Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions

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Abstract

While *possession of unexplained property* (illicit enrichment) is expressly criminalized under Article 419 of the 2004 Criminal Code of Ethiopia, there are practical problems in its prosecution, *inter alia,* regarding burden and standards of proof. Cases such as *Workineh Kenbato & Amelework Dalie* demonstrate the confusion regarding *who* bears *what* burden, for *which facts* the burden would apply and the required *standard of proof* thereof. Despite efforts to use the prosecution of illicit enrichment as a weapon in the combat against corruption, there are concerns triggered by such prosecutions. There is public interest to punish and deter corruption and seize and confiscate the proceeds of corruption; meanwhile there is the need for precaution against endangering the right to fair trial of the accused (especially the right to presumption of innocence, right to remain silent, right against self-incrimination) and property rights of innocent persons. This Article examines issues of the allocation of burdens and standards of proof in the prosecution of illicit enrichment cases. It assesses the relevant legal framework in Ethiopia and examines some court practices. The author argues that the binding interpretation adopted in *Workineh Kenbato & Amelework Dalie* case is erroneous and calls for its rectification in future cases that involve similar issues.

Key words

Possession of Unexplained Property, illicit enrichment, burden of proof, standard of proof, easing of burden of proof, Criminal Code of Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v8i1.1

Introduction

Since the entry into force of the 2004 Criminal Code of Ethiopia (as of the 9th of May 2005), prosecution of public servants for alleged commission of the

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offence of possession of unexplained property has become a recurrent phenomenon. This holds true both in the federal government and in various regional states. Apart from the *Workineh Kenbato & Amelework Dalie* case,[1] there are many other cases, some already decided and others still pending, before federal and some regional states courts. In many of these cases, litigants and judges are facing some practical problems, particularly regarding *who* must prove *what,* and *to what degree*. There is an enormous confusion on whether an *accused* in such prosecution bears some form of *burden of proof* and, if so, whether the type of burden is *evidential* or *persuasive*. There is no sufficient clarity on the idea of *easing* ("shifting" or *reversal) of burden of "proof",* and *under what circumstances* such an easing (reversal) of burden of proof comes to be operational, as well as, as to *what consequence(s)* would ensue. There is a crucial dilemma on whether the prosecution of illicit enrichment envisages a different approach from other normal criminal proceedings. As the offence is new to the Ethiopian legal system, legal professionals appear to be exceptionally perplexed with these and related issues arising in the criminal process. Such limitations and dilemmas have triggered crucial concerns and seem to pose serious threats to the protection of the right to fair trial of accused persons and the right to property of innocent persons.

In the fight against public corruption, the general public is interested in seeing the enforcement of the criminal law against corrupt public servants (and their criminal associates) and seeks the recovery of plundered public money and other property. However, society does not want to attain such goals at any cost. It seeks to realize these goals without setting aside other most cherished fundamental values such as the protection of the right to fair trial of accused persons. No society condones the erroneous (wrongful) conviction and punishment of innocent individuals and the wrongful confiscation of their legitimate private property.

Where public interest competes or clashes with the rights and interests of individual accused persons, there is the need to strike a proper balance between these rights and interests. This requires weighing all rights and interests (individual and public) at stake, and forging an appropriate, reasonable and proportional means toward an acceptable solution. As some court cases including the *Workineh Kenbato & Amelework Dalie* case demonstrate, it is very doubtful if due attention is given to competing and conflicting rights and interests arising in the prosecution of illicit enrichment cases. This raises serious concerns and provokes legitimate fears.

[1] See the decision of the Cassation Division of the Federal Supreme Court in Cassation File No. 63014, Judgment given on Miazia 9, 2004 E.C.

This Article sets out to examine the various burdens and standards of proof that arise in the prosecution of possession of unexplained property cases. The first section analyzes issues of burdens of proof. Section 2 is devoted to the analysis of issues of standard of proof arising in such prosecutions. Section 3 assesses the legal framework while Section 4 considers some court practices relating to issues of burden and standard of proof in Ethiopia. Finally, the author suggests that the binding interpretation adopted by the Cassation Division of the Federal Supreme Court be reconsidered in future cases.

1. Burdens of Proof in Illicit Enrichment Prosecutions

In this Section we shall closely examine how allocation of burdens of proof and presumption are embedded in the offence of illicit enrichment cases. Such an examination need to take into account the existence of varieties of 'burdens of proof' that become operational in different contexts. This author has tried to offer a succinct overview of the nature and operations of these varieties of burdens in a separate note which is concurrently published with this article. Such a general background of the nature and operations of evidential, tactical and persuasive burdens of proof facilitates our investigation of the specific nature and operations of the different forms of burdens of proof arising in the prosecution of illicit enrichment cases. This investigation also presupposes a sound knowledge of the relationship and mutual interactions between burdens of proof and various forms of presumptions. In this regard, it is necessary to pay attention of the form of presumption that is embodied in an offence-enacting provision. Furthermore, one has to carefully follow up the realization of the possible legal effect(s) which is/are intended to result from the interplay of the form of presumption with the form of burden of proof envisaged in a particular statutory provision.

1.1 Allocation of Burdens of Proof in the offence of Illicit Enrichment

There is the need to carefully examine the manner in which burdens of proof are allocated (in illicit enrichment cases) between prosecuting authorities and the accused. This issue further evokes questions such as *who* bears *what* burden and for *which* facts? Apart from other constitutive elements discussed elsewhere,[2]

[2] These pertain to 'persons of interest' and 'period of check'. The other constitutive elements fall within the *actus reus* and *mens rea* elements of the offence. 'Disproportionate assets' and 'absence of justifications' are components of the *actus reus* element of the offence. For a detailed discussion of the constitutive elements see this author's article "Criminalization of 'Possession of Unexplained Property' and the

the offence of illicit enrichment is said to be committed when all the legal, material and moral elements are found fulfilled. As is true in other criminal cases, the particular material and moral ingredients of this offence must be established before a court passes a judgement of conviction against an accused. How is this possible and which party bears the responsibility of proving/disproving these elements?

Due to the unique circumstances that surround the commission of public corruption offences and other variety of factors and reasons, it has been mentioned elsewhere that national jurisdictions and the international community at large are forced to recognize and to authorize different forms of special investigative, prosecutorial and adjudicatory methods and procedures.[3] It has also been noted that criminalization of illicit enrichment is one such weapon that is purposefully created to strengthen the fight against public corruption and to address the difficulty faced in respect of proof. At this juncture it is of paramount importance to appreciate how such criminalization measure strengthens the fight against public corruption and how it helps in addressing the difficulty in respect of proof. Part of the answer to these and related issues is to be found in the allocation of burdens of proof.

In view of the various challenges that prosecution of public corruption including illicit enrichment cases pose and the challenges encountered in respect of proof, national jurisdictions may, theoretically, decide to use different techniques or approaches to ensure that actual offenders do not escape justice. One possible approach is, arguably, to employ a *lesser standard of proof* than proof *beyond a reasonable doubt standard*.[4] Theoretically this could be either 'preponderant degree of proof' or a 'clear and convincing degree of proof'.[5] The

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Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia' in this same volume of *Mizan Law Review*, pages 45-84.

[3] For details See International Council on Human Rights Policy (2010), 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities', at 63; available at:< www.ichratorg/files/reports/58/131b_report.pdf>, (last visited on 12/08/ 2013); Benjamin B. Wagner & Leslie Gielow Jacobs (2008-2009), 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations', 30 *U. Pa. J. Int'l L.*, at 215-237.

[4] Ndiva Kofele-Kale (2006), 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes', 40 *Int'l Law*, at 940; Guillermo Jorge (2007), 'The Romanian Legal Framework on Illicit Enrichment', at 15-16; Available at: <www.aats.americanbar.org/.../romania-illegal_enrichment_framework-2007>, (last visited on 12/06/ 2013).

[5] Ibid; Margaret K. Lewis (2012), 'Presuming Innocence, or Corruption, in China', 50 *Colum. J. Transnat'l L.*, at 302- 307; Kofele-Kale, (at 940), writes as follows:

second option could be to *ease or reduce the burden of the prosecutor* by using legal techniques that involve presumptions of law, i.e., by embracing some form of reversal (easing) of burden of proof.

However, such option (or resort to any other choice) is not put in place arbitrarily, or in violation of other fundamental values and due process rights such as the right to be presumed innocent until proven guilty, the right to remain silent and the privilege against self-incrimination which modern democratic states observe, protect and enforce.[6] This article deals with the second option (easing of the burden of the prosecutor) as it is this approach which is followed in the offence of illicit enrichment. We shall see to what element of the offence this reduction (relaxation) relates and what that means in practice. As a prelude to this discussion, the material and/or moral facts which the prosecutor should prove in illicit enrichment cases need to be identified, after which whether there is any fact the accused is required to prove or disprove can be examined.

As is the case for other offences, the principle of presumption of innocence and other fundamental due process values in criminal justice require the prosecutor to bear both evidential and ultimate (persuasive) burdens of proof in illicit enrichment prosecutions. No accused person is required to *prove his innocence* in this era of modernity. Putting innocent persons in such a peril is not within the public interest and does not enhance the fight against public corruption. Even putting *de facto* criminals in such a skewed position is not

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> In illicit enrichment cases, the accused is likely to enjoy considerable advantages in terms of access to relevant information, which creates an imbalance to the detriment of the prosecution in breach of the equality-of-arms principle. Something needs to be done to compensate for this inequality of arms between the parties. Part of the solution lies in making some adjustments on how the burden of proof and the requisite standard of proof are allocated between the prosecution and the accused. The accused public official should be made to assume a significant burden in going forward with evidence [evidential burden] while allowing the state to be able to prove its case on the less stringent balance of probabilities standard.

[6] As mentioned elsewhere …, the U.S, Canada, England, South Africa and most other developed (western) countries out rightly rejected the idea of criminalization of illicit enrichment mainly because they think that such a measure would unduly interfere against the principle of presumption of innocence and other vital components of the right to fair trial. Babu noted that "the delegations of the Russian Federation, the Member States of the European Union and others had expressed their strong wish to delete [Art 20 of the UNCAC]" at the negotiating stage of the UNCAC. See R. Rajesh Babu (2006), 'The United Nations Convention Against Corruption: A Critical Overview', at 14 (footnote 65), available at:
<http://ssrn.com/abstract=891898> (last visited 25 December 2013). It would be beyond the tolerable (acceptable) degree, if those national jurisdictions that recognize the offence of illicit enrichment, go further and embrace other approaches.

acceptable as it defeats the right to equality of arms and other components of the right to a fair trial. To obtain conviction, the prosecutor must therefore go forward with (lead) evidence and prove that the accused has committed the crime of illicit enrichment with a culpable state of mind. These burdens in turn require the prosecutor to establish at least some of the *actus reus* and/or *mens rea* elements of the offence (in addition to establishing those other constitutive elements).[7] The prosecutor must prove at least the following four *threshold* factual elements:[8]

a) that the accused is or has been a public official (servant) or any other 'person of interest';
b) that the accused public servant has acquired a certain total amount of income from lawful sources during a 'period of check';
c) that the accused public servant possesses a 'disproportionate asset' and/or demonstrates a living style which is far in excess of his income from lawful earnings; and
d) that the significant increase is made during the period of check- from the time the accused has been hired/assigned/appointed or elected to serve in public office or public undertaking.

Apparently, the prosecutor should prove the public servant's legitimate income. Yet, whether the prosecutor's burden of proving such legitimate income of the accused is confined only to establishing legitimate income deriving from salary and related benefits or whether it extends to the establishment of other legitimate sources (such as income from inheritance, prize, or income from other private investment, etc.), is open to debate.

Be that as it may, the prosecutor must establish the extent of money/asset under the control of the accused public servant. Further, the extent of money or other property which the accused acquired lawfully during the 'period of check' must be established. The prosecutor in addition needs to establish the discrepancy between the amounts of income derived from known legitimate sources and the one which is found under the control of the accused, or which is manifested in his living standards, during the period of interest. If the prosecutor succeeds to establish these basic elements to the required degree of proof, then it could be possible to theoretically and/or legally conceive of other techniques or approaches that may mitigate the stringency of the prosecutor's evidential and/or persuasive burdens.

[7] Note that in ordinary crimes and in the normal course of things, the prosecutor is required to prove each and every ingredient of an offence in its charge.

[8] See Kofele-Kale, *supra* note 4, at 943 (including footnote 174). It appears that the *mens rea* is to be inferred from the proof of these elements.

As the formulation (definition) of the offence of illicit enrichment under the international/regional conventions and national laws shows, transfer ("shift" or "reversal") of burden of "proof" from the prosecutor to the accused is made only in relation to the fifth element of the offence ('*absence of justification*'). The nature of this "burden" and other related details are to be explained in the context of the operation of the form of presumption envisaged by the law. We have to note that the accused is required only to shoulder some form of burden of "proof", and this is only in respect of this element of the offence (i.e., '*absence of justification*'). It is thus wrong to take this transfer ("shift") as amounting to a total shift of burden of proof from the prosecutor to the accused in respect of every element of the offence. And this transfer of a form of burden of "proof" to the accused in respect of this one element of the offence does not in any way signify presumption of guilt. It is impossible to consider the transfer of burden in respect of this element before the prosecutor successfully proves the four threshold elements.

Moreover, it must be underscored that such transfer of burden of "proof" in respect of 'absence of justification' element of the offence from the prosecutor to the accused is different from the one that occurs in case of tactical burden of proof in other criminal proceedings. This transfer of burden of "proof" comes in the middle of the proceeding as soon as the prosecutor establishes the four threshold elements but before it is required to establish the other essential element of the offence in the charge. For example, if an accused raises an affirmative defence such as legitimate defence, or duress, or lawful order in a given criminal charge brought against him, a tactical burden of proof transfers from the prosecutor to the accused only after the prosecutor has comprehensively established every element of the offence in the charge. In the case of illicit enrichment, however, the "shift" of burden of "proof" comes into the picture only after the prosecutor has established the four basic elements and before it is required to prove 'absence of justification' element of the offence. This is made possible by the operation of presumption of law. Again, the nature, form and legal consequence of this "shift" of burden of "proof" eventuated by the operation of presumption of law should be identified by critically examining the kind of presumption that is adopted in the criminal law provision that creates the offence.

1.2 Burdens of Proof and the Operation of Presumption of law in Illicit Enrichment cases

The definition (formulation) of the offence of illicit enrichment in national, regional and international legal instruments employs a form of *presumption of*

law.[9] Such an employment of a presumption of law entails consequences upon the allocation of burdens of proof existing between prosecuting authorities and the accused. As can be gathered from the various definitions (formulations) of the offence of illicit enrichment, the embedded form of presumption pertains to the *disproportionate assets* of the accused person that is found under the possession of, or demonstrated in the life style of, the accused. The specific nature of the presumption needs closer scrutiny.

Theoretically, the formulation of *presumptions* in an offence of illicit enrichment case may take one of the following forms:[10]

a) *Irrebuttable* or *conclusive presumption:* This requires the prosecutor to prove the extra (disproportionate) assets of the accused that exceed lawful incomes/earnings. If that is successfully discharged, it requires the court to conclusively presume the illicit origin or illegality of such additional assets.[11]

b) *Provisional presumption:* This requires the prosecutor to prove the basic fact of assets out of proportion to lawful income. It further grants *discretionary* power to the courts to draw inference from those extra assets as originating from illicit sources.[12]

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[9] See Art IX of the 1996 Inter-American Convention Against Corruption (IACAC), Art 20 of the 2003 United Nations Convention Against Corruption (UNCAC), Art 1(1) of the 2003 African Union Convention on Combating and Preventing Corruption. (AUCPCC). Also see Art 419 of the Criminal Code as well as statutory laws of other countries in Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger (2012), *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*; Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9454-0. License: Creative Commons Attribution CC BY 3.0, at Appendix 'A'; available at: <http://creativecommons.org/licenses/by/3.0> (last visited 15/8/2013), (hereinafter '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption'*.

[10] See Lewis, *supra* note 5, at 305-307; See also Dennis I. H. Dennis (2002), *The Law of Evidence*, 2nd ed., (Reprinted, 2004), at 420-421. Normally, if it were not for the legislative recognition of presumption of law, the prosecutor would have been required to prove both the disproportionate assets that exceed the lawful income of the accused and the illicit sources of those extra assets.

[11] In this case the accused would not have any chance to rebut. This would tantamount to punishing a public servant for being found possessing property that exceeds his lawful income as such, with no proof of any illicit gain.

[12] Here the court has the discretion to draw or not draw a factual presumption of illicit gain. If the court draws such a presumption, the accused, in order to avoid the risk of losing on one's case, would be responsible to respond by adducing some form of evidence to rebut what has been presumed by the court. This refers to a situation of "shift" of a tactical or provisional burden of "proof" to the accused.

c) *Evidential presumption:* This requires the prosecutor to prove the basic fact of assets out of proportion to lawful income. It further requires courts to *mandatorily* draw thereof a rebuttable presumption about the illicit origin of the extra assets.[13]

d) *Persuasive presumption:* This requires the prosecutor to prove the basic fact of assets out of proportion to lawful income. It further requires the accused to produce some evidence of legal sources and *convince* judges that the assets were indeed from legal sources with a further mandatory obligation on the court to draw about the illicit origin of such property *unless the accused proves to the contrary*.[14]

While these are possible theoretical formulations and options, in practice it is necessary to specifically identify the particular form of presumption that is adopted by a particular legislative or judicial body. Failure to identify the kind of presumption adopted may not merely defeat the legislature's intention but can also be a source of injustice. It is thus necessary to identify whether a conclusive, or provisional, or evidential, or persuasive form of presumption has been envisaged under the offence-creating criminal law provision and/or the constitutional values such as the presumption of innocence, with a view to checking if that stands valid.

From the theoretical perspective, it is clear that the first formulation (i.e., conclusive presumption) conclusively assumes guilt. This stands in stark contrast to the presumption of innocence and many other fundamental values. As it creates an offence that is not susceptible for a contest otherwise it cannot be a tenable option in any modern country. The second formulation (provisional presumption) grants discretionary power to the courts to draw or not draw a presumption of illicit gain. From theoretical perspective this does not pose any problem. And, such a formulation is common in law-making. In the context of

[13] In this case, if the prosecutor proved the basic facts stated, the court *must* presume that the extra sources are from illicit origin. But, the accused can rebut this *evidential presumption* by adducing sufficient rebuttal evidence that raises the issue of whether the presumed fact (that the extra sources are from illicit origin) is true. The accused is not under duty to convince or persuade judges about the truthfulness of his side of story. It suffices if the accused succeeds in raising some doubt(s) as to the truthfulness of the conclusion drawn in respect of the presumed fact.

[14] In this case also, if the prosecution proves the basic facts stated, the court *must* presume that the extra sources are from illicit origin. But, the accused can rebut the presumption by adducing rebuttal (counter) evidence that *convinces* judges about the truthfulness of one's side of story. It is not sufficient for the accused to adduce evidence that sparks some doubt(s) against the presumed fact. The accused here bears legal or persuasive burden of proof and the accepted standard of proof imposed on the accused in such instances is balance of probabilities.

criminalization of illicit enrichment, however, such an approach may be criticized for being inadequate to address the difficulty encountered by prosecuting authorities in proving corruption offences. Such presumption does not significantly contribute to the effective enforcement of the criminal law against corrupt public officials as it leaves wide room for courts to exercise or not to exercise their discretionary power.

We are thus left with the other two formulations-evidential presumptions and persuasive presumptions. The question then will be: Which form of formulation (type of presumption of law) is adopted under the international and regional conventions and under the statutory laws of national jurisdictions dealing with the offence of illicit enrichment? To provide an answer for this question one has to refer to the relevant provisions of the UNCAC[15] and the two regional conventions -the Inter-American Convention against Corruption (IACAC)[16] and the AUCPCC[17]- as well as to the statutory formulations of the offence in individual national jurisdictions.[18]

The formulations of these regional and international legal instruments do not explicitly tell us whether evidential or persuasive presumption is envisaged. Nor do statutory laws of national jurisdictions squarely tell us whether the one or the other is adopted. However, the UN Legislative Guide for the implementation of the UNCAC makes it evident that only evidential presumption that entails shift

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[15] Article 20 of the United Nations Convention Against Corruption (UNCAC) provides:
"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official *that he or she cannot reasonably explain in relation to his or her lawful income*" [Emphasis added].

[16] Article IX of this Convention stipulates:
"Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that *he cannot reasonably explain in relation to his lawful earnings during the performance of his functions*" [Emphasis added].

[17] Article 8 (1) of the African Union Convention on Combating and Preventing Corruption (AUCPCC) reads:
"Subject to the provisions of their domestic law, State Parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment" Article 1 (1) of the same runs as follows: "'Illicit enrichment' means the significant increase in the assets of a public official or any other person *which he or she cannot reasonably explain in relation to his or her income*" [Emphasis added].

[18] See *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 9, at Appendix 'A'.

of evidential burden is envisaged.[19] The case law of many national jurisdictions also recognizes *evidential presumption* and this approach is widely supported by many scholars.[20]

This has been the experience in Hong Kong (a jurisdiction well experienced in prosecuting public officials under this offence for more than forty years), India, Argentina, Egypt, Mozambique and many other countries that have criminalized illicit enrichment. As Professor Kofele-Kale observes, "extant jurisprudence reads reverse onus clauses as casting an evidential burden on the accused."[21] Lewis also notes that "[r]everse-onus illicit enrichment provisions *only shift* an *evidentiary burden of production* and do not relieve the prosecution of the ultimate burden of proving the defendant guilty of the crime charged."[22]

If the prosecutor successfully establishes the four threshold elements (highlighted earlier under Section 1.1.), judges *shall*, as per the operation of the evidential presumption, presume that the disproportionate money/asset found

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[19] The Legislative Guide provides (at 104) that the accused only bears *evidential burden* of proof, available at: <https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide. pdf>; See also (2004), 'The United Nations Handbook on 'Practical Anti-Corruption Measures for Prosecutors and Investigators', at 61, available at: <https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

[20] See Kofele-Kale, s*upra* note 4, at 943; *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 9, at 24-25; 30-31; Bertrand de Speville (1997), 'Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights', paper presented to the 8th International Anti-Corruption Conference, available at: <http://8iacc.org/papers/despeville.html> (last visited on 21 November 2013), at 4-6; Nihal Jayawickrama, Jeremy Pope & Oliver Stolpe (2002), 'Legal Provisions to Facilitate the gathering of evidence in Corruption Cases: Easing the Burden of Proof', *2 Forum on Crime and Society, No.1*, at 28-31; Jorge, s*upra* note 4, at 60-61; Lewis, *supra* note 5, at 308 & 312; Lilian Y. Y. Ma (1991), 'Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bills of Rights, *21 Hong Kong L. J*., at 318; Pedro Gomes Pereira and João Carlos Trindade (2012), 'Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique-Legal analysis',at 33;available at <http://www.baselgovernance.org/fileadmin/.../Mozambique_Legal_analysis.pdf> (last visited 22 December, 2013).

[21] Ibid. Nevertheless, Professor Kofele-Kale argues (*supra* note 4, at 942-943) in favor of imposing persuasive burden of proof in respect of the presumed fact if such prosecutions involve senior public officials.

[22] Lewis, *supra* note 5, at 312 (footnoted omitted). As will be discussed, endorsement of evidential presumption has the effect of transferring or "shifting" evidential burden in respect of the fifth element of the crime of illicit enrichment ('absence of justification') to the accused.

under the direct or indirect possession of the accused public servant is a result of some illegal or illicit activity. The prosecutor is not required to prove any illegal transaction or activity ("predicate offence") that could explain the background.[23] From the proof of the disproportionate money/assets or the lifestyle of the accused public official the court presumes the commission of some illicit or illegal activity in relation to the public servant's position or service. In this regard, it has been noted:

> In illicit enrichment, the prosecution no longer is required to determine the unlawful origin of the assets. Instead, if they have proven that they cannot determine the legal origin of the assets, they can require the person under investigation to explain how this property derived from legal sources. There is thus no reversal of the burden of proof but an easing of the burden of proof on the prosecution: the prosecution does not have to demonstrate that the assets are criminal in nature, but it has to demonstrate that they cannot determine the legal origin of the assets.[24]

In prosecuting this offence, the prosecution is made a beneficiary of the evidential presumption. Its *burden of adduction of evidence* in respect of one of the ingredients of the offence (absence of justification) is relaxed (eased) by the presumption. Such measure contributes to effective law enforcement against corrupt officials and better intensifies the fight against public corruption. It helps prosecuting authorities to overcome the difficulty they face in proving some forms of corruption crimes which often take place in secret. The following observation illustrates the point:

> The intent behind the offence of illicit enrichment is to allow the prosecution to prove corruption much more easily by removing any requirement to demonstrate a nexus between a benefit gained by an official and a particular governmental action rendered by the official in exchange for the benefit. A relaxation of the state's burden is deemed necessary because proving that a public servant's unexplained accumulated wealth is the product of corruption presents serious evidential problems for the state.[25]

To some extent, such an approach interferes with the enjoyment of the right to be presumed innocent, right to remain silent and the right against self-incrimination. However, the approach is accepted (in those countries that have criminalized illicit enrichment) as a legitimate, necessary, reasonable and proportional response in view of the multi-dimensional severe threats that public corruption has posed against public interest. At this juncture, one should note

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[23] Jorge, *supra* note 4, at 16.
[24] See Pereira & Trindade , *supra* note 20, at 33.
[25] Kofele-Kale, *supra* note 4, at 912.

that this approach is not something unique envisaged only in the offence of illicit enrichment. With the proliferation of "acquisitive crimes" (crimes that generate profits such as money laundering, illicit drug market, corruption, trafficking in persons, arms, organs and migrants) traditional criminal law and enforcement theory has, in recent times, entered into some paradigm shift across the globe.[26]

As Professor Jorge notes "attacking criminal profits after they have been earned become a central objective of many criminal law systems."[27] Such a new approach increases the effectiveness of legal instruments to detect, seize and confiscate ill-gotten gains and reduces the motivation for engaging in such acquisitive criminal activities.[28] Thus, one has to see the evidential presumption endorsed in the offence of illicit enrichment and the attendant transfer of evidential burden from the prosecutor to the accused from this vantage point.

Yet, one may still doubt whether this approach of *evidential presumption* is compatible with the principle of presumption of innocence. While this can be debatable, the European Court of Human Rights in *Salabiaku v. France* and the Court of Appeals in Hong Kong in *Attorney General v. Hui Kin Hong* maintained that reversing evidential burdens of proof is compatible with the principle of presumption of innocence.[29] Countries that criminalized illicit enrichment do not see incompatibility between the embedded evidential presumption and the principle of presumption of innocence.[30]

Despite the evidential presumption taken against him, the accused has a chance to offer 'reasonable explanation' regarding the disproportionate money/assets that is established by the prosecutor. Apart from other grounds of

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[26] For some details read Jorge, *supra* note 4, at 13-20.

[27] Id, at 14.

[28] Ibid.

[29] See *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 9, at 25; Maud Perdriel-Vaissiere (January 2012), 'The Accumulation of Unexplained Wealth by Public Officials: Making the offence of illicit enrichment enforceable', *U4 Brief*, No 1, at 2-3, available at: <www.U4.no>, (last visited on 17/08/2013), at 2; de Speville, *supra* note 20, at 4-6; Kofele-Kale observes the experience of the European Court of Human Rights in some other criminal offences and notes: "The European Court of Human Rights was one of the first international tribunals to argue in favour of treating reverse burden clauses as no more than reasonable limits on the presumption of innocence since *they only place an evidential burden on the accused* with respect to *an element that would be otherwise difficult for the prosecution to prove* given the defendant's superior access to that information" [emphasis added] (Kofele-Kale, *supra* note 4, at 931).

[30] For the position of the U.S, Canada, South Africa and others one may again look at what has been briefly mentioned under footnote 6.

defense (e.g., alibi, false testimony, erroneous estimation, etc) which the accused may raise to discharge his tactical burden of proof, the accused in illicit enrichment prosecution is further allowed to rebut or counter the presumption drawn (by introducing evidence that shows the 'otherwise origin' of his money or assets).[31] To this effect, the accused may introduce evidence of inheritance, prize, lawful gifts or donations, income from bonus, or income from overtime, or part-time work, or per diem, or from renting, or other agricultural, trading or investment activities, etc. Whether this "otherwise origin" is confined to only such and other lawful sources or can extend to include unrelated illegal or illicit sources (unrelated with one's public position or service) is left open for judicial interpretation.

The fourth formulation (persuasive presumption) requires the prosecution to prove the four threshold elements, after which the court *must* presume that the extra sources are from illicit origin *unless the accused disproves* this presumption. The accused can rebut the presumption by adducing rebuttal (counter) evidence that *convinces* judges about the truthfulness of his side of story. It is clear that such an approach endorses the reversal of *persuasive burden* of proof from the prosecutor to the accused. Nevertheless, this approach of persuasive presumption has never been accepted so far in international and national legal regimes as well as in judicial jurisprudence as it may lead to wrongful conviction of innocent individuals in the face of reasonable doubts.[32]

This approach may annihilate one of the most universally accepted and cherished principles of criminal and criminal procedure laws i.e., the principle of presumption of innocence and jeopardize other components of the right to fair trial as well as the right to private ownership of property. Yet, some scholars such as Kofele-Kale support the adoption of this approach in cases where higher (senior) officials of a state such as "heads of state and government, senior government, judicial or military officials and senior executives of publicly-owned corporations who, soon after their appointment or election to office suddenly become rich without their being any rational explanation to such accumulation of wealth" are charged for committing the offence of illicit

[31] The accused can contest the assessment of the prosecutor that is said to constitute disproportionate assets. It is open for the accused to attack the prosecutor's establishment of preliminary facts based on 'person of interest', 'period of check', valuation of property, discrediting possession (ownership) of money or other property as his own, etc. If the prosecutor successfully discharges its evidential burden of proof on all the basic facts under its obligation, the accused is required to bear tactical burden of proof on these elements or other grounds of defense such as alibi defense. The accused is also required to bear evidential burden of proof on the fifth element of the offence, i.e., '*absence of justification*'.

[32] See the references under footnotes 19 & 20.

enrichment.[33] Kofele-Kale, however, notes that the prevailing approach and the extant jurisprudence only envisages shift of evidential burden of proof eventuated by endorsement of evidential presumption.[34]

2. Standards of Proof in Illicit Enrichment Prosecutions

Standard of proof pertains to the assessment or evaluation of probative materials, mainly of evidence. In criminal proceedings the standard is measured differently at the various stages of the criminal process. For example, the amount or intensity of evidence that is required to issue an arrest warrant is different from that which is required to decide to prosecute or prepare a formal criminal charge. Therefore, the different forms of standards of proof in criminal proceedings include those degrees of "proof" utilized in pre-trial proceedings to assess if there exists:

- '*probable cause*'- a prerequisite to issue summons or arrest warrant or search and seizure warrant;
- '*sufficient evidence*'- a prerequisite to decide to prosecute (prepare a criminal charge); and,
- the standard employed during trial proceedings such as '*prima facie* degree of proof', '*preponderance* degree of proof', '*clear and convincing* degree of proof', and '*proof beyond a reasonable doubt* degree of proof'.[35]

Here we are interested in identifying the standards of proof that are applicable in trial proceedings involving illicit enrichment cases. The themes involved in this regard include the respective standards of proof borne by the prosecutor and the accused over the factual matters falling under their respective burdens of proof. In other words, the inquiry relates to the degrees of proof that are required of the

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[33] Kofele-Kale (*supra* note 4, at 910 & 942-943). He (at 942-943) argues that "given the clandestine nature of official corruption, fairness and public policy demand that the burden of persuasion be placed on the accused. This should be the case given the accused public official's superior resources, which place him in a considerably better position than the prosecution to determine whether or not statements regarding the origins of his wealth are true or false.[…] in exceptional cases where the essential elements of the facts at issue in the case are peculiarly within the knowledge of the accused, then the evidentiary burden, as well as the burden of persuasion, can arguably be borne by the accused."

