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In this Issue

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This issue of the Journal is dedicated to

Mr. Wray Witten

Articles

Tax Reform Discourse and Its Implication on Development: Evidence from the VAT Introduction in Ethiopia
Misganaw Gashaw

Dealing with Justiciability: in Defense of Judicial Power in Ethiopia
Yemane Kassa

Conversion of Old Possessions to Leasehold and Its Implication on Tenure Security of Holders of Old Possessions
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Court Review of Arbitral Awards Through the Power of Cassation: A Case Comment on *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co*.
Seid Demeke

Seminar Paper

Legal Education in the Evolution of Law School and Constitutions in a Non-Colonized African States
M. Wray Witten J.D., M.P.A.

Case Report

የመ/ቁ.16273 ጥቅምት 22 ቀን 1998 ዓ.ም. አመልካች፡- የኢትዮጵያ ቴሌኮሙኒኬሽን ኮርፖሬሽን ተጠሪ፡- አቶ ገንታ ገምአ
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Editor's Message

Dear Reader,

It is the pleasure of the Editorial Committee to warmly welcome you to the readership of the third volume of the Mekelle University Law Journal. Mekelle University Law Journal is dedicated to the rapid dissemination of scholarly writings by publishing contributions in the form of scholarly articles, case comments, and comments on draft or enacted laws, book reviews, proceedings, research outputs, precedents, case briefs/index and a special corner/supplement on new developments.

The Editorial Committee vies to take the journal in a trajectory where it serves as an outlet of high quality academic works to the academia and the community at large. As a result of this, three volumes and one special issue on Mr. Wray Witten have been, so far, released and made accessible in soft copy and hard copy formats.

The success of the journal office is attributed to the efforts of a number of people of whom Mr. Wray Witten is one. Hence, we would like to take this opportunity to pay our tribute for the immense contribution of Mr. Witten for the Law School and the journal office. Mr. Wray has inexpressibly contributed for the development of Mekelle University Law School. Being a patron of the Journal, he had stood on the side of the journal office in all its movements.

Immersed in heavy-heartedness of the passing of Mr. Wray Witten, we do not want to remember him with tears but by doing what he would like us to do. Hence, confidently believing that he would like to see

Mekelle University Law Journal in its pinnacle of reputability, we will remember Mr. Wray by taking the journal to its acme.

Finally, seamless and relentless efforts of the incumbent school head, Mr. Mihreteab Gebremeskel, Dean of College of Law and Governance, Mr. Gebrehiwot Hadush, Former Head of School of Law, Mr. Mekonnen Fisseha, assessors, patrons and others whose contributions were indispensible in making this journal a reality deserve special gratitude.

The Editorial Committee

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Tax Reform Discourse and Its Implication on Development: Evidence from the VAT Introduction in Ethiopia

*By: Misganaw Gashaw **

Abstract

The contemporary tax reform projects in the world, especially in developing and transition countries, are under the sway of international institutions, theories and experts influenced by developed countries. The repercussion of such tax reforms on development endeavours of a nation can be quizzed from different angles. Ethiopia is not an exception to this influence as it can be learnt from the 2002's comprehensive tax reform that has also introduced Value Added Tax. This paper indicates that the tax reform was a hurried moment and VAT was untimely introduced in Ethiopia. The paper tries to demonstrate that the existing VAT practice is fenced with variety of teething troubles including administrative and fairness issues, which are critically related to the poverty reduction efforts of the nation. This paper concludes by providing legal, administrative and policy recommendations.

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*LL.B-University of Gondar, LL.M (Taxation and Investment Laws) - Mekelle University, Lecturer- Debre Markos University Law School; He can be reached at misgepower@gmail.com. The author wishes to acknowledge the inspiration, help and comment of my colleague Mebrahtom Fitiwi and anonymous reviewers.

***Key terms**: Tax reform, Tax Reform Discourse, VAT Adoption, Ethiopia, Development*

Introduction

Tax reform has been a significant part of post-World War II development projects, where legal and economic notions or models are easily transplanted across borders to reform the tax systems of different countries.[1] It is generally established that international institutions, developed country and tax experts have dominated the tax reform projects of the world.[2] As part of the Structural Adjustment Programs (SAPs) and the tenets of the Washington Consensus (WC), tax reform has served as a tool the Global North trimmed the hands of the Global South. With this acknowledged discourse, western legal and economic concepts and regimes are freely diffused into developing and transition countries even without questioning their applicability in the context of the adopting state—the reform owner.[3] The development implication of this sort of tax reform has conflicting faces when it is measured against different development theories. For example, the Modernization Theory of development (the single veracious line of development), is really disturbing on the word of the

[1]Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, Harvard International Law Journal, Vol. 44, No.1 (2003), p.142

[2]*Ibid*

[3]John W. Diamond *et al*, *Fundamental Tax Reform Issues, Choices, and Implications*, The MIT Press (2008) p.4 See also Wilson Prichard, Taxation and State Building: Towards a Governance Focused Tax Reform Agenda, The Institute of Development Studies, (2010), p.13

Dependency Theory of development,[4] which encompasses the economic, social and environmental aspects, much can be said as to the development implication of this Western influenced tax reform discourse. Indubitably, deliberating on the development implication of the current tax reform discourse is the major concern of this paper.

In Ethiopia, from the time when modern tax system took a root, the 1940's, there have been a number of attempts to improve the tax system. Various taxes have been introduced at different times with the principal objectives of enhancing revenue productivity, economic mobilization and financing development plans. For example, the imperial government had introduced modern taxes and the socialist government had done its part with a view to support their respective economic programs.

The current government, since the transitional period in the early 1990's, initiate tax reform as part of the development reform process against the long lived economic crisis. The 2002's tax reform that introduced VAT was, however, distinctive for it was the first comprehensive tax reform in the history of the country. This is so because major types of taxes such as income tax, turn over tax, excise tax, stamp duties and custom duties were by far reformed.[5] While VAT was introduced for the first time, this was, if not overdue,

[4] Reinhard Steurer *et al* , *Corporations*, Journal of Business Ethics, Vol. 61, No. 3 (2005), p. 269

[5] Many of the existing tax proclamations (such as Income Tax, VAT, Turnover, Excise Tax Proclamations) were enacted in the year 2002, except few amendments thereafter.

apparently normal for a country whose economy is transformed from command economic system to relatively free economic system.

However, the reform, especially the introduction of VAT, involves the influence and participation of non-stakeholders. As a part of the global tax reform discourse, VAT was introduced in Ethiopia in the midst of *'developing countries notion of VAT as money machine'* and '*developed worlds understanding of VAT as the only layout of development'*.[6] No doubt, this tax reform has achieved significant transformation especially in increasing the revenue of the state but the mere increase of revenue may not be considered as development. Hence, it is crucial to question the development implication of this reform as part of the global tax reform discourse.

This paper has, an objective, to sketch this crucial question and demonstrate the definite and superior role of non-nationals (than reform owners). To this end, a brief discussion on tax reform concepts, the paper locates the global tax reform discourse, which is under the wave of developed states' governments, institutions, experts and theories. At this point, the fact that Ethiopia is not an exception (as clearly depicted in the 2002's tax reform that introduces VAT) will be marked. Then after, the paper ventures to examine the development repercussions of the discourse. For this purpose different development theories on legal reform in general and tax reforms in particular will be

[6] Richard M. Bird, *Value-Added Taxes in Developing and Transitional Countries: Lessons and Questions*, (Unpublished), 2005, Filed with the Author, p. 24

discussed. Main drivers of tax reform and the general role of a tax reform for development will also be outlined. The IMF has played quite exceptional role in leading tax reform projects in general and VAT spreading-out in particular. That is why a separate section is employed to address the policy and role of IMF in the adoption of VAT in developing countries including Ethiopia.

Then, follows a brief account of tax reform, and the introduction of VAT in Ethiopia. The nest part of the paper presents some discontents on VAT and their development implication in Ethiopia. Among other things, it conveys sovereignty, incidence and equity, policy, administration and development concerns as the main areas of discontent. Basically, introducing fresh taxes short of knowing the reality of a country and before building the necessary administrative capacity/facilities or creating awareness etc. could make countries' mission to build quality tax system very challenging, if not impossible. As will be discussed further, the VAT adoption process, its legal enclosure and administration on the ground are all open to criticisms of diverse sort. The writer is of the opinion that many of VAT limitations and discontents could have been avoided or reduced had there been a thorough and measured reform moment. These constraints are on the whole required for they enable us to evaluate the real bearing of VAT in all-encompassing development of Ethiopia.

The last part of the paper concludes by summarizing the major findings. It also commends some ways for ward including some administrative, policy and legal tools that need to be put in place.

1. Tax Reform and the Current Tax Reform Discourse in General

Currently, there is no agreement on what exactly tax reform is. Professor Raghbendra Jha exemplified that if country 'X' introduced a tax or it abandoned a tax, both the adoption and abandonment, with or without a substituting tax, can be designated as tax reform.[7] According to him, tax reform can also include increases or decreases in tax rates, brackets or thresholds and changes in the tax base; the introduction of new taxes and the abolition of old taxes; changes in the tax mix; change in administrative practices and procedures etc. Yet, not all changes in taxes (like change in tax collection periods) should be called tax reform and we would do well to reserve this term for 'significant' changes.[8]

Tax reform has become almost a universal interest ever since the 1980s, which itself was truly a decade of worldwide tax reform, and unmistakeably tax reform in different countries have a lot in common.[9]

[7] Jha Raghbendra, *Modern Public Economics Routledge Advanced Texts*, (2nd ed, 2009), p.366-71

[8] *Ibid.*

[9] Ibid, For example, During these periods, almost all countries of Western Europe, USA, Canada, Japan, New Zealand, Australia, several of the Scandinavian countries, several developing countries etc. have undergone major tax reforms by thoroughly revising their tax structures and making substantial changes to their tax laws.

An interesting question to ask at this point is why such substantial tax reforms took place in so many countries simultaneously and instantaneously. There can be several ins and outs but discontents with internal tax systems and a need to achieve the social and economic objectives are often cited reasons in most of the countries.[10]Some of the tax systems were unfair, inefficient, mind-bogglingly complex, and does not come close to raising enough revenue to pay for the government and hence badly needs reform.[11]

The thrust of these tax reforms shall be to make the tax system comprehensive, simple and transparent that not only enhances revenue but also support the economic, social and environmental developments. With this developmental goal, efficiency and equity are taken to be central principles. A good tax reform shall give the tax system the boot to be strong (sustainable that efficiently raises revenue to support the provision of the quality public services and be a simpler one), smart (assist the productive allocation of resources in the economy by supporting entrepreneurial activity and create

[10] *Ibid.*

[11] M. Govinda Rao, *Tax Reform In India: Achievements and Challenges*, Asia-Pacific Development Journal Vol. 7, No. 2 (December, 2000) P. 59-74. The philosophy of tax reform has undergone significant changes over the years in keeping with the changing perception of the role of the state. In market determined resource allocation, the traditional approach of raising revenues to finance a large public sector without much regard to economic and social effects has been given up. In every political economy, however, the recent tax reform approach, as a best practice approach, has an end to address efficiency, equity, administrative, etc. constraints.

employment) and fair (consistent with the egalitarian spirit that considers the poor).[12]

While this is the science of a tax reform, the current tax reform projects in the world are blamed to be the deviations. Especially, tax reform projects in developing and transition countries rarely support national development, because like that of development manoeuvres, tax reforms in these nations have continued under the influence of the external world though the degree may vary.[13] Even if the reforming state government is expected to play the central role, through the enactment of laws and organization of local bureaucracies, external influences are pervasive and significant. Tax law and policy is often held up as the essence of national sovereignty but globalization has clearly challenged this notion on all fronts. Stewart has grouped external agencies that influence tax reform in to three.[14] The developed countries, tax experts, and international institutions, as to him, mainly channelled their influences in the form of lending, aid, and technical assistance.

Developed countries influenced tax reforms through imperial relationships, postcolonial reconstruction, aid projects, and through their control of and contributions to the international institutions. For example, France is still active in the 19 Francophone countries of sub-

[12] *Ibid.*
[13] *Supra Note* 1, p. 142
[14] *Supra Note* 1, p. 146

Saharan Africa through the provision of tax advisors, training and project support (like drafting tax codes, purchasing computer equipment, etc.).[15] Experts from the developed countries frequently draw on this knowledge in recommending reforms. Developed countries have also influenced tax reform in developing and transitional countries through bilateral tax treaties.

International institutions, which are external entities to the situation of developing and transition countries, have played inordinate role in the different tax reform projects.[16] The World Bank (WB) has influenced tax reform programs through monetary lending, provision of technical assistances and tax advice.[17] The bank grants loans or finances specific projects only after its advisers and experts determine that the prospective borrower can meet conditions stipulated by the bank. After the loan is granted, the bank requires periodic reports both from the borrower and from its own observers on the use of the loan and on the progress of the project. Hence, if the WB is to extend loans or technical assistances for certain tax reform projects, its experts or advisors shall do the examination before and after the loan. This way, it influenced tax reforms or VAT adoptions in developing economies.

[15] Patrick Fossat and Michel Bua, *Tax Administration Reform in the Francophone Countries of Sub-Saharan Africa* , IMF Working Paper No. 13/173 (2013) p. 3

[16] *Supra Note* 1, See also Timothy Lindsey (eds), Law Reform in Developing and Transitional States, Taylor and Francis, 2007 p. 340 *ff*.

[17] John Williamson, *A Short History of the Washington Consensus, and Suggestions for What to Do Next,*
Reform Agenda, (Unpublished), 2003, p. 13-15

The IMF is the first and preeminent institution engaged in tax reform for developing and transition countries today.[18] Its involvement is primarily through structural adjustment reforms required as a condition for receiving IMF loans. The Fiscal Affairs Department (FAD) of the IMF provides recommendations, technical assistance and surveys tax policies of developing and transition countries.

The WTO, which replaced the General Agreement on Tariffs and Trade (GATT) as an international body for the promotion and enforcement of international trade laws and regulations, influences internal fiscal policy and tax reform projects through its liberalization or elimination of trade barriers archetype.[19] Since the tax revenues of many developing countries are highly dependent on import and export taxes, WTO's strategy have strong repercussions. Most of the time, countries are concerned with the adverse revenue effect of WTO's influence and besought VAT to make up reduction/abolishment of customs and tariffs.[20]

The Organization for Economic Cooperation and Development (OECD), an international organization founded in 1961 to coordinate the economic policies of industrialized nations, has also influenced tax reform projects. Unlike International Monetary Fund (IMF), World

[18]*Ibid*.
[19]*Ibid.*
[20]Thiess Buettner et al, *VAT Introduction and WTO Membership: The Experience in Developing and Transition Countries*, (2006), p.12

Trade Organization (WTO), and WB, the OECD does not directly offer development assistance and its functions are primarily advisory with expertise supervision on domestic economies of member nations and the global economy. The OECD's involvement in taxation began with its development of a model tax treaty.[21] Although both member and non-member states are not bound by the model, most of tax treaties are based on the OECD model and this is a testament to its pervasive influence.

Finally, the verve of European Union (EU) shall in no way be overlooked. VAT is the principal means of indirect taxation in many European countries and as an organization dedicated to increase economic integration of the European countries. The EU developed a model, which was the source of many VAT laws in many countries including Ethiopia. Although the influence of the EU, WTO and OECD is not direct and is less pervasive due to membership precincts, the influence of IMF and WB in Ethiopian 2002's tax reform was so ubiquitous, as it will be thoroughly seen at length.

The developed countries and international institutions have, as often as not, alleged that it is their burden to develop the third world by making reforms and introducing linear solutions.[22] It is with this inspiration that VAT is considered to be a single medicine for developing

[21]Timothy Lindsey (eds), *Law Reform in Developing and Transitional States, Taylor and Francis,* (2007), P. 359

[22]Sam Adelman, *Between the Scylla of Sovereignty and the Charybdis of Human Rights: The Pitfalls of Development in Pursuit of Justice*, University of Warwick, (2008) p.21

countries revenue deficiency in financing public expenditures. This one size fits all policy is disseminated without considering the capacity of the receiving states to utilize the new tax area and to ameliorate its demerits as well.[23] In theory, such reforms would improve the revenue, but because of implementation difficulties the reform failed to help states to achieve development to the required degree.[24] Due to this fact, the promised benefits of VAT were not fully reaped and the claimed revenue is collected at the expense of the majority of (urban) poor in many of VAT adopting jurisdictions.[25] This sort of tax reform is not in line with the main objective of a tax system. Normally, there are basic features of tax reforms that most countries give substantial weight to. More generally, taxation and tax reform shall be administratively efficient, equitable, enforceable, simple, neutral, productive, elastic, buoyant, certain etc.[26] In a good tax system, these all are cumulatively required and if one of these meticulous requirements is missed a tax reform or an introduction of a new tax regime may not contribute to the development of a country. Administratively inefficient tax (collection cost is exorbitant or net revenue is squat), imposes inequitable tax burden or its laws are

[23] *Supra Note* 6

[24] International Tax Dialogue, Revenue Administration in Sub-Saharan Africa, ITD Comparative Information Series No 1. 2010, p. 58 As it will be discussed at length in this paper, for example, the introduction of VAT in Ethiopia was a speeded tax reform done before building necessary infrastructures for VAT.

[25] *Infra Note* 77, p. 6

[26] OECD, *Fundamental Reform of Personal Income Tax*, OECD publishing, No.13, (2006), p.31

complex, the reform is not responsive to the development interests of a state.

Generally, looking the historical account of VAT, one can contemplate that foreigners influence, like other tax reform cases, is the major conduit through which VAT has flourished throughout the world. It has happened to be a trend, where developing countries accept western models when they are unsatisfied with domestic tax administrations. Even though VAT has established advantages such as modernizing tax system, encouraging saving and investment, minimizing tax evasion, raising adequate revenue etc., as one writer exactly pointed out, the principal justification of developing countries adoption of VAT concentrates on western economic theories, which whooshes the advantages of VAT in every tax jurisdictions.[27]

2. Tax Reform Discourse and Development Endeavours

Since the 1950's, Tax reform has been a significant part of economic globalization, which refers to the growing economic linkages in which economic events (including its fiscal dimensions) in one part of the world quickly comes to have significance impact for people in other parts of the world, mainly through the tumour of multinational corporations and international personalities. International and regional institutions that oversee global economic activities have played an increasingly important role in hastening this economic globalization.

[27]Hailemariam Mamo, *Implementation of VAT and its Related Problems in Ethiopia: The Case of ERCA*, MSc. Thesis, (unpublished), 2011, Addis Ababa University School of Business and Public Administration, p. 19

Along their role in the economic globalizations, these external entities have played inordinate parts in the different tax reform projects of developing states, as it has already been enlightened. The economic globalization has amplified allocation of world resources, open availability of and access to information, goods and services with low cost etc. but it also causes social and environmental deleterious effects and, to worsen the matter, it diminishes the power of states to ameliorate these effects.[28] These benefits and costs have also been reflected in tax reforms but the latter usually outweighs.

As of the 1950s, with the emphasis on nation building of the war deteriorated world and improve better standard of living, developmental theories proliferated with their respective lucidities. The current tax reform discourse is set against the backdrop of this development theories formulated beginning in the period after World War II. [29] One can find sundry of developmental theories with regard to legal reforms, wherein tax reforms are part to. From these diverse theories of developments: Modernization, Dependency and Sustainable development theories are often cited as representative and dominant ones.[30] These theories have presented conflicting positions on the development repercussions of adopting western values in legal

[28] *Supra Note* 22, p. 32

[29] Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, Third World Quarterly, Vol.22, No.1 (2001), p.21–36

[30] Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty*, The MIT Press, (2004), p.53 see also Francis G. Snyder, *Law and Development in Light of Dependency Theory, law and society review*, Vol.14 No.3, (1980)

or tax reforms through the influence of western governments, experts and institutions. Modernisation Theory takes transplantation of laws and legal institutions from developed or western countries to less developed and transition countries as the solitary path for development.[31] Hence, tax laws and institutions that promote aggregate economic growth in the western society are considered to be the sole vehicle to undertake qualified tax reform. Perhaps, the dissemination of VAT to the developing states as a means of enhancing the revenue level of a country is welcomed in this theory without interrogating its application in the host state.

By way of response, Dependency Theorists argued that unswerving reliance on laws and institutions of developed countries is neo-colonization under the guise of legal reforms.[32] As per this theory, development is certain only when it occurs in the context of specific but complex economic, political and cultural backgrounds. As a result, a tax reform undertaken by copiously transplanting laws and institutions of outsiders can in no way work for a country's effort to achieve development. For instance, for VAT to be introduced, it should be an internal undertaking based on societal inquisitiveness not because it brought change in developed states. Hence, they favour tax reform projects to emerge from the internal context of developing nations.

[31] *Ibid.* Francis G. Snyder
[32] *Ibid.*

The third theory of sustainable development, which is currently burgeoning and acceptable paradigm of development, shows that legal reforms and transplantations should really address the social, economic and environmental interests of the present and future generations.[33] Hence, a tax reform by transplanting western values shall be tolerable if and only if it is compatible with the economic, social and environmental dimensions of the host country. The first two theories are often impugned to be the overindulgences and it is the third theory that often fascinates scholarly kindnesses.

The three dimensions of sustainable development have various tax reform aspects for the reason that taxation and sustainable development have strong correlation. Social, economic or environmental developments usually necessitate fiscal remedies and contrariwise developments of a nation determine the excellence of a tax reform. Tax is an engine for sustainable economic growth, poverty reduction, social equality and environmental protection.[34] Through tax reform, governments can affect the economy at micro and macro levels. For example, introduction of corporate taxation affects the firm's economic decision while personal income taxation, and VAT affects the household decisions. Perhaps, it provides developing countries with a stable and predictable fiscal environment to promote growth and to finance their social and physical infrastructural needs. It

[33] Thomas Poguntke (eds), *In Pursuit of Sustainable Development, The Routledge*, (2008), p. 5-7

[34]Gareth D. Myles, *Economic Growth and the Role of Taxation*, OECD (2007), p. 54

reduces long-term reliance on aid and ensures good governance by promoting the accountability of governments to their citizens. Taxation has also limitless quality in maintaining social equity through income redistribution, by making tax system progressive. By taxing the haves more it extends public services to the have-nots. This way, taxation ensures social justice, which is the bedrock for sustainable development. Moreover, adoption of environmental taxes promotes sustainable development by shaping economic growth to a green direction. This is a case where, taxes are designed to discourage environmentally menacing economic activities or encourage environmentally and socially friendly establishments. Generally, properly employed tax reform projects can be one of the key building blocks of development efforts of developing countries.

Sustainable Development, in this regard, is concerned with the synergy between transplanted laws/institutions and administrative capacity of the host nation responsible for enforcing or administering those laws/institutions.[35] Meaning, transplanting new tax regimes, which are functional in a computerized and modern tax system, for example, would result in unbearable overheads. Particularly, the direct adoption of new tax concepts into many developing countries has experienced high levels of tax evasion and corruption in their tax administrations. This is also proper in light of the different tax reform approaches that recommend for the setting up of a tax system, which capable of maximizing social welfare, balancing efficiency and equity, economic

[35]OECD, *Tax Policy Reform and Economic Growth*, OECD (2010) p.11

growth, administrative capacity, democratization process and political legitimacy.[36] At this point, understanding significant differences between developing and advanced economies is crucial so that designing tax policies would not simply be reproducing tax laws and policies of countries. Lower economic development, weaker enforcing institutions, less accountable and transparent regimes, larger informal sectors, considerably higher inequality etc. are some of the major differences.[37] To sum up, the development (sustainable development in essence) ramifications of tax reforms can better be amplified if they emerge from the internal and timely interest of a nation rather than exclusive imposition by non-reform owners.

3. IMF and the Concourse to VAT

The IMF is the first monetary multilateral organization established by allied powers at the Britton Woods conference of 1944 to regulate international monetary and trade relations.[38] Together with the WB and supported by developed countries, it augments globalization, which is said to have radically limited the power of national governments, to the extent of making domestic development efforts meagre and impotent.[39] The IMF claims, the policy as depicted under

[36]Mick Moore et al, *Pro-poor Tax Reform in Latin America: A Critical Survey and Policy Recommendations*, University of Sussex (2003), p.43
[37]*Ibid.*
[38]Martin A. Weiss, *International Monetary Fund: Background and Issues for Congress*, (2013), p.2
[39]Ian Roxan, Limits to Globalisation: *Some Implications for Taxation, Tax Policy, and the Developing World , Law, Society and Economy* Working Papers No. 3, (unpublished), 2012, p. 4

Article I of the IMF Articles of Agreement, is the only policy to clear the economic mess and is a prudent lender it argues it is only right to put several preconditions in granting loan or technical assistances.[40]In becoming members of the IMF, countries agree to pursue economic policies that are consistent with its objectives. The Articles of Agreement confer on the IMF the legal authority to oversee compliance by members with this obligation, making the IMF "the only organization that has a mandate to examine on a regular basis the economic circumstances of virtually every country in the world."[41]

Generally, due to the pined role of external financing, the IMF has aggressively continued to influence the world economic order of members and non-members alike, through its lending, technical assistance and advisory powers. For instance, SAPs which is prescribed by the Britton Woods Institutions since the early 1980's, has influenced several developing countries including Ethiopia.[42] Although Ethiopia, waited in socialism, was a latecomer compared to other developing countries and the relationship between these institutions and the current Ethiopian government has followed a

[40] *Ibid.*

[41] James Boughton, *Silent Revolution: The International Monetary Fund*, 1979-89, IMF (2001), p. 68

[42]Fantahun Belew, *the Bretton Woods Institutions and the Ethiopian Economic Reform*, Ethiopian Economic Association Publications (2003), p. 311- 331. SAPs are detailed instructions on what countries have to do to bring economic development mainly based on neo-liberalism or the Washington Consensus, as both the IMF and the WB are headquartered in Washington D.C. These strategies are geared towards promoting free markets including privatization, deregulation, trade liberalization, shrinking the role of government, reducing taxes and cutting back on publicly provided services.

path full of ups and downs, the government from the outset agreed with the IMF and WB to conduct SAPs to solicit external assistance to finance the envisaged economic reform program and Ethiopia has been seeking financial and technical assistance and yet a number of policies are being implemented fully or partially with the sponsorship of these institutions.[43]For example, as an HIPC eligible country,[44] Ethiopia has benefited from significant interim debt relief support in 2001/02. Hence, IMFs intercession in the Ethiopia's recent economic reform could not be underestimated. The problem here is, while development undertakings of developing countries require different policy approaches as their foundation varies, the IMF develops and prescribes similar strategy and sets similar preconditions for all developing countries alike. Practically, however, these non-home grown or non- locally owned strategies fell to address the thrust and those conditions are beyond the capacity of the implementing country. For example, given Ethiopia's limited institutional and technical expertise, some of the imposed core conditions (such as deregulation, privatisation and devaluation) were burdensome and have had an adverse effect on the welfare of the poor.[45] Furthermore, IMFs policy of rapid custom duty reduction exposed domestic infant industries to unbearable foreign

[43]*Ibid.*

[44]The HIPC stands for 'Highly Indebted Poor Countries'- a group of 39 developing countries with high levels of poverty and debt overhang and are eligible for special assistance from the IMF and the WB .

[45]*Supra Note* 42

competition.[46] With this blameworthiness, however, in the periods of 1992/93-1994/95, 1996/97- 1998/99 and 1998/99-2000/01 Ethiopia entered different phases of ESAF arrangements with IMF[47] and it had concluded policy framework programs on legal and institutional reform, fiscal policy, financial and monetary policy, investment and industry policy and pricing and distribution policy.

In this regard, the IMF shares the tax component of the Washington Consensus that objectivises to simplify and broaden tax bases, lower income and corporate tax rates, reduce trade tax rates and strengthen VAT.[48] According to the IMF, the tax policy, like other policy precincts, is calculated to procure economic growth, which is by itself not development. The mantra of economic growth in tax reform is best explained by Diamond and Zodrow. For them the current tax reform discussions, under the influence of IMF and its doppelgangers, focuses on improving the tax climate for business in order to stimulate additional saving, investment, employment, wages, and economic growth.[49] Yet, it is important to appreciate that, though important, economic growth is not a panacea because human development is

[46]*Ibid*

[47]The ESAF or Enhanced Structural Adjustment Facility is a concessional IMF facility for assisting eligible members that are undertaking economic reform programs to strengthen their balance of payments and improve their growth prospects.

[48]Jonathan Di John, *The Political Economy of Taxation and Tax Reform in Developing Countries,* United Nation University Research Paper No. 74, (unpublished), 2006, p.2

[49]Anthony C. Infanti , *Tax Reform Discourse,* Virginia Tax Review, Vol. 32, , 2012(2012), P. 211

about much more than just increasing incomes and economic growth.[50] Economist and philosopher Amartya Sen has persuasively argued that an adequate conception of development must go much beyond accumulation of wealth.[51] Therefore, given the fact that economic growth is an impoverished proxy for development, the time has come to shift the focus of tax reform towards advancing social and environmental developments as sensible ends for a tax reform in addition to economic growth.

VAT adoption, which was a central tax reform agenda of the IMF, VAT was one of the specific tax policy anticipated to upsurge economic growth.[52] As of the 1970s, IMF campaigned to substitute existing sales taxes with European modelled VAT as a main tax reform initiative to Sub-Saharan Africa.[53] The IMF has endorsed VAT practice into member countries through loan conditionality and general tax advice.[54] As one of the IMF's tax reform package, adoption of a VAT was a necessary precondition to receiving IMF loan and assistance, at least as *a de facto* requirement. IMF also consults member countries annually based on it Article IV Consultations. However, IMF's undertaking to introduce or strengthen VAT is so

[50]United Nations Development Program, Human Development Report 2010: *The Real Wealth Of Nations: Pathways To Human Development*, (2010), p. 5
[51]Amartya Sen, *Development As Freedom*, Oxford, Oxford University Press, (1999), p.14–15
[52]*Supra Note* 25, p. 16
[53]*Ibid.*
[54]Lauren Damme *et al*, *Taxation Policy in Developing Countries: What Is the IMF's Involvement?* Bretton Woods Project, (2008), p. 23

identical and without considering countries' context. For example, IMF's VAT advice has been fairly consistent and includes a credit-invoice method, retail stage extended, service taxing, national or central and programmed VAT.[55] This consistency by itself contradicts with state's reality and practically breeds problems for the context within which they must be answered differs significantly from country to country.

