means, there is no possibility to institute criminal charges against organs like EPA. Similarly, criminal charges are instituted by a public prosecutor, although private prosecution can be allowed under certain circumstances.[56] Others can help/cause public prosecutor to institute criminal cases for EWDs which constitute crimes.

[55] Moreover, administrative bodies are not criminally liable. Thus, criminal charges can be instituted only against non-governmental bodies. For example, under article 34(1), the Criminal Code excludes government (administrative) bodies from the definition of juridical persons for the purpose of criminal responsibility.

[56] For instance, in Ethiopia, private prosecution is allowed in relation to offences punishable upon complaint if a public prosecutor refuses to institute a charge. See articles 44 and 47, Criminal Procedure Code.

Therefore, the issue of who can sue and who can be sued is relatively non-complicated in relation to criminal cases/remedies. Accordingly, in the following sub-sections, the two issues will be entertained only in relation to the use of civil and administrative remedies.

5.1. Who Can Sue for EWDs

The question of *who can sue* is the question of *standing*. In relation to EWD, it is about who can seek remedies when EWDs occur. The answer to such inquiry may be either *anyone* or *those who are affected* like the direct victims of a given action or inaction. However, as a rule, in order to select suitable plaintiff and allocate scarce resources to it,[57] only a person whose right or interest is affected by a given behavior can seek relief from whosoever is responsible.[58] For example, in Ethiopia, the Civil Procedure Code allows only a person who has vested interest in a litigation to act as a plaintiff.[59] If a person lacks vested interest, that is, if his interest is not at stake, he cannot be a party to a case as a claimant.[60] On the contrary, a person whose interest is at stake due to a positive or negative conduct of any person can challenge that conduct and seek an appropriate remedy.

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[57] Han Somsen, *Protecting the European Environment: Enforcing EC Environmental Law*, Blackstone Printing Ltd, UK, 1996, p. 151.
[58] C.M. Abraham, *Environmental Jurisprudence in India*, Kluwer Law International, The Hague, London, and Boston, 1999, p 29.
[59] See article 33(2), The Civil Procedure Code Decree, Decree No. 52 of 1965, Negarit Gazeta, Gazeta Extraordinary, 25th Year No. 3, Addis Ababa, 8th October 1965 (Civil Procedure Code *hereinafter*).
[60] On the rationales for requiring vest interest, see generally, Robert Allen Sedler, *Ethiopian Civil Procedure*, Faculty of Law of Haile Sellasie I University and Oxford University Press, Addis Ababa, 1968, pp. 52-56.

Nonetheless, the limitation of standing in environmental cases only to a person whose interest is (to be) affected by a given action or inaction may be an impediment to effective protection of the environment. Indeed, some have argued that recognizing the standing of all to sue for EWDs amounts to removing one of the major obstacles to the enforcement of environmental laws.[61] Moreover, it is argued that in environmental cases, standing should be extended to many because all citizens or at least all citizens in a region are individually affected by the administrative action or inaction relating to the environment.[62] There are also scholars who argue that standing in environmental litigation should be extended to all citizens as it allows the use of private resources to enforce environmental laws.[63]

The experiences of some countries also show that environmental standing is recognized in its broader sense. For example, in the US, the Clean Air Act, the CWA, and the RCRA contain what is known as *citizen suit provisions* which permit every ordinary citizen to bring actions against violators of environmental regulations, be it individuals or government bodies.[64] In South Africa, the issue of standing is covered by its Constitution. In the Bill of Rights Chapter, the South African Constitution recognizes, under Section 24, everyone's right to have an environment which is not harmful to health or wellbeing and the right to have the environment protected and, under Section 38, the *locus standi* of every person to approach a court claiming

[61] For more on standards, see generally, Duard Barnard, mentioned at note 9, p. 51.
[62] Han Somsen, mentioned at note 57, p. 152.
[63] Steven Ferry, mentioned at note 3, p. 228.
[64] For more on this issue, see Steven Ferry mentioned at note 3, pp. 228, 337-339; and William L. Andreen, mentioned at note 16, p. 550. On the evolution and development of wide standing right in environmental cases in the US, *Sierra Club v. Morton case* as discussed in Harold Hickok, *Introduction to Environmental Law*, 1996, Delmar Publishers, USA, pp. 8-9; and Mark Wilde, mentioned at note 12, pp. 8-9, pp. 146-150.

violation of the rights included in the Bill of Rights Chapter.[65] Therefore, if the action or inaction of any person including government organ is believed to violate or threaten the right to have an environment which is not harmful to health or wellbeing and the right to have the environment protected, then suit can be brought by anyone against such person. In Kenya, public interest litigation has been recognized since 1986.[66] Thus, every person can bring action for violations of environmental regulations in Kenya. In India, in 1970s, the Supreme Court indicated that in matters of private law, standing should be understood narrowly, whereas in matters of public law, it should be understood broadly; as a result, subsequent decisions conformed to this declaration and public interest litigation in environmental cases is now accepted.[67] European countries also seem to follow the same path. For instance, in countries like Denmark and England, public interest litigation is recognized in environmental cases.[68] Therefore, the issue of broad standing in environmental cases seems a widely accepted phenomenon.

Who has standing to bring action for EWDs in Ethiopia? Unlike the South African Constitution, the FDRE Constitution does not contain clear provision on the issue of standing. However, according to some scholars, the recognition of environmental right in a constitution opens door for public

[65] See Chapter 2, Statutes of the Republic of South Africa, Constitutional Law, (Issue No. 38), Constitution of the Republic of South Africa Act, No. 108 of 1996.
[66] Michael Ochieng Odhiambo, *Legal And Institutional Constraints To Public Interest Litigation As A Mechanism For The Enforcement Of Environmental Rights And Duties In Kenya*, Paper Presented On The Fifth International Conference On Environmental Compliance And Enforcement, Kenya, available at http://www.inece.org/5thvol2/odhiambo.pdf, accessed on 12 August 2013).
[67] C.M. Abraham, mentioned at note 58, pp. 29-31.
[68] Han Somsen, mentioned at note 57, p. 153.

interest litigation.[69] Although the assertion is not without sense, it may be too much to try to derive standing right form environmental right recognized in a constitutional provision. In Ethiopia, the Constitution recognizes the right to clean and healthy environment although it is farfetched to argue that standing right can be derived from this right. Yet, it is interesting to realize that, under article 9(2), the Constitution imposes a duty on everyone not only to obey the Constitution but also to *ensure* the observance of the Constitution. Then, one may ask: *how can everyone discharge his duty to ensure the observance of the Constitution, which includes a stipulation on environmental right?* Is it not by taking every possible action to contribute to the observance of the Constitution's provisions? If so, isn't using public interest litigation one of the actions a person can take to ensure the observance of the Constitution in relation to rights? Arguably, it is more sensible to try to derive standing right from such duty than from an environmental right alone.[70] Of course, if accepted, this argument works only in relation to environmental claims that can be made based on the Constitution such as challenging the violation of the right to clean and healthy environment. It does not extend to other environmental cases unless they are, in one way or another, related to the Constitution.

Although the above construction of a constitutional provision to come up with environmental standing makes some sense, it requires strong judicial activism. Therefore, the best thing to do is to look for environmental laws which expressly deal with the issue of standing. In this regard, even if most

[69]See, for example, Michael Ochieng Odhiambo, mentioned at note 66, p. 267.

[70] This construction may be reinforced by article 92(4) of the Constitution, which is among the national policy principles and objectives, as it states that citizens and government have the duty to protect the environment.

of the environmental statutes of Ethiopia are silent, article 11 of the Environmental Pollution Control Proclamation contains the following stipulations.

> Right to standing
>
> 1. Any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority [FEPA] or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment.
> 2. When the Authority or the relevant regional environmental agency fails to give a decision within thirty days or when the person who has lodged the compliant is dissatisfied with the decision, he may institute a court case within sixty days from the date the decision was given or the deadline for the decision has elapsed.

As one can see from this article, standing is granted to everyone to seek both judicial and administrative remedies. This means, a suit can be brought against any person who is allegedly causing actual or potential damage to the environment. Thus, compared to other environmental laws that do not contain stipulations on standing at all, the Environmental Pollution Control Proclamation is an important piece of environmental legislation on the issue of standing. Of course, this article contains some problems as we will see later on.

5.2. Who Can Be Sued for EWD[71]

The point here is whether or not everyone who violates environmental regulations can be sued. For example, as we have seen before, in the US, the

[71] At this juncture, the author has not discussed the requirement or otherwise of fault to bring action for EWDs. In fact, as mentioned elsewhere in this work, there are times when liability can be incurred regardless of fault. Thus, strict liability can exist in case of EWDs. The case of fault liability is self-evident.

Clean Air Act, the CWA, and the RCRA recognize the possibility of suing everyone including the US EPA for violating environmental laws.[72] In South Africa, too, anyone can be sued if he/it violates the bill of rights in the Constitution which includes the right to environment. In Ethiopia, article 11 of the Environmental Pollution Control Proclamation stipulates that any person can bring an action *against any person* that is allegedly causing actual or potential damage to the environment. The expression *against any person* may be construed to include not only private persons but also government organs. This implies that everyone can be sued for violating environmental regulations although this is not necessarily the case as we will see later on.

6. Evaluation of the Remedies for ERDs under Environmental Laws

In this section, the author evaluates the remedies that are recognized for EWDs (both the types and the extent). Moreover, the author examines if the existing environmental laws have provided for suitable conditions to effectively apply the remedies they recognize for EWDs.

To begin with, there are different civil remedies that can be used when there is harm or threat to harm to the environment. For instance, compensation, injunctive order and restoration order can be sought against any person who is causing actual or potential harm to the environment. Besides, such measures could be sought on behalf of oneself or others. Thus, it seems that there is no problem with the types of civil remedies one can seek. Likewise, there will be no problem with regard to the extent of civil remedies because

[72] For more on this issue, see Steven Ferry, mentioned at note 3, pp. 228, 337-339; and William L. Andreen, mentioned at note 16, p. 550.

the extent of civil remedies is determined based on the needs of the case (to ensure environmental protection) and the claims made by an applicant. For example, in the case of compensation, it is up to the claimant to indicate how much he needs although the final amount will be determined by the court. In relation to injunctive order, it is up to the court to determine if such order is necessary and, if so, for how long based on what is demanded and what is needed to ensure environmental protection. In relation to restoration order, it is up to the court to decide what exactly a person who is found at fault ought to do to restore the damaged environment.

Moreover, according to article 11 of the Environmental Pollution Control Proclamation, any person can seek appropriate civil remedies for environmental damage (of course after exhausting administrative remedies). This is an impressive point because the Proclamation leaps to create suitable condition for the effective use of civil remedies in relation to environmental matters.

However, despite what is discussed in the preceding paragraphs, the existing environmental laws contain certain problems in relation to civil remedies. First, article 11(1) of the Environmental Pollution Control Proclamation recognizes everyone's right to standing to seek civil remedies for EWDs only when there is actual or potential harm to the environment. That means, public interest litigation cannot be instituted against those persons who have violated environmental regulations but whose behaviors have not caused harm or are not likely to cause harm. For instance, if a proponent fails to engage the public in the EIA process, his failure amounts to EWD. Yet, since no actual or potential damage to the environment may be claimed

solely for failing to engage the public in the EIA process, public interest litigation cannot be instituted based on article 11. In this case, only persons who have vested interest can sue the proponent.

Second, none of the environmental laws of Ethiopia recognizes suing environmental protection organs for failure to discharge their duties under environmental laws. This is another defect in the existing environmental laws because the effectiveness of environmental laws requires, *inter alia*, environmental protection organs to discharge their duties such as monitoring compliance with environmental regulations, taking necessary actions to correct deviation, and issuing necessary instruments. Of course, article 11(1) of the Environmental Pollution Control Proclamation recognizes bringing an action against any person. However, the expression *against any person* refers only to persons who cause actual or potential damage to the environment, whereas environmental protection organs do not cause damage to the environment[73] (although their failure to discharge their duties may contribute to the occurrence of such damage).

So, the fact that public interest litigation is not recognized in relation to all EWDs and a suit against environmental protection organs for failure to discharge their duties is not allowed can adversely affect the use of civil remedies against certain persons. On the other hand, since these two conditions are necessary to ensure environmental protection, it could be

[73] It may be argued that the failure of the FEPA to discharge its duties in relation to environmental protection should render FEPA an indirect polluter or "unseen polluter" and, as a result, it can be sued for pollution by virtue of article 11(1) of Environmental Pollution Control Proclamation.

argued that the existing environmental laws do not go far enough to create suitable conditions for the effective use of civil remedies.

In respect of criminal remedies, as our previous discussions have shown, they are recognized for EWDs at two places; that is, in environmental proclamations and in the Criminal Code. As far as the evaluation of the criminal remedies recognized under different proclamations is concerned, the following observation can be made. The Environmental Pollution Control Proclamation, under article 12(1), provides for penalties that can be applied when there are violations of environmental laws but for which the laws violated do not recognize criminal sanctions. Accordingly, it states that a natural person can be held liable to a fine of not less than five thousand Birr and not more than ten thousand Birr or an imprisonment of not more than one year or both, whereas a juridical person can be held liable to a fine of not less than ten thousand Birr and not more than twenty thousand Birr. In addition to these penalties, the Proclamation provides for severe penalties that should be applied in case its provisions are violated. For instance, offences involving mismanagement, mislabeling or illegal trafficking of hazardous waste or other materials entail a fine of not less than twenty thousand Birr and not more than fifty thousand Birr for a natural person and a fine of not less than fifty thousand Birr and not more than one hundred thousand Birr for a juridical person and imprisonment of the officer in charge for not less than five years and not more than ten years, or a fine of not less than five thousand Birr and not more than ten thousand Birr or both.[74]

[74] Article 15, Environmental Pollution Control Proclamation

Similarly, offences involving pollution of the environment such as discharging any pollutant contrary to the provisions of the Proclamation or regulations issued there under entail a fine of not less than one thousand Birr and not more than five thousand Birr or to an imprisonment of not less than one year and not more than ten years or both for natural persons, and to a fine of not less than five thousand Birr and not more than twenty five thousand Birr and an imprisonment of the officer in charge for a term of not less than five years and not more than ten years, or a fine of not less than five thousand Birr and not more than ten thousand Birr or both in the case of a juridical person.[75] The Proclamation further recognizes other measures such as the confiscation of anything that is used in the commission of environmental crimes, ordering the convict to bear the cost of cleaning up, and requiring the convict to restore to the state in which the environment was prior to the infliction of the damage, and when such restoration is not possible to pay appropriate compensation.[76] Interestingly, the Proclamation clearly stipulates that the provisions of other laws like the Criminal Code should take precedence over its stipulations on criminal remedies whenever they recognize more serious penalties.[77]

The EIA proclamations also provide for similar criminal remedies. For instance, article 18 of the EIA Proclamation recognizes the use of fine up to the maximum 100,000 birr for failure to do EIA or for making false statement in EIAs. Of course, it does not recognize imprisonment but it recognizes that the provisions of the Criminal Code can apply, whereas the

[75] Id., article 16
[76] Id., article 17
[77] Id., article 12(3)

Criminal Code recognizes imprisonment not exceeding 1 year for offences involving EIA.

Article 29 of the Water Resources Management Proclamation and article 21 of the Animal Disease Control Proclamation do not recognize separate criminal remedies but stipulate that the violation of their provisions or the provisions of regulations or directives issued under them will entail penalties recognized under the criminal law. On its part, the Public Health Proclamation provides, under article 20, for a fine not exceeding 9,000 birr for violation of its provisions or regulations issued there under. According to article 16 of the Development, Conservation and Utilization of Wildlife Proclamation, an act that violates its provisions entails a maximum fine not exceeding Birr 30,000 or imprisonment not exceeding five years or with both unless higher penalty is provided under criminal law.

Under the Criminal Code, different EWDs are identified and subjected to various types of punishments depending on their gravity and consequences. For instance, according to articles 515-516, while acts of spreading human disease may entail severe punishments including life and death sentence, acts of spreading animal and plant diseases entail simple imprisonment of not less than three months. Water contamination is also considered, under article 517, a serious crime and hence subjected to rigorous imprisonment not exceeding 7 years with the possibility of extending it to 15 years in serious cases. For other EWDs such as discharging pollutants into the environment, article 519 of the Criminal Code recognizes the imposition of fine not exceeding 10,000 birr or rigorous imprisonment not exceeding five years with the possibility of extending it to ten years when harm happens to human

health or life or the environment. With regard to hazardous waste and other materials mismanagement, article 520 of the Code recognizes the use of fine not exceeding 5,000 birr or rigorous imprisonment not exceeding three years or both. As far as wrongful acts relating to EIA such as failure to do EIA or making false statements in EIAs are concerned, article 521 of the Code stipulates the use of simple imprisonment not exceeding one year. Thus, the Code attaches severe penalties to some of the EWDs it considers grave.[78]

Generally, there seems no problem with regard to the types of criminal remedies to apply when EWDs occur. Similarly, the extent of criminal remedies may not be at issue. One, the provisions of the Criminal Code could be used whenever they provide for severe penalties for EWDs because environmental laws recognize such application of the Criminal Code. Likewise, the Criminal Code leaves a room for the application of special laws which provide for severe penalties than its provisions do. This shows that there is a complementary relationship between environmental proclamations and the Criminal Code on EWDs. So, since it is the law that provides for a severe penalty that will be applied, the extent of criminal remedies that can be applied to EWDs may not be an issue.

Nevertheless, even if the above-mentioned complementary relationship between the Criminal Code and the environmental proclamations is a good thing, there is still a room to question the adequacy of the extent of the available criminal remedies, in particular, fines, to serve the purposes for

[78] Crimes relating to EIA do not entail rigorous imprisonment but simple imprisonment. One of the differences between simple and rigorous imprisonment relates to their mode of execution as the latter is required to be executed under harsher conditions than the former.

which they are recognized.[79] The first concern relates to the declining value of Birr.[80] Here, one can legitimately question the adequacy of the amount of fines that are recognized for EWDs. The value of birr now is more than 100% less than the value of birr when most of the environmental laws of Ethiopia, and even the Criminal Code, were enacted.[81] Thus, the fines we have in the environmental laws may not be adequate enough to serve the purposes they were meant for when they were stipulated. Of course, when fine and imprisonment are provided as alternative remedies, courts can opt for the imprisonment to avoid the effect of the leniency of the fines. However, this is not always possible since there are times when only fines are stipulated for certain EWDs. Similarly, we cannot imprison juridical persons.

The second concern relates to the absence of subsidiary laws to implement the provisions of environmental proclamations. On certain matters, the provisions of the Criminal Code and different environmental proclamations in relation to criminal remedies can only be applied if there are detailed regulations or standards or directives or guidelines to put them into effect. However, so far, most of these laws like regulations and directives have not been issued. Thus, the criminal remedies discussed above could not be used to the full extent to ensure environmental protection.

[79] According to what is expressly stated under article 1 of the Criminal Code, punishment aims to deter and/or rehabilitate criminals with a view to ensuring the order, peace and security of the State, its people, and its inhabitants for the public good.
[80] Now, 1 USD is sold at more than 19 Birr.
[81] By then, 1 USD was less than 7 birr.

Finally, the existing environmental laws recognize the use of different administrative remedies such as suspension or revocation of permits, relocation of an entity that is violating environmental regulations, confiscation of tools used to violate environmental regulations, and restoration of the injured environment. This implies that there is no problem of recognition of administrative remedies, too. Thus, if these remedies are used properly, they can facilitate the achievement of the objectives of environmental regulations. However, there is one major problem with these laws. That is, they do not authorize environmental protection organs to take some of the most important administrative remedies by themselves such as suspension, closure or relocation of the operation of an entity that is violating environmental laws; instead, they simply allow them to request other government organs such as licensing bodies to take such measures without imposing corresponding obligations on such bodies to comply with their requests. It is interesting to note that the new Investment Proclamation does not recognize non-compliance with environmental laws as one of the grounds to suspend or revoke investment permits although it requires investors to observe laws pertaining to environmental protection.[82]

Therefore, although Ethiopia's environmental laws seem adequate with regard to the recognition of different administrative remedies that can be used when EWDs occur, they have failed to devise a better way of effectively applying them; that is, mandating environmental protection organs to take some important administrative measures by themselves

[82] See articles 19 and 38, Investment Proclamation, Proclamation No. 769/2012, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 18th Year No.63, Addis Ababa, 17th September 2012.

whenever necessary or imposing duties on other bodies to take such measures when requested by environmental protection organs.

In conclusion, even if the environmental laws of Ethiopia recognize the use of civil, criminal and administrative remedies to enforce environmental laws, there are problems which militate against the effectiveness of these remedies. For example, the non-recognition of standing in broader sense, the failure to allow environmental protection organs to take certain necessary administrative measures by themselves, and the declining value of Birr which reduces the effectiveness of fine can have adverse effect on the effectiveness of these remedies to serve the purposes they were meant for.

7. Tort Law and Environment Protection

In addition to environmental laws, it is possible to use the law of tort to protect the environment. However, this law can only be of limited importance due to certain reasons. For example, the law of tort is primarily concerned with the protection of individuals' interests while environmental protection constitutes public interest objective. Besides, as tort law is for individual interest's protection, the damages awarded may not be adequate to restore the harm caused to the environment such as cleaning up pollution. Moreover, in tort, standing is limited to the individual whose interest is affected. Further, tort action depends on the resource capacity and willingness of the victim to take action for infringement.[83]

[83] For the discussion in this paragraph, see Mark Wilde, mentioned at note 12, pp. 4, 55, 78-84.

Therefore, although it can somewhat contribute to environmental protection, tort law is not suitable for effective environmental protection. If, for example, the damage awarded to a person is not enough to fully clean up the pollution caused by a defendant, the pollution may continue to exist. In addition, since action can be taken only by the victim or his representative, others will not be able to make contribution to environmental protection based on tort law. More importantly, however, if the victim lacks capacity to sue the wrongdoer or is not interested in suing him, the harm to the environment will not be averted. Therefore, seen in light of these and other factors, it is clear that the law of tort cannot be much help to ensure environmental protection. It is argued that tort law became more ineffective to protect the environment after industrial revolution thereby leading to the emergence of environmental regulations which, in turn, led to the marginalization of tort law in the field of environment.[84]

In Ethiopia, for example, a court may, in accordance with the civil code, order a person who is found at fault to pay compensation to the victim or to take any appropriate measures to make good or limit harm.[85] As far as the extent of compensation is concerned, it will be equal to the damage caused to the victim by the act giving rise to the liability. On the other hand, the other appropriate measures that a court may order include rectification of the problems created such as cleaning up pollution if pollution is the wrong on which the tort case is based. However, these measures must be taken for the protection of individual (the victim's) interests in mind because that is one of the *raison d'etre* of tort law, whereas harms to the environment affect the

[84] Id., p 4-5.
[85] See articles 2090-2091, Civil Code.

public at large thereby necessitating measures that can protect the interest of the public.[86]

Conclusion and Recommendations

As the brief browsing of mainly Ethiopian environmental laws in this article has revealed, EWDs in Ethiopia can entail civil, criminal and administrative measures/remedies. On the other hand, the recognition of these remedies creates the impression that they can contribute to the effective protection of the environment if used properly.

However, a closer look at the provisions of these laws reveals that there are certain problems which affect the effective use of these remedies. Among other things, the civil remedies they recognize are limited to certain types of EWDs; they do not permit suits against environmental protection organs for failure to discharge their duties under environmental laws; environmental protection organs have not been fully authorized to take some important administrative measures against violators of environmental regulations, and the ability of the fines recognized for EWDs to serve their purposes is becoming smaller with the declining value of Birr.

Therefore, it is recommended that all relevant environmental laws should be amended to avoid these defects. In particular, article 11 of the Environmental Pollution Control Proclamation should be amended to recognize public interest litigation in its broader sense; that is, against any person, including government organs, and for all EWDs including cases where harm has not

[86] The principle on which tort law is based is that *whosoever causes harm to another by a wrongful act shall make it good*. See id., article 2028.

occurred. Similarly, the fines that have been recognized by various environmental laws must be reconsidered to suit the needs of the time.

The Elements of Rape as a Crime of Genocide under International Criminal Law: *Case law analysis*

*Awet Hailezgi Tefera**

Abstract

Even though there is a duty on the international community to condemn and prosecute acts of genocide in general, [1][including genocidal rape[2]], the act of rape is not explicitly subsumed under the category of the prohibited acts of the crime of genocide under the Genocide Convention and the International Criminal Court Statute either.[3] *This lack of explicit reference creates uncertainty as to whether or not to consider rape as act of genocide.*

However, the international criminal law has started to give legal recognition to the use of rape as genocide through the pioneer decision of the International Criminal Tribunal for Rwanda (ICTR) in the Akayesu case.[4] *This heinous weapon [rape] has continued to be employed as a means of destroying groups of people even after the traumatic Rwandan Genocide. The gang rapes committed against Darfurians in West Sudan can be cited as a recent incident that the International criminal Court (ICC) is dealing with.*

Despite the fact that rape is not specifically mentioned under the Genocide Convention or the Rome Statute as a prohibited act of the crime of genocide, recent case law of the international criminal tribunal, particularly the Akayesu case reveal that the act of rape can be treated

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[1] See Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December1948. Entry into force: 12 January 1951 [herein after the Genocide Convention]

[2] Emphasis added

[3] See Article 2 of the Genocide Convention, and Article 6 of the ICC Elements of crime, here in under referred to as the ICC EoC

[4] Ibid, pp 93

as prohibited act of the crime of Genocide.[5] *This Article tries to show the link between the elements of rape and the crime of genocide.*

Introduction

Mass rapes have been committed against people particularly women, in several parts of the world, both in times of war and peace. The approximately 20,000-60,000 rapes committed in Bosnia,[6] the 250,000-500,000 rapes committed during the Rwandan genocide,[7] and the thousands of gang rapes in Darfur, [North] Sudan are just recent incidents. Can one imagine that these rapes have been committed as a means of perpetrating Genocide?

This article tries to shed light on the relationship between the elements of rape and the crime of genocide. The elements of the crime of genocide: the mental element, material element and protected groups are assessed as they relate to the act of rape. Relatively broader discussion is made on how the material element of the crime of genocide is related with the elements of rape. Hence, this article tries to show how rape can be subsumed as a material element of the crime of genocide.

[5] Prosecutor v Akayesu, case no. ICTR-96-4-T (Jugement, September 2, 1998, para 496
[6] Lisa Sharlach ,Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda, New Political Science, Volume 22, Number 1, 2000 pp. 92
[7] Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, para, 16, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996)

1.1 Definition of Rape

There is no uniform statutory meaning to the term rape under international law as yet.[8] Consequently, different meanings of the term are given in the decisions of international criminal tribunals. For the purpose of this Article, the definition given in the *Akayesu* case is adopted. The definition conceptualises the term rape as having two components: the 'physical invasion of sexual nature' and 'the presence of coercive circumstances (absence of consent).[9]

The ICTR trial chamber, in the *Akayesu* case, tried to define rape as '[a] physical invasion of a sexual nature committed on a person under circumstances which are coercive'.[10] In relation to the first component of rape, the definition given by the trial chamber deviates from the common, traditional definition of rape which focuses on 'mechanical description of objects and body parts'. The tribunal expressed the above notion stating that '… the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.'[11] In relation to this, the tribunal tends to focus on the violence which according to the tribunal is considered to be the 'objective of criminalizing rape in international law'.[12] The other reason that compelled the tribunal to opt for the above definition of rape is the '…cultural sensitivities involved in public discussion of intimate matters

[8] Chile Eboe-Osuji, Rape as Genocide: Some Questions Arising, Journal of Genocide Research 9:2 , June (2007) pp 252
[9] Cryer,(2010),pp254
[10] *Akayesu(T.Ch,1998), para 688*
[11] *Akayesu (T.Ch.1998) para 687*
[12] Ibid

and the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured'.[13] Indeed, if victims and witness are unable to express the facts of the crime they endured in terms of the body parts; defining rape in terms of body parts may not achieve the 'objective of criminalizing rape.'[14]

The first component of rape was more elaborated by the trial chamber in the *Furundzija* case. However, the definition emphasizes more on the mechanical description as follows: [15]

(i) Sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) [B]y coercion or force or threat of force against the victim or a third person.