[34] Id, at 943.

[35] For further details See J. P. McBaine, 'Burden of Proof: Degrees of Belief', 32 *Cal. L. Rev.* (1944), at 242-268. See also Christoph Engel (2008-2009), 'Preponderance of the Evidence versus *Intime Conviction:* A Behavioral Perspective on a Conflict between American and Continental European Law', 33 *Vt. L. Rev*., at 435 *ff*; See the experience of some countries of the world from Craig M. Bradley (ed.) (2001), *Criminal Procedure: A Worldwide Study*, 2nd ed.

prosecutor to discharge its evidential and ultimate burdens of proof, and it also deals with the tactical and evidential burdens of proof borne by accused.

The degree of "proof" borne by the prosecutor to successfully discharge the *evidential burden* on those threshold facts is not specifically stated in any of the relevant conventions or in any other national statutory law. The same is true with regard to an accused person's tactical and/or evidential burdens of proof. Moreover, there is no particular mention of the standard of proof that is required of the prosecutor to discharge its persuasive (ultimate) burden of proof. In view of such state of affairs and in the face of the almost universally accepted principle of presumption of innocence, it is appropriate to follow the usual standards of proof that are applicable in other cases. In this regard, there is no difference between prosecutions involving illicit enrichment and prosecutions involving any other form of ordinary crimes. In effect, the prosecutor is required to establish the existence of all the threshold elements with a *prima facie* degree of proof, which in actuality has to be *proof beyond a reasonable doubt* degree of proof.

Thus, judges cannot lawfully order an accused to enter into his defense and to bear an evidential burden in respect of the 'absence of justification' element of the offence *before and until the prosecutor successfully discharges* its case with this degree of proof.[36] The commission of illicit enrichment by the accused must be demonstrated *prior to* and *independent of* the "explanation" of the accused.[37] The *satisfactory* or *reasonable explanation* requirement contained in the definition or formulation of the offence in the conventions as well as in statutory laws of national jurisdictions comes into the picture *only after* the prosecutor has sufficiently demonstrated the existence of disproportionate ("above commensurate") property or a lifestyle that demonstrates such a disproportionate wealth of the accused during the period of check.

If the prosecutor establishes those basic facts with such degree of proof, courts are mandatorily required to presume the *illegal or illicit* source or acquisition of the disproportionate assets unless they are provided with an otherwise reasonable explanation by the accused. Here lies the other unique feature of the offence. Following the successful discharge of evidential burden by the prosecutor on the threshold facts, the court is required to instruct the accused to give a *satisfactory* or *reasonable explanation* of the sources of the disproportionate assets found in his possession or on how he came to lead such a

[36] Jorge, *supra* note 4, at 60-61.

[37] *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *supra* note 9, at 23.

standard of life that is above his commensurate official income or resource.[38] The presumption drawn by the court remains valid if the accused fails or cannot *give reasonable or satisfactory explanation*.

As has already been mentioned, an accused who contests the validity of such presumption and who would like to avoid conviction has to lead evidence with a view to rebut or counter it. He can do that by introducing evidence which explains the source of the money/assets found under his control. This evokes various questions: To *what extent* should the accused show or demonstrate that the extra money or property found under his control is from other legitimate sources? What does providing '*reasonable' or 'satisfactory' explanation* to the court mean? Does this mean that the accused can only 'spark some doubt' on the presumption drawn or on the basic facts that led into the drawing of such a presumption? Or, is the accused required to create or raise some 'reasonable doubt'? Or, is he required to '*prove* to a *preponderant degree* of proof' that the disproportionate asset is not a result of some illicit or illegal activity related to his position or service but is a result of some known legitimate sources (even unrelated illegitimate sources)? What would be the consequence if at the end of the trial, the judges remain at equipoise or at equilibrium regarding the assets found under the control of the accused?

As discussed earlier, evidential burden of proof only imposes upon the accused the duty of creating or raising 'reasonable doubt'. As the particular burden of "proof" borne by the accused in this case is one of evidential burden, it follows that the standard of proof borne by the accused is one of *creating or raising reasonable doubt against the presumed fact* or *against the evidence of the prosecutor*. The prosecution bears the ultimate burden of proof. It is the duty of the prosecutor to prove the guilt of the accused beyond reasonable doubt. Thus, the accused succeeds if he creates some reasonable doubt against the presumed fact or against the evidence of the prosecutor. The employment of such expression as "reasonable explanation" or "satisfactory explanation" in the three conventions and in the statutory laws of national jurisdictions reinforces this assertion. The accused is required to give or offer "reasonable explanation" or "satisfactory explanation" about the disproportionate money or property found under his control. The accused is not required to *prove* something to the satisfaction of judges. He is not expected of *convincing* judges about the truthfulness of his side of story because such a requirement does not apply to

[38] Note how Art IX of IACAC, Art 20 of UNCAC, and Art 1 of AUCPCC define the offence as a significant increase in the assets of a public/government official ("or any other person" adds the AUCPCC) which [the accused] "cannot reasonably explain" in relation to his/her (lawful) income/earnings.

evidential burden but only relates to reversal of persuasive burden of proof.[39] We have seen hereinabove that the Legislative Guide for the implementation of the UNCAC expressly provides for the transfer of *evidential burden* and not of *persuasive burden*. We have also noted that the practice of national jurisdictions does not involve such transfer of persuasive burden of proof from the prosecutor to the accused.

Therefore, the accused in illicit enrichment cases is not expected to prove the truthfulness of his side of story with a preponderant degree of proof. The accused would be the beneficiary of doubt if at the end of the trial judges remain at equipoise about the money or property that is found under his control. Judges would thus be able to pass a judgment of conviction if the prosecutor proves the guilt of the accused *beyond a reasonable doubt* degree of proof.

3. Appraisal of the Ethiopian Legal Framework on Burdens and Standards of Proof in Illicit Enrichment

3.1 General overview

There is the need to examine whether the Ethiopian legal framework is different from the three conventions and from the laws of other national jurisdictions. To this end, we need to have a closer look at the general organization, design and operation of the Ethiopian criminal justice system in general. This is because issues of burden and standard of proof are influenced or determined by, *inter alia*, the organizational structure and other peculiar features of the legal system in question.[40]

It is often claimed that the contemporary Ethiopian legal system in general is a result of the mix of the common law and civil law legal systems.[41] The manner

[39] See Kofele-Kale, *supra* note 4, at 943.

[40] Structures of legal systems are affected by theories of dispute resolution such as adversarial or inquisitorial systems which in turn are reflections of the role of governments in dispute resolution. For further details see Ronald J. Allen (2012), 'Burdens of Proof', at 2- 24; available at: <http://ssrn.com/abstract=2146184> (Visited on 2 December 2013).

[41] See Jacques Vanderlinden (1966-1967), 'Civil Law and Common Law influences on the developing law of Ethiopia', 16 *Buff. L. Rev.,* at 250- 266. It is a widely known that from 1955 through 1965 Ethiopia has adopted six codified laws in addition to the Revised Constitution of 1955. These were: the 1957 Penal Code, the 1960 Civil Code, the 1960 Commercial Code, the 1960 Maritime Code, the 1961 Criminal Procedure Code and the 1965 Civil Procedure Code. Except for the Civil Procedure Code, which was drafted by an Ethiopian (Mr. Nirayo Esayas), the other codes were drafted by European legal experts. The Penal Code was drafted by Professor Jean Graven, a Swiss criminal lawyer; the Civil Code was drafted by Professor Rene

in which the mix (combination) has been made in the laws and how it was put into practice requires extensive specific studies. Yet, a closer scrutiny of the legal design in the relevant codes of Ethiopian law shows that the substantive law codes were very much influenced by the civil law (Romano-Germanic) legal traditions and systems while the adjective (procedural) codes were influenced by the common law traditions and systems.[42] This is definitely true in the case of the 1957 Penal Code and the 1961 Criminal Procedure Code.[43]

Although the Penal Code is replaced by the new Criminal Code in 2004, the latter has substantially retained the substance and style of its predecessor. Yet, the Criminal Code has come up with new and additional forms of crimes.[44] One of the new crimes incorporated in this Code is the offence of Possession of Unexplained Property embodied under Art 419 of the Code.

On the other hand, the Criminal Procedure Code (1961) is still in force despite its many flaws and lacunae which were mainly identified in the aftermath of its promulgation.[45] This Code exhibits more of adversarial criminal procedure systems and styles. This is especially true in respect of pre-trial and trial procedural designs and operations. For instance, the Code endorses partisan form of criminal investigation. The charging and trial and presentation of evidence are designed in the fashion of adversarial systems. The gathering and

David, a French Comparative lawyer, and the Commercial and Maritime codes were prepared by other French Professors, Professor Escarra and after his death by Professor Jauffret. The Criminal Procedure Code was initially drafted by Professor Jean Graven but his draft was substantially set aside and it was again prepared by Sir Charles Mathew, a British common lawyer. Sir Charles Mathew's draft was highly influenced by the then Malayan Criminal Procedure Code, which had a pronounced common law flavour (See Vanderlinden, *supra* note 76, at 257; Stanley Z. Fisher (1969), *Ethiopian Criminal Procedure: A sourcebook*, at ix-xii).

[42] Ibid.

[43] To properly grasp how issues of burden and standard of proof are accommodated in possession of unexplained property cases, we need to first know how the system of criminal justice is structured and what roles and responsibilities are assigned to participants in the criminal process. These are primarily determined by the Constitution, and the substantive criminal and criminal procedure laws. Thus our assessment involves these and other relevant normative and institutional elements of the present criminal justice system.

[44] To a certain extent, this Code has been influenced by the values and principles that are incorporated in the Federal Democratic Republic Constitution of Ethiopia (1995), hereinafter the Constitution.

[45] See what Fisher noted in 1969 (*supra* note 41, at xi-xii).

collection of evidence is undertaken by law enforcement agencies, mainly the regular police.[46]

Even if the Criminal Procedure Code is still in force, it has been complemented by various laws. Other than the regular police, there are some specialized bodies that undertake criminal investigation in certain specific forms of crimes such as the Federal Ethics and Anti-Corruption Commission. The Ethics and Anti-Corruption Commissions of each Regional State are also entrusted with the power of criminal investigation and prosecution of cases involving corruption.[47] At present, Ethiopia essentially follows the system of mandatory prosecution.[48] In ordinary criminal offences, the decision to prosecute or not to prosecute is made by the regular public prosecutor. In the case of corruption offences this power is granted to the respective Ethics and Anti-Corruption Commission bodies.[49] The roles and responsibilities of courts in the pre-trial and charging phases of the criminal processes are somehow similar to what is found in common law legal systems.[50]

At the trial phase, the Ethiopian criminal justice system is substantially similar to, and it follows, that of the common law- adversarial style of litigation. Litigating parties are responsible to select and adduce their respective evidence.

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[46] See for example Arts 9, 22-37 of the Criminal Procedure Code (Cr. P. C). Also, see Art 7 of the Federal Police Commission Proclamation No. 313/2003, apart from Regional States laws that establish and grant powers to the Regional Police bodies.

[47] See, for example, Arts 6 (3), 7 (3) - (7), & 8 of the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005 (hereinafter Proc No. 433/2005).

[48] See Art 40 Cr. P.C endorsing system of mandatory prosecution. But, see also Art 42 (1) (d). In cases of corruption offences see Arts 7(4) & 9 of Proc No. 433/2005. The Criminal Justice Policy of the country which was adopted on 25 Yekatit 2003 (March 4, 2011) seems to envisage, under 3.12 of Section Three, a system of non-mandatory (discretionary) prosecution to some extent.

[49] See, for example, Arts 7 (4) & 9 of Proc No. 433/2005.

[50] They do not actively participate in the gathering and collection of evidence; they do not participate in the determination of the preliminary assessment of the evidence to gauge if there is sufficient evidence that leads into prosecution by the prosecutor. Their participation is confined to the supervision, controlling and granting or denial or restriction of the employment of coercive measures by police and other specialized bodies such as in cases of arrest and detention, remand and bail, search and seizure (Art 19 of the Constitution, Arts 26, 32-34, 49-56, 59, 63-79 & 93 of the Cr. P. C). To some extent, they participate in the recordation and preservation of evidence- such as recording statements or confessions of suspected persons (Art 35 Cr. P.C), and recording and preserving of statements of suspected persons, testimony of witnesses in circumstances where preliminary inquiry is preferred to by the prosecuting authorities (Arts 80-92 Cr. P.C).

Parties are responsible for the presentation and examination of evidence and witnesses.[51] Examination of witnesses is accomplished in three interrelated phases: namely, examination-in-chief, cross-examination and re-examination, all of which are typical features of the common law adversarial systems. The roles and responsibilities of judges are somehow limited.[52] Accused persons are guaranteed with the right to fair trial including the right to be presumed innocent until proved guilty according to law, the right to counsel, the right to full access to any evidence presented against them and the right to examine witnesses testifying against them.[53] All these are applicable to any accused person without discrimination as it is expressly provided that every person is entitled to equality and the equal protection of the law.[54]

Generally the criminal process in Ethiopia starts with partisan investigation, with judges having no role in the collection and gathering of incriminatory and exculpatory evidence. Preliminary assessment of the sufficiency of evidence collected by investigative authorities and the decision to prosecute or not prosecute are entirely accomplished and determined by prosecuting authorities. Litigating parties have pronounced roles and responsibilities during the trial and presentation of evidence. The Ethiopian criminal process is thus closer to the common law adversarial systems. Professor Fisher has also noted that the Ethiopian system of criminal procedure is predominantly adversarial with some fragments of inquisitorial elements.[55] Hence what has been discussed in the previous sections in respect of issues of burden and standard of proof in the context of common law adversarial systems generally hold true to the Ethiopian criminal justice system.

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[51] Art 20 (4) of the Constitution; Arts 136 – 142 & 147 Cr. P. C.

[52] Apart from generally controlling/supervising the parties' presentation and examination of evidence and ruling on issues of admissibility of evidence as provided under Arts 137, 139 & 144-146, judges have some limited roles in the presentation and examination of evidence (Arts 136 (4) & 143 Cr. P. C). Unlike the typical common law systems, however, there are no juries; and, all judges, both at the federal and regional states levels, are legally trained, though their level of education may vary.

[53] The Constitution, ratified treaties and the Criminal Procedure Code provide for a number of due process guarantees to suspected and/or accused persons. See Arts 20 (1)-(7), 22, & 23 of the Constitution; also, see Art 11 of the UDHR, Art 14 of the ICCPR and Art 7 of the African Charter as these are also binding laws in Ethiopia (Arts 9 (4) and 13(2) of the Constitution).

[54] Art 25 of the Constitution & Art 4 of the Criminal Code.

[55] Fisher, *supra* note 41, at xii.

3.2 The Legal Framework on Burdens of Proof in Possession of Unexplained Property Cases

Whether Ethiopian law on possession of unexplained property envisages an approach different from the UNCAC, the AUCPCC and the statutory laws of other jurisdictions in respect of allocation of burdens of proof [56] requires close scrutiny of relevant laws such as the stipulations in the Ethiopian Constitution, the provisions of relevant international and regional human rights instruments, the Criminal Code and the Criminal Procedure Code. Art 20(3) of the Constitution embodies the principle of the presumption of innocence. It reads: "During proceedings, accused persons have the *right to be presumed innocent* until proved guilty according to law and *not to be compelled to testify against* themselves." Art 11(1) of the Universal Declaration of Human Rights (UDHR), Art 14(2) of the International Covenant of Civil and Political Rights (ICCPR) and Art 7 (1) (b) of the African Charter have similar stipulations.

One of the basic legal effects of the principle (right) of presumption of innocence is to impose evidential burden of proof upon prosecuting bodies. By virtue of this principle, the prosecutor in possession of unexplained property cases, as is true in all other criminal cases, is required to *open its case* and to *lead evidence*. Art 136 of the Criminal Procedure Code also partly provides:

(1) After the plea of the accused has been entered, the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead. […]
(2) The public prosecutor shall then call his witnesses and experts, if any. […]

Art 141 of the same Code provides: "When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, shall record an order of acquittal." These provisions show that it is the prosecuting authorities that bear evidential burden of proof in all criminal cases including those involving corruption offences. Whether the prosecution of illicit enrichment envisages some distinctive approaches in this regard can be examined based on substantive criminal law.

[56] The author would like to emphasize the need to have clarity on the particular sense of "burden of proof". As there are varieties of senses in which this term could be employed (in the literature, in statutory laws, in speech), it is vital to try to identify in which sense this term is to be employed or has already been employed.

To this end, we can examine the allocation of evidential burden of proof under Art 419 of the Criminal Code.[57] The constitutive elements of the offence under Art 419 of the Criminal Code are: 'persons of interest', 'period of check', 'existence of disproportionate assets', '*mens rea'*, and 'absence of justification'. Of these five essential ingredients of the offence, the prosecutor, is required to prove:

a) that the accused is or has been a public servant (person of interest), [58]
b) the amount of salary the accused public servant has been paid during the period of check,
c) that the accused had or has a disproportionate amount of money or property, or had a standard of life or is living a standard of life that is not commensurate with his official legitimate income (disproportionate assets); and
d) the *mens rea*- an element which is to be inferred from the other proved factual facts.

Prosecuting authorities bear *evidential burden of proof* on these facts; and the accused is not required to lead and prove or disprove with evidence any of these four elements of the offence. There is no single word or expression in the provision that warrants or implies any other interpretation. What has been noted above in the context of the international and regional conventions and other national jurisdictions also holds true to Ethiopia.

Following a successful discharge of the evidential burden by the prosecutor on those facts, the court would instruct the accused to give an *explanation* regarding the "disproportionate pecuniary resources or property" found in his possession or "how he was able to maintain such a standard of living" that is "above that which is commensurate with the official income from his present or

[57] Art 419 provides:

(1) Any public servant, being or having been in a public office, who:
a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means,
shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.

[58] Also, read Art 419 *cum* Art 33 of the Criminal Code. The scope of 'person of interest' includes other non-public servants who may participate in the commission of this crime.

past employment or other means". The court cannot order the accused to enter into his defence without a prior establishment of the four elements by the prosecutor to the standard of degree required. What is provided under Art 419(1) goes in line with the constitutional principle of presumption of innocence as well as with that provided under Arts 141 & 142 of the Criminal Procedure Code.

Once the prosecutor sufficiently establishes the four elements of the offence, it is not required to adduce (further) evidence that supports and establishes the lack of justification for the disproportionate money or other property found in the possession of the accused or for the manifestations in the lifestyle of the accused. Based on the proof of the four elements, Art 419 explicitly provides that the court *shall* draw a legal presumption that the accused has committed the offence of possession of unexplained property "*unless* he [the accused public servant] gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control".

This stipulation creates rebuttable presumption of law in favour of the prosecutor and against the accused. It is clear that it is the accused that is required to adduce evidence with a view to provide a satisfactory explanation of the sources of the disproportionate money or other property. This is therefore an instance where one observes the easing or transfer ("shift") of the prosecutor's evidential burden on an essential element of the offence, i.e. as to how the accused was able to maintain such a standard of living or how such pecuniary resources or property came under his control. The court is required to draw a presumption about the commission of the offence only "unless the accused gives satisfactory explanation." This is different from requiring courts to draw a presumption *until and unless the accused proves/disproves* an element of an offence. Art 419 does not thus envisage transfer ("shift") or reversal of persuasive burden from the prosecutor to the accused.

To avoid the risk of the mandatory presumption of law, the accused needs to lead evidence that shows the 'otherwise origin'[59]of the money or property found

[59] Whether this 'otherwise origin' is only confined to legitimate sources or could include other illegitimate but unrelated sources appears to be open for debate on both sides. Yet, there is no qualification under Art 419 for it to be only from lawful or legitimate sources. The accused is only required to give satisfactory explanation as to "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control." Apart from this ground of defense that is related to source of income, the accused may adduce evidence that may counter or rebut any of the four elements which might have been tentatively (provisionally) established by the prosecutor. For example, he may contest the fact relating to his status as a public servant, or the time of check, or the amount of official income, or

in his control or that which is manifested in his living standard. The accused is only required to *give satisfactory explanation* and the explanation is required in respect of "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control". Clearly, the accused is not required to *prove* any element of the offence or any other under Art 419 of the Criminal Code.[60] There is a distinction between 'giving an *explanation* about something' and '*proving* something'. Yet it is to be noted that the explanation required from the accused has to be *satisfactory*. This requirement of "satisfactory" explanation implies the degree of "proof" (in its loose sense) required of the accused. If the accused fails to introduce evidence, or even if he adduces some if that fails to provide "satisfactory explanation" regarding "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control", the court is required to convict the accused for committing the offence of possession of unexplained property.

Some people assume that Art 419 of the Criminal Code shifts persuasive burden of proof from the prosecutor to the accused thereby violating presumption of innocence embodied in Art 20(3) of the Constitution. However, the discussion in Sections 1 and 2 above indicates that this assumption is not tenable. As mentioned elsewhere, Art 419 is an exact copy of Hong Kong's provision dealing with the same offence. In Hong Kong and other jurisdictions including Argentina and India (jurisdictions where the idea of criminalization of illicit enrichment originated), similar provisions on illicit enrichment are being enforced, and they merely envisage the reversal of evidential burden without being incompatible with the principle of presumption of innocence.

3.3 The Legal Framework on Standards of Proof in Possession of Unexplained Property Cases

It is essential to be clear with respect to the various forms of standards of proof that surface in relation to:

a) the (initial) evidential burden of proof of the prosecutor,
b) the tactical (provisional) burden of an accused that may arise in the middle of the trial,

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the calculation made to show the disparity between official income and what is found under his control, or still he may contest the fact of owning/possessing or controlling, etc. In this regard, the accused bears tactical burden of proof and is thus required, if he wants, to adduce some rebuttal evidence for mere denial or contest does not count as such.

[60] See also the Amharic version which goes in part as "**የዚህ ዓይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት ሊገባ እንደቻለ ለፍርድ ቤት ካላስረዳ በስተቀር**....." Note the distinction between the Amharic terms "**ማስረዳት**" and "**ማረጋገጥ**".

c) the evidential burden of an accused in respect of some elements (or an element) of an offence that may arise in the middle of the trial following the operation of an evidential presumption,
d) the persuasive burden of an accused in respect of some or just an element of an offence that may arise in the middle of the trial following the operation of a persuasive presumption, if any, and
e) the ultimate (persuasive) burden of proof of the prosecutor.

The degree of "proof" borne by the prosecutor to successfully discharge its *evidential burden* on those four basic facts is not specifically stated in any of the conventions and under Art 419 of the Criminal Code. Moreover, there is no particular mention of any special *persuasive* or *ultimate burden* borne by the prosecutor in such prosecutions.

In view of such state of affairs and in the face of the constitutional principle of presumption of innocence,[61] it is appropriate to follow the normal course of things as are determined by the constitutional principle of the presumption of innocence and the explicit stipulations of Arts 141 and 142 of the Criminal Procedure Code. Accordingly, the standard of proof which the prosecutor bears to discharge its evidential burden for the four basic elements of the offence of possession of unexplained property under Art 419 of the Criminal Code is the *prima facie* degree of proof, which in effect is *proof beyond a reasonable doubt*. This author does not share the view of some people who regard Art 33 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 as one which envisages a lesser standard of proof in criminal cases involving corruption (possession of unexplained property included).[62] What this provision stipulates has to do with the determination of whether an accused person *has benefited from* an identified criminal conduct in a charge or it has to do with the determination of *the amount of money [or other property] to be recovered* from an accused charged of committing some identified offence of corruption.

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[61] It is important to recall that one other legal consequence of the principle of presumption of innocence pertains to the evidential burden of the state (prosecutor). For a brief overview of the contemporary narrow and wider meanings of the principle of presumption of innocence and for attendant implications and legal consequences see Worku Yaze Wodage, 'Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law', at 116-118 in Wondwossen Demissie (Ed.) (2010), 'Human Rights in Criminal Proceedings: Normative and Practical Aspects', *Ethiopian Human Rights Law Series,* Vol. III.

[62] See, for example, Simeneh Kiros Assefa (2012), 'The Principle of Presumption of Innocence and its Challenges in the Ethiopian Criminal Process', 6 (2*) Mizan Law Review*, at 292.

The provision reads: "The standard of proof required to determine any question arising as to *whether a person has benefited from criminal conduct*, or *the amount to be recovered* shall be that applicable in civil proceedings [emphasis added]."[63] The legislature has, under Art 33, reduced the *evidential burden* borne by the prosecutor in respect of two elements- 'getting of benefit from a criminal conduct' and 'amount of money/property to be recovered from' the accused. Yet this provision does not reduce the *degree of proof* that is required to establish other elements of the *actus reus* and *mens rea* of a particular offence of corruption. The alleged criminal conduct and *mens rea* elements need to be established at the same threshold as is required in other crimes, of course subject to other more specific stipulations, if any.

If the prosecutor successfully discharges its evidential burden by securing a *prima facie* degree of proof, the court orders the accused to enter into his defense (as per Art 142 of the Cr. P. C) and to give a satisfactory explanation regarding the disproportionate money or property proved to be under his control as per Art 419 of the Criminal Code. In such cases the accused bears *tactical (provisional) burden* in respect of the four basic elements that are tentatively established by the prosecutor, and *evidential burden* in respect of the fifth element of the offence of possession of unexplained property (giving satisfactory explanation "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control"). For the former burden of "proof", it suffices if the accused produces evidence the *intensity* of which is *sufficient to spark some doubt(s)* against those elements established by the prosecutor.

As has been elaborated, the accused is not required to *disprove*; the accused is not under duty to *convince* even to a preponderant degree about the truthfulness of his side of the story in respect of any or all of these four elements of the offence. By virtue of the operation of the principle of presumption of innocence, it is the prosecutor that is expected to *convince* judges *beyond* a reasonable doubt when the court (in respect of a similar fact situation) assesses the evidence submitted by the prosecutor against the evidence of the accused.

With regard to the *evidential burden* of the accused in respect of the fifth element of the offence of possession of unexplained property he is not required to *disprove* or to *prove* - he is only required to give explanation.[64] But the

[63] The Amharic equivalent goes: "**አንድ ሰው በሙስና የወንጀል ድርጊት ሳቢያ ጥቅም ያገኘ መሆኑን ወይም አለመሆኑን ወይም ተመላሽ የሚሆነውን ገንዘብ መጠን መወሰንን አስመልክቶ የሚነሱ ክርክሮችን ለማስረዳት** [**ለማረጋገጥ**] **የሚቀርበው የማስረጃ ደረጃ በፍትሐብሔር ክርክር ጊዜ እንደሚቀርበው የማስረጃ ደረጃ ይሆናል**::"

[64] As Ashworth observed in relation to evidential burden imposed on accused persons, "... the burden is much lighter than the onus of proving an issue on the balance of

explanation has to be *satisfactory* to the court. This could be only accomplished by introducing evidence. The adduced evidence must have the intensity to satisfy judges as to "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control." He is expected to secure the inner conviction (belief) of judges to some extent (satisfactorily) though he is not under duty to persuade (convince) them about the truthfulness of his assertion in his explanation. As the specific form of presumption drawn against him is not one of persuasive presumption, he is *not even required to convince judges to a preponderant degree* (50%+1) of proof.[65]

Unlike the situation in the case of the tactical burden of "proof", where the evidence of the two opposing parties are to be compared and evaluated to know which side of the evidence is closer to the reality, in this case of evidential burden only the evidence of the accused is gauged (evaluated) in view of the presumption drawn. 'Presumption of law' is a legal stipulation, and thus cannot be measured in terms of its intensity in the mind of judges. As Kofele-Kale notes:

> […] in truth, nothing tips the scale but evidence, and a presumption, being a legal rule or a legal conclusion, is not evidence. It may represent and spring from certain evidential facts and these facts may be put in the scale; but that is not putting in the presumption itself. It may in a sense, be called 'an instrument of proof' or something 'in the nature of evidence,' in that it determines from whom evidence shall come; or it may be called a substitute for evidence, in the sense that it counts at the outset for evidence enough to make a *prima facie* case; but it is not evidence in the true sense. It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature (Footnote omitted).[66]

Although the evidence of the accused in not gauged in comparison with any other evidence (for the prosecutor is not required to adduce any evidence in respect of the fifth element of the crime), it should still be measured in itself to check its intensity in the minds of judges. This is something subjective which judges internally feel. If the intensity of the evidence of the accused is felt to be a *satisfactory explanation*, the accused is said to have met the required standard of "proof" envisaged under Art 419 of the Criminal Code.

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probabilities..." (See Andrew Ashworth (2006), 'Four Threats to the Presumption of Innocence', 10 *Int'l J. Evidence & Proof*, at 269).

[65] For details and better clarity see this author's note titled 'Burdens of proof, Presumptions and Standards of Proof in Criminal Cases' published in this same volume of *Mizan Law Review*.

[66] Kofele-Kale, *supra* note 4, at 921.

The true and proper sense of standard of proof in criminal trials, including in possession of unexplained property, comes at the end of the trial and presentation of evidence stage of the process when all the evidence of each party is assessed both individually (separately) and in combination (holistically). At this stage, the other third legal effect of the operation of the principle of presumption of innocence comes into the picture. As many scholars in the field explained and as the Human Rights Committee of the United Nations interpreted it in its General Comment 13, the principle of presumption of innocence imposes upon the public prosecutor an *ultimate burden of proof* that is met by a *proof beyond a reasonable doubt* standard of proof.[67] Thus the prosecutor is required to prove the guilt of the accused in possession of unexplained property to this degree of proof. In this author's understanding, the degree of proof required to establish the *guilt of an accused* is not affected by Art 33 of Proclamation No 434/2005. As already stated, the question of determination of 'obtaining/getting of benefit from a criminal conduct' and the 'amount of money/property to be recovered from' the accused are different from establishing the existence of the four basic elements of the offence of possession of unexplained property. Art 33 of Proclamation No 434/2005 and Art 419 of the Criminal Code are meant to give different answers for the different questions that arise in different contexts.[68]

[67] See, for example, Ashworth, *supra* note 64, at 243-251; P. J. Schwikkard (1998), 'The Presumption of Innocence: What is it?', 11 *S. Afr. J. Crim. Just*., at 406; General Comment of the Human Rights Committee of the UN adopted in its 21st Session, 13 May 1984, available at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 17 Dec. 2013).