4. VAT Reform in Ethiopia

In order to appreciate the Ethiopian stake in the global tax reform discourse and evaluate the net benefits of the Ethiopian 2002's tax reform and introduction of VAT, it is better to revisit some developments in the Ethiopian tax reform in general. The first major change in Ethiopia's tax system was initiated in the post Second World War period between 1942 -44 and 1947-52.[56] These changes were generally discretionary and fragmentary. Broad-based taxes on goods and services were also introduced in the mid-1950s. Later in the decade and in the early 1960s, changes were also made in the rate and structure of taxes, especially on income. Generally, during 1941-1961, the government revised tax laws on numerous occasions in an effort to heighten revenue and encourage productivity.[57] However, as the majority of the people were living at a subsistence level to upsurge revenue at domestic direct taxes, the imperial government relied on

[55] *Ibid.*

[56] Wogene Y. *History of the Post War Ethiopian Fiscal System, in E. Chole (ed.), Fiscal Decentralization in Ethiopia*. Addis Ababa University Press, (1994), p. 58

[57] Saheed A. Adejumobi, *The History of Ethiopia,* Greenwood Press (2007), pp. 100-101

indirect taxes (customs, excise, and sales) and taxes on foreign trade to generate revenues.[58] In the post-revolution period, particularly during 1976-79, significant major changes on the rate and structure of all types of taxes were made with a view to demote private investment and empower the government in the economy. The revolutionary government changed the tax structure in 1976. Hence, business and sales taxes become truncated and rural land-use fee and tax on income from agricultural activities were emphasised.

With the implementation of the new Economic Reform Program (ERP) as of 1992/93, the Tax Reform Program (TRP) has got momentum in 1999 with a funding from WB, IMF, foreign governments and experts.[59] Increased government revenue in contrast with encouraging trade and investment are considered to be vital directions to support social programs and alleviate poverty. The critical tax reform goals were broadening the tax base, strengthening the enforcement capacity of the tax and customs authorities and promoting equity in the tax system.[60] The tax reform scheme was made to consist of six projects: Tax Policy and Legislation Project, Tax Payer Identification (TIN) project, Presumptive Tax Project, VAT

[58]Thomas P. Ofcansky and LaVerle Berry, *Ethiopia: A Country Study*, Kessinger publishing (1991), p.132-134 for example, in the early l970s, tax revenues and about one- third of all government revenues, excluding foreign grants. At the same time, direct taxes accounted for less than one-third of tax revenues.

[59]Demirew Getachew, *Tax Reform in Ethiopia and Progress to date*, Proceedings of the Second International Conference on the Ethiopian Economy, Ethiopian Economic Association, Vol. 111, (2013), p. 183-205

[60]*Ibid.*

Project, Reorganization and Work Producer Development Project and Taxpayers' Education Project.[61] The VAT Project was concluded by replacing the Sales Tax Proclamation No. 228/2001, which was by itself an amendment of Proclamation No. 68/1993. The 2001's sales tax law imposed tax on imports and domestically produced goods between the ranges of 5-15%.[62] For example, many essential goods such as primarily agricultural products and food, pharmaceutical products, and printed books were taxed at a lower 5% rate. Some other essentials such as water, electricity, and medical and educational services were completely exempted. While only a few specified services were taxed at 15% rate, financial services and work contracts were taxed at the lower rate 5%. Hence, the poor were not denied of access to some goods as some basic necessities are exempted or taxed at lower rates. Though there was no organized mechanism for refunding, tax paid on some goods such as raw materials was credited against the output and credits were not given in some areas. However, the sales tax base was blamed for it has narrow tax base that limits revenue and it impeded economic growth for there was no credit as required, the tax had cascading effect and it distorted efficient resource allocation.[63]

[61] *Ibid.*
[62] *Ibid*. see also Alemayehu Geda and Abebe Shimeles, *Taxes and Tax Reform in Ethiopia 1990-2003*, United Nations University UNU-WIDER Research Paper No. 2005/65, 2005, p. 4
[63] *Ibid.*

With this aces and amateurs, very consistent to the world trend, Ethiopia introduced VAT through Proclamation no. 285/2002 replacing sales tax Proclamation no. 228/2001, a law that did not operated for less than a year. This process was substantially supported by the involvement of the IMF, as mentioned before, with the objective of keeping uniformity in tax reform projects in Ethiopia. The IMF sent their technical staffs, which were led by Mr Timothy R. Muzondo, that meet Ethiopian officials and recommended, among other things, Ethiopia has to introduce VAT.[64] The IMF, as part of its technical support, sent Professor Alan Schenk from the University of San Diego to draft the new VAT law in Ethiopia.[65] Schenk, a Western scholar, known to have drafted many of developing countries VAT law, used the EU VAT directive as a model during the drafting.[66] In October 2001, a draft VAT legislation was submitted to Parliament and on the 4th July, 2002, Proclamation No. 285/2002 was enacted as a law and become effective as of January 1, 2003. Though prior to the introduction of VAT, the Ethiopian government has initiated processes to welcome VAT with improved

[64]Timothy R. Muzondo et al, *Ethiopia, Introduction of a VAT and a Presumptive Income Tax and a Reform of the Income Tax*, IMF, (2002), p.6

[65]Curriculum Vitae, Alan Schenk, Wayne State University Law School July, 2012, p. 9 (Available at http://law.wayne.edu/profile/alan.schenk/ (last visited, 12/08/13) he is a technical advisor of the IMF (since 1996) engaged in drafting and reviewing legislative proposals for sales and VAT in developing countries and transition countries such as Ukraine, Ghana, Gambia, Botswana, Namibia, Swaziland, Lesotho, Malawi etc. It is attention grabbing that he is from the USA, the only industrialized nation that does not have VAT.

[66] *Supra Note* 63

administration,[67] none of these measures were effective without taking decades for it was surrounded by a number of problems attributable to tax laws, officers, taxpayers and the system itself. Hence, the influence of Western organizations and the broad involvement of Western scholar evince how VAT was introduced in the midst of external gravities before several home-works remained up in the air.

The influence of IMF in the Ethiopian tax system did not stop even after the 2002 tax reform and VAT introduction. On November 12, 2010, the Deputy Managing Director and the Acting Chair of Executive Board of the IMF advised Ethiopia to continue its tax reform in his official statement made after the IMF approved around 63 million US dollars disbursement to Ethiopia.[68] On March 29, 2010, the IMF advised Ethiopia to drop dividend taxes and lift VAT on Kerosene sales after Sufian Ahmed, Minister of Finance and Economic Development (MoFED), requested technical assistance in studying the possibilities of restructuring Ethiopia's taxes in a bid to increase revenue.[69] The Minister had admitted that the government is making tax reforms and restructuring with a view to modernise and improve the tax system in line with IMF's recommendations, which is the owner of the loan and technical assistance. From this it is possible to conclude that the IMF has continued the influence even after the

[67] See *Supra Note* 60, P. 7-8

[68] Bruh Yihunbelay, *IMF Recommends Tax Reform in Ethiopia*, http://allafrica.com/stories/201003300683.html last visited on 12 July, (2013),

[69] *Ibid.*

introduction of VAT and the Ethiopian tax reform project is within the global tax reform discourse.

5. Some Discontents and Development Implications VAT in Ethiopia

Under the preceding sections an attempt is made to demonstrate the introduction of VAT in Ethiopia as part of the global tax reform discourse, the influence of external agencies/individuals and their possible development ramifications. Under this section, a brief discussion will be made on some of the discontents of VAT and their implication on Ethiopia's development. The main argument is that the mother of all of these discontents is, wholly or partly, the pressurized, premature and profligate reform or adoption of VAT.

5.1. Assaultive Nature of VAT and Tax Sovereignty Concerns

The idea of VAT was first conceived by Wilhelm Von Siemens, German businessman, in the 1920s and built into a system by the so-called father of VAT, Maurice Laure, the director of the French tax authorities in 1954.[70] Under the inspiration of EU, IMF, WB, WTO, etc. the tax has, shortly, been a blowout in more than 140 countries, accounted for one-fifth of the total tax revenue and affected about 4 billion people.[71] It has been the centrepiece of tax reform in many developing countries that VAT was introduced in Ethiopia, under the

[70] Bekure Herouy, *The VAT Regime Under Ethiopian Law with Special Emphasis on Tax Exemption: The Ethiopian and International Experience*, (2004), p.8

[71] Michael Keen and Ben Lockwood, *The VAT: Its Causes and Consequences*, Warwick Economic Research Papers No 801 (2007), p.4

influence of IMF and drafting of Alan Schenk, a scholar from USA, a non-VAT state. The key reasons that have led countries to adopt VAT were the need to mobilize adequate revenue from the majority, which is critical to finance development ventures, and the need to abolish sales tax, which was a barrier to the free flow of international goods and services for the Western multinational/international traders.[72] These two rationales are usually predisposed by Westerners and claimed by the developing world. Developing countries, which lack capital and capital owners, swiftly move to introduce VAT so as to collect sufficient tax from the majority (urban) poor consumer than collecting sales tax from businessmen.

On the other hand, Westerners have monitored such a policy for two main political agendas.[73] In the first place, having reached the limits of aiding and lending developing countries, they have a policy to strengthen the revenue performance of developing states. On the other hand, as part of the liberalization process, they do not like the imposition of taxes including sales tax on multinational traders, who are mostly westerners by origin.[74] But if they claim to abolish such sales tax they needed to introduce a new regime as a source for government and VAT was the preferred policy. Determined to reform the tax regime of a state without studying its administrative capacity and the social impact of the reform is the dogma of modernization

[72] *Ibid*.
[73] *Supra Note* 50, p. 31
[74] This is because while sales tax is a transaction tax paid by the businessmen, the actual bearer of VAT is the final consumer.

theory as discussed before. VAT was unbearably introduced in Ethiopia in this way while it was totally unfitting to Ethiopia. To begin with, the introduction of VAT was a top-down development than an internal tumour necessitating its adopting. It was introduced to serve the interest of non-reform owners. However, VAT's contribution to the country's development can be questioned at all as will be seen afterward. The reason is that it cannot be such a milky cow or money machine as previously alleged because of administrative limitations and it cannot principally assist poverty reduction efforts because the majority poor is not virtually promoted by this assaulted tax. Moreover, the influence of foreign institutions, experts and application of foreign VAT models in the Ethiopian tax reform project could perhaps violate the country's tax sovereignty. As Christians argued, Taxation is an inherent component of sovereign status and autonomy in designing the tax system deserves greater protection.[75] If tax systems are the product of outsiders without considering domestic dialogues and debates, the expected autonomy in taxation is not maintained. Of course, the domestic law making process of a state may devise mechanisms of reducing the influence, for instance, the law making body may deliberate on the draft. Yet, the influence survives and therefore, as an assaulting tax transcends Ethiopian tax sovereignty.

[75]Allison Christians, *Sovereignty, Taxation and Social Contract*, Minnesota Journal of International Law Vol. 18, No.1 (2009), p. 99-154

5.2. Incidence and Equitability Issues

VAT is consumption tax assessed on the value added to goods and services and its burden is borne ultimately by the final consumer irrespective of its financial eminence. It is not paid by businessmen who can claim full credit for input VAT provided they fulfil all the legal requirements. With this regressive nature, VAT unfairly exploits the poor and deviates from equity, which is an essential concern in taxation.[76] Unlike income tax that taxes the income—amounts coming in, VAT taxes the expenditure—amounts going out. Tax liability upsurges if one consumes taxable activities frequently. That means whenever you expend money the government is there waiting for you to take away your purchasing power. Nahida Faridy and Tapan Sarker argued that understanding the incidence of VA that is who bears the final burden of tax or whose disposable income is changed by VAT, indicates its fairness.[77] Incidentally, several studies have indicated that it is the poorest part of the society that pay a higher portion of its income than the wealthier in developing countries. This is what makes VAT unfair as the rate of sacrifice (or the after tax income) is not comparable because of difference in income or earning capacity. For example, a study in Bangladesh shows that the incidence of VAT on urban poor is higher than middle-income groups.[78]

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[76]Recharged M. Bird and Pierre-Pascal Gendron, *Is VAT The Best Way To Impose A General Consumption Tax In Developing Countries?* International Studies Programme Working Paper No. 5(2006), p. 2

[77]Nahida Faridy and Tapan Sarker, *Who Really Pays VAT in Developing Countries? Empirical Evidence from Bangladesh*, IACSIT Press (2011), p.1-6

[78] *Ibid.*

In the Ethiopian context, recently, Dakito Alemu found that even if the VAT revenue is growing from time to time, this revenue is unable to neutralize the regressivity of VAT because of its unsystematic exemptions, tax structure, and tax system. Among other things, he recommends a consideration of equity in spending of VAT proceeds in order to ensure balanced and sustainable development.[79] A study by Munoz and Cho, on the social impact of tax reform in Ethiopia, has likewise indicated that the replacement of the sales tax by the VAT has increased the tax payment burden for the average household and the sales tax was more progressive than the VAT.[80] Indeed, the study has indicated that replacement of the sales tax with the VAT has had an adverse impact on the poorest 40% of Ethiopians.[81] Human right activists, such as Save the Children, criticize VAT for it denies or at least discourages the poor, especially the urban poor, access to some basic necessities and it puts low income families under even more pressure.[82] As to them, besides the existing VAT exemptions in different states, governments should provide more exemptions.

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[79] Dakito Alemu, *Empirical Analysis of the Contribution of VAT for Economic Development and Social Spending in Ethiopia*, (unpublished), School of Business and Public Administration of Addis Ababa University, (2011), P. 55 & 81

[80] Munoz Sonia and Stanley Sang-Wook Cho, Social Impact of A Tax Reform: the Case of Ethiopia, IMF Working Paper No. 232 (2003), p.25

[81] Ibid.

[82] Save the Children, *Why VAT must not goes up?, Policy Brief* (2010) www.savethechildren.org.uk/sites/.../Why_VAT_must_not_go_up_1.pdf, last visited on 12 July, 2013, p.3

Generally, the impact of VAT on the poor is obvious in Ethiopia. Unless legal exemptions are strictly enforced and policy measures are devised, VAT becomes an antithesis of the country's endeavour to sustainable development, wherein equity is at the center. VAT can be a good source of revenue and it might support economic growth but its unfairness obliterates these gains. Governments do not need tax to only raise money as they can print it but also to act further towards equitable development. That is why the Ethiopian government devises different mechanisms to minimize the regressive or non-equitable nature of VAT. For example, exemption of basic goods and services, elevation of the minimum threshold for VAT registration, allocation of revenue (from VAT) to poverty reduction/alleviation programs (such as building infrastructures-road, health, education, safety net programs etc.) can be mentioned. Ethiopia has been implementing several developmental programmes (from the ADLI to the GTP) that take poverty reduction and vulnerable groups at the centre.[83] Though there is no specific tax policy addressing the downside of VAT, all policies do have frameworks to maintain social justice and distribution of incomes or resources. Hence, if the lion share of the public budget is to be allocated for poverty reduction or other welfare activities to the benefit of the majority, the regressive effect of VAT can be reduced. However, this could not be especially relevant for VAT because all tax and non-tax revenue can be utilized for services anyway. However,

[83]The Economic Development Strategy of 1994, Sustainable Development and Poverty Reduction Program (SDPRP) of 2002, Plan for Accelerated and Sustained Development to End Poverty (PASDEP) of 2005 Growth and Transformation Plan (GTP) of 2011 are major developmental programmes that target the poor.

revenue collected from VAT should specifically be targeted to poverty reduction ventures.

5.3. VAT Administration Concerns

A scrubby look at the Ethiopian VAT proclamation conveys that VAT related administrative tasks include identification and registration of taxpayers, following up taxpayers (during invoicing, filing, crediting and payment), processing returns, auditing taxpayers, investigating tax fraud and evasion, levying penalties, handling complaints etc.[84] These responsibilities by their nature demands well organized, educated or informed taxpayers and tax administrations. Largely, effective administration is a precondition for VAT practice. Because once the system is installed, VAT is administratively the most effective tax. From top to bottom, legal and institutional capacity is desired to reap maximum benefit from VAT and reduce the nastiest effects.[85] However, several literature presented that developing countries are not successful in VAT because they simply adopt strange VAT design before they build administrative capacity and tax culture. For instance, as Riswold exactly argued, developing countries' VAT frequently suffers from being incomplete because they adopt VAT with weak tax institutions, fragmented economies, large informal sectors, low tax morale, rampant evasion, distrust between tax administrators and

[84] Art.16, Proc. No. 285. Neg. Gaz. Year, 2002. No, 33

[85] Gillis Malcolm *et' al*, *VATation In Developing Countries*, The World Bank (1990), p. 4

taxpayers, etc.[86] Ethiopia is not the exception. Of course, it can be said that the whole tax system in Ethiopia is faced with problems such as low habit of record keeping, administrative inefficiency, illiteracy, high compliance cost, extensive evasion, and corrupt tax officials and extremely narrow tax base etc.[87] More importantly, different studies are indicating that even if the revenue from VAT is increasing from time to time, VAT administration is largely ineffective and excruciating in Ethiopia.[88] Lack of computerized systems, low VAT education, overdue assessments, low audit capacity, lack of sound risk management practice, unreliable compliant handling, etc are the often cited administrative problems. From the sides of taxpayers, non-registration, none or null declaration, non-use or the use of fake or

[86] Riswold Scott, *VAT In sub Saharan Africa: a Critique of IMF VAT Policy*, University of London (2003) see also Bird, R.M. and P–P Gendron, VAT Revisited: A new look at the VAT in developing and transitional countries, (unpublished), 2005, p. 4

[87] *Supra Note* 55

[88] Wollela Abehodie, *VAT Administration in Ethiopia: A Reflection of Problems*, e-Journal of Tax Research Vol. 6, No. 2 (2008) p.146. In addition, the author considered four Msc. thesis papers and two papers published by Ethiopian Economic Association. Yalemtesfa Taye , The impact of Electronic Tax Register on VAT: on the case of Addis Ababa City, MSc. Thesis Submitted to Addis Ababa University School of Business and Public Administration, 2011; Dakito Alemu, *Empirical Analysis of the Contribution of VAT For Economic Development and Social Spending In Ethiopia*, MSc. thesis submitted to Addis Ababa University School of Business and Public Administration, 2011; Bisrat Alemayehu, *An Examination of the Link Between Tax Administration and VAT Compliance In Ethiopia*, MSc. thesis submitted to Addis Ababa University School of *Business and Public Administration*, 2010; Abraham Tesfaye, *Problems and Prospects of Implementing VAT in Ethiopia*, Proceedings of the Second International Conference on the Ethiopian Economy, Ethiopian Economic Association, Volume 111 (2013); Arega Hailu, *Assessment on the VAT Implementation in Ethiopia, Proceedings of the Second International Conference On The Ethiopian Economy, Ethiopian Economic Association*, Volume 111, (2013)

duplicated invoices, exaggerated refund requests, etc. are significant risks facing the Ethiopian VAT administration.

Problems from both sides have further created VAT non-compliance and tension between tax authorities and the business sector. As a new and sophisticated tax, unlike classical tax schemes familiar to Ethiopia, misconceptions and misapplications are expected. Nonetheless, VAT registration, invoicing, filing, returns and payment, refund, audit and enforcement according to the law are the souls of VAT. These cavities, beyond revenue loss, would result in market distortion and unfair competition between those who comply with and those who violate. Even if those who escape VAT are subjected to Turnover Tax,[89] the iniquitousness remains intact because of the wider gap between VAT administrative bureaucracy and rate of 15% for VAT and the 2% rate for Turnover Tax. In general, administrative limitations are excruciating problems and especially the introduction of VAT is the main reason.

5.4. The Hurriedness of the Tax Reform

The existence of several administrative problems and gaps even a decade after its introduction can be taken as an indication of the hurriedness of the 2000s tax reform that introduced VAT in Ethiopia. Just in the passing, I want to add two instances to show how the process was indeed swift. Though it was a source of parliamentary

[89]Turnover Tax Proclamation No.308/2002, Federal Negarit Gazeta, 9th Year No. 21, Addis Ababa, 31st December 2002

deliberations, VAT was adopted before an agreement was reached to which government, Federal or regional, the tax belongs and a decision was pronounced only after the joint houses unanimously gave the power to impose VAT to the Federal Government. On one hand, the decision by itself is criticized for VAT was constitutionally mentioned in substance (though not by name) as a family of sales taxes and cannot be an undesignated tax.[90] Furthermore, the solution comes after we lived long with the problem and it demonstrates how the reform was so hastened. Just to mention one last point, one of the major decisions that should be taken in preparation for the introduction of the VAT is a choice of organization and staffing to administer it. However, in Ethiopia VAT was introduced without setting up a special VAT unit in FIRA (the former Revenue Authority of the country) and it is only a recently that VAT speciality departments were established in Addis Ababa and branches.[91] This can be another evidence how the VAT adoption process was a hurried moment.

6. Conclusion

The paper has tried to map tax reform projects (with emphasis on VAT adoption) in the world of today. It has been, in clear and vibrant terms, indicated that tax reform discourse, like development discourse, is under the control of external agencies, individuals, theories and governments while the governments and peoples of reform owners (domestic agencies, experts and governments) played little

[90]Taddese Lencho, *The Ethiopian Tax System: Excesses and Gaps*, Michigan State International Law Review, Vol.20, No.2 (2012), p. 328-380

[91]*Supra Note* 81

responsibility. This makes developing countries soundless in their own parade.

In the year 2002, VAT was introduced in Ethiopia as part of this international tax reform discourse. The adoption process was totally influenced by Westerner governments, international institutions, scholars and models of the developed countries. The country hurried to host this new type of tax before national contexts are adequately studied and the necessary infrastructure for VAT administration was built. This hurried tax reform, beyond weakening tax sovereignty of the country, is the most important cause for the current legal and practical gaps in the Ethiopian VAT system even after more than a decade of experience. Empirical researches conducted in the different parts of the country tangibly exhibit legal, administrative and knowledge gaps that make VAT embryonic, thought-provoking and challenging in Ethiopia. Even if the Ethiopian VAT system is surrounded by a wide variety of discontents, on the word of empirical researchers, it unerringly overlooked the two major principles of taxation i.e. efficiency and equity.

VAT's administrative and compliance charge is so challenging and unaffordable for the tax authorities' and taxpayers' technical, manpower and resource capacity. VAT evasion and avoidance are prevalent practices that threaten the conventional rubrics of voluntary-compliance and self-assessment in VAT administration. There subsist huge administrative and awareness gaps in the areas of VAT

registration, invoicing, filing, payment, refund, audit, compliant handling and enforcement. Due to all those limitations, determination of countries to raise the possible amount of revenue is turning out to be challenging albeit numerical increase. At this time, the government shall create mass sensitization of VAT and shall modernize and simplify tax laws and its administration, speed up tax officers' capacity building and strengthen adequate and continuous taxpayer education. This demands huge public expenditure and administrative commitments.

The other key principle of taxation threatened by VAT solicitation in Ethiopia is equity. This paper, it indicates that VAT, which has regressive nature, unduly affects the majority (urban) poor and unless vigilant policy, legal and administrative measures are taken, it could be an impediment to the realization of equity that the constitution and other laws intend to meet. Hitherto, this nature of VAT is exacerbated by administrative, legislative and awareness limitations. It is now crucial to consider the existing (economic and social) reality of the country and formulate appropriate techniques. Hence, amendment of the VAT proclamation must be undertaken that would, go some way to make the tax system fairer.

First, taxable goods and supplies have to be redefined clearly in such a way that it draws a distinction between luxurious goods and necessity goods. This enables to exempt more goods, which are commonly consumed by the poor and introduce a higher rate of VAT (distinct and

higher than the standard 15% rate may be) for high cost and luxury items that only the rich can afford. Those who can afford to pay should do so and the revenue can serve to redistribute income as well. The other legislative measure can be elevating the minimum threshold of annual sale requirement for VAT registration so that access to the poor can be widened up. This is critically needed in the current inflationary market.

Reasonably high threshold can reduce the regressivity of a VAT system by excluding some transactions from VAT regime and thereby making them affordable to the poor, particularly the urban poor as the rural community is not as such open to 'VATable' goods and services in Ethiopia. Lastly, the author recommends that the government should utilize the revenue from VAT in activities that specially benefit the urban poor. The current social policy and poverty reduction programs need to be strengthened further. This can reduce the unfairness of VAT.

VAT, in its existing form, is doubtful to play its expected role in the realisation of sustainable development of the country. The contribution of VAT to the modernization of the Ethiopian tax system and its growing share in the country's tax revenue can't be denied. Though it is not still adequate as it is supposed to be, the revenue of the country is increasing since the introduction of VAT. However, the contribution of taxation for development should not be measured by a revenue accumulation. This is not to argue against the introduction of VAT nor

to suggest its deletion from the Ethiopian tax regime, but to show the limitations its untimely adoption as part of the global tax reform discourse. Hence, Ethiopia is in a dire need to find better ways of optimizing benefits, which VAT brought better than the former sales tax, and minimizing the costs of the new system.

Finally, once it is true that we humbly procured it from the eclectic bazaar, it is reasonable to mark its current eminence and the providence of VAT in Ethiopia. The inordinate influence of non-stakeholders, as discussed above, has brought up many of the troubles. The fact that the system is plagued with a variety of serious problems reminds me one of a speech of Confucius *'desire to have things done quickly prevents their being done thoroughly.'* [92] Future tax reforms in Ethiopia should take lessons from those challenges. Among other, it needs to come after administrative and capacity reforms. Besides, when the government undertakes tax reform and/or introduces a new tax, it is highly recommended that it involves Ethiopian experts, which was not the case in previous VAT reform in Ethiopia. This could make the tax reform healthier as the new system will be better examined by taking the context of the country. This way tax reform enables development endeavours of the country.

[92]Chinese Philosopher, Administrator, and Moralist. (551 BC - 479 BC)

Dealing with Justiciability: in Defense of Judicial Power in Ethiopia

*Yemane Kassa**

Abstract

Although judicial power is constitutionally vested on courts, in Ethiopia, it is being challenged by the increasing trend of promulgating ouster legislation and subsequent confirmation of such laws by decisions of the Federal Supreme Court Cassation Bench and the Council of Constitutional Inquiry (CCI). By interpreting ouster laws as laws that make a constitutional right non-justiciable, the concept of justiciability is used as a tool to divest judicial power from courts thereby leaving individuals with no remedy from courts when their rights are violated by administrative agencies. This article, therefore, posits justiciability is applied contrary to the aspiration and spirit of FDRE Constitution in such a way that it erodes the power of the Ethiopian judiciary in protecting and enforcing fundamental rights and freedoms guaranteed under the Constitution.

Key words: *Justiciability, Ouster Clauses, Finality Clauses, Judicial Power, Ethiopia*

**Lecturer, Mekelle University, School of Law; LL.B (Jimma University); LL.M (AAU). E-Mail: yemane_kassa@yahoo.com.* *I am grateful to the two anonymous assessors who commented on the earlier draft of this article. I would also like to thank to my colleague Mehereteab G/meskel for his helpful comments to the article.*

1. Introduction

It is taken for granted in any system that the existence of independent judiciary with a meaningful power is a critical aspect of whether the system complies with the rule of law and recognizes human rights. Considerable literature reveal constitutionalism and constitutional supremacy is nothing unless there is an independent judiciary or similar tribunal established to enforce constitutionally entrenched rights. The rule of law requires the existence of an independent and impartial organ, usually the judiciary, with a power of invalidating laws when they are not compatible with the rights of individuals as recognized by the supreme law.[1]

However, judicial power is among the controversial powers of the three departments of a government. Particularly, the power of the judiciary to interpret the constitution is the most contested area in constitutional law scholarships. In principle, it could be said that the power to interpret a law is vested in on the ordinary judiciary. This principle does not however always hold true in all countries. Depending on the type of legal system, certain limitations may be placed on judicial power. It is not unusual that the power of ordinary courts to see some category of cases and controversies is constrained by their national constitutions. Constitutions at times provide that particular constitutional or legislative issues cannot be reviewed by

[1] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (1st ed., 2004), p.63-64

courts. For instance, the US Constitution limits the jurisdiction of courts only to cases and controversies thereby constraining them from giving advisory opinion and hearing hypothetical cases. Similarly, under the German Constitution, the constitutional court cannot review the constitutionality of a matter which the Basic Law has given to the discretion of the legislature.[2]

Ethiopia is not an exception in this regard. The Constitution imposes limitation on courts not to interpret the Constitution by empowering the House of Federation (HoF) to interpret the Constitution. This, in fact, calls for different contending views among constitutional law scholars regarding the role of courts in interpreting the constitution and enforcing human rights.[3] It is not the concern of this article to discus on the nature and scope of constitutional limitation on the judiciary in interpreting the constitution. It rather is concerned with the legislative restrictions on judicial power and the interpretive jurisprudence of empowering the legislature to make rights non-justiciable in Ethiopia.

The issue is, therefore, is it constitutionally legitimate for the legislature to divest courts' jurisdiction in Ethiopia? It is true that in

[2]Chester J. Antieau, *Adjudicating Constitutional Issues*, Oceania Publications, 1985, p13-16; The inadmissibility of hypothetical cases by the Supreme Court in the United States is in fact the articulation of the US Supreme Court and is inferred from the stipulation of Art.III of the US constitution.

[3]There is a debate for instance as to the determination of what amounts to constitutional interpretation is far from clarity yet its similarity or difference with constitutional dispute is part of the issue. Additionally, the scope of the power of the HoF/CCI vis-à-vis the role of courts in constitutional interpretation seems to be unsettled issue. See Art.62 (1), Proc. No. 1, Neg. Gaz. Year, 1995, No.1

countries where parliamentary supremacy is firmly established, the parliament may provide statutory limit on judicial power by ousting some of its powers.[4] In such systems, there is no legal ground for courts to challenge the court stripping legislation by the parliament. However, in Ethiopia, though the legislature (HoPR) is the highest organ of government,[5] its supremacy is not absolute, rather it is subject to the supremacy of the Constitution as provided under Art.9 (1). Constitutionally speaking, therefore, the supremacy of the HoPR is subject to a constitutional limit; thus, cannot make laws which have the effect of encroaching on the constitutional mandate of the other branches.[6] In this regard, one may not easily find an express constitutional provision that allows the Ethiopian legislature to limit the power of courts recognized under the Constitution.[7]

Practically, however, there are legislation which remove or partially limit courts' jurisdiction and it seems that this trend poses a threat to the judiciary. This article argues that the trend in Ethiopia seems to prove that there is an increasing practice of promulgating laws containing court stripping clauses from reviewing decisions of

[4] This is true of the UK constitutional system where there is an absolute supremacy of the parliament over the other branches.

[5] *Supra note* 3, Art.50 (3)

[6] This is because in a country where constitutional supremacy is firmly established, it is hardly sound to think that the supreme legislature which is subject to constitutional limit will have the power to grant or deny the constitutionally mandated powers of the other branches.