Even though the Trial Chamber in the case of *Kunarac*,[16] followed similar approach in defining rape as in the *Furundzija* case, it added some other factors which make the act of 'sexual penetration non-consensual' in addition to the factors mentioned as 'coercion or force or

[13] Ibid

[14] 'Objective of criminalising rape according to the tribunal is prevention of violence or aggression of sexual character

[15] *Prosecutor v Furundzija (Judgment), December 10, 1998 (ICTY Trial Chamber), Para 185, The ICTY trial chamber in this case tried to define rape. It should also be noted that the analysis of the tribunal doesn't go to the extent of relating rape with the crime of genocide.*

[16] *Prosecutor v Kunarac & Others (Judgment), February 22, 2001 (ICTY Trial Chamber)* Para 438, *(the analysis of the tribunal doesn't go to the extent of relating rape with the crime of genocide.)*

threat of force against the victim or a third person'.[17] Generally, the analysis of the judgement in the *Kunarac* case focused on three important factors [elements] of the act, (a) sex related activity, (b) consent, and (c) force inquiry.[18]

As shown below, the definition of rape provided under the ICC Elements of Crime (hereinafter ICC EoC) reflects the approaches adhered by the above tribunals.[19]

> 'The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.'[20]

There are different views regarding the second component of rape. The ICTR in its decision in the *Akayesu* case focused on the requirement of 'coercive circumstance'.[21] This approach is also adopted by the ICC EoC.[22] On the other hand, there are sources which focus on 'lack of consent of the victim' which is believed to be an approach adhered by

[17] Ibid
[18] *See, generally the Kunarac case*
[19] Some paragraphs of Articles 6, 7 and 8 of the Rome Statute list multiple of crimes, in such instances, the elements of crime appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements. This is in line with the stipulation of article 9 of the ICC EoC that a particular conduct may constitute one or more crimes. Generally the ICC EoC assist the ICC in the interpretation and application of articles 6 ,7 and 8 of the Rome Statute, see Article 1, general introduction of the ICC EoC.
[20] See, the ICC EoC, Art. 7(1) (g)–1, element 1, this meaning is given in elaborating the elements of rape as crime against humanity.
[21] See, eg.Akayesu ICTR T. Ch. I 2.9.1998, para. 598; Furundžija ICTY T. Ch. II 10.12.1998, para. 185
[22] See Art. 7(1)(g)–1, element 2.of the ICC EoC

many national legal systems.[23] It should be noted that both the above stipulations are similar because it is clear that victims of rape cannot give their consent under 'coercive circumstances'.

1.2 The Meaning and Concepts of Genocide: *Overview*

1.2.1 The Meaning of Genocide

The term genocide is derived from the Greek term '*genos'* meaning nation, race or tribe, and the Latin term '*cide'*, meaning killing. [24]It is during the World War II, in 1944 that a Polish Law Professor Raphael Lemkin, tried to coin the term in an attempt to deal with and condemn the violence perpetrated by Hitler's regime.[25]

The UN treaty, which emerged in reaction to the holocaust of World War II under article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, defines genocide as an act which is 'committed with the intent to destroy in whole or in part a national, ethnical, racial or religious group […]'.[26] The above definition of the crime of genocide has now been incorporated directly into modern international instruments such as the ICTR, ICTY, and ICC statutes.[27] Today, the prohibition of genocide has the status of customary international law[28] that binds all

[23] Cryer(2010)pp 255
[24] R. Lemkin, Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government– Proposals for Redress (Washington, DC, Carnegie Endowment for World Peace 1944) p. 79.
[25] Ibid
[26] See article 2 of the Genocide Convention which provides the standard definition of genocide.
[27] See ICTR statute, article 2(2), ICTY article 4(2) and article 6 of the ICC statute
[28] Payam Akhavan, The Crime of Genocide in the ICTR Jurisprudence, JICJ 3 (2005),pp3

members of the international community as the pre-emptive norms of international law.[29]

The crime of genocide, like any other crime, encapsulates elements such as the *mens rea* or mental element, the *actus rea* or material element or prohibited act.[30] Yet, the crime of genocide is unique in that it requires a different *mens rea* element which is characterized as *double mental* element: the general and the specific intent.[31]

1.2.2 Overview of the Elements of the Crime of Genocide

Article II of the Genocide Convention defines genocide as:[32]

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group[33]

[29] Russell-Brown,Sherrie, Rape as an Act of Genocide, Stefan A. Riesenfeld Symposium 2002, Berkeley JIL,Vol 21, number 1, 2003, pp 361

[30] See generally Article 2 of the Genocide Convention

[31] For the meaning of 'general' & 'specific' intent, see section 2.1 of this Article

[32] This definition is also directly incorporated under Article 6 of the ICC Statute, Article 2(2) of the ICTR and Article 4(2) of the ICTY Statutes.

The above stipulation provides two important parts: the mental element [*means rea]* element of genocide, and the material element. The mental element of the crime of genocide encapsulates two components: (i) 'the general criminal intent required for the underlying offence mentioned under sub paragraphs (a-e) above and, (ii) the 'intent to destroy in whole or in part the protected group' which is known as the special intent.[34] The material element embraces the prohibited offences listed under sub paragraphs (a-e) mentioned above. Besides, the protected groups, mentioned as 'national, ethnical, racial or religious' are also other components of the material element of the crime of genocide.[35] Each of the elements of the crime of genocide shall be assessed separately, along with their relationship with rape in the subsequent topics of this article.

2.1 The Mental Element

Genocide is characterised as possessing double mental element: the general intent and the special intent or 'intent to destroy.[36] The general intent includes the 'wilful intent' and the knowledge about the conduct and its consequence. [37] This kind of intent is generally defined under article 30 of the ICC statute that the intention encapsulates the components of volition or wilfulness and cognitive (intellectual)

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[33] See, Article 2 of the Geneva Convention

[34] Mathilde K. van Haren, The Report of the International Commission of Inquiry in Darfur & *Genocidal Intent* – A Critical Analysis , NILR, 2006, pp214

[35] Ibid

[36] Kai Ambos, What Does Intent to Destroy in Genocide Mean? International Review of the Red Cross, Volume 91, Number 876, December 2009,pp 833

[37] E.g article 3(3) of the The Rome Statute of the International Criminal Court, A/CONF.183/9 of July 1998(hereinafter the ICC statue) defines the term 'knowledge' as awareness that a circumstance exists or a consequence will occur in the ordinary course of events'

awareness about the act and the consequence of the act in an ordinary course of events.[38]

In order for an act to constitute a crime of genocide, the volition and awareness about the consequences of the act (general intent) should be complemented by an ulterior (specific) intent which is 'intent to destroy in whole or in part'.[39] This additional requirement, which goes beyond mere volition and will to commit one of the prohibited acts, [40] is essential element in the crime of genocide.

2.1.1 The Meaning of Special Intent (*Intent to Destroy*)

The phrase mentioned under article 2 of the Genocide Convention states '… *intent to destroy, in whole or in part,…,*' is considered to be the special intent component of the crime of genocide.[41] Concomitantly, the Trial Judgement in the *Akayasu* case defined the 'intent to destroy' to be the special intent required as a constitutive element of the crime of genocide.[42] Subsequent decisions of the ICTR applied similar definition

[38] See, Article 30 of the ICC statute.
[39] See, definition of special intent under Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December1948. Entry into force: 12 January 1951 [herein after the Genocide Convention]
[40] Ambos(2009),pp835
[41] See, article 2 of the Genocide Convention
[42] *Akayesu,Trial Judgement (1998), para. 498; see also Prosecutor v. Athanase Seromba, Trial Judgement, Case No. ICTR-2001-66-I,13 December, 2006, paras. 175, 319)*

to the term 'special intent' which goes beyond the mere knowledge standard.[43]

The special intent requirement defined in the *Akayesu* case above was also similarly applied under the case law of the ICTY. For instance, the mere knowledge (*general knowledge*) standard submitted by the prosecutor in the case *Prosecutor v. Goran Jelisic* was rejected by the ICTY.[44] Similarly, the judgement in the *Jelisic* case had similar opinion with what is mentioned above. In this case, the tribunal noted that the accused should not be convicted for genocide even though he was aware that his conduct was contributing in the destruction of the protected group, unless he shared the intent of destroying the group in whole or in part.[45]

Cases subsequently decided by different tribunals adhered to the definition given to special intent in the *Akayesu* judgement. The specific intent or intent to destroy is defined under the case laws as a specific intent which expresses the 'volitional element in its most intensive form' and is goal oriented.[46]

The distinction between special intent and motive is worth mentioning. It is submitted that motive and intent often overlap for the reason that motive can be subsumed within the concept of intent required in the

[43] *See eg. Prosecutor v. Georges Rutaganda, TrialJudgement, Case No. ICTR-96-3-T, 6 December 1999, para 61; Prosecutor v. Ignace Bagilishema, Trial Judgement, Case No. ICTR-95-1A-T, 7 June 2001*,para 62

[44] *Prosecutor v. Goran Jelisic, Prosecutor's Pre-Trial Brief, Case No. IT-95-10-PT, 19,* November 1998, para. 3.1

[45] Prosecutor v. Jelisić, ICTY Trial Chamber Judgment, 14 December,1999 para 86

[46] Krstić(Trial Judgement)2001, para 561

crime of genocide.[47] Mostly, several factors such as sexual gratification, political gain, or economic benefit may motivate a perpetrator to participate in the destruction of certain protected groups.[48] However, mere motive, which is not pooled with the 'special intent to destroy' component of genocide, does not amount to the constituent element of the crime of genocide. Therefore, mere motive can't be equated to special intent. For instance, the ICTY Appellate Chamber in *Kristic* case argued that political motive cannot be treated as a 'special intent to destroy' component of genocide.[49] Similarly, the alleged economic and political motives, which were assumed to be the reason to commit mass rapes in Darfur, were distinguished from the ideals of special intent by the ICC establishing that there was reasonable ground to believe that the rapes were committed with intent to destroy.[50]

Therefore, even though a perpetrator can commit crime initiated by purposes other than intent to destroy, motives such as political or economic ones cannot constitute a crime of genocide unless the special intent is established.

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[47] Robert Cryer, et al, An Introduction to International Criminal Law & Procedure, 2nd edt. Cambridge University, 2010,Pp 347

[48] Ibid

[49] See, eg. The Prosecutor v. Krstic (Case No. IT-98-33-A), Judgement, ICTY A.Ch. 19.04.2004. paras. 133, 134; Report, UN Doc. S/2005/60 para. 518.

[50] Cryer,(2010) ,pp 225

2.2 The Protected Groups and Scope of Protection under the Genocide Convention

2.2.1 Who are protected under the Genocide Convention?

Article 2 of the Genocide Convention provides that the protected groups are *'national, ethnical, racial or religious group'*.[51] Technically, for an act to constitute a crime of genocide, the act must be committed against the protected groups mentioned above. However, it often remains difficult to give specific meaning for each of the terms listed above as there is no internationally accepted, clear definition of the terms national, ethnical, racial and religious group.[52] Under such circumstances, how is it possible to identify the protected groups under the Convention?

The ICTR, in its judgements of the *Akayesu* case, tried to give meaning for the above mentioned terms. For example, the term 'national group was defined by the ICTR as a group of people who are assumed to 'share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[53] The term racial group was defined as a group 'based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors'.[54] The term ethnic was also defined as 'a group whose members share a common language or culture'.[55] Finally, the term religious group was

[51] Article 2 of the Genocide Convention
[52] *Prosecutor v. Georges Rutaganda, TrialJudgement, Case No. ICTR-96-3-T, 6 December 1999,para 56*
[53] Cryer (2010)pp 210, citing , *Akayesu, ICTR T. Ch. I 2.9.1998, para. 511*
[54] *Akayesu, ICTR T. Ch. I 2.9.1998* para 513
[55] Ibid, para 512-15

defined as collection of people with a 'denomination or mode of worship or a group sharing common beliefs.[56]

Even though the Trial Chamber in the *Akayesu* case tried to define each term as mentioned above, such definition may not clearly show the differences among the terms for the reason that there might be overlaps among the meanings given above[57]. For instance, in order to convict the accused for committing rape as genocide, the ICTR Trial Chamber in the *Akayesu* case, had to establish whether the group (*Tutsi*) falls under the category of protected groups. However, the chamber, practically found it difficult to distinguish the *Tutsi* from *Hutu* groups for the reason that they both share similar language and culture.[58]

Due to the absence of a specific meaning to the terms referring to the protected groups, assessing these concepts in view of a 'particular historical, political, social and cultural context' is often essential.[59] Hence, the ICTR trial chamber in the *Akayesu* case tried to identify the *Hutu*, *Tutsi* and *Twa* groups based on the separate identities given by the Belgian authority around 1930s. Hence, the tribunal, in its effort to come out of the trouble it faced, argued that the Tutsi had already established 'a stable and permanent group'.[60] Concomitantly, the Rwandan Constitution of 1994, which addressed Rwandans by the ethnic groups mentioned above, was another ground for the Tribunal to justify the 'stable and

[56] Ibid
[57] See, Cryer(2010),pp 210
[58] See, Critiques on the chamber's reasoning in Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3 JICJ 989. As cited in Cryer,pp 210
[59] *Rutaganda* case , para 56 as cited in Payam Akhavan, page 1002
[60] *Akayesu, ICTR T. Ch. I 2.9.1998, para 702*, as cited in Russel supra note72, pp 369

permanent nature' of the group.[61] Therefore, the tribunal concluded that the victims against whom mass rapes were committed constitute ethnic groups and are protected under the Genocide Convention.

Based on the above discussion, one may raise a question on whether the list of protected groups mentioned above is exhaustive or illustrative. In other words, can mass rape committed against group other than the groups mentioned above amount to a crime of genocide against 'protected group' by the Convention?

The ICTR Trial Chamber in the *Akayesu* case opined that the list is non-exhaustive by mentioning that 'any stable and permanent group' can be protected under the convention.[62] This view of the chamber makes the list to be non-exhaustive. However, none of the ad hock tribunals adhered to the view of the chamber mentioned above. For example, the Appeals Chamber in the *Krstic* case consistently implied that the Genocide Convention is intended to exclusively focus on the four groups mentioned above.[63] Similarly, the ICC in the case of *Omar Al Bashir* reflected the view that the list is exhaustive.[64]

In addition to the above case law, the principle that '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy…'[65] excludes protected groups other than those mentioned in the list. Such kinds of interpretation are in line with the requirements of the

[61] Russel-Brown, Sherrie(2003),pp370
[62] *Akayesu (ICTR 96-4-T), Judgement, Trial Chamber I, 2 September 1998, para 702*
[63] Prosecutor v Krstic ICTY A. Ch. 19.4.2004 paras 6–8
[64] Al Bashir arrest warrant case, ICC PT Ch. I 4.3.2009 paras 134–7
[65] Aricle 22(2) of the ICC statute

principle of *nullum crimen sine lege.*[66] Therefore, the case law and the principles mentioned above can lead to the conclusion that the list of protected groups is exhaustive.[67]Even though the interpretation of the list is often criticised for being restrictive, attempts to widen the scope of protection have been unsuccessful for many, if not, all states.[68] This is due to the *nullum crimen sine lege* principle and the fact that article 22(2) of the ICC statue prohibits interpretation by analogy.[69]

Yet, under such situation, identifying the protected group is often found to be difficult.[70] This is due to lack of precise definition given to the 'four protected groups' under the Genocide Convention.[71] For instance, the ICTR trial chamber in the case of *Akayesu*, found the line of distinction between the Tutsi and Hutu ethnic group somehow blurred. This is because the two groups are intermingled through various means such as marriage and share common language and culture.[72] As mentioned above, the term 'ethnicity' is defined by the tribunal as a group whose members share a common language and culture'.[73] However, the Tutsi and Hutu people had a common language and culture. Therefore, we can

[66] Payam Akhavan, The Crime of Genocide in the ICTR Jurisprudence, JICJ Criminal Justice 3 (2005),pp 999
[67] Ibid
[68] See, Report of the Ad Hoc Committee on the Establishment of the ICC, UN GAOR 50th Sess., Supp. No. 22, A/50/22 (1995) paras. 60–1, Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I, UN GAOR, 51st Sess., Supp. No. 22, A/51/22 (1996) paras. 59–60 as cited in Robert cryer, supra note 49, page 208
[69] Ibid
[70] Cryer(2010),pp 208-209
[71] Mathilde K. van Haren, The Report of The International Commission of Inquiry on Darfur & Genocidal Intent –A Critical Analysis , NILR, 2006, pp 236
[72] Ibid.pp1001
[73] *Akayesu (ICTR 96-4-T), Judgement, Trial Chamber I, 2 September 1998.para 513*

see that the above meaning could not practically solve the ambiguity. The Trial Chamber, while trying to find a way out, referred to the *travaux préparatoires* of the genocide convention, and opined that the intention of the drafters was to protect any 'stable and permanent group'[74] and regarded the victims of rape (the Tutsis) as constituting a '…stable and permanent group and were identified as such by all.''[75]

In line with the above assertion, the Commission of Inquiry authorized by the Security Council to investigate violations in Darfur tried to apply the notion of 'any permanent and stable group', assuming that this notion has acquired the status of customary international law.[76] However, for a practice to be a customary international law, it should be upheld by state practice and *opinio juris*, which were not fulfilled in this particular situation.[77] Besides, there was no case law except the *Akayesu* case reflecting the validity of the assertion submitted by the commission.[78]

Therefore, even though the ICTR's findings mentioned above may lead to the conclusion that the list of protected group is not exhaustive, the argument that the list of protected groups cannot be illustrative has a wider acceptance and legal ground as mentioned above. This approach was adhered by the appeals chamber in the case of *Krstic*[79] and the ICC

[74] Ibid,para. 516.
[75] Ibid, para 702
[76] Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc.S/2005/60 para. 501., as cited in Cryer (2010), pp 209
[77] Ibid
[78] Cryer,(2010) pp 209
[79] *Krštic, (ICTY A. Ch. 19.4.2004), paras. 6–8*

pre-trial chamber in the arrest warrant of *Omar Al-Baeshir* in Darfur, Sudan.[80]

2.2.2 Identification of Protected Groups

Determining whether an individual belongs to the category of people mentioned as 'protected groups' is a difficult task.[81] Be this as it may, an individual can be identified as belonging to one ethnic, religious, national or racial group under article 2(2) of the Convention, based on subjective or objective approaches. The subjective approach is characterised by the perception of the perpetrator(s) that certain group belongs to the protected groups.[82] The objective approach, on the other hand is based on the assumption of the physical existence of certain protected group.[83] For instance, the fact that the Trial Chamber in the *Akayesu* case noted that every Rwandan citizen was made to possess an identification card indicating the Hutu, Tutsi, or Twa, ethnic groups can be an objective indicator of the victims of rape (Tutsis) as a distinct group.[84]

The subjective approach is mostly relied upon because it is assumed that establishing the group existence is often complicated.[85] For example, in dealing with the mass rapes committed in Darfur, identifying the *Fur, Massalit* and *Zaghawa* as making up a separate ethnic group different from the group to which the perpetrators belong was difficult because both groups share common language, religion, and, they are intermingled

[80] *Al Bashir Arrest Warrant Case, ICC PT Ch. I 4.3.2009,paras 134–7*
[81] Cryer(2010)pp 211
[82] Ibid
[83] See; *case Semanza ICTR, T. Ch. 15.5. 2003*, para. 317. As cited in Cryer Robert, pp 213
[84] Akayesu,(1998),para170
[85] Cryer (2010)pp 212

through marriage and coexistence.[86] Thus, the Commission of Inquiry in Darfur tried to rely on the subjective approach based on the argument that the groups opposing the government of Sudan were perceived by the perpetrators as 'Africans'. At the same time, the groups who were on the government side were perceived by both the victims and perpetrators as 'Arabs'.[87]

However, even though reliance on subjective approach seems feasible in order to identify the protected group, mere reliance on this approach is criticised for it might sometimes lead towards protecting imaginary groups which may not have objective existence.[88] This is because of the fact that the Genocide Convention is not intended to protect non-existing entities.[89]

Admittedly the combination of both subjective and objective approaches can preferably be taken in to account in identifying the protected group. Because, the perception of the perpetrator that there exists a distinct group (subjective approach), should have real existence on the ground (objective approach). Moreover, the aim of the Genocide Convention, as mentioned above, is to protect a group which has real existence. The Trial Chamber in the case of *Rutangana,* for instance, preferred to take both subjective and objective standards in to account.[90]

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[86] Ibid
[87] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, paras. 509-512.
[88] Ibid, pp 213
[89] Ibid
[90] See, eg. *Rutaganda (ICTR 96-3),Trial Chamber I, 6 December 1999*, para 56

2.2.3 Minimum Number of Victims Required

One can possibly pose a question on what would be the minimum number of people protected. Put differently, how many people should be raped for certain act to constitute a crime of genocide?

In relation to this issue some scholars have tried to find meaning to the term '*in whole* or *in part*' provided under the definition of genocide.[91] [*Emphasis added*]. Attempts are made to define the term 'in part' to mean a 'substantial part' or enough part having an impact on the whole group.[92] However, even though such definition was reflected in the jurisprudence of the international tribunals such as the ICTR,[93] it lacks acceptance for the reasons that the punitive purpose of the convention will not be achieved if there is a need to wait till 'substantial' number of people are to be raped with intent to destroy. [94] Secondly, 'genocide is characterised by the special intent not by the number of victims.'[95] The clarification of the ICC elements of crime elaborates that 'even one victim is sufficient to constitute an act as crime of genocide provided that the act was committed with the special intent required. [96] Therefore, we can see from the above discussion that there is no minimum threshold as far as the number of victims is concerned.[97] Hence, rapping a single

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[91] Chile Eboe-Osuji, Rape as genocide: some questions arising, Journal of Genocide Research 9:2 , June (2007) pp 260
[92] Ibid, pp 261
[93] See, eg.*Prosecutor v. Bagilishema (Case No. ICTR-95-1A-T), Judgment, 7 June 2001.para 64*
[94] Eboe(2007) pp 262-263
[95] Cecile Aptel,The Intent to Commit Genocide in the Case Law of the ICTR, Criminal Law Forum 13:, 2002, pp282
[96] See, the ICC EoC, U.N. Doc. PCNICC/2000/1/Add.2 (2000)
[97] See, eg.*Prosecutor v Kamuhanda (Judgment) January 22, 2004, ICTR-99-54A-T (ICTR Trial Chamber)*, para 628

person with intent to destroy the group to which the victim belongs may constitute a crime of genocide.[98]

2.3 How are the prohibited acts of the crime of genocide related with the elements of rape?

Article II of the Genocide Convention provides acts which constitute the material element of the genocide.[99] While these acts are listed under sub paragraphs (a) through (e) of the provision,[100] we can, nevertheless, clearly notice that rape is not explicitly mentioned as a crime of genocide.

In relation to the above issue, the questions that can possibly be raised are whether the list of prohibited acts is exhaustive or illustrative? And how can rape be treated as a prohibited act of the crime of genocide?

Article 22 of the ICC statute, as already mentioned above, requires the restrictive interpretation of the prohibited acts mentioned under article II (a-e) of the Genocide Convention where it makes impossible to extend the interpretation by analogy.[101] Similarly, the principle of '*nullum crimen sine lege*'[102] is another ground to possibly argue that the list should be exhaustive. Indeed, the above ground seems to sufficiently justify for the list to be exhaustive.[103]

[98] It should be noted that in such cases, proving intent to destroy may be difficult as it is usually the targeting of a large number of a particular group that is used as an indication of intent to destroy.
[99] See, Article 2 of the Genocide Convention
[100] Ibid
[101] See Article 22(2) of the ICC Statute
[102] See, eg. Cryer(2010)pp 17
[103] W. Schabas, Genocide in International Law (Cambridge: Cambridge University Press, 2000), p 73

Be this as it may, the ICC EoC mentions list of examples to elaborate the meaning of some of the acts mentioned under article II of the Genocide Convention providing that the meanings of some of the prohibited acts include rape.[104] The ICC EoC also shows that the meanings of some of the remaining acts are not restricted to the examples given to elaborate especially the following sub paragraphs; '*(b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction … (e) Forcibly transferring children of the group to another group.'*[105]

The elaboration on the meaning of each of the prohibited acts mentioned above implies the possibility for broad interpretation of the prohibited acts. This shows the possibility that rape can be included as constituting either one or all of the prohibited acts mentioned above. The ICC EoC does not provide list of examples to elaborate the meaning of the acts mentioned under sub articles (a) and (d) of article 2 of the convention.[106] However, there is a possibility to reasonably argue that rape can be linked to the acts mentioned under sub (a) and (d) as shown below.

The subsequent discussion shades light on how rape can be linked with the prohibited acts of the crime of Genocide.

[104] See, Eg. Article 6(b) Element 1 of the ICC EoC
[105] See, generally, ICC EoC, Elaborations on Article 6(genocide)
[106] ICC EoC, Article 6(a) &(d)

I. 'Killing Members of the Group'[107]

Article 6(a) of the ICC statute, prior case law and the ICC elements of crime do not specifically mention in what manner the act of killing is to be carried out.[108] Under such condition, deliberate rape conducted with the intent to kill members of the protected groups can be a legitimate act of genocide. For example, the fact that HIV patients were released from Hospital to rape women of the Tutsi ethnic group in Rwanda can support the above assertion.[109] In this circumstance, rape can cause killing if it can be verified that the deliberate act of the perpetrator resulted in the contraction of the fatal disease and thereby caused the death of the victim. [110] In fact one can argue that it can be difficult to establish the casual link, between the death of the victim and the intentional act of the perpetrator. This is because there might be other possible intervening factors which can result in the death of the victim.[111] Yet, there are concrete situations which reveal that rape can cause the death of victims as shown below.

[107] Article 6(a) of the Genocide Convention

[108] See , generally, Article 2(a) of the Genocide Convention,6(a) Of the ICC statute, and ICC EoC, Artcile 6(a)

[109] See eg. UN Special Reporter to the Commission n on Human Rights, Report on the Situation of Human Rights in Rwanda, para 16-20, U.N. Doc. E/CN.4/1996/68 (1996) reporting ''*militiamen carrying the [HIV] virus used it as a 'weapon,' thus intending to cause delayed death.*''

[110] See, generally *Akayesu, ICTR-96-4-T (1998)* para 688; see also Sita Balthazar, Gender Crimes and the International Criminal Tribunals, 10 Gonz. J. Int'l L. 45, 48 (2006)

[111] Renee Dopplick, The Dictator's Guide to Genocide by Infectious Diseases, Georgetown University Law Centre (May 2008), pp 7

The elaboration mentioned by the ICC EoC that 'killing' and 'causing death' are interchangeable is important to consider.[112] Several situations show that rapes can result in the death of the victim even if the intention of the culprit was merely to rape.[113] For example, rapes committed by using sharp sticks or bottles most likely result in the death of victims.[114] Moreover, severe injuries as a result of rape can kill especially young and old victims if the rape is inflicted in areas where victims can not have any access to medication.[115] The Medicines Sans Frontiers in its briefing thesis about the situation in Darfur expressed that rapes in West and South Darfur are insidious and deadly. This is due to inadequate access to health care, and reluctance of victims to seek for assistance and treatment.[116]

The ICTR trial Chamber in the *Akayesu* case noticed that many Tutsi women and girls died as a result of their injuries.[117]

The above instances indicate how rape can cause the death of the victims and thereby linked to the prohibited act of 'killing' mentioned under Article II (a) of the genocide convention. Therefore, rape in this case

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[112] The terms 'killing' and 'causing death' are interchangeable, see, Article 6(a) element 1 of the ICC EoC.
[113] Anne-Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence, the ICC & the Practice of the ICTY and the ICTR,2005, pp 50
[114] Ibid
[115] L.M. de Brouwer(2005),pp 50
[116] See, A briefing paper by Medicines Sans Frontiers, Sexual Violence in Darfur,8 march 2005,Amsterdam, pp 7
[117] Banks, Angela M. Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes. The Hague: Women's Initiatives for Gender Justice, 2005, pp 9-10; *Akayesu, (1998), para 731*

becomes an act of genocide if the culprit commits the act with the special intent required in the crime of genocide.

II. 'Causing Serious Bodily or Mental Harm to Members of the Group'[118]

Causing serious bodily or mental harm to members of the group, as elaborated by the ICC EoC, encapsulates but not limited to acts of 'torture, *rape*, sexual violence, and inhumane and degrading treatment.'[119] (*Emphasis added*). Similarly, the ICTR Trial Chamber in the *Akayesu* case interpreted that serious bodily harm includes 'nonfatal physical violence that causes serious injury to the external or internal organs.'[120] paragraph 51 of the same case also mentions '[r]ape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim...."[121] Besides, the ICTR further elaborated that 'serious bodily or mental harm does not need to be permanent or irremediable'.[122]

The tribunal, while attempting to make a link between the prohibited acts of the crime of genocide and rape, tried to construe the Genocide Convention as embracing 'prohibition against torture',[123] and then established that rape is one form of torture.[124] Hence, the tribunal in

[118] See Article 6(b) ICC statute
[119] See ICC EoC, Article 6(b),n.3
[120] *Prosecutor v. Seromba, Case No. ICTR-2001-66-I (ICTR Dec. 13, 2006)*
[121] See Para 51 of the Summary of *Akayasu(1998)*
[122] *Akayesu,Judgment,(1998) para 502*
[123] *Akayasu(1998) para 7.7*
[124] Ibid, see also '[…] torture caused by rape is a particularly grave form of torture [. . .] The violation of the moral and physical integrity of the victims makes rape to be

elaborating the meaning of 'bodily or mental harm' provided under the Genocide Convention construed the term 'harm' to mean mental or bodily torture.[125]

Concomitantly, the ICTR Trial Chamber in the *Akayesu* case considered a testimony of one rape survivor who witnessed that her mother was begging one of the rapist to 'kill her daughters rather than raping them in front of her, and the man replied that ' the principle was to make them suffer'.[126] Another rape survivor before the ICTR trial chamber testified '[m]y life had never been the same as what it was before the rape.'[127]

Indeed, it is not difficult to imagine the traumatic physical and mental harm that rape can cause on victims. The mental distress that rape victims reflect while giving testimonies before the tribunals can be an equivocal manifestation of the mental and bodily harm that rape inflicts.