[68] Art 33 gives an answer to the following questions. (i) Has the accused got some benefit from the alleged crime of corruption in the charge? (ii) What is the amount of money or other property that the accused has to return? Unlike Art 33 of Proclamation No. 434/2005, Art 419 of the Criminal Code gives answers for the following four questions: (i) Is the accused a "public servant" as defined in the Code or is he a person who has associated with a public servant accused of committing an offence of possession of unexplained property? (ii) What is the amount of income this public servant obtained from present or past employment or from other source? (iii) Is the money or property found under the control of the public servant or which is manifested in his way of life above (disproportionate to) the income he earned from present or past employment or from other source? And, (iv) Did the public servant obtain this disproportionate income during the period of check?

4. Practice of Ethiopian Courts in handling Issues of Burden and Standard of Proof in Possession of Unexplained Property Cases

Apart from the *Workineh Kenbato & Amelework Dalie* case, there are many decided and still pending cases before the federal and some regional state courts.[69] The brief assessment (made in this section) on the practice of courts in handling issues of burden and standard of proof arising in such prosecutions is limited to highlighting some cases decided by the Federal High Court at Addis Ababa, and a few others decided by the Hawasa City High Court, by the Appellate Division and Cassation Division of the SNNP Regional Supreme Court, and one case decided by the West Gojjam High Court of the Amhara National Regional State. *Workineh Kenbato & Amelework Dalie'*s case offers a broad picture of the confusions and dilemmas arising in these areas. As the Cassation Division of the Federal Supreme Court adopted a binding interpretation of Art 419 in this case, we shall examine at some depth how the Cassation Division handled issues of burden and standard of proof in this case.

4.1 FEACC *v.* Elethabet W/Gebriel *et al*

In *FEACC v. Elethabet W/Gebriel et al,* the 4th count brought against the 5th defendant, Mulugeta Y. is relevant for our discussion. Mulugeta Y., who has been a marketing manager since Sene 15, 1990 E.C. (22 June 1998) in the

[69] Some of these cases are listed and referred to in the author's other work. The cases consulted now include: 1) Cases decided by the Cassation Division of the Federal Supreme Court such as the *Workineh Kenbato & Amelework Dalie v. SNNP EACC* (Cassation File No. 63014), *Hankara Harqa v. SNNP EACC* (Cassation File No. 58514), *Adem Abdu et al v. FEACC* (Cassation File No. 57938), and *Tarekegn Teklu et al v. SNNP EACC* (Cassation File No. 67411); 2) Cases decided by the Federal High Court at Addis Ababa such as the *FEACC v. Yared Getaneh* case (File No. 106020), *FEACC v. Abdulkerim Adem et al* case (File No. 97668), *FEACC v. Seyfe Desta et al (*on 6th count against 2nd defendant, *Ahmed Seid Ebrahim*) case (File No.66210), and *FEACC v. Elethabet W/Gebriel et al* case (particularly the 4th count against 5th defendant, Mulugeta Yayeh) (File No. 62293) and *FEACC v. Birhanu Hika Roba* case (File No. 83936); 3) Cases decided by the Awassa City High Court of the Southern Nations, Nationalities and Peoples' Regional State (SNNP Regional State) such as the *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (File No.06693), *SNNP EACC v. Tarekegn Teklu et al* case (File No. 6646); *4)* Cases decided by Supreme Court appellate Division of SNNP Regional State *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (File No. 31614), *SNNP EACC v. Tarekegn Teklu et al* case (File No. 33970). See also the cases that were decided by different high courts in the Amhara Regional State (ANRS) such as the *ANRS EACC v. Dagim Dessalegn* case (West Gojjam High Court, File No. 41634).

Akaki Steels Factory, a government owned enterprise, was (apart from other accusations in other counts) accused of possessing unexplained money and many other properties. The prosecutor stated in its charge the amount of salary the accused was being paid until the time of charge and included the list of money and properties alleged to constitute the offence.[70] It adduced various pieces of documentary evidence in support of its charge.[71] The accused denied committing this and other offences. After examining the contents of these documents, the judges, in a majority vote, ordered the accused to enter into his defence. Accordingly, the accused first moved to give his statement in accordance with Art 142(3) and then produced five witnesses to show that:

- Some of the immovable properties were constructed before the entry into force of the Criminal Code,
- The estimation of the immovable properties submitted by the prosecutor is too exaggerated and is not congruent to labour cost and construction expenses during the period of construction;
- Some of the money belonged to other individuals, and
- Other money and property listed in the charge were derived from legitimate sources such as inheritance, from saving of salary, bonus and other benefits, and income deriving from renting of house.[72]

The Court proceeded to assess if the accused succeeded in rebutting the evidence of the prosecutor. It then held: 'Because the prosecutor's charge states the accumulation of unexplained property by the accused until 2000 E.C, the accused's objection relating to the house (which he said has been constructed before the entry into force of the Criminal Code) is not acceptable'; 'the testimony of the defence witnesses in respect of income from inheritance and house rent is not sufficiently credible to rebut prosecution evidence', and the 'extent of income derived from bonus and other benefits is not supported with evidence'. It further held: 'even though there is some documentary evidence which proves that some of the money deposited in various banks belonged to other persons, these alone could not sufficiently prove the legitimate sources of all the money and properties found under the control of the accused'. Accordingly the court convicted the accused under Arts 438(1)(b) of the

[70] The list went from No. 1 through No. 9.

[71] These included documents that were alleged to establish ownership of residential buildings (house certificates) and estimations thereof, documents that testify defendant's membership to various cooperatives established with a view to secure vacant lands for housing constructions, documents that establish amount of money deposited in saving accounts in different banks, and other documents that establish lease transaction.

[72] He has further introduced some documentary evidence to show that some of the moneys belonged to other persons.

previous Penal Code and under Art 419(1)(a) & (b) of the Criminal Code, and imposed three years rigorous imprisonment and a penalty of Birr 2,000. The court also ordered the confiscation of the money (subject to some reduction) and other properties listed in the charge.[73]

The accused appealed to the Federal Supreme Court. After assessing the appellant's arguments, and the response of the prosecutor, the Supreme Court partly quashed and partly confirmed the judgment and decision of the High Court.[74] The Appellate Court noted that no shift of burden of proof could take place under Art 419 before the prosecutor establishes its case as it asserted in its charge. It reads:

> ...**የወንጀል ሕግ አንቀጽ** 419 (1) **ምንጩ ያልታወቀ ንብረትና ገንዘብ የሚለውን በፊደል ተራ "ሀ" እና "ለ" ላይ ከዘረዘረ በኋላ በፊደል "ለ" [...] ስለተከሳሹ የማስረዳት ሸክም የሚገልጽ ሆኖ ቢገኝም ይህ ማለት ከሳሽ የሚሆነው አካል ይህንን የሕግ አንቀጽ ጠቅሶ በተከሳሹ ላይ የወንጀል ክስ ማቅረቡ ብቻ በክሱ ላይ የተገለጸው ንብረት ወይም ገንዘብ ምንጭ የታወቀና ከሕጋዊ ገቢው የተገኘ ስለመሆኑ የማስረዳት ሸክም ወዲያውኑ ወደተከሳሹ ይዛወራል የሚል ትርጉም የሚሰጠው አይደለም፡፡ ከሳሽ የሆነው አካል በሌሎች የወንጀል ጉዳዮች በቅድሚያ እንደ ክሱ አገላለጽና አቀራረብ የማስረዳት ሸክም እንዳለበት ሁሉ በእንዲህ ዓይነቱ የወንጀል ክስና ክርክርም የተከሳሹ የኑሮ ደረጃ ከሕጋዊ ገቢው የበለጠ ስለመሆኑ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ ጋር የማይመጣጠን መሆኑን ማስረዳት ይጠበቅበታል፡፡ የማስረዳት ሸክሙ ወደተከሳሽ የሚዛወረው ከሳሽ ባቀረበው ማስረጃ ያስረዳበት ሆኖ ሲገኝ ነው፡፡ በወንጀል ሕግ አንቀጽ** 419 (1) **መሠረት የሚቀርብ ክስ ከዚህ የሥነ-ሥርዓት አካሄድ ውጭ ሊሆን አይችልም፡፡**

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[73] These included a house that is proved to be (i) built and completed until 1984 E.C, (ii) a vacant land which the accused obtained as one member to a cooperative that was established in 1996 E.C, (iii) another vacant land which the accused secured in a contract of lease from the City Administration, and (iv) money which other persons sent to the accused for other lawful purposes.

[74] On the basis of the principle of non-retroactivity of criminal law, it quashed the judgement that pertained to the house built before the promulgation of the Criminal Code. It also revoked the judgement that included confiscation of vacant land (wherein no construction work was undertaken yet). The Court noted that the Prosecutor did not produce any evidence that proved the accomplishment of any construction work over the plot of land. It has also modified the judgment relating to the amount of money found deposited in the name of the accused by subtracting that amount which belonged to his brother (which the latter sent from Jimma). The Court also decided that the amount of money which this appellant deposited until 1996 E.C in closed account with a view to secure residential plots of land in three different cooperatives should not be confiscated. Furthermore, this Court revoked the decision relating to a vacant land which it said the appellant obtained from the City Administration with a contract of lease. It affirmed the judgment and decision of the High Court relating to other money and the buildings that are still underway and which the accused obtained as a member in the three cooperatives.

The High Court has properly stated that charging of an accused under Art 419(1) of the Criminal Code does not entail transfer of burden of proof from the prosecutor to the accused. However, the High Court did not identify the facts that should have been established by, and the extent of proof required of, the prosecutor. It also did not consider the operation of the presumption embodied under Art 419 (1) and did not identify the burden of "proof" borne by the accused and the extent of "proof" thereof. This Court did not attempt to assess the issues in the case from the perspective of the principle of presumption of innocence. Nor did it sort out the respective burdens and standards of proof required of each party. It merely focused on whether the oral and documentary evidence produced by the accused are sufficiently credible to rebut the evidence of the prosecutor.

The Appellate Court, on the other hand, tried to specifically determine if the prosecutor succeeded in discharging its burden of proof, though it did not point out the nature of burdens and standards of proof borne by the prosecutor both at the initial and at the ultimate stages of the presentation of evidence.[75] Again, this Court did not state how the presumption contained under Art 419(1) enters into operation and how evidential burden (as distinct from tactical burden of proof) transfers from the prosecutor to the accused. It did not expressly state that it was the prosecutor that shouldered evidential and legal burden to establish the actual amount of salary, bonus and other related benefits which the accused used to receive until the time of charge and to prove that what was found under the control of the accused was above those identified lawful sources of income.

[75] This Court has rightly identified that 'period of check' is one of the crucial points in this offence. It has rightly applied the principle of non-retroactive application of the criminal law to the house that was built before the promulgation of the Criminal Code. But, it has wrongly maintained that it is the burden of the appellant to prove that the money paid to the partial construction of the other three buildings was before the entry into force of the Criminal Code. It said: "**እነዚህ ሦስት የቤት ሥራ ማኅበሮች የተደራጁትና በቅድሚያ በገዘግ የባንክ ሂሳብ የሚቀመጠው ገንዘብ የተያዘው በ**19[9]6 **ሆኖ ቢገኝም ይግባኝ ባይ ለሦስቱ ጅምር ቤቶች ማሠሪያ ክፍያለሁ ወይም አውጥቻለሁ የሚለው ገንዘብ የወንጀል ሕጉ ከመውጣቱ በፊት ስለመሆኑ ካለመገለጹም በተጨማሪ ያቀረበው ማስረጃ የለም።**" It seems that the Court has appreciated the issue of 'disproportionate assets' as a vital constitutive element of the offence, though there are some flaws in trying to fix the burden of the prosecutor in that regard. It seems that it has, to some extent, appreciated the burden which the accused shouldered in respect of some of the money found deposited in his name in the different banks, though it did not appreciate that the accused was only required to "give satisfactory explanation"- it said "**የሌላ ሰው ገንዘብ ነው፤ የእኔ አይደለም የሚለውን የማስረዳት ሸክም ያለበት ይግባኝ ባይ ነው።**"

4.2 FEACC *v.* Yared Getaneh, *ANRS EACC v. Dagim Dessalegn* and other cases

The accused, who was a public servant (and later on a First Instance Court judge at Addis Ababa, but a lawyer at the time of charge), was accused of accumulating unexplained money and other properties from Sene 18, 1993 E.C through Sene 9, 2002 E.C. (25 June 2001 to 16 June 2010). The amount of money and the value of other properties was generally estimated to reach Birr 1,399,377.35. The prosecutor listed and adduced a number of documentary evidence to prove this accusation. The accused pleaded not guilty and claimed that he can produce evidence to show the lawful origin of all the money and property alleged to have been found under his control. The High Court immediately ordered the accused to enter into his defence on this count. The accused produced four defence witnesses and some documentary evidence. Although the accused claimed that he earned Birr 266,000 as a lawyer fee in 2003 E.C and produced documentary evidence to that effect, the Court held it 'not credible' stating that this declaration of income to the tax authority was made after the institution of the charge. The court also maintained that the testimony of the three witnesses was not credible. Finally, it convicted the accused and imposed punishment.

As this judgment stands to demonstrate, the Court in this case did not attempt to specifically indicate the particular burdens and standards of proof borne by each party. It ordered the accused to enter into his defence without first checking if the prosecutor has successfully discharged its evidential burden. It did not try to analyse issues from the perspective of the principle of presumption of innocence; it did not say anything in respect of the requirement of giving of 'satisfactory explanation' provided under Art 419 of the Criminal Code. With due respect, the Court did not even consider that the 'period of check' was only between Ginbot 1, 1997 (9 May 2005) and the date of charge.

The same holds true for the decision of West Gojjam High Court in the Amhara Regional State in the *ANRS EACC v. Dagim Dessalegn* case. The accused was prosecuted for possessing an amount of money and property totally worth of birr 721,191.35 while working in various public institutions from 1983 through 2002 E.C. In this case, the court did not notice the 'period of check' and did not attempt to sort out if the money and other properties were accumulated since the entry into force of the Criminal Code. Its assessment rather went back to 1983 E.C. The Court did not say anything regarding the principle of presumption of innocence, the particular burdens and standards of proof and the operation of the presumption. It did not consider the case in light of the requirement of giving of 'satisfactory explanation' under Art 419 of the Criminal Code. Yet it has rightly tried to figure out some of the legitimate sources which the accused might have earned from salary and part-time work.

There are other cases that show contradictory holdings among the different levels of courts on similar issues and similar evidence. Accused persons who were acquitted by lower courts have been convicted by Appellate and/or Cassation courts. The main cause of such reversals and inconsistencies is attributable to the variation in the standards of proof employed. For instance, in *SNNP EACC v. Hankara H. & Hiripato H.*[76] and in *SNNP EACC v. Tarekegn T. et al*,[77] the High Court acquitted the accused persons in the two separate files. In both cases, the *SNNP EACC* appealed to the Regional Supreme Court. The Appellate Court reversed the decisions of the lower court and passed conviction on all the respondents.[78] It also imposed punishment and ordered for the

[76] *Hankara,* who was a public servant from 1985 E.C through Ginbot 30, 2000 E.C and whose earning from salary during this time was assessed to be not more than Birr 52,958, and his wife *Hiripato H.*, alleged to be unemployed house wife, were accused of accumulating money and property estimated to reach to Birr 4,159,497.80. The two accused pleaded not guilty. After examining the various documentary evidence of the prosecutor the High Court ordered the accused to enter their defence. Accordingly, they produced documentary and oral evidence to establish that a substantial amount of the money belonged to other persons (loan from individuals and church money) and that the other are derived from different agricultural activities such as sale of *chat, enset*, eucalyptus tree, coffee, and maize. After assessing the evidence in the case the High Court acquitted the accused saying that the accused have rebutted the evidence of the prosecutor.

[77] *Tarekegn T.,* who was a public servant from Sene 10, 1996 E.C through Megabit 30, 2000 E.C and whose earning from salary was assessed not to exceed Birr 70, 000, his wife, alleged to be unemployed house-wife (2nd accused) and, his brother-in-law, alleged to be a student, an unemployed one (3rd accused), were accused of accumulating money and properties estimated to reach to Birr 3,602,262.84. The three accused pleaded not guilty. After examining the various documentary evidence of the prosecutor the High Court ordered the accused to enter their defence. Accordingly, they produced documentary and oral evidence to establish that most of the money and properties included in the charge were bought and/constructed before the promulgation of the Criminal Code at lesser price and that the remaining money was one which the 2rd accused received (through bank transfer and through other persons) lawfully from her brother living outside of Ethiopia and one which was obtained from agricultural activities. After assessing the evidence in the case, the High Court acquitted the accused stating that the accused have rebutted the evidence of the prosecutor. The court ascertained that most of the immovable properties were bought and/or constructed before 1997 E.C and their estimated price is less than that has been expressed in the charge. It also expressed that it ascertained that accused had other lawful means of income.

[78] The lawyer for *Hankara & Hiripato* argued before the Appellate Court, "...**አዲሱ የወንጀል ሕግ ከሌሎች ሕጎች የተለየ አዲስ ነገር አልፈጠረም፡፡ ... የማስረዳት ሸክሙ ወደ መልስ ሰጭዎች መዛወሩ የማስረዳት ደረጃ ጭምር የሚያዛውር አይደለም፡፡ መልስ ሰጭዎች ክጥርጣሬ በፀዳ መልኩ ማስረዳት**

confiscation of the moneys and other properties found under the control of each accused.[79]

In both cases, the accused persons, petitioned to the Cassation Division of the Regional Supreme Court but their petitions were not accepted. Finally, they petitioned to the Cassation Division of the Federal Supreme Court which confirmed the decisions of the Regional Supreme Court.[80]

4.3 The Binding Interpretation adopted in the *Workineh Kenbato & Amelework Dalie* Case

The Cassation Division of the Federal Supreme Court has rendered a binding interpretation in the *Workineh Kenbato & Amelework Dalie* case. The propriety of its interpretation needs to be critically investigated in the light of fundamental constitutional values and principles such as the principle of presumption of innocence, right to liberty, and the right to private property. It must also be assessed based on the perspectives of what the legislature has expressly stipulated under Art 419 of the Criminal Code, and in the light of the UN Legislative Guide and the experience (and judicial jurisprudence) of other jurisdictions.

4.3.1 Synopsis of the Case

In *Workineh Kenbato & Amelework Dalie,* the prosecutor (i.e. the SNNP EACC), charged Ato Workneh (1st Accused) and his wife, W/ro Amelework (2nd Accused) alleging that they were found possessing of unexplained property in violation of Art 419 (1) of the Criminal Code. In the particulars of the charge filed at the Hawasa City High Court of the SNNP Regional State, the prosecutor stated that Workineh was a public servant from Meskerem 1984 E.C (September 1991) until the time of the charge. According to the charge the amount of salary paid to Workineh during this period was a total of Birr 90,220 while his wife remained an unemployed house-wife. The charge stated that the two defendants were found possessing a total asset of Birr 2,081,468 and 90 cents[81].

አይጠበቅባቸውም፤ ሚዛን በሚደፋ መልክ ማስረዳት ስለመልስ ሰጭዎች በቂ ነው።" The Appellate Court convicted all the accused in these two cases stating that the evidence of the accused is not sufficient to rebut the evidence of the prosecutor.

[79] In the second case it partly confirmed the decision of the lower court and excluded some moneys and properties from the order of confiscation.

[80] See the files cited under footnote 69.

[81] The details of the Charge describes that the two accused deposited Birr 332,363.63 at Dashen Bank in the name of 2nd Accused; Birr 1,646,371.24 at Dashen Bank and Birr 46,802.11 at the Commercial Bank of Ethiopia in the name of 1st Accused; and have a residential house which is estimated to worth Birr 55,931.92 in the name of their son.

The accused persons pleaded not guilty, and the prosecutor adduced documentary evidence[82] to prove the commission of the offence. After examining the contents of the various pieces of documentary evidence, the High Court ordered the accused to enter into their defence. Accordingly, the two accused introduced oral and documentary evidence. In their defence, they alleged having other legitimate sources of income (from cultivation of chat, coffee, *enset* and sugar-cane). They further argued that Birr 1,120,500 belonged to two private limited companies, i.e., Gararamu Lanito Animal Husbandry PLC and Galma Cultural Lodge PLC. Moreover, they claimed that that amount deposited in the name of 1st defendant at Dashen Bank was obtained as loan from an individual person; they said that this money was initially deposited in the name of the 2nd defendant, but later on transferred to 1st accused for another legitimate purpose. Submitting all these grounds of defence and oral and documentary evidence[83] they prayed for acquittal. After having examined the evidence on both sides, the High Court acquitted the two defendants stating that they have successfully rebutted the evidence of the prosecution.

The Prosecutor appealed to the Regional State Supreme Court which confirmed the decision of the High Court after hearing additional witnesses. The prosecutor took its petition to the Cassation Division of the Regional Supreme Court alleging that the two courts committed fundamental error of law. The Cassation Division of the Regional Supreme Court found that the evidence submitted by the accused persons lacked cogency and credibility to rebut the evidence of the prosecutor. It found both defendants guilty of possession of unexplained property and imposed rigorous imprisonment of three years and one year against the 1st and 2nd defendants[84] respectively. It further ordered for the confiscation of their money (deposited at the two banks) and the house mentioned in the charge.

Aggrieved with this decision, the defendants petitioned to the Cassation Division of the Federal Supreme Court requesting that the Division quash the

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[82] These are documents purported to establish/prove (i) the amount of salary paid to 1st accused since Meskerem 1984 E.C until the time of charge, (ii) that 2nd accused remained unemployed house-wife, (iii) amount of money deposited in 1st accused's name in the Commericial Bank of Ethiopia and in Dashen Bank, (iv) amount of money deposited in 2nd accused's name in Dashen Bank, and (v) the two accused have a residential house in the name of their son, Desta Workineh.

[83] Apart from adducing the documents written by the Kebele Administration and the Zonal Agriculture Office regarding the income they alleged to have collected from two agricultural sites, they have introduced the minutes of the two private limited companies that state about the 1,120,5000 birr deposited in the name of 1st accused. Also, some shareholders of these two companies have testified before the court.

[84] The Division ordered that the 1 year rigorous imprisonment remain in suspension.

judgment rendered against them. The prosecutor, on its part, argued otherwise and prayed for confirmation.

4.3.2 The Holding of the Cassation Division of the Federal Supreme Court

After an extensive and thorough review of the case, the Cassation Division of the Federal Supreme Court found that the Cassation Division of the SNNP Regional State Supreme Court committed fundamental error of law. It observed that the Cassation Division of the Regional State Supreme Court does not have power to review errors of fact as well as to review the assessment of evidence conducted by the lower courts. It revoked both the conviction and the sanctions imposed on the accused. The FSC Cassation Division found that the High Court and the Regional Supreme Court committed fundamental error of law because they failed to frame the right issues and to order the accused persons carry out their respective burden of proof as per the requirement of Art 419 (1) of the Criminal Code.[85]

The FSC Cassation Division stated that it is not sufficient for the accused to merely produce evidence that raises some doubts against the evidence of the prosecution. It maintained that the accused persons bear the burden of establishing or proving the source of the extra money and other property found in their name in a manner that ascertains the legitimate source of each money and property.[86] The Cassation Division of the Federal Supreme Court quashed the decision of the Cassation Division of the SNNP Regional State Supreme Court and remanded the case for re-trial by the High Court providing detailed

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[85] The decision reads: "...**የሥር ፍርድ ቤትና ይግባኝ ሰሚው ችሎት አመልካቾች ያቀቧቸው ማስረጃዎች አንደኛ አመልካች ከሚሠራው የመንግሥት ሥራ በተጨማሪ ሌላ የገቢ ምንጭ የነበረው መሆኑን የሚያሳዩ ማስረጃዎች መሆናቸውን በመመልከት መጣራት የሚገባቸው ፍሬ ጉዳዮችን ሳያጣሩና በተለይም አመልካቾች በዐቃቤ ሕግ ክስና ማስረጃ ከሕጋዊ ገቢያቸው በላይ የያዙ መሆናቸውን ብር** 2,081,468.90 **ያገኙበትን ትክክለኛ የገቢ ምንጭ የወንጀል ሕጉ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **በሚደነግገው መሠረት የማስረዳት ግዴታቸውን ተወጥተዋል ወይስ አልተወጡም የሚለውን ጭብጥ በመያዝ በሕጉ በአመልካቾች ላይ የተጣለውን የማስረዳት ግዴታ**/burden of proof/ **መሠረት በማድረግ ተገቢውን ማጣራት አድርገው መርምረውና መዝነው ውሳኔ የሰጡ አለመሆናቸውን ከውሳኔያቸው ይዘት ለመረዳት ችለናል።**"

[86] The Cassation Division framed this issue reads "**አመልካቾች (በመንግሥት ሠራተኛነት ለ**1**ኛ ተከሳሽ ይከፈለው ከነበረው በላይ)... በባንክ ሂሳብ ቁጥራቸው የተገኘው ጥሬ ገንዘብና በልጃቸው ስም ቤት የሠሩበት ሀብት ማለትም ብር** 2,081,468.90 **ትክክለኛ ምንጭ የማስረዳት ግዴታና ኃላፊነት አለባቸው ወይስ የዐቃቤ ሕግን ክስና ማስረጃ ሊያስተባብሉ የሚችሉ አንዳንድ ፍሬ ጉዳዮችን ለፍርድ ቤት ማቅረባቸው በቂ ይሆናል ወይስ አይሆንም ?**"

Then it reasoned and concluded as follows: "...**ዐቃቤ ሕግ በግልጽ ከሚታወቀው ሕጋዊ ገቢ በላይ ነው በማለት በክሱ የገለጸውንና በማስረጃ ያረጋገጠውን ሀብት ትክክለኛ ምንጭ የማስረዳት ግዴታ** /burden of proof/ **በተከሳሾች ላይ የሚወድቅ መሆኑን ነው። የተከሳሾች የማስረዳት ግዴታም ዐቃቤ ሕግ በክሱ ከገለጸውና በማስረጃ ከረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ሥራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍርድ ቤቱ በማሳየት የሚወሰን ሳይሆን በዐቃቤ ሕግ ክስና ማስረጃ ከተረጋገጠው ገቢ ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብና ሀብት ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታና ኃላፊነት ያለበት መሆኑን ከወንጀል ሕግ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **ሦስተኛው ፓራግራፍ ድንጋጌ አቀራረጽና ይዘት ለመረዳት ይቻላል።**"

instructions to the court in respect of the specific burden of proof borne by the accused as well as the nature of examination and assessment of the defence evidence.

4.4 Observations and Critique on the Binding Interpretation adopted in the *Workineh Kenbato* & *Amelework Dalie Case*

As some of the cases consulted demonstrate, the Amharic term "**የማስረጃ ሸክም**" or "**የማስረዳት ግዴታ**" are often indiscriminately used to refer to burdens borne by the parties without clearly identifying the distinction between *evidential burden* (**ማስረጃ የማቅረብ ሸክም**) and *legal burden of proof* (**በማስረጃ የማረጋገጥ ሸክም**). The *Workineh Kenbato & Amelework Dalie Case* and many other reported cases demonstrate this fact. Furthermore, in almost all cases highlighted above the courts did not attempt to indicate the particular standards of proof required from the respective parties to successfully discharge their respective burdens of proof. Besides, issues of burden and standard of proof have not been related with the constitutional principle of presumption of innocence and its legal implications. Most importantly, the natures and implications of the interrelationships between burdens of proof and presumptions, and between burdens of proof, presumptions and standards of proof should have been observed. This has led to lack of clarity on the operational features of the presumption embodied under Art 419 of the Criminal Code.

As the cases indicate, judges could have paid particular attention to the specific factual matters towards which each of the litigating parties bears evidential and/or persuasive burdens of proof. The Cassation Division of the Federal Supreme Court has rightly identified some of the principal *ingredients* of the offence of possession of unexplained property which the public prosecutor bears the burden of proving in the *Workineh Kenbato & Amelework Dalie Case*. The Division held that the prosecutor bears burden of proof and must prove:[87] the amount of income which an accused public servant (present or previous) is (or has been) earning; and, the extra (disproportionate or incommensurate) amount of money or property (vis-à-vis his lawful income) found in the possession of the accused, in his own name or in the name of his family.

Moreover, the Cassation Division has rightly, though implicitly, recognized that proving the status of the accused during the alleged commission of the crime as a *public servant* (or as one who is or used to associate with a public servant accused of committing this crime during such time) is borne by the

[87] "**ከወንጀል ሕግ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 (**ሀ**) **እና** (**ለ**) **ድንጋጌዎች ለመረዳት የሚቻለው ዐቃቤ ሕግ የመንግሥት ሠራተኛ የሆነው ወይም የነበረው ሰው ያገኝ የነበረውና የሚያገኘው ገቢ ምን ያህል እንደሆነና የመንግሥት ሠራተኛው በራሱ ስምም ሆነ በቤተሰቡ ስም ከሕጋዊ ገቢው ውጭ ይዞት የሚገኘውን የገንዘብና የንብረት ግምት የማስረዳት ግዴታ ያለበት መሆኑን በግልጽ ደንግጓል።**"

prosecutor. But the Division did not take note that such an assessment of the income of the accused public servant has to be made *within the period of check*. It did not confine the search of extra amount of money or property of the accused to be within the period of interest after the entry into force of the Criminal Code. It has accepted what the prosecutor stated in its charge and tried to establish with evidence starting from Meskerem 1984 E. C (thirteen years before the criminalization of possession of unexplained property in Ethiopia). Of the estimated Birr 2,081,468.90 (alleged to be found under the control of the accused), the portion of money acquired during the period of check (from Ginbot 1, 1997 E.C until the time of charge) has not been duly established by the prosecutor. The Cassation Division did not comment, let alone quash, the decision of the Regional Supreme Court from this perspective. Nothing has been stated in any of the judgements regarding the *mens rea* element of the offence.