[7] The Constitution, under Art.79 (1) provides that judicial powers, both at federal and state level, are vested on the courts. This constitutional power of courts could have been acceptably limited by the same document or other laws which are clearly authorized by same.

administrative agencies. To this end, it uncovers three main mechanisms of stripping courts' jurisdiction in Ethiopia. First, by issuing legislation with a 'finality clause' of administrative decisions, courts are prohibited by the legislature from reviewing such decisions. Second, once judicial power on certain claims is given to other organs, such claims are made to be non-justiciable before ordinary courts. Finally, by making the legislature an organ that decides which matters are justiciable and which are not, the CCI has established a jurisprudence where the legislature can grant or deny judicial jurisdiction in Ethiopia.

Throughout this article, the author uses case study with analytical methodologies to demonstrate the points just made. At this juncture, the author wants to be clear that the critique forwarded to courts in general and the Cassation Bench in particular is not demanding same to invalidate laws that contain ouster clauses. It rather intends to argue that they fail to defend judicial power by broadly and improperly interpreting such clauses in a way it broadens the discretion of administrative agencies and narrows the jurisdiction of courts. In the same vein, the article is not praying for constitutional amendment regarding the system of constitutional interpretation. It rather argues that the House of Federation (HoF)/CCI did not do enough in upholding the supremacy of the Constitution in general and protecting judicial power and human rights as recognized by the Constitution while interpreting the constitutionality of laws in particular.

The article has six sections. Starting with a brief introduction, it continues to provide a theoretical discourse of the concept of justiciability in section two. The third section makes a modest attempt of analyzing justiciability in Ethiopia in light of ouster laws and decisions of the Cassation Bench and the CCI. The fourth section tries to establish the pattern and implication of ouster laws, decisions of courts and the CCI regarding judicial power in Ethiopia. After analyzing the constitutional-legal standing of ouster laws in Ethiopia in section five, the article concludes some remarks in section six.

2. Justiciability

It is true that the cornerstone of judicial review is the concept of 'justiciability' for it only a 'justiciable' matter that can be subjected to judicial review.[8] It is a condition that a person needs to comply with in order to access a court or other similar institution. However, the concept, which is used frequently, continued to be debatable for its scope is not definitely known across legal systems. To be precise, the term 'justiciability' has a common law origin and refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions.[9] Its core concerns lie in a belief that there are some decisions or classes of decisions which are not appropriate for the courts to review either because they are beyond

[8] I. Ellis-John, *Essential Administrative Law*, (2nd ed., 2001), p.9

[9] Chris Finn, *The Concept of 'Justiciability' in Administrative Law*, in M. Groves and H. P .Lee (eds.) Australian Administrative Law: Fundamentals, Principles and Doctrines, (2007), p.143

the institutional competence of the court or would involve stepping outside the bounds of its appropriate constitutional role.[10]

The reasons for a subject matter to be non-justiciable are various. These include (i) deference to matters of high policy and to Parliament; (ii) lack of judicial knowledge and effectiveness; (iii) the absence of objective standards; (iv) the need to trust the executive in an emergency; (v) the existence of other remedies; and (vi) worries about hampering government efficiency.[11] Accordingly, prerogative powers such as those relating to the making of treaties, defense, granting mercy, awarding honors, the dissolution of parliament and the appointment of ministers as well as other similar matters are considered as non-justiciable, may be, because their nature and subject matter are not to be amenable to the judicial process.[12]

The dichotomy between justiciable and non-justiciable matters compels the courts to address the question of which issues are amenable to the judicial process under the principle of separation of powers. This poses questions about the functions of the courts. Alder argues that the issue should not be resolved by looking at the source of the power (statute or prerogative) but upon its subject matter. Accordingly, if the subject matter is amenable to judicial review (i.e., a

[10] *Ibid*.
[11] J. Alder, *General Principles of Constitutional and Administrative Law* (4th ed., 2002), p. 305-306
[12]Paul Daly, *Justiciability and the 'Political Question' Doctrine*, Public Law Series, (2010), p.1

matter which, under the separation of powers, the courts are entitled to consider) and particularly concerns the rights or legitimate expectations of individuals, the matter is open to judicial review.[13]

Generally, justiciability can be considered as a doctrine which imposes a serious limit on judicial power to entertain cases. Nonetheless, its origin and scope varies from country to country. In the common law legal tradition, where the term is said to be originated, it is considered as a series of self-imposed restraints by the judiciary founded in a view as to the appropriate constitutional balance between the respective roles of the Executive and the Judiciary.[14] In this manner, courts have themselves developed it that though a decision may have been reached in breach of one or more of the principles enabling the courts to exercise their powers of review, the courts will, nevertheless, decline to do so if the decision is taken within an area which the courts themselves regard to be 'non-justiciable'.[15]

In USA, justiciability as a doctrine may develop in two ways. Some of justiciability limits are declared to be "constitutional" that the congress cannot by statute overrides them whereas some of the doctrines are "prudential" that are developed through prudent judicial determination and can be overridden by the Congress.[16] To be specific, five major

[13] *Supra note 11*, p.305
[14] *Supra note* 9
[15] D. Stott and A. Felix, *Principles of administrative Law*, (1997), p. 44
[16]In the US system determination of cases and controversies are called as constitutionally provided doctrine of justiciability where as the political question

justiciability doctrines are developed in the United States, namely the prohibition of advisory opinion, standing, ripeness, mootness, and the political question doctrine.[17] In South Africa, all rights recognized as bill of rights are made to be justiciable.[18]

No matter how the concept of justiciability is perceived in many legal systems, it could generally be said that justiciability/non-justiciability is determined based on two standards; on the status of the decision maker and the nature of the subject matter.[19] According to the first standard, some cases may be rendered to be outside of the jurisdiction of courts because the constitutional status given to courts is insignificant, whereas in the second case the character and nature of some subject matters necessarily requires judicial self restraint to review them.[20] In the latter category, some prerogative rights of the executive (such as war, security, and treaty agreements), political questions and complex policy issues are included. This is also true in some European constitutional systems such as Germany where the Constitutional Court is considered to be empowered to see matters involving political issues. At times, the Constitutional Court declines constitutional complaint for judicial review regarding an approved

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Doctrine is self-imposed constraint established through judicial practices. See Erwin Chemerinky, *Constitutional Law*, (2nd ed. 2005), p.30

[17] *Ibid*

[18] Constitution of the Republic of South Africa, 1996, Section 38

[19] Chris Finn, *the Justiciability of Administrative Decisions: a Redundant Concept*, Federal Law Review, Vol. 30, (2002), p.239-263

[20] *Ibid*

treaty on the reason that some degree of self restraint by the court is necessary to leave a space for a free moulding of policy matters which the Basic Law leaves to other institutions.[21]

3. Justiciability as a Limit on Judicial Power in Ethiopia

In Ethiopia, the concept of justiciabilityis not clear and raises series of issues. The Constitution only provides justiciability as one limit on judicial function. It provides that 'everyone has the right to bring *a justiciable matter* to, and to obtain a decision or judgment by, *a court of law* or any other *competent body with judicial power*.[22] It is apparent that the Constitution does not provide which matters are justiciable and which are not, and who determines the issue. A couple of additional issues may be raised regarding the provision; a) which organs of the government are legitimate to exercise judicial function under the Constitution? and b) does exercising judicial power by other competent bodies other than courts make claims non-justiciable? These and other related issues are addressed in the subsequent sub-sections.

3.1. Deciding on Justiciability—Whose Power is it?

As discussed above, the Constitution does not give us a clear response to the issues of which matters are justiciable and which are not, and who decides such big issues. The issue was raised during the making of the Constitution by the Constitutional Assembly. Some members of

[21]Tim Koopmans, *Courts and Political Institutions*, (2003), p. 68
[22] *Supra note* 3, Art.37 (1)

the Assembly stated that the phrase 'justiciable matter' should be excluded from the provision since it raises the issue of who determines it but the idea did not get the majority support.[23] The Assembly adopted the current version of the provision on the reason that since there must be some administrative matters that may not be seen by judicial bodies the phrase 'justiciable matters' is necessary.[24] Nonetheless, the Assembly did not address which types of administrative matters are non-justiciable and who determines them.

If we see the practice, one may witness different experiences. For example, it seems that the HoPR is empowered to determine the issue of justiciable and non-justiciable matters. In the case of *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority*, the CCI firmly recommended that since the judiciary is established within parliamentary system, it is within the parliament to decide whether these issues are justiciable or not, provided that it is within the constitutional limit. It further stated that regarding the issue of whether or not a matter is justiciable, the decision of the legislature, which was made made *according to the Constitution* saying this matter is justiciable and others not, is correct even though it could be said that *it narrows judicial power*.[25]

[23]Minute of the Constitutional Assembly of the Transitional Government of Ethiopia, v.5, December 01-04, 1994, discussion of the Assembly on Art.37(1)

[24] *Ibid.*

[25]Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, the Council of Constitutional Inquiry (CCI) File No 101/2009, 9, 2010. The claim by the

A noticeable oversight of the CCI in this regard is that, apart from saying that the legislature (HoPR) has made the matter non-justiciable according to the Constitution, it failed to flesh out its reasons justifying that the legislature has acted in line with the Constitution. Furthermore, the CCI did not stipulate the possible constitutional limit on the power of the HoPR to determine justiciable and non-justiciable matters. Nor does the Constitution contain a clause that helps to address the issue. Similarly, the Cassation Bench, in the case of *Welday Zeru et al v the Ethiopian Revenues and Customs Authority*, confirmed the decision of the CCI saying it is up to the legislature to decide the issue of justiciability.[26]

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complainants, employees dismissed by the defendant, says "Art.37 (2) of the regulation is contrary to the constitutional right of access to justice which provides that everyone has the right to bring any justiciable matter to courts…" the contested law is a regulation issued by the Council of Ministers which provides, under Art.37(1), "notwithstanding any provision to the contrary, the Director General may, *without adhering to the formal disciplinary procedures dismiss* an employee from duty whenever he has *suspected him of involving in corruption* and *lost confidence in him*." Sub-article 2 of same provides that "an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the *decision of any judicial body*.' See Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, 2008, Art.37, Reg. No.155, Fed. Neg. Gaz., 14th Year No.49

[26]Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, (Federal Supreme Court Cassation Division, May 23, 2011), *Federal Supreme Court Cassation Division*, vol.12, p.482; The issue is similar with Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority (Ibid). In this case, 61 complainants who are dismissed by the Ethiopian Revenues and Customs Authority appealed to the Cassation Division against the defendant after lower courts declined jurisdiction to hear their complaint on the ground that the regulation did prohibit them to review decisions of the Authority. The applicants argue that they are dismissed by the authority from their work based on Art.37 of the regulation which is against their constitutional rights particularly, the right of access to justice. See the Regulation, *Ibid.*

However, a reading of the document, which provides a brief explanation on the finally approved draft of the Constitution, proves the otherwise intention of its makers. While giving explanation on access to justice, it provides two scenarios by saying there are matters that are to be decided by courts. There are also other matters that require administrative decisions; though these administrative decisions may be brought to courts.[27] Furthermore, the discussion by the Constitutional Assembly on the issue provides that …generally a person should not be left without a recourse when he/she is aggrieved by a decision of government institution; rather one is entitled to bring his complaint to another government institution and get remedy.[28]

From the discussion of the Assembly, it is easily discernible that the legislature is not constitutionally empowered to decide on issues of justiciable and non-justiciable matters. Apart from the minutes of the Constitution, the spirit of the Constitution does not support the empowerment of the legislature to decide issues of justiciability. Even though the legislature is supreme to the other branches, it is still subordinate to the Constitution. The reasoning given by the CCI and the Cassation Bench triggers series of questions. If the legislature is said to be vested with the power to determine issues of justiciability, what is the guarantee that the fundamental rights will not be made non-

[27] A Brief Explanation of the Final Draft approved by the Constitutional Assembly, Oct. 28, 1995, an explanation on Art.37 of the final draft
[28] *Supra note* 23

justiciable by legislation? If the legislature can limit the enforceability of fundamental human rights, why is the entrenchment of such rights needed under the Constitution as it is reflected in their amendment procedure?

3.2. Justiciability and Legislative Override of Courts' Jurisdiction

Even though it is uncontestable that justiciability is one of the constitutional limits on the power of ordinary courts, stripping courts' jurisdiction by the legislature and making certain claims non-justiciable is open to constitutional debate. Whether the legislature can remove or limit court's jurisdiction varies from country to country and depends on the type of system established in a country.

In countries where the parliament is sovereign, jurisdiction stripping legislations are common.[29] Whereas in countries where there is constitutional supremacy over the supremacy of the parliament (the Ethiopian case), legislations that oust judicial power are relatively contestable. Yet, in countries that establish the three government organs with equal constitutional status, the issue is highly contested. For instance, in the United States constitutional history, the Congress

[29] In parliamentary systems where the parliament is supreme, such as the UK, the role of courts to review agency decisions may be limited when the parliament provide for 'ouster clauses' in legislation. 'Ouster clauses' are clauses provided by primary legislation which purport to exclude the courts from reviewing the decisions of a public body. Yet, such legislative limitations are not successful in excluding courts' jurisdiction to review agencies decision. This is because courts have time and again restrictively construed such exclusionary provisions of legislations in a way it defends their review power. See for detail account on this D. Longley and R. James*; Administrative Justice: Central Issues in UK and European Administrative Law,* (1999), p.160 and P. P. Craig, *Administrative Law,* (5th ed., 2007), p.847

has proposed bills that remove or limit the jurisdiction of Federal Supreme Court as well as state courts in many occasions and the measure continues to be an area of controversy until recently.[30] In Ethiopia too, there are many legislation which remove or partially limit courts' jurisdiction and it seems that stripping court jurisdiction is the new threat to the judiciary these days.

3.3. Legislative Override of Courts' Jurisdiction in Ethiopia

In the last two decades of constitutional experience in Ethiopia, significant numbers of laws that totally or partly divest judicial power are issued. The Urban Lands Lease Holding Proclamation, which provides that the decision of the Urban Land Clearing and Compensation Cases Appellate Tribunals delivered both on points of law and fact shall be final except on issues of compensation, is among the laws that foreclose judicial power.[31] The law prohibits citizen's right to challenge the legality of measures taken by the concerned government authority, for instance, the legality of a lease issued by the agency, and excludes courts' power to entertain such issue. In the case *Southern Region Hawassa City Manucipality v HawassaDebre Genet St. Gabriel Church*, the Federal Supreme Court Cassation Bench decided

[30]Max Baucus and Kenneth R. Kay, *The Court Stripping Bills: Its Impact on the Constitution, the Courts and Congress,* Villanova Law Review, Vol. 27, (1981-1982), pp.986-992. It is argued that many of the motions by the congress to limit or remove courts' jurisdiction was needed to constrain the practice of judicial activism by the US Supreme court in handling "social issues of controversial nature" and the practice of the Court was challenged on the ground that it is against the separation of powers.

[31]Art 29 (3), Proc. No. 721, Neg. Gaz. Year 2011, No 4,

that courts do not have the jurisdiction to see claims challenging the legality of lease issued by the Lease Board.[32]

Another law that precludes court jurisdiction is the Social Security Agency Re-establishment Proclamation that provides the decision of the Social Security Appeal Tribunal is final and conclusive.[33] This is an absolute denial of jurisdiction of ordinary courts on issues (law and fact) related to pension and benefits. The federal Supreme Court Cassation Bench in the case of *Social Security Agency V. Berhanu Hiruy and Kebede G/Mariam* has confirmed the power of the commission to render final decision and ordered lower courts not to review cases that come from the Social Security Tribunal.[34]

The law that empowered the Agency for Government Houses is another legislation that that takes away judicial power from the judiciary and gives it to an administrative organ. The law empowers the Agency to evict a tenant who is allegedly to be in breaching a contract or is an illegal occupant, and to this end the Agency is vested with the power to order the police force on its own motion and without

[32]Southern Region Hawassa City Manucipality v Hawassa Debre Genet St. Gabriel Church, (Federal Supreme Court Cassation Division, Jan. 27, 2010), Federal Supreme Court Cassation Division, Vol. 10, p.260

[33]The Social Security Agency Re-establishment Proclamation, 2006, Art.11 (5), Proc. No.495, Fed Neg. Gaz, 12th Year, No. 31

[34]Social Security Agency v Berhanu Hiruy and Kebede G/Mariam, (Federal Supreme Court Cassation Division, Dec. 2005), Federal Supreme Court Cassation Division, vol.3, p.104

the need to have court warrant in the eviction of a tenant.[35] Under this law, the power of courts to issue a warrant empowering the police to take such measures is ousted. In fact, there is no clause in the proclamation that stipulates the decision of the Agency is final. However, in the case of Mogninet *Tiruneh v Agency for Government Houses*, the Federal First Instance Court relinquished its jurisdiction to see the complainant by merely stating that the court does not have jurisdiction to see the case.[36] This is a clear evidence of judicial uncertainty of its jurisdiction and self-relinquishment of same.

The Charities and Societies Proclamation is another law that provides the decision of the board regarding claims by foreign charity or society organizations over the agencies activities is final.[37]Another recently issued law, Trade Competition and Consumers Protection Proclamation, provides that a decision passed by the Federal Trade

[35]Art.6 (3), Proc. No.555, Neg. Gaz, Year 14, No 2. The Agency is further empowered by the proclamation to demolish constructions which are considered to be done illegally on government houses and possessions.

[36]Mogninet Tiruneh v Agency for Government Houses, (Civil File No.129014, Federal First Instance Court, Nov.22, 2008) (unpublished). The applicant claimed that he/she is not an illegal occupant rather have had valid contract with the agency. The Agency provides preliminary objection in the case that its decision which is made according to the proclamation is not subject to review by courts and the court upheld the objection though the proclamation does not have a provision implicating the exclusion of judicial power.

[37]Art.104 (2), Proc. No. 621, Fed. Neg. Gaz. Year, 15, No.25

Competition and Consumer Protection Appellate Tribunal is final except for error of law.[38]

While some of the finality clauses are partial (only in relation to fact or specific subject matter), others are total (both as to issue of fact and law). The Civil Servants Proclamation and the Income Tax Proclamations provide that the decision of the tribunal as to issue of fact is final[39] While the decision of the Social Security Appeal Tribunal is final both on issues of fact and law.[40] The above discussed laws are not exhaustive in that there are other legislations with similar effect on the jurisdiction of the judiciary.[41]

3.4. Justiciabilty and Exercising Judicial Power by Other Organs

It is apparent that Art.37 of the Constitution gives the clue that other competent organs, other than ordinary courts, may be established to exercise judicial function. A consequential issue is, therefore, whether vesting such organs with judicial power mean ousting power of ordinary courts regarding the same subject matters. Whether it means claims which are normally under the jurisdiction of ordinary courts are

[38]Trade Competition and Consumers Protection Proclamation, 2013, Art.39 (2), Proc. No.813, Neg. Gaz. This provision provides only claims on grounds of mistake of law regarding a decision passed by the Appellate Tribunal may be appealed to the Federal Supreme Court.

[39] Art.76 (2), Proc. No.515, Neg. Gaz. Year, 13, No.15, Art.112 (1), Proc. No.286, Neg. Gaz. Year 8, No.34

[40] *Supra note* 33

[41]We can see, for instance, the Property Mortgaged or Pledged with Banks Proclamation, 1998, Art.4, Proc. No.97, Fed. Neg. Gaz. 4th Year No. 16 and the Privatization of Public Enterprises proclamation, 1998, Art.28 (2), Proc. No.146, 5th Year No.26

non-justiciable for the mere fact that such power is vested to other organs. It seems that there is misconception of two concepts; making rights non-justiciable and giving the power to dispose certain claims to other institutions other than ordinary courts.

In *Welday Zeru et al v the Ethiopian Revenues and Customs Authority*, the Cassation Bench stated that an issue is justiciable only when the power to decide that case is not given by law to another institution.[42] The FDRE Constitution provides that judicial power may be taken away from ordinary courts and given to other institutions that follow legally prescribed procedures.[43] This should not however be construed that those matters vested to other institutions exercising judicial power are made non-justiciable. Rather, it was meant that for some policy and practical reasons, some judicial powers should be given to other institutions. If a matter is non-justiciable before ordinary courts, it is also non-justiciable to other institutions that exercise judicial power for what they are exercising is judicial power. For instance, the Civil Servants Administrative Tribunal is established to exercise judicial functions in relation to claims of administrative grievance in the Civil Service area.[44] The tribunal is empowered to hear administrative claims only if such claims are justiciable. On the same token, it is not

[42] *Supra note* 26, see also Assefa Fiseha, *the Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia*, in Assefa Fiseha and Getachew Assefa (eds.,) Institutionalizing Constitutionalism and Rule of Law: Towards Constitutional Practice in Ethiopia (2010), p. 19&27
[43] *Supra note* 3, Art.78 (4)
[44] *Supra note* 39

non-justiciable for ordinary courts to assume jurisdiction of administrative claims for the mere fact that the power is given to the tribunal.

Therefore, judicial powers given to other institutions other than ordinary courts are necessarily justiciable matters. If not, the institutions are not exercising judicial power and are not institutions which are referred to under Art.78 (4) and 37(1) of the Constitution. After all, the bench should have been aware of the fact that the institutions that are stipulated under Art.37 of the Constitution are those which are established to exercise judicial function, not any administrative institution[45] as the Bench provides in its reasoning in *Welday Zeru et al v the Ethiopian Revenues and Customs Authority*.[46]

Another issue worth cosniedring is as to which organs other than ordinary courts are competent to exercise judicial function under the Constitution? The Constitution seems to be clear in this regard. According to Art.78 (4), institutions or other bodies other than ordinary courts that do not follow legally prescribed procedures cannot be established to exercise judicial functions.[47] From this, it is very

[45] This is easily inferable from the cumulative reading of Art. 37 (1) and Art.78 (4) of the Constitution (*supra note* 3)
[46] See *supra note* 42 for the reasoning
[47] Art.78 (4), the Constitution (supra note 3) stipulates that "special or ad hoc courts that take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established". It is important here to remind readers that this constitutional stipulation has a connotation that due process of law must be observed when institutions exercise judicial function involving individual rights.

clear that establishing an organ or institution vested with judicial function but that does not follow legally prescribed procedures is unconstitutional. When the Constitution requires the need to follow legally prescribed procedures while exercising judicial function by organs other than ordinary courts, it should be construed that it is within the spirit of the Constitution that due process of law should be ensured.

Practically however, there are institutions that are established to exercise judicial function while there is no legally prescribed procedure they may follow. For instance, the Urban Land Clearing and Compensation Cases Appellate Tribunal established by the Urban Land Lease Proclamation is not required to follow any procedure; instead, it is explicitly empowered that it shall not be governed by the ordinary Civil Procedure Code while conducting its functions.[48]

Case study of the decisions of the Cassation Bench also reveals that courts have jurisdiction to see justiciable matters if such power is not legally given to other institutions that exercise judicial function. The Bench however did not attempt to see whether the organs are established according to the law and required to follow legally prescribed procedure. For instance, in the case of *the Ethiopian Privatization and Public Enterprises Supervising Agency v Heirs of Nur BezaTerega*, the Cassation Bench interprets Art.37 (1) of the

[48]*Supra note* 31, Art. 30 (8)

Constitution very literally without making nexus with the other relevant provision.[49] The same reasoning is provided by the Bench in *WeldayZeru et al v the Ethiopian Revenues and Customs Authority*" while the respondent (the Ethiopian Revenues and Customs Authority) is not the kind of institution established to exercise judicial function as provided in the Constitution.[50]

In both the preceding cases, the Cassation Bench interprets Art.37 (1) of the Constitution saying that courts may adjudicate a complaint before them when judicial power on the matter is not vested to other organs by law. The author, however, contends that the decision as being made by relying on the literal understanding of a single constitutional provision. It is true that Art. 37(1) of the Constitution tells us the fact that other organs that exercise judicial power may be established and in such cases it provides that individual complainants

[49]Ethiopian Privatization and Public Enterprises Supervising Agency v Heirs of Nur BezaTerega, (Federal Supreme Court Cassation Division, November 12, 2007), Federal Supreme Court Cassation Division, vol. 5, p.300; in this case the law at issue was Proclamation No.110/1995, which provides the powers and functions of the Agency. Accordingly, Art.4 (1&2) of the Proclamation provides that the agency will have the power to decide whether private houses nationalized during the Derg regime are made legally or illegally so that houses which are considered to be nationalized illegally (outside what the then nationalization proclamation authorizes) will be recovered to the owners. The Proclamation further provides that any person dissatisfied by the decision of the Agency may appeal to the Agency's Management Board. In the cases, the Cassation Division stated that courts do not have the jurisdiction to hear appeals came from the decisions of the Board since such power is given to other organs (the Board in the case at hand) according to Art.37 (1) of the Constitution. The truth is however, the Board is not a kind of institution that is established to exercise judicial function if seen in light of Art.37 (1) and Art.78 (4) of the Constitution.

[50]*Supra note* 26; see also *Supra note* 42, P.19&27

do have the right to bring their cases before such organs. However, it does not tell us how these organs should be established. The provision is not meant to deal with the establishment of other organs that may exercise judicial function, it rather is meant to address when and how everyone may pursue access to justice when ones rights of justiciable matters are allegedly violated. A mere reliance on such single sub-article is therefore less convincing.

If relying on the provision is necessary, the same reference should have been made to Art.78 (4) of the Constitution which has direct relevancy as to how judicial power may be exercised by other organs other than ordinary courts. Thus, even though judicial power may be vested to other organs by law as it can be deduced from Art.37 (1) of the Constitution, this cannot warrant the Cassation Bench to justify that decisions of the organs are compatible with the Constitution. Instead, it would have been correct for the Bench had it tried to check whether these organs vested with judicial power are at the same time required to follow a legally prescribed procedure.

From these constitutional stipulations, one may safely conclude that ordinary courts are vested to interpret laws other than (arguably) the Constitution provided that they are justiciable. Thus, the mere empowerment of judicial function to other organs cannot exclude courts of their jurisdiction particularly where such organs do not employ legally prescribed procedure while deciding matters.

4. Establishing the Pattern and Implications

It is not easy to establish a pattern on the laws that limit or remove court jurisdiction in Ethiopia. What could be generally drawn is that most of the legislation issued in the early parliamentary days removed court jurisdiction partly; i.e. they limit judicial jurisdiction either from reviewing decision of agency tribunals regarding issues of fact[51] or allowing courts to assume jurisdiction only as to specific cause of action.[52] By and large, these categories of laws established tribunals that exercise judicial function whose decision is final. During these times, judicial power was removed by establishing within agency tribunals that at least follow certain procedures that may ensure minimum due process requirements.[53]

Later on, however, the pattern of affecting court jurisdiction took different ways and legislation continued to be issued with content that totally removes court jurisdiction to review decision of agency tribunals on both error of law and fact.[54] The trend continues in a more threatening manner to the extent that the power to render a final decision is given to agencies that are administered by a Board. In such

[51] *Supra note* 39

[52]The proclamation, *Supra note* 30, under Art.29 (3) provides that only claims related to amount of compensation are appealable to ordinary courts.

[53]The Civil Servant Administrative Tribunal is for instance required to apply the civil procedure code in similar way as ordinary courts, see supra note 39, Art.74 (4). Similar procedural requirement is provided under Art.115&116 of the Income Tax Proclamation. *Supra note 39*, regarding with the exercise of judicial function by the Tax Appeal Commission.

[54] See for instance the Social Security Proclamation. *supra note* 33, Art.11(5) and the Lease Proclamation, Supra note 31, Art.29 (3)

a case the decision of a board, not even a tribunal, is made to be final.[55] As time goes, however, the trend continues to get worse that law empowered individual director generals of some agencies to pass a decision that affects individual rights without following any procedural requirements.[56]

Apart from the legislation, looking at the decisions of the Cassation Bench as to laws that oust judicial power[57] are also important in establishing the pattern. Accordingly, in its many decisions, the Bench interprets the 'finality clauses' of the various proclamations broadly as if they were meant to say the decisions, which were made under these clauses, were not subject to review by ordinary courts.[58] Not only this, the Bench in its decision restricts judicial power by wrongly interpreting the separation of powers in a way that broadens executive power. In many cases, the Bench invokes separation of powers to

[55] *Supra note* 37

[56]See for instance the Regulation, *supra note* 26, Art.37, We can see the proclamation that established the Agency for Government Houses. S*upra note 35*, which give the Director General of the Agency to evict a tenant on grounds of breach of contract or illegality of the occupation without the need to get a warrant from court of law.

[57]The writer considers decisions of the Federal Supreme Court Cassation Bench as if they were equivalent to the many laws that oust judicial power since such decisions have binding effect on other courts in the same way as the ouster laws. See Federal Courts Re-amendment Proclamation, 2005, Art.2 (4), Proc. No.454, Fed. Neg. Gaz. 11th Year No. 42

[58] Many decisions of the Bench can be mentioned in this regard and includes, the Social Security Agency v Berhanu Hiruy and Kebede G/Mariam. *Supra Note* 34, and Heirs of Nur Beza Terega v the Ethiopian Privatization and Public Enterprises Supervising Agency, *supra note 49*

decline court jurisdiction of reviewing agency decisions even in times where agencies do not invoke it as objection to courts' jurisdiction.[59]

The more recent pattern of the court stripping laws is made by making rights non-justiciable thereby removing court jurisdiction completely. This argument can easily be deduced from the decision of the CCI and the Cassation Bench in which both held that it is possible for the legislature to make some rights, in particular those related to administrative grievances, non-justiciable.[60] The decisions seem to encourage the legislature to come up with new and very dangerous ways of foreclosing judicial power, i.e., making rights non-justiciable, which goes against the entrenchment of fundamental rights that is necessary for the rule of law to flourish.

From the above discussion, it is possible to establish at least three patterns regarding court stripping laws, decisions of the CCI and the Cassation Bench. The first takes the pattern of limiting judicial power by misinterpreting the separation of powers in a way to restrict judicial power and defending the power of the executive. This is commonly discernible from the decision of the Cassation Bench. The second pattern seems to rely on supremacy of the legislature as opposed to supremacy of the Constitution and accordingly, it is stated both by the

[59]Zelekawerk Bekele *et al* v Agency for Government Houses, Federal Supreme Court Cassation Division, March 24, 2008), Federal Supreme Court Cassation Division, vol. 6, p.110

[60] See decision of the CCI at supra note 25 and decision of the Cassation Division at, *supra note* 26. In both cases, it is argued that the parliament can determine which matters are justiciable and which are not.