III. '[D]eliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part'[128]

This prohibited act is different from the acts mentioned under sections (i) and (ii) above, in that actual harm may not be required in this particular act. Establishing that the conditions were intentionally inflicted is

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particularly serious crime[…](Sexual Violence Research Initiative, sub site on Sexual Violence in Conflict Settings: *http://www.svri.org/emergencies.htm*)

[125] *Akayesu(1998), para 7.7*

[126] Ibid, para 430

[127] Ibid para 423

[128] See, Article 6(c) ICC statute

sufficient.[129] Besides, these conditions seek the physical not mental destruction of the group.[130]

The ICTR in the *Akayesu* case opined that 'by deliberately inflicting on the group conditions of life […], the perpetrator does not immediately kill the members of the group, but he ultimately seeks their physical destruction'.[131]

Rape can be considered as a condition in the physical destruction of a group. Particularly, in patriarchal community that considers victims of rape as no longer marriageable, rape is a relevant instrument in achieving the intention of perpetrators who seek the physical destruction of the people.[132]

The ICC EoC clarifies that the term conditions of life 'includes but not necessarily restricted to deliberate deprivation of resources indispensible for survival…or *systematic expulsion from homes.'*[133] [*Emphasis added*]. Hence, perpetrators who seek the physical destruction of a group can use rape in order to create chaos or terror making the group to '*flee the area…*'[134][*Emphasis added*].

[129] L.M. de Brouwer(2005),pp56
[130] Ibid , pp57
[131] *See, Akayesu (Judgement, 1998) para 505, Kayishema and Ruzindana (Judgement)para 116*
[132] L.M. de Brouwer(2005),pp57
[133] See Article 6(c) element 4 ICC EoC
[134] Kellydawn Askin , War, War Crimes against Women: Prosecution in International War Crimes Tribunals 262 n.867 (1997) cited in Karen Engle, Criminalizing Wartime Rape in Bosnia and Herzegovina, JIL, Vol. 99, No. 4 (Oct., 2005, pp 789

The fact that HIV victims were released to rape, the Hutu groups in Rwanda can also be mentioned as a relevant condition in the physical destruction of the Hutu people.[135]

Generally, the above discussion shows how rape can be a condition in the physical destruction of a targeted group.

IV. 'Imposing measures intended to prevent births'[136]

The ICC EoC does not provide clarifications or list of examples that constitute measures intended to prevent births.[137] The Trial Chamber in the *Akayesu* case mentioned that imposing measures to prevent births include 'sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriages'.[138]When rape is used to reproduce one ethnic group at the same time with intent to prevent the procreation of other ethnic group, the act can fall under measures of preventing births by forcibly controlling birth.[139] Some scholars argue in favour of the above assertion by posing the scenario of Bosnia in which Bosnian Muslim were intentionally raped to occupy the womb of the women by the Serbian foetus preventing her not to conceive a child of her ethnic group.[140] The ICTR Trial Chamber also verified in the same manner.[141] The trial chamber further found that even when a woman

[135] See eg. UN Special Reporter to the Commission n on Human Rights, Report on the Situation of Human Rights in Rwanda, para 16-20, U.N. Doc. E/CN.4/1996/68 (1996) reporting ''*militiamen carrying the [HIV] virus used it as a 'weapon,' thus intending to cause delayed death.*''

[136] Article 6(d) of the Geneva convention, supra note 53

[137] See, generally ICC EoC, Artcile 6(d)

[138] *Akayesu (ICTR T. Ch. I 2.9.1998), para. 507*

[139]Engle(2005), pp 794

[140] Ibid, pp 794

[141] See ,Akayasu, Trial Chamber(1998) para, 507

refuses to give birth to a child as a result of the trauma of the violent rape, such refusal amounts to the measure intended to prevent birth.[142] Therefore, 'measures intended to prevent births' can be both physical as well as mental.[143]

In a Muslim society such as Bosnia, Sudan [Darfur], where premarital sex is condemned, the victims of rape have little or no opportunity to get married.[144] Moreover, if the woman is pregnant as a result of the rape, normally it is an obstacle for her to marry. There are also situations where as a result of the trauma of rape, women refuse to have any kind of sexual intercourse or get married thereby preventing themselves from having children.[145] The above situations can be 'measures intended to prevent births' particularly under the prohibition of marriage category as mentioned by the ICTR above.

Generally, the above grounds reveal how rape can be linked to the prohibited acts of the crime of genocide. Yet, it should be noted that the special intent component of the *mens rea* of the crime of genocide should exist, in order for rape to be treated as a crime of genocide.

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[142] Ibid
[143] Cryer (2010) pp 217
[144] Anthony Marino, Bosnia v. Serbia and The Status of Rape as Genocide under International Law, Boston ILJ, Vol. 27:205, 2009, pp 221 citing Siobhan K. Fisher, Occupation of the Womb: Forced Impregnation as Genocide, 46 Duke L.J. 91, 123-24 (1996)
[145] Ibid

Concluding Remarks

Mass rape has been inflicted throughout history as a strategic weapon of destroying people. The UN General Assembly, through its resolution number 50/192, reacting to the mass rapes in Bosnia, acknowledged that mass rape can be used as a means of inflicting genocide under certain conditions. The momentous events of mass rapes in Bosnia, Rwanda, and recently in Darfur, Sudan have triggered the development of new jurisprudence which conceptualises rape as a crime of genocide.

Even though rape is not specifically subsumed along with the prohibited acts of the crime of genocide, the interpretation and analysis of the case law of the international tribunals and the ICC reveal that rape can be treated as a prohibited act of the crime of genocide.

In principle, the list of prohibited acts of the crime of the genocide is exhaustive due to the principle of *nullum crimen sine lege* and the principles stipulated under article 22(2) of the ICC statute. However, the non- exhaustive list of examples provided by the ICC elements of crime which elaborate the prohibited acts of genocide and the interpretation of the prohibited acts of the crime of genocide by the international criminal tribunals in their case law portray that the interpretation of the prohibited acts can be extended to include rape.

The elaboration of the meaning of prohibited acts of the crime of genocide by the ICC EoC indicates that rape can constitute the prohibited acts of the crime of genocide. For example, under article 6(b), element 1, of ICC EoC, rape is mentioned as a means of inflicting serious bodily or mental harm. With regard to the meanings of the remaining prohibited

acts, the ICC EoC provides non-exhaustive examples per each definition in elaborating the meaning of the prohibited acts. This indicates the possibility that these acts can be broadly interpreted through which their meaning can be extended to encapsulate rape as a prohibited act of the crime of genocide.

Remarkably, despite the fact that rape continues to be employed as a means of destruction, it is not explicitly subsumed as a material element of the crime of genocide under the international statutes. However, in the absence of explicit mention of rape along with the prohibited acts of the crime of genocide, the ICTR in its precedent-setting *Akayesu* judgment has tried to demonstrate the link between rape and genocide.

The analysis of the ICTR in its judgements, particularly in the *Akayesu* case, reveals how the interpretation of the prohibited acts of the crime of genocide can be linked to include rape. Accordingly, if rape is accompanied by serious bodily or mental harm, it suffices to be considered as a prohibited act of the crime of genocide. For example, the analysis of the tribunal shows that rape was used to cause 'serious bodily or mental harm' to the Tutsi ethnic group thereby constituting prohibited act of the crime of genocide.

Committing rape by using sharp objects, especially against young and old women or men in areas where there is no access to medical facilities could cause their death. As indicated under article 6 (a), element 1 of the ICC EoC, the terms 'causing death' and 'killing' can be used interchangeably. Hence, as shown above causing death through rape can also mean killing. Thereby, rape can be treated as a prohibited act of

genocide under the category of 'killing', as mentioned under article 6(a) of the Genocide Convention.

Finally, it should be noted that for rape to constitute a crime of genocide, the act should be committed with the *requisite special intent*. However, proving the genocidal intent of perpetrators of rape is often challenging due to difficulty in finding direct genocidal evidence**.**

Advancing Children's Rights in Africa: The Role of the African Children's Charter and its Monitoring Body

*Ayalew Getachew Assefa**

Introduction

Children in Africa are double disadvantaged; first due to their status as children, they are not in a position to defend themselves in cases of violations, and second they are living in a place where children are more likely to be suffering from human rights violations than adults, Africa. It is too unfortunate that African children are the primary victims of all conflicts, natural disasters, epidemics (like HIV/AIDS), famine, bad cultural practices and superstitions. It is in response to these plight of African children that we have the African Charter on the Rights and Welfare of the Child (the African Children's Charter/the Charter) and its monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (the African Committee of Experts/the Committee of Experts).

This article assesses the normative and institutional structure of the African human rights system in light of the protection it accords to African children. The article is structured into five parts. The first part gives a general background on the normative and institutional structure

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of the African human rights system. The second part describes a general background on the African Children's Charter and its monitoring body. The third part explores the added value of the African Charter mostly in comparison with the 1989 United Nations Convention on the Rights of the Child (CRC). As a continuation of this discussion, the fourth part explains the added values of this system in light of the mandate of the Committee of Experts. The fifth part touches upon the issue of the impact of the African Children's Charter on the legislative reforms and judicial actions of member States.

1. The African Human Rights System: Normative and Institutional Framework

Systematic human rights protection[1] in Africa has been neglected in the continent for a long time. Even the land mark legal and political document, the Charter of the Organization of African Unity,[2] has made only a subtle reference to protection of human rights.[3] Of Course, human rights, as evidenced by the struggle for the decolonization of Africa and the right to self-determination and independence was the agenda of the time. Since its establishment, the OAU has been preoccupied with the struggle against colonization and apartheid and assurance of self-

[1] Systematic human rights protection refers to the existence of structured and integrated human rights norms and monitoring bodies and mechanisms at the regional level. Though there are various instruments and mechanisms in this regard, the African Charter, as supplemented by the African Human Rights Court Protocol; the African Commission and the African Human Rights Court lie at the heart of the African human rights system.

[2] Charter of the Organization of African Unity, 479 U.N.T.S. 39, *entered into force* Sept. 13, 1963.

[3] F Ouguregouz, *The African Charter on Human and Peoples' Rights: A Comprehensive agenda for human dignity and sustainable democracy in Africa* 2.

determination.[4] Embodied within this, no doubt, is the fact that those agitating and fighting for independence used human rights standards to justify their struggle, as colonialism had no regard for the human rights of colonized people.

However, it has been argued that, while the OAU played a significant role in the decolonization and freedom of countries and peoples, it did not expressly uphold the values inherent in human rights norms and standards as they relate to individuals and groups. Furthermore, by adopting an unconditional position on non-interference, the OAU became ineffective in the promotion and protection of human rights in a decolonized and free Africa. Human rights were, therefore, relegated as secondary by putting too much emphasis on sovereignty, territorial integrity and independence. This required strengthening the system with a view to developing a holistic, comprehensive and integrated approach to ensure that all human rights are respected. It, therefore, took decades for the organization to consider human rights as its main agenda and reach to the point it is today. It was after 1970s, particularly with the adoption of the African Charter on Human and Peoples' Rights (the African Charter), the situation started to slowly alter.[5]

The African Charter was adopted by the Assembly of Heads of States and Governments of the OAU in 1981 and entered into force five years later in

[4] Article 3(e) of the OAU charter. Freedom from colonialism is a human right. See Vincent Orlu Nmehielle, The African human Rights System: Its Laws, Practice and Instruments, The Hague/London/new York: Martinus Nijhoff Publishers. 2001. The notion of self determination and apartheid could also be considered as issues of human rights.

[5] Rachel Murray, *The African Commission on Humans and Peoples' Rights and International Law* (2000) 10.

1986.[6] The African Charter covers a wider range of rights[7] when compared to the other regional human rights instruments, such as the European and the Inter-American Human Rights Systems.[8] The Charter is designed to reflect the history, values, traditions, and development of Africa.[9] The African Commission on Humans and Peoples' Rights (the Commission)[10] is responsible for the enforcement of the African Charter. Currently, the African Charter is ratified by 53 countries.[11]

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[6]As above.

[7] The African Charter has three main parts. The two chapters of Part I deal with rights and duties to be protected under the Charter; while Part II composed of four chapters dealing with the measures to safeguard the rights articulated in Part I. Finally, Part III establishes general provisions concerning the commencement of the African Commission on Human and Peoples' Rights. In all these provisions, the African Charter prescribes various innovative and progressive normative standards which enhance the protection of human rights in Africa. Though most of the provisions may have their own addition to the regional human rights system, the following three concepts could be identified as the main peculiar nature of the instrument; these are: the indivisibility of rights, the concept of people's rights, and individual duties.

[8]F Viljoen, *International human rights law in Africa* (2007) 237.

[9]GJ Naldi 'Future trends in human rights in Africa: the increased role of the OAU' in M Evans & R Murray (eds) *The African Charter on Human and People's Rights* (2002) 25.

[10]The Commission was established to promote, protect and interpret the provisions of the Charter. Article 45 of the Charter sets out the mandate of the Commission

Promotion of human and peoples' rights

The Commission carries out sensitization, public mobilization and information dissemination through seminars, symposia, conferences and missions.

Protection of human and peoples' rights

The Commission ensures protection of human and peoples' rights through its communication procedure, friendly settlement of disputes, state reporting (including consideration of NGOs' shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions.

Interpretation of the Charter

The Commission is mandated to interpret the provisions of the Charter upon a request by a state party, organs of the AU or individuals. No organ of the AU has referred any case of interpretation of the Charter to the Commission. However, a handful of NGOs have approached the Commission for interpretation of the various articles of the Charter. The Commission has also adopted many resolutions expounding upon the provisions of the Charter.

[11]The African Commission documents available at http://www.achpr.org/instruments/ (accessed on 8 April 2013)

Though the African Charter is the main constituent of the African human rights system, there are also other significant treaties that supplement the normative framework of human rights in Africa. [12] These instruments include: the Constitutive Act of the African Union [13] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[14] the 1969 African Charter Governing Specific Aspects of the Refugee Problem in Africa,[15] the 1998 Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights,[16]the African Charter on Democracy, Elections and Governance[17] and the African Charter on the Rights and Welfare of the Child.

To implement the above normative documents, the system has established monitoring bodies and specialized agencies and personalities. The major monitoring bodies of the African human rights system include: the African Commission on Human and Peoples' Rights,[18] the

[12] D Oluwa 'The regional system of protection of human rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 14
[13] Adopted in 2000 and entered into force in May 2001,
[14] Adopted in 2003 and entered into force December 2005.
[15] Adopted in 1969 and entered in to force in June 1974.
[16] Adopted in 1998 and entered into force in January 2004.
[17] Adopted in 2011 and entered into force February 2012.
[18] The African Commission is the pillar of human rights promotion and protection in Africa, yet the practice does not always warrant it. In fact, the Commission has been only a useful tool for the promotion of human rights, but a largely ineffective mechanism for the protection of human rights. The fact that decisions are made unanimously and its decisions are mere recommendations without having any binding nature, are indicative of its ineffectiveness. The Charter under the protective mandate of the Commission was considered as a paper tiger, which vehemently forced some to look for an effective protective mechanism such as a Court. The growing sense of inadequacy of the protection under the African Human Rights Commission has eventually called for the re-consideration of the idea of the Court in 1994.

African Court on Human and Peoples' Rights,[19] and the African Committee of Experts on the Rights and Welfare of the Child.[20]

These instruments and their monitoring bodies are designed to play a significant role in advancing human and peoples' rights in the continent. In order to fully grasp and understand the role and application of the African regional Human Rights System, one has to go through the above instruments and machineries. The discussion in this article, however, limits itself on one of the wings of the African regional human rights system; the African Children's Charter and the Committee of Exports on the Rights and Welfare of the Child.

1.2. The Children's Charter and Its Monitoring Body

The African Children's Charter[21] is the only region-focused child rights instrument in the world. It was in 1990, shortly after the establishment of the Convention on the Rights of the Child (CRC), that the OAU Assembly has adopted the Children's Charter.[22] Currently, it is ratified by 47 African Countries as of August 2013. Though the adoption of this Charter was influenced by its predecessor child rights instruments, such as, the CRC, the 1924 and the 1959 Declarations,[23] it has revealed itself

[19] Some points on the establishment of the court and the process of the merger
[20] Olowa (n 12 above) 15
[21] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999 (African Children's Charter).
[22] F Viljoen *International human rights law in Africa* (2007) 261
[23] At the time when these documents promulgated, the majority of African states were still under colonial rule. The principles in these documents were arguably not intended to benefit children who found themselves under colonial rule. See T Kaime*The African Charter on the Rights and Welfare of the Chile: A socio-Legal perspective* (2009). 130.

with some form of peculiarities to advance the protection of children in Africa. The African Children's Charter is crafted in a manner it can be able to address issues specific to the African children.[24]

Discussing the reasons for the establishment of this regional human rights system for the protection of children's rights in Africa, Viljoen identifies two main reasons: political and legal.[25] With regard to the former reason, he mentions the OAU's perception of exclusion or marginalization of African states in the drafting process of the CRC as the major factor. Due to such underrepresentation, most of the concerns of African Children were neglected. From the legal perspective, some specific omissions from the CRC, such as the situation of children living under apartheid, factors disadvantaging the female child, socio-economic conditions of African children, and a compulsory minimum age for military service necessitated the adoption of this regional instrument.[26]

As Kamie rightly noted, it is the desire to incorporate the 'universalist outlook of the CRC in African context' which mainly necessitated the adoption of the African Children's Charter.[27] This idea is clearly envisaged in the document itself. The Preamble states that the Charter is established to recognize the situation of African children which 'remains

[24] A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) *the International Journal of Children's Rights* 180.
[25] F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (ed) *Child Law in South Africa* (2009) 335.
[26] MA Mindzie 'Regional protection of child rights in Africa' in H Abbas (ed) Africa's long road to rights: reflections on the 20th anniversary of the African Commission on Human and Peoples' Rights (2008) 50.
[27] Kamie (n 23 above) 132

critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger'.[28]

To monitor the implementation of this instrument, in accordance with article 32 of the African Children's Charter, the Committee of Experts was established in 2001. The Committee comprises of 11 independent experts who are elected by the Assembly of the African Union.[29] Each member is elected for a non-renewable term of five years. According to articles 33-37 of the Africa Children's Charter, members must be nationals of a State Party to the Children's Charter. They must also be individuals of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.

2. The Added Values of the African Children's Charter[30]

As it is indicated above, the African Children's Charter encompasses a wide range of rights and obligations for a better advancement of children's rights in Africa. The Charter contains 48 articles (compared to 54 of the UN Convention on the Rights of the Child). Of these, 31 are substantive provisions; the remaining are procedural and aimed at oversight and implementation. The four 'pillars' of the CRC, namely, the principles of non-discrimination, the best interest of the child, survival and development, and participation, are also incorporated with the same

[28] The Preamble of the African Children's Charter para 4
[29] Art 33 of the African Charter.
[30] This section discusses the added values of the African Children's Charter in comparison with its predecessor, the UN CRC.

status in the African Children's Charter.[31]In addition, it also consists of provisions which are articulated in an innovative and progressive manner for the advancement of children's rights in Africa.

The instrument has been characterized as 'the most progressive achievement of all the regional systems, as it is the only system to provide a comprehensive mechanism for the protection and promotion of children's rights at a regional level.'[32] This comprehensive nature of the Charter enables it to accord a greater degree of protection for African Children than the CRC does. The accuracy of this conclusion can be measured against the following discussion on some of the provisions of the African Children's Charter and the CRC.

The first point which should be noted with regard to the progressive nature of the African Children's Charter is the wording of its provisions. While the wording of the CRC refers principally to member states and provides that '…state parties shall respect and ensure…' a certain right, the African Children's Charter takes a different approach by directly referring to the child as bearer of rights. Allocating the rights to *every child* 'the African Children's Charter seems to follow a more human rights centered approach in conferring the right directly upon the child'.[33] Many provisions give a right, stating "Every child has the right…" This is in line with the evolving trend of considering the individual as a subject of international law.

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[31] J Sloth-Nielsen & B Mezmur 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' (2008) *Journal of African Law* 166.

[32] A Lloyd 'The African regional system for protection of children's rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008)33.

[33] M Gose*The African Charter on the Rights and Welfare of the Child* (2002) 17-18

Such innovative and progressive nature of the African Children's Charter has also been evidenced by its position on social, economic and cultural rights. The Charter avoids the traditional separate treatment of human rights as civil and political rights on the one hand and economic, social and cultural rights on the other hand. Rather it carries both civil and political rights (so-called first generation human rights) with socio-economic rights (so-called second generation human rights) in one document, so that it is not possible to clearly differentiate these categories. The current view of human rights treats all rights as interdependent, and the charter seems in line with this contemporary understanding of human rights.[34] Moreover, the concept of progressive realization[35] of rights, which is part of the CRC[36], does not appear in the African Children's Charter.[37] This feature of the African Children's Charter is heralded as a major strength, because in the African context, socio-economic rights are as significant, for wellbeing and development, as civil and political rights.

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[34]Gose(2002) 19

[35] The obligations of States in relation to economic, social and cultural rights are expressed differently from treaty to treaty. For example, in its Article 2 (1) the International Covenant on Economic, Social and Cultural Rights requires States "to take steps" to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. The obligation to achieve progressively the full realization is a central aspect of States' obligations in connection with economic, social and cultural rights under international human rights treaties. At its core is the obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of their available resources. The reference to "resource availability" reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time. Equally, it means that a State's compliance with its obligation to take appropriate measures is assessed in the light of the resources—financial and others—available to it.

[36] Article 4 of the Convention on the Rights of the Child

[37] BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero sum game?'*South Africa Public Law* (2008) 8

In addition to the above progressive articulations of rights, the African Children's Charter has also granted a higher degree of protection to children in Africa through the non-qualified definition of a child. The definition of a child is crucial because it determines which rights apply to children and which remedies are available to children as a class. It serves as the founding basis for data collection in critical areas such as access to education and health. Article 2 defines a child as all human beings below the age of 18, without attaching any limitation.[38] The CRC, however, takes a different position by defining a child as a person below the age of 18, unless majority is attained earlier under applicable law.[39] This is an important milestone in furthering children's protection, since it is patent that many children enter forms of adulthood in the African context before they reach the age of 18 years – such as by early marriage – and this definition entails that these children are nevertheless beneficiaries of the protections and freedoms afforded by the Charter. It also harmonizes the myriad of ways in which adulthood is achieved under customary laws, such as by initiation, formation of a separate household or the attainment of puberty (which can lead to discrimination between boys and girls). The age of 18[40] sets a consistent and non-discriminatory standard.

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[38]Mezmur (n 37 above) 9

[39] Art 1 of the CRC.

[40] Within the African context, debates around age related issues are legion, and the African Committee of Experts has been encouraged to foster discussions around some of the contentious areas relating to age, for example:
The age at which children should be enabled to consent to medical treatment on their own; or consent to surgical operations. Another debate in this context is whether a fixed age – say 12 or 14 years- should be provided for, or whether the criterion should be the level of understanding and maturity of the child, which is in practice more difficult to apply, since an assessment must then be done in each and every instance of the child's understanding, stage of development and maturity; The age at which children should be

Another innovative articulation of the African Children's Charter has also been echoed in article 4(1) of the Charter, which states that the best interest of the child[41] is '*the'* primary consideration in all actions concerning the child and is paramount over the other three principles.[42] The same principle has been embodied in article 3(1) of the CRC, but different from the African Children's Charter it states that in all actions concerning children, the best interests of the child shall be '*a'* primary consideration. The article '*a*' in the CRC shows that in determining on issues which consist of the child's interest, the best interest principle may not be the only principle to be consulted. The CRC allows other principles and considerations to be taken in this regard. However, the African Children's Charter takes a different stance and uses the article '*the*', which basically means, the best interest of the child is *the only*

protected from sexual activity (also known as the age of sexual consent), and how this relates to the age at which children are permitted to marry

The age at which children are liable for their criminal misdeeds, also called the minimum age for criminal responsibility;

The age at which children should legally be able to be recruited into the military or the armed forces;

The age at which children should be permitted or encouraged to participate in administrative and judicial processes Article 12(2) of the UN Convention on the Rights of the Child does not establish any particular age for this, and refers rather to the evolving capacities of the child

[41] The 'best interests' principle has been criticized as vague and indeterminate: it has been regarded as overly individualistic and context specific, lacking in substantive content. It has also been a vessel into which the personal inclinations, ideologies and idiosyncrasies of the decision maker can be poured. It is unclear how best interests are to be determined in specific cases - must the standard be the long best interests, or the immediate best interests term? How much does culture count? And what if a child's views on his or her best interests conflict with the views of older persons? These questions continue to occupy the minds of scholars, judges, psychologists and others. Yet, contradictorily, the principle has come to be regarded as a 'neutral' one.

[42] According to the African Committee of Experts the African Children's Charter contains four general principles, which form its heart namely: non-discrimination (article 3 and 26), the best interest of the child (article 4), life, survival and development (article 5), and participation (article 7).

principle to be consulted in matters containing the child's interests.[43] This is obviously more conducive to the protection and promotion of children's rights and welfare issues than the principle as formulated in the text of the CRC, which allows children's best interests to be overridden by a myriad of unstated competing agendas or adult interests: as it is only 'a' primary concern.

It is clear, though, that even under the prescripts of the African Children's Charter, where the best interest principle shall be the primary consideration; this cannot and does not mean that there are no exceptions or other policy considerations which outweigh the child's best interests. For instance, it is in the interests of the public that persons who have committed serious crimes get punished and sentenced to imprisonment, albeit that this might not be in the best interests of their children.

Further, in determining who must apply the 'best interests' principle, the phrase 'in all actions' (concerning the child) as used in the African Children's Charter provides significant guidance. It indicates that any person considering any matter concerning children should have regard to that child's best interests. This understanding of the provision is confirmed by the reference to 'any person or authority' later in article 4(1) of the Charter. This formulation should be contrasted with the manner in which article 3(1) of the CRC, which also encapsulates the best interest principle, limits the application of the principle to 'public or private welfare institutions, courts of law, administrative authorities or legislative bodies.' It is therefore submitted that the African Children's

[43]Lloyd (n 32 above) 37

Charter provides better protection to children since it captures the actions of any person or authority without making any distinction.[44]

The other added value of the African Children's Charter has been manifested through the inclusion of the concept of children's duties.[45] Proceeding from the view that a child is part of a community of people, the African Children's Charter gives children the responsibility to work for the cohesion of the family, to respect their parents, superiors and elders at all times and to assist them in case of need.[46] This unique feature of the African Children's Charter contributes towards the provision of a forum of participation for the African children. It allows children to be involved in matters which might affect their interests and experience adulthood in advance and hence secures the realization of 'a true' participation. As Sloth-Nielsen & Mezmur argue 'true participation cannot merely mean having a voice, or a forum for expression of opinions, or an opportunity to have a say independently or through a representative. The very word "participate" - to join in, be part of - indicates physical activity beyond the mere verbal or cerebral'.[47]

Moreover, the Charter includes the child's rights to participation, which includes the right to be given for an opportunity for the child's views to be held in all judicial or administrative proceedings affecting his/her interests and those views must be taken into consideration.[48] Several provisions in the CRC indeed reflect children's right to participation.

[44] Kamie (n 23 above) 133
[45] Art 31 of the African Children's Charter
[46] Art 31(a) of the African Children's Charter
[47] Sloth-Nielsen & Mezmur (n 31 above) 166
[48] Art 4(2) of the African Children's Charter

Article 12 of the CRC states that children have the right to participate in decision-making processes that may be relevant in their lives and to influence decisions taken in their regard—within the family, the school or the community. The principle affirms that children are full-fledged persons who have the right to express their views in all matters affecting them and requires that those views be heard and given due weight in accordance with the child's age and maturity. It recognizes the potential of children to enrich decision-making processes, to share perspectives and to participate as citizens and actors of change. The practical meaning of children's right to participation must be considered in each and every matter concerning children.

In addition to the idea reflected in the CRC, the Charter has also guarantees the right of participation of the child in artistic and cultural life and in administrative justice.[49] Considering the child as an autonomous individual, these provisions are of great importance to a place like Africa, where children are considered to be the property of both their parents and the community at large.

Moreover, trying to address the plight of the girl child in Africa, article 11(3)(e) of the African Children's Charter obliges member States to take affirmative action and measures with regard to female, disadvantaged and gifted children. This provision, as Lloyd opines 'attempts to address social imbalances, which can be corrected by states actions'.[50]

[49] Art 12 & 17 of the African Children's Charter
[50] Lloyd (n 32 above) 38

Generally, the fact that the African Children's Charter imposes an obligation upon member states to take special measures with regard to children with disabilities,[51] the fact that it provides State Parties to take all appropriate measures to eliminate harmful social and cultural practices prejudicial to the welfare, dignity and development of the child,[52]are among the added values of the African Children's Charter.