The Cassation Division has addressed the question of *burden of proof* in relation to the accused. It stated that the defendant in such cases bears "burden of proof". Although the Cassation Division did not indicate whether the term *burden of proof* (**የማስረዳት ግዴታ**) specifically refers to evidential burden or legal burden, further reading of the details in the judgment show that it refers to legal burden of proof.[88] The Division held that an accused public servant and an

[88] "(**ሀ**) **አመልካቾች በስማቸው እንዳለና ጫት፣እንሰት፣ቡናና ሽንኩራ አገዳ እያለማን ገቢ እናገኝበታለን ያሉትን** 2.25 **ሄክታር መሬት በተመለከተ አመልካቾች የእርሻ መሬቱ ባለይዞታ ናቸው ወይስ አይደሉም? የእርሻ መሬቱ ባለይዞታ ከሆኑ የእርሻ መሬቱን በይዞታነት የያዙት መቼ ነው? መሬቱን በማልማት ኢኮኖሚያዊ ጠቀሜታ ያላቸው የተለያዩ ተክሎች በማልማት ምርት ገቢ ማግኘት የጀመሩት መቼ ነው? ከመሬቱ የሚገኘው ገቢና መሬቱን ለማልማትና ምርቱን ለገበያ ለማቅረብ የሚወጣው ወጭ ምን ያህል ነው? አመልካቾች ከመሬቱ ተጣርቶ የሚደርሳቸው ገቢ ምን ያህል ነው? የሚለው ፍሬ ጉዳይ በአግባቡና በገለልተኛ ባለሙያ ተጣርቶ ባልታወቀበት ሁኔታ ከቀበሌና ከዞኑ ግብርና ጽ/ቤት የተጻፉ ደብዳቤዎችን ብቻ መሠረት በማድረግ አመልካቾች ከእርሻ የሚያገኙት ገቢ መጠን ከፍተኛ እንደሆነ መወሰኑ በወንጀል ሕጉ አንቀጽ** 419(1) **በአመልካቾች ላይ የሚደነግገውን የማስረዳት ግዴታ** /burden of proof/ **መሠረት በማድረግ ጉዳዩ ተጣርቶ የተወሰነ አለመሆኑን የሚያሳይ በመሆኑ፣**

(**ለ**) **አመልካቾች በባንክ ሂሳባቸው ውስጥ ከተገኘው ገንዘብ ውስጥ ብር** 1,120,500 […] **በአንደኛው አመልካች ስም የተቀመጠ ከፊሉ የጋራራሙ ላንቶ የእንስሳት ማድለብ ኃላፊነቱ የተወሰነ የግል ማኅበር ገንዘብ ከፊሉ ደግሞ የጋልማ ባህላዊ ሎጅ ኃላፊነቱ የተወሰነ የግል ማኅበር መሆኑን ለማስረዳት የማኅበራቱ ቃለ-ጉባዔና አባላት በማስረጃነት የቀረቡ መሆኑ በሥር ፍርድ ቤትና በይግባኝ ሰሚው ችሎት ውሳኔ ተገልጿል፡፡ ሆኖም በመጀመሪያ ደረጃ ኃላፊነታቸው የተወሰኑ የግል ማኅበራት የሚመሠረቱት የማኅበሩ ዋና ገንዘብ ልክና የማኅበሩ ዋና ገንዘብ በሙሉ መግባቱን የሚያስረዳ መግለጫ ሲቀርብ መሆኑ በንግድ ሕጉ አንቀጽ** 519 **ንዑስ አንቀጽ /መ/ እና /ሰ/ በአስገዳጅነት የተደነገገ በመሆኑ እነዚህ የንግድ ማኅበራት ሕጋዊ ሰውነት አግኝተው ተመዝግበው ከሆነ ሲመዘገቡ ያስመዘገቡትና ገቢ ያደረጉት የማኅበሩ ዋና ገንዘብ ምን ያህል ነው? ማኅበራቱ በካፒታልነት ካስመዘገቡት ካፒታል በላይ በአመልካቾች ስም ለማኅበር መመሥረቻ የተዋጣ ገንዘብ አለ በማለት የሚጽፉአቸው የተለያዩ ማስረጃዎች ሕጋዊ ተቀባይነት ያላቸው ናቸው ወይስ አይደሉም? የሚሉት ነጥቦች ኃላፊነቱ የተወሰነ የግል ማኅበር አመሠራረት፣መዋጮ አከፋፈል፣የማኅበሩ ዋና ገንዘብና ገንዘቡ ገቢ ስለሚሆንበት ሁኔታ የተቀመጡ ሕጋዊ መሥፈርቶችን መሠረት በማድረግ መጣራት የሚገባቸው ፍሬ ጉዳዮች ተጣርተውና ማስረጃዎቹ አመልካቾች በወንጀል ሕጉ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **ያለባቸውን የማስረዳት ኃላፊነት መሠረት በማድረግ ተጣርተው ውሳኔ የተሰጠበት ሆኖ አላገኘንም፡፡**"

accomplice non-public servant bear burden of proof on one of the elements of the offence: namely, burden of proving the legitimate source (origin) of the extra amount of wealth found in one's possession other than that amount which the prosecutor already established to be a legitimate income.[89] While the Cassation Division has rightly identified this element of the offence which falls under the shoulder of the accused, the Division has unduly interpreted Art 419(1) as imposing persuasive burden of proof on the accused, contrary to the principle of presumption of innocence.

The Division arrived at such conclusion by focusing on the expression "….unless he *gives a satisfactory explanation* to the Court as to *how he was able to maintain such a standard of living* or *how such pecuniary resources or property came under his control*…" (**"የዚህ ዓይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት ሊገባ እንደቻለ *ለፍርድ ቤት ካላስረዳ በስተቀር*"**) (Emphasis added). The Division did not consider the limited scope of this expression "**… *ለፍርድ ቤት ካላስረዳ በስተቀር*"** ("….unless he *gives a satisfactory explanation* to the Court"). This phrase does not imply persuasive burden of proof. What is required rather is *explanation (**ማስረዳት**)*, not *proving (**ማረጋገጥ**)*.

Moreover, the Division did not notice that the explanation has to relate to "*how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control* [emphasis added]." Contrary to the law, it maintained that the accused should prove the exact amounts of net-incomes obtained from every identified and specific source. It required the defendants to convince the court about the amount of the net-income they derived from agricultural activities by producing a balance sheet that has been checked by a neutral a professional auditor. It further required them to convince the court about the truthfulness of their allegation regarding the amount of money claimed to be belonging to the two private limited companies by producing what has been registered during the registration of the two companies. All these requirements are not envisaged under Art 419 of the Criminal Code; there is no single word or expression in this provision that requires an accused to produce evidence that establishes (proves) the exact amount of money/property derived from specific sources. Nor does the provision require the accused to *convince* judges about the truthfulness of each gross income, expenditure and net-income.

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[89] The Court maintained: "**በሌላ በኩል የመንግሥት ሠራተኛ የነበረው ሰውና ከእሱ ጋር በልዩ አባሪነት የተከሰሰ ሰው የመንግሥት ሠራተኛው ሊያገኝ ከነበረውና ከሚያገኘው ገቢ በላይ ይዞት የተገኘው ገንዘብ ወይም ሀብት ትክክለኛው ምንጭ ምን እንደሆነ የማስረዳት ግዴታ እንዳለበት በወንጀል ሕጉ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **ሦስተኛ ፓራግራፍ** […] **በግልጽ ይደነግጋል። ከዚህም የምንረዳው ዐቃቤ ሕግ በግልጽ ከሚታወቀው ሕጋዊ ገቢ በላይ ነው በማለት በክሱ የገለጸውንና በማስረጃ ያረጋገጠውን ሀብት ትክክለኛ ምንጭ የማስረዳት ግዴታ** (Burden of Proof) **በተከሳሾች ላይ የሚወድቅ መሆኑን ነው።**"

The Cassation Division has also considered the issue of *standard of proof borne by the accused*. Without saying anything about the standard of proof borne by the prosecutor, the Division first framed the issue of whether the accused persons bear the burden of persuasion or whether it suffices if they merely introduce some evidence that rebut some of the facts established by the prosecutor.[90] The FSC Cassation Division invoked Art 419(1) of the Criminal Code, third paragraph, and concluded that the defendants bear the burden of persuading the court about the legitimate source of the extra amount of money and wealth which they possessed.[91] Whether the accused are required to convince judges with a standard of proof that is 'less than preponderant degree of proof', or 'equivalent to preponderant degree of proof', or 'equal to clear and convincing degree of proof', or 'equal to beyond a reasonable doubt standard of proof', or 'absolute certainty degree of proof' is not explicitly stated.

The analysis in the Cassation Division's final order seems to endorse and impose a requirement of an absolute certainty degree of proof upon the accused.[92] Such an interpretation clearly violates the principle of presumption of innocence enshrined under Art 20(3) of the Constitution and international instruments (which are integral part of Ethiopian law by virtue of Art 9(4) of the Constitution), namely: Art 11(1) of the UDHR, Art 14(2) of the ICCPR and Art 7(1)(b) of the African Charter on Human and People's Rights. It also deviates from the experience and judicial jurisprudence developed in other jurisdictions including the countries of origin of the idea of criminalization of illicit enrichment. The approach taken by the Cassation Division allows conviction of an accused person who fails to persuade judges about the truthfulness of one's side of the story. According to the Division's holding, it is possible to convict an accused person even if there are reasonable doubts about the truthfulness of the prosecutor's allegations or even if the prosecutor's and the defendant's evidence are at equipoise.

Conclusion

In jurisdictions where the problem of corruption is widespread, the criminalization of illicit enrichment is adopted as a vital tool to reinforce the

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[90] [ተከሳሾች በዐቃቤ ግ ማስረጃ የተረጋገጠባቸውንና ሕጋዊ ከሆነው ገቢ በላይ የያዙትን ገንዘብና ሀብት] "ትክክለኛ ምንጭ የማስረዳት ግዴታና ኃላፊነት አለባቸው ወይስ የዐቃቤ ሕግን ክስና ማስረጃ ሊያስተባብሉ የሚችሉ አንዳንድ ፍሬ ጉዳዮችን ለፍርድ ቤት ማቅረባቸው በቂ ይሆናል ወይስ አይሆንም?"

[91] It concluded: "የተከሳሾች የማስረዳት ግዴታም ዐቃቤ ሕግ በክሱ ከገለፀውና በማስረጃ ካረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ሥራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍርድ ቤቱ በማሳየት የሚወሰን ሳይሆን በዐቃቤ ሕግ ክስና ማስረጃ ከተረጋገጠው ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብና ሀብት ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታና ኃላፊነት ያለበት መሆኑን ከወንጀል ሕግ አንቀጽ 419 ንዑስ አንቀጽ 1 ሦስተኛው ፓራግራፍ ድንጋጌ አቀራረጽና ይዘት ለመረዳት ይቻላል።"

[92] *Supra*, notes 88-91.

fight against this social evil. However, countries which are not severely threatened with corruption resort to civil and/or administrative measures and remedies to address the problem. Yet, the criminalization of illicit enrichment is increasingly gaining acceptance as a legitimate instrument against corruption.

Apart from the incorporation of this offence in the 2004 Criminal Code, Ethiopia is a party to the UNCAC[93] and the AUCPCC[94]. Article 419 of the Criminal Code is clearly significant in the combat against corruption and as a tool to punish corrupt public servants and deprive them of their ill-gotten gains. Yet, there is the need for sufficient clarity on issues of burdens and standards of proof applicable in such prosecutions and on how this provision can be enforced without violating the right to presumption of innocence and other components of the right to fair trial and the right to private property.

A case in point is the need to distinguish between *evidential* and *legal* burdens and the need to analyze and determine whether Art 419 of the Criminal Code imposes *evidential* or *legal* burden of proof upon the accused. Moreover, clarity is required regarding the degree of proof that has to be met to trigger the operation of the legal presumption, and also to obtain conviction of an accused. The element or issue which requires *satisfactory explanation* from the accused also needs to be clearly identified. Furthermore, clarity is required regarding the degree of 'proof' imposed on the accused to meet 'satisfactory explanation'.

The Cassation Division of the Federal Supreme Court gave an erroneous interpretation to Art 419 of the Criminal Code stating that the accused in such prosecutions is required to shoulder a persuasive burden of proof. The Division further erroneously implied that such a burden can only be discharged by a standard of proof that reaches to a proof beyond a reasonable doubt. This author hence submits that the Federal Supreme Court Cassation Division should re-consider and rectify such interpretation of Art 419 when it comes across another case that bears similar issues.

The Division is indeed expected to identify the initial evidential and ultimate burdens of proof borne by prosecuting authorities, on the one hand, and the tactical and evidential burdens of "proof" borne by accused, on the other. This calls for the need to be clear on how the evidential presumption recognized under Art 419 becomes operational in each case and with regard to the various standards of proof applicable in such prosecutions throughout the trial and adjudication process.

Prosecutions under Art 419 of the Criminal Code are meant to deter corrupt public servants, deprive them of ill-gotten gains and facilitate the recovery of

[93] The United Nations Convention against Corruption (UNCAC), 2003.
[94] The African Union Convention on Combating and Preventing Corruption (AUCPCC), 2003.

plundered public money and other assets. Meanwhile, it is of paramount importance to take all the necessary precaution against the violation of the constitutional principle of presumption of innocence until proven guilty and other fundamental human rights of accused persons. Moreover, utmost caution has to be taken not to interfere against the lawful property of accused individuals, their families and other third parties. As the experience of other jurisdictions such as Argentina, India, Hong Kong and many others demonstrate, Art 419 can indeed be enforced without unduly restricting and violating the right to fair trial and other fundamental human rights enshrined in the FDRE Constitution and international human rights instruments ratified by Ethiopia. ■

Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption:

Identifying the Elements of the Offence under the Criminal Code of Ethiopia

Worku Yaze Wodage ♣

Abstract

Despite countervailing arguments, there is a growing national and global trend of criminalization of 'possession of unexplained property'. Since the end of the 20th century, many national, regional and global instruments that deal with corruption have criminalized possession of unexplained property (illicit enrichment). It is believed that this would facilitate deterrence and the recovery of public money/assets. It is further assumed that such measure would help facilitate investigatory, prosecutorial and adjudicatory activities in corruption cases. Ethiopia has joined these pursuits, and has criminalized 'possession of unexplained property' under the 2004 Criminal Code. The proper interpretation and application of this law presupposes sound understanding of the notion of the offence of illicit enrichment and the rationales that justify its criminalization. It also presupposes the proper identification of its constitutive elements and an appreciation of the contexts in which the offence can be invoked. This Article examines the reasons for the criminalization of possession of unexplained property, discusses the nature and salient elements of this crime and related issues of concern. The aim of the Article is to examine the notion of illicit enrichment, its criminalization and ingredients with a view to contributing toward the proper interpretation and enforcement of the law in Ethiopia.

Key words

Possession of unexplained Property, illicit enrichment, corruption, Criminal Code of Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v8i1.2

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Introduction

The problem of public corruption is one of the pressing issues in Ethiopia today. The legal and institutional frameworks that combat against corruption[1] include Ethiopia's substantive criminal law that criminalizes forms of corruptive and abusive behavior. The Criminal Code defines specific forms of wrongdoing that constitute crimes of corruption and prescribes respective sanctions.[2] Special procedural and evidentiary rules and provisions are also put in place to facilitate the effective prevention, detection, prosecution and/or adjudication of corruption crimes.[3] Some of these laws encompass provisions which facilitate the investigation and prosecution of corruption crimes.

'Possession of unexplained property' is one of the kinds of corruption offence that is expressly proscribed by the Criminal Code. This is a new form of offence introduced since 2004. Since the entry into force of the new Criminal Code in May 2005, the Federal Ethics and Anti-Corruption Commission (FEACC) and the Ethics and Anti-Corruption commissions of some regional states have started prosecuting suspected public officials/servants and other individuals (alleged to have some form of participation with the former ones) under Art 419 of the Criminal Code.

As some of the court cases involving 'possession of unexplained property' demonstrate, there are some confusions and dilemmas on certain crucial aspects of the concept of 'possession of unexplained property' and its prosecution. The confusion particularly relates to 'period of interest' and relevant 'money' or 'property' that should be part of the criminal investigation, prosecution, adjudication and confiscation. There is no sufficient clarity regarding the temporal scope of the offence and the circumstances that justify initiating and

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[1] Currently there are various institutional, administrative and regulatory measures that are put in place. These include: the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005, *Federal Negarit Gazeta, 11th Year No.18*; the Disclosure and Registration of Assets Proclamation, No.668/2010, *Federal Negarit Gazeta, 16th Year No.18*; the Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009, *Federal Negarit Gazeta, 15th Year No. 60*. Ethiopia is also a party to both the United Nations Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC).

[2] See Book IV, Title III of the Criminal Code (2004) of the Federal Democratic of Ethiopia, Proclamation No 414/2004, (hereinafter to be referred to as the FDRE Criminal Code or the Criminal Code) from Chapter I through Chapter III especially Arts 402- 431 and other cross-referred provisions such as Art 684.

[3] The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005, *Federal Negarit Gazeta, 11th Year No.19*; Also see the proclamations mentioned above at *supra* note 1.

continuing criminal investigation, prosecution and adjudication. There are enormous confusions and dilemmas relating to issues of burdens and standards of proof. The major sources of confusions and dilemmas seem to arise from misconceptions on the notion of the crime of 'possession of unexplained property' and its peculiar features, such as nature of the crime, the justifications of its criminalization, the specific *material* and *mental* conditions that constitute the offence, and other crucial issues.

This Article examines the notion of 'possession of unexplained property' and the rationales justifying its criminalization. It outlines the constitutive elements of the offence and highlights its distinctive features. The importance of enforcing the law dealing with this offence meanwhile evokes the need for caution against violating the principle of legality and other components of the right to a fair trial as well as other fundamental human rights. The perpetrators the law seeks to deter as well as the property or money that can be recovered in such criminal proceedings should also be clearly identified.

The first section of the article examines the concept and nature of the offence of 'possession of unexplained property'. Section 2 outlines the basic ingredients of this offence in the light of some regional and international conventions that deal with the fight against corruption. In addition to identifying the basic constitutive elements of the offence, this section highlights the particular contexts in which the offence can arise, and considers major issues of concern which emanate from the criminalization of illicit enrichment. In the light of the discussion in these two sections, Section 3 makes a brief analysis of the constitutive elements of this offence under the Ethiopian Criminal Code.

1. The Concept and Nature of the Crime of 'Possession of Unexplained Property'

1.1 Historical Origin and Definition

Possession of unexplained property, also known as illicit enrichment or possession of unexplained wealth, or possession of inexplicable wealth, or possession of excessive wealth,[4] is a relatively new form of crime when compared with other forms of corruption offences such as bribery, fraud and embezzlement. It was unknown as a punishable form of corruption offence until

[4] Nihal Jayawicrama, Jeremy Pope & Oliver Stolpe (2002), 'Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof', 2 *Forum on Crime & Society, No. 1,* at 24 (hereinafter Jayawicrama *et al*). Thus in this piece the terms "illicit enrichment", "possession of unexplained wealth", "possession of unexplained property" or "possession of unexplained assets" are employed interchangeably to refer to same idea.

the 1960s. It was during the 1960s that a few countries started to employ this term in their laws – first, as an *evidentiary* measure, and later on, as a *form of corruption offence*.[5] Lindy Muzila *et al* state the time, place and context in which this offence originated and spread out.[6] They relate its emergence with an Argentine Congressman's observations in 1936. The congressman, named Rodolfo Corominas Segura, was astonished with the unexpected increase in the assets and the sudden rise in a certain public official's wealth within a short period of time since the officia took office:

> Rodolfo Corominas Segura was traveling by train from his home in Mendoza to Buenos Aires when he encountered a public official displaying the wealth he had accumulated since taking office, wealth that Corominas Segura felt could not possibly have come from a legitimate source. Inspired, Corominas Segura introduced a bill stating that the government would penalize 'public officials who acquire wealth without being able to prove its legitimate source'.[7]

In 1964, Segura's idea and proposal got acceptance and as of that time *illicit enrichment* has become a punishable corruption offence in Argentina. Through time, this idea of criminalization has spread to some other countries. However, its pace was slow throughout the 20th century. Until the dawn of the 21st century, it was only a handful of national jurisdictions in Latin America, Asia and Africa that have had such an offence in their criminal laws.

In due course, many countries have recognized possession of unexplained property as a type of corruption offence. Lindy Muzila *et al* write:

> In 1964, […], Argentina and India became the first countries to criminalize illicit enrichment. […] In the 20 years since illicit enrichment was criminalized in Argentina and India, similar provisions have been introduced in Brunei Darussalam, Colombia, Ecuador, the Arab Republic of Egypt, the Dominican Republic, Pakistan, and Senegal. By 1990, illicit enrichment had been criminalized in at least 10 countries, by 2000 in more than 20 countries, and by 2010 in more than 40 jurisdictions.[8]

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[5] See Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger (2012), *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*; Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9454-0. License: Creative Commons Attribution CC BY 3.0, at 7-8, available at: <http://creativecommons.org/licenses/by/3.0> (last visited 10/7/2013), (hereinafter, '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*').

[6] Ibid.

[7] Ibid.

[8] Ibid.

The idea of illicit enrichment refers to *illicit or illegal* way of getting wealth by using (misusing) or abusing one's public position or office thereby accumulating a disproportionate amount of wealth by a public official in a manner that cannot be justified by lawful gains. It arises in circumstances wherein a public official unexpectedly, suddenly and/or unjustifiably becomes rich with a boom in his wealth and/or drastic change in his living style which seems to have resulted from an unlawful or illegal exercise of one's public position.

Suspicion arises in circumstances that transpire an air of the commission of some form of corruption which could not be easily indentified or fixed; it comes into the scene when investigative authorities are unable to locate or prove an identified illegal or illicit transaction (such as bribery, fraud, embezzlement, etc) that an official of a government is engaging in.[9] Although one is unable to testify or prove any such corrupt or other illicit activities, the public official's extraordinary assets or expenditures could be noticeable as physical evidence to imply the commission of some form of corruption. The movable and/or immovable things, the extraordinary money or other precious things deposited in bank account which an official of a state owns, the lifestyle or living standard that an official of a state (and perhaps his family) is leading, etc., could be visible manifestations of the commission of some form of corruption. Unless the public official provides explanation about the lawful origins, these assets/wealth or expenditure appear to be the proceeds of some form of illicit or illegal activity that took place in public office or public service. It is such state of affairs that is criminalized as constituting one form of corruption offence.

One of the principal and distinctive features of the law dealing with the offence of illicit enrichment lies in its focus on the *results* of suspect criminal acts rather than on actual illicit or illegal practices or transactions behind the results.[10] The other feature of the offence is that the targets of investigation and prosecution are primarily public officials, i.e., persons who enjoy public trust but who may abuse or misuse their positions of trust to enrich themselves or their families. Hence, laws that criminalize possession of unexplained property essentially aim at public officials who appear to lead a lifestyle or who appear to possess property beyond their legitimate sources of income.

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[9] If there is sufficient evidence to establish the commission of either of these *predicate* or any other corruption offences, the prosecutor would be in a position to institute a criminal charge against the suspect citing the breached provision of the criminal law. If, for example, there is sufficient evidence that a public official received some bribe, he will be prosecuted for committing an offence of bribery, not for committing an offence of illicit enrichment. N.B. the reference in the masculine in this Article refers to both sexes.

[10] Jayawicrama *et al, supra* note 4, at 24; *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 5, at 7.

Illicit enrichment can thus be defined as a *significant increase* in the assets of a public official which one *cannot reasonably explain* in relation to one's lawful salary and other legitimate incomes.[11] It is this unjustifiable, unexplainable and suspicious significant increase in the assets of a public official that is criminalized as a form of corruption offence. The essence of the concept is therefore linked with a *suspicious increase in the assets of a public official* - suspicion that some form of illicit activity or unlawful exercise of public office is a *raison d'etre* for such unexplainable significant increase in the wealth of a person. This offence "penalizes public officials for possessing wealth disproportionate to their known lawful sources of income if they cannot provide a satisfactory explanation for this."[12]

1.2 Illicit Enrichment as a form of Corruption Offence and as a Weapon to Fight Public Corruption

Illicit enrichment is better explained in the context of the fight against public corruption. It is considered as a *type* of corruption offence and as a *tool* to fight public corruption. As is widely known, public corruption is a contemporary national, regional and global problem. It is a global phenomenon which is occurring in both developed and developing countries.[13] It is identified as the main feeding source of organized crime; it is an evil that hampers political stability; it undermines economic and social foundations, disentangles cultural and moral values, compromises rule of law, and obstructs rendering of public services.[14] It is widely observed that:

> [Corruption] deepens poverty; it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in

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[11] International Council on Human Rights Policy (2009), *Corruption and Human Rights: Making the Connection*, at 65, available at: <www.ichratorg> (last visited on 14/8/2013), hereinafter *Corruption and Human Rights: Making the Connection*.

[12] Maud Perdriel-Vaissiere (January 2012), 'The Accumulation of Unexplained Wealth by Public Officials: Making the offence of illicit enrichment enforceable', *U4 Brief*, No 1, at 2-3, available at: <www.U4.no> (last visited on 7/08/2013).

[13] Ali Hajigholam Saryazdi (2007-2008), 'Basic Preconditions of Anti-Corruption Strategies', 4 *Int'l Stud. J.,* at 29. The term "public corruption" denotes that form of corruption occurring in the public sector context, in contrast to that which takes place in the private sector. For further details on the distinction between these two and related sub-forms see Indira Carr (2007), **'**Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?', 15 *Eur. J. Crime Crim. L. & Crim. Just.,* at 131-138; Peter J. Henning (2001), 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law', 18 *Arizona J. Int'l & Comp L.*, at 793-827.

[14] Ibid.

> democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.[15]

Professor Jorge notes that "corruption lowers tax revenues, increases government operating costs, increases government spending for wages and reduces spending on operations and maintenance. Corruption also diminishes public trust in government institutions, which is a crucial factor in the transition to democracy."[16] As Professor Ndiva Kofele-Kale observes:

> Corruption […], reduces economic growth and discourages foreign direct investments because it undermines the performance, integrity and effectiveness of the private sector; it decreases and diverts government revenues by plundering revenue generating agencies such as tax collection, customs and excise; it misallocates scarce national resources by concentrating wealth among a small bureaucratic and political elite; and it undermines democratic institutions by undermining the rule of law among other things.[17]

It has been further observed that "a broad consensus has emerged in recent years that corruption retards development by slowing economic growth, weakening government institutions, and exacerbating poverty."[18] Wagner and Jacobs consider corruption as "*the* development issue of the twenty-first century".[19] It has become one of the most serious contemporary developmental challenges in the African continent.[20] As Udomban notes "[a]ll forms of corruption are

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[15] See David Hess and Thomas W. Dunfee (2000), 'Fighting Corruption: A Principled Approach; The C^2 Principles (Combating Corruption)', 33 *Cornell Int'l L.J.,* at 594 (quoting from the *Durban Commitment to Effective Action Against Corruption,* signed by 1600 delegates from 135 countries at the October 1999 Anti-Corruption Conference sponsored by Transparency International).

[16] Guillermo Jorge (2007), 'The Romanian Legal Framework on Illicit Enrichment' at 36, available at: <www.aats.americanbar.org/.../romania-illegal_enrichment_framework-2007> (last visited on 12/06/ 2013).

[17] Ndiva Kofele-Kale (2006), 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes', 40 *Int'l Law,* at 935. See also the Preamble of the *Council of Europe Criminal Law Convention on Corruption (1999). It* reads: "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society."

[18] Benjamin B. Wagner & Leslie Gielow Jacobs (2008-2009), 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations', 30 *U. Pa. J. Int'l L.,* at 184.

[19] Ibid.

[20] Thomas R. Snider & Won Kidane (2007), 'Combating Corruption through International Law in Africa: A Comparative Analysis', 40 *Cornell Int'l L.J.* at 691;

prevalent in Africa, ranging from small-scale bribes required for normal bureaucratic procedures to large-scale payment of considerable sums of money in return for preferential treatment or access."[21] Udomban notes:

> The illicit acquisition of personal wealth by public officials and their cronies have had damaging effects on society, ethical values, justice, the rule of law, and sustainable developments in Africa. The level of corruption and the figures involved stagger belief; usually the figures constitute a substantial proportion of the resources of the state concerned.[22]

Corruption is considered as a dangerous *cancer* to a healthy socio-cultural, economic and political life.[23] The fight against corrupt practices and abusive behavior is thus given due attention at national, regional and global levels. Toward this end, criminalization of forms of corrupt practices and abusive behavior is a key component in a comprehensive anti-corruption strategy. Despite measures of criminalization and other endeavors to fight corruption,[24] it has become more entrenched and sophisticated in many countries. Saryazdi notes some common factors and reasons for its steady entrenchment:

> …[corruption] has grown at an alarming rate in recent years due to, in particular, economic liberalization and globalization, the widespread introduction and use of new cyber technologies, and the increasing role of multinational corporations in a rapidly evolving political and economic context. [25]

In most instances, corruption is an appealing, financially rewarding and short-cut method to boost up wealth or to generate "profits" in a short span of time without incurring costs. Often, it occurs in hidden and clandestine settings, mostly with no or just a few direct victims. It takes place with the secret agreement of suppliers and recipients. It involves complex methods and leaves no or little trace of evidence. This makes investigation, prosecution and proof extremely difficult. It is established that "public officials who engage in

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See also Nsonguruaj Udomban (2003), 'Fighting Corruption Seriously? Africa's Anti- Corruption Convention', 7 *Sing. J. Int'l & Comp. L*. at 449-450.

[21] Udomban, *supra* note 20, at 450.

[22] Ibid.

[23] See Robert Klitgaard (2008), 'A Holistic Approach to the Fight against Corruption', at 1; available at: <www.cgu.edu/pdf> (last visited on 14/8/2013).

[24] It has been noted that "Despite countless policy diagnoses, public campaigns to raise awareness, and institutional and legal reforms to improve public administration, research shows that it continues to flourish." See *Corruption and Human Rights: Making the Connection, supra* note 11, at 1; see also Hess & Dunfee, *supra* note 15, at 595-596.

[25] Saryazdi, *supra* note 13, at 29-30.

corruption often use their exalted position to impede investigations and destroy or conceal evidence."[26] Wagner and Jacobs write:

> In all countries, public corruption is more difficult than most other illegal acts to investigate and prosecute. It is a secret crime, carried out by powerful and often sophisticated perpetrators intent on silencing potential witnesses and retaining access to the spoils. Investigative techniques geared toward violent crime and other single-instance illegalities do not work in the context of entrenched corruption, where multiple players, often integrated hierarchically, operate through self-sustaining networks.[27]

National jurisdictions and the international community at large are thus forced to recognize and endorse new and advanced forms of criminal investigation and prosecution methods. At present, more proactive investigatory and prosecution strategies are being employed in many national jurisdictions to intensify the fight against corruption.[28] Use of infiltration and undercover agents, conducting surveillance and interception of correspondence (including wiretapping and eavesdropping), granting of immunity for some accomplice who willingly disclose corrupt activities and/or testify against corrupt public officials (the 'divide and rule' method), provision of protections to whistleblowers and witnesses, authorization of access to financial records, etc., can be mentioned in this regard.[29]

Against this backdrop, the criminalization of *possession of unexplained property* has come into contemporary national, regional and global legal scenes as a *form* of punishable offence and as an additional *weapon* to intensify the fight against public corruption.[30] It is particularly and purposefully included in contemporary legal instruments to address the difficulty encountered by investigating and prosecuting authorities in the enforcement of anti-corruption laws. At regional level, the Inter-American Convention against Corruption (IACAC) is the first international legal instrument that expressly incorporated this form of crime, both as a *form* of punishable offence and as a *weapon* to effectively combat corrupt practices.[31] The United Nations Convention against

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[26] Kofele-Kale, *supra* note 17, at 912.
[27] Wagner and Jacobs, *supra* note 18, at 185.
[28] Id, at 215-237. Most of these measures and procedures are endorsed in multinational treaties such as the IACAC, UNCAC and the AUCPCC.
[29] Ibid; also, See Snider & Kidane, *supra* note 20, at 710.
[30] See Kofele-Kale, *supra* note 17, at 913.
[31] The IACAC was adopted on March 29, 1996 by the Organization of American States and it entered into force on March 6, 1997. It is the first binding international convention aimed at combating corruption (Id, at 698).