CCI and the Cassation Bench that power of courts in Ethiopia emanates from laws, including legislation, and courts cannot claim to have an inherent power.[61] Finally, both the CCI and the Cassation Bench came up with new trend that courts can assume jurisdiction only as to justiciable matters and it is up to the legislature to determine what matters are justiciable.

The combination of all these patterns gives the implication that judicial power in Ethiopia is in the way of being eroded. A survey of decision of the Cassation Bench has the implication of the fact that the Bench's main task is becoming helping the executive to aggrandize its power space at the cost of the jurisdiction of the judiciary. In the case of *Agency for Government Houses v Heirs of Mersie Menberu*, for instance, the Bench stated that a claim for the issuance of certificate of possession of an immovable property to an administrative agency is not justiciable despite the fact that an objection based on justiciability is not made by the agency.[62]

[61] Heirs of Nur Beza Terega v the Ethiopian Privatization and Public Enterprises Supervising Agency, supra note 49; in this case, when the Bench said that judicial power in Ethiopia emanates from 'law', it was referring to legislation that provides the decision of the Privatization Agency is final. It ultimately gives us the inference that judicial power in Ethiopia is emanates from legislations and does not have constitutional guarantee.

[62]Agency for Government Houses v Heirs of Mersie Menberu, (Federal Supreme Court Cassation Bench, Nov. 13, 2008), Federal Supreme Court Cassation Bench,, vol. 9, p.94. The claim is brought to the court after the applicant has made a resort to all available administrative mechanisms.

Not only this, the ouster laws also indicate the fact that the legislature is working to extend and confer the executive with limitless discretion. The jurisdiction stripping laws also imply the fact that there is no clear constitutional or other limits on the legislature to restrict the jurisdiction of courts and to make rights non-justiciable. Thus, one may question, where does the power of the legislature to limit or remove judicial power stop? and what is the limit of limiting constitutional rights by making them non-justiciable? These questions clearly imply that the trend puts uncertain future as to the guarantee of the basic rights recognized in the Constitution from being derogated by similar measures.

5. The Constitutional-Legal Standing of Ouster Laws in Ethiopia

Judicial power, in its general context, is the power to say what the law is and this power is, in principle, vested on ordinary courts.[63] However, it cannot be argued that vesting judicial power to ordinary courts is legitimate at all times. The fact that the power to determine the law is given to unelected judges has continued to be an area of contention and this call for the proposition that the power should be subject to some constraints.[64] The extent of the constraints may be

[63] *Supra note* 16, p.10

[64] *Ibid.* P.11-31, in the United States there are some commonly employed limits on judicial power includes, interpretive limits (involves the issue of whether courts should limit their interpretation only as intended or expressly provided by the framers, also called the originalism), congressional limits (this is a limit by the congress up on power of the supreme court though it is contested for its constitutionality, and justiciability limits (are limits emanated either from the constitution or from doctrine developed through judicial interpretation).

either legislative or constitutional as discussed above and this varies from country to country.

Before analyzing the constitutional standing of the laws that limit or remove court jurisdiction, it is worth seeing first the legitimate constitutional constraints on judicial power in Ethiopia very briefly. The first constraint is that the judiciary is excluded from interpreting the Constitution that involves the constitutionality of laws even though the scope of such constraint is still debatable. Another constraint is justiciability as discussed above. Finally, courts cannot exercise power when such power is expressly given to other organs under the Constitution, mainly, because such powers are more of political nature that is not amenable to judicial determination.[65]

Even though such constitutionally provided constraints reveal that judicial power in Ethiopia is not absolute, ouster laws are open to challenge for many reasons. Ousting courts' power to review decisions of agencies has also been challenged in other jurisprudences. It is true that one of the pivotal issues in administrative law is the scope of judicial review of agency's action. Particularly, the scope of judicial review of administrative acts in parliamentary systems may be diminished by statutory exclusions. Since the parliament is supreme, the role of courts to review agency decisions may be limited when the

[65] See the Constitution (supra note 3) for instance on issues of inter-state border disputes (Art.48) and the right to self-determination (Art.62(3)) which are expressly given to the House of the Federation.

parliament provide for 'ouster clauses' in legislations. 'Ouster clauses' are clauses provided by a primary legislation which purport to exclude the courts from reviewing the decisions of a public body.[66] 'Ouster clauses' can be of different types, mainly, 'total ouster clauses' and 'finality clauses'. Total ouster clauses are those which state that a decision of public body is *not to be challenged in any court of law*.[67]

'Finality clauses', on the other hand, are clauses in the primary legislation which provide that the decision of a public body *shall be final*.[68] Unlike total ouster clauses, finality clauses do not prevent judicial review, but only an appeal.[69] In both cases, ouster clauses have the implication of the sovereignty of the parliament to restrict courts' power of reviewing agency decisions.

Despite the variation in the scope of judicial power to review administrative decisions across systems, subordinate legislation are often susceptible to judicial control on various grounds. Even in countries where the parliament is supreme, such as the UK, and various types of ouster clauses are inserted into legislation with the intent of precluding judicial review of agencies' decisions, these efforts have been found to be unsuccessful. This is because courts have

[66] S*upra note* 29
[67] *Ibid.*
[68] *Ibid.* p.161
[69] *Ibid.*

time and again restrictively construed such exclusionary provisions in such a way that it defends their review power.[70]

Thus, judicial review of administrative decisions cannot be totally excluded even where a statute contains a total ouster clause that says a decision of public body '*shall not be questioned before any court of law'*. This is because such clauses can only exclude courts from reviewing agency decisions on grounds of *intra vires*, but not for *ultra vires* (jurisdictional error) of administrative act.[71] This was the case in *Anisminic Ltd. v foreign Compensation Commission* (UK) where the Foreign Compensation Act of 1950 stated that a determination of the Commission should not be called into question in any court of law. The court before which the case appeared unanimously held that this only prevented *intra vires* determinations, and not of *ultra vires* determinations by the court.[72]

In Ethiopian courts, it would have been appropriate for the Cassation Bench to defend judicial power from being narrowed down by laws containing finality clauses. It is plausible to argue that making the decision of administrative agencies to be final should be construed as appeal is not possible. This argument could be sound if one adheres to the distinction that exists between appeal and judicial review. Regarding this, literatures reveal that appeal is statutory that the

[70] *Supra note* 29
[71] *Ibid*. p.849
[72] *Ibid.*

parliament can deny or grant to litigants where as judicial review is an inherent power of court.[73] In the absence of an express provision by the law maker that precludes judicial review, interpreting a law that stipulates a decision of an agency to be final to mean appeal is prohibited, not only narrows judicial power but also is against human rights which are in principle recognized to be implemented, not to be restricted.

In this regard, there was an attempt made by the Federal First Instance Court and the Federal High Court that, for instance, in the case of *Heirs of Nur Beza Terega v the Ethiopian Privatization and Public Enterprises Supervision Agency*, held that courts do have an inherent power to review decision of administrative agencies irrespective of the fact that the law provides decision of administrative agency is final.[74] However, the Cassation Bench reversed the decision by stating that courts in Ethiopia do not have an inherent judicial power, rather their power emanates from law (including proclamation).[75] Apart from the arguments against the ouster laws, as discussed in the preceding

[73]There are many literatures that provide courts have an inherent power to review decision of administrative agencies and the fact that a statute expressly provides that an administrative decision shall be "final" does not have the message that "it is not inconsistent for the court to inquire whether the agency has observed procedural requirements." See for detail Louis L. Jaffe, Judicial Control of Administrative Action, (1965), P.153-154

[74]Heirs of Nur Beza Terega v the Ethiopian Privatization an Public Enterprises Supervising Agency, (Civil File No.48, Federal First Instance Court, March 2001) (unpublished), and Heirs of Nur Beza Terega v the Ethiopian Privatization an Public Enterprises Supervising Agency, (Appeal File No.13021, Federal High Court, December 2005) (unpublished)

[75]*Supra note* 61

paragraphs, they can further be challenged when they are seen in light of express and implied standards of our Constitution. The implied standards that are considered here are relevant principles of law as ascribed to the Constitution which includes the rule of law and separation of powers.

5.1.Express Constitutional Standards

The first category of ouster laws can be seen from the angle of Art.78 (4) of the Constitution. According to this provision, institutions or bodies other than ordinary courts that do not follow legally prescribed procedures cannot be established to exercise judicial functions. a couple of issues can be raised; 1) whether the institutions or bodies established by the various laws to exercise judicial functions are constitutional, 2) whether making the decision of these institutions to be final is in line with the Constitution.

To address the first issue, many of the institutions that are vested with the power to give final decision do not seem to be the kind of organs that are legally empowered to exercise judicial function under the Constitution. Two reasons may be provided to support this allegation. First, the organs are not 'quasi-judicial' institutions; rather they are either members of a board or individuals (such as directors) of a government institution.[76] Giving a power to render a final decision to

[76]See for instance the Lease proclamation. *Supra not*e 30, Charities and Societies proclamation. *supra note* 37, and Agency for Government Houses proclamation S*upra note 35* which give the power to render final decision to the respective board

such institutions is constitutionally illegitimate since they are not the bodies that can exercise judicial function as intended by Art.78 (4) and Art.37 (1) of the Constitution. Second, many of these institutions are not required to follow legally prescribed procedures.[77] These institutions, no matter whether their decision is final or not, do not have constitutional basis since there is no legally prescribed procedure they are required to follow while discharging such functions.

Therefore, in the absence of the responsibility to follow legally prescribed procedures, any legislative authorization to exercise judicial function by other organs is apparently unconstitutional. In such cases, it is up to the ordinary courts to interpret laws, except testing the un/constitutionality, and review decision of administrative agencies for its legality; for instance to see whether there is jurisdictional error (*ultra vires*). This argument is forwarded from constitutional perspective and the laws that establish bodies and institutions vesting judicial function without the need to follow legally prescribed procedure are constitutionally contestable. Even if it could be said that, owing to its supremacy, the parliament may impose limitations on

members. Of worrisome, the regulation issued by the Council of Ministers. *Supra note* 25, gave such power to a single man, the Director General of the Authority.

[77]Even though some of them are required to follow legally prescribed procedures (such as Civil Service Administrative Tribunal, the Tax Appeal Commission, and the Social Security Appeal Tribunal), yet significant numbers of organs exercising such power are not compatible with the requirement under Art.78 (4) of the Constitution. For instance, the Appeal Commission established by the Urban Land Lease Proclamation, *supra note* 31, is not required to follow any procedure; instead, it is empowered that it shall not be governed by the ordinary Civil Procedure Code while conducting its functions.

judicial power, such legislative authority to divest the court of its jurisdiction must be exercised in conformity with constitutional provisions. This is, therefore, not whether courts' power is taken away or not; rather it is whether the institutions and body established to exercise judicial power are at the same time required to follow certain procedure as stipulated in a constitution while discharging the power vested upon them.

Another point based on which the constitutional standing of the laws that remove or limit the jurisdiction of courts can be checked is whether the laws that contain finality clause are supported by the intention and spirit of a constitution. A related issue is that when the legislature provides that decision of a tribunal or government institution is final, should it be taken for granted that it is meant to say the decisions are not subject to review by courts? The Constitution is not clear in this respect and in the absence of clear constitutional stipulation what one can do is to resort to ideals and general principles of law as recognized in the Constitution of which the rule of law and separation of powers are important. The following two sections, thus, deal with analysis of the finality clauses in light of the two ideals.

5.2.The Rule of Law

The rule of law, though famous ideal, is contentious that many competing views are forwarded as to its content and scope. The difference among scholars regarding the rule of law can generally be

seen from two perspectives; the formal and the substantive conception. In its formal conception, the rule of law requires that every action of government must be done in accordance with a law which is made by appropriate organ, prospective, general, non-retroactive and equally applicable.[78] This conception of the ideal does not give concern to the substantive content of a law. The rule of law in its formal sense is value neutral in that whether the content of a law protects human rights or not is unnecessary.[79]

The formal conception of the rule of law has been criticized for many reasons. The most important is however that the ideal in its formal sense reinforces a mere principle of legality and cannot prevent the establishment of tyrant government.[80] The rule of law which fulfils the requirements in the formal conception may not serve to constrain a government from exercising an arbitrary power. Moreover, the ideal in its formal sense does not prevent laws from being instruments of oppression by governments and even totalitarian regimes may comply with it.[81]

The rule of law in its substantive version on the other hand requires that, in addition to the elements in the formal conception, laws must

[78] Paul Craig, *Formal and Substantive Conception of the Rule of Law: Analytical framework*, Richard Bellamy (ed.,) The Rule of Law and Separation of Powers (2005), p.96
[79] Joseph Raz, the Rule of Law and Its Virtue, in Richard Bellamy (ed.) *The Rule of Law and Separation of Powers*, (2nd series, 2005), p.78
[80] John De Waal, *et al*, the Bill of Rights Handbook, (4th ed., 2001), p.10
[81] *Ibid*.

also be substantively just. It questions whether a law is good or bad and whether the content of a law recognizes individual rights. In their quest for substantive consideration of the rule of law, advocates of the substantive version argue that in its formal sense, "the law may institute slavery without violating the rule of law."[82] Accordingly, the substantive conception argues that if government of law [rule by law] is to be avoided, the legislature must be guided by general principles of fairness to address what the content of a law ought to be.[83] Despite the contending views on the scope and normative aspect of the rule of law, the least common denominator of the ideal, both in its formal and substantive conception, is that there must exist an independent tribunal before which aggrieved individuals require remedy for harms and injuries they sustain from illegal act of government.[84]

The rule of law in Ethiopia is enshrined in broader scope that has an implication of including the substantive fairness of the various laws to be promulgated by the legislature. The Constitution first recognizes the need to obey the rule of law in its preamble which provides "…to build a political community founded on the rule of law."[85] The preamble does not, in fact, tell us how the ideal is intended to be recognized in Ethiopia. However, the commitment to the rule of law

[82] *Supra note 79*
[83] F. A. Hayek, *Freedom and the Rule of Law*, Richard Bellamy (ed.) The rule of Law and the separation of Powers, (2nd series, 2005), p.149
[84] *supra note 1*
[85] Preamble of the Constitution, *Supra note* 3

under the FDRE Constitution may be inferred from the elaborate list of fundamental rights and freedoms recognized by the Constitution.[86] The long lists of fundamental rights in the Constitution are recognized to be respected and implemented, not to be restricted. This is clearly provided in the Constitution which provides that human rights and freedoms are inalienable and inviolable; and shall be respected.[87]

Furthermore, the constitutional entrenchment of fundamental rights and freedoms, which is reflected by providing stringent amendment procedure of them,[88] is another indication as to how the FDRE Constitution aspires to ensure the rule of law. Entrenchment of rights is among the mechanisms that constitutions employ to ensure constitutionalism and the rule of law.[89] This becomes real only if the rights are respected and enforced by government bodies and most importantly by the judiciary. However, the laws that provide decision of government agencies to be final do have an impact on the fundamental rights and freedoms.

If it is true that FDRE Constitution established the rule of law and aspires for it, it is curious to say that the supremacy of the Constitution is possibly achievable if there is compliance of all government organs

[86] *Ibid.* Chapter three of the Constitution which established the bill of rights regime covers the largest portion of the text.
[87] *Ibid.* Art.10
[88] *Ibid.* Art.105 (1), comparing to other provisions of the constitution, amendment of chapter three that deals with human rights is rigorous and this is an indication of entrenchment of human rights and freedoms
[89] *Supra note 80, p.7*

with the ideal while discharging their functions. One of the core values of the rule of law that government organs need to ensure is that individuals must be vested with legal remedy for the violation of legal rights and such remedy should be judicial, not administrative remedy only.[90] Two reasons may be mentioned here; first, as Chief Justice Marshall argued, it is "profoundly the province of the judiciary to say what the law is."[91] There is no reason that prohibits us from borrowing Marshal's argument regarding our judiciary that it is the power of courts in Ethiopia to say what the law is except the [Constitution]. Accordingly, to prohibit the judiciary to say what these laws meant by incorporating finality clauses is a limit on the rule of law which requires individuals to claim a remedy when they receive injury by the government.

Second, the laws that exclude courts' jurisdiction to review decision of administrative agencies, including decision of within-agency tribunals, provide an insufficient guarantee in the protection of the rights and freedoms in a country where the rule of law is constitutionally embedded. This is because the right to appeal available at within-agency tribunals cannot replace the role of courts for the tribunals do

[90] Sidney A. Shapiro, *Standards-Based Theory of Judicial Review and the Rule of Law*, bepress Legal Series, 2005, p.6
[91] *Ibid.*

not possess the constitutionally guaranteed independence of courts,[92] thus, are not trustworthy of remedying administrative grievances.

5.3.Separation of Powers

Another important point against which the laws containing ouster clause may better be challenged is the doctrine of separation of powers. The Constitution, as it can be inferred from its structure, recognizes separation of powers and, accordingly, Art.79 of the Constitution provides that judicial power is vested on the judiciary [thus courts]. Moreover, from the separation of powers perspective, the principle is that the judiciary is the ultimate guarantor of the legality of laws and actions of government.[93] No matter how and to what extent the ideal is recognized in the Constitution, the very purpose of the ideal is to ensure that power is not concentrated on a single body or organ of government[94] and by diffusing the government power the separation plays an important rule of law value. It is hardly realistic to imagine that while FDRE Constitution recognizes the ideal, it does not intend to ensure that power is not concentrated in one person or organ of government.

[92]*Supra note 3,* Art.78 (1); within agency tribunals are argued as defective in ensuring administrative justice rather they are considered as part of the problem. This is because, they do not have the same constitutional independence as that of the judiciary, and they are rather part of the executive.
[93] *Supra note 73,* p.154
[94]Eric Barendt, *Separation of Powers and Constitutional Government*, Richard Bellamy (ed.), the Rule of Law and the Separation of Powers, (2005), p.283

When the legislature empowers government agencies with decision making power that potentially affects individual rights and judicial power to review such decisions is excluded, this goes clearly against the ideal; not only because the executive is carrying out judicial functions, but also it reinforces a concentration of power in a single government branch (executive). This ultimately confirms the dictum "power corrupts and absolute power corrupts absolutely." Moreover, judicial review of administrative action is inseparable with the separation of powers doctrine[95] and to provide a legislation that excludes judicial review of agency decision completely defeats the very essence of separation of powers.

It may be said that exclusion of courts' jurisdiction regarding determination of facts may be acceptable since it may involve the determination of the substantive policy of a given law. Such exclusion may not grossly go against the principle of separation of powers. However, if the judiciary is divested of its power to review on error of law and fact, the constitutionality of the laws causing foreclosure of jurisdiction of courts is highly contestable.

Thus, when our legislature precludes courts' power to review agency decisions, it apparently violates the separation of powers because this choice makes the executive branch the ultimate authority of determining its own compliance with the legislative standards. This

[95] *Supra note* 90, p.40

apparently reinforces the unconstrained concentration of powers (administrative and judicial) in a single government organ (the executive) or single person as in the case of the Ethiopian Revenues and Customs Authority.[96] The various laws that provide for the exclusion of judicial power in Ethiopia can therefore be seen in light of this potential risk. The laws that exclude jurisdiction of courts, at least to the point of correcting violations of the clear statutory text or failure to correctly apply statutory standards or factors, is against the commitment of the Constitution to entrench and promote individual rights and freedoms.

However, case study of courts, in particular, the Cassation Bench confirms the fact that the separation of powers is wrongly applied not to defend judicial power but to narrow same and broaden the power of the agencies.[97] In the case *Zelekawerk Bekele et al v Agency for Government Houses*, the Cassation Bench ruled that "courts determination of whether a house is nationalized by proclamation or not based on evidences is, not only beyond the jurisdiction of courts, but also *usurps the power of the executive."*[98] The bench forwarded this reasoning on its own motion while there was no objection made against the jurisdiction of courts by the applicant (Agency) and this may indicate how the Bench is active enough to justify executive power and weak enough to defend judicial jurisdiction.

[96] The regulation, S*upra note* 25
[97] *Supra note 42*, p.9
[98] *Supra note* 59

Generally, substantive limitation of power by establishing a Bill of Rights regime in a Constitution alone serves nothing in preventing government tyranny and ensuring the rule of law; rather constitutional supremacy, making fundamental rights justiciable, and entrenchment of same are equally important.[99] Recognizing rights in the Constitution is meaningless unless they are made to be implemented by making them justiciable. Furthermore, to argue that the legislature has a discretion to limit rights based on justiciability ground amounts to amending the entrenched human rights chapter in a procedure which is very simple than the one provided in the Constitution.[100]

Thus, when Ethiopian citizens do not have any constitutional avenue to challenge laws issued by the parliament on the ground that they are against the constitutionally vested rights and freedoms by making the parliament the ultimate decision maker of issues of justiciability, this may end up to be a source of tyranny. In such case, there is no any mechanism that prevents laws from becoming instruments of oppression so long as the HoF/CCI does not wish to uphold the supremacy of the Constitution, which seems to be the case in practice.

[99] *Supra note 80*, p.8

[100] See Art.105 (1) of the Constitution (supra note 3) which provides a rigorous amendment of the fundamental rights under chapter three of the constitution which in turn shows the makers did not intend to limit such rights easily whenever the legislature wishes.

6. Conclusion

Apart from the debate as to the scope of constitutional constraint, judicial power in Ethiopia remains to be subject to arguments on the ground that it is being foreclosed by legislation and executive acts in such a way that it is unintended by the Constitution. First, there is a trend that shows that the legislature is busy issuing laws that take away judicial power and vesting it to institutions that are not required to follow legally prescribed procedures. This is against the spirit of the Constitution which intends to ensure due process of law by requiring institutions other than ordinary courts to exercise judicial function only if they can follow legally prescribed procedures.

Second, the legislation came up with finality clauses that have an impact on judicial power and human rights. The finality clauses negate judicial review of decisions of administrative agencies which is hardly sound to conclude that it is in line with the Constitution. Making an agency the sole and ultimate determinant of its compliance with its own standards not only is absurd but also reinforces the concentration of executive and judicial powers on the same organ of government. The case becomes worst when one considers the power to render a final decision is legislatively given to agencies that are not required to follow legally prescribed procedures. The laws with finality clauses are subject to challenge for they go contrary to the right of access to justice of individuals recognized under FDRE Constitution thereby

leaving them with no remedy for an alleged abuse of power by administrative agencies.

Apart from the legislation, the stand of the Cassation Bench seems to advocate the act of the other two branches. In many of its decisions, the Bench confirmed that once a decision of an agency is legislatively made to be final, courts do not have the power to review it. More regrettable is, the Bench has established a jurisprudence which is a direct threat to courts' power by stating that courts in Ethiopia do not have an inherent power but a power which emanates from law. When one discovers the term 'law', from which the power of courts emanates, according to the stand of the Bench includes proclamations, it becomes easy to make a logical deduction that the legislature in Ethiopia is given a blank cheque to grant or deny court jurisdiction even in a way contrary to the Constitution. Moreover, the Cassation Bench seems to be the vanguard of the other branches when it wrongly applied the separation of powers principle to defend the discretion of the executive organ and restrict jurisdiction of ordinary courts.

More troublesome, both the CCI the Cassation Bench have come up with an outrageous jurisprudence that encourages the legislature to continue in the task of foreclosing judicial power using ouster clauses and by making rights non-justiciable. This pattern may have the implication that the Ethiopian constitutional jurisprudence is in the way of establishing *de facto* legislative and executive supremacy over

the supremacy of the Constitution. The consequence of this reveals that there are hardly available mechanisms that ensure the judiciary continues with the power it possess right now and ensures the protection of the Bill of Rights entrenched in the Constitution.

Generally, the trend from legislative practices and case study shows that claims against administrative agencies seem to be made non-justiciable any time the parliament wishes. This is true since there is no clear border of administrative issues that could not be made non-justiciable by legislations. Nor does the case study of the CCI guarantee us that the constitutional rights have dependable custodian against potential and unwarranted restriction by the legislature. On top of this, the fact that ordinary courts are relinquishing their jurisdiction and are reluctant to play an activist stand in defending their powers is another threat to judicial power in Ethiopia.

Conversion of Old Possessions to Leasehold and Its Implication on Tenure Security of Holders of Old Possessions

*Yared Berhe Gebrelibanos**

Abstract

In 2011, Ethiopian government adopted a new urban land Proclamation. Apart from eliminating all forms of tenure other than lease, the Proclamation requires for conversion of old possessions to leasehold tenure system. This paper assesses the implication of the Proclamation on tenure security of holders of old possessions in Ethiopia. Land tenure security has two core elements—objective and subjective. The objective element refers to the existence of an effective legal protection against eviction or arbitrary curtailment of land rights. The subjective element refers to the perception factor that landholders have sufficient confidence that they will not be arbitrarily deprived of their rights over their land. Viewed from these elements, the new law adversely affects tenure security of holders of old possessions for the following major reasons. First, the conversion impairs tenure security because it expropriates some rights without compensation and tenure security is a right that stands primarily for protection of landholders against arbitrary expropriation. Secondly, the conversion causes tenure insecurity because, at least, preliminary evidences show that holders of old possessions feel the law has caused them tenure insecurity. Thirdly, the conversion has jeopardized rule of law and constitutionalism which are vital for a tenure security.

Key Words: *Urban Land, Lease, Tenure Security, Conversion, Old possessions, Ethiopia*

*LL.B, LL.M, Lecturer, Mekelle University School of Law, Mekelle, Ethiopia Email: yaredBHL@yahoo.com

1. Introduction

To the surprise of large number of Ethiopian urban residents, the Ethiopian government took a very sweeping measure in respect to urban land at the end of 2011. The Federal House of Peoples' Representatives (lower house of the Parliament) passed a new and controversial urban land law. Apart from bringing all forms of land tenure systems outside of lease system to an end, the legislation requires the conversion of all previous holdings in the form of permit system to leasehold. The adoption of this legislation caused apprehension on the part of large number of urban landholders which also drew the attention of other stakeholders such as political parties and some members of the international community.

One of the key issues of concern with regard to the new land Lease Proclamation relates to its implication on tenure security of urban landholders. In this regard, many urban landholders in general and holders of old possessions in particular were worried about the forthcoming impact of the law on their holdings.

Interestingly, the public was silent when the government passed this piece of legislation for a reason which has to do with apparently lack of awareness. As the future enforcement of this law would have caused serious challenges, however, the government undertook series of

awareness enhancement campaigns during which the public aired its views.

Generally, there is no agreement on the ramification of the Proclamation. While some scholars, politicians, donor governments etc, allege that the legislation has detrimental effect on tenure security of urban landholders, government authorities categorically reject this argument. Leaving the broader range of analysis on the implication of the Proclamation to various stakeholders aside, this work examines the implication of conversion of old possessions to leasehold, one of the thorny issues in the new Proclamation, on tenure security of urban land holders.

In fact, the issue of conversion of old possessions to leasehold dominated much of the discussions held during the awareness raising discussions. What likely impact will the conversion bring to tenure security of urban landholders in general and holders of old possessions in particular will thus be examined thoroughly against the backdrop of the elements of land tenure security.

To that end, the paper is divided into six parts. Part one is the introduction section. As the paper deals exclusively with the issue of conversion of old possessions, part two of the paper is devoted to defining the category of landholdings called old possession. Part three

gives the reader a brief idea about the modalities of conversion of old possessions to leasehold as provided for under the new Proclamation. In part four, the reasons for the conversion will be discussed. Part five is devoted to investigating the effect of the conversion on tenure security from the points of view of the component elements of tenure security. Lastly, concluding remarks and recommendations are provided.

2. Old Possession: What is it?

As it is a case for many developing countries, land has special place in the socio-economic and political life of Ethiopians. Taking the economic facet, land has been a source of wealth, economic growth, employment and a source of basic survival for an overwhelming majority of the population of the country and it will remain so, at least, for foreseeable future.[1] When it comes to urban land, it is evident that the country is witnessing rapid level of urbanization which is drastically changing the physical, social, economic, political and administrative structures of the cities.[2] This calls for its continuous and yet predictable regulation for which the policy environment of land tenure is the starting point.

[1] Bacry Yusuf et al, *Land Lease Policy in Addis Ababa*, (2009), p. 14
[2] *Ibid.*

Conversion of Old Possessions to Leasehold

The urban land tenure policy of Ethiopia has passed through a range of paths at different times and regimes. In the period before 1975, the urban land tenure policy was a freehold tenure system that allows land to be sold, exchanged, rented, leased or transferred without restriction.[3] When the Dergue government came to power in 1975, it passed a new law i.e., Proclamation 47/1975, which introduced the monopoly of land ownership by the state which abolished private ownership of land and, perhaps terribly, banned any form of transaction in land.[4] The tenure system during the Dergue era (1975-1991) was then a public controlled permit system.[5]

In 1991, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) assumed power by deposing the Derge regime. Though the incumbent Ethiopian government followed similar land policy to that of the Dergue, the current land tenure system has its own peculiar features. Ethiopian urban land tenure system passed through two important periods since 1991. The first one is the period between

[3] Gondo, Tendayi, *Housing Informality in Expanding Ethiopian Cities: Moving beyond the 'New Normal' Syndrome*, in Manfred Schrenk et al (eds.) Change for Stability Life Cycles of Cities and Regions: The Role and Possibilities of Foresighted Planning in Transformation Processes (2011), p. 407

[4] *Supra note* 1

[5] *Supra note* 3

1993,[6] the time when the first urban land lease law was enacted by the then Transitional Government of Ethiopia (TGE), and 2011, the year when the new urban land Lease Proclamation was adopted, which is the turning point in the urban land history of the country. In 1993, the TGE introduced a public lease form of urban land tenure system in Ethiopia by virtue of Proclamation No.80/1993, as revised by Proclamation 272/2002 with a view to transfer use rights over land from government holding to private individuals. Apart from the revenue generation to support the urban infrastructure, one of the important objectives of the lease law was to "turn land from a timeless and costless resource into formally exchangeable commodity with both cost and time limit"[7] thereby increase land use efficiency and investment.

In order to explain what conversion of old possessions is all about, it is imperative to discuss what old possession is in the context of the present urban land lease regime of Ethiopia. The term old possession was not as such new concept in Ethiopia. In fact, the classification of urban landholdings into old possessions and new possessions (lease possessions) was first introduced by the first Ethiopian Lease

[6] It is to be noted that the Transitional Government of Ethiopia administered urban land based on the laws and policies enacted by the Dergue government until it enacted its own law in 1993

[7] Abuye Aneley, *Synoptic Reflection On Urban Land Administration Issues In Ethiopia*, (Unpublished), 2006, Windhoek, p. 5

Proclamation, Proclamation No. 80/1993. In many of its articles, the Proclamation regulated matters relating to old possession.[8] Similar conclusion may also be made after reading Art 3 of the Revised Urban Lease Holding Proclamation, Proclamation No. 272/2002.