3. Normative Drawbacks of the African Children's Charter

Looking at the additions of the Charter, one might hastily conclude and take the document as an instrument which provides a full-fledged protection for children's interests in Africa. However, this would lead to a wrong conclusion as the Charter suffers from serious flaws with regard to some aspects of children's rights. For instance, the fact that the Charter does not take any position on the right of the unborn child is a serious flaw. According to Olowu, though the issue is controversial, 'it cannot be expected that documents of such regional importance can make the desired impact if they avoid controversial questions, and confine themselves to settled issues'.[53] He also stated that the African Children's Charter does not include, contrary to article 39 of CRC, any provision as to psychological recovery and social integration of children affected by armed conflict.[54]

[51] Art 13 of the African Children's Charter
[52] Art 21 the African Children's Charter
[53] D Olowu 'Protecting Children's Rights in Africa: A critique of the African Children's Charter on the Rights and Welfare of the Child' (2002) *International journal of Children's Rights* 131-132.
[54]As above

Similarly, while providing special protection of children in various forms of discrimination, the Children's Charter, unlike CRC, fails to expressly put disability as a ground for discrimination. Moreover, neglecting the existence of significant number of children belonging to minority groups, the Charter has failed to clearly recognize the plight of children in such groups.[55]

The formulation of the right to participation in article 4(2) can also be considered problematic. The article defines participation very narrowly, in a sense that the child has to be capable of communicating his/her views for him/her to be heard. As Chirewa pointed out, this may lead to a flawed interpretation to say a child who is able to form an opinion but unable to communicate may not be heard.[56]

The African Children's Charter, similar to the African Charter on Human and Peoples' Rights has also introduced some claw-back clauses, which basically makes implementation of the rights dependent on the respective national laws. For instance, such cases have been evidenced on the right to freedom of expression as it is prescribed in article 7 of the Charter. The existence of such clauses, according to some writers, such as Chirewa and Bondzie-Simpson, may create a situation which renders the rights completely meaningless.[57] The fear out of the inclusion of such clauses could be shared; however, the writer thinks that, analogizing the interpretation of the African Commission on the application of the claw-

[55]DM Chirewa 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) I*nternational Journal of Children's Rights* 157- 159.
[56]Chirewa (n 55 above) 161
[57] E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1998) *Howard Law Journal* 644 seeChirewa (n 34 above) 161.

back clauses in the African Charter would address the problem. In the context of the claw-back clauses, the African Commission has held that provisions in articles that allow rights to be limited 'in accordance with law' should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards.[58]

Besides, the fact that the African Children's Charter lacks a general limitation clause is also another challenge to the proper implementation of the rights. This may create an obstacle to the way in which the Charter deals with restrictions on all rights. If there is no guidelines as to how the rights should be limited, that may expose the rights to an arbitrary restrictions by government actors. As Heyns argues, 'a well-defined system of limitations is important...a society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations'.[59]

The above discussions show that though the African Children's Charter has made a great contribution to the children's rights discourse in Africa, there are still substantive shortcomings that the document fails to cover. In such situations, as it is discussed in the following section, the monitoring body should play a role in interpreting the existing norms in conformity with the wider principle of the best interest of the child and other international standards.

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[58]Communication152/96, Media *Rights Agenda & Others v. Nigeria,* para 66 see C Heyns 'The African Regional Human Rights System' (2004) *Penn State Law Review* 687.

[59]Heyns (n 58 above) 688

4. The Monitoring Body of the African Children's Charter: Its Mandates, Achievements and Challenges in Advancing Children's Rights in Africa

As a monitoring body of the norms embodied in the African Children's Charter, the African Committee of Experts is mandated to undertake various activities in the area of children's rights in Africa. Accordingly, since its establishment in 2001, the Committee has evidenced considerable progress in making children's rights visible in the continent. Since the commencement of its work in 2002, the Committee of Experts has worked assiduously to increase the number of ratifications of the African Children's Charter by AU member states. To this end, the Committee has carried out a number of promotional visits to African states including Burundi, Madagascar, Namibia, Uganda and Sudan. Presently the number of ratification stands at 47 out of 53 AU member states. Strengthening institutional structures, the Committee has also been continuously working with a small Secretariat, and has been able to develop the following documents: Rules of Procedure (2003); Guidelines for Initial Reports of States Parties (2003); Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child (2005); Guidelines for the Conduction of Investigations by the African Committee of Experts on The Rights and Welfare of the Child under Article 45 of the African Charter and Rule 74 of the Rules of Procedure (2006); and Guidelines for the Criteria for Granting Observer Status in the African Committee of Experts on the Rights and Welfare of the Child to Non-Governmental Organizations (NGOs) and Associations (2006).

To understand the extent of contribution of the African Children's Charter in this regard, it is crucial to assess the successes and challenges of this Committee in the past years. Accordingly, this section will briefly explore the activities of the Committee in the light of its mandates and how that enhances the protection of children's rights in Africa.

4.1. Mandate of the African Committee of Experts

The Committee draws its mandate from article 42 of the African Children's Charter. Accordingly, the core aspects of the African Committee of Expert's mandate are:[60]

> Promotion and protection of the rights enshrined in the African Children's Charter, particularly to collect and document information, commission inter-disciplinary assessment of situations on African problems relating to rights and welfare of the child, organize meetings, encouraging national institutions working on the rights and welfare of the child, and where necessary give it views and recommendations to governments;
>
> Formulation of principles and rules aimed at protecting the rights and welfare of the child;
>
> Monitoring the implementation of the African Children's Charter; and interpretation of the African Children's at the request of a State Party, institution of the AU or any other person or institution recognized by the AU.

4.1.1. Promotional activities

Article 42 (a) of the African Children's Charter mandates the Committee of Experts to promote the Charter by collecting and documenting information. In this process, as article 42(a)(iii) states cooperation with

[60]The African Committee of Experts on the Rights and Welfare of the Child available at http://www.ihrda.org/515-2/ (accessed on 29 August 2011).

other African, international and regional institutions and organizations concerned with the promotion and protection of the rights and welfare of the child is very crucial. Particularly, Civil Society Actors are important partners in disseminating information about the African Children's Charter. Giving due notice to this fact, the African Committee of Experts has adopted Guidelines for Granting Observer Status in the African Committee of Experts on the Rights and Welfare of the Child to NGOs and Associations.[61] However, these Guidelines were criticized as they are unnecessarily restrictive.[62] It was as a response to these criticisms that the African Committee of Experts decided to amend these Guidelines. This decision, as Sloth-Neilsen and Mezmur noted, 'was informed by the need to make the criteria more flexible, thereby enabling a greater number of CSOs to obtain observer status before the Committee'.[63] Hence, during its Sessions since March 2010, the Committee has granted observer status to nine organizations.[64]

The other major promotional activity of the African Committee of Experts is examination of State reports. Article 43 of the Children's Charter prescribes that member States must submit their initial reports in two years of ratification and their periodic reports on the implementation

[61] Viljoen (n 22 above) 344

[62] In particular, they set as requirement for observer status that NGOs must have 'an administrative comprising a majority of African citizens' and 'an elected children's representative' see Viljoen (n 6 above) 344.

[63] J Sloth-Neilsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child (2010) *African Human Rights Law Journal* 551

[64] The organizations are African Child Policy Forum, Save the Children, Institute of Human Rights and Development in Africa, Penal Reform International, African Movement of Working Children and Youth, SOS Village International, The Botswana Centre for Human Rights and Plan International.

of the Charter every three years. Accordingly, the Committee has been receiving reports from member States and issuing concluding observations to most of the reports.

There are three main stages in the consideration of State party reports before the Committee: the pre-session working group stage; the plenary stage; and the concluding observations stage. During the pre-session, the Committee identifies issues for discussion with the State party and highlights areas where information is inadequate or unavailable. This is usually convened as a private meeting between the Committee, civil society organizations and other relevant organs to discuss and come up with a list of issues emanating from the State Party report, ahead of the presentation of the report. The plenary is where the State Party Report is scheduled for examination at a meeting of the African Committee, and the State Party is invited to send representatives to present the report and answer the African Committee's questions in process of constructive dialogue. A rapporteur is appointed from among the Committee members to serve as the Committee's voice during this process. The concluding observations stage is the outcomes stage where the African Committee meets in a closed session to evaluate States Parties' reports in light of whatever information is available to them about the situation in the country at issue, including external sources, and to prepare Concluding Observations highlighting progress achieved, goals and difficulties, major issues of concern, suggestions and recommendations.

However, in the past years this mechanism did not yield the expected result. This is mainly because State Parties are constantly failing to

comply with their reporting duties.[65] As Mezmur stated, there are countries whose reports are long overdue by ten years.[66] For most of the countries[67], the due date for submission of their periodic report has already lapsed.[68] The other challenge against the reporting mechanism relates to the ineffectiveness of the concluding observations. With all its importance in promoting children's rights, the Committee's recommendations have been criticized as lacking clarity and they are not as comprehensive, concrete and accessible as they are supposed to be.[69]

To be functional, a concluding observation should credibly identify strengths and weaknesses and therefore accurately direct attentions to shortfalls requiring compliance. The utility of a concluding observation is enhanced by the ability of its drafters to identify specific measures needed to improve implementation of a treaty provision. The language, terms, and expressions used in the concluding observations are very indicative of this ability.

The presumed purpose of concluding observations is to prompt specific and targeted change in policy or its implementation – need to take a

[65]Sloth-Neilsen &Mezimur(n 63 above) 549
[66] The African Child Policy Forum, interview with Dr Beneyam Dawit Mezmur, second chairperson, African Committee of Experts 16 June 2011 available at www.africanchildforum.org/ *(accessed 02 September 2011).*
[67] State party reports submitted before the Committee so far include those from Burkina Faso, Cameroon, Egypt, Kenya, Libya, Mali, Niger, Nigeria, Rwanda, Tanzania, Togo and Uganda.
[68]Sloth-Neilsen & Mezmur (n 63 above) 541
[69]Sloth-Neilsen & Mezmur (n 63 above) 542

decision. To achieve this goal concluding observations must be drafted clearly[70], concisely[71] and it should be engaging.[72]

With all the challenges, the African Committee of Experts, in its promotional mandates, however, has undertaken various activities, which have played a great role in advancing children's rights in Africa. These include, designation of 16 June as the Day of African Child,[73] lobbying

[70] Clarity requires proper grammar and punctuation. A sentence should begin with elements that are relatively short: a short introductory phrase or clause, followed by a short, concrete subject, followed by a verb expressing a specific action. Legal and quasi-legal drafting should try to avoid meta-discourse (sometimes referred to as 'throat-clearing' phrases), minimize the use of negatives, avoid using noun strings and nominalizations, and prefer the use of active voice. In whatever context, writers of concluding observations should consider carefully the purpose of the writing, needs, interests, and background knowledge of the intended audience when deciding what is appropriate for a particular document.

[71] Conciseness is about efficiency. It is about communicating an idea without superfluous words, and with an appropriate level of detail. Concise legal writing is clearer and engaging, and it makes efficient use of the readers' time. Since concluding observations are directed to policy makers, many may not have time to spare and either will resent inflated verbiage or will simply refuse to read it, it is important that appropriate level of efforts is put into communicating recommendations concisely, clearly, courteously and compellingly.

[72] When a writing does not engage the reader's attention it becomes more difficult for the reader to glean necessary information from a document and, thus, making the reading process more laborious. Variety, voice, appropriate humor and tone are said to be good ingredients of an engaging writing.

[73] The Day of the African Child (DAC) is one of the standing promotional items of the Committee. It traces its roots to the 1976 uprising in Soweto, South Africa. The day is celebrated every year on June 16; the celebrations are based on themes identified and agreed upon by the Committee and communicated to State parties the previous year. The themes covered to date are as follows:

'Right to Registration' (2003)
'The African Child and the Family' (2004)
'African Orphans: Our Collective Responsibility' (2005)
'Right to Protection: Stop violence against children' (2006)
'Combat Child Trafficking' (2007)
"Right to Participate: Let Children be Seen and Heard' (2008)
'Africa Fit for Children: Call for Accelerated Action towards their Survival' (2009)
'Budgeting for Child Rights' (2010)

to increase the number of ratifying countries to the African Children's Charter, and organizing discussions on key issues and problems affecting children in Africa.[74]

4.1.2 Protective mandates

In its protective mandate the African Committee of Experts conducts investigation in accordance with article 45 of the African Children's Charter and consider communications submitted by individuals and NGOs recognized by AU, a member State or the UN.[75]

With regard to its investigative mandate the Committee, in 2006, has developed Guidelines for the Conduction of Investigations by the African Committee of Experts on The Rights and Welfare of the Child under Article 45 of the African Charter and Rule 74 of the Rules of Procedure. Moreover, in 2005 it also conducted an investigation mission to Northern Uganda on the situations of Children affected by the armed conflict.

The other main protective mandate is stipulated in article 44 of the African Children's Charter, which empowers the Committee to receive (and eventually examine) communications[76] from any person, group or non-governmental organization recognized by the Organization of

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'All Together for Urgent Action for Street Children' (2011)
'The rights of children with disabilities: the duty to protect, respect, promote and fulfil' (2012)
'Eliminating Harmful Social and Cultural Practices affecting children: Our Responsibility' (2013)

[74] This information is taken from the African Committee of Experts website http://www.acerwc.org/achievements/ (accessed 12 September 2011).

[75] Art 44 of the African Children's Charter.

[76] A communication refers to a 'complaint' ('individual complaint') brought before a treaty body alleging the violation of a right contained in the treaty

African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter. This mandate of receiving communications gives to the Committee a significant edge over the CRC Committee, which can still only receive state reports but not communications (pending the finalization and entry into force of the recently agreed Optional Protocol to the CRC of an individual complaints mechanism). It is also interesting to note that '[a] communication may be presented on behalf of a victim without his agreement on condition that the author is able to prove that his action is taken in the supreme interest of the child'.[77] This is intended to address situations in which the 'best interest of the child' principle under the African Children's Charter[78] would override other circumstances. Consequently, the Committee may admit a communication from a non-signatory state to the Charter in the overall best interest of the child.[79]

It should be noted that, unlike the African Charter on Human and Peoples' Rights, the issue of admissibility of communications by the Committee, is addressed by the 'Guidelines for Communications'[80] as opposed to the Charter's provisions. Accordingly, the Guidelines provide that in order to take a decision on the admissibility of a communication, the Committee shall ensure that the communication is compatible with the provisions of the Constitutive Act of the African Union or with the ACRWC[81]; the communication is not exclusively based on information

[77]Chap 2, Art 1(I)(4) Guidelines for Communications
[78]Art 4 of the ACRWC
[79]Chap 2, Art 1(ii)(2) Guidelines for Communications
[80] AU Doc ACERW C/8.4 (2006) available at http://www.acerwc.org/achievements/(accessed 05 September 2011)
[81]Chap 2, Art 1(III)(a)Guidelines for Communications

circulated by the media;[82] the complainant must show that the same issue has not been considered according to another investigation, procedure or international regulation;[83] the author has exhausted all the available appeal channels at the national level or when the author of the communication is not satisfied with the solution provided;[84] the communication is presented within a reasonable period after appeal channels at the national level have been exhausted[85] and, that the wording of the communication shall not be offensive.[86] The state concerned in a communication is to be given the chance to present an explanation or written statement containing its observations on a communication within six months.[87] However, if this deadline is not respected, the Committee may decide to consider the communication anyway.

Exercising its mandate, to date, the African Committee of Experts has received two communications. The first communication was on the situations of children in Northern Uganda, it was received by the Committee in 2005. This communication was submitted by the Centre for Human Rights of the University of Pretoria and has declared admissible.[88] The communication addresses the violations that children in the Northern Uganda have faced during the longest running armed conflict. Uganda has been ravaged by a civil war for over eighteen years involving the Lord's Resistance Army (LRA), a rebel group headed by

[82]Chap 2, Art 1(III)(b)Guidelines for Communications
[83]Chap 2, Art 1(III)(c)Guidelines for Communications
[84]Chap 2, Art 1(3)(d) Guidelines for Communications
[85]Chap 2, Art 1(3) (e) Guidelines for Communications
[86]Chap 2, Art 1(3)(f) Guidelines for Communications
[87]Chap 2, Art 2 (II)(4) Guidelines for Communications
[88] *Michelo Hansungule and Ors v the government of Uganda*

Joseph Kony. His aspirations are virtually unknown besides that he wants to rule Uganda according to the Ten Commandments of the Bible. The war has led to an acute catastrophe in that thousands of people in general and children in particular have been forcibly displaced to IDP camps.

Children's rights are the building blocks for securing human rights for future generation yet since the outbreak of the insurgency in 1986; thousands of children in northern Uganda have been killed, abducted or brutalized in one way or the other by various armed elements including the LRA and the Uganda People's Defense Forces (UPDF). The plight of the children is worsened by the fact that the government is not doing enough to secure their rights, including the right to survival, development health, education, and freedom from torture, sexual abuse and abduction. The Communication, therefore, has been brought to establish the liability of the Government of Uganda in relation to violations of children's rights under the African Children's Charter. These rights include: survival protection and development,[89] the rights to education[90], prohibition of participation of children in armed conflict[91], prohibition of sexual exploitation[92], abduction[93], the right to health[94], and protections against abuse and torture.[95] With regard to the follow up on this communication,

[89] Article 5(2) of the African Children's Charter
[90] Article 11(1)&(3) of the African Children's Charter
[91] Article 22 of the African Children's Charter
[92] Article 27 of the African Children's Charter
[93] Article 29(a) of the African Children's Charter
[94] Article 14 of the African Children's Charter
[95] Article 16 of the African Children's Charter

during 19th Session, the Committee has assigned two of its members to undertake the investigation mission to Uganda.[96]

The second communication was on the violation of the rights of Nubian children in Kenya and it was submitted jointly by the Human Rights and Development in Africa (IHRDA), and the Open Society Justice Initiative (OSJI); and a decision has already been made on the merit of the communication. Despite the lack of cooperation from the government of Kenya's side, the Committee revealed its determination in publishing its well-articulated first ever decision.[97] In the decision, the Committee found a violation of article 6(2), (3) & (4), article 3, article 12(2) (b) & (c), and article 11(3) of the African Charter by the Kenyan government. In its decision the Committee addressed a wide range of issues in relation to the rights of Nubian Children in Kenya. Among the positive sides of this decision, the fact that the Committee innovatively goes beyond what has been claimed by the applicant and interpreted article 31 of the African Children's Charter in light of the issues in the case deserves mentioning.[98] Moreover, the decision is written in a precise and well-structured manner.

However, there are still some flaws, which compromised the quality of the decision. For instance, in discussing the alleged violation of article 11(3), on the right to education, the Committee asserted that the children

[96] The 19th Session of the African Committee of Experts 26- 30 March, 2012 Addis Ababa, Ethiopia.

[97] Issued on 22 March 2011, on communication 002/2009 *IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya*, the Committee finds Kenya in violation of the rights of Nubian children to non-discrimination, nationality and protection against statelessness.

[98] n 97 above para 66

of Nubian communities have been provided with 'fewer schools and disproportionally lower share of available resources in the sphere of education'.[99] This fact is a serious allegation and it serves as the main ground for the Committee to reach on the conclusion that the government of Kenya has violated the right to education of these children. However, this assertion should have been further elaborated. The Committee should have backed its position with the necessary data which shows budget allocations to these particular communities and the number of schools, teachers and students ratio in that particular area.

Furthermore, the Committee, in some of the cases, relied on *unconfirmed indications*. It is understandable that the Government of Kenya's failure to cooperate makes the investigation process very difficult. However, to investigate some issues like 'whether the case is still pending in the High Court of Kenya' does not necessarily require the Government's cooperation. The Committee, rather than relying on an *unconfirmed indications*, it could have investigated this fact in cooperation with some other NGOs and Human Rights Institutions in Kenya.

Finally, it is important to anticipate the inevitable challenge in relation to enforcement of the decision. As it is stated in paragraph 69 of the decision, the Committee recommends to the Government to report on the implementation of the decision within the coming six months. Considering the previous trend of non-cooperation, it is less likely for the Government of Kenya to comply with such recommendation. If the Government of Kenya persists with its non-compliance, the Committee

[99] *Nubian descent in Kenya) v Kenya* (n 97 para) 65.

should think of referring the case to the African Court of Human and Peoples' Rights (the African Court) for a binding decision against the Government. According to article 5(1)(e) of the Protocol to the African Court, African intergovernmental organizations can submit contentious cases to the court. As Viljoen noted, one such organization is the African Committee of Experts.[100] Therefore, if the Committee, after finalizing its enforcement mechanism, finds the Government of Kenya in non-compliance as its recommendations, it can take the case before the African Court, which in a way enhances the required collaboration between the African Committee and the other Regional organs.[101]

5. The added value of the system[102] to the legislative and judicial actions of African countries

Adopting a comprehensive document like the African Children's Charter and establishing a separate monitoring body is one step in advancing children's rights in Africa. However, references to the added values of the Charter and its monitoring body by itself may not help us getting the real impact of this system. An assessment should also be made as to what extent African governments reflect the African Children's Charter in their legislative and judicial actions.

[100]Viljoen (n 22 above) 542

[101]In this regard it is important to note the fact that collaboration between the African Commission and the African Committee has already been established. The African Commission in its 45th Session in May 2009 has adopted a 'Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa'.

[102] 'The system' refers to the system of protection of children's rights as it is established through the African Children's Charter.

Article 1 the African Children's Charter obliges State Parties to recognize the rights, freedoms and duties enshrined in the Charter and undertake the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter. In consideration of this duty, numbers of countries have taken the initiative to adopt and amend their legislations to reconcile with the provisions of the African Charter and the CRC. Regarding this issue, the Child and the Law Program at the African Child Policy Forum has undertaken an audit of national laws, policies and practices related to children in 30 African countries; and the study revealed that 'though many countries still have a long way to go in terms of harmonizing their laws and policies on children, almost every country has embarked on review of their child-related laws and policies.'[103] According to this study, many of the countries in Eastern and Southern Africa have passed legislation in the last ten years that comply with the African Children's Charter and the CRC.[104]

Some of the countries have made a clear reference to the African Children's Charter as a main motivator for the adoption of their laws. For instance, the Preamble of the South Africa's Children's Act 38 of 2005 states that

> The need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child, in the United Nations Declarations on the

[103]Harmonization of Laws on Children in Africa http://www.africanchildforum.org/site/index.php?option=com_content&view=article&id=124&Itemid=121 (accessed 01 September 2011).
[104]As above

> Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child…

In response to harmonization of their laws both with CRC and the Children's Charter, many African countries have also managed to include similar rights and prohibitions with these instruments. For instance, Guinea-Bissau has inserted a provision which prohibits corporal punishment in its law while harmonizing its laws with the African Children's Charter.[105]

Therefore, looking at the laws of child rights in various African countries, we can easily get the spirit of the African Charter reflected in the provisions. In agreement with this conclusion, in his interview with the African Child Policy Forum, Mezmur has also stated that:[106]

> in the last three to five years what have come out in a number of countries on the African continent that include South Africa, Tanzania, Botswana, Sierra Leone, just recently Lesotho, and so forth, we can see some important elements of the African Children's Charter that are not necessarily explicitly provided for under the UN Convention on the Rights of the Child that have been incorporated in these nation legislations. So I think this is one example where the Charter is starting to have impact.

[105] Ending legalized violence against children: all African report 2010 available at http://www.africanchildinfo.net/site/index.php?option=com_acymailing&ctrl=archive&task=view&listid=1-mailinglist&mailid=16-the-african-child-e-newsletter-jan-feb-2011 (accessed on 08 September 2011).

[106] The African Child Policy Forum, interview with Dr Beneyam Mezimur, second chairperson, African Committee of Experts 16 June 2011 available at www.africanchildforum.org/ *(accessed 02 September 2011).*

With regard to application of the African Children's Charter in judicial decisions, unfortunately we may not get a satisfactory record. The word 'application' entails both 'direct enforcement' and 'reliance on the instrument for interpretative guidance'.[107] Some countries, like Nigeria and Benin, speak to the possibility of direct enforcement; however, much more frequently courts look to international human rights law for interpretative guidance, thereby providing for a non-legislative measure to give effect to the treaty.[108]

The African Children's Charter has been referred in some decisions of courts in countries that have ratified the African Children's Charter. For instance, if we take the case of South Africa the Constitutional Court in *Bhe v Magistrate Khayelitsha* case has relied on the African Children's Charter. In the judgment, both Langa DCJ and Ngcobo J have used the African Charter in supporting their arguments.[109] Similarly, the judges in *B v M* [110]and *Centre for Child Law v Minister of Home Affairs*[111] have also invoked the African Children's Charter in supporting their arguments. However, in these judgments, the Charter has never been invoked as a ground for remedy.

Conclusion

The past decade has evidenced a considerable advancement with regard to protection of children's rights in Africa. Among other factors, the protection accorded through the African Children's Charter and its

[107]Viljoen (n22 above) 540
[108]As it is the case in South Africa, Constitution of South Africa 1996, s 39 (1))
[109]*Bhe v Magistrate Khayelitsha*(2005) CCT 49/03 (CC) 55
[110]B v M 2006 9 BCLR 104 (W) para 137
[111]*Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) para 30.

monitoring body is the main facilitators of this change. Therefore, at this point, it is warranted to conclude that had it not been the adoption of the African Children's Charter and the establishment of its monitoring body, the situation of African children would not have been in the same as situation as it is now.

However, there is still a long way to go. Particularly, the Committee of Experts should exploit its mandates more in developing the jurisprudence of children's rights in Africa through interpreting the provisions of the African Children's Charter and issuing strong and well-articulated concluding observations. Generally, better work and achievement could be guaranteed through strong involvement of the AU organs and other stakeholders. It seems in consideration of this fact that currently the African Committee of Experts has developed a collaboration plan with Regional Economic Communities (RECs)[112] and other partner organizations[113] for a better implementation of the provisions of the African Children's Charter.

The next logical step is for the Committee of Experts to elaborate its broad partnership framework that would ensure that partnership is complementary and value adding, spells out clear roles and

[112] The African Committee of Experts adopted a collaboration plan during its 21st Session, recognising the Regional Economic Communities as important pan African policy players it ought to engage. The primary objective of the collaboration is to pull together efforts, to extend the reach to scale up the impact of the work of the Committee, to avoid duplication and leverage scarce resources in the service of the African child through effective implementation of the African Children's Charter.

[113] The Children's Charter Project funded by SIDA and involving a number of civil society organizations is a test case for this path.

responsibility, and mutually agreed framework accountability and transparency.

Funding is one of the most serious challenges that are facing the effective operation of the African Committee of Experts. Even though there has been significant increase in the ratification of the African Children's Charter which is resulting in increased reporting and consequently increase in the meeting time of the Committee of Experts; the core budget support to the Committee has not sufficiently responded to these changes. Therefore, the Committee should look for institutional support, program support or specific project and activity or a combination of these supports to address this challenge.

Finally, as some of the provisions of the Charter need to be interpreted, in light of other regional human rights bodies, the Committee should also play a role in creating strong jurisprudence by interpreting the provision of the Charter.[114]

[114] The Committee, in this regard, will soon publish General Comments on articles 6, 21 and 30 of the African Children's Charter.

The Need for Environmental Tax in Ethiopia: Economic Analysis of Law

*Mebrahtom Fitiwi**

Abstract

Environmental tax compliments to the regulatory and free market instruments because neither regulatory nor free-market instruments can sufficiently tackle environmental problems. Even though the regulatory and liability regime are not sufficient, there are no sufficient environmental tax laws in Ethiopia. Therefore, Ethiopia needs to introduce more clear Environmental tax laws for better protection of the environment. This argument is developed by reviewing literatures against and in favor of environmental tax and also Ethiopian Tax laws, investment laws and environmental laws. At last the paper concludes that there are very few environmental taxes and commending the need for environmental taxes in different ways.

1. Introduction

Nowadays environmental pollution is a critical global concern. Different scholars have proposed different remedies among which environmental tax is one. The situation of Ethiopia down to the ground depicts that it has 'poor environmental sanitation, insufficient and unsafe water supply, urban sewerage system, inadequate access to basic infrastructure services'.[1]

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[1] Girma Hailu, International Encyclopedia of laws, Kulwer Law International Leuven, Belgium, p. 21

This is a reflection of the problem related to insufficiency of the laws and problem of implementation of environmental laws.[2]

Most of the researches, which depict different problems on environment in Ethiopia, hardly pay heed on pollution by industries because it is believed that there are few industries. This is worsened by absence of environmental economics in which GDP supposed to be assessed by taking into account depletion of national assets like soil, water, minerals and others.[3]Weakness in conducting impact assessment, less public participation in environmental issues, practical non-compliance of standards and lack of technology to evaluate observance of environmental standard are also observed. Different researches show that the existing few industries are polluting the environment because of lack of sufficient system and regulation for hazardous wastes, chemicals and radioactive substances. [4]

This work, therefore, ponders with investigating need for environmental tax in general and in Ethiopia in particular. This piece discusses the meaning and nature of environmental tax, different arguments for and against environmental tax and the laws about environmental taxes in Ethiopia.

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[2] Shibiru Tedla and Kifle lemma, Environmental management in Ethiopia, Has the national conservation plan worked? Environmental forum Publication Series Number 1, p. 13

[3] Ibid

4 Supra note 1, p. 23-24

2. Meaning and Nature of Environmental Taxes

The meaning of environmental tax seems to be inconsistent with the traditional understanding of tax and sometimes include environmental charge. Black's law dictionary defines tax to be "A monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue."[5] On the other hand, tax is defined to be mandatory payment to the government, which may not be proportional to the benefit given to the tax payer by the government.[6] If it is not necessarily proportional to the service provided by the government, it does not include charges or fees which are characterized by proportionality of the amount.

A definition which reflects the internalizing of externality purpose of environmental tax seems the widely accepted definition whether the legislature has the intention to achieve the purpose or not. The widely applied definition is that environmental tax is a tax on the basis of physical unit of something, which is proved to have negative impact on the environment.[7]This definition does not seem to require intention of the legislature to be characterizing element of the definition. According to the Guideline of the International Energy Agency and experts on environmental accounts, Environmental tax is not every tax that is related

5 Brian A. Garner, Editor in Chief, Blacks Law dictionary, 8th edition
6 Santiago Dichile, Green tax reform in OECD countries, an overview, 2004, p 2, http://www.eclac.org/dmaah/noticias/discursos/3/14283/03_en.pdf last visited on October 10, 2013
7 Ibid

to the environment, nor is it required to reflect the motive of the legislator.[8]

Reviewing different tax laws of Ethiopia may lead one to conclude that taxes are mandatory impositions which can include charges fees and rents that reflect the proportionality of the service provided by the government. If we thoroughly see the constitution, Article 97 (2) collection of fees for land usufractuary, Article 97 (6) rent on houses and their property, Article 97 (9) on collection of license related fees and charges, Article 97 (10) on royalties for the use of forest are under the state power of taxation. These all indirectly show that the meaning of tax in the tax laws of Ethiopia is broad enough to include fees and charges. It is clear that the constitutional provisions embrace payments which are not taxes in the conventional understanding of tax.