Corruption (UNCAC)[32] and the African Union Convention on the Prevention and Combating of Corruption (AUCPCC)[33] have also recognized this crime as a form of corruption offence and as an anti-corruption measure.[34] As Lindy Muzila *et al* noted:

> Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe. Among countries choosing not to criminalize illicit enrichment by public officials, many have enacted alternative means for tackling it, such as measures making it easier either to prosecute or to confiscate illicit proceeds.[35]

In the aftermath of the adoption of these international and regional conventions, various countries have become parties to the conventions and have proceeded to incorporate the *crime of possession of unexplained wealth* in their domestic laws. Many countries have currently included this crime in their domestic laws as a weapon to effectively combat corruption, to deprive corrupt officials the enjoyment of their ill-gotten gains and to deter corrupted and would-be corrupted public officials.[36] It is believed that this would enable states to impose punishment on corrupt officials and to deprive them of the proceeds of corruption, through confiscation and recovery of public moneys and assets.[37] Such measure of criminalization is believed to have significant roles in enabling victim states to trace and recover public moneys and assets looted by corrupt officials and which might have been deposited in some foreign banks and other financial institutions. The specified forms of sanctions may include the

[32] The UNCAC was adopted by the General Assembly of the UN on October 31, 2003 and entered into force on December 14, 2005.

[33] The AUCPCC was adopted in July 2003 and entered into force on August 5, 2006.

[34] See Article 20 of the UNCAC and Articles 1(1) & 4(1) (g) of the AUCPCC.

[35] See '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption' supra* note 5, at 9.

[36] Ibid, at xiii; Jorge, *supra* note 16, at 66. See also International Council on Human Rights Policy (2010), 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities', at 65; available at: <www.ichratorg/files/reports/58/131b_report.pdf>, (last visited on 2/08/ 2013), hereinafter to be cited as 'Integrating Human Rights in the Anti-Corruption Agenda'; Perdriel-Vaissiere, *supra* note 12, at 2.

[37] Jayawicrama *et al*., *supra* note 4, at 24.

confiscation of proceeds of corrupt activities.[38] This is particularly the case in Latin American, Asian and African countries.[39]

> There is an increasing tendency, both at the national and international levels, to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation. Several national legislators have introduced such provisions and, at the international level, the offence of "illicit enrichment" or "unexplained wealth" has become an accepted instrument in the fight against corruption.[40]

Criminalization of illicit enrichment can have the following objectives:[41]

a) to restore to the state losses that have occurred through corruption, (or to remedy the unjust enrichment of public officials who profit at society's expense);
b) to punish public officials who engage in illicit enrichment;
c) to prevent offenders from benefiting from ill-gotten gains, signaling through prosecution that crime does not pay, thereby providing an effective deterrence;
d) to incapacitate offenders through dismissal or prison sentences.

It is of paramount importance to bear in mind that these objectives and intended goals inform law enforcement and judicial bodies in the investigation, prosecution and adjudication of this offence and at the same time watch against unintended effects that may ensue.

2. Ingredients of the Crime of Illicit Enrichment and Related Issues of Concern: Overview of Regional and Global Legal Instruments

One of the crucial issues in the investigation, prosecution and adjudication of illicit enrichment is identification of the essential elements of the offence. The elements of an offence are the bases of criminal investigation, prosecution and

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[38] '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption', supra* note 5, Appendix A, (at 67-88).

[39] Ibid, at 9. It is noted: "Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe."

[40] See the *United Nations Anti-Corruption Toolkit (February 2004)*, 2nd edition, at 513.

[41] '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption', Supra* note 5, at 53.

conviction. It is the identification and subsequent establishment (proof) of the essential elements of an offence that enable courts of law to convict and punish persons accused of committing some form of crime. The following preliminary questions arise in relation to the crime of illicit enrichment:

- On what particular elements should an investigative officer focus to build a case against a person suspected of committing an offence of illicit enrichment?
- What factual material and/or moral elements and circumstances should be included in a criminal charge involving illicit enrichment? In other words, what is the public prosecutor required to state in his charge as material and/or moral elements to justify the prosecution of a person and to demonstrate later on during trial? Or,
- What are the objects of proof which constitute this offence and which judges must check before passing judgment of acquittal or conviction?

These are some of the preliminary but basic issues that investigative officers, litigants and judges need to consider ahead of every criminal process that involves prosecution of illicit enrichment. It is also of paramount importance to be mindful of the basic concerns that arise in relation to the criminalization of illicit enrichment and its prosecution. Such an understanding of basic concerns and spillover effects helps in mitigating or preventing undesirable and unintended outcomes at the earliest time possible.

2.1 The Basic Elements of Illicit Enrichment as recognized under the IACAC, UNCAC and AUCPCC

To properly identify the constitutive elements of the offence of illicit enrichment one has to refer to the law that criminalizes such form of behavior and should focus on the law that defines the offence. In the context of national statutory laws, it is vital to consult the general parts, if any, and the special part that defines the offence. Apart from this general cautionary note, it is also desirable to consult other relevant and applicable global and regional legal instruments dealing with this particular offence. As already mentioned, illicit enrichment is criminalized under the IACAC, UNCAC and the AUCPCC.[42] Apart from the definition that one may gather from the criminal laws of national jurisdictions, the definitions provided in these regional and global legal instruments may help one deduce the principal ingredients of the offence that should be the focus of criminal investigation, prosecution and adjudication.

[42] Definitions adopted in such regional and global conventions would inevitably influence how national jurisdictions approach, define and formulate the offence of illicit enrichment in their respective criminal laws.

Article IX of IACAC defines illicit enrichment as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions." The Convention requires States parties to the Convention to criminalize illicit enrichment in their respective domestic laws (of course, subject to constitutional and fundamental principles of each State Party's legal system). Article IX reads:

> Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.
>
> Among those States Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Article 20 of the UNCAC titled as "Illicit enrichment", also stipulates:

> Subject to its constitution and the fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Likewise, Article 1(1) of the AUCPCC defines the offence as "the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income." It is one of the acts of corruption and related offences that AUCPCC listed under Article 4(1) (g).

While the two regional conventions and the UNCAC recognize the offense of illicit enrichment, there are some differences between the IACAC and the other two conventions, and between the three of them in respect of some detailed issues regarding the crime.[43] The major difference is that the IACAC uses mandatory language in requiring state parties to criminalize illicit enrichment, while the UNCAC and the AUCPCC use non-mandatory languages.[44] Subject to domestic constitutional and fundamental legal principles, a State Party to the IACAC is thus under duty to take measures to establish in its domestic law an

[43] For further details and comparative analysis, read Snider & Kidane, *supra* note 20, at 715-747.

[44] The former stipulates the obligation of a State party to the Convention in these terms: "…*shall* take the necessary measures to establish under its laws as an offense..." while according to the latter two conventions a State Party "…*shall consider* adopting such legislative and other measures as may be necessary to establish as a criminal offence…." (Id, at 728; Perdriel-Vaissiere, *supra* note 12, at 2.)

offence of illicit enrichment.[45] A State party to the UNCAC or to the AUCPCC, however, has the option to decide not to criminalize illicit enrichment after considering the matter as is made explicit in the expression "Subject to its constitution and the fundamental principles of its legal system…." In spite of this, many countries, particularly developing countries, have criminalized illicit enrichment.

A close scrutiny of the relevant parts of the IACAC, UNCAC and AUCPCC demonstrates that the offence of illicit enrichment consists of the following common and basic elements:[46]

(i) Individuals who may be prosecuted for the crime (persons of interest);
(ii) The period during which a person can be held liable for having illicitly enriched himself/herself (Period of interest or period of check);
(iii) Significant increase in assets (disproportionate assets);
(iv) Intent (*mens rea*)[47]; and
(v) Absence of justification.

a) Persons of interest

This element refers to the *individuals who may be prosecuted for committing this offence*. The offence of illicit enrichment chiefly pertains to or specifically targets *public officials*.[48] But the words 'public officials' need to be examined. For example, Art 2 of the UNCAC provides a wide definition for "public official", and it includes:

(i) any person holding a legislative, executive, administrative, or judicial office of a state party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority
(ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party;
(iii) Any other person defined as a public official in the domestic law of a state party.

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[45] Using this saving clause (some call it "escape clause"), the US and Canada have put their respective reservations to the IACAC and decided not to recognize such a crime called illicit enrichment.

[46] For the details of each element as well as the approaches of some jurisdictions on each element see, '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption', supra note* 5, at 13-22.

[47] While this element is explicitly included in the UNCAC, the other two, IACAC & AUCPCC do not contain such an explicit element.

[48] See '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption', supra* note 5, at 14.

Ultimately, it is for national jurisdictions to determine the scope of persons that could be subject to this offence. Accordingly, there are some jurisdictions that adopt a more expansive definition of 'public officials' to include persons that serve in non-governmental organizations or other organizations *which use public resources* other than public servants in the usual sense of the term. National jurisdictions may also decide to include private persons, mainly individuals who are family members to suspect/accused public officials.[49] Depending on the prevailing conditions relating to the fight against corruption, the scope of persons of interest may even extend beyond family members and relatives and include any person who is an accomplice or who participates in the receiving and hiding of some illicit gains of a public official.

b) Period of Interest (Check)

The second ingredient of the crime of illicit enrichment that forms the centerpiece of criminal investigation, prosecution, adjudication and punishment is 'period of interest' or 'period of check'. This refers to the period during which a person can be held liable for having illicitly enriched himself. This pertains to the period during which the suspected/accused person acquired the extraordinary assets in question using or misusing his trusted public position.[50] This refers to the *period which should be within the focus of criminal investigation, prosecution and adjudication* in order to establish the suspected/accused person's disproportionate assets alleged to have been obtained illicitly or illegally abusing or misusing one's public position.

According to Article IX of the IACAC, the period of check refers to the time covered *during the performance of* the public official's functions. Arts 20 and 8 of the UNCAC and the AUCPCC, respectively, do not explicitly provide for a specified period of check. But the reading of the term "public official" seems to at least imply the official's period of performance during the term of office.

As can be observed from the above-mentioned provisions of the three conventions and a look at of the experience of national jurisdictions, there are three different approaches to the determination of 'period of interest'.[51] As noted by Lindy Muzila *et al*, in some national jurisdictions this period of check coincides with *the term of office* of the public official (i.e., coincidence with the performance of public functions). For example, if a suspected public servant has been working in public institution(s) from 20 December 2000 until 5 January 2013, the period of check (to investigate significant increase in his assets) will be for the same period. Without prejudice to the principle of legality that is attached to the time of entry into force of the criminal law of a national

[49] Ibid.
[50] Id, at 16.
[51] Ibid.

jurisdiction and its specific scope, the investigation, prosecution and conviction/punishment of this person is, in such an approach, confined within this time range. In practice, it may be difficult to identify and establish if a given property or money which has been found under the possession of the suspected/accused person was one which he secured after or before he began his public function.

In national jurisdictions where there is an asset declaration and registration system that compels public officials to declare and register their property before assuming (and leaving) public office there may not be a significant problem in this regard. The challenge is graver jurisdictions such as Ethiopia[52] where there is no *compulsory* asset declaration (disclosure) and registration system provided as a *prerequisite* for assuming public office or as a requirement to be observed within a short fixed time from the public official's assumption and termination of such a public position. Identifying whether a given property or money that has been found under the control of a public official was acquired *before* or *during* or *after* the assumption of such public position by the person under investigation, is thus `a daunting investigative, prosecutorial and adjudicative responsibility in such jurisdictions.

In some jurisdictions, the 'period of interest' may extend *from the beginning of the term of office of a public official until some limited time after the end of the term of office* of such an official, say for example until five years after the termination of his term of office.[53] Compared to the first approach this gives more room for the state to go forward with its evidence and to establish its case. And, this approach enhances the opportunities for combating corruption. Other jurisdictions may leave the period of check *open-ended.* In this open-ended

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[52] Art 4 (1) of the Ethiopian Disclosure and Registration of Assets Proclamation No.668/2010 provides the following:

> "Any appointee, elected person or public servant shall have the obligation to disclose and register:
>
> a) the assets under the ownership or possession of himself and his family; and
>
> b) Sources of his income and those of his family."

While this provision provides for a system of mandatory Disclosure and Registration of Assets in Ethiopia, the Proclamation or any law does not make disclosure and registration a *prerequisite* upon assuming or leaving public office. The practice on the ground substantiates this. This author knows no appointee, elected person or public servant who has been required to disclose and register his assets or other sources of his income and those of his family before assuming public office. The author has never heard of any appointee, elected person or public servant who has ever been required to declare the same upon termination of his public position within a specified period of time identified as a governing norm.

[53] *On the Take: Criminalizing Illicit Enrichment to Fight Corruption', supra note 5*, at 14.

approach, the person of interest remains criminally liable throughout his life (since the beginning of his functions in public office extending to the time beyond employment), save for any period of limitation, if applicable. Compared to the other approaches, this option makes corrupt officials more vulnerable.

c) Disproportionate Assets

The third constitutive element of illicit enrichment is 'significant increase' or 'disproportionate assets'. The three conventions employ the term "*significant* increase in assets" in defining the offence. The existence of 'significant increase' in the assets of the public servant, or a manifestation of 'a lifestyle' or 'standard of living' which cannot be explained in comparison with the lawful sources of income/earning of a public servant is a necessary element to start and continue criminal investigation, prosecution and adjudication involving illicit enrichment. If the investigator gathers sufficiently strong evidence that establishes the accumulation of disproportionate assets or the leading of a life style that is not commensurate with one's legitimate source of income (an *actus reus* element of the offence) and if all other basic elements are fulfilled, the prosecutor is more likely to determine to prosecute the suspected person. This is a crucial point since cases that do not warrant prosecution should not be pursued further.[54]

There are a host of questions that come to one's mind with regard to the determination of 'disproportionate asset'. What should the public prosecutor check to justify his prosecution and later on to demonstrate the fulfillment of this ingredient of the offence during trial? How is it possible to establish (preliminarily or during trial) whether someone's asset has shown 'significant' increase or that it is 'disproportionate' (or that there is significant increase) to his lawful earnings? And, what amount would constitute 'significant', or 'disproportionate', or 'incommensurate', or 'above commensurate' asset or living style? What is the point of reference for such a comparison? What and which money or property is to be considered for the comparison (and later on for the measure of confiscation)? These issues require extensive inquiry, and the scope of this article does not allow such discussion.

In short, the terms 'significant increase' or 'disproportionate (above commensurate) assets or lifestyle', or other equivalent terms, refer to the *increase in the assets or wealth of a public official as compared to his lawful sources of income,* or the *lifestyle* he (and his family) *that is manifested as*

[54] It is appropriate to take all the necessary care not to cause embarrassment to innocent public servants. It is vital to recall that *prevention of miscarriage of justice* that is likely to eventuate in the criminal process is one legitimate function of modern criminal procedure laws. Prevention of miscarriage of justice is, of course, a general public interest issue.

becoming above his lawful sources of income or earnings. Such a significant increase in the assets/wealth or living standard that appears to be above the lawful income of the public official can be known by considering and calculating the official's lawful gains and expenditures and comparing them with what he is/has been actually controlling or showing in his lifestyle *during the period of interest*. This is calculated by taking the sum of the official's earnings from lawful sources of income and then deducting all his expenditures and then comparing what remains with the actual assets of the person at the period of check. To put this mathematically:

Lawful earning from all lawful sources of income (X)
= Earning from lawful source 1 (X_1)
+ Earning from lawful source 2 (X_2)
+ (Earning from lawful source 3 (X_3) + etc.[55]
The sum of all Expenditure (Y)
= Expenditure 1 (Y_1) + Expenditure 2 (Y_2) + Expenditure 3 (Y_3) + etc.[56]
Lawful Asset of the official (*Z*) = X-Y

The occurrence or non-occurrence of illicit enrichment can be calculated by comparing what the suspect/accused currently (or previously during the period of check) actually possessed of (*P*) vis-à-vis *Z*. However, a slight positive difference or small increase in favor of *P* does not constitute 'significant increase' or 'disproportionate asset'. There is no fixed measurement (figure) to exactly determine the increase in the assets which constitutes a 'disproportionate asset'. Yet, the expression '*significant*' or '*incommensurate*' or 'above commensurate' (or any other equivalent term) signifies that trivial or small increases are not, arguably, sufficient.

The above-mentioned regional and global conventions use the expression "significant increase in assets" leaving what this may mean to the interpretation of national jurisdictions. Accordingly, some jurisdictions expressly provide some specified threshold in percentage (e.g. India stipulates 10%) or simply state that small increases are not to be considered. Some others envisage the issuance of some guideline by the appropriate authorities. Still others leave the matter open-ended to be determined by the prosecutor and later on by courts.[57] Generally, the formula: *Illicit Enrichment = Actual possession of the Public official* (*P*) – *Z* can serve as a guidance to determine the existence or non-

[55] N.B. X_1 may refer to income from salary; X_2 may refer to income from inheritance; X_3 may refer to income from lottery prize; etc.

[56] N.B. Y_1 may refer to costs incurred in the purchase of food items; Y_2 may stand for the cost of house rent; Y_3 may refer to expenditure for children's school fee; etc.

[57] *On the Take: Criminalizing Illicit Enrichment to Fight Corruption', Supra note 5*, at 18-19.

existence of some significant increase in the assets of suspected/accused public officials.

The money or property that would be considered in such calculations is another controversial issue in the investigation, prosecution and adjudication of illicit enrichment. Issues such as, whether debts or other obligations (of the accused or of his family) that have been cancelled could be considered, or whether labor services provided to the accused or his family could be taken into account, or whether future promises and guaranteed interests will be considered, etc., are issues that can be determined by countries.

It is important to determine the exact tenor of the expression 'lawful earnings'. In its narrow sense, this term may refer to salary and other related benefits only. In its broad sense it may include salary, related benefits and many other forms of income such as income from inheritance, lottery prize, lawful gifts, or income from other income generating investments, etc. Whether the term 'lawful earnings' (or its equivalent) is employed in the narrow or broader sense could bring substantial difference in the outcome of criminal proceedings.

Another debatable issue arises in relation to income that might have been derived from *unrelated* (to ones public position or office), illegal or illicit activities of an official. Like any other person in all walks of life, a public official may engage in some forms of illegal or illicit activities which are not related with his public office or public services. For example, one may engage drug trafficking etc., and may derive some benefits. There is no consensus on whether such gains from unrelated illegal/illicit activities could be considered in the assessment of the wealth of a suspected public servant.

d) *Mens rea*

Mens rea is a widely acknowledged and central element of crimes in any modern national or international jurisdiction.[58] It constitutes the subjective (mental) element of an offence. It forms the fault (culpability) element of an offence. As is widely accepted, there is no criminal punishment without criminal guilt or fault (*nulla poena sine culpa*) in modern criminal law.

The issue that arises in relation to illicit enrichment is whether the offence is a strict liability offence, or whether it is an ordinary offence that presupposes the proof of criminal guilt; and further, if it is a *mens rea*[59] offence, what state of

[58] Some jurisdictions recognize criminal liability irrespective of fault or strict liability only for some regulatory (public welfare) offences.

[59] The term *mens rea* may signify different states of mind in various legal systems of the world. In the broad sense, especially in continental law jurisdictions, it refers to criminal intention and criminal negligence. In continental legal systems *intention* basically takes two different forms reflecting prevailing degrees of *awareness* and *volition*: direct intention (*dolus directus)* and indirect intention (*dolus eventualis).* It

mind would constitute the required criminal guilt. It is to be noted that the above-mentioned conventions do not endorse strict criminal liability. UNCAC explicitly puts *intention* as an essential mental element of this offence. Even if the IACAC and the AUCPCC are silent in this regard, it appears that intentional commission of such an offence is held in view.[60] The experience of some jurisdictions also confirms this requirement. Moreover, *negligence* appears to have no place in the prosecution of illicit enrichment.[61] It appears that only *intentional* commission of illicit enrichment entails criminal liability and punishment.

It is to be noted that intentional commission of crimes embraces *knowledge* (awareness) and *intent* (volition or desire). The degree of awareness could be either *certain*, or *near certain*, or mere *possibility*. And such awareness relates to as to one's act/omission (conduct), factual circumstance, illegality (unacceptability), and/or consequence of conduct. Volition, on the other hand, refers to the willingness or desire to behave in a manner that one is aware of, and/or to bring about such a result which one is aware of in a given factual circumstance.

With regard to the offence of illicit enrichment, the requirement of intention relates to the *increase in assets*.[62] The *mens rea* element of illicit enrichment thus pertains to the knowledge (awareness) and volition of the suspect/accused in respect of the extra wealth or asset that is beyond his lawful income.

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may further refer to such detailed forms as specific/special intention (*dolus specialis*)) and indirect intention as to secondary factual circumstances (*dolus indirectus)*. For more detail see Ronald Sklar (1972), ' "Desire", "knowledge of certainty," and *Dolus Eventualis*: Intention Under the Ethiopian Penal Code', 8 *J. Eth. L. No. 2*, at 373-393; Johan D. Van der Vyver (2004), 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law', 12 *U. Miami Int'l & Comp. L. Rev*. at 57-65.

[60] *On the Take: Criminalizing Illicit Enrichment to Fight Corruption', Supra note 5*, at 21.

[61] Yet, the boundary between *dolus eventualis* state of mind and an advertent (conscious) negligence state of mind remains often blurred and controversial. Professor Johan D. Van der Vyver (*supra* note 59, at 63-64) wrote: "In Anglo/American legal systems, *dolus eventualis* is usually defined as a manifestation of fault in cases where the perpetrator acted "recklessly" in regard to the (undesired) consequences of the act. In legal systems where "recklessness" features prominently in the circumscription of fault, the distinction between *dolus eventualis* and negligence becomes blurred" (footnote omitted).

[62] *On the Take: Criminalizing Illicit Enrichment to Fight Corruption', supra* note 5, at 22.

e) Absence of justifications

The three conventions under consideration include 'absence of justification' as an essential ingredient of the offence of illicit enrichment. In addition to the foregoing elements, the offence would be constituted *only if* the public official "…. cannot reasonably *explain* in relation to his or her lawful income" (UNCAC) or "….cannot reasonably *explain* in relation to his lawful earnings" (IACAC), or "….cannot reasonably *explain* in relation to his or her income" (AUCPCC).[63] This refers to the *lack of reasonable justification for the disproportionate asset* found in the possession of the person of interest.[64] It is inconceivable to secure conviction on this offence without establishing this element.

There are important issues that arise in this regard: How is it possible to establish the fulfillment of this element in each case involving such prosecutions? What particular burdens do litigating parties bear in this regard and to what extent? As these issues relate to issues of *burdens and standards of proof*, it is not our immediate interest to dwell at length on these issues. Yet, we need to emphasize that establishing a lacking (negative) element- absence of justifications- is often difficult. To overcome such practical problems it is common to employ *legal presumption* as a tool in favor of the state. This is what one observes from the conventions. The statutory laws of national jurisdictions also confirm that such an approach is appropriate.

Where there is the proof of accumulation or possession of *disproportionate wealth* or the proof of leading *a life style that is above the commensurate amount* that could be earned from legitimate sources *during the period of interest*, and if there is no satisfactory explanation, a legal *presumption* of illicit enrichment is drawn.[65] If no satisfactory explanation is offered, the law *requires*

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[63] [Emphasis supplied]. Apart from salary, lawful earnings or sources of income include incomes from inheritance, prize or reward, lottery, payments from part-time or other extraordinary works, gifts from family or friends not associated with any form of corruption, or any other income generated from other investments.

[64] This is another point that forms part of the *actus reus* element of the offence.

[65] Prior establishment of any *predicate offence* or any illegal or illicit practice that served as a source for accumulating a disproportionate amount of asset or for leading a standard of life that exceeds one's legitimate and lawful income is not a prerequisite element of the offence. *Predicate offence* refers to criminal activities that give rise to disproportionate assets such as accepting bribes, committing frauds, or embezzlement, etc. It is noted that "…there is no need to prove the *source* of the illegally acquired wealth by identifying and proving the underlying offenses, such as bribery, embezzlement, trading in influence, and abuse of functions." See '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption'*, *supra* note 5, at 7.

or *authorizes* an assumption that the extra asset is a result of some (unidentified) illicit activity associated with the accused person's public position or office.

Considering all the elements highlighted so far in light of the terms of the conventions and experiences in some national jurisdictions, illicit enrichment is an offence that penalizes public officials for possessing wealth that is *disproportionate* ("above that which is commensurate with the official income") to one's known lawful sources of income or for leading a lifestyle which is incommensurate with one's lawful income for which one *cannot provide a satisfactory explanation*. The offence does not punish public servants for being rich. It rather punishes the *procuring of money* or *other assets* through *illegal* or *illicit practices* while in *public office* or *using* such a *public position*.

2.2 Major Concerns accompanying the criminalization of Illicit Enrichment

The merits of criminalization of illicit enrichment in enhancing effective law enforcement, recovering looted public moneys/assets and its contribution toward deterrence, at least in theory, seem to be too obvious to require further elaboration. On the other hand, however, there are crucial concerns and threats which such measure poses. Primarily, recognition of such an offence has severe impacts upon due process rights of accused persons. Its impact upon the right to remain silent is apparent. Moreover, the legal presumption embodied in the offence somehow interferes with the enjoyment of the right to presumption of innocence. Unlike most ordinary criminal proceedings, the accused in illicit enrichment proceedings does not enjoy the wider scope of the principle of presumption of innocence and other components of the right to a fair trial. The legal presumption that is drawn following the establishment of some *actus reus* elements by the prosecutor compels the accused to shoulder some form of burden.[66] Once the public prosecutor establishes some basic facts, the accused is required to provide a *satisfactory explanation*.[67]

[66] Whether that is burden of *explanation* or burden of *proof* is an issue considered by this author in the note published in this volume of *Mizan Law Review*.

[67] It is to be noted that the accused is not required to *establish* or to *prove* something but to provide/give an *explanation*. There is understandable distinction between *providing* an explanation and *proving* something as the latter would require *convincing* judges about the facts in consideration. It should also be noted that the accused is required not to merely provide an explanation, but he has to provide *satisfactory* explanation to avoid any probable peril. While this is open for case by case determination, it is obvious that simple denial of the presumed facts is not enough. The accused is required to adduce some evidence in support of his version. These issues are addressed separately by this author's note published in this Issue of

Another concern relates to the adverse effect against the enjoyment of the right against self-incrimination. The formulation of the offence requires the accused to *say* something to *explain* about the disproportionate amount of money/property or changed living standards and to produce some evidence that supports his explanation. In making an explanation and in moving to adduce some evidence, a person may, on some occasions, be impelled to expose oneself as the author or associate of another crime.[68] For example, a public servant who is proved to possess a disproportionate amount of property may, if he wants to avoid such a conviction on this crime, explain to the court that the true source of such a disproportionate asset some other illicit act (e.g., theft) that he at one time had committed, or that it is an amount which is accumulated in violation of some tax duties (e.g., tax evasion). In such circumstances one would be ending up becoming a suspect of another offence which might not have been under investigation. This opens the door for investigative authorities to commence or to go ahead with another investigation which is unrelated to the offence of illicit enrichment.

Requiring an accused to explain an alleged disproportionate wealth would go, at least in some instances, to clash with the right to presumption of innocence, the right to remain silent as well as with the right against self-incrimination.[69] Hence, Snider & Kidane opined: "Although the crime of 'illicit enrichment' might appear to be a good weapon to combat corruption, it is fundamentally flawed as a matter of recognized principles of criminal justice."[70] They further noted:

> Regardless of this flaw, however, both the UNCAC and the AU Corruption Convention adopted the illicit enrichment provision, albeit in non mandatory language. It is highly doubtful that compromising the fundamental principle

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Mizan Law Review (See 'Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions').

[68] Or, if the accused had received some gift (unrelated with his public office) from a relative or close friend, or what he possesses is not his own property or money but of his close relative or friend, which the latter had obtained from some illegal source such as evasion of tax duties, contraband or black-market, or if he is hiding for any reason, the accused would be impelled to expose that person who made such a gift or who deposited such property/money.

[69] As to the nature, meaning and scope of the right of silence as well as the right against self-incrimination see Steven Greer (1990), 'The Right to Silence: A Review of the Current Debate', *53 Mod. L. Rev.*, at 709 ff; Nicolas A.J. Croquet (2008-2009), 'The Right of Silence and Not to Self-Incriminate under the European Convention on Human Rights: To what extent are they qualified?', 4 *Cambridge Student L. Rev.*, at 214 ff; Rose M. D'SA (1990), **'**Reforming the Right of Silence in Criminal Trials: A Commonwealth Perspective,' 2 *Afr. J. Int'l & Comp. L.*, at 604 ff.

[70] Snider & Kidane, *supra* note 20, at 728.

> of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course. This is particularly true in Africa where, […] the crime of corruption is directly linked with the rule of law and good governance. In fact, it directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples' Rights.[71]

The criminalization of illicit enrichment may violate the sanctity of private ownership of property as it involves seizure and confiscation.[72] Depending on the unique circumstances arising in each case, it can also have the potential to threaten the right of privacy as well as the right to the liberty of individuals.[73] This offence may open a loophole for arbitrary prosecutions and embarrassment of dissidents[74] in countries where the values and culture of democracy and tolerance are not firmly rooted. Such criminalization is likely to produce undesirable outcomes for it is susceptible to be manipulated for purposes of attacking and embarrassing dissidents as well as for instituting false accusations. It is also argued that this offence goes against one of the fundamental principles of modern criminal laws, i.e., the principle of legality, particularly the requirement of *legal certainty- nullum crimen sine lege certa* (without clear criminal law there is no crime and punishment).[75]

The offence may further give a wrong message, it is argued, for investigative authorities and public prosecutors: instead of conducting an extensive investigation to discover the actual truth (to know what sort of abuse or illegal exercise of power actually took place), law enforcement authorities may rather be tempted to rely on anticipated explanations of accused public servants. Moreover, even if criminalization may be found necessary to intensify the fight against corruption, some doubt the practicability of its implementation.[76] There

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[71] Id, at 729 (footnote omitted).These authors thus opined: "The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment." (Ibid).

[72] Lorana Bartels (July 2010), 'Unexplained Wealth laws in Australia', *Australian Institute of Criminology,* No. 395, at 5, Also, available at: <http://www.aic.gov.au>.

[73] Ibid.

[74] Ibid.

[75] '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption'*, *supra note 5*, at 30-33. Criminal law can only perform its task as an authoritative basis for punish-ability if it describes with sufficient legal certainty both the criminalized act and the consequences thereof.