Unlike the previous Lease Proclamations, the new Lease Proclamation comes up with an express definition of old possession. Accordingly, old possession as per Art 2(18) of the Proclamation refers to "a plot of land legally acquired before the urban center entered into the leasehold system or a land provided as compensation in kind to persons evicted from old possession." From this definition, it is easy to conclude that old possessions refer to all landholdings outside of the lease system. It follows that old possession refers to the following forms of urban landholdings. First, it refers to holdings that are given before the enactment of the new lease law if the urban center[9] was not a lease town. Secondly, in the case of lease towns, old possession refers to landholdings that were given prior to the introduction of the lease

[8] Urban Lands Lease Holding Proclamation, 2011, Arts 3 and 15 of the proclamation which expressly exclude old possessions from the scope of application of the proclamation and subjects some (vacant) land permitted for purposes other than construction of dwelling houses to the lease system respectively

[9] Urban center is defined by the new lease proclamation as "urban center" means any locality having a
Municipal administration or a population size of 2,000 or more inhabitants of which at least 50% of its labor force is engaged in nonagricultural activities". Urban Lands Lease Holding Proclamation, 2011, Art 2(3), Proclamation No 721, *Federal Negarit Gazeta*, Year 18, No. 4

system. Thirdly, it refers to the holdings that were given through the permit system in lease towns in which both, the lease system and the permit system were operating in parallel.[10] Fourthly, old possession refers to a holding that is granted as a substitute of an old possession if such possession is expropriated for public purpose.

3. Modalities of Converting Old Possessions to Lease System

As per the new Lease Proclamation, conversion of old possessions takes place in one of two ways. The first one is the future full-scale conversion anticipated by the law to transfer all forms of old possessions to the lease system. In respect to this, Art 6(1) of the Proclamation states that such conversion shall take place based on the modality to be determined by the Council of Ministers on the basis of a detailed study to be submitted by the Ministry of Urban Development, Housing and Construction.[11]

The second modality is a gradual conversion of old possessions into lease form of tenure. There are three specific situations in which old possession must be converted this way. To begin with, Art 6(3) of the Proclamation states that where a property attached to an old possession

[10] This was possible for two reasons. First, this practice was common in many parts of the country. Secondly, as Proclamation No 272/2002 empowers regional governments to decide on the specific matters relating to lease, some regional states used to allow the parallel operation of both systems of holdings

[11] Urban Lands Lease Holding Proclamation, 2011, Art 6(1), Proclamation No 721, *Federal Negarit Gazeta*, Year 18, No. 4,

is transferred to a third party through any modality other than inheritance, the person to whom the property is transferred becomes the possessor through lease holding.[12] The second situation refers to regularization of informal settlements. With regard to this, Art. 6(4) of the Proclamation states, "in order to regularize possessions held without the authorization of the appropriate body, the possessions which have found to be acceptable in accordance with urban plans and parceling standard following the regulations to be issued by regions and city administrations shall be administered by lease holding." The third situation is where an old possession is merged to leasehold.[13]

4. Reasons for the Conversion

One interesting question in connection with the conversion issue is why the government preferred to the conversion of old possessions to lease form of tenure. In Ethiopia, purposes of Proclamations are found in either of two parts of the respective Proclamation. Many of the Proclamations state their respective objectives at the preamble section of the Proclamation. On the other hand, some Proclamations expressly allocate an article that states the objectives of the Proclamation. As the Lease Proclamation does not allocate any provision dealing with the objectives, recourse will be made to the preamble part of the Proclamation. But none of the paragraphs in that part deals with old

[12] *Ibid.* Art. 6(3)
[13] *Ibid.* Art. 6(6)

possessions. While conversion of old possessions is one of the grand features of the Proclamation, the objectives of the conversion are not mentioned in the Proclamation. Thus, it is inevitable to resort to the overall circumstances and trends accompanying the urban land tenure in general and the new Lease Proclamation in particular.

Since 1993, lease has been the dominant form of urban land tenure system in Ethiopia. In major cities of the country, lease has been even the only means of land holding though it has diversified features and performance records. The repealed Lease Proclamation, in particular, stipulated a conversion of old possessions to lease system "as per the time and conditions to be set by the concerned region or city government."[14] In addition, that very Proclamation extends its scope of applications to towns other than the ones officially recognized to be lease towns during the re-enactment of the Proclamation in 2002 "as per the time and conditions to be set by the concerned region or city government." These together with the current prohibition of land provision other than the lease system[15] and the stipulation to convert old possessions to leasehold show that "uniformalising the urban land

[14]Re-Enactment of Urban Lands Lease Holding Proclamation, Art 3(2), Proc. 272, *Neg. Gaz.* Year 2002, No. 19

[15] *Supra note* 11, Art. 5

holdings under the unified leasehold system remained a long over-due project of the current government."[16]

Evidently, having a uniform system of landholdings has many advantages over having various tenure systems, administrative convenience to say the least. The main issue is why lease is preferred to the permit system in a situation where urban landholdings in the country currently are primarily held through the permit system.[17] Although this is a question difficult to answer because it is a policy choice, it is possible to estimate taking the overall benefit of the lease system into consideration. "The first and usual objective of any leasehold system is to collect enough capital money in the form of ground rent to finance the urban infrastructure systems"[18] The fact that lease is time bound and therefore certain plot of land may be re-leased after the expiry of the lease period also makes the revenue to be lucrative. Lease also attaches monetary value to land so that land is provided according to the market forces of demand and supply. Moreover, properly implemented lease in general and the auction-oriented system of lease in particular promotes transparency in land

[16] Belachew Mekuria, *Overview of the Core Changes in the New Ethiopian Urban Land Leasehold Legislation*, Mizan Law Review, Vol. 5 No. 2, (Dec. 2011), p.314
[17] *Ibid.*
[18] Daniel Weldegebriel, *The New Land Lease Proclamation: Changes and Implications*, http://www.thereporterethiopia.com/Politics-and-Law/the-new-land-lease-proclamation-changes-implications.html, Last visited on January 21, 2015

governance. In view of these, it is easy to conclude that the conversion is by and large justified by revenue motive and other advantages of lease system in urban land administration.

5. The Impact of the Conversion on Tenure Security

5.1. Conceptual Framework and Elements of Land Tenure Security

There is a direct relationship between land tenure security and socio-economic and political development of a country. There is, for instance, direct relation between land tenure security and investments on land which, in turn, is very much linked to improvement of standard of living of a nation's population.[19] As a result, access to land with sufficient tenure security forms central element of land-related development strategies for individuals, groups, cities, and nations. It is difficult, if not impossible, to achieve sustainable investment on land without tenure security.[20] Tenure security is even more important in urban than rural areas because the interplay of demand and prices of land is high.[21]

In as much as there is such an inseparable link between land tenure security and quality of life, the degree of the security of the tenure is

[19] United Nations Human Settlement Programme (UN-Habitat), *Secure Land Rights for All*, (2008), p. 13

[20] Geoffrey Payne, *Urban Land Tenure and Property Rights in Developing Countries: A Review of the Literature*, (1996), p. 13

[21] *Ibid.*

crucial for any urban life. However, first and foremost, let us outline the defining elements of tenure security so as to examine the implications of the conversion of old possessions on tenure security.

Land tenure security comprises two important concepts: land tenure and tenure security. In its general view, land tenure refers to "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. Rules of tenure define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints."[22] Generally speaking, land tenure includes three basic things.[23] First, land tenure refers to people's relationship to land. Second, land tenure is an institution through which individual's access to land and use right is determined. Thirdly, it denotes rules of the game through which the content of rights and duties of individuals with respect to land are defined. The relationships are usually defined by formal laws or customary rules. In both cases, tenure rules define land property rights regarding access, control and transfer of rights with corresponding duties and restraints.

Tenure security is defined in a variety of ways by different authorities. Yet, many agree that the term has two core elements. Land tenure

[22] Food and Agriculture Organization (FAO), *Land Tenure and Rural Development*, Land Tenure Studies 3, (2002), p. 12

[23] Gudeta Seifu, *Rural Land Tenure Security in Oromiya National Regional State*, Ethiopian Business Law Series, in Muradu Abdo, ed. Land Law and Policy in Ethiopia Since 1991: Continuities and Changes, Addis Ababa, 112

security refers primarily to an "effective legal protection against eviction or arbitrary curtailment of land rights, with enforceable guarantees and legal/social remedies against the loss of these rights."[24] [Forced] eviction refers to the permanent or temporary removal of an individual, families and/or communities from the home/land they occupy against their will and without the provision of and access to appropriate forms of legal or other protection.[25]

In the course of the eviction, wide range of rights may be violated either due to absence of justification/legality for the eviction or the way the eviction is carried out.[26] Expropriations effected without the fulfillment of the substantive or procedural requirements form among such kinds of evictions. To put it otherwise, any measure that entails an arbitrary denial of existing legally recognized land rights amounts to tenure insecurity.

The second major component of tenure security relates to the perception element that the land users have confidence that they will not be arbitrarily deprived of the rights they enjoy over their land and the economic benefits that flow from it.[27] This refers to the perception

[24] *Supra note* 19
[25] United Nations Human Settlement Programme (UN-Habitat), *Monitoring security Tenure in Cities: People, Land and Policies*, (2009), p. ix
[26] *Ibid.*
[27] UN-Habitat, *supra note* 19

of landholders in relation to their land that they would not be evicted from their holdings arbitrarily.

Hence, while the first component is related to objective elements that can reasonably be measured against the laws and policies of the tenure system, the second component deals with subjective elements related to the landholders' perception of the security of their rights.[28] Viewed from these two elements, the question, therefore, what the implication of the conversion of old possessions to leasehold form of tenure system are.

5.2. Conversion of Old Possessions viewed from tenure Security Point of view

As stated above, security derives from the fact that bundles of rights on land that are supported by known and legitimate set of rules cannot be challenged without reason and that, if they are challenged, local conflict resolution mechanisms and/or courts will uphold them. In exceptional circumstances, evictions or curtailment of land rights can take place but only by means of known and agreed legal procedures, which must be objective, applied equally to all, contestable, and independent.[29] This sort of protection is given to land holders by the Federal Democratic Republic of Ethiopia (FDRE) Constitution, which

[28] *supra note* 23

[29] French Development Cooperation, *Land Governance and Security of Tenure in Developing Countries*, (2009), p. 46

states that a property cannot be expropriated except in cases where this is necessary and upon payment of compensation.[30]

The specific substantive and procedural requirements that must be fulfilled to effect expropriation are provided by legislation and other subsidiary laws;[31] the major ones being the existence of public interest for the expropriation, payment of compensation and procedural safeguards such as notification of the landholder prior to the expropriation (at least 90 days before the eviction), and right to appeal,[32] etc. Thus, it is clear that land tenure security is a constitutionally guaranteed right in Ethiopia from legal point of view.

Now, it is time to examine the implication of the conversion against the backdrop of the above discussions. The new Lease Proclamation anticipates that old possessions shall be converted to leasehold in

[30] Federal democratic Republic Of Ethiopia Constitution, Art. 40 (8), Proc. No. 1, Neg. Gaz. Year, 1995, No.1, Although the constitution does not use the term 'eviction,' expropriation done in contravention to the legally protected property rights (rights over land and other properties attached to land) is one form of eviction.

[31] There are two important legislation in this regard which are Expropriation of Landholdings for Public Purposes and Payment of Compensation, Proclamation No. 455/2005 and the Council of Ministers Regulation on Payment of Compensation Situated on Landholding Expropriated for Public Purposes, Regulation No. 135/2007. There are also a number of subject matter-specific directives. Moreover, the provisions of the Civil Code relating to expropriation are also applicable on matters not provided by the above legislations and without contravention to same. See Civil Code of Empire of Ethiopia, 1960, Art. 1460-1488.

[32] In fact, the appeal right is defective on its own realm as it unusually limits it only to the amount of compensation excluding appeal on the very order of expropriation. See Art 11 of Proclamation No. 455/2005

accordance with Council of Ministers regulation "on the basis of a detailed study to be submitted by the Ministry of Urban Development, [Housing] and Construction"[33] which does not necessarily mean that the substantive and procedural safeguards provided in the Constitution, Proclamations and the subsidiary laws issued to implement the constitutional provision need to be complied with.

This may amount to expropriation of some elements of the property rights of the holders of the old possessions unconstitutionally. To begin with, in converting old possessions to leasehold, the law is converting time-boundless land use rights to rights bound by time. This is clearly an arbitrary curtailment of rights which amounts to expropriation. The concept of expropriation refers to "a governmental taking or modification of an individual's property rights, especially by eminent domain."[34] Accordingly, expropriation refers to either of two things: taking of the property over which property rights are exercisable by a government organ or modification of the constitutive rights of a property which is a case in the Lease Proclamation.

On another count, the conversion of old possessions to leasehold entails eviction/expropriation without compensation which is a serious

[33] *Supra note* 11

[34] Bryan A.Garner (ed.), Black's Law Dictionary, (8th Ed., 2004), p. 1585. Eminent domain according to same dictionary refers to the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.

setback to tenure security. As mentioned above, the property rights for indefinite duration that one has over a land will be limited by time as a result of the conversion. According to the Lease Proclamation, the right holder is not entitled to any compensation other than removing his properties attached to the land at the expiry of the lease period.[35] The fact that renewal of a lease after the expiry of the lease period is not a right recognized by the Proclamation exacerbates the situation.[36] Had the holder been able to keep on holding the land according to the permit system, s/he would not have been forced to surrender the land any time as s/he would have had an indefinite right. Because of the conversion, however, s/he is losing property right over that particular land without commensurate compensation for the damage s/he sustained due to the taking of the land by government. This is even direct expropriation of property rights without compensation and in contravention to the procedural safeguards provided by the Constitution, Proclamation and subsidiary laws and entails serious negative impact on tenure security.

Besides, holders of old possessions are disadvantaged by the time limit provided in the new law for a construction to be completed. The previous law does not set specific time duration within which construction shall be commenced and completed. As a result, the

[35] *Supra note* 11, Arts. 19(1), 25(5)
[36] *Ibid.* Art 19(1)

regional states have been flexibly approaching the matter taking their respective circumstances and the development level of their respective towns into account.[37] This situation used to allow the leaseholders to hold their possessions for long time which, in turn, gives them a chance to wait till they get better price in case they want to sell their holdings along with the improvements they have made on the land.[38] Moreover, the relatively relaxed duration for completion of constructions was an additional advantage for lease holders.

However, the new law provides two years time limit within which the construction of buildings must be completed provided this provision is applicable to the old possessions to be converted to lease system. On top of losing the economic returns attached with time, holders of old possessions have to face the two years' time limit for competition construction the moment their possessions are converted to leasehold. This, in turn, has been another point of concern and source of tenure insecurity.[39]

[37] *Supra note* 14, Art. 12

[38] It is to be noted, however, that this has been a source of concern for the government as significant parcel of land used to be kept idle that gave rise to negative effect on land use efficiency

[39] Araya Asgedom, *Salient Features of the New Ethiopian Urban Land Lease Holding Proclamation No.721/2011 and Its Implications on the Ethiopian Economy*, (Unpublished), 2013, Addis Ababa University School of Law, P. 28

Further, the fact that the Lease Proclamation compellingly changes the form of tenure from the permit system of indefinite duration to leasehold of definite duration by itself and on its own affects tenure security. If the legislature's power goes to the extent of changing the scope and duration of rights on land acquired in the past unpredictably, there is no guarantee, in the future as well, that it keeps its promises. Hence, there is lack of guarantee in enforcement of existing property rights. If the conversion is taken to be legally right, there would not be any wrong if the legislature, for instance, shortens the duration of lease for residential housing, science and technology, research and study, government offices, charitable organizations, and religious institutions from 99 years[40] to, say, 40 years.

One may even argue that the situation results in retroactive application of a law. Even though the principle has different weight in civil and criminal matters (it is very strict in the later case), it is a principle that has significant importance even in civil cases particularly when it comes to tenure security of property rights. Some writers argue that retroactive application of laws that adversely affects once-established property rights should be discouraged unless they are accompanied

[40] *Supra note* 11, Art. 18(1)(a),

with adequate compensation.[41] One of the reasons for the extension of the principle of non-retroactivity to civil laws is in order to prevent unfair and capricious changes in the law.[42]

True, Ethiopian law has limited the application of the principle only to criminal cases;[43] hence one cannot argue that the constitution is violated on this point. One may also argue that the law's application is limited only to future conducts and relationships. Hence, the argument of retroactivity of a law may not be as such sound enough. However, it is clear that the effect of the law is not limited to property rights acquired after the law as it curtails already established property right without compensation. Hence, it is reasonable to argue that the law has retroactively impacted rights acquired before its enactment which in turn undermines tenure security as it causes uncertainty to the legal environment of urban land tenure, to say the least.

5.3. Perception of the Public

The second and related component of tenure security is the degree of confidence that landholders would not be evicted from their holdings which is the perception (subjective) element. Indeed, this matter needs to be studied with a reasonable depth and across the country at large.

[41] Steve Selinger , *The Case Against Civil Ex Post Facto Laws*, Cato Journal, Vol. 15, Nos,2-3 (1995), p.207-212. See also Jan G. Laitos, *Legislative Retroactivity*, Journal of Urban and Contemporary Law, Vol. 52, No. 81, (1997), p. 81-157
[42] *Ibid.*
[43] *Supra Note* 30, Art. 22

Thus far, a comprehensive study that assesses the perception of the public arising out of the conversion of old possessions to leasehold form of tenure had not been conducted.

Yet, there are preliminary evidences that reveal the existence of the perception on the part of the holders of old possessions. To begin with, many of the urban landholders expressed their discontent and insecurity with the conversion in many instances. Following the enactment of the Proclamation, series of public discussions were held in the presence of senior government officials throughout the country. Conversion of old possessions to leasehold dominated much of the discussions in which vast number of the participants revealed their feeling of insecurity.

In a situation where overwhelming majority of urban land possessions are held by the permit system,[44] it is not surprising to see that the urban landholders were very much concerned about it. Also, the government did not hide the existing discontent and the perception of insecurity, but believes that this happens as a result of unfounded fear and that holders should rather convert their old possessions to leasehold taking the advantages of transferring to lease these days over the future

[44] *Supra note* 17

mainly because the lease price will be higher in the future than present, in a way mentioning the inevitability of the conversion.[45]

Secondly, some preliminary researches show that there is a real uncertainty caused as a result of the law that converts old possessions to leasehold form of tenure. In his investigation of the matter in Addis Ababa, Araya states that his informants are feeling unsecured because of the law. Such people have also been seriously affected by the law in respect to getting loans from banks. He found that banks are not extending as much loans as they used to extend before the adoption of the Proclamation "because location value will not be taken in to consideration and banks are not sure how much lease will a buyer pay in case the debtor defaults"[46] Similarly, the Proclamation has caused uncertainty on the part of potential buyers of old possessions. In Addis Ababa, for instance, Araya's finding revealed that evidences obtained from two Documents Authentication and Registration Offices in 2013 show transactions relating to old possessions fall by about 60-80% following the coming into operation of the Lease Proclamation.[47]

[45] Ato Mekuria Haile, Minister, Ministry of Urban Development and Construction said this in a discussion on a Draft Regulation to implement the proclamation. See ታምሩ ጽጌ ፣ "ካባር ይዞታ ወደፊት በሊዝ መካተቱ እንደማይቀር ተጠቆመ" ሪፖርተር፣ ቅዕ 17 ቁጥር 25 (የካቲት 28 ቀን 2004)፣ ገፅ 1 እና 42

[46] *Supra Note 39*, p.129

[47] *Ibid.* p.135

Further, the fact that the Proclamation requires that the issue of modality and time of conversion to be determined by the Council of Ministers after a thorough study is conducted by the Ministry of Urban Development and Construction is causing confusions and uncertainties. This leaves not only the holders of old possessions but also potential buyers under huge insecurity. It would have been better to first wind up the modality and conditions of conversion before the enactment of the Proclamation.

In describing the effect of the law, a certain writer contends that the law "raised confusions, doubts and uncertainties on urban land holdings."[48] He further argues that most urban land holders believe that the new law could arbitrarily dispose of their proprietary rights and reduce the value of improvements made on their holdings.[49]

From these, we can say that the Proclamation poses considerable negative impact on tenure security of holders of old possessions.

5.4. Legality of the Conversion

In this section, the legality of the conversion from the constitutional viewpoints will be investigated because such legality has its own impact on tenure security. In treating the legality of the conversion, it

[48] Yohannes Weldegiorgis, "*New Land Lease Law Expands State Ownership Extreme."* Fortune, 12(601), (Nov.06, 2011)
[49] Ibid

is good to start with the constitutional basis of the leasehold form of tenure as this answers some of the questions that may be raised in respect to the conversion.

In Ethiopia, the first lease form of urban land tenure system, as mentioned above, was introduced in 1993 by the then Transitional Government of Ethiopia, just two years prior to the promulgation of the FDRE Constitution. When the Constitution came into force in 1995, it, unlike the case of rural land which is expressly regulated, failed to provide any urban tenure system. Thus, it is difficult to take the federal constitution as the basis for the introduction and dominance of the lease system in Ethiopia.[50]

The reason for failing to regulate the matter is understood differently. While some argue that this is an implied endorsement of the already operating urban land lease system, others do not accept this line of reasoning on the ground that the constitution could have easily included it had that been the actual reason.[51] Given the weight that must be attached to the constitutional framework, constructing a constitutional basis for lease through the "implied endorsement" argument seems flawed. In fact, the Constitution clearly recognizes

[50] Molla Mengistu, *The Ethiopian Urban Landholding System: An Assessment of the Governing Legal Regime*, Ethiopian Business Law Series, in Muradu Abdo, ed. Land Law and Policy in Ethiopia Since 1991: Continuities and Changes, Addis Ababa, (2009), p. 157

[51] *Ibid.*

rural land lease as one modality of land acquisition for investors. Thus, it would have been possible to insert certain provision that deals with the urban land lease.

However, the legislation seems to violate some constitutional provisions from different perspective. For instance, the government did not consult the public to express its views before the issuance of the law. The FDRE Constitution has treated land specially and differently. Art 40(3) of the Constitution provides that land is a "common property of the state and the people of Ethiopia." Literally speaking, this constitutional provision makes the public a joint owner of both urban and rural lands together with the government.

There are two ways of understanding this constitutional proviso. The first line of arguments suggests that there is no distinction between the people and the state; hence the purpose is simply to forbid private ownership of land.[52] On the contrary, the second line of argument holds that the Constitution, by expressly mentioning that land belongs both to the people and state, considers the state and the people as two distinct entities. According to this line of understanding, the state and the people are separate entities and land is the joint property of these

[52] Melesse Damite, *Land Ownership and Its Relation with Sustainable Development, Ethiopian Business Law Series, in Muradu Abdo, ed. Land Law and Policy in Ethiopia Since 1991: Continuities and Changes*, Addis Ababa, (2009), p. 32

entities.[53] In line to the later point of view, Daniel argues that such arrangement creates a joint ownership of land between the people and the state which entitles the people for wider rights than simple use or lease rights.[54]

In this regard, the author thinks that the second line of reasoning is sound for the following major reasons. First, the Constitution has clearly mentioned that land is the joint ownership of the state and the people. To use Melesse's words, "it would be inappropriate to impair what is clearly provided by the Constitution."[55] Secondly, during the drafting of the Constitution, many members of the Constitutional Assembly argued that land is the common asset of the society and the later, mainly the pastoralist communities do not accept the agency of the state.[56] It follows that this was one of the reasons for arranging a joint ownership of the state and the people.

Joint ownership on the other hand creates a situation of equality between the parties. As such, decisions and laws relating to land cannot be unilaterally taken by the government which is just co-owner and not sole owner, of the land. This makes the issue of conversion by unilateral decision of the parliament, a political representative of the

[53] *Ibid.*
[54] *supra note* 19
[55] *Supra Note* 52, p. 32
[56] *Ibid*

public but part of the government (co-owner), against the law. It means that the public has a constitutionally guaranteed right to have a say directly. Hence, the public should have, at least, had the opportunity to air its views before the adoption of the law by the parliament.

Apart from the joint ownership argument, the conversion is not constitutionally acceptable because the public should have an opportunity to air its views on such law again because it hugely affects its interests. The FDRE Constitution explicitly recognizes the right to participation in the process of designing and implementation of developmental policies, laws and projects particularly when such instruments and/or projects affect them and the community they belong to.[57] Had the deliberation of the House of Peoples Representatives been enough, there would not have had a reason for the Constitution to provide for the public a right of consultation (participation). So, it is possible to conclude that the collective right of participation is also violated. In fact, it seems that there was a rush in passing the legislation even by the legislature itself. On this point, the speaker of the House, in his briefing to journalists in 2012 admits that

[57] *Supra note 30,* Art 43(2)

the Proclamation was approved "before taking deep and thorough discussion in the House" and he "got big lesson from it."[58]

On another count, the law leaves a room to partly rectify the lack of public participation limitation. The Proclamation, which stipulates that the entire conversion of old possessions is to take place in the future by a regulation of the Council of Ministers after a thorough study is conducted by the Ministry of Urban Development, Housing and Construction gives, one more chance to the public to air its views. According to the federal draft Model Regulation, old possessions will be converted in its entirety within five years time period.[59] In doing so, Art 6 of the Regulation requires conducting thorough discussions with the public before the conversion takes place. Even if this requirement cannot set an agenda on the very conversion decision, it gives an opportunity to the public to raise its concerns and pass an optimum solution within that framework.

[58] Solomon Bekelle, Abadula Admits problem with approval of the lease proclamation, http://capitalethiopia.com/index.php?option=com_content&view=article&id=1461:abadula-admits-problem-with-approval-of-lease-proclamation&catid=35:capital&Itemid=27 31 July 2012

[59] Art. 5, Council of Ministers Model Urban Land Lease Holding Regulation (Draft), (2011)

6. Conclusion

This paper investigated the impact of the new Lease Proclamation on tenure security of holders of immovable properties known as old possessions in Ethiopia. The findings reveal that the obligation for compulsory conversion of old possessions has negative impact on tenure security for the following main reasons. First, the conversion violates the constitutionally guaranteed right of joint ownership of land and the collective right of public participation. This endangers the rule of law and constitutionalism which are vital for tenure security as such constitutional principles enhance certainty, predictability and confidence of urban landholders. Secondly, the conversion impairs tenure security because it is an indirect expropriation without compensation and tenure security is a right that stands for protection of landholders against expropriation. Thirdly, there are preliminary evidences that show that the obligatory conversion requirement has brought about tenure insecurity of holders of old possessions in urban areas.

7. Recommendations

Taking the above discussions and findings into account, the writer suggests the following recommendations.

1. The government should table the issue of conversion of old possession to leasehold tenure and invite the public to discuss

on it. As a constitutionally equal party with the government on land matters, the public needs to meaningfully participate whether conversion is necessary and the way it should be implemented.

2. If the above recommendation does not happen for whatever reason, the government should seriously and meaningfully consult the public during the upcoming study for the future conversion of the old possessions. The study should also be conducted by independent body preferably neutral researchers (academicians) whose activities must be guided by a high level of objectivity and professionalism.

3. The writer also recommends for comprehensive study that investigates the impact of the Proclamation on tenure security of urban landholders in general by government and/or other stakeholders.

Court Review of Arbitral Awards through the Power of Cassation: A Case Comment on *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co*.

*Seid Demeke Mekonnen**

Abstract

Despite the existence of parties' autonomy in providing arbitration finality clause, a recent decision by the Ethiopian Supreme Court of Cassation Bench struck down a waiver agreement that prohibited the parties from appealing their case. The case is between National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co. The Federal Cassation Bench relied on article 80 (3) of the FDRE Constitution, Proclamation No.454/1997, article 356 of the CPC and the purpose of arbitration in its decision to strike down the arbitration finality clause. The Bench states that the mere existence of a waiver agreement cannot preclude a dissatisfied party from appeal, if the decision of the arbitral tribunal contains basic error of law. Therefore now, the purpose of this work is to comment on such a recent approach of courts control over arbitration process, in the situation where parties waived their right of appeal to avoid courts intervention. In this work, it is asserted that in the condition where courts lack a clear-cut and qualified approach in enforcing waiver agreements, merit review through appeal or cassation is nothing to do for the parties' interest when evaluated from the standing point of modern commercial arbitration.

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*LL.B (Mekelle University), LL.M in Business and Corporate Law (Bahr Dar University), Lecturer at Jigjiga University. The author can be reached at: seid1429@gmail.com Tel. +251-0924436319.

1. Method of Challenge: An Introduction

Globally, the most common methods of challenging from arbitral awards are to bring an action to annul, set aside, or vacate the award (the terms differ in different jurisdictions) in the court at the *situs* of the arbitration.[1] The level and form of review for arbitral awards varies between jurisdictions. However, three broad frameworks of review from arbitral awards by courts can be distinguished: i) a right to appeal matters related to both points of law and procedural fairness; ii) a right to challenge an award only for defects of procedural integrity in the arbitration; and iii) no judicial review at all.[2]

The majority of jurisdictions with leading arbitration legal regime adhere closely to the second model but there are a number of notable exceptions. England may be cited as an example in this regard. As per section 69 of the 1996 Arbitration Act of England, invoking error of law, parties to arbitration are permitted to opt out of judicial review on the legal merits of the case through appeal.[3]

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[1]The court at the seat of the arbitration is the proper court under the UNCITRAL Model Law, article 34. This is because the court at the *situs* is considered to have supervisory jurisdiction over the arbitral process to ensure that it was conducted in a fair and non corrupt manner.

[2]William Park, The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the United States?" *International Arbitration Law Review* Vol. 4, No. 2, 1998, p. 56.

[3]Report of The Departmental Advisory Committee on the Arbitration Bill 1996, Department of Trade and industry, Chaired by Lord Justice Seville, (London, 1996) , p. 285. In England, one way in which an award may be challenged is on a point of law. This is facilitated under section 69 of the 1996 Act. The reasoning for including a restricted right of appeal in this way was provided by the 1996 DAC's Report:

Holmes and O'Reilly question the value of section 69, noting that it "adds little to the cause of justice or the development of the law. As well as being contrary to the spirit of party autonomy…it is a source of cost and inefficiency".[4] Lord Hacking on his part criticised the provision for review of awards in the Act, pointing out that:

> *Unlike the UNCITRAL Model law, where there is no judicial review of arbitral awards, the parties under the 1996 Act must expressly agree to exclude judicial review. If not, the English Courts are entitled to judicially review arbitral awards.*[5]

A widely held view is that a review through appeal has no place in a modern transnational environment where the parties' objective in agreeing to arbitration is usually to get away from the courts of whatever country and entrust the resolution of their disputes – and especially of the merits of their disputes – to international arbitrators. Some countries regard even low level of control as unnecessary and are content to leave matters within the hands of the arbitrators. For instance, Belgium, Sweden and Switzerland permit parties to waive in their arbitration agreement provided that the parties are not nationals of or incorporated in the country in question.[6]

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[4]R. Holmes and M O'Reilly, *Appeals from Arbitral Awards: Should Section 69 be Repealed?* International Arbitration Law Review Vol. 3, No. 2, 2003, p. 1.