It is questionable if these provisions deal with revenue in general or specifically about power of taxation. With due respect to the contrary argument; the author believes that contextual interpretation lead to a simple conclusion that the payments under the title "power of taxation" are taxes. Actually, considering charges to be taxes is not a deviant interpretation if the experience of different countries is considered.

Depending on the meaning given to the term environment the meaning of environmental tax can be made too broad to exclude charges penalties

[8] Nancy Steinbach, *et'al*, Environmental Taxes, 14th Meeting of the London Group on Environmental accounting camberra, 27-30 April, 2009, p. 3. The definition of environmental tax according to the definition of OECD is not again required to reflect the intention of the legislature.

and any other tax. The European Commission and OECD (Organization for Economic Cooperation and Development) seem to look into the meaning of the term through the lens of tax base,[9] disregarding the intention of the legislature behind the tax, as far as the tax has relationship with the environment.[10] According to this definition if a country imposes tax on a certain tax base which has relationship with environment, it would be considered to be an environmental tax.

It is also necessary to give emphasis to this definition as the central theme of the article is on internalizing environmental social cost through environmental tax. Consequently, we will have a working meaning of environmental tax which subsumes all the environmental taxes, fees and charges, with the purpose of getting negative externalities internalized. Charges which have quid pro quo relationship with the service are best options of internalizing environmental externality when they are compared with general taxes. This is because general taxes do not reflect the amount of pollution. Moreover, there may be charges which do not reflect the amount of service. The charges on imports and exports may not necessarily reflect the proportionality. Environmental taxation, whether it is service based or disproportional to the service provision, are the payment imposed by the government with the purpose of internalizing environmental externalities. Environment related taxes which aim at collecting revenue disregarding the purpose of attenuating externalities are not environmental taxes.

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9 Tax base refers to the value of the asset to be taxed and tax purpose refers to the reason why certain tax is imposed like generation of revenue or regulation

10 Market-based Instrument for Environmental policy, EEA Technical report, No 8/2005 , p. 40

3. Do We Need Environmental Taxes?

Although the need for environmental taxes is not in a heated debate, there are other remedies which seem to be silver bullet solution for environmental problems. There are arguments which fetch their justification from free market approach and regulatory regime to the environmental remedies that they propose.

3.1 Argument Against Environmental Tax

3.1.1 Coase Institutional Economic Theory

Certain scholars like Coase have disapproving opinion on the need for environmental taxes. Ronald Coase premises his argument on the fact that legal systems should be structured so that efficiency can be attained through establishing a pattern of rights.[11] According to the Coase theorem, whether the cost of pollution has to be borne by the polluter depends on the efficiency of the allocation of cost, which depicts the allocation of property rights. If the pollutees can avoid the pollution at less cost than the polluters, efficiency requires the pollutees bear the cost of pollution and if the polluter can avoid the pollution in less cost than the pollutees, the polluter shall bear the cost of avoiding pollution.[12]

Coase seems to respond to the potential unfairness of making the polluttee bear the cost of pollution by arguing that the polluter bears the cost by private bargain. In such bargain the cost of pollution is covered by the injured and the injured shares from the profit of the

11Steven GMedema and Richerd O.Zerbe, Jr, The Coase Theorem, Encyclopedia of Law and Economics, 1999, p. 836, See http://encyclo.findlaw.com/0730book.pdf Last visited on October 27, 2013

12 Ibid

injurer/polluter. Although Coase theorem formulates his theorem on the assumption of zero transaction cost[13], he has also recommended Normative Coase theorem. Normative Coase theorem dictates legal rules to be structured in a way they minimizes the transaction cost.

In cases of high transaction cost legal rules which opt for efficiency by allocating to those who give more value to the property right are recommended.[14] When the polluter and pollutees are compared as to who gives more value to the property right, Coase seems to believe that those who give more value to the property are those who can best exploit the property right and those are going to be the producers or polluters.[15]

According to the proposition of Coase, if market transactions are zero and property rights are clearly assigned and protected, governmental intervention to regulate externalities is not necessary since bargaining between polluters and the society will come up with pareto-optimal outcome.[16]He also contends that the government shall define and enforce property rights for environmental rights and alleviate transaction costs.[17] After the property rights are defined then when there is environmental pollution, whether the polluter shall be liable for the damage caused should be determined. In deciding whether the polluter shall be liable for

13 Zero transaction cost refers to the assumption that the cost of concluding contract and the cost of the necessary information for individual cooperation through contract is zero.
14 Allen and Cutter, Law and Economics, 3rd Edition, Addison Wesley Longman, United States of America, 2000, p. 101
15 Supra note 11, P 15 See alsoSteven G,Medema, Symposium on the Coase Theorem, legal fiction:The place of Coase theorem in Law and Economics, Cambridge University Press, 1999, page 11
16 Ibid. p.8
17 Ibid

pollution shall depend on whether the gain from preventing the pollution is more than the loss of the stoppage of the harm.

Accordingly, getting the polluter compensates the damage or imposing limitation on the polluter is inefficient provided that the pollutees can avoid the cost of pollution at less cost than the polluter.[18] Coase proposes that legal rules that allocate property rights shall be structured to allocate to the one who values them more. Any other way of allocation can be efficient if there can be cooperation through lesser transaction cost.[19] The cooperation can be contractual relationship between the property owner and the polluter.

Similarly, legal rules that require payment of compensation are believed to be more efficient than imposing restriction on the polluter as far as the polluter puts the pollutees in the same position by dint of compensation.[20] This is efficient because it gives choice to the polluter to maximize profit without affecting the pollutees as the compensation would put him in a point of indifference.[21]

However, free market instruments fail to address the environmental problems which are expected to be addressed by environmental taxes. There are different reasons for the problem of social cost in free market. These problems are usually attributed to the problem of transaction cost,

18 Ibid
19 Ibid. p. 102
20 Ibid. p.104
21 Ibid

which may in turn cause information asymmetry.[22] People usually make agreement to allot costs and benefits among themselves. Sometimes the costs and benefits may convey outside a market (outside the consumer and producer) and this is termed as externality as it has been discussed. [23]

Spillover of negative externality can be attributed to high transaction cost of getting people participate in decision making that affect them.[24] It is either impossible or inefficient to have effect, regardless the magnitude on a population far from the surrounding. However, it is impossible to get people beyond the surrounding participate in decision making about this factory. Although getting all the people participate might seem possible, knowing exactly the people who are affected by the pollution of certain economic activity would be so costly.

Sometimes environmental externalities can be intractable as spillover escapes the boarder of property rights, contracts may have unforeseen/latent effect and the causes may not be attributed.[25] In such circumstance the three institutions (property right, contractual and compensation regime) are not effective. Environmental pollution that spoils the test of a fruit can neither be attributed to certain polluter nor compensated in a way it exactly compensates the damage.[26] The compensation which might be assessed after the occurrence of the

22Supra note 14, p.151
23 Ibid. 115
24 Ibid. p. 207
25 Juergen G.Backhaus, Increasing the role of environmental taxes and charges as a policy Instrument in Developing Countries. Some Conceptual considerations, Journal of Economics and Sociology-AMER J ECON SOCIOL, vol. 63, no. 5, p. 8
26 Ibid

damage does not necessarily reflect the amount of damage.[27] This is attributed to the possibility of perpetuation of the damage to the extent of intergenerational effect and to the presence of different sources of environmental harm which weaken the cause and effect relationship.

The public goods nature of environment and the problem of free-ridership also worsen the problem of private bargain in solving environmental pollution[28] as it is difficult to know the extent of the right of individuals, the extent of damage and the person who caused the pollution. Therefore, there are environmental problems which can be addressed by neither free-market instruments nor purely regulatory rules but by environmental taxes. The regulatory regime, the free market and environmental tax can complement each other without mutual exclusive effect.

3.2 Arguments in favor of Environmental Tax

3.2.1 Avoiding Social Cost

Environmental taxation is rationalized on the principles of economic analysis of law as it avoids market failure by causing environmental social cost internalized. When there is environmental pollution, people may get sick and pay for medication, the government may clean the pollution and the society may suffer from health problems. These all exemplify social costs.

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27 Ibid

28. Gary North, The Coase Theorem, Study in Economics Epistemology, Institute for Christian Economics1992, P. 38 See also Economic analysis of Environmental Taxes: the ecological taxation on vehicles in France, European Masters In Law and Economics, (Unpublished) 2007/8, p. 9-10

If firms produce and pollute in the process of production, the point of individual efficiency and social efficiency will not be the same. The firm takes into account the costs like price of inputs, wage/salary of the labor and other costs that the firm incurs. Firms do not consider external costs like environmental costs[29]unless they are required to pay for. This implies that without considering social cost the point of diseconomy will not be reached at the point of diseconomy if the social costs were considered. Social cost, which is not internalized by firms not only makes the society incur cost without any benefit but also may cause inefficient economic activity.

In that case, the externality social cost can be internalized by environmental taxation[30] by designing it to be proportional to the extent of externality according to Pigou.[31] This proposition might contradict with a conception of environmental taxes that dictates such taxes do not reflect proportionality. Pigou differs from Coase not in the presence of the problem of social cost but on the solution for such problem. He believes that such problem can be solved by proportional environmental tax.

29Bernand Salanie, The Economics of Contract, A premier, 2nd Edn, The MIT Press, 2005 p. 44 it is asserted that social cost may Cause distortion as it increases cost, Allen and cutter , p. 424-426, Economic principles dictate that any additional cost will be in line with economic efficiency (Pareto efficiency) if it results in additional profit that satisfies the requirement of least cost production.

30 William J.Baumol, On Taxation and Control of Externalities, The American review, Vol 62 No 3 (June 1972), American Economic Association, P. 307-322 1803378, Pigou was the first scholar who proposed environmental taxation as an elixir for environmental negative externality.

31http://www.greentaxreport.co.uk/read-chapters-online/11-theory-and-practice-of-environmental-taxation?showall=1 September 20, 2011, Pigouvian theory recommends that that extent of environmental taxation shall be the reflection of environmental externalities.

3.2.2 Reducing Cost of Regulation

Environmental taxation also brings efficiency by minimizing compliance cost of environmental pollution.[32] The economic actors are near to the polluting behavior of theirs that the regulating governmental organ. Because of this they can easily manage to comply with the environmental pollution by applying different mechanisms which are more efficient.

Contrary to command and control way of regulating the environment, environmental taxation gives better option for different sectors to select the compliance method with least cost.[33] Accordingly, such tax enables them to efficiently deal with environmental externalities. Moreover, since the regulator does not know the marginal cost of abatement of each firm some might be imposed with higher cost and other with lower cost of abetment.[34] Regulatory rules which may specify the technology to be employed may achieve compliance without encouraging the polluter to further reduce pollution as there is no tax to each of the residual pollution.[35] There can be different ways to reduce environmental pollution. Environmental tax gives them the option either to be taxed or reduce environmental pollution. Such option encourages optimal behavior in their decision with reference to environmental pollution. However, it does not mean that all pollutions shall be governed by taxes

32 Frank Scingeor and Ken Piddigton Environmental taxation in New Zealand What places does it
have, University Waikato, July 6, 2001, p. 6
33 Ibid. P. 6
34Done Fullertone, *et'el*, Environmental Taxes Prepared for the report of a Commission reforming the tax system of the 21st century Chaired by Sir James Mirrlees, P. 7
Available at www.ifs.org.uk/mirrleesreview, Last visited on October 27,2013
35 Ibid

since there can be extremely dangerous pollutions, which have to be necessarily regulated.

3.2.3 National Dividend[36]

The idea of national dividend also rationalizes the need for environmental taxation because avoids spillover of negative externality. The national dividend is maximized when negative externality is avoided and the negative externality can be eliminated by the Pigouvian tax.[37]

Environmental taxation by discouraging excessive use and wastage of resources stimulates efficiency.[38]The purpose of environmental taxation is to encourage production of appropriate quality and quantity of production for the society and discourage excess production at the expense of environment inefficiently. If economic actors are taxed, they have either to quit the economic activity or use the resource to the highest possible extent to cope up with the environmental taxation. This will attract those who have the capacity to extract the highest possible advantage of the resource and drive out the weak and inefficient ones. This is achieved once the environmental tax is designed in a way it reflects the optimal amount of tax which is practically difficult.

3.2.4 Reducing Distortion Effect of Tax

Authors like Pigou also relate the importance of environmental tax to reducing distortionary taxes. This purpose works on employment, capital

36 National dividend is the advantage of environmental tax that is avoiding externality, efficient resource utilization and distributional role
37Ibid
38 Supra note 32 , p. 6

tax and where there are less tax bases in resources uses. Less tax bases in resource uses in turn show the possibility of inefficient overexploitation of resources. According to Pigou, payroll taxes discourage the motive to work and capital taxes reduce incentive for enterprises.[39] This disincentive can be alleviated by applying Pigouvian tax to raise sufficient revenue to susbstitute employment and capital taxes with the revenue.[40] Avoiding distorting taxes by dint of environmental taxes is called the second dividend or employment dividend.[41]

3.2.5 Recycling Revenue

In addition to avoiding distortion of employment or capital taxes, environmental tax may be used to recycle revenues collected from environmental taxes. The recycling can be used for example to avert the problem of unemployment and other welfare activities of the government, thereby yielding "Double Dividend."[42]

This weak form of double dividend becomes more effective when such taxes are intensively employed so that the environmental tax revenue indirectly affects other kinds of taxes and governmental expenditure.[43] Its

[39] Sheila Killian, Revenue Services and Environmental Taxes: Comparative Study of the Irish and south Africa Approaches to a levy on plastic Bags, Book Chapter in Critical Issues in Environmental Taxation, 2004, p.494
[40] Ibid, p.494
[41] Ibid, p.494
[42] Double dividend shows dual advantage by avoiding negative externality in one hand and it avoiding distortionary taxes on the other hand and even though this can be revenue neutral but it avoids distortion
43 Nick Johnstone and Janaki Alavalapati, THE DISTRIBUTIONAL EFFECTS OF ENVIRONMENTAL TAX REFORM, ENVIRONMENTAL ECONOMICS PROGRAMME, Discussion Paper, DP 98-01October 1998 p 20

effectiveness also depends on the amount of revenue and how it is recycled.

It is clear that immediate recycling happens as a result of price increment in the goods and services on which environmental taxes have been imposed. Once tax is imposed the production cost will increase and it will cause higher price of the product. Consequently, the regressive impact of environmental taxation is observed in lower-income households as the low-income households allocate most of their income to those goods and services on which environmental taxation is imposed. Different researches have proved that such households are prone to regressive nature of environmental taxation.[44] Different countries take measures such as ecobonus, ecotax and other remedies to reduce the impact regressive nature of environmental tax for social purpose.[45] Reduction of income tax[46] is also employed to tackle the regressive nature of environmental taxes.

In a nut shell, it can be said that environmental taxes are important as they have inseparable advantages of enhancing efficient use of environmental resources and avoiding distortionary kinds of taxes. It is also important to note that the role of environmental tax in the protection of the environment shall also be given due consideration. Welfarism through the lens of production and consumption might lead to ignore the value of the protection of the environment.

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44 Ibid. p.7
45 Paul Ekins, Stefan Speck, Environmental tax reform (ETR): A Policy for Green Growth, Oxford University Press, May 26, 2011, p. 250
46 Ibid. p. 252

4. Legal Framework of Environmental Taxation in Ethiopia

4.1 Jurisdiction of Environmental Taxation

The revenue sharing scheme between regional and federal government is in principle expected to reflect the expenditure as a consequence of the powers and responsibilities of the respected governments. Article 95 and 94 of the FDRE Constitutions seems to show that source of revenue is determined by considering the necessary expenditure to discharge the powers and responsibilities. However, the specific provisions about revenue sharing scheme have certain deviation from this arrangement.

Generally, the constitution provides exclusive federal power of taxation, exclusive regional power of taxation, concurrent power of taxation and undesignated power of taxation. Article 96 of the constitution vests the federal government exclusive power of taxation. Environmental taxes can possibly be indirectly subsumed in some of the aforementioned types of taxes. Some of the taxes in which environmental tax might be included are: custom duties, taxes and other charges on imports and exports, profit, sales and excise taxes on enterprises owned by the federal government, income of air, rail and sea transport services, fee and other similar taxes. In these areas, the federal government has exclusive power of imposing environmental tax. This denotes that environmental taxes can be subsumed in sales tax, excise tax and others as if the taxes were one of these taxes.

The constitution has also enshrined exclusive power of taxation of the regional states under Article 97. Most of the exclusive powers of regional states are similar with the federal powers except difference in territorial

jurisdiction of the respective regional state or under its ownership. Most of the tax bases can be designed in a way they serve the purpose of environmental taxes. In such tax bases regional states can exclusively impose environmental taxes anonymously.

The constitution also denotes certain tax bases to be under concurrent jurisdiction under Article 98. Both the federal and regional governments have power of taxation in "profit, sales, excise and personal income taxes" of jointly established enterprises. They have also concurrent power on "profits of companies and on dividends due to shareholders." Income obtained from large-scale mining, income from petroleum and gas operations and royalties are also under the concurrent jurisdiction.

The fourth and unique revenue sharing scheme is the assignment of undesignated taxes. Article 99 of the constitution reads,

"The house of Federation and the House Peoples Representatives shall, in joint session, determine by two-third majority vote on the exercise of powers of taxation which shall have not been specifically provided for the constitution."

This is a deviation from the power and responsibility sharing scheme employed under the constitution. Undesignated power of taxes corresponds to residual power under the constitution and residual power is given to the state governments according to Article 52 (1) of the constitution that shows that all powers which are not given to the federal government exclusively or concurrently are reserved to the regional

states. The houses may decide that the power of such taxation shall be either for the federal or concurrently for both federal and regional states. Such revenues sharing scheme will not reflect the correspondence between revenue and responsibilities of federal and regional states. This is because while the residual power/responsibility is reserved for states, undesignated power of taxation (corresponding to residual) would be assigned without reflecting the expenditure needed for the residual state powers.

Undesignated power of taxation has put the power of taxation of regional states and the federal government in a limbo.[47]What is more in environmental tax is that tax with the purpose of environmental protection is scarcely provided in the constitution not only in name but also in substance. Neither the federal government nor regional governments have the power of taxation over environmental taxation without decision of both houses with reference to such taxation power or revenue sharing.

However, when the environmental taxation is provided, along with the other taxes like sales tax, excise tax, turn over tax, VAT and others, the power to impose such environmental taxation will be determined by the type of tax the environmental tax provision is subsumed in. The constitution allows neither regional states nor federal government to impose and levy environmental taxes. Nevertheless; both the Federal and

47Tadesse Lencho, The Ethiopian Tax System Excess and Gaps, Michigan State International Law Review, Vol (20:2), 2012, P 333.

Regional Governments may impose environmental tax provisions inserting in other types of taxes.

The other issue in relation to the tax jurisdiction is whether regional states or federal governments have tax jurisdiction in the sense that charges are also environmental taxes. The constitution does not, in clear terms, provide a circumstance by which the regional states can impose environmental taxes in the form of charges or fees.

It has been mentioned that charges and fees are considered to be taxes under Ethiopian laws, and environmental charges are environmental taxes. Therefore, regional states and federal government cannot impose 'environmental' charges and fees taking into account the wider meaning of taxes in the constitution and the existing revenue sharing scheme under the constitutional federal arrangement.

However, regional states and federal government may have the jurisdiction to impose environmental taxes in the form of charges and fees on the account of different grounds and subsuming in different laws. One of the possible grounds of having jurisdiction is regulating the environment. Proclamation 295/2002, 299/2002 and 300/2002 for example provide different ways by which environmental pollution can be regulated. Both the federal and regional governments have the power to regulate environmental pollution. The act of regulating can be, among different ways, made by enacting regulatory laws and rules. The regulatory rules can be fashioned in a way they address the purpose of

environmental taxes although environmental taxes are different from regulatory laws.

4.2 Environmental Taxes in Different Tax Laws

Environmental taxes with certain purpose, be it revenue, regulation or social justice, can be structured in different taxes in different ways. This can be made through increasing, decreasing, or exemption of taxes imposed on certain commodity or tax base.

4.2.1 Environmental Tax in Value Added Tax

Value added tax is among the possible taxes in which environmental taxation can be imposed. According to proclamation 285/2002, Article 7 Value Added Tax at the rate of 15 % is imposed on taxable transaction. The rate of 15 % is applicable for all taxable transactions without having environmental purpose. Article 6 of the proclamation defines taxable transaction to be a regular and perpetual intended in whole or partial supply of goods or provision of service. The meaning given to taxable transaction under Article 6 of proclamation 285/2002 and the Article 2(3) of Amendment Proclamation No. 609/2008 do not again show any special treatment for environmental friendly transactions.

The zero rate transactions and exemptions do not again show the purpose of protecting environment and getting environmental externalities internalized through the instrumentalities of taxes. Article 7 (2) provides rate of zero percent taxable transactions without any preference for environmental taxes. Article 8 of the proclamation also provides a number of exemptions none of which aim at environmental purpose.

However, the irony is the supply of kerosene and provision of transport are some of the taxable transactions under the exempted transactions while they are not environment friendly. There can be justification for exempting the aforementioned transaction. But the justifications are not on the basis of environmental tax purpose. In the presence of a number of exemptions there is no single exemption for the sake of internalizing environmental externality in our VAT proclamation.

4.2.2 Environmental Tax in Turnover Tax

Turnover tax can also be used as a means of regulating environmental tax through different mechanisms. Environmental tax can be subsumed in turn over tax in the way it can be made in VAT. Proclamation Number 308/2002 generally deals with turnover tax in Ethiopia. The preamble indicates that turnover tax is provided to complement Value Added Taxes as taxable transactions involving less than 500,000 are excluded from the Value Added Tax realm owing to administrative feasibility. This can lead us to the conclusion that the legislative inadvertent or inconsideration of environmental tax in value added tax also exist in turnover tax.

In the same way as that of VAT, the meaning of taxable transaction, the tax rate, and the exemptions do not have environmental function. Similar to the VAT, the turnover tax proclamation under the lists of exempted taxable transactions lists electricity, kerosene, and water supply, provision of transport service, which may probably result in certain environmental pollution, as exempted transaction.

Therefore, it is clear that, whether it is enacted heedlessly or not, the turnover tax does not subsume provisions, which aim at regulating environmental harm, generate revenue for environmental purpose, and rectify possible tax distortion by shifting tax base from employment to environment related tax bases.

4.2.3 Environmental Tax in Excise Tax

In addition to value added tax, excise taxes are among the widely applied means of market approach for environmental pollution by making externality internalized and discouraging consumption of environmentally unfriendly commodities. This purpose seems to be absent in the Excise Tax Proclamation No. 3007/2002 as it can be inferred in its preamble.

The Preamble shows that one of the purposes of this tax is discouraging the consumption of goods, which are hazardous to health and, which bring problem to the society. This preamble is more concerned about the impact of the products on the health of human beings and the society disregarding externality. Products, whose production process is dangerous, are not the concern of the excise tax and the impact of hazardous product on the consumer is not negative externality. The concern of the legislature to avoid the hazardous goods does not show the positive impact on the role of excise tax on environment.

The schedule on the Federal Proclamation 307/2002, which shows the kind of products on which excise tax is imposed, indicates that excise tax is imposed to avert the environmental problem. Those problems may

potentially be caused by the product. Some of the products such as drinks, tobacco, and asbestos may by themselves affect the health of human beings either as externality or simply when they are consumed. However, no different rate treatment is made on the basis of environmental friendly or unfriendly kinds of products. This is an indication of the fact that environmental purpose is not regarded in the excise tax proclamation.

The other products on which excise tax is imposed can be dangerous because of their polluting effect at the time of consumption not only for the consumer but also for society at large. Using fuel-super benzene, regular benzene, petrol, gasoline and other motor spirits, motor passenger cars, station wagons, utility cars, land rovers, jeeps pickups and other similar vehicles causes pollution. Hence, excise tax on these products can be considered as an environmental tax although the legislature is heedless of the environmental purpose.

Excise tax on garments and textile also depict intentional or unintentional provisions, which aim at protecting the environment. The process and inputs used in the production of textile products and garments might cause environmental pollution and excise tax imposed on them can serve environmental purpose. However, the tax rate seems to be less when it is related to the other products. The excise tax for textile and garment is 10% while the tax for perfume, other types of alcohol is 100%, cigarettes 75, fuel 30 and soft drinks 40%. This shows that the emphasis given to environmental protection and getting environmental externalities internalized through excise tax is less than the emphasis given to

discouraging consumption of luxurious goods, and harmful consumptions for the consumer.

4.2.4 Environmental Tax in Income Tax

Income tax rarely subsumes environmental tax as its purpose is usually by far different from the purpose of environmental tax. Generally, imposing environmental tax causes reduction in income tax. This is because the government will reduce the income tax and compensate the reduced revenue from the environmental tax. This becomes more effective provided that the amount of revenue from the environmental tax is considerable enough to affect income. This shifting of tax burden is believed to regulate tax distortions. On top of this, income imposed on environmentally dangerous activities and on corporations like that of super fund of USA can be used to serve environmental purpose.[48]

In the case of Ethiopia, the taxes collected from the industries seem to be negligible in its effect on easing the imposition of tax on income. This is because the amount compared to the number of employees is expected to be meager even though this needs to be backed by further research. However, this does not mean that it does not have any effect since this may lead to the right track of avoiding distortion by shifting the revenues collected from income tax to environmental tax and environmental tax bases. Imposing environmental tax in the form of corporate taxation on income might have discouraging effect on investment.

[48] This is a fund collected by environmental taxes and used for environmental purpose

To avoid such effect tax on fringe benefits and bonuses can be one way of either discouraging environmental pollution or generate fund and use the fund for different activities of protecting the environment and averting pollution. Imposing further income tax on employees for the sake of environmental protection can have adverse effect on employees, unless the social cost is accrued to the employees provided that the income obtained by the employees is more than their reasonable pay in market. Hence, ascertaining as to whether the tax is on social cost accrued to the employees or not is necessary.

However, income tax proclamation is not designed to serve environmental purpose as all the taxes are handed over to the respective tax authority without forming environmental fund, which resembles the super fund and there is no corporate tax, tax on fringe benefit and bonuses for the purpose of environment. In certain instances it could have been also possible to discourage environmental unfriendly economic activities by imposing higher taxes and encourage environment friendly economic activities by giving income tax exemptions. However, the income tax is not designed in such way.

The income tax exemptions in investment laws do not again show apparent environmental purpose. The Investment Proclamation shows the possibility of specifying incentives and their extent by regulation provided by the council of ministers.[49] Council of Ministers Regulations No. 84/2003 Article 4 and 5 show that most of the exemptions are export

[49] Article 9 of Proclamation Number 280/2002

driven ones. The income tax exemptions are indifferent in encouraging and discouraging environmental friendly and unfriendly investments.

To sum up, those which may have considerable income because of considerable profit are similarly taxed without considering the environmental cost that they externalize to the society. The absence of differential treatment on the account of the relationship of the taxable activity and environment leave certain economic actors inefficient through the lens of social cost benefit analysis.

5. Environmental Tax Laws under Environmental Laws

Proclamation 295/2002 of the Federal Democratic Republic of Ethiopia shows Environmental Authority is established with different powers and functions. Article 6 (2) of the proclamation empowers the authority with the power to:

> "Prepare, review and update, or as necessary, cause the preparation of environmental policies strategies and laws in consultation with the competent agencies, other concerned organs and the public at large and upon approval, monitor and enforce their implementation."[50]

Whether the authority can enact environmental tax laws in the form of environmental policy, strategy, and laws within its administrative power is controversial. It is plausible to assert that the authority can enact environmental taxes in the form of policies, strategies and laws without

[50] Federal Democratic Republic of Ethiopia Proclamation 295/2002 Article 6 (2)

naming as environmental tax/charge. Article 6 (10) and (11) of the proclamation also depict the power of enacting different laws, which aim at protecting environmental pollution. Particularly Article 6 (12) empowers the authority with the power to propose incentives and disincentives, among which environmental taxes can serve to prevent environmental pollution and degradation.

The fact that it is named as environmental tax can make it under the respective revenue authority and within the category of undesignated taxes or lead to irreconcilable dispute. This is not only attributable to the legal lacuna in the constitution but also to the implication that the name environmental taxation may connote the revenue purpose in addition to the regulatory role. If the charge or tax is designed to be regulatory charge or strategy or policy, the regulatory role will be more apparent. Be that as it may, potential legal perplexity remains as environmental tax includes environmental charges and environmental tax is under the category of undesignated power of taxation.

It has also the power of enacting directives according to Article 6 (19) of the proclamation and enacting directive would mean implementing the existing laws. In the absence of environmental tax laws, enacting environmental tax directives on the basis of Article 6 (19) would be without legal justification unless the taxes are envisaged to be incentives, disincentives or regulatory directives. On the other hand, environmental tax in the form of charge can also be one way of implementing the general laws and accordingly Article 6 (19) can also be one leeway to be maneuvered.