[76] Snider & Kidane, s*upra* note 20, at 728-729. As Snider and Kidane (at 729) stated: "[i]n fact, it [the offence of illicit enrichment] directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples' Rights. The implementation of this provision as

is the fear that such criminalization can be a source of miscarriage of justice (wrongful conviction). One may further raise questions or doubts about the propriety and legitimacy of such criminalization measures from the perspectives of the *principles of criminalization* and other related *policy issues* which a modern democratic state is expected to embrace.[77]

While the potential threats and impacts posed by criminalization of illicit enrichment are discernible, many countries including Ethiopia have decided to be parties to regional and international conventions without putting any reservations thereto.[78] Indeed, many jurisdictions have already criminalized possession of unexplained property in their domestic laws. It appears that these jurisdictions have made this choice despite the risk of compromising, limiting or restricting the enjoyment of some fundamental rights in the face of the threat of public corruption.

Various jurisdictions such as the USA, Canada, UK and South Africa have rejected the idea of criminalizing illicit enrichment. These countries are of the opinion that recognition of such offence would be an intolerable measure and costly *vis-a-vis* due process and other fundamental rights (the right to

written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment" (footnote omitted). Some scholars argue that the offence is deemed to be proved *without proving any act that constitutes crime*. They argue that "*being a public official* with *excessive wealth*" does not constitute criminal activity; these are not elements of the offence as defined by the criminal laws of those countries that recognize such an offence. So, apart from posing a crucial threat against fair trial rights of the accused such as the right to presumption of innocence, right to remain silent, right against self-incrimination and other fundamental rights, the argument goes, this offence of illicit enrichment is against the principle of legality. They argue that such provision that criminalizes illicit enrichment does not clearly define a prohibited conduct that constitutes the basis of the offence. (See, '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption', supra note 5*, at 33; Perdriel-Vaissiere, *supra* note 12, at 3; *Integrating Human Rights in the Anti-Corruption Agenda*, s*upra* note 36, at 65).

[77] It is beyond the scope of this work to dwell at length regarding possible arguments against such criminalization measure from the perspectives of the principles of criminalization and other policy issues. For an excellent background on principles of criminalization and related policy issues one may refer to Andrew Ashworth (2006), *Principles of Criminal Law*, 5rd ed., particularly Chapter 2 (Criminalization) and Chapter 3 (Principles and Policies); Nils Jareborg (2004), 'Criminalization as Last Resort (Ultima Ratio)', 2 *Ohio St. J. Crim. L.,* 521- 534; Douglas Husak (2004), 'The Criminal Law As Last Resort', 24 *Oxford J. Legal Stud.,* at 207- 235.

[78] Many countries in South America, Asia and Africa have accepted this new offence. The US, Canada, most western countries and some African countries have, on the other hand, objected criminalization of illicit enrichment.

presumption of innocence, the right to remain silent, the right against self-incrimination, the principle of legality, private ownership, right to privacy and right to liberty) which would be interfered with.[79]

It is beyond the scope of this article to dwell at length on the issue of why the international community at the UN level and AU levels and various national jurisdictions at regional and domestic levels, have opted to criminalize illicit enrichment (unlike most western and developed countries) while it is apparent that this measure can potentially compromise or interfere with many fundamental human rights principles recognized in international human rights instruments.[80] It suffices to mention here that there is no absolute right which always prevails in any circumstance. All fundamental rights including the right to presumption of innocence, the right to silence and the right against self-incrimination, although unquestionably basic, are not absolute rights.[81] The enjoyment of any of these rights can be limited or restricted under certain justifiable circumstances. Thus the issue that can be raised is whether public corruption is such a great concern and whether societal problems justify the criminalization of illicit enrichment, and if so, whether such measure is an unavoidable necessary evil that individuals and societies should tolerate.

At present, there is consensus regarding the gravity and the adverse effects of corruption. Nonetheless, countries may take different positions on whether criminalization of illicit enrichment is a necessary device to address and effectively combat the problem of public corruption. Depending on prevailing circumstances and factors within particular jurisdictions, other measures such as administrative and/or civil law measures may suffice. Such measures may include fine, dismissal from work or office, confiscation and forfeiture of proceeds of corruption in civil or administrative proceedings, etc. Yet, these measures can be inadequate in other settings. As shown in the adoption of regional and international conventions as well as in the statutory laws of national jurisdictions, many countries (developing countries in particular) have preferred to further intensify the fight against corruption through the criminalization of illicit enrichment. Whether this approach is appropriate, necessary and proportionate remains debatable.

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[79] *Integrating Human Rights in the Anti-Corruption Agenda, supra* note 36, at 65; '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption'*, *supra* note 5, at 30-33.

[80] The scope of this article does not allow the presentation all arguments raised on both sides.

[81] It is clear that there is no absolute right. But we may question whether it is wise to create such a new offence which has such severe impacts upon individual fundamental rights and interests rather than enhancing existing legal frameworks to intensify the preventive and suppressive measures.

3. Basic Ingredients of the Offence of Possession of Unexplained Property under the Criminal Code of Ethiopia

Ethiopia, a party to both the UNCAC and the AUCPCC, is one of the countries that have criminalized illicit enrichment as a punishable offence. It has incorporated this offence in the 2004 Criminal Code. As the Federal Supreme Court rightly observed in *Mulugeta Yayeh v. FEACC* case,[82] the concept of *possession of unexplained property* is new to the Ethiopian legal system. Various major issues thus inevitably arise in the context of investigation, prosecution, adjudication, conviction and punishment (including confiscation measures). To the knowledge of this author, no special training has been given to those who are involved in the enforcement of this part of the Criminal Code until the time of this writing.

In spite of this, the Federal Ethics and Anti-Corruption Commission (FEACC) and the Ethics and Anti-Corruption commissions of some regional states have proceeded to prosecute public officials/servants and other individuals (alleged to have some form of participation with public officials/servants) under Art 419 of the Criminal Code since the entry into force of the law in May 2005 (Ginbot 1997 E.C). Some cases involving such prosecution are reaching to the Cassation Division of the Federal Supreme Court on grounds of basic error of *law*.[83]

Cases involving possession of unexplained property are on the rise in Ethiopia. There are many more decided and pending cases before the federal and some of the regional states courts.[84] As some of the court cases demonstrate,

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[82] See Criminal Case File No.72231 (*Mulugeta Yayeh v. Federal Ethics & Anti-Corruption Commission (FEACC*).

[83] See for example *Hankara Harqa v. SNNP EACC* (Cassation File No. 58514, decided on Tir 9, 2003 E.C), *Adem Abdu et al v. FEACC* (Cassation File No. 57938, decided on Hamle 14, 2003 E.C), *Tarekegn Teklu et al v. SNNP EACC* (Cassation File No. 67411, decided on Tahsas 30, 2004 E.C), *Workineh Kenbato & Amelework Dalie v. SNNP EACC* (Cassation File No. 63014, decided on Miazia 9, 2004 E.C), *Tesfaye Tumiro v. FEACC* (Cassation File No. 73514, decided on Hidar 6, 2005 E.C).

[84] See for example those cases that were, or are still, before the Federal High Court at Addis Ababa: *FEACC v. Yared Getaneh* case, the *FEACC v. Adem Abdu et al* case, the *FEACC v. Abdulkerim Adem et al* case, the *FEACC v. Seyfe Desta et al (*on 6th count against 2nd defendant, *Ahmed Seid Ebrahim*) case, and the *FEACC v. Elethabet W/Gebriel et al* case (particularly the 4th count against 5th defendant, Mulugeta Yayeh) and the *FEACC v. Birhanu Hika Roba* case. There are more other pending cases including *FEACC v. Melaku Fanta et al* case, *FEACC v. Gebrewahid*

there are some confusions and dilemmas on certain crucial aspects of the concept and its prosecution. Some lack sufficient clarity regarding the temporal scope of the offence and the circumstances that justify initiating and continuing criminal investigation, prosecution and adjudication.[85] They sometimes fail to properly identify the constitutive elements of the offence. It appears that there should be caution regarding the factual (physical and psychological) elements that constitute the *actus reus* and *mens rea* elements of the crime.[86] As some of the cases evince, there is the need for further clarity regarding 'period of interest' and relevant money or property that should be considered as part of criminal investigation, prosecution, adjudication, conviction and confiscation.[87] Moreover, there are crucial problems relating to the assessment and calculation of money/property alleged to form part of the accusation.[88] There are also

Woldegiorgis et al case (See **አዲስ አድማስ** (**ጥቅምት** 16 **ቀን** 2006 **ዓ.ም**) "… **በሙስና የተከሰሱት ኃላፊዎች በሚሊዮን የሚቆጠር ሀብት አፍርተዋል ተባለ**" available at: ‹www.addisadmassnews.com› etc. In the Southern Nationas, Nationalities and Peoples' Regional State one may, for instance, mention, on top of the *Workineh Kenbato & Amelework Dalie* case, the *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (Awassa City High Court, File No.06693, decided on Nehassie 12, 2001 E. C), *SNNP EACC v. Tarekegn Teklu et al* case (Awassa City High Court, File No. 6646, decided on Meskerem 27, 2003 E.C); *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (SNNP Regional State Supreme Court, File No. 31614, decided on Ginbot 3, 2002 E.C), *SNNP EACC v. Tarekegn Teklu et al* case (SNNP Regional State Supreme Court, File No. 33970, decided on Meskerem 5, 2003 E.C.). In the Amhara Regional State we may mention the *ANRS EACC v. Dagim Dessalegn* case (West Gojjam High Court, File No. 41634, decided on Ginbot 28, 2004 E.C.), *ANRS EACC v. Adinew Abate & Lubaba Abegaz* (North Wollo High Court, File No. 04107), *Public Prosecutor v. Birhanu Admasu* case (West Gojjam High Court), etc.

[85] See for example how the *Tesfaye Tumiro* case reached the Cassation Division of the Federal Supreme Court.

[86] Art 23 (2) of the Criminal Code provides: "A crime is only completed when all its *legal*, *material* and *moral* ingredients are present" [Emphasis supplied]. There is the need for clarity regarding what has to be stated and established as a material element and on what has to be stated and proved as a moral element.

[87] One may, for example, check from the criminal charges and decisions of courts in the cases mentioned under footnotes 82 through 84. Prosecutors charged many public servants by stating the period of check whereupon the accused are said to have accumulated disproportionate assets/money; such period has been stated as starting from e.g., 1979 E.C, 1983 E. C, 1984 E. C, 1985 E.C, 1986 E.C, 1992 E. C, 1993 E.C, 1996 E.C. Assets/moneys that were alleged to have been under the control of the accused and incomes from salary obtained since such periods, etc were all considered to show the disproportion between alleged lawful gains and illicit gains.

[88] The major and recurring points of controversy include whether some amounts of money appearing in the bank statements are those that were withdrawn sometime in

uncertainties and controversies on alleged sources of lawful incomes (other than salary) that should or should not be part of the assessment.[89]

Therefore, it is necessary to examine the constitutive elements of this offence and to critically analyze the specific factors that should or should not be considered in attempting to establish each constitutive element in the context of the Criminal Code.

3.1 Definition of the Offence

The Criminal Code does not offer a definition of the offence of 'possession of unexplained property'. But it is possible to deduce one from what Art 419 of the Criminal Code provides. Article 419 which is titled as "Possession of Unexplained Property"[90] reads as follows:

(1) Any public servant, being or having been in a public office, who:
   a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
   b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means,

shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.

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the past and re-deposited after a while or are transfers from another bank or another's person, or whether the estimation of an immovable has to be made based on the previous purchase or construction price of such an immovable or whether the current market-value of the immovable should be a basis of the calculation, etc. (Ibid).

[89] Ibid.

[90] The Amharic version of sub (1) of Art 419 reads:

አንቀጽ 419- **ምንጩ ያልታወቀ ንብረትና ገንዘብ**

(1)**የመንግሥት ሠራተኛ የሆነ ወይም የነበረ ማንም ሰው**

(**ሀ**) **የኑሮ ደረጃው አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግሥት ሥራ ወይም በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ የበለጠ እንደሆነ ወይም**፤

(**ለ**) **ያለው ንብረት ወይም የገንዘብ ምንጭ አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግሥት ሥራ ወይም በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ ጋር የማይመጣጠን እንደሆነ** ፤-

የዚህ ዓይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት ሊገባ እንደቻለ ለፍርድ ቤት ካላስረዳ በስተቀር እንደሁኔታው የንብረቱ መወረስ ወይም ለባለቤቱ መመለስ እንደተጠበቀ ሆኖ በቀላል እስራት ወይም በመቀጮ፤ ነገሩ ከባድ ሲሆን ከአምስት ዓመት በማይበልጥ ፅኑ እስራትና በመቀጮ ይቀጣል።።

(2) Where the Court, during proceeding under sub-article (1) (b), is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.

Under this provision, it is an offence for any present or previous public servant to maintain or have maintained a standard of living above that which is commensurate with his present or past official income from his present or past employment or other legitimate source unless such person gives a satisfactory explanation thereof. It is an offence for a public servant to be in control of pecuniary resources or property disproportionate to his official income from his present or past employment or other legitimate source of income unless such person gives a satisfactory explanation thereto. It is also an offence if such a person is found *possessing such a disproportionate amount of money or other property through another person* such as relatives, or friends. From this we understand that the definition of the offence of possession of unexplained property in Ethiopia is basically the same as those definitions found under the IACAC, UNCAC and AUCPCC.[91] Accordingly, we may define the offence of possession of unexplained property under the Ethiopian Criminal Code as the

[91] The content of Art 419 of the Criminal Code is almost the same as those embodied in Article 20 of UNCAC and Article 1(1) and Article 4 (1) (g) of the AUCPCC. Except the part on penalty, it is perfectly the same as provided under Section 10 of the Prevention of Bribery Ordinance (1971) (as amended) of Hong Kong, China. To see the similarity or otherwise of illicit enrichment provisions of Ethiopia, Hong Kong and many other countries, one may refer to '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption'*, *supra* note 5, Appendix A, at 67-88. The criminalization of possession of unexplained property in Ethiopia is made in the face of many constitutional rights and freedoms. See the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No.1/1995, *Federal Negarit Gazeta, 1st Year, No.1* (FDRE Constitution). This Constitution embodies many aspects of the right to fair trial and other fundamental rights and freedoms which a criminal suspect or accused person may avail in the event of criminal investigation, prosecution and adjudication. Some of these include the right to presumption of innocence, right to remain silent, right against self incrimination, right to discovery and right to confrontation (Arts 19(2), 20 (3) & (4)). The Constitution has also incorporated the principle of legality under Art 22 and the right to equality under Art 25. Furthermore, Art 40 of the Constitution proclaims about right to private property. These rights are also found in the International Convention on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter) - both of which are ratified by Ethiopia and are therefore to be treated as part and parcel of the law of the country by virtue of Art 9(4) of the Constitution.

maintenance or leading of a standard of living or possession of money or other property by a previous or present public servant that is above or disproportionate to the public servant's official and other lawful sources of income which he cannot reasonably explain in relation to his official income during the performance of his functions or other means.

3.2 Elements of the Offence

Article 23(2) of the Code stipulates that "A crime is only completed when all its *legal*, *material* and *moral* ingredients are present." Identifying (a) a particular criminal conduct, circumstance and/or state of affairs that establishes the act (or omission) and its prohibition by the law, i.e. the *actus reus* element, and (b) determining the required subjective element (i.e., the mental disposition or psychological condition) that establishes the *mens rea* (moral guilt) element of this offence. These elements need closer and critical scrutiny in each individual offence that is a subject-matter of investigation, prosecution or adjudication. The elements apply to all offences including the possession of unexplained property. This requires paying due attention to the nature or essence of illicit enrichment and to the legal, material and mental context in which the offence could be committed. It is also vital to consider what the UNCAC and AUCPCC provide in respect of these elements of this offence and other related issues.[92]

Based on Art 419 of the Code and the three conventions highlighted above we can observe that 'persons of interest', 'period of interest', 'disproportionate assets', and 'absence of justification' are the pillars and the constituting elements of the offence. Besides, the reading of Art 419 together with Arts 23, 57-59 of the Criminal Code provide another constitutive element, i.e., the mental element.

a) Persons of interest

Art 419 of the Criminal Code indicates the persons who could be perpetrators of the offence of possession of unexplained property in Ethiopia. This offence is basically committed by *public servants*. Thus individuals who may be subjected to criminal investigation, prosecution, adjudication, conviction and punishment under this offence are *primarily* public servants.'

As defined under Art 402(1) of the Criminal Code, the term *public servant* (*የመንግሥት ሠራተኛ*) includes "any person who temporarily or permanently performs functions being employed by, or appointed, assigned or elected to, a

[92] These conventions are to be treated as part of the law of Ethiopia by virtue of Art 9(4) of the FDRE Constitution. Hence what has been discussed earlier in Section 2 elucidates some issues in our present discussion.

public office or a public enterprise."[93] This definition includes not only higher officials of the government working in public offices or public enterprises but also extends to all employees. The manner in which an individual assumed a position in a given public office or a public enterprise is immaterial. One might have been employed or assigned. Or, one might have come to assume that position through an appointment or election. Whether the duration of employment, or assignment, or election, or appointment is made for sometime (temporarily) or is for an unlimited period of time (permanently) is also immaterial. Moreover, this provision does not provide any qualification based on conditions or terms of employment, or assignment, or appointment or election. Whether a person is assigned, or appointed, or elected to serve in such a public office or public enterprise with or without consideration (payment) is not considered as a qualifying element.

However, it is to be noted that this provision only applies to persons employed, or assigned, or appointed, or elected to work only in *public offices* or *public enterprises*. Art 402(2) and Art 402(3) of the Criminal Code provide definitions for the terms "public office" and "public enterprise", respectively. According to Art 402(2), *public office* refers to "any office fully or partially financed by government budget, and which performs the functions of the Federal or Regional Governments."[94] Art 402(3) defines *public enterprise* as "a Federal, or Regional Government enterprise or share company, in which the Government has total or partial share as an owner."[95]

As the law now stands, persons working in institutions or other offices that are not at least partly funded by the federal or regional state governments are not within the scope of 'persons of interest'. Thus, persons working in charities, societies, mass-based societies, religious organizations, private business organizations, *Idir*, *Ekub*, or other cultural organizations etc., fall outside the scope of 'persons of interest'.[96]

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[93] The Amharic equivalent reads: '**የመንግሥት ሠራተኛ**' **ማለት በመንግሥት መሥሪያ ቤት ወይም በመንግሥት ልማት ድርጅት ውስጥ ተቀጥሮ፣ተሹሞ፣ተመድቦ፣ወይም በሕዝብ ተመርጦ በቋሚነት ወይም በጊዜያዊነት ሥራን የሚያከናውን ማንኛውም ሰው ነው።**"

[94] The Amharic equivalent reads: '**የመንግሥት መሥሪያ ቤት**' **ማለት ሙሉ በሙሉ ወይም በከፊል በመንግሥት በጀት የሚተዳደርና የፌደራል ወይም የክልል መንግሥት ሥራዎች የሚከናወኑበት ማናቸውም መሥሪያ ቤት ነው።**"

[95] The Amharic equivalent reads: '**የመንግሥት ልማት ድርጅት**' **ማለት የመንግሥት ባለቤትነት ድርሻ በሙሉ ወይም በከፊል ያለበት የፌደራል ወይም የክልል መንግሥት የልማት ድርጅት ወይም የአክስዮን ማኅበር ነው።**"

[96] For the definitions, scopes, types and other related issues pertaining to societies, charities, mass-based societies, and, to some extent, religious organizations *see* the Charities and Societies Proclamation No.621/2009, *Federal Negarit Gazeta, 15th Year No.25*. It appears that if any of these entities obtain some funding from the

Public servants as defined under Art 402 (1) are the potential perpetrators of this crime and are thus the primary targets of Art 419 of the Criminal Code, Under exceptional circumstances, this provision may extend to non-public servants if they participate in the commission of this crime by a public servant. A non-public servant may commit an offence of possession of unexplained property if he associates or participates with a public servant in the manner provided under Art 33 of the Criminal Code. Such a non-public servant can be held liable, if by his/her acts, he/she fully participated with *knowledge* and *intent* in the commission of an offence of possession of unexplained property.[97] This is not confined to close relatives and friends of accused public officials, but includes anyone who participates with *full knowledge* and *intent*. From this perspective, one may say that the scope of 'persons of interest' under Ethiopian Criminal Code is somehow broad.

b) Period of Interest

The period during which a person can be held liable for the offence is indicated under Art 419(1). The expression "*being* or *having been in a public office*"[98] qualifies the time element (period of interest/check). According to this provision, an offence of possession of unexplained property is said to be committed, if it is found that the offence was committed *sometime in the past while the accused was in public office* (during his tenure as a public servant) or if it is established that the offence is committed *presently while the accused is still in public office.* This shows that Ethiopia has endorsed an *open-ended approach*. There is no time limit even after the termination of one's term of office or employment unless it is barred by an applicable period of limitation.

While the threshold time for investigation, prosecution and adjudication appears to be the beginning of performing in a public office or in a public enterprise, this period of performance could not include the time before the entry into force of the 2004 Criminal Code, i.e., before 9th of May 2005 (Ginbot 1, 1997 E.C). By virtue of Art 5(2) of the Criminal Code, "[a]n act declared to

government and an alleged illicit enrichment is linked to such funding, the scope of 'persons of interest' seem to go to include those persons suspected in that context (see Art 88 (2) of the above proclamation providing a possibility to extend some incentives by the government to those charities or institutions that allocate more than 80% of their income to their stated purposes or to those which demonstrate outstanding performance).

[97] It reads: Article 33.- Participation in Cases of Special Crimes
"An accused person may be prosecuted as a principal criminal when, by his acts, he fully participated with knowledge and intent in the commission of a crime which can be committed only by certain specified persons, in particular [...] by a public servant in respect of crimes against public office [….]."

[98] See the Amharic equivalent "**የመንግሥት ሠራተኛ የሆነ ወይም የነበረ**".

be a crime under [the 2004 Criminal] Code but not under the repealed law and committed prior to the coming into force of this Code is not punishable." As the Cassation Division of the Federal Supreme Court rightly observed in *Tesfaye Tumiro* case, to extend the period of check to the time before 9th of May 2005 is against the principle of non-retroactive applicability of the criminal law.[99]

Establishing this *temporal link* between the moment of acquisition of disproportionate wealth and the time when an alleged crime of corruption is believed to have been committed by a public servant is crucial. Investigators, prosecutors and judges should always bear in mind that it is only an illicit accumulation of wealth by public servants since the 9th of May 2005 that is within the purview of Art 419 of the Criminal Code. This author fully understands the difficulty that is faced in trying to fix the particular period in which a corrupt public servant might have committed an illicit or illegal activity that is an element in the possession of unexplained property. It may be too difficult to obtain evidence that helps fix this particular period. Yet, the principle of legality and the principle of non-retroactive application of the criminal law will be violated if this period of check is stretched to the time before the criminalization of such conduct. The benefit of doubt in such cases has to go to accused persons.

It is necessary to pay particular attention to the expression "*being* or *having been* in a public office" (**የመንግሥት ሠራተኛ የሆነ ወይም የነበረ**) under Art 419 of the Code. It determines the period of interest for investigation, prosecution,

[99] See Art 22 (1) of the FDRE Constitution, Art 15(1) of the ICCPR, Art 7(2) of the African Charter, and Arts 2 (2) & 5 (2) of the Criminal Code. In *FEACC v. Tesfaye Tumiro* case, the accused was accused of committing an offence of possession of unexplained property while he served as a public servant in various public offices between 1992 E. C and 1996 E. C (i.e., before the criminalization of such conduct and before the entry into force of the Criminal Code). The Federal High Court at Addis Ababa had wrongly convicted the defendant under Art 419 (1)(b) of the Criminal Code and imposed two years and three months of rigorous imprisonment and a fine of Birr 66, 660 and further ordered for the confiscation of the defendant's car as well as his bank deposit of Birr 27, 330. This decision was confirmed by the regular division of the Federal Supreme Court on appeal. The Cassation Division of the Federal Supreme Court quashed these erroneous decisions by invoking the non-retroactive application of the Criminal Code in its decision rendered on Hidar 6, 2005 E.C. The Cassation Division's analysis of the law and its holding in this case are in line with the explicit stipulations of the FDRE Constitution, the ICCPR, the African Charter and the Criminal Code. It has rightly invoked and applied the principle of *nullum crimen sine lege.* Regrettably, this Division made no similar observations in other cases such as the *Workineh Kenbato & Amelework Dalie* case, the *Hanqara Harqa* case, and the *Tarekegn Tekilu et al* case where the period of check stretched back to 1984 E. C, 1985 E.C, and 1986 E.C., respectively.

adjudication, conviction and punishment. The increase in asset must be proved to have taken place *during the term of office of the public servant* or it must be shown that it occurred *from the date on which the public servant took office and/or thenafter, after he left office*. The expression "having been in a public office" (**የመንግሥት ሠራተኛ የነበረ**) is referring to the maximum future period of check (which is left open-ended) after having left public office.

c) Disproportionate Asset

As highlighted in Section 2, the element of disproportionate asset is one of the manifestations of overt conduct that constitutes an *actus reus* element of the offence of illicit enrichment. The expressions: "*above* that which is commensurate with the official income [...] or other means", or "control of pecuniary resources or property *disproportionate* to the official income […] or other means" under Art 419 of the Criminal Code indicate the recognition of this element. These expressions imply *significant increase* in the assets of the accused person. It is inconceivable to think, initiate and lead such a prosecution against a public servant without some visible manifestation of significant increase in the standard of living he or his family exhibits or in the money or other property he possesses at a given point of time or throughout.

The increase must be disproportionate to a reasonable saving of one's official income such as salary and related benefits (transport/house/telephone allowance, per diem, part-time payments, bonus, other incentives) or from other means of earnings such as income from inheritance, prize, lawful gifts, income from hiring of house or car, or gains from agricultural activities, or husbandry, or poultry, or income from other investment or trading activities, etc. It must be noted that Art 419 of the Criminal Code does not confine the means of living and earnings of a public servant to official income only. The expression: "[…] income from […] other means"[100] is broad enough to include other *lawful*[101]sources of income.

In some cases, the calculation and determination of incomes and expenditures could be too complex for investigative authorities. In a country that has a poor tradition in recording and the preservation of incomes and expenditures, this could be a daunting task. As the court cases consulted by this author demonstrate, most prosecutions confine themselves to the collection of

[100] See the expression "**በሌላ መንገድ ከሚያገኘው ወይም ሊያገኝ ከነበረው ሕጋዊ ገቢ**" under sub-(a) and sub-(b).

[101] The Amharic version puts this qualification while the English version simply states "other means". Whether courts should base the assessment of the assets of the accused solely taking the official income and incomes from other lawful means or whether they can consider incomes obtained from other lawful and (unrelated) illegal means such as from tax evasions, etc., is yet to be seen in practice.

records of salary payments (payrolls). Accused persons are often required to provide evidence of sources of income such as overtime payments and other income from lawful sources. Whether such practice is in line with what is provided in the Criminal Code or in line with applicable or accepted procedural and evidentiary rules is addressed in the context of allocation of burdens of proof.[102]

The particular money or property that is to be part of the assessment of the wealth or asset of a public servant is another area where prosecuting authorities and accused persons in Ethiopia often disagree. In most of the cases consulted by this author, accused persons claim that some parts of the money found in their name or in the name of their spouses are obtained from other persons in the form of loan, or in lawful gift from some family members; some defendants claim that a certain amount of money deposited in the bank is another person's money put in bailment, etc. [103] Public prosecutors often object such claims. Judges however allow accused persons to introduce supporting evidence and trial judges often assess and give credit to the adduced evidence in that regard.[104] But judges in the higher tiers of courts, particularly at the level of cassation benches often reverse such holdings.[105]

Another point of controversy in such prosecutions relates to the evaluation of immovable property alleged to be part of the illicit enrichment. In some the cases, accused persons objected the estimation of the price of the immovable that was made an object of assessment. Some argued that the purchase or construction price, and not the current market-price, should be the basis the assessment.[106] It is submitted that considering the current market-price of an immovable, what should be considered is what an accused person actually obtained at the time of commission of the crime. The appreciation or

[102] For details read this author's Article on burdens and standards of proof which is published in this issue of *Mizan Law Review*, pp. 1-44.

[103] See, for example, the *Workineh Kenbato & Amelework Dalie* case, the *SNNP EACC v. Hanqara Harqa & Hirpitu Hanqamo* case. The accused persons alleged that the bank deposits of Birr 1,120, 500 in the first case, and the Birr 500, 000 belonged to two private limited companies (in the first case), and to a church (in the second case). See also the *Mulugeta Yayeh* case, the *FEACC v. Seyfe Desta et al (*on 6th count against 2nd defendant, *Ahmed Seid Ebrahim*), the *FEACC v. Yared Getaneh* case, and the ANRS *EACC v. Dagim Dessalegn* case.

[104] Ibid.

[105] Revising cases based on an alleged error of assessment of evidence is beyond the power of cassation divisions. But, this is not our immediate concern here.

[106] See for example such an argument raised in the *Workineh Kenbato & Amelework Dalie* case and in the ANRS *EACC v. Dagim Dessalegn* case.

depreciation of money or property obtained from an illicit or illegal activity should not be the basis of calculation to determine if there is significant increase in the wealth of a public servant. But this does not imply that such offenders can be beneficiaries of the increase from incomes or gains generated from misuse or abuse of their positions.

The last issue that needs to be considered is whether Art 419 of the Criminal Code envisages future promise of payments, cancellation of debts, intellectual or labor services, provision of real or personal securities etc., in the assessment of the wealth of a public servant as income and/or expenditure. While this may be arguable, a reading of this provision together with Art 402(4) & (5) seem to support the propriety of considering these into the assessment.

d) *Mens Rea*

Article 419 of the Criminal Code does not state whether this crime entails liability when it is intentionally or negligently committed. Art 57(2), provides that no person "can be convicted under criminal law for an act penalized by the law *if it was performed* or *occurred without there being any guilt on his part*." Mere violation of any criminal law provision that establishes an offence cannot entail punishment unless there is *guilt* on the part of the accused. Establishment of culpability or guilt is a necessary ingredient of criminal liability under the Ethiopian Criminal Code. The maxim *nulla poena sine culpa* (without fault there is no criminal liability to punishment) holds full sway in Ethiopia.[107]

The principle of contemporaniety is also applicable under the Ethiopian criminal justice system.[108] To entail conviction, this principle requires that the *actus reus* and *mens rea* elements of an offence must co-exist at the same time.[109] In the absence of moral guilt, acts performed in a state accident do not entail criminal liability. Moreover, Art 58(3) stipulates that "[n]o person shall be convicted for what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence."

Guilt is established by proving the criminal intention or criminal negligence of an accused. As provided under Art 58(2), intentional commission of a crime is always punishable except in cases of justification or excuse expressly

[107] See Philippe Graven (1965), *An Introduction to Ethiopian Penal Law*, (Addis Ababa: Haile Selassie I Univeristy Faculty of Law) Arts 1- 84 Penal Code), at 152.

[108] For the details of these two principles see, Ashworth, *supra* note 77, at 94.