[5]Lord Hacking, Arbitration Law Reform: The Influence of the UNCITRAL Model Law on the English Arbitration Act 1996, *Journal of the Chartered Institute of Arbitrators*, Vol. 63, No. 4, (1997) , p. 56.

[6]Article 1717.4 of the Belgian Code Judiciaire allows a waiver where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal

It is not easy to strike a balance between the need for finality in the arbitral process and the wider public interest in some measures of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law. Internationally, however, the balance has come down overwhelmingly in favour of finality, and against judicial review, except in very limited circumstances. A great number of cases underline that the UNCITRAL Model Law does not permit review of the merits of an arbitral award.[7] This has been suggested that it applies in principle to issues of law,[8] as well as to issues of fact.[9]

Moreover, courts have regularly emphasized on the exceptional character of the remedy as courts should in principle not interfere with the decision of the arbitral tribunal.[10] The reason given by a court in Singapore for this minimal court intervention which respects the

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person having its head office or a branch there'; s. 51 of the Swedish Arbitration Act allows a waiver where none of the parties is domiciled or has its place of business in Sweden; and article 192 of the Swiss PILA allows a waiver of an action to set aside if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland. Belgium previously experimented with a law that removed entirely the parties' right to recourse against the award (rather than making it subject to the agreement of the parties) where none of the parties was a national of or incorporated in Belgium.

[7]For example, Cairo Court of Appeal, Egypt, 5 May 2009, case No. 112/124; Amman Court of Appeal, Jordan, 10 June 2008, No. 206;also see Oberlandesgericht Karlsruhe, Germany Supreme Court, Judgment, 14 September 2001,case No. 321/134, para. 10, available at http://www.dis-arb.de/de/47/datenbanken/rspr/olg-karlsruhe-az-10-sch-04-01-datum-2001-09-14-id1268

[8]*Navigation Sonamar Inc. v. Algoma Steamships Limited and others,* Superior Court of Quebec, Canada, April 1987, Case No. 10, Para. 16.

[9]*Ibid*

[10]*Quintette Coal Limited v. Nippon Steel Corp. et al.*, Court of Appeal for British Columbia, Canada, 24 October 1990, Case No. 16, Para. 2241.

finality of the arbitral process is that it "acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen".[11]

In practice, parties occasionally seek to agree on the available recourse against an award, either by excluding or modifying the right to recourse against an award. In some jurisdictions, parties to arbitrations may be able to exclude their right to challenge an award. For instance, under the arbitration laws of both Switzerland[12] and Belgium,[13] parties by express agreement exclude the right to challenge the arbitral award.[14] This may be attributed to the fear that courts may undermine arbitral procedure and devalue the currency of an award.

Under the Ethiopian arbitration law, there are three recourses where parties can challenge arbitral awards.[15] The first is appeal. A party can appeal from the awards of arbitrators to ordinary courts based on the grounds listed under article 351 of the Civil Procedure Code (CPC). However, parties can waive this right of appeal provided that they are with full knowledge of the circumstance.[16] The grounds of appeal are: i) inconsistency, uncertainty or ambiguity of the award or when the

[11]*CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK,* Court of Appeal, Singapore, 13 July 2011, para. 25.
[12]Swiss PIL, Ch. 12, Art. 192.
[13]Belgian Judicial Code, as amended in 1998, Art. 1717(2).
[14]However, for a contrary view see the Swiss Supreme Court's annulment of an award rendered by the Court of Arbitration for Sport (CAS), in which waivers to challenge awards were held to be invalid, 22 March 2007.
[15]Ethiopian Civil Procedure Code, 1965, Art. 350-357.
[16]*Ibid*, Art. 250(2)

award is wrong in matters of law or fact; ii) the arbitrator omitted to decide maters referred to him; or iii) irregularities of proceeding and misconduct of arbitrator.[17]

The second recourse is setting aside. This procedure, if granted, has the effect of nullifying and voiding the award if the court is convinced that the grounds enumerated under Art. 356 of the CPC are committed in the arbitration proceeding. The grounds are: i) when the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or had lapsed; ii) when the reference being to two or more arbitrators, they did not act together; or iii) when the arbitrator delegated any part of his authority, whether to a stranger, to one of the parties or to a co-arbitrator. The third recourse is a review by the Cassation bench which is always available for a party even if the arbitration agreement provided for the finality of the arbitral award.

Rather than reviewing the merit of the case, courts sometimes remit awards for reconsideration by the arbitrators. As provided under article 354 of the CPC, arbitrators may be ordered to correct the mistakes mentioned under 351(1) (a) and (b) of the CPC.[18] In such cases, the appellate court may confirm or remit to the arbitrators to reconsider their decision within three months. When the court orders remit for

[17]*Ibid*, Art. 351.
[18]The sub-articles are: "(a) the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact; [and] (b) the arbitrator omitted to decide matters referred to him."

reconsideration, there will be a possibility of a second award by the arbitrators.

2. The Case: *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co*.[19]

2.1. Facts and Issues

The case related to gold mineral drilling contract entered between National Mineral Corp. Pvt. Ltd (the appellant) and Danni Drilling Pvt. Ltd. Co (the respondent), where it initially has been submitted to arbitral tribunal. On June 2000 E.C the tribunal decided that the appellant should pay birr 579, 450 to the respondent. In addition, the tribunal decided that the appellant should pay birr 700, 000. 00 penalty for the damage resulted up on the respondent due to the delay for 35 days after the agreed time to begin the drilling contract. Though the appellant appealed to Federal Supreme Court, the court dismissed the appeal based on article 337 of the CPC.

Invoking mistake of law in the arbitrators' decision, the appellant further appealed to the Cassation Bench in 2001 E.C. Accordingly, the appellant asserted that since the respondent has terminated the contract by his own initiation and without good causes; hence, the birr 700, 000 penalty for the delay of 35 days could not be justified by any contractual and legal bases. The appellant also argued that the arbitral

[19] National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co, (Federal Supreme Court Cassation
Bench, Civil Case No. 42239, Tikimt 29 2003 E.C), Vol, 2, P. 346-351. The case provided here is a summary of facts selected based on relevance to the issues of this comment.

decision was without taking in to account the Civil Code provisions concerning rules on interpretation of contract; and further alleged that the overall decision of the tribunal was without relevant evidences.

Whereas, on March 2001 E.C. the respondent on his part submitted written response arguing that since waiver agreement is entered concerning appeal right from the arbitral award, the Cassation Bench should dismiss the appeal; or, the Bench should dismiss the claim since it is unacceptable as it lacks both legal and factual bases.

After investigating the argument of the two sides, the Bench framed two major issues: i) based on the parties' contractual agreement, whether or not the appellant could submit the current complaint to the Cassation Bench; and ii) whether or not the decision regarding the compensation for 35 days, which has been awarded to the respondent, is based on a persuasive argument showing the failure of the appellant in discharging its duty.

While ruling on the first issue, the Cassation Bench asserted that to comply with the very purpose of arbitration, and uniform interpretation and application of the law, the mere fact that the existence of arbitration finality clause could not be invoked as a ground to reject the appeal, where the tribunal's decision contains basic error of law. The Bench further stated that the case has to be evaluated alongside the background of Proclamation No. 454/1997 and the Ethiopian Constitution that give mandate to the Cassation Bench to ensure

uniform interpretation of laws throughout the country. The Bench further noted that the mere fact that the parties consent to give arbitration finality clause does not necessarily imply their intention to avoid their right to appeal. In addition, the Bench accredited that the grounds of appeal from arbitral awards are mentioned under article 351 of the CPC; and confirmed that this provision including article 356 do not provide a way to cassation procedure in order to entertain an appeal from arbitral awards.

2.2. Decision of the Bench

Invoking article 80(3) (a) of the FDRE Constitution, article 2(4) of Proclamation No. 454/1997 and article 356 of the CPC, the Cassation Bench decided that:

1. The previous decision of the Cassation Bench on cassation file No. 21849, that rejected appeal from an award waved by arbitration finality clause, is now reversed aligned with the background of Proclamation No. 454/1997 Art. 2 (4). Thus, the court can entertain the case albeit parties' agreement to waive their right of appeal. This decision is concerning the first issue; and
2. With regard to the second issue, based on article 348(1) of the CPC, the Bench dismissed the birr 700, 000 in compensation for the 35 days of delay that has been awarded by the arbitral tribunal, asserting that there is no legal bases that oblige the applicant to pay such a compensation.

3. The Justification of Mistake of Law to Nullify Arbitration Finality Clause and the Issue of Parties Autonomy

As has seen, the case contains two issues. However, the purpose of this work is to comment on the first issue that relates to the procedural power of the Cassation Bench of the Federal Supreme Court to entertain an appeal from arbitral tribunals, where the parties in the arbitration agreement have waived their right of appeal. The second issue seized by the Bench is, thus, not dealt with here.

3.1. Appeal and Setting Aside Procedures: The Confusion

When reading the case at hand, one can understand that the Bench has confused appeal and setting aside procedures applying them interchangeably. Despite the different nature of those two procedures, the Bench resorted to the grounds of setting aside for appeal.

Numerous jurisdictions have made it clear that setting aside proceedings are not appeal proceedings in which evidence is re-evaluated and the correctness of the arbitral tribunal's decision on the merits is examined.[20] The underlying rationale for that approach is that the arbitral tribunals decide in place of the State courts and does not

[20]Apa Insurance Co. Ltd. v. Chrysanthus Barnabas Okemo, (High Court, Nairobi, Kenya, 24 November 2005), Miscellaneous Application 241 of 2005; Simbymanyo Estates Ltd. v. Seyani Brothers Company(U) Ltd**.,** **(**High Court of Kampala, Commercial Division, Uganda, 23 August 2004), Misc. Application No. 555/2002; Sofía v. TintoreríaParis, (Madrid Court of Appeal, Spain, 20 January 2006, case No. 19/2006), Para. 132; Government of the Republic of the Philippines v. PhilippineInternational Air Terminals Co., Inc., (High Court, Singapore appeal No. 43/132, 17 November 2006), Para. 206.

constitute a first instance.[21] Therefore, for instance, the rules for appeal proceedings in relation to extension of time limits[22] or any other possible remedies[23] do not apply for setting aside procedure.

An action to set aside is, therefore, quite different from an appeal. It is designed to ensure that courts exercise a minimum level of control over the procedural and jurisdictional integrity. Thus, using the grounds for setting aside decisions as provided under article 356 of the CPC as a basis to entertain an appeal and challenge arbitral awards is, by no means, justified.

3.2. Arbitration Finality Clause and the Supremacy of Parties' Autonomy

As per the Cassation Bench's reasoning, the mere fact that the existence of arbitration finality clause should not be brought into play to reject appeal, where the arbitrators' decision contains basic error of law.

As to the writer's opinion, as far as arbitral award is concerned, there should not be an appeal right from arbitral award at all, in the condition where the contracting parties waived their right of appeal; as

[21] E,g.Hundral PLC v. ShamacKedir, (Cairo Court of Appeal, Egypt, case No. 112/124, 5 May 2009), Kaldomiloniad v. Kiar Flour share company, (Amman Court of Appeal, Jordan, No. 206, 10 June 2008), Oberichshudgan v. Tranford WC PLC, (Germany Supreme Court, Judgment,case No. 321/134) para. 10, 14 September 2001, http://www.dis-arb.de/de/47/datenbanken/rspr/olg-karlsruhe-az-10-sch-04-01-datum-2001-09-14-id1268 Last visited on 23 January 2013.

[22] *Ibid*, *ABC Co. v. XYZ Ltd.*

[23] Uniprex S.A. v. Grupo Radio Blanca (Madrid Court of Appeal, Spain, 22 March 2006, case No. 178/2006—4/2004), Para. 57

far as the parties made the clause with full knowledge of the circumstances as provided in article 350(2) of the CPC. For example, parties may state that: the award will not be subject to any right of appeal which the parties hereby irrevocably waive. In view of this, the only room to disable such a waiver agreement is if an allegation is made by a dissatisfied party proving that the agreement was without full knowledge of the circumstances. However, the existence of mistake of law in the decision of an arbitral tribunal is not devised to reject a finality clause rather such a ground is provided under 351(a) of the CPC only as a ground for an appeal from an arbitral award. Thus, an appeal should not be brought unless the appellant has first exhausted any available arbitral process of appeal or review. Above and beyond, in case where waiver of the right of appeal exists, the only available recourse is setting aside the award based on article 356 of the CPC.

Moreover, mistake of law justification to review the merit of the case is not persuasive in the situation where the arbitration legal regime authorizes courts to remit the award for reconsideration by the original arbitrators. As provided under article 354 of the CPC, arbitrators may be ordered to correct the mistakes mentioned under 351(1) (a) and (b) of the CPC, that is, including mistake of law. Besides, it can be argued that more than judges, arbitrators are the masters of the issues in the case. Arbitrators tend to be very thoughtful of the parties, and considerate in their interactions with them. It is in their interest to be

perceived as thoughtful, fair-minded, and reasonable.[24] Unlike judges, arbitrators are chosen by the parties, and, of course, they would like to be chosen again to reconsider their decision that has been challenged due to error of law.

While the error of law justification of the Bench may seem appropriate to the dissatisfied party, it does not meet the demands of the current commercial arbitration and the universal trend. At present, the most pressing need appears to be that of reducing the cost of arbitral proceedings which, it is argued, will become even more acute in the present economic conditions if arbitration is to distinguish itself from litigation.

The trend in legal systems around the world is towards immunising the award from judicial challenge on the ground of error of law, and indeed the Model Law envisaged no appeal.[25] Furthermore, allowing the court to substitute its own view for that of the parties' chosen tribunal amounts to subverting the parties' choice of arbitration in preference to litigation.[26] This is against the very purpose of arbitration, particularly the supremacy of parties' autonomy. The fundamental principle that party autonomy underlies arbitration is recognized now by nearly all international arbitration laws, rules, and

[24]Michael, Reisman, *et al*., *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Dispute*, Cambridge University Press, New York, 1997, p. 712.
[25] Fraser Davidson, *The New Arbitration Act – A Model Law?* Journal of Business Law Vol. 1, No. 2, (1997) , p. 122.
[26]*Ibid*. p. 113; UNCITRAL Model Arbitration Law, 1985, Art. 16.

conventions.[27] Many agreements between parties today include arbitration clauses with an explicit choice of law, and, in keeping with the principle of party autonomy, the parties' choice of law is invariably applied by arbitrators.[28] The parties' freedom to choose what law will govern their dispute is also confirmed in most international arbitration rules.[29]

In the context of Ethiopia and from a commercial standpoint, the possibility of going for a long court proceeding, often of dilatory character, after an arbitral award is rendered will make the country a less attractive option to parties choosing a forum for international arbitrations.[30] Companies that operate businesses in Ethiopia assert that the country's judicial system remains inadequately staffed and inexperienced, particularly with respect to commercial disputes.[31]

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[27]Emmanuel Gaillard, *The Role Of The Arbitrator In Determining The Applicable Law*, The Leading Arbitrators' Guide To International Arbitration, 2004; Robert Merkin, *Arbitration Law*, 3rd Edition., London, Informal Business Publishing, 2004, p. 185.

[28]W. Michael Reisman Et Al., *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Dispute*, (1997) , p. 712.

[29]Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition, Cambridge printing press, Cambridge, (2001), p. 560; Julian D.M. Lew Et Al., *Comparative International Commercial Arbitration*, oxford printing press, Oxford, *(*2003), p. 413

[30]Textually, the provisions under both the Model Law and the Ethiopian Arbitration law are similar in scope but it is submitted that the Model Law may permit a narrower possibility for intervention to rescue arbitral proceedings given the underlying philosophy of this legislative framework. This is an example of a situation in which restraining the courts may negatively impact arbitral proceedings.

[31]Booz, Hamilton, Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic, United States Agency for International Development (USAID), January 2007, p. 66-72.

Judges often lack understanding of commercial matters and scheduling of cases often suffer from extended delays. The companies further assert that courts excessively intervene in every process of commercial arbitration; and there is no guarantee that the award of an international arbitral tribunal will be fully recognised and enforced.[32] Here, it should be known that friendly arbitration rules attract foreign investment. However, if hostile courts intervention exists, investors will not have confidence that their property will not be confiscated, even if this occurs, they may have a remedy to fair arbitration, which they can enforce everywhere.

Coming to the presented case, the Cassation Bench has also invoked the purpose of arbitration in reaching at its decision. This is really objectionable and it is a misunderstanding of the purpose. Where the parties have an agreement that lays out the manner of resolving a dispute, the consensual nature of arbitration demands that the manner in which they have chosen to resolve their disputes be respected in every way possible. The authority of courts should come solely from agreements between parties. As arbitration only exists as a result of party consent, the parties' choice of arbitration cannot easily be replaced by the unilateral decision of courts. Thus, great consideration

[32]The main source of those companies' fear is usually the fact that Ethiopia has signed, but never ratified, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Ethiopia has also neither signed nor ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

must be made to party intentions and expectations as a tribunal only has authority to hear a dispute if the parties intend that it does so. Rokinson explains that:

> *It is probably true to say that the majority of those who include arbitration clauses in their contracts, and certainly those few who refer a specific dispute to ad hoc arbitration, do so because they do not wish their disputes and their commercial relationship to be referred to a national court, whether out of a desire for privacy or a fear for a suspicion of bias.*[33]

Formerly, the role of Ethiopian courts in arbitration process was criticised for maximum intervention which extends to reviewing the merit of the case through appeal. Unfortunately, in recent practice, the Cassation Bench rather than minimising the point of criticism, is aggravating it by stretching the court intervention more than the former limits, that is, by paralysing arbitration finality clause. Previously, the clause was utilized to escape from the wider courts intervention approach. Contradicting its previous position that recognised arbitration finality clause,[34] in the presented case, the bench stated that the case has to be evaluated against the background of article 2(4) of Proclamation No.454/1997 that reads:

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[33]Kenneth Rokinson QC, *Pastures New: Review of the Arbitration Act 1996, in Arbitration Insights:* Twenty Years of the Annual Lecture of the School of International Arbitration, Lew and Mistelis eds., 2008, note 45, p. 214.

[34]*National Motor Corp. v. General Business Development*, Federal Supreme Court Cassation Bench, Ethiopia, 1997, file No. 21849 (1997) The cassation court recognised arbitration finality clause at its decision in the case between.

> *Interpretation of a law by the Federal Supreme Court rendered by the Cassation division with not less than five judges shall be binding on federal as well as regional council at all levels. The Cassation division may, however, render a different legal interpretation some other time.*[35]

In the previous decision of the Cassation Bench, a waiver agreement was deemed to be the parties' autonomous right. In the case between *National Motor Corp. v. General Business Development*, the court rejected the appeal invoking the arbitration finality clause made by the parties' agreement.[36] Hence, it is a trite fact to articulate that divergent decisions made in the case at hand is contradicting this previous decision albeit the issues are of the same kind in both cases, i.e. the recognition of finality clause in arbitration. Now, the issues are: how does legal certainty come in the situation that the bench holds one position today and contradicts it tomorrow? And, is the power vested in the Cassation Bench absolute and without any limitation? That means, can it be stretched to interfere in parties' autonomy in a contract where parties, by their free consent, waived their right of appeal to avoid court intervention?[37]

Overall, to the opinion of the writer, the regime of appeal from an arbitral award is under pressure in Ethiopia because the legal theory

[35] Art. 2(4), Proc. No. 454, Neg. Gaz. Year 11, No. 42.
[36] Supra note 34.
[37] In relation to parties' autonomy, the contract law of Ethiopia clearly specified under the Civil Code, article 1711 that: "*The .object of a contract shall be freely determined by the parties subject to such restrictions and prohibitions as are provided by law*."

that sustained it under the CPC has all but disappeared. This is on the one hand, due to procedural confusion made by courts just to assume power in an unjustified manner; and on the other hand, due to hostile approaches of the courts that extends up to paralysing arbitration finality clause, which was formerly considered as a manifestation of parties autonomy. Here, it should be noted that judicial intervention in arbitral proceedings may have two consequences for arbitration. First, it may serve as a way of supporting arbitration when its control is at its minimum or friendly. Second, in contrast, it is a way of hindering the process and, in some instances, may undermine arbitral proceedings when the court's control is maximum or hostile, like the practice of the Cassation Bench in the case at hand. And, it should be noted that, as Sedler commented, an award is not subject to review to the same ground as a judgment.[38]

Concluding Notes

In the presented case, the Bench seemed to have difficulty properly differentiating appeal and setting aside procedures; it does not seem to read well into the normal understanding and interpretation of a clear law. The misinterpretation seems that the Bench is applying the law in such a way that it confers it with a power. This is a move towards a more hostile approach against arbitration process than the previous practice, in the situation where the world is shifting towards arbitration

[38] Sedler, R. *Ethiopian Civil Procedure.* Addis Ababa, Haile Selassie I University Press, (1968), p. 388.

friendly approach. A critical analysis of the approach taken by the Cassation Bench in light of contemporary developments in international commercial arbitration has much normative value. In particular, the importance of harmonizing it with the increasing globalisation of trade is underestimated. Hence, the position of the Bench should be re-evaluated given the present importance of inward foreign investment.

The test of injustice is intended to be applied by way of support for the arbitral process, not by way of interference with that process. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration with finality clause, the parties cannot validly complain of injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. And, the mere interest of courts to review the merit of arbitration decisions should not justify an invocation of a mistake of law as a ground to paralyse a waiver agreement, where in our procedural law the mechanism of remitting for reconsideration is devised as a sensible way out to strike a balance between the supremacy of parties' autonomy and the demand of justice.

Generally, as is plainly evident from this work, a strong emphasis on the need to maintain party autonomy is fundamental to the arbitral process and this should be the position to be upheld by judges. The

writer would advocate for this test to be applied constantly even to other arbitration cases which allow for judicial intervention given that it is likely to remind judges of the importance of maintaining respect for party autonomy when matters concerning arbitration reach at the forum of litigation. Judges should follow arbitration friendly approach and that the judiciary should respect the choice made by the parties to the arbitration.

Legal Education in the Evolution of Law and Development and constitutions in a Non-colonized African State*

M. Wray Witten J.D., M.P.A.

Ethnicity, new laws and decentralization have many facets. But, from the evolution-of-law perspective, most essentially these terms suggest to me the need to balance competing values: thus, ethnic diversity must be balanced against national cohesion, as well as individuals' rights; from various generations' laws and, now, from various jurisdictions' laws, the controlling law must be chosen; and states' rights must be defended against the power of the federal center. I'm sure Belgium does not need to be reminded of these tensions.

But they have been important in starting a new model law school, a task very much on the fault line defined by these competing values. The overall process is not unique; but doing it in such an extremely poor country as Ethiopia, with its 60 million people living with a per capita GNP of less than 80 Euros per year, introduces profound difficulties and moral responsibilities. One essential consequence of working in an extremely poor country is the moral demand for efficiency.

When we began about six years ago, the idea of starting a Law Faculty outside of the federal capital actually caused laughter. But sensitivity to the needs of diverse ethnic groups, new laws, and decentralization have today made Mekelle

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University Law Faculty the model for five new regional public Law Schools scattered around what used to be the forgotten periphery of Ethiopia. And its founding principles are part of the core of the World Bank Poverty Reduction Strategy for Ethiopia.

Mekelle University is located in Mekelle, the capital of the new State of Tigray. Tigray is probably best known to foreigners as the origin of the Tigray People's Liberation Front, still the dominant party in the ruling coalition party, the Ethiopian People's Revolutionary Democratic Front. As such, Tigray has often provided a laboratory for this government's new policies and strategies.

Others will no doubt point out that Tigray is relatively homogenous, with only two small areas dominated by non-Tigrayan ethnic groups. But because the new public regional universities are part of the Federal university system:

- each one teaches students from all of Ethiopia's 80-something ethnic groups (all higher education is in English);
- each must teach both federal laws and the new laws of the new states; and
- each has the potential to play an essential role in the capacity building and advising necessary to make decentralization more than just a slogan.

Thus, ethnicity, new laws and decentralization have both driven the design of the new laws schools and, in turn, addressed those realities. One of the predominant places in Ethiopia today where ethnic groups either come to blows or learn to negotiate coexistence, where state and federal laws are studiously compared, and where the personnel necessary to make decentralization work

are trained, is on the university campuses. At Mekelle University the Law Faculty has been active in all three areas. For example, during student unrest due to ethnic issues Law Faculty staff and graduates have played a key role in maintaining peaceful dialogues.

The evolution of the law is always an issue for legal education. Other speakers will more thoroughly review the details of that evolution, but here is my very brief overview. Lacking a colonial legacy, Ethiopian law is today an eclectic mix of a wide variety of local traditional and customary laws (often influenced by Roman law through church law), centrally promulgated codes imported in the mid-Twentieth Century from European Continental civil law systems, as well as from Britain and North America, and modified to fit Ethiopia, with further more radical components in the Soviet style, and yet more recent revisions in the style of a liberal market democracy.

To all of this, the new States are now adding their own laws and regulations in many areas of the law, particularly in the areas of land and family. In fact, so eager were the states to legislate on issues of importance to their citizens that, even though promulgation of land law was reserved to the federal government by the 1995 Constitution, the states began legislating and the federal government, subsequently, delegated to them its authority to do so, at the same time curing any Constitutional defect of lack of authority.

Probably the primary effect in Ethiopia from its lack of a strong colonial legacy is that the resulting mélange of laws now in place contains more than the usual variety of foreign influences and is, as a result, probably less coherent than a

single imported body of law might have been. Ethiopia may find that to be a strength, weakness, or both, once sufficient legal construction and commentary has accumulated.

One of several foreseeable further important steps in the evolution of the law resulting from the new state laws will, therefore, be the adoption of what Americans call Conflicts of Law, or, as it is still known in Ethiopia private international law, even though it is the domestic components that are now required by federalism. Fittingly, the Mekelle University Law Faculty is just completing the draft of a new federal conflicts of law code, an assignment from the Federal Government.

But more broadly, the interpretation of this mélange of laws has always been, and, as the law continues to evolve, will continue to be, central to legal education. This was a complicated task even before federalism. Initially, predominantly young American lawyers started Ethiopian legal education at Haile Selassie I University, now Addis Ababa University, shortly after Emperor Haile Selassie promulgated the modern codes, in the early 1960's. it was Americans exactly because Ethiopia had no colonial legacy.

But most of those fresh American law school graduates hired to teach and to prepare the very first teaching materials had had no exposure to the sources of Ethiopian law, knew nothing about comparative law, had not even taken a course in jurisprudence as a subject, and new little or nothing about Ethiopia and its diverse peoples and their customary laws. In preparing the first teaching materials, it must be noted, this crew usually found itself producing the very first interpretations of the new codes, certainly a daring task for such an

uninformed lot. As might be expected, they often arrived at quite odd interpretations. Yet their interpretations had, and have continued to have, huge influence.

For example, they failed to recognize that the rules of evidence are scattered through the codes in the civil law style. Instead, they decided they were missing and simply imported the American Rules of Evidence through the classroom. To this day judges regularly must reject arguments based on the irrelevant American rules.

Expanding on this point for a moment, it is important for every law school to note how much of what it teaches entails "informal institutions", using North's[1] sense of "institutions" as the "rules of the game". Interpretation of law is thus embedded in a social milieu comprised of both formal institutions (e.g., written and procedurally sound laws) as well as informal institutions (such as, traditions of interpretation and application of the formal rules). My own confusion in understanding Ethiopian interpretations of Ethiopian law has made me realize the great extent to which what lawyers bring to interpreting the law is informal and how much of the informal is passed along during legal education, often without critically reasoned analysis. Usually I find that it is because I have not been through the Ethiopian legal education process, and thus do not carry all this informal baggage, that my interpretations of the law differ from my colleagues. When we get down to the details of our different interpretation they usually turn on informal rules.

Injecting the notion of institutions is useful because from it we know that formal rules are relatively easy to change but informal rules tend to be more refractory. This, in turn, should lead law schools generally to pay just as much attention to the informal rules they propagate as to the letter of the law. But recognizing the role of informal institutions is also, I think, likely to reinforce the decision to establish regional law schools, and to enlarge the role of those regional law schools in the interpretation of local laws, because they are closer to the local sources and influences there.

So, for example, we often find that conflicting interpretations of law arise because their proponents rely on arguments by analogy, leveraged with different informal rules of interpretation that draw into one area of the law formal rules from another area of the law. For example, there is the informal convention in Ethiopia of using formal contract interpretation rules to interpret proclamations. There is no basis in Ethiopia's formal law for this practice. It was proposed as a last resort in one of the earlier law review articles written by a foreign law professor and continues to be propagated as if it were a part of the formal rules, only harder to change.

In fact, the current Dean of the first Ethiopian Law School, now Addis Ababa University Law School, who is one of its earlier graduates, once told me that nothing had ever been changed there, implying, I gathered, that they were running a sort of museum. If that is true, we must tarnish the image of the Americans for what they omitted, as well as burnish it for the great amount they achieved.

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[1] Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990.

As we began the establishment of Mekelle University's new model Law Faculty, we initiated a lengthy inquiry into the state of legal education in Ethiopia, culminating in a Curriculum Review Workshop. We found that Ethiopian legal education seemed to be ossified at a very low level of productivity[2]. By the late 1990's there were only a few trained lawyers in Ethiopia, little or no current legal research, and almost no new teaching materials or methods. Ten years into a federal form of government, the same teaching materials from the Imperial 1960's were being used; only federal law was being taught – without any mention of the state laws which predominate in a growing number of important areas such as land, family and environment; and practical skills courses and clinical legal education programs did not exist.