The allocation of the undesignated taxes and the meaning of environmental tax under Ethiopian law would put the power of environmental authority to enact environmental tax laws in limbo. This does not, however, mean that the agencies can in no circumstance enact laws, which have similar effect with environmental tax laws. They can do so under the guise of different regulatory policies, strategies, directives, laws and plans. This is because the distinction between enacting and implementing environmental laws and environmental tax is perplexing. The authorities can take advantage of positive interpretation of these legal lacunas.

In addition to proclamation No. 295/2002, Article 10 of proclamation No. 299/2002 shows that incentive, including exemptions from customs duty, for the importation or introduction of environmental friendly technologies can be determined by regulations. This is one of the environmental taxes provided as an incentive subsumed in customs duty.

Pollution control proclamation number 300/2002 seems to show a leeway by which environmental tax can be one mechanism of controlling pollution. In addition to other administrative measures, one of the ways by which pollution is controlled is getting the polluter cover the cost of cleaning. Article 3 of the pollution control proclamation number 300/2002 orders that cost of cleaning to be determined by the authority. The authority may then determine the cost of pollution and this can be imposed in the form of charge or fee on the polluter.

Generally, it seems uncertain whether the environmental authorities can enact environmental taxes or charges in the existing federal structure. However, there are different lee-ways through which environmental tax can be enacted. However, none of the gray areas are maneuvered by the respective authority so far.

Conclusion

In justifying the importance of environmental taxation, the author have shown that the rigid regulatory frameworks deny flexibility and efficient way of vying environmental externalities by the person in a better position of avoiding the risk. Environmental taxes are on the other hand middle ground solution for environmental pollution. Moreover, it can have significant role in complimenting the regulatory and three legal institutions of Coase theorem

The advantages of environmental taxes beg the existence of sufficient legal framework of environmental taxation in Ethiopia. The existing laws about environmental tax show uncertainty on how the environmental tax can be enacted. Environmental tax is among the undesignated taxes. Because of that neither the federal not the regional government can enact such laws. The wider meaning of environmental tax also has its own negative impact on the possibility of regulating the environment through environmental charges and fee.

Therefore, it is necessary to enact sufficient environmental tax laws. Alternatively, providing environmental tax laws in different provisions of

tax laws such as value added tax, turn over tax, excise tax, income tax, and other taxes will compliment the exiting environmental laws.

Case Comment

Jurisdiction and Pleading Foreign Law in Private International Law Matters: Case Comments on the Ruling of the Federal Cassation Division in the *Global Hotel plc Vs. Mr Nicola Aspapachit Zis*

*Gebrehiwot Hadush**

Introductory concepts

Private international law (also known as conflict of laws) is an area of the law that operates whenever a civil dispute involves a foreign element.[1] The key factor that moves the operation of the private international law is the presence of foreign element. As Collier provides that foreign element may pertain to a foreign residence, domicile or nationality; or a place where a legal transaction or a contract has been entered or performed; or a place where business entity is formed or operates; or an event where damage is felt or has occurred. As such, it is very important to establish that there is a foreign element before one talks of the application of private international law. It is possible that a state can ignore the presence of foreign element and treat the matter like purely domestic matters. However, leaving aside private international law would inevitably pose serious trouble on individuals who rely on foreign law because the act that created their right or privilege have been formed

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[1] Abla J Mayss, principles of conflict of laws, (conflict of laws series, 3rd .ed.), Cavendish Publishing Limited, 1998, p.1, also see Collier on p.3

under foreign law.[2] It may also create difficulties in the enforcement and recognition of judgment rendered by the forum state as the foreign court (recognition forum) may feel that the forum state did injustice by turning away the presence of foreign element in the matter. Other justifications such as party's choice (forum selection clause and choice of law clauses), comity or friendly respect for other states would also necessitate the application of private international law.[3] Hence, not arguably, the presence of foreign element in a civil dispute urges the forum state to address the matter in a 'special way'[4] than purely domestic matter.

Private international law comprises three major subject maters: Jurisdiction (also known as Judicial Jurisdiction), Choice of Law, and Recognition and Enforcement of Foreign Judgments. Jurisdiction, the focus of discussion in this case comment, is the initial issue that addresses whether the forum state can hear and adjudicate a matter containing foreign element. Often than not, jurisdiction over cases containing foreign element is determined mainly depending on the degree of connections of the matter to the forum state, and other bases of judicial jurisdiction such as forum selection clauses in international contract.[5]

However, the presence of foreign element may not always trigger the operation of private international law. Parties may waive their right to oppose the adjudicatory jurisdiction of a court. The defendant may consent to the jurisdiction of the court by submission. If the defendant

[2] Jhon O'Brien, Conflict of Laws, (2nd ed.), Cavendish Publishing Limited, 1999, P.7
[3] Ibid
[4] Ibid
[5] Id., p.26

failed to oppose the jurisdiction of the court then the court would assume jurisdiction notwithstanding that the court lacks original jurisdiction

It is argued whether issues on pleading or proving foreign law shall be dealt next to a decision on whether the forum shall assert jurisdiction, appropriately at the choice of law stage. Indeed, many authors as well accept that proof of foreign law is an important factor in selection of appropriate law during the choice of law stage. However, they don't buy the view that it shall not be raised in determination of judicial jurisdiction. The dominant view[6] is that a forum that has faced a case containing foreign element cannot of its own anticipate or assume that there is a foreign law giving a better claim or entitlement to a party than the law of the forum. Thus, irrespective of the presence of foreign element in a civil dispute, private international law would not be relevant if the parties or one of them don't plead foreign law.

Ethiopia does not have a private international law statute. For jurisdiction purposes, the federal courts establishment proclamation,[7] art.11 (2, a), states that the federal high court has fist instance jurisdiction on private international law matters. However, this proclamation does not spell out the essential factors that make a civil dispute a private international law matter. In article 5,[8] cases involving foreign national are taken to be the jurisdiction of federal courts, including federal first instance courts. This implies that jurisdiction on private international law as per.art.11 (2, a) requires much more than the fact that one of the party is a foreigner. In

[6] See Collier on pp.33-36, John O'Brien, conflict of laws (2nd Ed.), Cavendish Publishing Limited, 1999, pp. 145-149
[7] A proclamation to provide the establishment of federal courts, pro.No. 25/96
[8] Ibid

other words the fact that a case involves a foreign national does not mean that it is a private international law matter. Then, the host of the problem lays on the so called additional facts or factors needed beyond being a foreigner. It could be argued that the party must plead a foreign law in addition to the fact that he is a foreigner. This view as reflected above is a decisive factor in determination of whether a forum shall look into its private international law in cases containing foreign element. However, it won't be easy unless the legislator or the courts through interpretation address complications in proof of foreign law, on points such as the status of foreign law as fact or law, including the method and degree of proof required for determination of judicial jurisdiction. In the Global Hotel plc case,[9] the Federal Cassation Division noted that the presence of foreign element in a civil dispute per se does not trigger the operation of private international law under art.11 (2, a).

Global Hotel PLC Vs Mr Nicola Aspapachit Zis

Issue: Whether the presence of foreign national as a party in a civil dispute per se form private international law matter, precluding trial by the Federal First Instant Court (FFIC)

This case was initiated at the Federal First Instant Court, with the present petitioner requesting the court to order the respondent to pay birr 85,467.24 to the petitioner for hotel services given to the respondent. The petitioner stated that the respondent (foreign national) had given it a payment order notes that has not been accepted by the local banks. The court noted that disputes involving foreign nationals would invariably

[9] Global Hotel Plc Vs Mr Nicola Aspapachit Zis, Federal Supreme Court Cassation Division, File No. 28883, Vol.5

indicate the presence of foreign element which is the domain of private international law. Accordingly, the court declined jurisdiction based on art. 11(2) (a) of pro.25/96[10] that confers the power to hear and adjudicate private international law matters upon the Federal High Court. The Federal High court affirmed the decision of the Federal First instant Court without further explanation. An appeal submitted to the Federal High Court affirmed the decision of the Federal First Instance Court based on similar reasoning.

The present petition was then taken from the decision of the lower courts that rules that the Federal First Instance Courts do not have jurisdiction on matters of private international law, as both courts assume that the presence of foreign national in the dispute triggers the application of proclamation 25/96, as per art.11 (2, a). The Cassation Division of the Federal Supreme Court reiterated the assertion of the lower courts that federal high court has first instant jurisdiction on private international law matters, as per art.11 (2) (a), pro.25/96. However, it rejected the assumption that the presence of foreign national per se would imply foreign element there by triggering private international law issues. Then, the court remanded the case back to the to the Federal First Instance Court for the determination of the matter on the merits. The Cassation Division reversed the decision of the lower courts on two grounds:

1. It stated that private international law in the context of art.11 (2) (a) would come in to picture when one of the parties in the dispute raise or claim that the Ethiopian law would be in conflict

[10] Supra note 5

with a foreign law (the law of the disputing party or a third state). In a narrowly similar way, the court noted that the character of the case may also determine whether it raises private international law in the context of art.11 (2) (a), proc. 25/96. In all other cases where one or more of the parties have not indicated that there is a conflict between the Ethiopian law and a foreign law as to the choice of the applicable law, it would be erroneous to decline jurisdiction by considering only the involvement of a foreign national;

2. The conferral of first instant jurisdiction up on the federal high court on private international law matter, under art.11 (2) (a), when there is no private international law statute at present, implies that the federal high court would possess first instant jurisdiction on matters that raise private international law under future proclamation (s) on private international law. In other words, the Cassation Division noted that proclamation 25/96 is speaking for future private international law proclamation (s) which the court suggest would talk on other private international law characters, leaving jurisdictional issues in tact as determined under proc.25/96.

Comment and analysis

As stated above the cassation divisions has handed several reasons to ascertain that the presence of a foreigner in a civil dispute alone does not make the case private international law matter. The obvious and less

contentious reason is that the party has not pleaded or invoked foreign law. This could have been enough to overrule the decision of the lower courts which is grounded on a simple assumption that a case containing foreign element is always a private international law matter. However, while indicating that foreign law must be invoked by the party who relies on foreign law, it gave a slippery and apparently opposing note stating that the nature or character of the matter may make it a private international law. Seemingly, this additional overture lifts the burden of the party to invoke and plead foreign law. It looks the court one hand wants to assert that a party that relies on foreign law thereby triggering the operation of private international law must plead it; on the other hand it appears that the court acknowledges that there are cases in which the parties do not have plead them because their nature indicate that they are matters of private international law. The first gives clear message to the lower courts in that the federal first instant court shall assume jurisdiction in cases involving foreign national in so far as the party has not pleaded foreign law. However, the second one has the potential to put the lower courts in a dubious position because it is not clear what characters or factors of a case involving foreign element would automatically operate art.11 (2, a).

Further to the above points, the Cassation Division threw a very strange reasoning that harnesses and replaces the minds of the law maker. The court envisaged that the federal high court will continue to exercise original jurisdiction on private international law matters when the legislature in the future enacts a private international law, the *future is for the federal high court*. It appears that the Cassation Division has not

noted that jurisdictional issues, like other private international law matter such as choice of law issues, may attract serious debates that may challenge the conferral to the federal high court. In all cases, the Cassation Division through its amorphous prophesies has not only suggested legislative decisions but mercilessly entered in to what is known as "the law making province".

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ተጠሪ፡- **አቶ ፌኔት ተክሉ - ሞግዚት ነጋ ቦንገር በሌሉበት ይታያል**

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ፍርድ

ጉዳዩ የቀረበው አመልካች የፌደራል ከፍተኛ ፍርድ ቤትና የፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ችሎት የሰጡት ውሣኔ መሰረታዊ የሕግ ስህተት ያለበት ስለሆነ በሰበር ታይቶ እንዲታረምልኝ በማለት መጋቢት 10 **ቀን** 2001 **ዓ.ም በተፃፈ የሰበር አቤቱታ ስለጠየቁ ነው፡፡ ክርክሩ በመጀመሪያ የታየው በፌዴራል የመጀመሪያ ፍርድ ቤት ነው፡፡**

የፌዴራል የመጀመሪያ ፍርድ ቤት የአቶ ተክሉ ነጋ ውርስ እንዲጣራ ለውርስ አጣሪ መርቷል፡፡ የውርስ አጣሪው የሟች አቶ ተክሉ ነጋ ወራሾች ህፃን ኬሩዝ ተክሉና ህፃን ፌኔት ተክሉ መሆናቸውንና የውርሱ ንብረት ክፍል የሚሆነውን ጥሬ ገንዘብና ያክሲዮን ድርሻ በመዘርዘር የውሣኔ ሓሳብ አቅርቧል፡፡ ለዚህ ክርክር መነሻ የሆነው ጉዳይ ለአሁን

አመልካች ለሥር ተጠሪ ከፔፕሲ ኮሊ ዓለም አቀፍ መስሪያ ቤት የተከፈላቸው መሆኑ በማስረጃ የተረጋገጠው 166,449.97 የአሜሪካን ዶላር/አንድ መቶ ስልሣ ስድስት ሺ አራት መቶ አርባ ዘጠኝ ከዘጠና ሰባት ሣንቲም/ የአሜሪካን ዶላር ለአመልካች ጥቅም የተገባ የኢንሹራንስ ፖሊሲ መሆኑን የሚያረጋግጥ ማስረጃ ባለመኖሩ የውርስ ሃብት ነው በማለት የውርስ አጣሪው ያቀረበው ሃሳብ የመጀመሪያ ደረጃ ፍርድ ቤት ተቀብሎ አጽድቆታል፡፡ የውርስ አጣሪው ከላይ መጠኑ የተገለፀው የአሜሪካን ዶላር አመልካች እንዲካፈሉ ያቀረበውን የውሣኔ ሓሳብ የመጀመሪያ ደረጃ ፍርድ ቤት በማጽደቁ ተጠሪ ይህንን በመቃወም ይግባኝ ለከፍተኛ ፍርድ ቤት አቅርበዋል፡፡

ተጠሪዋ ለከፍተኛ ፍርድ ቤት ባቀረቡት የይግባኝ ማመልከቻ ሚች አቶ ተክሉ ነጋ ከፔፕሲ ኮላ ዓለም አቀፍ ተጠሪ ጽ/ቤት ለአፍሪካ አህጉር ሥራ አስኪያጅ በሆኑበት ጊዜ የሕይወት ኢንሹራንስ የገባው እንደ አውሮፖውያን አቆጣጠር 07/01/98 (ከታህሣሥ 19 ቀን 1990 ዓ.ም) እስከ አውሮፖውያን አቆጣጠር 05/21/2001 (ከግንቦት 13 ቀን 1993 ዓ.ም) ነው በዚህ ጊዜ 166,449.97(አንድ መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ ዘጠኝ ብር ከዘጠና ሰባት ሣንቲም) የአሜሪካን ዶላር ለአሁን አመልካች (መልስ ሰጭ መክፈሉ ተረጋግጧል)፡፡ ይህ ገንዘብ የውርስ ንብረት ክፍል ሆኖ በወራሾች መካከል ብቻ ሊከፋፈል ሲገባው የሥር መልስ ሰጭ የአሁን አመልካች የሕይወት ኢንሹራንስ ተጠቃሚ ሣይሆኑ የገንዘቡ ተጠቃሚ እንደሆኑ መደረጉ ተገቢ አይደለም የሚል ይግባኝ አቅርበዋል፡፡

የአሁኑ አመልካች በበኩላቸው ለከፍተኛው ፍ/ቤት መስቀለኛ ይግባኝ አቅርበዋል፡፡ አመልካች ባቀረቡት መስቀለኛ ይግባኝ ሚች አሜሪካዊና የሕይወት ኢንሹራንስ የገባው በአሜሪካን አገር በሚገኝ ኩባንያ ኢንሹራንስ ከፋዩም የአሜሪካን ኩባንያ በሆነበት ሁኔታ የመጀመሪያ ደረጃ ፍርድ ቤት ጉዳዩን አይቶ የወሰነው የሥረ ነገር ሥልጣን ሳይኖረው ነው በማለት አመልክተዋል፡፡ የከፍተኛው ፍርድ ቤት የአሁን አመልካች ተጠሪዋ ላቀረቡት ይግባኝ የሰጡትን መልስና የአሁን ተጠሪዎች ለአመልካች የመስቀለኛ ይግባኝ የሰጡትን መልስ ከተቀበለና ግራ ቀኙን ካከራከረ በኋላ የዓለም አቀፍ የግለሰብ ሕግ ጥያቄ ስላልተነሣ የፌዴራል የመጀመሪያ ፍርድ ቤት ጉዳዩን ለማየት ሥልጣን አለው፡፡ የአሁን አመልካች የኢንሹራንስ ክፍያው ለሚች አሰሪ መስሪያ ቤት የከፈላቸው መሆኑን እንጂ የሕይወት ኢንሹራንስ ለእሳቸው ጥቅም የተደረገ መሆኑን የሚያስረዳ ማስረጃ አላቀረቡም፡፡ ፍርድ ቤቱ ይህንን ለማጣራት የኢንሹራንስ ውሉ እንዲቀርብ ትእዛዝ ሰጥቶ ውል ተፈልጎ እንዳልተገኘ መሥሪያ ቤቱ ጥር 22 ቀን 2000 ዓ.ም በፃፈው ደብዳቤ አረጋግጧል፡፡ ስለሆነም አመልካች የሕይወት ኢንሹራንስ ውል የተለየ ተጠቃሚ መሆናቸውን የኢንሹራንስ ውሉ በማቅረብ ያላስረዱ ስለሆነ የሕይወት ኢንሹራንሱ የሚች የውርስ ንብረት ክፍል በመሆን ለሚች ልጆችና ወራሾች ብቻ የሚተላለፍ ነው በማለት የፍታብሔር ሕግ ቁጥር 827/1/ መሰረት በማድረግ የመጀመሪያ ደረጃ ፍርድ ቤት አመልካች ከኢንሹራንስ ገንዘቡ ግማሹን ትወሰድ በማለት የሰጠውን ውሣኔ ሽሮታል፡፡

አመልካች በዚህ ውሳኔ ቅር በመሰኘት ይግባኝ ለፌደራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት አቅርበዋል፡፡ ይግባኝ ሰሚ ችሎቱ የከፍተኛው ፍርድ ቤት የሰጠው ውሣኔ ጉዳት የሌለበት መሆኑን በመግለጽ ይግባኙን በፍታብሔር ሥነ-ሥርአት ሕግ ቁጥር 337 መሰረት ሰርዞታል፡፡ አመልካች መጋቢት 10 ቀን 2001 ዓ.ም ባቀረቡት የሰበር አቤቱታ ጉዳዩን ማየትና መወሰን የሚችለው በአሜሪካን ግዛት ውስጥ ያለ የስረ ነገር ሥልጣን ያለው ፍርድ ቤት መሆን ሲገባው የፌደራል ከፍተኛ ፍርድ ቤት የዳኝነት ሥልጣን አለኝ በማለት የሰጠው ውሣኔ መሰረታዊ የሕግ ስህተት ያለበት ነው፡፡ የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 በመተርጎም ረገድ የከፍተኛው ፍርድ ቤት መሰረታዊ የሕግ ስህተት ሰርቷል፡፡ ይህ ድንጋጌ በሕይወት ኢንሹራንስ ተጠቃሚ የሚሆኑ ባል ወይም ሚስት መብት ሙሉ በሙሉ በሚያሣጣና የህይወት ኢንሹራንስ ገንዘቡን ወደ ሟች ወራሾች ሙሉ በሙሉ ለማስተላለፍ በሚችል መንገድ መተርጎም የለበትም፡፡ አመልካች የኢንሹራንስ ገንዘብ ተከፍሎዋቸዋል፡፡ የህይወት ኢንሹራንስ ተጠቃሚ ባይሆኑ ኖሮ አይከፈላቸውም ነበር ስለዚህ በህይወት ኢንሹራንስ ልዩ ተጠቃሚ ስለመሆናቸው አላስረዳም ተብሎ የተሰጠው ውሣኔ መሰረታዊ የሕግ ስህተት ያለበት ነው፡፡ የበታች ፍርድ ቤቶች የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ ድንጋጌዎች ከግምት ውስጥ ሣያስገቡ የሰጡት ውሣኔ መሰረታዊ የሕግ ስህተት ያለበት ስለሆነ በሰበር ታይቶ እንዲታረምልኝ በማለት አመልክተዋል፡፡

ተጠሪ ሞግዚታቸው የተሻረ መሆኑ ተገልጿል፡፡ ስለሆነም ተጠሪዋ ፌኔት ተክሉ በሚል ስም በጋዜጣ ፍርድ ቤቱ ትእዛዝ ሰጥቶ በጋዜጣ ጥሪ የተደረገላቸው ቢሆንም ጉዳዩ በሌለበት እንዲታይ ፍርድ ቤቱ ትእዛዝ ሰጥቷል፡፡ ከሥር የክርክር አመጣጥና በሰበር የቀረበው ክርክር ከላይ የተገለፀው ሲሆን የከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ችሎት አመልካች ሟች ከገባው የሕይወት ኢንሹራንስ የምታገኘው ድርሻ የላትም የሕይወት ኢንሹራንስ ክፍያው የሟች ውርስ ንብረት ክፍል ስለሆነ የሕይወት ኢንሹራንስ ገንዘቡን የሟች ልጆችና ወራሾች ብቻ ይካፈሉ በማለት የሰጠው ውሣኔ አግባብነት ያላቸውን የሕግ ድንጋጌዎች ትርጉምና የተፈፃሚነት ወሰን መሰረት በማድረግ የተሰጠ ነው ወይስ አይደለም? የሚለውን ቁልፍ ጭብጥና ሌሎች ተዛማጅነት ያላቸው ነጥቦች በዝርዝር መመርመር የሚያስፈልገው ሆኖ አግኝተነዋል፡፡

ከላይ የተያዘው ቁልፍ ጭብጥ እልባት ለመስጠት በመጀመሪያ አመልካች የኢትዮጵያ ፍርድ ቤቶች የህይወት ኢንሹራንስ ገንዘቡን በተመለከተ የዳኝነት ሥልጣን የላቸውም? የሚች አሰሪ መሥሪያ ቤት የኢንሹራንስ ገንዘቡን ለእኔ መክፈል የሕይወት ኢንሹራንስ ውል ልዩ ተጠቃሚ መሆኔን ያስረዳል በማለት ያቀረቧቸውን ክርክሮች ተገቢነት ማየት ያስፈልጋል፡፡

1. **አመልካች ሟች የህይወት ኢንሹራንስ ክፍያ** 166,449.97(**አንድ መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ ዘጠኝ ከዘጠና ሰባት ሣንቲም**) **ዶላር የተከፈላቸው መሆኑን በመግለጽ**

የኢንሹራንስ ውል የተገባው ከኢትዮጵያ ውጭ በመሆኑ የኢንሹራንስ ገንዘቡን የሚከፈለው የኢንሹራንስ ኩባንያ በውጭ አገር ያለ በመሆኑ የኢትዮጵያ ፍርድ ቤቶች የዳኝነት ሥልጣን የላቸውም የሚል ክርክር አቅርበዋል፡፡ ክርክር የተነሣው አመልካችና የሟች ወራሾች ማግኘት የሚገባቸውን የኢንሹራንስ ገንዘብ የኢንሹራንስ ኩባንያው ስላልከፈላቸው በኢንሹራንስ ኩባንያውና በአመልካችና የሟች ልጆች መካከል አይደለም፡፡ የሟች አሰሪ መሥሪያ ቤት የኢንሹራንስ ገንዘቡን ከፍላዋል፡፡ የመድን ሽፋን የሰጠው የኢንሹራንስ ኩባንያም በውል መሰረት ግዴታና ኃላፊነቱን ተወጥቷል፡፡ አከራካሪው ጉዳይ የሕይወት ኢንሹራንስ የመድን ሽፋን የሰጠው ድርጅት በሟች መሥሪያ ቤት በኩል የከፈለው የህይወት ኢንሹራንስ ገንዘብ ላይ መብት ያለው ማን ነው? የሚለው ነው፡፡ አመልካችም ሆኑ ተጠሪ በዜግነት ኢትዮጵያዊ ናቸው፡፡ ከዚህ በተጨማሪ የሟች ውርስ በፍታብሔር ሕግ ቁጥር 944 ድንጋጌ መሰረት የተጣራው በኢትዮጵያ ሕግ በኢትዮጵያ ግዛት ክልል ውስጥ ነው፡፡

የውርስ ማጣራት አንደኛው ተግባር የሟች ወራሾች እነማን እንደሆኑ መለየት የሟች ውርስ ሓብት ክፍል የሚሆነውንና የሟችን እዳ አጣርቶ መለየትና መወሰን የሚያጠቃልል ነው፡፡ በውርስ ማጣራት ሒደት አመልካች የተቀበለት 166,447.97(አንድ መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ ዘጠኝ ከዘጠና ሰባት ሣንቲም) የአሜሪካን ዶላር የውርስ ንብረት ክፍል ነው ወይስ አይደለም? የሚለው ጥያቄ አከራካሪ ጭብጥ ሲሆን ጥያቄው በኢትዮጵያ ሕግ መሰረት ለመወሰን የኢትዮጵያ ፍርድ ቤቶች የዳኝነት ሥልጣን ያላቸው በመሆኑ

አመልካች ጉዳዩን በማየትና ለመወሰን የዳኝነት ሥልጣን የፌደራል ፍርድ ቤቶች የላቸውም በማለት ያቀረቡት ክርክር በመዝገቡ የተያዘው ክርክሩ በአመልካችና የሚች ወራሾች በሆኑ ሁለት ኢትዮጵያውያን መካከል መሆኑን፣የክርክሩም መሰረታዊ ጉዳይ በሚች አሰሪ መስሪያ ቤት በኩል የተከፈለው ወደ አገር ውስጥ የተላከው የህይወት ኢንሹራንስ ገንዘብ የሚች ውርስ ንብረት ክፍል ነው ወይስ አይደለም? የሚልና በውጭ አገር የሚገኙ የሕግ ወይም የተፈጥሮ ሰዎች በክርክሩ ተካፋይ የማይሆኑበት መሆኑን ያላገናዘበ በመሆኑ አልተቀበልነውም፡፡

2. ሁለተኛው ምላሽ ማግኘት ያለበት ነጥብ አመልካች የህይወት ኢንሹራንስ ክፍያው ለእኔ ተከፍልኛል፡፡ ይህም የህይወት ኢንሹራንስ ውል ልዩ ተጠቃሚ መሆኑን የሚያስረዳ ነው በማለት ያቀረቡት ክርክር ተገቢነው ወይስ አይደለም የሚለው ነው፡፡ አመልካች የህይወት ኢንሹራንስ ውል የተለዩ ተጠቃሚ መሆናቸውን የሚያስረዳ ማስረጃ በተለይም አመልካችን የህይወት ኢንሹራንስ ውል ተጠቃሚ በማድረግ ሚች የመድን ዋስትና ከሰጠው የመድን ድርጅት ጋር የገባውን ውል እንዲያቀርቡ ተጠይቀው ውሉን ሉያቀርቡ አለመቻላቸው በሥር ፍርድ ቤትና በከፍተኛ ፍርድ ቤት ተረጋግጧል፡፡ ለአንድ ለተለየ ተጠቃሚ የሚደረግ የህይወት ኢንሹራንስ ውል በዝርዝር የሚይዛቸው ጉዳዮችን የንግድ ሕግ አንቀጽ 195 በዝርዝር ይደነግጋል፡፡ አመልካች የኢንሹራንስ ፖሊሲው ልዩ ተጠቃሚ ነኝ ካለ በንግድ ሕጉ አንቀጽ 195 እና 701/1/ የተደነገጉትን ዝርዝር ጉዳዮች የሚያሥረዱ የኢንሹራንስ ውልና ፖሊሲ በማቅረብ የማስረዳት ግዴታ አለባቸው፡፡ አመልካች ይህንን የማስረዳት ግዴታና ኃላፊነታቸውን ያልተወጡ መሆኑን የሥር ፍርድ

ቤት በመደበውና ተቀብሎ ሪፖርቱን ባፀደቀው የውርስ አጣሪና በከፍተኛ ፍርድ ቤት ተረጋግጧል፡፡

አመልካች የሟች ልጆች ሞግዚትና የሟች ሚስት በመሆናቸው ምክንያት ይሁን ወይም በሌላ ምክንያት በሟች መኖሪያ ቤት በኩል የኢንሹራንስ ገንዘቡ ተከፍሎዋቸዋል፡፡ የህይወት ኢንሹራንስ ገንዘቡ አመልካች መክፈሉ ብቻውን አመልካች በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 1 መሰረት የህይወት ኢንሹራንስ ውል ተጠቃሚ መሆናቸውን አያስረዱም ከሚል መደምደሚያ ላይ የከፍተኛው ፍርድ ቤት የደረሰው ሟች የህይወት መድን ሽፋን ከሰጠው የኢንሹራንስ ኩባንያ ጋር ያደረገው የኢንሹራንስ ውል እንዲላከለት ትእዛዝ ሰጥቶ የህይወት ኢንሹራንስ የውል ሰነዱ ተፈልጎ ሊገኝ አለመቻሉ የሟች አሰሪ መሥሪያ ቤት ከግለጹለት በኋላ ነው፡፡ ስለሆነም አመልካች በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 1 መሰረት የህይወት ኢንሹራንስ ውል ተጠቃሚ መሆናቸው የተገለፀ መሆኑን አግባብነት ያለው ማስረጃ በማቅረብ አላስረዱም በማለት የከፍተኛው ፍርድ ቤት እና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት ውሣኔ የሰጡት የህይወት ኢንሹራንስ ውልን ለማስቀረብና ፍሬ ጉዳዩን ለማጣራት ተገቢውን ጥረት ካደረጉ በኋላ በግራ ቀኙ በኩል የቀረበውን ማስረጃ በመመዘን በመሆኑ አመልካች የህይወት ኢንሹራንስ ውል ተጠቃሚ መሆኔን አስረድቻለሁ በማለት ያቀረቡት የሰበር አቤቱታ ተገቢነት የሌለውና የሰበር ችሎት በህገ-መንግስቱ አንቀጽ 80 ንኡስ አንቀጽ 3/ሀ/ እና በአዋጅ ቁጥር 25/88 አንቀጽ 10 የተሰጠውን ሥልጣንና ኃላፊነት ያላገናዘበ በመሆኑ አልተቀበልነውም፡፡