[109] Only exceptionally will the other modern doctrine of criminal law that is *the doctrine of prior fault* work under the Ethiopian criminal justice system. According to this doctrine, an accused that deliberately put himself in an exculpatory condition would not be allowed to rely on a defense of exculpatory conditions. The doctrine of prior fault can be invoked to hold him liable (Ibid). See Art 50 of the Criminal Code.

provided by law. Art 59(2) provides that crimes committed "by negligence are liable to punishment *only if the law so expressly provides* ..." (Emphasis added). Art 419 of the Code does not expressly provide that possession of unexplained property shall be punishable if committed through negligence. It is clear, then, that this offence is punishable only if it is committed *intentionally*. In light of these provisions, therefore, a public servant cannot be punished for committing an offence of possession of unexplained property or money if, by accident or by a mistake committed by another person, such as a bank clerk, or an individual sender/transferor, a big amount of money is transferred to his/her bank account during the period of interest.

e) Absence of Justification

As is the case in other criminal proceedings, the material facts that need to be established in possession of unexplained property criminal proceedings involve, *inter alia,* an assessment of whether there exists a criminal conduct of the accused and a consideration of whether such conduct constitutes a criminal offence as stipulated under Art 419 of the Criminal Code. A close reading of Art 419 together with Arts 23, 57- 59 of the Criminal Code would help determine another element (other than the maintenance of a standard of living or possession of property above lawful sources of income) that constitutes the offence of possession of unexplained property under the Code. It would be absurd to condemn anyone for merely leading a standard of living above one's official income (or for merely possessing a significant amount of money or property). Art 419(1) thus embodies another essential material element (*actus reus*). This is: *failure* or *being unable,* on the part of the accused, to give a *satisfactory explanation* to the Court as to how he was able to maintain such a standard of living or how such a pecuniary resource or property came under his control. This is what is shortly referred to as '*absence of justifications*'.

Failure to give *satisfactory explanation* about the extra money or property triggers a *presumption* of the accused person's illicit or illegal activity committed *while he was in public office* or *after he left public office*. As has been mentioned earlier, this legal presumption is meant to address the difficulties encountered in the investigation, prosecution and adjudication of corruption-related offences. It must be underlined here that failure on the part of a public servant *to give explanation* about the extra amount of money or other property under his control or ownership is considered as an *evidential fact*[110] of some corrupt activity on the part of the public servant.

[110] Black's Law dictionary defines 'evidentiary fact' or 'evidential fact' as "a fact that is necessary for or leads to the determination of an ultimate fact" or it is taken as a "fact that furnishes evidence [proof] of the existence of some other fact."

Concluding Remarks

There is a trend towards the criminalization of illicit enrichment, particularly in developing countries. Such measure is believed to foster the fight against public corruption and to recover plundered public assets. The proper enforcement of such law presupposes clarity on the notion of the offence and the reasons that justify its punishment. It is also necessary to identify the constitutive elements of the offence and the circumstances that give rise to such suspicion of its commission.

There is the need to give due attention to the unique features of this crime and to identify the various *actus reus* and *mens rea* elements as well as other related constitutive elements of the crime. In this regard, one has to give special attention to the requirements of 'persons of interest', 'period of interest', 'disproportionate assets', requisite *mens rea* and 'absence of justification' elements as are provided under the UNCAC, AUCPCC and the Criminal Code. The experience in Ethiopia demonstrates serious shortcomings in respect of identifying 'persons of interest' that should be subjected to such prosecutions. There are also serious limitations regarding the determination of the 'period of interest' and the establishment of 'disproportionate assets'. In particular, investigative and prosecuting authorities need to pay particular attention to the temporal link between the moment of acquisition of disproportionate assets and the alleged time when such criminal offence could have been committed.

In the course of the investigation, prosecution and adjudication of illicit enrichment, due attention is expected to be given to the primary and secondary targets of the law and the goals intended to be achieved by such prosecutions. It is also necessary to keep in mind the potential concerns and threats that such prosecutions pose and the likely unintended consequences that may follow. The requisite care should thus be taken not to jeopardize innocent persons, their families and their legitimate properties. This necessitates thorough investigation and inquiry before convicting an accused person of illicit enrichment and imposing punishment. The effective and functional implementation of the Assets Disclosure and Registration System across Ethiopia is indeed expedient and in conformity with the intention of the legislature. Apart from its preventive role and its contribution to the enhancement of the fight against public corruption, it facilitates the pursuits of securing and preserving reliable evidence that can lead to the conviction of actual offenders along with the minimization of erroneous conviction, punishment and confiscation. ■

Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration

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Abstract

International investment law is dynamic. As treaty practice and jurisprudence in the area constantly develop, global standards are always in the making. Rethinking Ethiopia's Bilateral Investment Treaties (BITs) is thus a natural response to evaluate the status of the country's obligations under the regime of global investment standards. This article briefly evaluates the concept of *Most Favored Nation* (MFN) treatment, in relation to the nature or purpose of MFN clauses and its interaction with dispute resolution provisions contained in BITs. In doing so, the article evaluates the different scenarios of 'treaty shopping' whereby an investor can possibly use BITs signed by Ethiopia and a state other than the investor's home state, to benefit from treaty obligations entered by Ethiopia with other partners. A review of Ethiopian BITs indicate that in almost all of the BITs, the MFN clause is phrased in general terms and leaves leverage to raise competing interpretations and creating a matrix of obligations thereby stretching the country's obligations under the respective agreements. This calls for revising the broad and incoherent application of the MFN standard contained in various BITs signed by Ethiopia with the aim to laying down a coherent investment treaty framework.

Key words

Most Favored Nation, Bilateral Investment Treaties, Investment Arbitration, Umbrella Clause, Standard of Treatment

DOI http://dx.doi.org/10.4314/mlr.v8i1.4

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The Authors are grateful for the comments they received from the internal and external reviewers. All errors remain ours.

Introduction

International investment law is one of the most dynamic fields of international economic law. It is also one of the fields of international law discourse that is subject to continuous policy debate. This comes as no surprise considering the growing importance being given to protecting the flow of international investment and how deeply its contents are inserted in domestic policy making processes. The system is also influenced by the dynamics of globalization and global governance, and by various economic reforms resulting in investment disputes. In effect, the rules and principles of the regime are a flux. Treaty practice and jurisprudence in the area constantly develop and global standards are always in the making. Rethinking Ethiopia's Bilateral Investment Treaties (BITs) within this context is thus a natural response to evaluate the status of the country's obligations under the regime of evolving global investment standards.

However, it will be a disservice to attempt to evaluate the entire framework of BITs signed by Ethiopia in such short article. Rather, for the moment, the authors chose to examine one of the topical and hotly debated issues in the area; the dynamism in relation to the concept of *Most Favored Nation* (MFN) treatment. In particular the article addresses the nature and purpose of the clause and its interaction with dispute resolution provisions contained in BITs by taking recent developments in international investment dispute settlement. Generally the aim of this article is to show how recent application of MFN provision contained in basic treaty to benefit an investor from dispute settlement provisions contained in another comparator treaty is paving new grounds of application of the standard with the effect of stretching the country's obligations under the respective agreements.

The article thus attempts to elucidate the policy coherence pursued in this line. In making this evaluation, an attempt is made to review all BITs signed by Ethiopia and important international jurisprudence on the issue. In the meantime, it is also to be seen that case law and academic literature on the topic present constantly diverging stream of opinion. Thus, while the article attempts to be comprehensive in this regard, it does not claim to cover all ground.

The first section of the article provides a general observation on the development of BITs, by also putting the Ethiopian experience in context. Section Two discusses the nature, purpose and scope of the MFN clause in International Investment Agreements and also introduces the debate on its scope of application to and its interaction with dispute resolution provisions contained in BITs, which is the main subject matter of this article. Section Three deals with the types of MFN questions raised in the debate in the context of the rules contained under BITs sighed by Ethiopia. And finally, some observations of arbitral practice are highlighted in Section Four with a brief conclusion in the end.

1. General Observation on the Development of BITs

Foreign investors are normally exposed to different and less known environment of the host country with its different culture and traditions, ideology, bureaucracy, legal system and political infrastructures, as well as a specific vulnerability to interference by the Host State.[1] In order to mitigate the susceptibility of the foreign investor from the challenges that can be encountered in an unknown and unfamiliar system, certain mechanisms have been introduced through time. These mechanisms include diplomatic protection by the home state of the investor, the obligation under customary international law of host states to respect foreign investment, observation of the legal restrictions regarding procedures and compensation upon expropriation, arbitration of investment disputes as provided in multilateral and bilateral investment treaties, in national investment laws, and in the investment agreement of parties as well as enforcement procedures before state courts.[2] Investment contracts that are signed between the investor and an entity of the host state also extend protection to the foreign investor.

Regarding the level of acceptability of some of these measures by the foreign investors, using Host state courts is not acceptable to many investors as relying on host country law alone will subject foreign investment capital to various risks. One risk is the danger that Host countries may easily change the law after an investment is made, and host government officials responsible for applying the local law may not always act impartially toward foreign investors and their enterprises.[3] The protection given by customary international law is also seen as being not sufficient by foreign investors. 'Not only did customary international law contain no generally accepted rules on the subject, it also lacked a binding mechanism to resolve investment disputes.'[4] Customary international law mainly dwells on the right of the host state to regulate the investment in its territory. As far as the right of investors is concerned, what has gained wide recognition as part of customary international law is the principle which requires host states to respect the property of citizens of other states, at least to the extent that the expropriating state has a duty to compensate the foreign owner.[5]

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[1] Norbert Horn (2004), Arbitration and the Protection of Foreign Investment: Concepts and Means, in Norbert Horn and Stefan Kroll, (eds), *Arbitrating Foreign Investment Disputes*, (Kluwer Law International, The Netherlands), p 7.

[2] Ibid.

[3] Jeswald W. Salacuse (1990), BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 *International Lawyer*, p. 659.

[4] Id., p. 660.

[5] Brownlie (1998), *Principles of Public International Law*, (Oxford University Press, Oxford, 5th ed.), p. 535.

Moreover, there has been absence of a rapid development of international law to meet the needs of foreign investment.[6]

The other alternative resorted to by many states for protecting and promoting foreign investment is a bilateral investment treaty (BIT). BITs aim at protecting and promoting foreign investment between the contracting States Parties by granting a number of rights to foreign investors.[7] The development of BITs began in the 18th century with the signing of treaties of *friendship, navigation and commerce* (FNC). The signing of the Treaty of Amity and Commerce of 1782 between France and the United States[8] marked the start of bilateral trade relations. The primary concern of FNCs was trade relations as they were designed at a time when commerce was largely restricted to trading in goods by merchants and did not contemplate direct investment by corporations.[9] The treaties also extend to military matters. When we look into investment protection by the treaties, the provisions mainly focused on the protection of property in the country of another party.[10] Alien treatment, including freedom of worship and travel within the host state, was also included in the FCN.[11] The treaties of FCN were used by countries until modern bilateral investment treaties emerged since the beginning of the 1960s.

Following the signing of the first modern BIT between West Germany and Pakistan in 1959, the conclusion of BITs has been one of the most active areas of public international law making in the last decades.[12] By the end of 2013, the total number of BITs signed reached 2,857 while the number of other International Investment Agreements (IIAs) reached 339.[13] The fact that these bilateral investment treaties can be negotiated in such a manner to suit the mutual interests of the parties[14] and the absence of a comprehensive multilateral agreement on the area contributed to the popularity of the BITs.

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[6] M. Sornarajah (2010) *The International Law on Foreign Investment*, (Oxford University Press, Oxford, 3rd ed), p. 184.

[7] Stephan W. Schill (2009), Multilateralizing Investment Treaties through Most-Favored-Nation Clauses, 27 *Berkley Journal of International Law 2*, p. 498.

[8] Alireza Falsafi (2008-2009), Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate, 36 *Syracuse Journal of International Law and Commerce*, pp. 45-46.

[9] Sornarajah, *supra* note 6, p. 209.

[10] Falsafi, *supra* note 8, p. 46.

[11] Sornarajah *supra* note 6, p. 210.

[12] Salacuse, *supra* note 3, p 655.

[13] UNCTAD (2013), *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, (United Nations Publication, Geneva), p 101.

[14] Sornarajah, *supra* note 6, p. 183.

One of the issues raised in connection with the proliferation of BITs is the effect of these BITs on the flow of Foreign Direct Investment (FDI) to the signatory countries, especially developing countries. It has been said that BITs boost the confidence of investors which in turn will increase the flow of FDI to host states. This is so as BITs guarantee certain rights of foreign investors which will encourage the foreign investors to invest in that country.[15] These guarantees are believed to be credible as they provide an important procedural guarantee which allows investors to have the enforceable right to unilaterally initiate binding international arbitration against the host state that breaches its substantive promises of favorable treatment.[16] And again, States with a record of nationalization see such treaties as cure for their past deeds.[17]

There are, however, also claims which shed doubt on this effect of BITs on Foreign Direct Investment (FDI). Authors like Sornarajah argue that it is empirically untestable whether states will receive more investments if they conclude such treaties.[18] Salacuse and Sullivan also hold a similar view and attribute increase in flow of FDI to local political and economic conditions and government policies than BITs.[19] Attributing increase in flow of FDI to BITs implies that the investors are aware and take into account the presence or absence of such treaties at the pre-investment stage, which in most cases is not true as many potential investors have little awareness or appreciation of specific BITs.[20] And again it is wrong to assume that BITs are necessary to resolve the problem of credible commitment as investors have, for a long time, preferred to secure their interests through investment contracts which provide deal-specific promise that are more detailed and precise than the one-size-fits-all promise provided in BITs.[21]

Whatever the effect of these treaties on FDI, the uncontested fact is that many developing countries signed them with developed as well as other developing countries. Ethiopia is no exception. In an effort to attract foreign investment, the government of Ethiopia has signed BITs with developed, as well

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[15] Salacuse, *supra* note 3, p. 673.

[16] Jason Webb Yackee (October 2007), Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment, *University of Wisconsin Law School Legal Studies Research Paper Series*, Paper No. 1054, p 4.

[17] Sornarajah, *supra* note 6, p. 187.

[18] Ibid.

[19] Jeswald W. Salacuse and Nicholas P. Sullivan (2005), Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 *Harvard International Law Journal,* p. 96.

[20] Yackee, *supra* note 16, p. 5.

[21] Id., p. 6.

as developing countries. By the end of 2012, the country had signed 29 BITs.[22] Out of the top ten countries which were the main sources of FDI to Ethiopia in 2011/2012[23], Ethiopia has signed BITs with eight, namely Turkey, India, the Netherlands, United Kingdom, Sudan, China, Germany and Italy. The remaining two countries, the United States (US) and Qatar, are among the main sources of FDI even if they have not signed BITs with Ethiopia.

The structure of all BITs exhibits a striking similarity. They all contain a preambular statement which reiterates the aim of the treaty as the reciprocal encouragement and protection of investment. A definitional section which identifies the types of property protected is also included. The standard of treatment of the investor or the investment or both, standard of compensation as well as procedure for settlement of disputes also comprises part of the BITs. These standard contents in all the BITs are similar, but the wordings in which the statements are crafted have variation. It is this variation in the statements contained in the different BITs signed by a single country which at times leads to controversies. The focus of this article is on two aspects of these BITS: standard of treatment, particularly the Most Favored Nation Clause (MFN) and its interaction with dispute settlement provisions of the BIT.

2. MFN Clauses in International Investment Agreements: Nature, Purpose and Scope

The Most Favored Nation (MFN) clauses in international agreements entail an obligation of non discrimination on their signatories. Under these clauses, the signatories of a treaty agree to accord each other the same treatment they grant to any other nation. MFN treatment is "such treatment accorded by the granting state to the beneficiary state, or to persons or things in a determined relationship with that state, not less favorable than treatment extended by the granting state to a third state, or to persons or things in the same relationship as that third state."[24]

It is believed that the first written MFN clause was contained in a treaty dated 8 November 1226, under which Emperor Frederick II conceded to the city

[22] UNCTAD, supra note 13, p. 231.

[23] Ethiopian Business Review, Top ten FDI Sources in Ethiopia in 2011/2012, (2013), available at http://www.ethiopianbusinessreview.com/index.php/statistics/item/88-top-10-fdi-sources-in-ethiopia-in-2011-12.

[24] Alejandro Faya Rodriguez (2008), The Most Favored Nation Treatment Clause in International Investment Agreements: A tool for Treaty Shopping?, 25 *Journal of International Arbitration* 1, p. 90.

of Marseilles the privileges previously granted to citizens of Pisa and Genoa.[25] The origin of the modern MFN clauses can be traced back to the 15th century, but they became common features of many friendship, commerce and navigation treaties during the 18th and 19th centuries.[26] These early clauses were conditional as the benefits granted by one state were dependent on the granting of the same concessions by the beneficiary state.[27]

This trend was however changed with the adoption of the unconditional MFN obligation under the General Agreement on Tariff and Trade (GATT) in 1947. Even now, the unconditional MFN clause is the pillar of the World Trading System as its application extends beyond the original coverage of trade in goods to include trade in services and trade related aspects of intellectual property rights. (Article 2 of GATS and article 4 of TRIPS agreements). The MFN clause was also contained in the first BIT concluded between Germany and Pakistan in 1959.[28] Subsequently concluded BITs and other International Investment Agreements (IIAs) also contained the clause to ensure that there is no discrimination among investors and investments, regardless of their origin. Their application may be limited to pre-establishment or may also include post-establishment activities.

The operation of MFN clauses in international law presupposes a relationship of at least three States: State A (the granting State) enters into an obligation vis-à-vis State B (the beneficiary State) to extend rights and benefits granted in a specific context to any third State C. The consequence of the MFN clause in the treaty between A and B (basic treaty) is that State B can invoke and rely on all benefits State A grants vis-à-vis State C (in the comparator treaty) as long as the granted benefit is within the scope of application of the MFN clause in the relationship between A and B.[29]

Some of the major characteristics of MFN clauses include its relative nature and the fact that it covers both *de jure* and *de facto* discrimination based on nationality.[30] Its relative nature is explained by the fact that a comparison has to

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[25] Chris Newmark and Edward Poulton (January 2005), Most Favored Clause: Is the Siemens V Argentina Decision the High-Water Mark?, 20 *Mealy's International Arbitration Report* 1, p. 39.

[26] UNCTAD (2010), *Most Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements I*, (United Nations Publication, Geneva), p 9 see also Jurgen Kurtz (December 2004), The MFN Standard and Foreign Investment: an Uneasy Fit?, 5 *Journal of World Investment and Trade* 6, p. 863.

[27] Id., p. 10.

[28] Id., p 12.

[29] Stephan Schill (2009), *The Multilateralization of International Investment Law*, (Cambridge University Press), p. 126.

[30] Rordiguez, *supra* note 24, p. 92.

be made between two foreign investors or investments to determine existence of discrimination. As far as the second characteristic is concerned, it relates to the prohibition of discrimination on the basis of nationality, suggesting the possibility of discrimination on other objective grounds. Moreover, the principle of MFN applies where like circumstances or conditions exist, relieving the contracting parties from treating investors equally in different objective situations.[31] The other very important characteristic is the fact that the MFN clause is governed by the *Ejusdem Generis* principle. This principle requires that the MFN obligation applies to issues belonging to the same subject matter or the same category of subjects to which the clause relates.[32] In International Investment Agreements, the subject matter is investment while the subjects are the investors. Hence, a beneficiary investor may invoke a benefit *via* the MFN treatment only in regards to the benefits granted to investors and investments of third state.

These MFN clauses in International Investment Agreements serve various purposes, one of which is "giving investors a guarantee against certain forms of discrimination by host countries, and establishing equality of competitive opportunities between investors from different foreign countries."[33] Their inclusion in BITs will put investors from different foreign countries on equal playing field. MFN clauses also protect the value of concessions made between the contracting parties to the basic treaty. It upholds the bargain that States struck by preventing each of them from hollowing out the content of the basic treaty by granting more favorable protection to a third State and thus making investments from the original treaty partner comparably less attractive.[34]

The other important function of an MFN clause is stabilizing expectations over time so as to reassure investors about making long term investments.[35] With the MFN clauses, the investors will be assured that they will not be driven out of business due to grant of more favorable conditions for competitor investor in the future. Their existence ensures that whatever favorable condition is granted to the latter investor, will also be available for the previous ones. MFN treatment also has broader implications for the structure of international relations in implementing equal treatment among nations as such clause prevents states from forming economic alliances to the detriment and to the

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[31] Ibid.
[32] UNCTAD, *supra* note 26, p. 24.
[33] UNCTAD (1999), *Most Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements,* (United Nations Publication, Geneva), p 1.
[34] Schill, *supra* note 29, p. 128.
[35] Scott Vesel (2007), Clearing a Path Through a Tangled Jurisprudence: Most Favored Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, 32 *Yale Journal of International Law*, p. 142.

exclusion of other States.[36] As a result, the interest of smaller States will be protected against the influence of powerful States.

MFN clauses also have a purpose beyond governing investor-state relations. MFN clauses multilateralize the bilateral inter-state treaty relationship and harmonize the protection of foreign investment in a specific host state.[37] This is so as the application of the MFN clause in the basic treaty entails the importing of more favorable treatments from the comparator treaty to benefit the investor from the beneficiary country. That is, the comparator treaty is incorporated by reference into the relationship between the state parties to the basic treaty without any additional act of transformation.[38]

This last purpose of MFN clauses gives rise to a debate on its scope in relation to its interaction with dispute resolution provisions contained in BITs. International tribunals are divided on how to reconcile a BIT's specific dispute resolution mechanism with an MFN clause which allows the investor to invoke a more favorable dispute settlement arrangement incorporated in a comparator treaty. This division between and among the international tribunals on the issue is partly due to the variation in the way in which the clauses are crafted in the different BITs.

In most investment treaties, the MFN clause is more general in its wording and leaves considerable scope to argue competing interpretations and it is not clear whether the MFN treatment they embrace includes only substantive rules or extends to dispute settlement as well.[39] These BITs simply prohibit both contracting parties from according to investments of nationals of the other contracting party a less favorable treatment than that accorded to their own nationals or nationals of third states.[40] Article 3(2) of the BIT between Ethiopia and the Kingdom of the Netherlands can be an example in this regard. The treaty provides:

> Each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to

[36] Schill, *supra* note 29, p. 128.

[37] Schill, *supra* note 7, p 504. Rodriguez, however, argues that the purpose of MFN clause is to guarantee equality with respect to competitive conditions and not to contribute to harmonizing the procedural and substantive rights of IIAs. See Rodriguez supra note 24, p 100.

[38] Schill *supra* note 7, p. 507.

[39] Dana H Freyer and David Herlihy (2005), Most Favored Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most Favored"?, 20 *Foreign Investment Law Journal* 1, p. 60.

[40] See also Julie A. Maupin (2011), MFN-Based Jurisdiction In Investor–State Arbitration: Is There Any hope For A consistent approach?, 14 *Journal of International Economic Law* 1, p. 165.

> investment of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

A similar provision is found in the BIT between Ethiopia and Finland. This type of clause is a general MFN provision as it is not restricted in its scope to any particular part of the treaty containing it.[41] In some BITs, those general types of MFN clauses also provide that the most favored nation treatment to be enjoyed by the investors will be 'as regards their management, maintenance, use, enjoyment, or disposal of their investment.'[42] Article 4(2) of the Kuwait-Ethiopia[43] BITs can be an example. The article states:

> Each Contracting State shall accord investors of the other Contracting States, as regards any activity carried on in connection with their investments including, management, maintenance, use, enjoyment, disposal or compensation of such investments, treatment not less favorable than that which it accords to its own investors or to investors of any third state, whichever is the most favorable

The BITs Ethiopia signed with Germany[44], Equatorial Guinea[45], the State of Israel[46], Kingdom of Spain[47], Republic of Tunisia[48], People's Democratic Republic of Algeria[49], Islamic Republic of Iran[50], and the Republic of Austria[51]

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[41] OECD (2005), *International Investment Law: A Changing Landscape- A Companion Volume to International Investment Perspectives*, p. 130.

[42] See also Maupin, *supra* note 40, p. 165.

[43] Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investment, signed on 14 September 1996, entered in to force on 12 November 1998.

[44] Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia Concerning the Encouragement and Reciprocal Protection of Investments, signed on 19 January 2004 entered into force on 4 May 2006.

[45] Agreement between the Republic of Equatorial Guinea and the Government of the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investment signed on 11 June 2009.

[46] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investment signed on 26 November 2003, entered into force 22 March 2004.

[47] Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, Signed on 17 March 2009.

[48] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Tunisia for the Promotion and Protection of Investment signed on 14 December 2000, entered into force 2 October 2004.

[49] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Democratic Republic of Algeria on the

contain similarly worded provisions. Such clauses are general in that they do not define the precise meaning of the word 'treatment'; nor do they specify the scope of the MFN obligation.[52] It is also not clear if the favorable treatment for the 'management, maintenance, use, enjoyment or disposal of the investment' would include dispute resolution provisions. In this regard, different tribunals have reached at different conclusions as to whether dispute resolution provisions may be considered to be a normal part of the 'management, use, enjoyment or disposal' of investment.[53]

Some BITs are drafted broadly and they provide either explicitly or implicitly that the MFN clauses apply to dispute resolution provisions. Such clauses contain a sweeping language which indicates that the BIT's MFN commitment applies to 'all matters' covered in the treaty.[54] For example, Article 4(1) of the BIT signed between Ethiopia and the Belgian-Luxembourg Economic Union[55] reads:

> In all matters relating to the treatment of investments, the investors of each Contracting Party shall enjoy national treatment or most-favoured-nation treatment in the territory of the other Contracting Party.[56]

Although some other BITs do not have such phrase as 'all matters' it would still be considered as broad since they specifically mention that the MFN

Reciprocal Promotion and Protection of Investments, Signed on 4 June 2002, entered into force 1 November 2005.

[50] Agreement of Reciprocal Promotion and Protection of Investments Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Islamic Republic of Iran, Signed on 21 October 2003, entered into force 15 December 2005.

[51] Agreement between the Federal Democratic Republic of Ethiopia and the Republic of Austria on the Promotion and Protection of Investment signed on 12 November 2004 entered into force 1 November 2005.

[52] Maupin, *supra* note 40, p. 165.

[53] Ibid.

[54] Id., p. 163.

[55] Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investment signed on 26 October 2006.

[56] Agreement between the Belgian Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investments, signed on 26 October 2006, article 4(1).

commitment extends to dispute resolution provisions as well. Article 3 of the UK-Ethiopia[57] BIT, for instance, provides:

1. Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.
3. Except provided otherwise in this Agreement and for the avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 10 of this Agreement.

Article 8 of the agreement deals with dispute settlement between an investor and the host state. Thus, the provision contains a broad MFN clause as it is applicable with regard to the settlement of investor-state investment disputes.

There is also a possibility for the granting state and the beneficiary state to draft the MFN clause narrowly and limit in the basic treaty the extent of the favors that can be claimed by the beneficiary.[58] This narrowly drafted MFN clause in the basic treaty will exclude dispute settlement provision/s from the scope of the MFN clause. And again, the scope of the MFN clause might be narrowed down subsequent to entry into force of the BIT through exchange of interpretative note by the signatories or inclusion of 'vanishing footnote'. Retrospective interpretation of the MFN clause in a restrictive manner through exchange of note was resorted to by Argentina and Panama in which they stated that the MFN clause will not be applicable to dispute resolution and that 'this has always been their intention'.'[59] In the Central America (Dominican Republic-United States) Free Trade Agreement (CAFTA), the parties to the

[57] Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and protection of investment, signed on 19 November 2009.

[58] OECD, *supra* note 41, p. 142.

[59] Rudolf Dolzer and Christoph Schreuer (2008), *Principles of International Investment Law*, (Oxford University Press), pp. 187-188.

agreement inserted a footnote to the negotiating history limiting the scope of the MFN clause.[60]

Though the classical approach in drafting MFN clauses is the one which combines MFN treatment with national treatment,[61] there are also some BITs which tie the MFN treatment to Fair and Equitable treatment (FET).[62] Those BITs which tie MFN to FET provide in one paragraph the requirement to extend FET to the investor from the other contracting party and add another paragraph which specifies that the FET shall not be less favorable than that provided to the investors from a third state. Article 3 of the BIT between Ethiopia and China[63] provides:

1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party
2. The treatment and protection referred to in paragraph 1 of this article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of any third state.

The BITs Ethiopia signed with Russia[64] and Libya Arab Jamahiriya[65] contain similarly worded provisions. These types of clauses present confusion as they tie

[60] Maupin *supra* note 40, p 167. The added foot note reads as:
'The MFN Treatment article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investment.' The parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this chapter, and therefore could not reasonable lead to a conclusion similar to that of the Maffezini case. See Id., note 43 and Andreas R. Ziegler, (2010), 'The Nascent International Law on the Most Favored Nation (MFN) Clauses in Bilateral Investment Treaties (BITs), *1 European Yearbook of International Economic Law*, p 93.

[61] Dolzer and Schreuer, *supra* note 59, p. 187.

[62] The Fair and Equitable Treatment (FET) is an objective standard of treatment. Though the concept lacks precise definition, the elements of the content of the standard as fleshed out by arbitral tribunals include transparency and protection of investor's legitimate expectation, prohibition of manifest arbitrariness, protection against denial of justice and due process, freedom from coercion and harassment and the requirement of good faith on the part of the host state.

[63] Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the People's Republic of China concerning the encouragement and reciprocal protection of investment, signed on 11 May 1998 entered in to force on 1 May 2000.

[64] Agreement between the government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal

the relative standard of MFN with the objective standard of FET and it is not clear in what way the two are supposed to interact.[66]

3. Types of MFN Questions

The wording used in the drafting of MFN clauses varies from one BIT to another. While, the interpretation of the MFN clause by international jurisprudence is not a recent development, most of the international investment dispute settlement practice addressed the MFN standard with regard to substantive rights.[67] However, more recent investment case law also dealt with the question whether the MFN standard should apply to dispute settlement procedures.[68]

There are generally three scenarios in which an MFN clause within a BIT may be invoked. Under the first scenario, the beneficiary of an MFN clause invokes the MFN clause in order to obtain the benefit of some more favorable substantive treatment that has been granted by the host state to a third state's investment *via* the host state's domestic legislation or regulation.[69] Here the MFN clause of a BIT is invoked to import the more favorable treatment which is granted to another investor under the domestic legislation of the host state. In the second scenario, the claimant invokes the basic treaty's MFN clause in order to import into the treaty the more favorable substantive protections that have been granted by the host state to a third state's investor by the comparator treaty.[70] Here the investor is relying on the MFN clause of the basic treaty to import a favorable treatment from the comparator treaty to the basic treaty. Today, several investment tribunals have accepted the possibility of importing more favorable substantive protection from a comparator treaty to the basic

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Protection of Investments, signed on 10 February 2000, entered into force 6 June 2000.

[65] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Great Socialist People's Libyan Arab Jamahiriya concerning the Encouragement and Reciprocal Protection of Investments, signed on 27 January 2004, entered into force 25 June 2004.

[66] Maupin, *supra* note 40, p. 166.