As such, the existing legal education had not heeded the call for efficiency and was not responsive to the new form of government in which ethnicity is celebrated, some of the most sensitive new laws (e.g., family and land laws) are state laws, and a decentralized Ethiopia can not afford to turn out professionals

[2] During the seminar, Tsegaye Regassa, a lecturer at the Ethiopian Civil Service College (ECSC) and Ph.D.-researcher in Amsterdam, who also spoke at the seminar, reminded me of several facts: that some of the malaise in legal education was a result of the Derg's infatuation, or at least use of, Soviet style Marxist analysis and legal structure and process; that there were great expectations for the reform of legal education by the ECSC Law School at its launch in the early 1990's; and that the task of the ECSC (training any state employee sent to it in law) was so daunting that little more than replication of the AAU Law School was possible until later. I knew about this because the then Dean of the ECSC Law School was a member of the Task Force that guided the establishment of MULF and often remarked upon it as we moved forward in ways he found he was unable to. By now, the ECSC has also made a great deal of progress, though often in different ways. For example, the new teaching materials prepared by ECSC on Property, and gratefully used by MULF, only mention State land laws briefly while MULF supplements the materials extensively with the State land laws in its Property courses.

who don't know how to do their jobs. In response to this state of affairs, the Curriculum Review Workshop, which had assembled many of the legal educators and much of the justice sector establishment together in Mekelle, responded by revising the curriculum (described further, below) and encouraging the new Law Faculty to create a dynamic new form of evolving legal education.

I have never thought the ossified state of legal education in Ethiopia was intentional. The instructors at AAU Law School are marvelously well trained, able and cognizant of the problems. It has, instead, usually seemed to me that the situation simply provides further evidence of the fact that actually making change occur is much harder than knowing it is necessary, and that it is easier to make changes in a new organization than in an older one.

However the situation of legal education in the mid-1990's came to be, those given the task of starting the new model law school at Mekelle University were convinced by the review of legal education that the new Law Faculty would have to change legal education, particularly finding ways to teach practical skills, cover state and local laws along side federal laws, and acquaint students with the law's powerful impacts on different peoples before turning them loose on a society that would have no alternative other than to immediately grant to their young selves enormous power.

But it was equally obvious to us that, in order to make these changes, the Law Faculty would have to produce a new kind of teacher, new teaching methods, and new teaching materials. Looking within Ethiopia for resources with which to do this we found that there were few, primarily a consequence of extreme

wealth effects. First, most of the people with a legal education had primarily studied in Ethiopia and the way they had been taught would be the primary influence on their own teaching. And second, in the course of fifty years very few law review articles and case comments had been published, leaving such vast amounts of the continuously and radically changing law untouched that undergraduate senior law papers still continue to have an importance that foreigners find shocking. Other than these few commentaries there are almost no useful books about Ethiopia's unique laws, few legal scholars with LL.M. and Ph.D. degrees to produce them, very few opportunities for collegial intercourse, and extremely little guidance from the courts.

Interestingly, last year, for the first time, the Ethiopian Federal Supreme Court began distributing its decisions on the Internet and in cheap paper volumes, and, at the same time, to introduce some training for State judges. Traditionally the problem of disseminating court decisions had simply been dismissed because of its huge cost. Partly as a practical consequence of that, and partly, I suspect, as a misinterpretation of judicial independence in civil law countries, an extreme consensus had arisen and had been propagated particularly through the original legal education, to the effect that every judge had the authority to interpret the law as he or she saw fit, without any concern for the likelihood of reversal or other inefficient consequences. Even in the realm of civil law jurisdictions this is very extreme; even French judges have meters of bookshelves full of case reports to which they must refer.

The new initiative to distribute court decisions recognizes this and attempts to change the practical basis of the consensus, and, most interestingly, also to

change the consensus about judicial behavior. The new position is that the persuasive authority of judicial decisions should flourish. This transformation is occurring at this time, I suspect, at least in part, because federalism has multiplied both the sources and interpretations of laws. The initiative is an attempt to balance that diversity with a degree of uniformity appropriate for providing a more predictable legal environment.

The same principle is at work within Law School-based legal education. Mekelle University Law Faculty has been designated as the coordinator for all the new law schools with a similar objective, again seeking to balance both diversity and an appropriate degree of uniformity.

In addition to resources within Ethiopia, especially given Ethiopia's eclectic laws, it has also been important for the Law Faculty's staff to learn teaching methods abroad. Staff are currently studying in South Africa, the US, Britain, Norway, and here in Belgium. Similarly, short and long term foreign visiting law professors have taught in Mekelle from the same countries.

And, recognizing that it would never have the resources to build and sustain a paper library and for preparing new teaching materials, the Law Faculty chose to build a strong Internet research capability by sending the Law Faculty's law librarian to the US, UK, and Belgium and obtaining access to valuable legal databases.

With these staff capacity building aids, and with the direction of the Curriculum Review Workshop, the Law Faculty has taken on the major task of reviewing, as a team, every course. In so doing, the team of academic staff considers the old teaching materials, related reported cases and commentaries, and relevant

foreign sources of law, in order to prepare new teaching materials and course assignments. With quite varied results, as you might expect, given the Law Faculty's young staff. But the old was never quite completely abandoned and the essential guiding idea was to evolve better teaching and teaching materials over time by adding and improving every year, including review by other law schools.

This is indeed happening, but it must remain a conscious agenda. And in this light, we may conclude that largest change in legal education wrought by this general review of legal education has been a change in attitude, from that of museum keepers to a dynamic living organism constantly questioning what exactly should be taught and how. That change in attitude has now also infused other law schools.

This work has been a big undertaking on its own. But were these relatively standard legal education reform strategies enough? No. The Law Faculty had barely scratched the surface of what was needed.

During the Curriculum Review Workshop one of the most controversial documents discussed, but also perhaps, in the end, the most influential, was one analyzing how a regional university law school must differ from the tradition of established centralized legal education. Thus, when the Law Faculty studied how to improve legal education its analysis was forced, as a matter of moral responsibility, also to consider what benefits regional university Law Faculties could provide to the people of the newly decentralized federal states. And thus

it was exactly ethnicity, new laws, and decentralization that drove us to focus further on the following four characteristics:

- legal education close enough for continuing education and capacity upgrading;
- legal expertise close enough for consultation and contribution;
- constructive interaction between the academy and local practice; and
- legal research influenced by local concerns.

These characteristics in turn lead us to ask:

1. **Why teach only elite Regular Program federal scholarship students from all over Ethiopia without also offering diverse Continuing Education programs to benefit local people?** Local citizens need legal education, too. It is the strongest argument for starting regional universities. Most local District Court judges and prosecutors, as well as government and business actors, had had little legal training. The public had never been exposed to the institutions of a liberal market democracy. So, balancing national interests and local interests, the Law Faculty decided it could add value locally by expanding its evening program (ironically, also drawing students from other States); creating a summer in-service program to train large numbers of state judges, prosecutors, police and prison administrators efficiently during their holidays; starting a street law program to teach civics in the high schools; and holding public briefings on important legal topics such as the Eritrean War Boundary Commission Decision. But, surprise! In order to attract citizens and paying customers the Law Faculty had to hire a different kind of teacher – experienced judges, prosecutors and private

sector practitioners – so it could offer a product these target groups would value and, in some cases, pay for. Thus, the Law Faculty's desire to provide public service in support of decentralization lead to both improvement of the Law Faculty and of decentralization.

2. **How can the Law Faculty help make better laws and regulations at the state and local levels of government now?** In addition to helping to write and evaluate federal laws, as it does as a part of the federal university system, the Law Faculty recognized that the State Parliament and Bureaus have only a modest understanding and appreciation for how law affects people and businesses (for example, unpredictable or economically stifling regulations are far too common). The Law Faculty's intellectual and substantive assets are, therefore, a valuable resource and the Law Faculty chose to make them available from the start in order to help strengthen the newly decentralized government. But that resource could only be engaged in the processes of law making and governance if the Law Faculty were respected for well-grounded contributions. Wanting to help meant becoming more engaged, something legal education in Ethiopia, as so often elsewhere, often turns up its nose at. Today, the Law Faculty is a strong partner in building better governance, including the protection of human rights.

3. **Why wait for the Law Faculty's graduates to improve the practice of law and access to justice?** Building on the Law Faculty's close collaboration with the State Courts and Justice Bureaus lead to the creation of a new Practical Attachment Program, in which all LL.B. law students

spend their fifth semester, out of six, on the job any place in Ethiopia, and during which the student, the host practitioner, and the academic monitor must triangulate and negotiate the intersection of theory and practice, with the goal of improving both. At the same time, the Law Faculty has created the first clinical legal education program in Ethiopia, starting with providing legal aid for women, thus both helping students to be job-ready and providing legal assistance for the neediest citizens. The combination reinforces the Law Faculty's knowledge base. And when the network of regional law schools work together they are a remarkable force for balancing local innovations with shared best practices throughout Ethiopia.

4. **Finally, what is the foundation on which all this must be built?** Given the narrow education and limited exposure to the world of even the oldest of the Law Faculty's instructors, and the same is even truer of the students, in order to do all of the above, in addition to hiring more experienced staff, the Law Faculty searched for and found research funds and encouraged all staff to conduct useful empirical research and to incorporate their experience into their teaching and teaching materials. The Law Faculty has been graced with a number of strong research partners, including our hosts today, Ghent University. Research foci now include law and development, human rights including a special focus on women's rights, state laws, all levels of the judiciary, and, of course, federalism. The Law Faculty encourages students to participate in the research, in order to expose them to the real effects of law on different peoples. As a regular part of their education, they visit every level of court, starting with very basic village courts in their first year, one of the Law Faculty's primary areas of research. Since the students

come from all over Ethiopia, the ethnic bases of local differences are always an element of the discussions. It is also intended that this exposure will also have an significant effect on another problem in legal education: producing graduates not only able but also willing to work throughout Ethiopia wherever they are needed.

In all these strategies, ethnicity, new laws, and decentralization have both driven the design of the new Law Faculties and the new Law Faculties are, in return, now having an impact on how the legal system evolves to address and incorporate the balanced values inherent in those aspects of the new Ethiopian reality.

It is my firm belief that as long as Mekelle University Law Faculty continues to improve its productivity and to add value in each of these multi-faceted strategies, it is likely to add greatly to Ethiopia's slow, iterative but asymptotic progress towards the reliable, fair and equitable justice system Ethiopia needs to instill that confidence among its citizens which is necessary for them to invest in the future; to invest in the business sense, but also to invest in families, children, civil society, and the political system.

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<u>ፍርድ</u>

አቤቱታው ሊቀርብ የቻለው የአሠሪና ሠራተኛ ጉዳይ ወሣኝ ቦርድ ሚያዚያ 21/96 ዓ.ም. በመ/ቁ. 3አ3/አ2/94 በሰጠው ውሣኔ እና የፌዴ/ከፍተኛ ፍ/ቤትም ውሣኔውን በማፅናት በመ/ቁ. 3አ835 ሰኔ16/96 ዓ.ም. በሰጠው ትእዛዝ ላይ ነው፡፡

ለአቤቱታው መነሻ ምክንያት የሆነው የአሁን ተጠሪ በአሁን አመልካች ላይ ለአሠሪና ሠራተኛ ጉዳይ ወሣኝ ቦርድ ያቀረበው ክስ ሲሆን፣ የክሱ ይዘትም ባጭሩ፡- በድርጅቱ ውስጥ በጥበቃ ሥራ ተቀጥሬ በመሥራት ላይ የምገኝ ስለሆነና ሥራውም ዘላቂነት ያለው ሆኖ ሣለ የቋሚ ሠራተኝነት መብቴ ሊጠበቅልኝ ባለመቻሉ በአዋጅ ቁጥር 42/85 አንቀጽ 9 መሠረት ቋሚ

ሠራተኛ እንድሆን፣ ስቋሚ ሠራተኞችም የሚሰጠው ጥቅማጥቅም ክሱን ካቀረብኩበት ጊዜ ጀምሮ እንዲሰጠኝ እንዲወሰንልኝ የሚል ነው፡፡

የአሁን አመልካችም ለቀረበበት ክስ በሰጠው መልስ፡- ተጠሪው የሻምበል ባሻ የውትድርና ማእረግ ያለው በጡረታ ላይ የሚገኝ እንደሆነ ጠቅሶ በወቅቱ ለተፈጠረ የፀጥታ ችግር ምክንያት ችግሩ እስኪወገድ ድረስ ጥበቃውን ለማጠናከር የቀድሞ ወታደሮችን ቀጥሮ ለመመደብ እንዲችል ኩርፖሬሽኑ ለበላይ አካል ጥያቄ አቅርቦ በተፈቀደለት መሠረት ለተወሰነ ጊዜ የተቀጠረ እንጂ በቋሚነት በሥራ ላይ ሊቀጥል የሚችል አለመሆኑን፤ የጥቅማ ጥቅም ጥያቄውም በህብረት ስምምነቱ ለተወሰነ ጊዜ ለተቀጠረ ሠራተኛ ፈፃሚ የሚሆን አይደለም በማለት ተከራክሯል፡፡

ቦርዱም የግራ ቀኙን ክርክር መርምሮ ከሣሽ በአዋጅ ቁጥር 42/85 አንቀጽ 10 መሠረት የተቀጠረ መሆኑን ተከሳሽ በተጨባጭ በማስረጃ አስደግፎ ያላስረዳ በመሆኑ በአዋጅ ቁጥር 42/85 አንቀጽ 9 መሠረት ከሣሽ ላልተወሰነ ጊዜ የተቀጠረ ነው፡፡ ጥቅማጥቅምን በተመለከተም በህብረት ስምምነቱ መሠረት ውሣኔው ከተሰጠበት ጊዜ ጀምሮ ወደፊት እየታሰበ ሊሰጠው ይገባል ሲል ወስኗል፡፡

የአሁን አመልካች ውሣኔውን በመቃወም ለከፍተኛው ፍ/ቤት ይግባኝ ቢያቀርብም ይግባኙ ተቀባይነት ባለማግኘቱ ይህ አቤቱታ ሊቀርብ ችሏል፡፡

በዚሁ መሠረት ቦርዱም ሆነ የከፍተኛው ፍ/ቤት የሰጡት ውሣኔ መሠረታዊ የሕግ ስህተት ያለት ነው ሲል ውሣኔው እንዲታረምለት አመልካች አቤቱታውን ለዚህ ችሎት ያቀረበ ሲሆን፣ ተጠሪውም ቀርቦ መልሱን በመስጠት የሥር

ፍ/ቤቶች የሰጡት ውሣኔ ስህተት ስለሌለበት ውሣኔው ፀንቶ ልሰናበት በማለት ተከራክሯል፡፡

ይህም ችሎት ከክርክሩ በመነሳት ጉዳዩ ምን የክስ ምክንያት /cause of action/ ቦርድስ ይህን ጉዳይ ለማየት የሚያስችለው ሕጋዊ ሥልጣን አለው ወይ? የሚሉትን ጭብጦች በመያዝ ከሥር ውሣኔና አግባብ ካለው ሕግ ጋር በማገናዘብ እንደሚከተለው መርመሮታል፡፡

የክስ ምክንያት /cause of action/ አለ ወይም የለም የሚለውን ከማየታችን በፊት የዚህን ቃል ፅንሰ ሃሣብ ማየቱና መረዳቱ ተገቢ ሆኖ አግኝተነዋል፡፡

ስለ ክስ ምክንያት / cause of action / ፅንስ ሀሳብ በ1958 ዓ.ም. በወጣው የፍ/ብ/ሥ/ሥ/ሕግ ውስጥ መካተቱን ከሕጉ አንቀጽ 29፣80/2/፣224/2/፣23/1//ሀ/ ... ወዘተ መረዳት የሚቻል ሲሆን ለቃሉ የሰጠው ትርጉም ግን የለም፡፡

በመሠረቱ ማንም ሰው በህግ ችሎታ ኖሮት በሌላ ሰው ላይ ማናቸውንም ክስ ለማቅርብ እንዲችል አስቀድሞ ለክሱ መነሻ በሆነው ነገር ወይም ክሱ በተመሠረተበት ነገር ላይ ጥቅም ወይም መብት ያለው መሆኑ መረጋገጥ እንደሚገባው የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 33 ይደነግጋል፡፡ በዚህም ከሣሽ ከተከሣሽ ላይ ሊፈፀም የሚችል መብት አለኝ ብሎ ለማለት አስቀድሞ ለመብቱ መገኘት መነሻ የሆነውን ነገር በማረጋገጥ የተጠየቀውን ዳኝነት ለማግኘት ከሣሹ በሕግ መብት ያለው መሆን ይኖርበታል፡፡

ከሕጉ አንቀፅ 80(2) ሳይም መረዳት የሚቻለው የክስ ምክንያት ሲባል አንድ ሰው አንድን ነገር ከአንድ ሰው ሳይ ለማግኘት ፍ/ቤቱ እንዲወስንለት ክስ ለማቅረብ የሚያስችለው የፍሮ ነገር ሁኔታ ሲሆን፣ ይህም ፍሬ ነገር ዳኝነት ለማግኘት የሚያስችል መሆን ያለበት መሆኑን ነው።

ሮበርት አለን ሴድለር "Ethiopian civil procedure" በሚል ርእስ ባዘጋጁት መጽሀፍ ላይ "የክስ ምክንያት" አለ ብሎ ለመወሰን የሚቻለው በክሱ ላይ የቀረበው ነገር ቢረጋገጥ ከሣሹ የጠየቀውን ዳኝነት ለማግኘት ሕግ ይፈቅድለታል ወይ? ለሚለው ጥያቄ አዎንታዊ ምላሽ መስጠት ሲቻል እንደሆነ ገልፀዋል።

ወደተያዘው ጉዳይ ስንመለስም በግራ ቀኙ መካከል በቅጥር ላይ የተመሠረተ የሥራ ውል ግንኙነት መኖሩ አልተካደም። ተጠሪው በሥር ያቀረበው ክስ በአዋጅ ቁጥር 42/85 አንቀፅ 9 መሠረት ሳልተወሰነ ጊዜ እንደተቀጠርኩ ልቆጠር ይገባል በማለት ሲሆን፣ ከዚሁ የቃሚ ልሁን ጥያቄው ጋር በተጓዳኝ ያቀረበው ለሌሎች ቃሚ ሠራተኞች የተሰጠው ጥቅማጥቅም ለእኔም ይሰጠኝ የሚል ነው። የአሁኑ ተጠሪ ለቦርዱ ያቀረበው ክስ የክስ ምክንያት ያለው መሆን አለመሆኑን ለመመርመር እነዚህን ጥያቄዎቹን ለያይቶ ማየት ያስፈልጋል። ተጠሪው ቃሚ ልሁን ሲል ያቀረበው ዋነኛው ጥያቄ ከአመልካች ጋር አድርጎት የነበረው ውል ባሕርይ እንዲተረጎምለት የጠየቀበት ሲሆን፣ ለሌሎች ሰራተኞች የተጠሰው ጥቅማ ጥቅም ለኔም ይሰጠኝ የሚለው ጥያቄ ደግሞ በውሉ መሠረት ሊያገኝ የሚገባውን ነገር ግን ቀረብኝ ያለውን ጥቅም ለማስከበር የቀረበ ጥያቄ ነው። የመጀመሪያው የውሉ ባሕርይ እንዲገለጽለት ከመጠየቅ የዘለለ ጥቅም የሌለው ሲሆን ሁለተኛው ግን ውሉ አልተከበረምና

ውሉን የጣሰው ወገን የውሉን ቃለ እንዲያከብር እንዲደረግለት የሚጠይቅ ነው፡፡

በመካከላቸው የሥራ ውል የተፈፀመ ስለመሆኑ ግራ ቀኙ የተቀበሉበት ጉዳይ ነው፡፡ የሥራ ውል የራሱ ልዩ ባሕሪያት ያሉት ቢሆንም ከአጠቃላይ ውሎች ጋር የሚጋራቸው በርካታ ባሕሪያት እንዳሉትም መገንዘብ አስፈላጊ ነው፡፡ ከእነዚህ አንዱና ዋነኛው ውል ከተፈፀመ በኋላ ይኸው ውል በተዋዋዮች መካከል የአስገዳጅነት ባሕርይ ያለው መሆኑ ነው፡፡

ተዋዋዮቹ በውሉ የሚገደዱት በመርህ ደረጃ ሁለቱም ስምምነት ላይ ከደረሱበት ጊዜ ጀምሮ ነው፡፡ በመሆኑም ተዋዋይ ወገኖች ከውል የሚመነጭ መብት ለማግኘት የፍርድ ቤት ውሣኔ የግድ አያስፈልጋቸውም፡፡ ውሎች የፍርድ ቤቶች ይሁንታ ሳያስፈልጋቸው በአንዱ ወይም በሌላው ተዋዋይ ወገን ላይ መብትና ግዴታ የሚጥሉ በመሆናቸው ተዋዋዮች ወደ ፍርድ ቤቶች ሊመጡ የሚገባው በውሉ መሠረት አልተፈፀመም የሚሉት ነገር ካለ ብቻ ወይም ውሉ ሕጉ ለይቶ ባስቀመጣቸው ምክንያቶች እንዲፈርስላቸው የፈለጉ እንደሆነ ብቻ ነው፡፡ ከዚህ ውጪ በተዋዋዮቹ መካከል ያለው የውል ዓይነት እንዲነገር ወይም ውሉ እንዲፀድቅ ለፍርድ ቤቶች ጥያቄ ሊቀርብ አይገባም፡፡

ይህ አጠቃላይ የውሎች መሠረት ሃሣብ በሥራ ውልም ላይ ተፈጻሚነት አለው፡፡ በአዋጅ ቁ. 42/85 አንቀጽ 9 የሰፈረው መሠረት ሃሣብ በመርህ ደረጃ አንድ ሰራተኛ ላልተወሰነ ጊዜ እንደተቀጠረ የሚገመት መሆኑን የሚያስገነዝብ ነው፡፡ የአዲሱ አዋጅ ቁ. 377/96 አንቀጽ 9 ድንጋጌም ተመሣሣይ ይዘት ያለው ነው፡፡ ማንኛውም በአዋጁ የሚሸፈን ሠራተኛ የዚህ የህግ ግምት ተጠቃሚ ነው፡፡ ይህ የሕግ ግምት የሕግ ውጤት እንደመሆኑ

የፍርድ ቤት ችሮታ ሳያስፈልገው ውሉ ከተፈፀመበት ጊዜ ጀምሮ የሚሰራ የሕግ ግምት ነው፡፡ በመሆኑም አንድ ሠራተኛ ከውሉና ከዚህ ሕግ ግምት አንጻር ጎደለብኝ የሚለው ነገር ካለ ሚጠይቅ በቀር ቋሚ ነህ ልባል የሚል ጥያቄ ሊያቀርብ አይገባውም፡፡ በአሠሪውና በሠራተኛው መካከል የተፈፀመው ውል በሕጉ ግምት የሚሸፈን ሳይሆን አዋጁ በአንቀጽ 10/በአዲሱም አዋጁ አንቀጽ 10/ የሚሸፈን ነው የሚል ክርክር ሊነሳ እንደሚችል ግልጽ ነው፡፡ ሆኖም ይህም ቢሆን ሊነሣ የሚችለው ሠራተኛው ቀረብኝ የሚለው ጥቅም ወይም በአሰሪው ከሕጉና ከውሉ ውጪ ተፈፀመ የሚለውን በይል ማሳየት ሲችል ነው፡፡ በመሆኑም በኔና በአሰሪዬ መካከል ያለው የሥራ ውል ጊዜያዊ ሳይሆን ቋሚ ነው ተብሎ የተርጎምልኝ የሚለው ክስ የክስ ምክንያት ያለው ባለመሆኑ በቦርድም ይሁን በመደበኛ ፍርድ ቤቶች ሊስተናገድ የሚገባው አይደለም፡፡ ከዚህም በተጨማሪ ቋሚ ልሁን የሚለው ጥያቄ የአንድን ሠራተኛ የውል ግንኙነት እንጂ አጠቃላይ የሥራ ሁኔታውን የሚመለከት ባለመሆኑ የግል የሥራ ክርክር እንጂ የወል የሥራ ክርክር አይደለም በመሆኑም ጉዳዩ የክስ ምክንያት የሌለው ከመሆኑም በተጨማሪ ለአሰሪና ሠራተኛ ጉዳይ ወሳኝ ቦርድ የሚቀርብም ጉዳይ አይደለም፡፡ ቦርዱ ሥልጣን ያለው የወል የሥራ ክርክሮችን ለመመልከት እንጂ የግል የሥራ ክርክር ለመዳኘት አይደለም፡፡ በመሆኑም በሁለቱም ተደራራቢ ምክንያቶች ቦርዱ የቀረበለትን ይህን የመጀመሪያ ጥያቄ ማስተናገዱ አግባብ አይደለም፡፡

ከላይ እንደተመለከትነው ሠራተኛው ለሌሎች ሠራተኞች የተሰጠው ጥቅም ለኔም ይጠበቅልኝ የሚል ጥያቄ አያይዞ ያቀረበ በመሆኑ ቦርዱ ጉዳዩን ማስተናገዱ የሚያመጣው ለውጥ መኖር አለመኖሩ ቀጥሎ የምንመለከተው ጉዳይ ነው፡፡ ከላይ እንደተመለከተው ይህ ጥያቄ አስፈሪው የውሉን ወይም

የሕጉን ወይም የሁለቱን ድንጋጌ በመፃረር መብቴን ተጋፍቷል የሚል እንደምታ ያለው በመሆኑ የክስ ምክንያት የለውም ሊባል የሚችል አይደለም፡፡ ውሉ የተጣሰበት ወገን መፍትሄ ፍለጋ ወደሚመለከተው አካል ከሶ መቅረቡ ተገቢ ነው፡፡

ውል ወይም ሕግ ተጥሶ የአንድ ወገን መብት የተጓደለ ከሆነ መብቱን ለማስጠበቅ ክስ ማቅረብ ትክክለኛ አሠራር ነው፡፡ ጥቅም ተጓደለብኝ የሚል ሰራተኛ በሕጉ አንቀጽ 9 መሠረት ቅሚ ነው የሚል የህግ ግምት ተጠቃሚ ስለሆነ ቅሚ መሆኑን ማስረዳት አያስፈልገውም፡፡ ሠራተኛ መሆኑን የሚያረጋግጥ ማስረጃ እስካቀረበ ድረስ ጉዳዩን የሚያየው አካል ቂል እንደሆነ ግምት መውሰድ ይገባዋል፣ ቅሚ እንዳልሆነ ማስረዳት የሌላኛው ወገን ኃላፊነት ነው፡፡

ነገር ግን ይህ ጥቅም ቀረብኝ የሚል ሠራተኛ የሚያቀርበው ክስ የዛን ሠራተኛ ጉዳይ ብቻ የሚመለከት በመሆኑ በሕጉ አንቀጽ 138 መሠረት እንደግል የሥራ ክርክር የሚቆጠር እንጂ የወል የሥራ ክርክር አይደለም፡፡ ስለዚህ ከዚህ ጥያቄ የሚቀርበው ክስ የክስ ምክንያት የለውም ባይባልም ለቦርዱ ቀርቦ የሚስተናገድ ነጥብ ግን አይደለም፡፡ የወል የሥራ ክርክር ከግል የሥራ ክርክር የሚለየው በምንድነው የሚለው የሕግ ነጥብ ላይ ይህ ፍ/ቤት በመዝገብ ቁ.18180 በሐምሌ 29 ቀን 1997 ዓ.ም. ውሣኔ የሰጠበት በመሆኑ አሁን በዝርዝር መድገሙ አስፈላጊ አይደለም፡፡ ዋናው ነጥብ አንድ ሠራተኛ እሱን ብቻ የሚመለከትና የሌሎችን ሠራተኞች የሥራ ሁኔታ የማይመለከት ክስ ያቀረበ እንደሆነ ጉዳዩ የግሉ የሥራ ክርክር እንጂ የወል የሥራ ክርክር ሆኖ ሊታይ አይገባውም፡፡ የወል የሥራ ክርክር ካልሆነ

ደግሞ ለቦርዱ ቀርቦ ውሣኔ ሊሰጥበት የሚገባ አይሆንም፡፡ በአዋጃ ቁ. 42/85 አንቀጽ 1382 መሠረት በአዲሱም አዋጅ ቁ.377/96 አንቀጽ 138 የግል ሥራ ክርክርን የማየት ሥልጣን ያለው መደበኛ ፍርድ ቤት ነው፡፡ በመሆኑም በዚህም ረገድ ቦርድ የሄደበት አቅጣጫ ሕጉ ካስቀመጠው ሥርዓት ውጪ ነው፡፡ በመሆኑም ለሌሎች ሠራተኞች የተሰጠ ጥቅማ ጥቅም ለኔ አልተጠበቀልኝም የሚለውን አጠቃላይ ክስ ቦርዱ የተመለከተው ከስልጣኑ ውጪ በመሆኑ ሊሻር የሚገባው ነው፡፡

ለማጠቃለል ቋሚ ሰራተኛ እንደሆንኩ ይወሰንልኝ የሚለው ክስ የክስ ምክንያት የሌለው በመሆኑና የግል ጉዳይም በመሆኑ፣ የጥቅማ ጥቅም ጥያቄውም የግል ክርክር በመሆኑ በአሰሪና ሰራተኛ ጉዳይ ወሳኝ ቦርድ ቀርበው መታየታቸው የጉዳዩ አመራር የህጉን ሥርዓት ያልተከተለ በመሆኑ ትክክለኛውን የሕግ ትርጉም ተከትሎ እንዲሄድ ማድረግ አስፈላጊ ነው፡፡

ውሣኔ

1. የአሠሪና ሠራተኛ ጉዳይ ወሳኝ ቦርድ ሚያዝያ 21/96 ዓ.ም. በቁጥር 303/02/94 የሰጠው ውሣኔና የፌ/ከፍተኛ ፍ/ቤት በመ/ቁ. 30835 ሰኔ 16/96 ዓ.ም. የሰጠው ውሣኔ በፍ/ብሥ/ሥ/ቁ. 348/1/ መሠረት በድምጽ ብልጫ ተሽረዋል፡፡
2. ውሣኔዎቻቸው የተሻረ መሆናቸውን እንዲያውቁት የፍርዱና የውሣኔው ቅጂ ይተላለፍላቸው፡፡
3. ወጪና ኪሣራ ግራ ቀኙ በየራሳቸው ይቻቻሉ መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ፡፡