ሚች የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 1 እና በንግድ ሕግ ቁጥር 695 በተደነገገው መሰረት የህይወት ኢንሹራንስ ውሉን ያደረገው ለአመልካች ወይም ለልጆቹ ህፃን ኬሩዝ ተክሉና ህፃን ፌኔት ተክሉ ልዩ ጥቅም ያደረገ ስለመሆኑ የሚያስረዳ ማስረጃ አልቀረበም፡፡ የህይወት መድን ውል በመድን ውል በተጠቃሚነት ለተገለፀው ሰው ወይም ሰዎች ወይም ኢንሹራንስ ከገባው ሰው መብት ላላቸውና ስማቸው በተጠቃሚነት ላልተገለፁ ሰዎች ሊደረግ እንደሚችል ከንግድ ሕግ ቁጥር 692 ንኡስ አንቀጽ 2 ድንጋጌ ለመገንዘብ ይቻላል፡፡ ሚች በገባው የሕይወት ኢንሹራንስ ውል ተጠቃሚ የሚሆነውን ሰው በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 1 የገለፀ በሆነ ጊዜ የኢንሹራንስ ውሉ መሰረት ገንዘብ ለማን ይከፈላል የሚለው ጥያቄ በዚህ መዝገብ አከራካሪ ጭብጥ ሆኖ አልቀረበም፡፡ በያዝነው ጉዳይ ሚች ያደረገው የኢንሹራንስ ውል ለአመልካች ወይም ለልጆቹ ልዩ ጥቅም የተደረገ መሆኑን የማይገልጽና ለተለየ ተጠቃሚ ያልተደረገ ነው በማለት የበታች ፍርድ ቤቶች የደረሱበት መደምደሚያ ተገቢነት ያለው ቢሆንም ሚች ባደረገው የህይወት ኢንሹራንስ ውል በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 1 ደንጋጌ መሰረት የኢንሹራንስ ውሉ ተጠቃሚ ወይም ተጠቃሚዎች ያልገለፀ በሆነ ጊዜ በህይወት ኢንሹራንስ ውል መሰረት በሚከፈለው ገንዘብ ላይ መብት የሚኖራቸው እነማን ናቸው? ጉዲዩስ የትኛውን የሕግ ድንጋጌ መሰረት በማድረግ ይወስናል የሚለውን ሰፊ የሕግ ክርክር ያስነሳ ጭብጥ አስመልክቶ የከፍተኛው ፍርድ ቤትና ይግባኝ ሰሚው ፍ/ቤት የሰጡት ውሣኔና የደረሱበት መደምደሚያ በዝርዝር መታየት ያለበት ሆኖ አግኝተነዋል፡፡

3. ሚች የተዋዋለው የህይወት ኢንሹራንስ ውል የኢንሹራንስ ውሉን ተጠቃሚ የማይገልጽ በሆነ ጊዜ የኢንሹራንስ ገንዘቡ ይገባናል ብሎ ለመጠየቅ የሚያስችሉ ሶስት የሕግ ድንጋጌዎች ያሉ መሆኑን የፍታብሔር ሕጉንና የንግድ ሕጉን ድንጋጌዎች በመመርመር ለመረዳት ይቻላል፡፡ የሕይወት ኢንሹራንስ ውል ተጠቃሚ ባልተገለጸበት ጊዜ የሚች ወራሾች የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 እና የንግድ ሕግ ቁጥር 705 ድንጋጌዎችን በመጥቀስና መሰረት በማድረግ የህይወት ኢንሹራንስ ገንዘቡ ሙሉ በሙሉ እንዲሰጣቸው ጥያቄ የሚያቀርቡ መሆኑን የተጠሪ ሞግዚት በዚህ መዝገብ ያቀረቡትን ክርክርና የድንጋጌዎቹን ይዘት በማገናዘብ ለመረዳት ይቻላል፡፡ በሌላ በኩል ሚች ያደረገው የህይወት የኢንሹራንስ ውል የተለየ ተጠቃሚ ባልገለፀ ጊዜ ወይም የህይወት ኢንሹራንስ ውሉን ለወራሾቹ ጥቅም ያደረገው መሆኑን በኢንሹራንስ ውል ባልገለፀ ጊዜ የሚች ባል ወይም ሚስትና የኢንሹራንስ ውሉ ሲፈረም የተወለደው ልጅ የህይወት ኢንሹራንስ ገንዘቡ እንዲሰጣቸው የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ እና /ለ/ በመጥቀስ የሚጠይቁና የሚከራከሩ መሆኑን አመልካች ከሥር ጀምሮ ያቀረቡትን ክርክርና የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2 ድንጋጌ ይዘት በማገናዘብ ለመረዳት ይቻላል፡፡ ስለሆነም በዚህ መዝገብ አመልካችና ተጠሪ የከተከራከሩበትን ጭብጥና ውሣኔ ለመስጠት ከላይ የተጠቀሱትን የሕግ ድንጋጌዎች ይዘት መሰረታዊ ግብና ዓላማ በተናጠል ማየትና የሕግ ድንጋጌዎች በአንድ ላይ ለማስፈፀም በሚሞክርበት ጊዜ የሚያጋጥሙ ችግሮችንና ችግሮቹን ለመፍታት

ለሕግ ድንጋጌዎቹ ሊሰጣቸው የሚገባውን ትርጉም በዝርዝር ማየትና ውሣኔ ላይ መድረስ የሚጠይቅ ጉዳይ ሆኖ አግኝተነዋል፡፡ ስለሆነም ከላይ የተጠቀሱትን የሕግ ድንጌጋዎች፣ ይዘት መንፈስና ዓላማና በአንድ ላይ ተፈፃሚ በማይደረጉበት ጊዜ የሚያጋጥመን ተጨባጭ ነባራዊ ችግር በዝርዝር እንመለከታለን፡፡

ሀ. የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1

የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 ድንጋጌ ይዘትና መሰረታዊ ባህሪ ለመረዳት በኢትዮጵያ የውርስ ሥርአት ከሟች ወደ ወራሾች የሚተላለፈው መብትና ግዴታ በተመለከተ በፍታብሔር ሕግ ቁጥር 826 ንኡስ አንቀጽ 2 የተደነገገውን ጠቅላላ መርህ ማገናዘብ ያስፈልጋል፡፡ በርካታ አገሮች ለምሣሌ ሩሲያ ከሟች ወደ ወራሾቹ በውርስ ሊተላለፉ የሚችሉ ንብረቶችና መብቶች በዝርዝር ያስቀምጣሉ፡፡ የፍታብሔር ሕግ ቁጥር 826/2/ የሟች ውርስ ክፍል ሆነው ለወራሾቹ ሊተላለፉ የሚችሉ ንብረቶችና መብቶች ምንምን እንደሆኑ ከመዘርዘር ይልቅ በሟች መሞት የሚያቋርጡ የሟች መብቶችና ግዴታዎች ለሟች ወራሾችና የኑዛዜ ባለስጦታዎች የሚተላለፉ መሆኑን በመርህነት የሚደነግግ መሆኑን የፍታብሔር ሕግ ቁጥር 826 ንኡስ አንቀጽ 2 ድንጋጌ በማየት ለመገንዘብ ይቻላል፡፡ ይህም ማለት በሟች መሞት ምክንያት ቀሪ የሚሆኑና ሟች በግሉ ብቻ ሊሰራባቸው የሚችሉ መብቶችና ሟች በግሉ ብቻ እንዲፈጽማቸው የሚገደድባቸው ግዴታዎች ውጭ ያሉ በሟች መሞት ምክንያት የማይቋረጡ መብትና ግዳታዎች ለሟች ወራሾች የሚተላለፉ መሆኑ በአጠቃላይ መርህነት ተደንግጓል፡፡

የፍታብሔር ሕግ ቁጥር 827 እና የፍታብሔር ሕግ ቁጥር 828 በፍታብሔር ሕግ ቁጥር 826 ንኡስ አንቀጽ 2 የተደነገገው ጠቅላላ መርህ ለየት ባለ ሁኔታ ሕግ አውጭው የደነገጋቸው ልዩ የሕግ ድንጋጌዎች ናቸው፡፡ የፍታብሔር ሕግቁጥር 827 "በውርስ ውስጥ የሚገኘው ስለሕይወት ኢንሹራንስ ውል" በሚል እርስ ንኡስ አንቀጽ 1 "ሟች ተጠቃሚውን ያልወሰነ እንደሆነ ወይም ኢንሹራንሱ ለሟች ወራሾች ጥቅም የተደረገ እንደሆነ ሟች በፈረመው ስለ ህይወት ኢንሹራንስ ውል አፈፃፀም የሚከፈሉ ገንዘቦች የውርስ ንብረት ክፍል ይሆናሉ" በማለት የሚደነግግ ሲሆን ንኡስ አንቀጽ 2 "ተቃራኒ ሁኔታ ሲኖር የውርስ ክፍል አይሆንም" በማለት ይደነግጋል፡፡

የፍታብሔር ሕግ ቁጥር 827 ድንጋጌ በሞት ጊዜ እንዲከፈል የተደረገ የህይወት ኢንሹራንስ ውል መሰረት የሚከፈል የኢንሹራንስ ገንዘብ በሟች መሞት ምክንያት የማይቋረጥ ይልቁንም ገንዘቡ የሚጠየቀው ኢንሹራንስ ገቢው ከዚህ ዓለም በሞት ሲለይ መሆኑን በመግንዘብ ሕግ አውጭው በሞት ጊዜ የሚከፈል የህይወት ኢንሹራንስ ውል በንግድ ሕግ ቁጥር 695 እና በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 1 በተደነገገው መሰረት የህይወት ኢንሹራንስ ውሉ ተጠቃሚ ወይም ተጠቃሚዎች የተደረገ በሆነ ጊዜ የኢንሹራንስ ገንዘቡ የውርስ ንብረት ክፍል እንደማይሆንና ወራሾቹ ድርሻ አለን ብለው የመብት ጥያቄ ሊያነሱ የማይችሉ መሆናቸውን በፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 2 በግልጽ የሚደነግግ ሲሆን፣የሕይወት ኢንሹራንስ ውል ተከፋይ የሆነ ገንዘብ የሟች የውርስ ሃብት ክፍል የሚሆነው በመጀመሪያው ሟች "ለወራሾቹ" በሚል መንገድ ኢንሹራንስ ውሉ

በተጠቃሚነት የገለፀ ከሆነ መሆኑን ሁለተኛው ሚች የኢንሹራንስ ተጠቃሚ ማን እንደሆነ ሣይገልጽ በቀረ ጊዜ እንደሆነ በፍታብሔር ሕግቁጥር 827 ንኡስ አንቀጽ 1 ይደነግጋል፡፡ ድንጋጌው በፍታብሔር ሕግ ቁጥር 826 ንኡስ አንቀጽ 1 ከተደነገገው ጠቅላላ መርህ በተለየ ሁኔታ በህይወት ኢንሹራንስ ውል መሰረት የሚከፈል ገንዘብ በምን ሁኔታ የሚች የውርስ ሃብት ክፍል እንደማይሆንና የሚች ወራሾች የመብት ጥያቄ እንደማያነሱ የሚደነግግ ነው፡፡

ለ/ የንግድ ሕግ ቁጥር 705

የንግድ ሕግ ቁጥር 705 የህይወት ኢንሹራንስ ክፍያ የሚች የውርስ ክፍል ስለሚሆንባቸውን ሁኔታዎች በፍታበሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 የተደነገጉትን ሁኔታዎች የሚያሰፋ ነው፡፡ ድንጋጌው የሕይወት ኢንሹራንስ ውሉ ለተለየ ተጠቃሚ የተደረገ መሆኑን በማይገልጽበት ጊዜ ብቻ ሣይሆን ሚች የኢንሹራስን ውሉ ተጠቃሚ ነው ብሎ የገለፀውን ሰው በንግድ ሕግ ቁጥር 703 መሰረት በመሻር ሌላ ተጠቃሚ ያልገለፀ ሆኖ በሚገኝበት ጊዜ ወይም ተጠቃሚው ፈቃዱን ሣይገልጽ በመሞቱ ምክንያት ውድቅ በሆነ ጊዜ የኢንሹራንስ ገንዘቡ የሚች የውርስ ንብረት ክፍል እንደሚሆንና ለሚች ወራሾች እንደሚተላለፍ የሚገልጽ ነው፡፡ የንግድ ሕግ ቁጥር 705 “ተጠቃሚው ሣይለይ የተደረገ ኢንሹራንስ” በሚል ርእስ “ተጠቃሚው ተለይቶ ያልታወቀ እንደሆነ ወይም ተሸሮ እንደሆነ ወይም በሕይወት የሌለ በመሆኑ ውድቅ የሆነ እንደሆነ ስለሞት የተደረገው የኢንሹራንስ ዋናው ገንዘብ የሚከፈለው ኢንሹራንሱን ለተዋዋለው ሰው ውርስ ነው” በማለት በግልጽ ይደነግጋል፡፡

ከዚህ በላይ የተደነገጉት የሕግ ድንጋጌዎች የተጠሪ ሞግዚት ሚች ባደረገው የሕይወት ኢንሹራንስ ውል መሰረት አመልካች የተቀበሉት ገንዘብ የሚች ውርስ ክፍል በመሆኑ ለሚች ወራሾች ብቻ ሊከፈል ይገባል በማለት የሚያቀርቡትን ክርክር የሚደግፍና የሚች ወራሾች የኢንሹራንስ ተጠቃሚው በኢንሹራንስ ውል ተለይቶ ባልተገለፀበት ጊዜ የሚኖራቸውን ሰፊ መብት የሚደነግጉና የሚችን ባል ወይም ሚስት በኢንሹራንስ ገንዘቡ መብት የሌለው መሆኑን የሚያሣዩ ናቸው፡፡

ሐ. የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2

የንግድ ሕግ ቁጥር 701 "ለሞት በሆነ ኢንሹራንስ ተጠቃሚ የሆነ ሰው" በሚል ርእስ ሥር በንኡስ አንቀጽ 2 "ስማቸው በውሉ ላይ ተለይቶ ባይጠቀስም /ሀ/ ጋብቻው የተደረገው የኢንሹራንስ ውሉ ከተፈረመ በኋላ ቢሆን እንኳን የኢንሹራንስ ውል የፈረመው ባል ወይም ሚስት /ለ/ የኢንሹራንስ ውል ሲፈርም የተወለዱት የኢንሹራንስ ውል ፈራሚ ልጆች ተለይተው የታወቁ ተጠቃሚዎች ተብለው ይቆጠራሉ" በማለት ይደነግጋል፡፡ ይህ ድንጋጌ ሚች የኢንሹራንስ ውሉን ተጠቃሚ ሣይገልጽ የኢንሹራንስ ውል ባደረገ ጊዜ ከኢንሹራንስ ውሉ ከመፈረሙ በፊት ወይም በኋላ ኢንሹራንስ ውል የተዋዋለው ሰው ጋር በጋብቻ የተሣሰሩ ሚስት ወይም ባልና የኢንሹራንስ ውሉ ሲፈረም ተወልደው የነበሩ ሌጆቹ የኢንሹራንስ ውል ተጠቃሚ የሚሆኑ መሆናቸውን የሚደነግግ ነው፡፡ በዚህ ደንጋጌ መሰረት የኢንሹራንስ ውል ፈራሚው ባል ወይም ሚስት የሚች ወራሽ ባይሆኑም ተጠቃሚው ተለይቶ ያልተገለፀበት የህይወት ኢንሹራንስ ውል የሕግ ተጠቃሚና ባለመብት እንደሚሆኑና የሚች አንደኛ ደረጃ ወራሾች ከሚሆኑት ከሚች ልጆች

መካከል የኢንሹራንስ ውሉ ሲፈረም የተወለዱት የኢንሹራንስ ውሉ የሕግ ተጠቃሚ እንደሚሆኑና የኢንሹራንስ ውሉ ከተፈረመ በኋላ የተወለዱት በዚህ ደንጋጌ መሰረት የተጠቃሚነት መብት የሌላቸው መሆኑን የሚደነግግ ነው፡፡

የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 እና የንግድ ሕግ ቁጥር 705 ደንጋጌዎችና የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2 ድንጋጌዎች እንዲሁ እንዳሉ በአንድ ላይ ተፈፃሚ ለማደረግ ቢሞከር የተለያየ ውጤት የሚያስከትሉ መሆኑን በአመልካችና በተጠሪ መካከል በዚህ መዝገብ የተደረገው ክርክርና ፍርድ ቤቶቹ በየደረጃው የሰጡት ውሣኔ በማየት ለመገንዘብ ይቻላል፡፡ ሟች የሕይወት ኢንሹራንስ ውል ተጠቃሚ ሣይገልጽ የገባው የህይወት መድን ገንዘብ የይገባኛል ጥያቄን የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 እና የንግድ ሕግ ቁጥር 705 ድንጋጌ ብቻ መሰረት በማድረግ የወሰነው ከፍተኛ ፍ/ቤት የኢንሹራንስ ገንዘቡ ለሟች ወራሾች (ልጆች ብቻ) ይከፈላል በማለት የወሰነውን ሲሆን በተቃራኒው ቄብጡን የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2 ድንጋጌ ብቻ የሚወስን አመልካችና የኢንሹራንስ ውሉ ሲፈረም የተወለደችውን የሟች ልጅ ብቻ የኢንሹራንስ ተጠቃሚ እንደሆኑ የሚወሰንበት ሁኔታ እንደሚኖር ከላይ ይዞታቸውንና ዓላማቸውን በዝርዝር ያየናቸውን ድንጋጌዎች ያላቸውን ልዩነትና የሚያስከተሉት ህጋዊ ውጤት በመመርመር ለመገንዘብ ይቻላል፡፡

4. በዚህ መዝገብ የተያዘውን ቄብጥ ለመወሰን እነዚህ ተቃራኒ ይዘትና በተግባራዊ አፈፃፀምም የተለያየ ውጤት የሚያስከትሉ የሕግ ደንጋጌዎች ማለትም የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1

የንግድ ሕግ ቁጥር 705 እና የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2 ድንጋጌዎች በምን መንገድ ቢተረጎሙ ሕግ አውጭው ያሰበውን ግብና ዓላማ ለማሟላትና ሁሉም ድንጋጌዎች ውጤታማ በሆነ መንገድ ተፈፃሚ ለማድረግ ይቻላል? የሚለውን ጥያቄ በቅድሚያ መመለስ ያስፈልጋል፡፡

በሁለት የሕግ ድንጋጌዎች መሰረታዊ ይዘትና በአንድ ላይ ሲፈፀሙ የሚያስከትለትን ተቃራኒ ውጤት ለማስቀረት ፍርድ ቤቶች የተለያዩ የሕግ አተረጓጎም መርሆችን በመጠቀም የሕግ ትርጉም በመስጠት ችግሩን የሚያቃልሉ መሆኑ ይታወቃል፡፡ ሆኖም ከላይ በተገለፁት ድንጋጌዎች በመካከል ያለውን መሰረታዊ ቅራኔ ለመፍታት ሌሎች ድንጋጌዎችን ለማስታረቅ ዘወትር የምንከተላቸው የሕግ አተረጓጎም ዘዴዎች (ጥበቦች) አገልግሎት የሌላቸው መሆኑን መገንዘብ ይቻላል፡፡ ፍርድ ቤቶች የዚህ አይነት ችግር ሲያጋጥም የሚከተሉት የሕግ አተረጓጎም ጥበብ አንደኛው ከሁለቱ ሕጎች ማንኛው ቀድሞ እንደታወጀ ማንኛው በኋላ እንደታወጀ በመመርመር በኋላ የወጣው ሕግ ቀድሞ በወጣው ሕግ የተደነገገውን ድንጋጌ እንዳሻሻለው ወይም እንደሻረው ይቆጠራል የሚለውን የሕግ አተረጓጎም ዘዴ በመከተል በኋላ የታወጀውን ሕግ ተፈፃሚ በማድረግ ችግሩን ያቃልላሉ፡፡ በያዝነው ጉዳይ የፍታብሔር ሕጉም ሆነ የንግድ ሕጉ በአንድ ቀን ማለትም ሚያዝያ 27 ቀን 1952 ዓ.ም የታወጀ መሆኑን በመግቢያቸው የተገለፀ በመሆኑ ይኸ የአተረጓጎም ዘዴ ከላይ በገለጽናቸው የሕግ ድንጌዎች መካከል ያለውን ልዩነት ለመፍታት የሚያስችለን ሆኖ አልተገኘም፡፡

በሁለት የሕግ ድንጋጌዎች ይዘትና በውጤት በአንድ ጉዳይ ልዩነት የሚያስከትል ሲሆን ፍርድ ቤቶች የሚከተሉት ሌላው የሕግ አተረጓጎም ዘዴ ስለ ልዩ ሁኔታ የተደነገገው ድንጋጌ በጠቅላላ የሕግ ድንጋጌዎች ላይ የበላይነትና ተፈፃሚነት ይኖረዋል የሚለው ነው፡፡ በያዝነው ጉዳይ የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 ድንጋጌ በፍታብሔር ሕግ ቁጥር 826 ንኡስ አንቀጽ 2 ለተደነገገው መሰረታዊ ጠቅላላ መርህ በልዩ ሁኔታ የተደነገገ ልዩ ድንጋጌ ሲሆን የሕይወት ኢንሹራንስ ገንዘብ የሚች የውርስ ክፍል የሚሆንባቸውንና የማይሆንባቸውን ልዩ ሁኔታዎች የሚደነግግ ነው፡፡ በተመሣሣይ ሁኔታ የንግድ ሕግ ቁጥር 705 ተጠቃሚው ሣይለይ የተደረገ ኢንሹራንስ የሚመለከት ደንቦችን የያዘ ልዩ ድንጋጌ ሲሆን የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2 ድንጋጌዎችም በሞት ጊዜ የሚከፈልና ተጠቃሚው ያልተገለፀበት የህይወት ኢንሹራንስ ውል በልዩ ሁኔታ ባል ወይም ሚስት ተጠቃሚ የሚሆኑበትን የሚደነግግ ልዩ ድንጋጌ መሆኑን ለመገንዘብ ይቻላል፡፡ ስለሆነም ከላይ የተጠቀሱትን ድንጋጌዎች አንድኛውን ጠቅላላ የሕግ ድንጋጌ ሌላውን ልዩ የሕግ ደንጋጌ ነው ብሎ ለመፈረጅ የማይቻልና ልዩ የሕግ ደንጋጌ በጠቅላላ የሕግ ደንጋጌ ላይ የበላይነትና ተፈፃሚነት ይኖረዋል የሚለውን የሕግ አተረጓጎም መርህ ለመከተል የሚያስቸግር ሆኖ አግኝተነዋል፡፡

በእኛ በኩል በድንጋጌዎቹ መካከል ያለውን ልዩነት ለመፍታት ሕግ አውጭው እያንዳንዱን የሕግ ድንጋጌ የደነገገው በነባራዊ ህይወት ውስጥ ተፈፃሚ እንደሆነና አንድ ማህበራዊ ችግር እንዲፈታ አስቦ ነው፡፡ ስለዚህ ለአንደኛው የሕግ ድንጋጌ የሚሰጠው የሕግ ትርጉም ሌላውን ድንጋጌ ሙሉ በሙሉ ውጤት አልባ በማያደርግ መንገድና ሁሉም

ድንጋጌዎች ውጤታማ የሚሆኑበትን የሕግ አተረጓጎም መከተል አለበት የሚለውን የሕግ አተረጓጎም መርህ ጠቃሚና አስስላጊ ሆኖ አግኝተነዋል፡፡ በዚህ አተረጓጎም መሰረት ተጠቃሚው በኢንሹራንስ ውሉ ባልተገለፀበት ጊዜ የሚች ባል ወይም ሚስት የኢንሹራንሱን ገንዘብ ከሚች ወራሾች ጋር የሚካፈሉበትን ልዩ ሁኔታ በመከተል የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 የንግድ ሕግ ቁጥር 705 እና የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ ድንጋጌዎች በማጣጣም የሚች ወራሾችም ሆኑ የሚች ባል ወይም ሚስት በሕግ የተሰጣቸውን መብት ሙሉ በሙሉ ሣያጡ የኢንሹራንሱ ገንዘብ እንዲካፈሉ በማድረግ ሁሉም የሕግ ድንጋጌዎች ውጤታማ ተፈፃሚነት እንዲኖራቸው ማድረግ የተሻረው የሕግ አተረጓጎም መንገድ መሆኑን ተገንዝበናል፡፡

ስለሆነም በፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 እና በንግድ ሕግ ቁጥር 705 ተጠቃሚው ተለይቶ ባልተገለፀበት የህይወት ኢንሹራንስ ውል መሰረት በሚከፈል የኢንሹራንስ ገንዘብ የመካፈል መብት ያላቸው የሚች ወራሾችና የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ መሰረት የኢንሹራንስ ውሉ ተጠቃሚ የመሆን መብት ያላቸው የሚች ሚስት ወይም ባል የኢንሹራንስ ገንዘቡን የመጠየቅ በሕግ እንደልዩ ተጠቃሚ የሚቆጠር መብት ያላቸው በመሆኑ አንድ ላይ የኢንሹራንስ ገንዘቡ ተጠቃሚና ተካፋይ ሊሆኑ ይገባል ብለናል፡፡

5. **የሚች ወራሾችና የሚች ባልና ሚስት ተጠቃሚው ተለይቶ ያልተገለፀበት የህይወት ኢንሹራንስ ገንዘብ የጋራ ተጠቃሚ በሚሆኑበት መንገድ የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1**

የንግድ ሕግ ቁጥር 705 እና የንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ መተርጎም ያለባቸው መሆኑ መደምደሚያ ላይ ከተደረሰ በኋላ የሚነሣው ሌላው ጥያቄ የሟች ወራሾችና የሟች ባል ወይም ሚስት የኢንሹራንስ ገንዘቡን በምን ሁኔታ ሊካፈሉ ይገባል የሚለው ነጥብ ነው፡፡ በእኛ በኩል አሁን ባለው የሕግ ሥርአት ሚስት ባሉዋን ባል ሚስቱን ያለኑዛዜ ለመውረስ የማይፈቀድላቸው መሆኑ ግምት ውስጥ በማስገባት የህይወት ኢንሹራንስ ተጠቃሚውን ሣይገልጽ የተዋዋለው ሟች በኢንሹራንስ ውሉ መሰረት ወቅታዊ ክፍያ ከባለንብረት የተከፈለ መሆኑ ካልተረጋገጠ የባልና ሚስት የጋራ ገቢ ከሆነው ገንዘብ (ደሞዝ) እየቀነሰ ሲከፈል የቆየ ነው የሚል ግምት የመያዝ መሆኑን ከግንዛቤ ውስጥ በማስገባት የኢንሹራንስ ገንዘቡን ግማሽ የሟች ባል ወይም ሚስት እንዲወስዱ ማድረግና የኢንሹራንስ ገንዘቡን ግማሽ የሟች ወራሾች ተካፍለው በመውሰድ የሟች የውርስ ሃብት ክፍል በማድረግ በውርስ ሕግ ድንጋጌዎች መሰረት የሚደርሳቸውን ድርሻ የሚካፈለበትን ሁኔታ መከተል ከሌሎች አማራጮች የተሻለና ለፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 የንግድ ሕግ ቁጥር 705 እና በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ ሕግ አውጭው ሲደነግግ የነበረውን ሃሳብና ግብ ለማሣካት የሚያስችል ሆኖ አግኝተነዋል፡፡

ስለሆነም የአመልካችና የተጠሪ ክርክርም ከላይ በዝርዝር ያስቀመጥነውን የሕግ አተረጓጎም በመከተል መፍታት ሲገባቸው የከፍተኛ ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ችሎት ለአመልካች በንግድ ሕግ ቁጥር 701 ንኡስ አንቀጽ 2/ሀ/ የተረጋገጠላትን መብት ሙሉ በሙሉ ዋጋ በሚያጣጣ ሁኔታ

የፍታብሔር ሕግ ቁጥር 827 ንኡስ አንቀጽ 1 በመተርጎም የኢንሹራንስ ገንዘቡ የሟች የውርስ ክፍል ስለሆነ አመልካች መብት የላትም፡፡ የኢንሹራንስ ገንዘቡን የሟች ልጆችና ወራሾች ብቻ እኩል ይካፈሉ በማለት የሰጡት ውሣኔ መሰረታዊ የሕግ ስህተት ያለበት በመሆኑ በፍታብሔር ሥነ- ሥርአት ሕግ ቁጥር 348/1/መሰረት በማሻሻል አመልካች ከሟች ልጆችና ወራሾች ጋር የኢንሹራንስ ገንዘቡ ተጠቃሚ የመሆን መብት አላት በማለት ወስነናል፡፡

ው ሳ ኔ

1. **የፌዴራል ከፍተኛ ፍርድ ቤትና የጠቅላይ ፍ/ቤት ይግባኝ ችሎት የሰጡት ውሣኔ ተሻሽሎዋል፡፡**

2. **የህይወት ኢንሹራንስ ገንዘብ በሆነው** 166,449.97(**አንድ መቶ ስልሣ ስድስት ሺ አራት መቶ አርባ ዘጠኝ ከዘጠና ሰባት ሣንቲም**) **የአሜሪካን ዶላር በተመለከተ የሟች ሚስት የሆኑት አመልካችና የሟች ልጅች ወራሽ የሆኑት ሕፃን ኬሩዝ ተክሉና ህፃን ፌኔት ተክሉ በሕግ ጥበቃ የተሰጠው መብትና ጥቅም አላቸው ብለናል፡፡**

3. **አመልካች የኢንሹራንስ ገንዘቡን ግማሹን ብር** 83,224(**ሰማኒያ ሶስት ሺ ሁ□ት መቶ ሃያ አራት**) **የአሜሪካን ዶላር ይውሰድ ብለናል፡፡**

4. **የሟች ልጆች ወራሾች የሆኑት ህፃን ኬሩዝ ተክሉና ህፃን ፌኔት ተክሉ(ተጠሪ) ቀሪውን** 83,224(**ሰማኒያ ሶስት ሺ ሁለት መቶ ሃያ አራት**) **የአሜሪካን ዶላር እኩል ይካፈሉ ብለናል፡፡**

ይህ ፍርድ በፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት በሙሉ ድምጽ ተሰጠ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰ/መ/ቁ 72824

ሓምሌ 18 ቀን 2004 ዓ.ም.