<u>የሐሳብ ልዩነት</u>

አብዛኛው ድምጽ በተጠሪ የቀረበው አንድም የስራ ውሴ ያልተወሰነ ጊዜ የስራ ውል መሆኑ ተረጋግጦ ይወሰንልኝ ሴላም የሚገባኝን ጥቅማ ጥቅም እንዳገኝ ውሳኔ ይሰጥልኝ የሚለው የክስ ነጥብ የውል የስራ ክርክር ሲሰኝ የሚችል ስለአልሆነ ጉዳዩን የመዳኘት ሥልጣን የአሰሪ እና ሠራተኛ ጉዳይ ወሳኝ ቦርድ አይደለም ሲል በሰጠው የውሣኔ ክፍል እኔም የምስማማበት ነው፡፡ ይሁን እንጂ የሥራ ቅጥር ውሴ ሳልተወሰነ ጊዜ እንደሆነ ይወሰንልኝ በሚል አይነት የቀረበው የተጠሪ አቤቱታ "የክስ ምክንያት" የለውምና በፍርድ ቤት ጭምር ሊስተናገድ የሚገባው አይደለም በሚል ዋነኛ ምክንያት ውድቅ በመደረጉ ባለመስማማት እንደሚከተለው በሐሳብ ተለይቻለሁ፡፡

አንድ ከሣሽ ክስ በመሰረተበት ነገር ሳይ ጥቅም ወይም መብት ያለው መሆኑን በማሳየት በሕግ አግባብ ዳኝነት ይሰጥለት ዘንድ መጠየቅ ይችላል፡፡ ይህን ከ ሳይ በአብዛኛው ድምፅ በተሰጠው ውሣኔ ውስጥ ከተጠቀሱት የፌ/ብ/ሥ/ሥ/ሕጉ ድንጋጌዎች ሳይ ጭምር መረዳት ይቻላል፡፡ ክሱ ጥቅም ወይም መብት የተጠየቀበት መሆኑን ለማሳየት የቻለ እስከሆነ ድረስ ደግሞ ጉዳዩ የክስ ምክንያት ያለው ነው ለመሰኘት ይበቃል፡፡

በስራ ክርክር ጉዳይ በሚቀርቡ ክሶች እንዲጠየቅ የሚፈለገው ዳኝነትም ከዚህ አጠቃላይ መርህ በተለየ ሁኔታ እንዲታይ የሚያስገድድ ሕግ የለም፡፡ ስለሆነም አንድ የሥራ ክርክርን የሚመለከት ክስ ደመወዝ፣ የደመወዝ ጭማሪ፣ የትርፍ ሰዓት ሥራ ክፍያ የሥራ ስንብት ክፍያ ወዘተ... ሊከፈለኝ ይገባል በሚል አይነት የጥቅም ጥያቄን መሠረት አድርጎ ሊቀርብ ይችላል፡፡ ለዚያም እድገት ይሰጠኝ፣ ዝውውር ሳገኝ ይገባል፣ የተወሰደብኝ የዲሲፕሊን

እርምጃ ተገቢ አይደለም ወዘተ... የሚሉ የመብት ጥያቄዎችን ብቻ መሠረት አድርጎ ሊቀርብ ይችላል፡፡ እነዚህ ከብዙ በጥቂቱ የተጠቀሱት የክፍያ ወይም የመብት ደረጋገጥልኝ ጥያቄዎች ስሥራ ክርክር ጉዳይ በተናጥልም ሆነ በጥምር የክስ ምክንያቶች ሊሆኑ እንደሚችሉ ከአዋጅ ቁ.42/85 አንቀጽ 138፣142፣162 ወዘተ ... መንፈስም መገንዘብ ይቻላል፡፡

በተያዘው ጉዳይ ተጠሪ የሥራ ቅጥሩ ያልተወሰነ ጊዜ የሥራ ውል መሆኑ ተረጋግጦ እንዲወሰንለት በአቀረበው ክስ ጠይቋል፡፡

በተጨማሪም ይገባኛል የሚሳቸው ጥቅሞች መኖራቸውን እና አመልካች ጥቅሞቹን የከለከለውም ቅጥሩ ያልተወሰነ ጊዜ የሥራ ውል መሆኑን ስለአልተቀበለለት መሆኑን በክሱ አመላክቷል፡፡ የክሱም አቀራረብ የሥራ ውሉ ያልተወሰነ ጊዜ የሥራ ውል ነው ቢሰኝ ያጣቸው ጥቅሞች ያስ ሌላ ተጨማሪነ ቅድመ ሁኔታ እንደሚከበሩለት ያስገነዝባል፡፡ በሌላ በኩል ደግሞ አመልካች የተጠሪ የሥራ ውል የተወሰነ ጊዜ የሥራ ውል መሆኑን እና ጥቅሞቹ ያለተሰጡትም ቅጥሩ ያልተወሰነ ጊዜ የሥራ ውል ባለመሆኑ ምክንያት መሆኑን ገልጾ ተከራክሯል፡፡

ይህ የክርክራቸው ይዘት አመልካች እና ተጠሪ በመካከላቸው የነበረውን የሥራ ውል በየራሳቸው እንደሚጠቅማቸው የተረጎሙት መሆኑን ያረጋግጣል፡፡ ይህም ግራ ቀኙ በተጠሪ የሥራ ውል ሁኔታ ላይ ማስትም የተጠሪ የሥራ ውል የተወሰነ ጊዜ የሥራ ውል ነው? ወይስ አይደለም? በሚለው ፍሬ ነገር ላይ ልዩነት እንዲኖራቸው አድርጓል፡፡ ይህ ልዩነታቸው ሲፈታ የሚችለው በፍርድ እንደመሆኑም ጉዳይ ዳኝነት ይሰጥበት ዘንድ ሥልጣን ለተሰጠው አካል ሊቀርብ እና የሥራ ውሉ በአዋጅ ቁ.42/85 አንቀጽ 10 ወይም 9

የሚሸፈን መሆኑ አስመሆኑ ተጣርቶ ዳኝነት ሊሰጥበት ይገባል። በእርግጥ በዚህ አይነት የሚቀርቡና የሥራ ውሳችን ያልተወሰነ ጊዜ የሥራ ውል መሆኑ ይረጋገጥልን በሚል መልኩ የሚመሰረቱ ክሶች በቀጥታ የጥቅም ጥያቄን የያዙ ክሶች አስመሆናቸው ግልጽ ነው። ነገር ግን የሥራ ቅጥር ውሴ በአሰሪው ከሕግ ውጭ የተወሰነ ጊዜ የሥራ ውል እንደሆነ ተወስዶብኛልና ሊታረምልኝ ይገባል የሚል ይዘት ያላቸው እንደመሆናቸው መሠረታቸው የመብት ጥያቄ መሆኑ አከራካሪ ሊሆን የሚይገባው ነው። በዚህም ምክንያት ይህን መሰሉ ጥያቄ በአንድ ክስ ውስጥ ለብቻው ቀርቦ ዳኝነት ቢጠየቅበት እንኳን ክሱ የክስ ምክንያት የለውም የሚሰኝበት በሕግ የተደገፈ ምክንያት አይኖርም። ጉዳዩ የአሪሱ የሆነ የክስ ምክንያት ያለው በመሆኑም ጭብጥ ሆኖና ከአዋጅ ቁ. 42/85 አንቀጽ 9 እና 10 ጋር ተገናዝቦ ውሣኔ ሊሰጥበት ይገባል። ይህ ይሆን ዘንድ ክሱ ከሳሹ ቀረብኝ የሚባልን ጥቅም በሚጠይቅ መልኩ የቀረበ እንዲሆን አያስፈልግም። ይልቁንም የቀረበው ክስ ቀረብኝ የሚባልን ጥቅም ብቻ ጠቅሶ የቀረበ ቢሆን እንኳን የጥቅም ይገባኛል ጥያቄው ውሣኔ ከማግኘቱ አስቀድሞ ቅጥሩ የተወሰነ ወይም ያልተወሰነ ጊዜ የመሆኑ ነገር ከሕጉ አግባብ ታይቶ ምላሽ ያገኝ ዘንድ አስፈላጊ የሚሆንበት ጊዜ ይኖራል። ይህ ሁኔታ ሊያጋጥም እና የሥራ ውሱ የሚሸፈነው በአዋጅ ቁ.42/85 አንቀጽ 9 ነው? ወይስ 10? የሚል ክርክር ሊነሳ እንደሚችልም በአብዛኛው ድምፅ ጭምር መታመኑን ከውሣኔው መገንዘብ ይቻላል። እንዲህ ከሆነ ደግሞ የሥራ ውሴ ያልተወሰነ ጊዜ የሥራ ውል መሆኑ ይረጋገጥልኝ በሚል አይነት የሚቀርብ ክስ የክስ ምክንያት የለውም የሚል መደምደሚያ ላይ ሊደርስ የሚገባ አይሆንም። ምክንያቱም የክስ ምክንያት ያላቸውም የሚባሉ ክሶች በይዘታቸው ተከሣሹ ክሱ በተመሰረተበት ጉዳይ ላይ የውልም ሆነ የሕግ

ኃላፊነት እንደአስበት የሚያመለክቱ አይደሉም፡፡ እንዲህ ያሉ ክሶች ከመሰረቱም ክሱ ተከሣሹ ላይ ሊመሰረት የቻለበትን ሕጋዊ ምክንያት ለማሳየት የሚበቁም አይደሉም፡፡ ጉዳዩ ተከሣሹን የማይመለከተው መሆኑ ግልፅ ከመሆኑ የተነሳም ወደ ክርክሩ ፍሬ ነገር መግባቱ አስፈላጊ አይሆንም፡፡ የሥራ ውሴ ያልተወሰነ ጊዜ የሥራ ውል መሆኑ ተረጋግጣ ውሣኔ ይሰጥልኝ የሚል ምክንያት ይዘው የሚመሰረቱ ክሶች ግን አሰሪ የሆነው ተከሣሽ ቅጥሩ የተወሰነ ጊዜ የሥራ ውል መሆኑን እስከአሳስረዳ ድረስ የሥራ ውሱን ያልተወሰነ ጊዜ የሥራ ውል ያደረገው ዘንድ የሕግ ኃላፊነት እንዳለበት የሚያመላክቱ ናቸው በተጨማሪም በዚህ መዝገብ የተያዘውን ክርክር ጨምሮ በሌሎች በርካታ መሰል ሙግቶችም ውስጥ ተከታይ ጥቅሞችን ያለክርክር ለማስገኘት የሚበቃን የመብት ጥያቄ መሰረት አድርገው የሚመሰረቱ ናቸው፡፡ ስለሆነም የክስ ምክንያት የላቸውም የሚባሉ አይሆኑም፡፡

ከፍ ሲል እንደተመለከተው የዚህ መዝገብ ተከራካሪዎች ልዩነት የቅጥሩን የቆይታ ጊዜ ብቻ የሚመለከት ነው፡፡ በጥቅሞቹ አከፋፈል ጉዳይ ላይ ለምምነት እንጂ ልዩነት እንደሌላቸው ግልፅ ነው፡፡ የተጠሪ የሥራ ውል በሕግ አግባብ ተመዝግ ያልተወሰነ ጊዜ የሥራ ውል መሆኑ ቢረጋገጥ ተጠሪው ጥቅሞቹን ሊያገኛቸው እንደሚችል በአመልካች ጭምር የታመነ መሆኑን ከክርክሩ መገንዘብ የሚቻል ነው፡፡ ይህ ደግሞ የተጠሪ የሥራ ውል የተወሰነ ወይም ያልተወሰነ ጊዜ ውል መሆኑ በፍርድ ሳይረጋገጥ ተጠሪው ጥቅሞቹን ያገኛል ወይም አያገኝም የሚል መደምደሚያ ላይ ሊደርስ እንደማይችል የሚያረጋግጥ ነው፡፡ አከራካሪ ሆኖ የተገኘው የሥራ ቅጥሩ ሁኔታ አስቀድሞ ሳይፈታ የጥቅም ጥያቄው ጉዳይ ምላሽ ሊያገኝ እንደማይችል እየታወቀም የክሱ ዋና ክፍል የሆነው የሥራ ውሴ ያልተወሰነ ጊዜ የሥራ ውል መሆኑ

ተረጋገጦ ደወሰንልኝ የሚለው የተጠሪ አቤቱታ የክስ ምክንያት የለውም መባሉ ሕጋዊ አሳማኝነት የሌለው ነው፡፡

በእኔ እምነት የሥራ ውሴ ያልተወሰነ ጊዜ የሥራ ውል መሆኑ ደወሰንልኝ በሚል አይነት የሚቀርቡ ክሶች ምንም እንኳን የወል የሥራ ክርክር ባለመሆናቸው ምክንያት በአሰሪ እና ሠራተኛ ጉዳይ ወሳኝ ቦርድ ሊታዩ የማይችሉ ቢሆኑም የግል የሥራ ክርክር አይነቶች በመሆናቸው በፍርድ ቤት ሊዳኙ የሚገባቸው ናቸው፡፡ ስለሆነም እነዚህ ጥያቄዎች የክስ ምክንያት የላቸውምና የትኛውም የዳኝነት አካል ዘንድ ሊቀርቡ አይችሉም በሚል በአብዛኛው ድምፅ በተሰጠው የውሣኔ ምክንያት ባለመስማማት ስሜ በሦስተኛ ተራ የተጠቀሰው ዳኛ በሐሳብ ተለይቻለሁ፡፡

የሰ/መ/ቁ. 51790

ግንቦት 16 **ቀን** 2003 **ዓ.ም**

ዳኞች፡-ሓጎስ ወልዱ

አልማው ወሴ

ዓሊ መሐመድ

ነጋ ዱፍሳ

አዳነ ንጉሴ

አመልካች :- 1. **እነ ወልዳይ ዘሩ** (61 **ሰዎች**) - **ጠበቃ ዳንኤል ብርዬ ቀረቡ**

2. **አቶ ቴዎድሮስ ይልማ - የቀረበ የለም**

3. **አቶ አማረ ተረፈ - የቀረበ የለም**

4. **እነ አቶ ጀማል አህመድ** (**ሶስት ሰዎች**) - **የቀረበ የለም**

5. **አቶ ትግስቱ ጥላሁን - የቀረበ የለም**

6. **አቶ ቀዳማዊ ረታ - የቀረበ የለም**

7. **እነ አቶ አሰለፈው ገድፍ** (**ሁለት ሰዎች**) - **የቀረበ የለም**

8. **እነ አሸናፊ አማረ** (**ሁለት ሰዎች**) - **ቀረቡ**

ተጠሪ፡- **የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን - ዓ/ሕግ አስከዳር አዘዘው ቀረቡ**፡፡

በዚህ መዝገብ የተያዘው ጉዳይ በመ/ቁጥር 51789፣ 51792፣ 51794፣ 51798፣ 53301፣ 53460 **እና** 57247 **ከቀረቡት ጉዳዮች ጋር ተመሳሳይ የሕግ ጥያቄ ያለበት በመሆኑ መዝገቦችን አንድ ላይ አጣምረን በመመርመር ተከታዩን ፍርድ ሰጥተናል**፡፡

ፍ ር ድ

ጉዳዩ በኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ሠራተኞች አስተዳደር የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 155/2000 አንቀጽ 37/1/ መሠረት ሠራተኛን በልዩ ሁኔታ ከሥራ ስለማስናበት የሚመለከት ነው፡፡ ክርክሩ የተጀመረው በፌደራል ሲቪል ሰርቪስ ኤጄንሲ አስተዳደር ፍርድ ቤት ሲሆን በዚሁ ፍርድ ቤት አቤቱታ ያቀረቡት የአሁኑ አመልካች ናቸው፡፡ የአመልካች አቤቱታ ይዘት የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን እየተገበረ ባለው የመሠረታዊ አሰራር ሂደት ለውጥ ምክንያት ምደባ ሳያገኙ የቀሩ በመሆኑ እረፍት እንዲወስዱ መደረጉንና ለአስራ አንድ ወራት ደመወዝ ሲከፈላቸው ቆይቶ ሐምሌ 01 ቀን 2001 ዓ.ም ጀምሮ የስራ ውላቸው ተቋርጦ ከስራ መሰናበታቸው ከሕግ ውጪ መሆኑን ገልፀው ወደ ስራ እንዲመለሱ፣ ይህ የማይሆን ከሆነ ከስራቸው የተሰናበቱበትን ምክንያት በአግባቡ በመግለፅ የአመልካችን የመሰማት መብት ተግባራዊ በማድረግ ተገቢውን ውሳኔ እንዲሰጣቸው ይወሰንላቸው ዘንድ የይግባኝ አቤቱታውን ማቅረባቸውን የሚያሳይ ነው፡፡ በአስተዳደር ፍርድ ቤቱ በተደረገለት ጥሪ መሠረት የአሁኑ ተጠሪ ቀርቦም አርምጃው በአዋጅ ቁጥር 578/2000 አንቀፅ 19/1/ለ/ እና በደንብ ቁጥር 155/2000 አንቀጽ 37/1/ መሠረት የተከናወነ በመሆኑ ተገቢ ነው በማለት የአመልካች ይግባኝ ውድቅ እንዲሆን ገልፃ ተከራክሯል፡፡ ጉዳዩ በይግባኝ የቀረበለት የአስተዳደር ፍርድ ቤትም የግራ ቀኙን ክርክር መርምሮ የአመልካችችን ይግባኝ በድምጽ ብልጫ ውድቅ አድርጓል፡፡ በዚህ ውሳኔ አመልካችች ቅር በመሰኘት ለፌደራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት ይግባኛቸውን በተለያዩ መዛግብት ቢያቀርቡም በፍ/ብ/ሥ/ሥ/ሕ/ቁ/337

መሠረት ደግሳኛቸው ተሰርዞባቸዋል። የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ ውሳኔ በመቃወም ስማስለወጥ ነው።

ከላይ በተጠቀሱት መዛግብት አመልካቾች የሰበር አቤቱታቸውን ያቀረቡ ሲሆን የአቤቱታቸው መሠረታዊ ይዘትም አመልካቾች የኢ.ፌ.ድ.ሪ ሕገ መንግስት ያረጋገጠልን የመደመጥ መብት ሳይከበር የተሰጠ የባለስልጣኑ መስሪያ ቤት ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት ያለበት ነው በማለት ጉዳያቸው ባግባቡ እንዲጣራ ይወሰንላቸው ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው። አቤቱታቸው ተመርምሮም የፌደራል መንግስት ሰራተኞች አስተዳደር ፍርድ ቤት አመልካቾች የተሰናበቱት በሕጉ አግባብ ነው በማለት የሰጠው ውሳኔ ከሚኒስትሮች ምክር ቤት ደንብ ቁጥር 155/2000 አንቀጽ 37/1/ እና /2/ አንጻር ለመመርመር ሲባል ለሰበር ችሎቱ እንዲቀርብ የተደረገ ሲሆን የግራ ቀኙ የቃል ክርክር መጋቢት 10 ቀን 2002 ዓ/ም በዋለው ችሎት በተወሰኑ መዛግብት ሲያሰሙ በተወሰኑ መዛግብት ደግሞ የጽሑፍ ክርክር ተደርጓል።

የጉዳዩ አመጣጥ አጠር አጠር ባለ መልኩ ከላይ የተገለፀው ሲሆን ይህ ችሎትም ጉዳዩን ለሰበር ችሎቱ ሲቀርብ ከተያዘው ጭብጥ አንጻር በሚከተለው መልኩ መርምሮታል።

ከክርክሩ ሂደት መገንዘብ የተቻለው የፌደራል አገር ውስጥ ገቢና ጉምሩክ ባለስልጣን ሠራተኞች መስሪያ ቤቱ በአዲስ መልክ የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ተብሎ ሲዋቀር የባለስልጣኑ መስሪያ ቤት የሰራተኞችን መተዳደሪያ ደንብ ቁጥር 155/2000 አንቀጽ 37/1/ ን በመጥቀስ አመልካቾችን ከስራ ያሰናበታቸው መሆኑን ሲሆን አመልካቾች ይህ የተጠሪ

እርምጃ ሕጋዊ አይደለም፣ በሕገ መንግስቱ የተከበረውን የመሰማት መብት የሚጥስ ነው በማለት የሚከራከሩ መሆኑን ተገንዝበናል፡፡

በመሠረቱ ማንኛውም ሰው በፍርድ ሊወሰን የሚገባውን ጉዳይ ስፍርድ ቤት ወይም ስሌላ በሕግ የዳኝነት ስልጣን ስተሰጠው አካል የማቅረብና ውሳኔ ወይም ፍርድ የማግኘት መብት ያለው ስለመሆኑ የኢ.ፌ.ዲ.ሪ ሕገ መንግስት አንቀጽ 37/1/ ድንጋጌ በግልፅ የሚያሳየው ጉዳይ ነው፡፡ ከዚሁ የሕገ መንግስት ድንጋጌ መገንዘብ የሚቻለው ደግሞ ፍርድ ቤቶች አንድን ጉዳይ (አቤቱታ) ተቀብለው ውሳኔ መስጠት የሚችሉት ዳኝነት የተጠየቀበት ጉዳይ በሕግ ስሌላ አካል ያልተሰጠ ጉዳይ በሚሆንበት ጊዜ እንደሆነ መሆኑን ነው፡፡ በህግ ተስይተው በአስተዳደራዊ ውሳኔ እንዲቋጩ በተባሉ ጉዳዮች ላይ መደበኛ ፍርድ ቤት የመዳኘት የስረ ነገር ስልጣን ስለሌለው በሕጉ መሠረት ለአንድ የአስተዳደር አካል ቀርቦ አስተዳደራዊ ውሳኔ የተሰጠበትን ጉዳይ ወይም ለአስተዳደር መቅረብ የሚገባውን ጉዳይ ፍርድ ቤት ሊያስተናግደውም ሆነ አከራክሮ ውሳኔ ሊሰጥበት አይችልም፡፡ ለአንዳንድ የመንግስት አካላት በተወሰኑ ጉዳዮች ላይ የመወሰን ስልጣን የሚሠጡት ሕጎች መጠበቅና መከበር ያለባቸው ሲሆን የዳኝነት አካል ስልጣንም በሕግ የተወሰነ ስለሆነ ሕግ የመተርጎም ስራው በሕጉ በተመለከተው አድማስ የሚመራ ይሆናሌ፡፡ የፌ/ብ/ሥ/ሥ/ሕ/ቁጥር 4 ድንጋጌ የሚያሳየውም ፍርድ ቤቶች በሌላ ህግ በግልጽ በታገዱ ጉዳዮች ላይ አከራክሮ የመወሰን ስልጣን የሌላቸው መሆኑን ነው፡፡ በመሆኑም በአስተዳደራዊ ውሳኔ የመጨረሻ እልባት እንዲያገኙ በህግ ተስይተው የተቀመጡት ጉዳዮችን ፍ/ቤቶች የመዳኘት ስልጣን የሌላቸው መሆኑ ሲስተዋል የሚገባው ጉዳይ ነው፡፡ በዚህም መሠረት የሕገ መንግስቱ

አንቀፅ 79/1/ እና 37 ድንጋጌዎች አንድ ሳይ ሲታዩ ፍ/ቤቶች አንድን ጉዳይ ተቀብለው የማየትና የመወሰን ሥልጣን የሚኖራቸው ጉዳዩ በፍርድ ሊወሰን የሚገባው (Justiciable matter) ሆኖ ከተገኘ ብቻ መሆኑን ያስገነዝባሉ፡፡

ወደተያዘው ጉዳይ ስንመለስ አዋጅ ቁጥር 578/2000 የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣንን ያቋቁመ ሕግ ሲሆን በዚሁ አዋጅ አንቀጽ 19/1/ለ/ ድንጋጌ የመንግስት ሠራተኞች አዋጅ ቁጥር 515/1999 ቢኖርም የባለስልጣኑ ሠራተኞች አስተዳደር የሚኒስትሮች ምክር ቤት በሚያወጣው ደንብ መሠረት ይመራል በሚል በኃይለ ቃል ተደንግጎ ይገኛል ፡፡ በዚሁ ሥርዓት መሠረትም የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 155/2000 ያወጣ ሲሆን በዚህ ደንብ አንቀጽ 37/1/ ስር በደንቡ በሌላ ሁኔታ የተደነገገ ቢሆንም ዋና ዳይሬክተሩ በሙስና የተጠረጠረውንና እምነት ያጣበትን ማንኛውንም ሠራተኛ መደበኛውን የዲስኘሊን እርምጃ አፈጻጸም ሥርዓት ሳይከተል ከሥራ ማሰናበት እንደሚችል የተደነገገ ሲሆን የዚሁ አንቀጽ ንዑስ ቁጥር ሁለት ድንጋጌ ደግሞ ከላይ በተመለከተው ስርዓት መሠረት ከስራ የተሰናበተ ሰራተኛ በየትኛውም የፍርድ አካል ውሳኔ ወደ ስራ የመመለስ መብት እንደማይኖረው አስገዳጅነት ባለው መልኩ አስቀምጧል፡፡ በመሆኑም የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ሰራተኞች የሚተዳደሩት አዋጅ ቁጥር 578/2000 ን ተከትሎ በወጣው ደንብ ቁጥር 155/2000 መሠረት እንደሆነ በግልጽ ተመልክቷል፡፡ በደንቡ አንቀፅ 37/1/ መሠረት የሥራ ስንብት ቢፈፀም በዳኝነት በፍ/ቤት እንደማይታይ በተጠቀሰው ድንጋጌ በንዑስ ቁጥር ሁለት ድንጋጌ በግልፅ ተመልክቷል፡፡ በመርህ ደረጃ ሕግ የማውጣት ሥልጣን በሥልጣን ክፍፍል መርህ መሠረት የሕግ አውጪው አካል ስለመሆኑ ግልፅ

ነው፡፡ በሕግ አውጪው የመንግስት አካል የሚወጡ ሕጎች ቀዳማዊ (primary legislations) ተብለው የሚታወቁ ሲሆን ሌሎቹ እንደአስፈላጊነታቸው አግባብ ባለው አካል የሚወጡ ሕጎች የበታች ህጎች (subsidiary legislations) ተብለው የሚታወቁ ናቸው፡፡ ሕግ አውጪው የመንግሥት አካል በተለያዩ ቴክኒካዊ፣ ኢኮኖሚያዊና ማህበራዊ ምክንያቶች ቀዳሚውን ሕግ ለማስፈጸም የሚያስችሉ ዝርዝር ሕጎች ያስፈልጋል ብሎ ባመነ ጊዜ ተገቢ ነው ባለው አካል የበታች ሕጎችን እንዲያወጣ ሥልጣን ሲሰጥ ይስተዋላል፡፡ ይህ አሰራር በሕገም በምክንያትም የተደገፈ እና የዳበረ ልምድ ስለመሆኑ ግልፅ ነው፡፡ በሚኒስትሮች ምክር ቤት የወጣው ደንብ ቁጥር 155/2000 ሕግ አውጪው በሰጠው ስልጣን መሠረት የወጣ ሲሆን በደንቡ አንቀጽ 37 መሠረት ደግሞ ሰራተኛው ከስራ የሚሰናበትበትን አግባብ ደንግጓል፡፡ በመሆኑም ወደ ስራ የመመለስ ወይም የመደመጥ መብት በፍርድ የሚያልቅ ጉዳይ ስለመሆኑን የተጠቀሱት ድንጋጌዎች ያሳያሉ፡፡ ከላይ እንደተገለጸው አንድ ጉዳይ በፍርድ ሊያልቅ የሚችለው ዳኝነት የተጠየቀበት ጉዳይ በሕግ ለሌላ አካል ያልተሰጠ ጉዳይ በሚሆንበት ጊዜ እንደሆነ ነው፡፡ በተያዘው ጉዳይ ግን አመልካቾች የተሰናበቱት ሕግ አውጪው በዘረጋው ሥርዓት መሰረት ሲሆን አመልካቾች ከጠየቁት ዳኝነት አንጻር (ወደ ስራ መመለስ ወይም የመደመጥ መብት መከበር) ሲታይ ጥያቄው በፍርድ ሊያልቅ የሚችል (justiciable matter) አይደለም፡፡

በመሆኑም የአስተዳደር ፍርድ ቤት ጉዳዩ በፍርድ ቤት ሊታይ የሚችል አይደለም በሚል ምክንያት የአመልካቾችን የይግባኝ ቅሬታ በአብላጫ ድምፅ ውድቅ ማድረጉ በአመልካቾች ከተጠየቀው ዳኝነት (ወደ ስራ እንድንመለስ ወይም የመደመጥ መብታችን ይጠበቅልን ከሚለው) አንጻር ሲታይ በአዋጅ

ቁጥር 578/2000 አንቀጽ 19/1/ለ/ እና ከሚኒስትሮች ምክር ቤት ደንብ ቁጥር 155/2000 አንቀጽ 37(1 እና 2) ድንጋጌዎች ይዘትና መንፈስ እንዲሁም አሳማን የተከተለና ለአስተዳደር አካሉ በሕጉ አግባብ የተሰጠውን ስልጣን (executive prerogative) ያከበረ ነው ከሚባል በስተቀር መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ነው ለማለት የሚያስችል ሕጋዊ ምክንያት ያለ ሆኖ አልተገኘም፡፡ በዚህም ምክንያት ተከታዩን ወስነናል፡፡

ው ሣ ኔ

1. በፌዴራል ሲቪል ሰርቪስ ኤጄንሲ አስተዳደር ፍርድ ቤት በይ/መ/ቁጥር 00827/2001 ነሐሴ 18 ቀን 2001 ዓ/ም ጳጉሜ 02 ቀን 2001፣ በይ/መ/ቁጥር 00831/2001 ነሐሴ 18 ቀን 2001 ዓ/ም፣ በይ/መ/ቁጥር 00839/2001 ነሐሴ 26 ቀን 2001 ዓ.ም፣ በይ/መ/ቁ 00833/2001 ነሐሴ 26 ቀን 2001 ዓ.ም፣ በይ/መ/ቁ 00826/2001 ነሐሴ 21 ቀን 2001 ዓ.ም፣ በይ/መ/ቁጥር 00828/2001 ነሐሴ 13 ቀን 2001 ዓ/ም እና በይ/መ/ቁጥር 00830/2001 መጋቢት 08 ቀን 2002 በአቶ አሸናፊ አማረና በአቶ አወቀ ተሻለ ጉዳይ ተሰጥተው በፌዴራሉ ጠቅላይ ፍርድ ቤት በትዕዛዝ የፀኑት ውሳኔዎች በፌ/ብ/ሥ/ሥ/ሕ/ቁ/ 348(1) መሠረት ጸንተዋል፡፡

2. በዚህ ችሎት ስተደረገው ክርክር የወጣውን ወጪና ኪሣራ ግራ ቀኙ የየራሳቸውን ይቻሉ ብለናል፡፡

ት ዕ ዛ ዝ

የዚህ ውሳኔ ግልባጭ ተጣምረው እንዲታዩ ከተባሉት መዛግብት ጋርም ይያያዝ ብለናል፡፡

መዝገቡ ተዘግቷል፣ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፈርማ አለበት

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