ዳኞች፡-ተሻገር ገ/ስላሴ

አልማው ወሌ

ዓሊ መሐመድ

ነጋ ዱፊሳ

አዳነ ንጉሴ

አመልካች፡-የቦሌ ክፍለ ከተማ ገቢዎች ፅ/ቤት

ተጠሪ፡-አቶ ሚሊዮን አሰፋ

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

ጉዳዩ አንድ በሕጉ አግባብ ደረጃው ተለይቶ ግብሩን ሲከፍል የቆየ ግብር ከፋይ የገቢ መጠኑ ሲሻሻል የግብር ከፋይነቱ ደረጃ ለውጥ የሚወሰነው በግብር አስገቢው ባለስልጣን ነው ወይስ በግብር ከፋዩ ነው? የሚለውን ጥያቄ የሚመለከት ነው፡፡

ክርክሩ የተጀመረው በግብር ይግባኝ ሰሚ ጉባኤ ሲሆን በዚህ አካል ይግባኝ ያቀረቡት የአሁኑ ተጠሪ ናቸው፡፡ተጠሪ ለዚህ አካል ባቀረቡት የይግባኝ ቅሬታ በጥብቅና አገልግሎት የጥብቅና ፈቃድ በደረጃ "ሐ" ከፋይነት ያወጡ መሆኑ፣የአሁኑ አመልካች መስሪያ ቤት ከደረጃ "ሐ"

ግብር ከፋይነት ወደ ደረጃ "ለ" ግብር ከፋይነት እንዲሻሻል የሰጠው ውሳኔ ሳይኖር ተርን ኦቨር ታክስ አሳውቀህ አልከፈልህም፣የ ደረጃ ለ ግብር ከፋይ ሁነህ መዝገብ ሳትይዝ ቀርተሃል በሚል መዝገብ ባለመያዝ ቅጣት የጣለባቸው መሆኑንና ይህ ተግባር ከአዋጁ ቁጥር 286/1994 **አንቀጽ** 48(1)፣89(1) **እና ከደንብ ቁጥር** 78/1994 **አንቀጽ** 22(2) **ድንጋጌዎች አንፃር ሕጋዊ ያለመሆኑን ገልፀው የአመልካች መስሪያ ቤት ውሳኔ እንዲሻርላቸው ዳኝነት ጠይቀዋል፡፡ጉባኤውም የአሁኑ አመልካች መልስ እንዲሰጥበት ያደረገ ሲሆን አመልካች ባቀረበው መልስም ተጠሪ አመታዊ ገቢያቸው ከብር** 100,000.00 **(አንድ መቶ ሺህ ብር) በላይ በመሆኑ የደረጃ "ለ" ግብር ከፋይ መሆናቸውን እንደሚያሳይ፣የደረጃ ለ ግብር ከፋይ ደግሞ የተጨማሪ እሴት ታክስ ተመዝጋቢ እስካልሆነ ድረስ በደረጃው የሚጣለውን ማንኛውንም ታክስ መክፈል እንደሚኖርበት፣ በዚህም መሰረት በተቀመጠው የመክፈያ ወቅት ሊከፍሉ እንደሚገባ ስለሚታወቅ ሊከፍሉ እንደሚገባ፣ ገቢ ሰብሳቢ መስሪያ ቤቱም በወቅቱ ባልከፈለውና ሊከፍል በሚገባው ግብር መነሻነት መዝገብ ካለመያዝ መቀጫ መጣል በሕግ በተሰጠው ስልጣን መሰረት መሆኑን፣ተርን ኦቨር ታክስ በአዋጅ ቁጥር** 308/1995 **አንቀፅ** 3 **መሰረት ከታክስ ነፃ ካልተደረገ በቀር በተጨማሪ እሴት ታክስ ያልተመዘገቡ ሰዎች ከአገር ውስጥ በሚሸጧቸው እቃዎችና አገልግሎት ላይ ተርን ኦቨር ታክስ እንደሚከፍሉ በግልፅ የተቀመጠና ተጠሪ ቅሬታ በቀረበባቸው ዘመናት የተጨማሪ እሴት ታክስ ተመዝጋቢ ባለመሆናቸው የተርን ኦቨር ታክስ የመክፈል ግዴታ እንደአለባቸው፣መዝገብ ባለመያዝ የተጣለው ቅጣትም ከደረጃ "ሐ" ግብር ከፋዮች በስተቀር በንግድ ስራ ላይ የተሰማሩ በሙሉ /በከፊል/ የሚከራዩ ሕንጻዎች ባለቤት የሆኑ የሒሳብ**

መዝገብና ሰነዶችን የመያዝ ግዴታ በህግ የተጣለባቸው መሆኑን፣ማናቸውም የግብር ከፋይ ለአንድ የተወሰነ የግብር ዘመን መያዝ የሚገባውን ተገቢ የሂሳብ መዝገብና መግለጫ ያልያዘ እንደሆነ የተወሰነበትን ግብር 20% መቀጫ እንደሚከፍል በሕጉ መመልከቱን፣ተጠሪውም የደረጃ "ለ" ግብር ከፋይ በመሆናቸው የሂሳብ መግለጫ ለመያዝ ግዴታ ባለመወጣታቸው የተቀጡ መሆኑንና ይህንንም ለማድረግ የአሁኑ አመልካች በሕጉ ስልጣን የተሰጠው መሆኑን ዘርዝሮ ተከራክሯል፡፡ ክርክሩ በዚኅ መልክ የቀረበለት ጉባኤም ጉዳዩን መርምሮ ተጠሪ የለረጃ "ለ" ከፋይነት ደረጃውን ራሱ መለወጥ ነበረበት የሚለው የአሁኑ አመልካች ክርክር የሕግ ድጋፍ የሌለው መሆኑንና ከ1999 እስከ 2001 ዓ.ም. ድረስ ያለውን ፍሬ ግብር አመልካች ከተጠሪ ሙሉ በሙሉ ከተቀበለ በኋላ መቀጫው መወሰኑ የህግ ድጋፍ እንደሌለው በምክንያትነት ይዞ የአመልካችን ውሳኔ ውድቅ አድርጎ ተጠሪ መቀጫውን ሊከፍሉ አይገባም ሲል ወስኗል፡፡በዚኅ ውሳኔ አመልካች ባለመስማማት ይግባኙን ለአዲስ አበባ ከተማ ይግባኝ ሰሚ ፍርድ ቤት አቅርቦ ግራ ቀኙ ከተከራከሩ በኋላ ተጠሪ የግብር ከፋይነት የደረጃ ለውጡን ራሳቸው አውቀው የደረጃ ለ ግብር ከፋይ በሕጉ የተጣለበትን ግዴታ መወጣት ሲገባቸው የአሁኑ አመልካች መስሪያ ቤት የደረጃ ለውጥ ውሳኔ አላሳወቀኝም በማለት የሚያቀርቡት ክርክርና የግብር ይግባኝ ሰሚ ጉባኤ የሰጠው ውሳኔ ሕጋዊ አይደለም የሚል ምክንያት በመያዝ የጉባኤውን ውሳኔ በመሻር በመቀጫ ላይ የአሁኑ አመልካች መስሪያ ቤት በተጠሪ ላይ የሰጠውን ውሳኔ አስመልክቶ ጉባኤው የመሰለውን እንዲወስን ጉዳዩን መልሶ ልኮለታል፡፡ ከዚህም በኋላ የአሁኑ ተጠሪ የሠበር አቤቱታቸውን

ለከተማው ሰበር ሰሚ ችሎት አቅርበው ግራ ቀኙ ከተከራከሩ በኋላ የደረጃ ለውጥ ውሳኔ መሰጠት ያለበት በግብር ሰብሳቢ መስሪያ ቤት እንጂ በግብር ከፋዩ ሊሆን አይገባም በሚል ምክንያት የከተማው ይግባኝ ሰሚ ፍርድ ቤት የሰጠው ውሳኔ ተሽሮ የጉባኤው ውሳኔ በድምጽ ብልጫ ጸንቷል፡፡ የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ ውሳኔ በመቃወም ለማስለወጥ ነው፡፡ የአመልካች የሰበር አቤቱታ መሰረታዊ ይዘትም ተጠሪ የደረጃ "ሐ" ግብር ከፋይ ሁነው ቆይተው ገቢያቸው ማደጉን ራሳቸው አውቀው በደረጃ ለ ፍሬ ግብሩን ሲከፍሉ ከቆዩ በኋላ የደረጃ ለውጥ ስለመኖሩ አመልካች መስሪያ ወስኖ ስላላሳወቀኝ በደረጃ "ለ" ግብር ከፋይነት መዝገብ የመያዝ ግዴታ የለብኝም በማለት የሚያቀርቡትና በከተማው ሰበር ሰሚ ችሎት አብላጫ ድምፅ ተቀባይነት ያገኘው ክርክር ሕጋዊ ድጋፍ የለውም በማለት መከራከሩን የሚያሳይ ነው፡፡አቤቱታው ተመርምሮም በሰበር ችሎቱ ሊታይ የሚገባው ስለመሆኑ ታምኖ ለዚህ ችሎት እንዲቀርብ የተደረገ ሲሆን ለተጠሪ ጥሪ ተደርጎላቸው ቀርበው በጽሑፍ በሰጡት መልስ የአመልካች መስሪያ ቤት ክርክር የሕግ ድጋፍ የሌለው መሆኑን ያሳያል ያሎዋቸውን ምክንያቶችን አንስተው ተከራክረዋል፡፡ የአመልካች መስሪያ ቤት ነ/ፈጅም የሰበር አቤቱታቸውን በማጠናከር የመልስ መልሱን አቅርበዋል፡፡ የጉዳዩ አመጣጥ አጠር አጠር ባለመልኩ ከላይ የተገለጸው ሲሆን ይህ ችሎትም የግራ ቀኙኝ ክርክር ለሰበር አቤቱታ መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ በሚከተለው መልኩ መርምሮታል፡፡እንደመረመረውም የግብር ከፋይ ደረጃ ለውጥ መኖሩን የመወሰን ስልጣን የግብር ሰብሳቢው መስሪያ ቤት ስልጣን ነው? ወይስ

የግብር ከፊዩ ነው? የሚለው ነጥብ በሞጁብጥነት ሊታይ የሚገባው ሁኖ አግኝቶታል፡፡

ከክርክሩ ሂደት መገንዘብ የተቻለው ተጠሪ የተሰማሩበት የገቢ ማስገኛ ስራ 1ኛ ደረጃ የጥብቅና ስራ ሲሆን የተጠየቁትም የ1999፣2000 እና የ2001 ዓ.ም. የግብር ዘመን መዝገብ ባለመያዛቸው ቅጣት እንዲከፍሉ እንዲሁም በ1999 እና 2000 ዓ.ም. የግብር ዘመን የተርን ኦቨር ታክስ ፍሬ ግብር፣ገቢን ባለማስታወቅ ግብር በጊዜ ባለመክፈል ቅጣት እንደተወሰነባቸው የአመልካች መስሪያ ቤት የውሳኔ ማስታወቂያ የሚገልጽ መሆኑን ተጠሪ የአመልካች መስሪያ ቤትን ውሳኔ እየተቃወሙ ያሉት የደረጃ ሐ ግብር ከፋይ በመሆን ገቢዬን ሳልደብቅ ያስታወቅሁና የተወሰነውን ግብር የከፈልኩ ስለሆነ ግብር አስገቢው ባለስልጣን ደረጃዬን ሳይለውጥ በደረጃ ለ ግብር ከፋይ፣የተርን ኦቨር ታክስ ክፍል፣ገቢ ባለማስታወቅና በጊዜ ባለመክፈል እንዲሁም መዝገብ ባለመያዝ ሊቀጣ አይገባም በማለት የሚከራከሩ መሆኑን የክርክሩ ሂደት የሚያሳይ መሆኑን፣ተጠሪ አመታዊ ገቢአቸው ብር 100,000.00 ስለመሆኑ ገልፀው በዚህ አግባብ ጥሬ ግብሩን ሲከፍሉ የነበሩ መሆኑ በፍሬ ነገር ደረጃ መረጋገጡን ነው፡፡

በመሰረቱ ግብር አስፈላጊነቱ ዘርፈ ብዙ በመሆኑ ሕጉ ይህንኑ የግብር አስፈላጊነት ግንዛቤ ውስጥ በማስገባትና የግብር አሰባሰብ ስርዓቱን ውጤታማና ቀልጣፋ በማድረግ በማሰብ በግብር ከፋዩም በአጠቃላይ፣እንደታክስ ከፋይነቱ ደረጃና እንደ ታክሱ አይነት በታክስ ከፋዩ ላይ የጣለው ግዴታ ያለ ሲሆን በግብር ሰብሰቢ መስሪያ ቤት

ላይም የጣለው ግዴታ መኖሩ የሚታወቅ ነው፡፡ሁሉም የግብር ከፋይ ተገቢ በሆነው የሂሳብ አያያዝ ስርኣትና የታክስ ባለስልጣኑ በሚያስቀምጠውና በሚፈቅደው አኳኋን የሒሳብ መዛግብትንና ደጋፊ ሰነዶችን አሰናድቶ በስራ ሂደቱ መጠቀም ግዴታው ተብሎ ከሚጠቀሱ ነጥቦች አንድ ስለመሆኑ ከገቢ ግብር አዋጅ ቁጥር 286/1994 እና ይህንኑ አዋጅ ለማሻሻል ከወጣው አዋጅ ቁጥር 608/2001፣ ከተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/1994 እና ይህንኑ አዋጅ ለማሻሻል ከወጣው አዋጅ ቁጥር 609/2001፣ ከተርን ኦቨር ታክስ አዋጅ ቁጥር 308/1995 እና ይህንኑ አዋጅ ለማሻሻል ከወጣው አዋጅ ቁጥር 611/2001፣ከኤክሳይዝ ታክስ አዋጅ ቁጥር 307/1995 እና ይህንኑ አዋጅ ለማሻሻል ከወጣው አዋጅ ቁጥር 610/2001 እንዲሁም ከሚኒስትሮች ምክር ቤት ደንብ ቁጥር 78/1994 እና በስራ ላይ ካሉት ሌሎች አዋጆች፣ደንቦች፣መመሪያዎች ጠቅላላ ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው፡፡

ከላይ የተዘረዘሩት ሕጎችን ግብር ሰብሳቢ መስሪያ ቤትን ከአቋቋመው አዋጅ ቁጥር 587/2001 ጋር አንድ ላይ ስንመለከትም ግብር ሰብሰቢ መስሪያ ቤት ግብር የሚሰበሰብበትን ጊዜና ቦታ፣እያንዳንዱ ግብር ከፋይ የሚከፍለውን የግብር መጠን እንዲሁም ግብር የሚሰበሰብበትን ሁኔታ የግብር መሰብሰቢያ ጊዜ ከመድረሱ በፊት በማያሻያማና ግልፅ በሆነ ሁኔታ ለግብር ከፋዩቹ ማሳወቅ ያለበት መሆኑን ያስገነዝባል፡፡ይህ በታክስ ስርዓት ግልጽነት እንዲኖር የሚያደርግ ሲሆን በታክስ ሕግ ጽንሰ ሀሳብም ሙሉ ተቀባይነት ያለውና በኢ.ፌ.ድ.ሪ ሕገ መንግስት አንቀፅ 12 ድንጋጌ ይዘትና መንፈስ አንፃር ሲታይም በአግባቡ ሊተገበር የሚገባው ጉዳይ ነው፡፡ከላይ የተጠቀሱት ሕጎች፣ደንቦችና

በስራ ላይ ያሉ መመሪያዎች በአጠቃላይ ሲታዩ ለግብር ሰብሰቢው መስሪያ ቤት ስልጣን ሰጪ ሲሆኑ መስሪያ ቤቱ ግብርን በወቅቱ የማስከፈል፣ግብር ከፋዩቹ የገቢና ወጪ ሰነድ ካልያዙ የግብር ክፍያ መጠንም ተምኖ የማስከፈልን፣ግብር ከፋዩ በግብሩ አከፋፈል ስርኣት የግብር ህጎችን፣ደንቦችንና አግባብነት ያላቸውን መመሪያዎችን ጥሶ ከሆነ በሕግ እንዲጠየቅ ማድረግን፣የግብር ከፋዩን ንብረት መያዝንና የመሳሳሉት ስልጣንና ተግባራት ያሉት መሆኑን ያስገነዝባሉ።።እነዚህን ስልጣንና ተግባራት ለመወጣት ደግሞ ግብር ከፋዬችን ደረጃውን የመለየት እና በተገቢው መንገድ ማሳወቅ ያለበት መሆኑ ይታመናል።። ህጉ በግብር ከፋዩ ላይ ከጣላቸው መሰረታዊ ግዴታዎች መካከል ገቢን ማሳወቅና በሕጉ አግባብ ግብሩን መክፈል ነው።።ገቢን የማሳወቅ ተግባር ለግብር ከፋዩ ደረጃ አወሳሰን ወሳኝ ሂደት ሲሆን ግብርን ለመክፈልም ቀድሞ መሟላት ያለበት ሁኔታ ነው።።ይህ የማሳወቅ ተግባር ደግሞ በሕጉ አግባብ ለእያንዳንዱ የግብር አይነት በሕግ በተቀመጠለት ጊዜና ባለስልጣኑ ተገቢ ነው ባለው መንገድ ተገቢውን ማስረጃ /ቅፅ /በመሙላት መካሄድ ያለበት ጉዳይ ነው።።በአግባቡ ያልተያዘ መዝገብም ሆነ በሕግ በተወሰነው ጊዜ ያልተከናወነ ገቢውን አሳውቆ ግብር መክፈል ድርጊት መቀጫን የሚያስከፍል ከመሆኑም በላይ በወንጀል ጭምር ሊያስቀጣ የሚችል ነው።።

በገቢ ግብር አዋጅ ቁጥር 286/1994 አንቀፅ 11፣ 14 እና 17 ድንጋጌዎች ስር እንዲሁም በደንብ ቁጥር 78/1994 አንቀጽ 18 ስር የግብር ከፋዮች ደረጃ ተዘርዝሯል።።እነዚህ ድንጋጌዎች ለግብር ከፋዮች ደረጃ መሰረት ያደረጉት አንደ መነሻ የግብር ከፋዩን የአመታዊ ገቢ

መጠን ነው፡፡የደንብ ቁጥር 78/1994 የእያንዳንዱ ደረጃ ግብር ከፋይ ስላለበት ግዴታ በግልጽ ያሳያል፡፡በዚህም መሰረት የደንቡ አንቀፅ 19 መዝገብ የመያዝ ግዴታ ያለባቸው ግብር ከፋዮች ደረጃ "ሀ" እና ደረጃ "ለ" መሆናቸውን የሚያሳይ ሲሆን የአዋጅ ቁጥር 286/1994 አንቀፅ 48(1) ድንጋጌ የደረጃ "ሐ" ግብር ከፋዮች መዝገብ የመያዝ ግዴታ የሌለባቸው መሆኑን ሲደነግግ የተርን ኦቨር ታክስ አዋጅ ቁጥር 308/1995 አንቀፅ 10 ደግሞ የተርን ኦቨር ታክስ ማስታወቂያ ማቅረብና ታክሱን የመክፈል ግዴታ የተለያየ መሆኑን ያሳያል፡፡አንድ ግብር ከፋይ በወጣለት ደረጃ መሰረት ግብር የመክፈል ሁኔታ ሊቀጥል ወይም ሊለወጥ የሚችልበት አግባብ ስለመኖሩም ደንብ ቁጥር 286/1994 በአንቀፅ 22(2) ስር ተደግንጓል፡፡በዚህ ድንጋጌ አግባብ የግብር ከፋይ ደረጃ በነበረው ደረጃ እንዲቀጥል ወይም እንዲለወጥ የሚደረገው ግብር ከፋዩ የሚያቀርበውን መግለጫ፣መረጃዎችንና የአከባቢ ሁኔታዎችን መሰረት በማድረግ ሲሆን ይህ ተግባር በግብር አስገቢው ባለስልጣን መስሪያ ቤት ሊከናወን የሚችለው ለጉዳዩ ያገኛቸውን ማስረጃዎች በመመርመርና ክብደታቸውን በመመልከት ስለመሆኑ የድንጋጌው ይዘትና መንፈስ ያሳያል፡፡ሕግ አውጪው በደንቡ አንቀፅ 18 ስር ለግብር ከፋዮቹ ደረጃ ካወጣላቸው በኋላ በዚሁ አግባብ ደረጃው ቀጣይነት ሊኖር የማይችልበት አጋጣሚ እንደሚኖር በመገመት የደረጃ ለውጡን ባለስልጣኑ መስሪያ ቤት ሊወስን የሚችበትን አግባብ በደንቡ አንቀፅ 22(2) ስር በግልፅ አስፍሯል፡፡ይህ ድንጋጌ ግብር አስገቢው መስሪያ ቤት የደረጃ ለውጡን ሊወስን ይችላል ብሎ ፈቃጅነት ባለው ሁኔታ መደንገጉ ግልፅ ሲሆን ይኸው የድንጋጌው ቅርፅና ይዘት ግን የደረጃ ለውጡ በግብር አስገቢው ባለስልጣን ሳይወሰን ቢቀር ግብር ከፋዩ በራሱ የደረጃ ለወጡን መወሰን ያለበት

ስለመሆኑ አያስገነዝብም፡፡ግብር ከፋዩ በራሱ ጊዜ የደረጃ ለውጡን መወሰን አለበት ከተባለ በግብር አሰባሰብ ስርዓት ላይ የራሱ የሆነ አሉታዊ ተእፅኖ ሊያስከትል እንደሚችል የሚታመን ነው፡፡ይኸውም ግብር ከፋዩ ገቢውን አሳንሶ በማቅረብ ሊከፍል የሚገባውን ግብር ሳይከፍል እንዲቀር የማድረግና በታክስ ስርዓቱ ላይ የማጭበርበር ድርጊት እንዲስፋፋ ሰፊ በር የሚከፍት መሆኑ ይታመናል፡፡የግብር ሰብሳቢ ባለስልጣኑን ከአቋቋመው አዋጅ ቁጥር 587/2001ም ሆነ ከገቢ ግብር አዋጅ ቁጥር 286/1994 አንቀፅ 38 ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው የግብር አስገቢው ባለስልጣን በግብር ስርዓቱ ላይ ከፍተኛ የቁጥጥር ስራ በማድረግ የግብር ስርዓቱን ውጤታማና ቀልጣፋ የማድረግ ሃላፊነት ና ተግባር የተሰጠው መሆኑን ሲሆን ይህንኑ የባለስልጣኑን ሃላፊነትና ተግባር ውጤታማ እንዲሆን ከግብር ከፋዩ የሚጠበቀው ግዴታ በሕጉ የተጣለበትን ግዴታ መወጣት ነው፡፡በግብር ከፋዩ ላይ በሕጉ የተጣለበት ግዴታዎች በባለስልጣኑ መስሪያ ቤት በወጣለት ደረጃ መሰረት ግብሩን በወቅቱ፣በተገቢው ቦታና ሁኔታ መክፈል እንጂ ደረጃውን ጭምር ግብር ከፋዩ አውጥቶ ግብርን እንዲከፍል አይደለም፡፡

ወደተያዘው ጉዳይ ስንመለስ ተጠሪ የደረጃ "ሐ" ግብር ከፋይ ሁነው ከ1999 እስከ 2001 ዓ.ም. ድረስ ያገኙትን ገቢ ሳይደብቁ ገቢያቸውን ለአመልካች መስሪያ ቤት ማሳወቃቸው፣ግብር ባለመክፈል ወይም አሳንሰው በማሳወቃቸው የተወሰነባቸው ቅጣት የሌለ መሆኑ፣በአዋጅ ቁጥር 308/1995 አንቀፅ 10(2(ሐ)) መሰረት ተጠሪ ግዴታቸውን አልተወጡም የሚል ክርክር በአመልካች በኩል

ያለመቅረቡን ፍሬ ነገርን የማጣራትና ማስረጃን የመመዘን ስልጣን ያለው ጉባኤው ያረጋገጠው ጉዳይ ነው፡፡ እንዲህ ከሆነ አመልካች አሁን አጥብቆ የሚከራከረው ተጠሪው ገቢያቸው ከብር 500,000.00 (አምስት መቶ ሺህ ብር) በላይ መሆኑን እያወቁ የግብር ከፋይነት ደረጃቸውን ከደረጃ "ሐ" ወደ ደረጃ "ለ" ራሳቸው ከፍ አድርገው በመወሰን የደረጃ "ለ" ግብር ከፋይ ያለበትን መዝገብ የመያዝ ግዴታ መወጣት ነበረባቸው በማለት ነው፡፡ይሁን እንጂ ከላይ በዝርዝር ከተመለከትናቸው የሕግ ድንጋጌዎች ይዘትና አላማ አንጻር ሲታይ አንድ ግብር ከፋይ ገቢውን በሕጉ አግባብ ለግብር አስገቢው መስሪያ ቤት ከማሳወቅ ውጪ ደረጃውን ራሱ ሊወስን እንደሚገባ በሕጉ ግልጽ ግዴታ የተጣለበት ባለመሆኑና የግብር ከፋዩን ደረጃ ለውጥ የመወሰን ስልጣን የግብር አስከፋዩ መስሪያ ቤት በመሆኑ አመልካች ተጠሪ ላይ መቀጮ የሚጥልበት ህጋዊ መሰረት የለም፡፡የአመልካቹ ክርክር የግብር ከፋዩን መብትና ግዴታ ከግብር ሰብሳቢው ባለስልጣን ሃላፊነትና ተግባር ጋር ያላገናዘበና ለታክስ ስርዓቱ ውጤታማነትና ቀልጣፋነትም አሉታዊ ውጤት ያለው በመሆኑ ተቀባይነት የሌለው ሲሆን የአዲስ አበባ ከተማ ሰበር ሰሚ ችሎት የሰጠው ውሳኔ በአንፃሩ የአዋጅ ቁጥር 286/1994 አንቀፅ 38፣የደንብ ቁጥር 78/1994 አንቀፅ 18 እና 22፣የአዋጅ ቁጥር 308/1995 አንቀፅ 10(2(ሐ)) እንዲሁም አዋጅ ቁጥር 587/2001 እና ተቀባይነት ያላቸውን የታክስ ህግ መርሆችን ያገናዘበ ሁኖ አግኝተነዋል፡፡በዚህም ምክንያት በጉዳዩ ላይ የተሰጠው ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት የለበትም በማለት ተከታዩን ወስነናል፡፡

ው ሣ ኔ

1. **በአዲስ አበባ ከተማ ይግባኝ ሰሚ ፍርድ ቤት ሰበር ችሎት በመ/ቁጥር** 16215 **ሃምሌ** 20 **ቀን** 2003 **ዓ.ም. በአብላጫ ድምፅ የተሰጠው ውሳኔ በፌ/ብ/ሥ/ሥ/ሕ/ቁጥር** 348(1) **መሰረት ጸንቷል፡፡**

2. **የአንድ ግብር ከፋይ ደረጃ ለውጥ ሊወሰን የሚገባው በግብር ከፋዩ ሳይሆን በግብር ሰብሳቢው ባለስልጣን ነው ብለናል፡፡**

3. **ወጪና ኪሳራ ግራ ቀኙ የየራሳቸውን ይቻሉ ብለናል፡፡**

መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ ብለናል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

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