[67] Most Favoured Nation Treatment Application in International Investment Arbitration A Study on Conflicting Precedence in International Dispute Settlement Procedure, (2001), University of Oslo, p 4, available at: <https://www.duo.uio.no/bitstream/handle/10852/22714/Master_thesis.pdf?sequence=1>

[68] UNCTAD (2007), *Investor-State Dispute Settlement and Impact on Investment Rule Making*, (United Nations Publication, Geneva), p. 52.

[69] Maupin, *supra* note 40, p. 159.

[70] Ibid.

treaty.[71] For instance, in the first known investment treaty arbitration, Asian Agricultural Products *versus* Sri Lanka, the Tribunal accepted the principle that an investor covered by the basic treaty could rely on more favorable substantive conditions granted under another BIT of the host State.[72] The tribunals in Pope & Talbot *versus* Canada and MTD *versus* Chile cases are few of the other tribunals which allowed the incorporation of substantive rights from third country BITs through MFN clause to the basic treaty.[73]

The third scenario in which an MFN clause may be invoked relates to the importation of more favourable dispute resolution provisions from a comparator treaty to the basic treaty. There are potentially four sets of questions that may arise in investor-state arbitration in this regard.

3.1 Changes to Arbitral Procedure

The first set of 'MFN' claims under investment dispute settlement practice involves circumstances by which a claimant investor will attempt to override procedural obstacles under the basic treaty using the BITs MFN clause to use more preferable procedural terms that exist in another comparator BIT.[74] The procedural hurdle that the claimant wants to avoid could relate to the use of domestic court as forum for settlement of the dispute or longer consultation period before resorting to arbitration or adjudication. Much dispute settlement jurisprudence has been set in this regard. The first of these issues was decided following the landmark arbitration in Maffezini *versus* Spain,[75] although this tribunal was actually not the first to face this issue.[76] In Maffezini, the Argentine

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[71] Emmanuel Gaillard, (2005), Establishing Jurisdiction through A Most-Favored-Nation Clause, International Arbitration Law, 233 *New York Law Journal* 105.

[72] Asian Agricultural Products v. Sri Lanka, Final Award, June 27, 1990, Para 54, However, the investor in this case did not prevail on the more favorable conditions because the investor could not show that the Swiss–Sri Lankan BIT provided for a stricter liability standard of the host State compared with the British–Sri Lankan BIT. See Schill supra note 29, p. 140.

[73] Nonetheless, there are also cases in which the importation of favorable substantive rights from comparator treaty has been controversial. For more on this please see UNCTAD supra note 26.

[74] Maupin, *supra* note 40, p. 168.

[75] Emilio Agustín Maffezini and the Kingdom Of Spain, Case No. ARB/97/7, Decision of The Tribunal On Objections To Jurisdiction, 2000.

[76] This question was extensively discussed in the Anglo-Iranian Oil Company Case, where the International Court of Justice determined that the basic treaty upon which the Claimant could rely was that "containing the most-favored-nation clause". - International Court of Justice, *Reports*, 1952, at 109. Also see the Case concerning the rights of nationals of the United States of America in Morocco. International Court of Justice, Reports, 1952, p. 191.

investor in Spain was allowed to use a more beneficial time requirement in the arbitration process found in the Chile-Spain BIT (as opposed to the Argentina-Spain BIT under which the claim was filed). The tribunal accepted application of the MFN principle, subject to the limitation that it did not override public policy considerations of the parties to the negotiations.[77] The tribunal stated:

> 56. … if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations […][78]

Similarly, subsequent investment tribunals have been faced mostly with the question of whether MFN clauses allow an investor to rely on shorter waiting periods in third-country BITs or to do away with the requirement to pursue local remedies for a limited time before initiating investor-State arbitration. Accordingly, until today, arbitral jurisprudence has consistently accepted that investors may circumvent such 'admissibility-related' requirements by relying on more favorable provisions for investor-State dispute settlement under a comparator BIT.[79] In this respect, "MFN clauses have been held to multilateralize access to investment treaty arbitration."[80] The issue has been "applied as one principle of international investment law that has been

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[77] Maffezini v. Spain ARB/97/7, decision on Jurisdiction. Also see UNCTAD, (2005), *Investor-State Disputes Arising From Investment Treaties: A Review, Series on International Investment Policies for Development*, (United Nations Publication, Geneva).

[78] Id., Para 56.

[79] Perhaps the only exception in this regard is the arbitral ruling in Wintershall where the tribunal did not agree to the possibility of circumventing an 18 month cooling period before the investor could lodge claims under international arbitration. In reaching this conclusion the tribunal stated that "That the eighteen-month requirement of a proceeding in a local court constitutes a necessary preliminary step to an ICSID arbitration under the Argentina-Germany BIT is apparent from the text of Article 10 itself." And thus the state's consent must be explicit and cannot be inffereed. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14,(November 8, 2008).

[80] Schill, *supra* note 29, p. 145.

incorporated in the pertinent BIT and is independent of the exact wording of the MFN clause in question."[81]

Accordingly, this issue brings three different scenarios of 'treaty shopping' to our attention whereby an investor can possibly use BITs signed by Ethiopia, other than the investor's home state, to benefit from treaty obligations entered by Ethiopia with other partners.

***a) Shorter consultation periods*:**

The first cases that one can make out of the present circumstance of arbitral practice against the contents of BITs signed by Ethiopia involves the length of time periods which an investor has to wait for to challenge the state action under the established dispute settlement framework of the particular BIT.[82] These issues involve a scenario where the basic treaty provides for particular conditions before an international arbitration proceeding can be initiated, for example, a cooling-off period varying from three to six months or sometimes the exhaustion of local remedies. Simply, the question is whether an MFN clause can be invoked to benefit from the more favorable conditions of a third-party treaty?[83]

While almost all BITs signed by Ethiopia reviewed for the purpose of this article set a consultation time period of six months,[84] the bilateral investment treaty signed by Ethiopia with UK, Finland and South Africa provide for a shorter, three months, waiting period of consultation before a dispute can be submitted either to national courts or international arbitration tribunal as the case may be. Article 8 of the UK-Ethiopia BIT reads as follows:

> ARTICLE 8: Settlement of Disputes between an Investor and a Host State
>
> Any dispute between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which has not been amicably settled shall, *after a period of three months* from written notification of a claim, be submitted to the competent courts or administrative tribunals of the Contracting Party, to the dispute, or to

[81] Ibid.

[82] Most BITs often require that investors wait for a certain period of time, a 'cooling off' period of usually three or six months, before commencing arbitration. C. Ignacio Suarez Anzorena and William K. Perry (2010), Protecting Foreign Investments and Arbitration, *In-House Defense Quarterly*, p. 60.

[83] Gaillard, *supra* note 71.

[84] For instance see BIT between Germany and Ethiopia Article 11 sub 2; Ethiopia and Russian federation Art 8 sub 2; Ethiopia and Sudan Art 8 sub 2.

> international arbitration if the national or company concerned so wishes.[85] [Emphasis added]

Even more so, the Ethio-Austria BIT provides for sixty days (two month) waiting period before a dispute can be submitted to the appropriate organs. Article 12(2) of the treaty provides that a dispute 'may be submitted for resolution […] *after 60 days from the date notice of intent* to do so was provided to the Contracting Party, party to the dispute […][86]

Thus, one can see that few BITs signed by Ethiopia provide for a three month or less waiting period while virtually all BITs provide for a 6 month waiting periods of 'consultation'. Accordingly, it seems that investors from other BITs can base their claim under their basic treaty's MFN provisions to claim a more preferable (shorter waiting/consultation period) as included under the Ethiopia-UK, South Africa, Finland or even more the Ethio-Austria BIT.

***b) Agreement of the State*:**

Another interesting case to note is the scenario where the basic treaty contains a dispute settlement clause but no choice is given to the investor as regards the type of arbitration, notably institutional arbitration such as the International Center for Settlement of Investment Disputes (ICSID).[87] Hence the difficult question would be whether the MFN clause can be invoked to seek the benefit of 'investor's-option' offered in a third-party treaty?[88]

The only instance in this regard under BITs signed by Ethiopia is the manner of submitting dispute claims to an international arbitration under the Ethio-Denmark BIT. [89] Under this agreement[90], despite a clear invocation by the terms

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[85] Art 8 of the BIT between Ethiopia and UK.

[86] Paragraph 1(c) of article 12 deals with settlement of investment dispute using arbitration at ICSID or ICSID Additional Facility, sole arbitrator or ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL) or the International Chamber of Commerce, by a sole arbitrator or an ad hoc Tribunal under its Rules of Arbitration.

[87] It is the argument of the authors that the limitations defined by the Maffezini Tribunal don't cover this matter. The limitations set by that tribunal covered such "public policy considerations" as the exhaustion of local remedies, the stipulation of a fork-in-the-road clause (i.e., an irreversible option offered to the investor between the courts of the host state and international arbitration), the provision of a particular arbitration forum such as ICSID, or the parties' agreement to have a highly institutionalized system of arbitration-such as NAFTA.

[88] Gaillard, *supra* note 71.

[89] Agreement between the Federal Democratic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, signed on 24 April 2001 entered into force 21 August 2005.

[90] Also see the BIT between Ethiopia and South Africa, which provides:

of the treaty that the investor can chose to submit its claim between the local courts of the host sate and an international arbitration tribunal, it seems that the agreement of the concerned parties is required to submit the case to any of arbitration panels listed under Art 9 Sub 2 lit a-c, thus at the same time limiting the investor's choice of forum.

> Article 9: Settlement of disputes between a Contracting Party and an investor of the other Contracting Party
>
> 2. Where the dispute is referred to international arbitration, parties in the dispute may agree to refer the dispute either to:
>
> a) the International Center for Settlement of Investment Disputes (ICSID) …
> b) the International Center for Settlement of Investment Disputes under the rules governing Additional Facility …
> c) an international ad hoc tribunal… [Emphasis added]

This seems to be a 'weak obligation' as the word 'may' does not constitute a strong obligation. But in any case, if one considers this to be an 'obstacle' for a Danish investor against submitting the case for international arbitration, it certainly brings an interesting thought with regard to what an arbitration panel would decide if a claim was brought to it without securing an agreement from its host counterpart, by merely basing its claim on an MFN provision which this basic treaty contains and thereby asking to benefit from other BITs signed by Ethiopia which do not require such type of prerequisites.

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(2) Where the dispute is referred to international arbitration, the investor and the Party concerned in the dispute may agree to refer the dispute either to:
   (a) The International Center for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington DC on 18 March 1965. As long as this requirement is not met, each Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID; or
   (b) an international arbitrator or ad hoc arbitration tribunal to be established by agreement between the Parties to the dispute.

(3) If after a period of three months from written notification of the investor's decision to refer the dispute to international arbitration there is no agreement on one of the alternative procedures referred to in sub-article (2), the dispute shall, at the written request of the investor concerned, be dealt with in terms of the procedure preferred by the investor.

c) 'Period of limitation':

Finally under Austria-Ethiopia BIT there is a limitation against admissibility of a 5 year period of limitation which is not included in other BITs. Article 12(2) of the BIT states:

> A dispute may be submitted for resolution pursuant to paragraph 1(c) of this Article after 60 days from the date notice of intent to do so was provided to the Contracting Party, party to the dispute, *but not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.*

Accordingly, an interesting question to bring to a hypothetical panel's attention is whether an Austrian investor can use the MFN provision in the Austria-Ethiopia BIT and claim a more preferable treatment whereby his claims would not be barred by period of limitation as almost all BITs signed by Ethiopia do not provide such kind of 'obstacle'.

3.2- Expansion of subject-matter-scope of arbitral clause

These sorts of claims involve applications by an investor to broaden the limited subject matter coverage of the basic treaty by embedding more extensive subject matter coverage of a comparator BIT. This category comprises attempts to overcome the limited subject matter jurisdiction granted to a tribunal under a basic treaty's dispute resolution clause by importing, via MFN clause, the broader subject matter jurisdiction granted under a comparator treaty.[91]

The relevance of this issue would have been moot had the BITs signed by Ethiopia followed consistent approach while marking the scope of dispute settlement mechanisms and choice of dispute settlement institutions. But this is not the case. Among the 28 BITs reviewed for the purpose of this article, two appear to be distinct concerning this issue. In particular, review of the BIT signed between Ethiopia and China indicate that the reference to international arbitration panels is limited only in cases where the subject matter of dispute is the amount of compensation. Article 9(3) of the BIT states:

> If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this article, it may be submitted at the request of either party to an ad hoc arbitral tribunal or arbitration under the auspices of ICSID….

[91] Maupin, *supra* note 40, p. 170.

An award on jurisdiction between RosInvest Co. UK Ltd *vs*. The Russian Federation [92] has permitted an investor to avail itself of the most-favoured nation clause in the underlying BIT between the Soviet Union and the United Kingdom, [93] in order to extend the tribunal's jurisdiction to issues of occurrence and validity of expropriation, which were not covered by the limited jurisdiction clause in the BIT. Through the applicable MFN clause, the tribunal based its jurisdiction on the broader jurisdiction clause in the BIT between Denmark and the Russian Federation.[94] It was the first award which set a potential milestone for future jurisprudence which enables a tribunal to employthe MFN clause to extend its jurisdiction to categories of claims excluded by the jurisdiction clause of the applicable BIT as the interpretation of the MFN clause had previously been rejected in Plama Consortium Ltd v. Bulgaria,[95] and Telenor Mobile Communications A.S. v. Republic of Hungary. [96]

Most recently, however, the Austrian Airlines *versus* Slovakia award has reiterated the latter position.[97] In this award, the panel found that it has the mandate to interpret the provisions of the underlying BIT "neither restrictively nor expansively but rather objectively and in good faith" and thus while it is acceptable to rely on the MFN clause to benefit from certain advantageous dispute settlement clauses contained in other treaties it however rejected the possibility for an investor, by relying on the MFN clause, to seek to extend the arbitral jurisdiction of the panel to matters not covered under the agreement. According to the panel, "Taken in context, Article 3(1) is not a neutral MFN clause. The Contracting States have confined recourse to arbitration to clearly defined categories of disputes. This is particularly evident for expropriation claims. It is also clear for disputes over transfer obligations. Seen in interaction with the express limitations which the Treaty imposes on arbitration, the general

[92] RosInvestCo Uk Ltd. Vs The Russian Federation, Case No. Arbitration Award V 079/2005, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction (October 2007).

[93] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (UK-Soviet BIT) signed in 1989.

[94] UNCTAD, (2008), Latest Developments in Investor-State Dispute Settlement, *International Investment Agreements MONITOR,* No. 1.

[95] (ICSID Case No. ARB/03/24, 2005).

[96] (ICSID Case No. ARB/04/15, 2006) Also See UNCTAD, *supra* note 86.

[97] Austrian Airlines v. The Slovak Republic, UNCITRAL, Finaly Award October 9, 2009. < http://www.italaw.com/sites/default/files/case-documents/ita0048_0.pdf >

intent manifested in the MFN clause is insufficient to displace such limitations.[98]

Another reassurance for Ethiopia might be the fact that the tribunal in RosInvest case decided to expand its subject matter jurisdiction based on a general MFN clause of the BIT between Soviet Union and UK while the type of MFN clause in the Ethiopia-China BIT is tied to FET. It is worth noting that a similar approach is used in the BIT between Ethiopia and Libya.

Another possible way of extending the subject matter scope of a tribunal is by seeking to import 'Umbrella Clause' from the comparator treaty to the basic treaty. Umbrella clauses are clauses through which the contracting parties assume-as a matter of treaty law-additional substantive and/or procedural obligations with regard to undertakings contained in instruments extraneous to the treaty.[99]According to Schill, umbrella clauses create a separate obligation under the investment treaty in question to observe obligations the host state has assumed in relation to foreign investors, in particular obligations under investor-state contracts.[100] Hence, an investor that benefits from a BIT which contains an umbrella clause can assert violation of the treaty which entails international responsibility of the host state that failed to observe commitments entered under an investor-state contract. The question then would be whether an in investor can attempt to import an umbrella clause from a comparator treaty to the basic treaty relying on the MFN clause of the basic treaty.

In the case EDF International S.A. et.al *versus* Argentina[101], the French claimant invoked the MFN clause contained in the BIT between Argentina and France in order to benefit from the protection of umbrella clauses found in the BIT between Argentina and Belgian Luxembourg Economic Union, and Argentina and Germany.[102] The tribunal in the case concluded that the MFN clause permits recourse to the umbrella clauses of third country treaties as it

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[98] Ibid, para 138. However also see the opinion of the dissenting arbitrator as he stated "Article 3(l} of the Treaty, [MNF] according to Austrian investors treatment equal to that granted to investors under any third-State treaty of the Slovak Republic, covers both substantive and procedural treatment, including the consent to international arbitration given by Slovakia under any of its other BITs." *Austrian Airlines v. The Slovak Republic*, Separate Opinion of Charles N. Brower, p 2. http://www.italaw.com/sites/default/files/case-documents/ita0047_0.pdf ,>

[99] Tracisio Gazzini and Attila Tanzi (2013), Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration, *14 The Journal of World Investment and Trade*, p. 985.

[100] Schill, *supra* note 29, p. 84.

[101] EDF International S.A, SAUR International S.A. and Leon Participaciones Argentinas S.A. V. Argentine Republic, ICSID ARB/03/23, Award, 11 June 2012.

[102] Gazzini and Tanzi, *supra* note 99, p. 981.

accords investors anything other than those rights which fall within the limits of the subject matter of the clause.[103] In another case, Salini *vs.* Jordan, the claimant attempted to import an umbrella clause from a comparator treaty in order to bring its contract-based claims before an investor-state tribunal, although the basic BIT specifically prohibited contract claims, deferring instead to the contractually selected forum.[104] The Tribunal, however, declined the claim.

When we look into the BITs Ethiopia has signed, some of them contain umbrella clauses. One example is Article 8(2) of the Ethiopia-Germany BIT which states:

> A Contracting Party shall adhere to any other obligation deriving from a written commitment undertaken by it in favor of an investor of the other Contracting Party with regard to an investment in its territory.

The BITs Ethiopia signed with Denmark and Kuwait also contain umbrella clauses, although the wording is different.[105] The effect of such umbrella clauses is that a contractual obligation which the Ethiopian state entities owe to the investors from one of these countries, if not respected, will give rise to treaty claim. Investors whose basic treaty contains a general and broad MFN clause, but not an umbrella clause, may attempt to import the umbrella clause from any one of these comparator treaties. Even if the arbitral jurisprudence is not well settled, it still entails some level of uncertainty on the part of the host state.

Tribunals have also given effect to MFN clauses to overcome admissibility requirements (such as a requirement to submit disputes initially to local courts for an 18 month period).[106] However, applying the MFN clause in those cases did not actually change the scope of the tribunal's jurisdiction agreed upon in the BITs or create 'consent' to arbitration that was otherwise lacking. It merely affected the timing of the host state's consent to, for example ICSID arbitration, and allowed tribunals promptly to hear claims over which they would later have jurisdiction in any event.[107] The Gas Natural tribunal concluded that;

> '…[u]nless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution

[103] EDF International Award, paragraph 934. See also Id., p. 982.

[104] See Salini Costruttori S.p.A. and Italstrade S.p.A. and Italstrade S.p.A v. The Hasemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 12 November 2004. See also Maupin, *supra* note 40, p. 170.

[105] Article 2/3 of the Ethiopia-Denmark BIT and article 3/3 of the Ethiopia-Kuwait BIT states: 'Each Contracting party shall observe any commitment it may have entered into with regard to investments of investors of the other contracting party.'

[106] Maffezini, Siemens, Camuzzi and Gas Natural.

[107] Freyer and Herlihy, *supra* note 39.

> of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement."[108]

BITs are usually signed for a specified period of time. But their protection might extend to investments established prior to their entry into force based on the 'extension of temporal scope of application of arbitral clause'. Such BITs which extend their protection to investments established prior to the entry date, however, exclude from the coverage those disputes that have emerged before the entry into force of the BIT. For example, article 11 of the BIT between Ethiopia and China, states '…It shall, however, not be applicable to claims arising out of events which occurred prior to its entry into force.' In such circumstances, an MFN clause might be invoked to extend the temporal dimension of a basic treaty's dispute resolution provisions.[109] In the case Tecmed *versus* Mexico, the claimant relied upon the basic Treaty's MFN clause to import into the basic treaty a retroactive application clause from a comparator treaty signed between Mexico and Austria.[110] The tribunal, however, did not accept the claimant's request.

It is also important to note changes to arbitral forum or system of dispute resolution. This relates to a situation whereby a claimant would rely upon a comparator treaty in order to change the forum or displace the entire dispute resolution system selected by the basic treaty. [111]

4. Some Observations of Arbitral Practice

Generally, the arbitral practice highlights the importance of clearly delimiting the scope of application of the MFN clause in the text of these agreements. If contracting parties do not intend to extend MFN treatment to dispute settlement matters, it would be better for the investment agreement to explicitly say so.[112] Accordingly, the general tenor of the arbitral jurisprudence is that MFN clauses allow for the incorporation of more favorable treatment concerning the admissibility of an investor-state claim, but do not allow investors to establish or to expand the jurisdictional basis for investor-State arbitration based on broader consent to arbitration in third-party BITs.[113]

Yet, the potential case towards a broader treaty interpretation is largely open in cases where the contracting parties have expressly stated that the MFN clause

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[108] Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 2005.
[109] Maupin, *supra* note 40, p. 169.
[110] Tecmed vs. Mexico … see also Ibid.
[111] Id., p. 171.
[112] UNCTAD, *supra* note 68, p. 53.
[113] Schill, *supra* note 29, p. 151.

extends to dispute settlement provisions; absolving the need to inquire into their intent as the wording of the treaty is clear and must be given effect.[114] In particular, the Plama Consortium Tribunal has announced what is considered to be a landmark test by commentators. Interestingly, while interpreting the requirement for consent to ICSID jurisdiction, the Tribunal stated: 'It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous.'[115] The panel further stated: 'an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.'[116] This implicitly commends that in cases whereby the terms of the treaty specifically incorporate treaty provisions addressing dispute settlement, there is a clear understanding of the intent of the parties to the BIT; it is assumed that they had consented to embed preferable terms of dispute settlement included under other BITs entered by one of the parties.[117]

While Maffezini and Siemens favor the application of MFN status to dispute settlement, Salini and Plama say, at least in principle, the opposite, focusing on the intention of the parties as the decisive factor. In this view, reference to dispute settlement provisions from other treaties will be possible only where the parties to the BIT have a clear and unambiguous intention of incorporating it – by the operation of the MFN clause.[118] The same is true in the opposite scenario, where the parties have expressly excluded dispute settlement from the scope of an MFN clause, either through the wording of the original treaty or, for example, through a common Note of Interpretation.

Accordingly, commentators have already shown that the trend is essentially in this latter approach. As Gaillard notes:

> '[T]he interpretation question of whether dispute settlement arrangements constitute a substantive right that can be extended to the beneficiary of an MFN clause arises when the clause is broadly phrased and the contracting parties to the treaty have neither expressly excluded dispute resolution mechanisms nor clarified their intention of including such mechanisms in the protection that is accorded to the beneficiaries of the clause. In those situations, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors

[114] Maffezini v. Spain, Paragraph 52.
[115] Plama Consortium Limited v. Bulgaria, ICSID Case No.ARB/03/24, 2005, para 198.
[116] Ibid, para 223.
[117] Ibid.
[118] UNCTAD, *supr*a note 77.

> of a third country, including the right to the neutral and effective settlement of their investment disputes through arbitration rather than through the judicial organs of the host state itself.' [119]

A review of Ethiopian BITs indicate that in almost all of the BITs, the MFN clause is phrased in highly general terms and leaves considerable leverage to raise competing interpretations. In particular, most BITs are silent on whether by the MFN treatment they embrace only substantive rules for the protection of investments, such as guarantees of fair treatment as discussed above, or extend to other 'procedural protections' such as dispute settlement. Most of these BITs include general wording. The following two clauses from Article 3(2) of the Ethiopia-South Africa and Article 3(2) of Ethio-Germany BIT, respectively, illustrate this point with regard to the treatments of investments, national treatment and MFN treatment:

> "Each Party shall in its territory accord to investments and returns of investors the other Party treatment as favorable as that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State".[120]

> "Neither Contracting Party shall subject investors of the other Contracting Party, as regards their activities such as the management, maintenance, use, enjoyment and disposal of their investments in its territory, to treatment less favorable than it accords to its own investors or to investors of any third State".

As discussed above, the implication of these terms is limited in terms of the possibility of including procedural protections via the MFN standard. The existing arbitral jurisprudence shows that tribunals are reluctant to apply such MFN treaty terms. However, there also exists an arbitral jurisprudence which shows the likelihood of broad applications of the MFN treatment if the treaty language shows an explicit intention of including the dispute settlement provisions of the BIT, like the one signed between Ethiopia and UK and Ethiopia and Belgian Luxembourg Economic Union. The implication of such an overtly stretched use of the MFN provision under the Agreements is that, an investor from the capital source state (in this case the UK) can potentially use the basic Ethiopia-UK BIT and shop for a more preferable dispute settlement

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[119] Gaillard, *supra* note 71, p 3 Also see Emmanuel Gaillard, (2008), (in) Andrea K Bjorklund et al. (eds.) *Investment Treaty Law: Current Issues III Remedies in International Investment Law The Emerging Jurisprudence of International Investment Law*, (British Institute of International and Comparative Law), p 273.

[120] Agreement between The Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of South Africa on the Promotion and Reciprocal Protection of Investments, signed on 1 January 2008.

provision included in other BITs which Ethiopia has concluded now or will do so in the future with other states, hence potentially granting the investor the ultimate privilege for treaty and/or forum shopping.

Concluding Remarks

Countries sign BITs with the aim of attracting foreign direct investment and protecting the foreign investors' property from host State's actions. Ethiopia has signed 29 BITs with its trading partners. These BITs contain different standards of treatment, one of which is the Most Favored Nation treatment. This standard guarantees equality between investors of different countries with respect to competitive conditions. As discussed in the preceding sections, the dynamism in relation to the concept of Most Favored Nation treatment should be noted, in particular as raised in relation to the nature or purpose of MFN clauses and its interaction with dispute resolution provisions contained in the BITs. To this end, the different scenarios are examined whereby a foreign investor can possibly use BITs signed by Ethiopia, other than the investor's home state, to benefit from treaty obligations entered by Ethiopia with other partners - 'treaty shopping'.

A review of Ethiopian BITs indicate that in almost all of the BITs, the MFN clause is phrased in highly general terms and leaves considerable leverage to raise competing interpretations and creating a matrix of obligations with the effect of stretching the Country's obligations under the respective agreements. BITs are signed for a certain period of time. Many of the BITs Ethiopia signed have initial minimum period of 10 years while few extend beyond this timeframe.[121] Depending on what is agreed, the BIT may allow for its automatic renewal for indefinite period of time subject to the right of the parties to terminate it at any time by giving notice of termination, known as 'any time termination clause'.[122] Alternatively, the BIT may provide that it will continue to be in force for additional fixed period of time, in which case the treaty can be terminated only at the end of each fixed period.[123]

The fact that such clauses are inserted in the BITs gives the contracting parties the opportunity to revisit the BITs. The action taken by the South African and Indonesian governments can be taken as example. In September 2012, South Africa informed the Belgian–Luxembourg Economic Union, through a notice of termination, that it would not renew the existing BIT which was set to

[121] The initial minimum period contained in the BIT signed with Kuwait is for 30 years, with Finland 20 years, and with Russia 15 years.
[122] UNCTAD, *supra* note 13, p. 110.
[123] Ibid.

expire in March 2013.[124] The country also served a notice of termination in respect of its BIT with Spain on June 23, 2013[125] and latter on to Germany, Switzerland and The Netherlands.[126] The imprecise provisions contained in the old generation BITs which create uncertainty and unacceptable risk both to serious investors and the governments was stated as reason for the decision to terminate the BITs.[127] Indonesia is also planning to terminate more than 60 BITs[128] and it has started giving notice of termination. A notice of termination was given to terminate the BIT with the Netherlands as of July 1, 2015.[129] Some argue that this move is an attempt by the Indonesian government to update its BITs with a new model that reflects the latest legal technology as the older ones tend to contain provisions that protect foreign investors without specifically providing for the preservation of government's policy space to regulate in the public interest for health, the environment or for financial reasons.[130]

Many of the BITs signed by Ethiopia contain 'any time termination' clause, the ones signed with Kuwait being an exception. Considering the fact that many of these BITs entered into force in the early 2000, one can conclude that the initial minimum period of many of these BITs has lapsed or is about to lapse. This gives the government of Ethiopia a good opportunity to learn from the experience of other countries and revisit its BITs with the aim of having a coherent investment treaty framework. ■

[124] Id., p. 108. See also Publication by a spokesman of South Africa's Department of Trade and Industry, available at http://www.bdlive.co.za/ opinion/letters/2012/10/01/letter-critical-issues-ignored.

[125] Nicholas Peacock and Hannah Ambrose, South Africa terminates its BIT with Spain, available at <http://www.lexology.com/library/detail.aspx?g=dar93855-71f9-425e-92d3-5368d104f8ff>, [accessed on November 20, 2014].

[126] Robert Hunter, South Africa terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland, available at <http://www/rh-arbitration.com>, [accessed on November 20, 2014].

[127] <http://www.bdlive.co.za/ opinion/letters/2012/10/01/letter-critical-issues-ignored>, [accessed on November 20, 2014].

[128] Ben Bland and Shwan Donnan, Indonesia to Terminate more than 60 Bilateral Investment Treaties, *Financial Times*, March 26, 2014, online version available at <http://www.ft.com>, [accessed on November 20, 2014].

[129] Simon Nesbitt et al, Indonesia terminates its Bilateral Investment Treaty with the Netherlands from 1 July 2015 and may terminate all of its BITs, available at <http://www.lexology.com/library/detail.aspx?g=dar93855-71f9-425e-92d3-5368d104f8ff> [accessed on November 20, 2014].

[130] Prof Michael Ewing-Chow and Mr Junianto James Losari, Indonesia is letting its Bilateral Treaties Lapse so as to Renegotiate Better ones, *Financial Times*, April 15, 2014, online version available at <http://www.ft.com>, [accessed on November 20, 2014].

Trade Facilitation in Ethiopia:
The Role of WTO Accession in Domestic Reform

Tilahun Esmael Kassahun ♣

Abstract

Ethiopia is one of the countries with excessive challenges in cross border trade. The high cost of doing business across borders in Ethiopia has become a major constraint. The focus of this article is *trade facilitation* which requires the examination of the dynamic gains associated with lowering trade transaction costs and identifying the relative importance of related trade policy reform measures in Ethiopia. In particular, the current state of the law and practice in trade facilitation and the international trading environment in Ethiopia are examined. The article focuses on customs law, border institutions, transport and logistics services and various issues related with investment and trade policy. In so doing, it attempts to examine how Ethiopia's WTO Accession and trade facilitation instruments can be streamlined with domestic reform.

Key words

Trade facilitation, customs valuation, logistic services, WTO, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v8i1.5

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Acronyms

CV	Customs valuation
CVA	Customs Valuation Agreement
ERCA	Ethiopian Revenues and Customs Authority
EPPCF	The Ethiopian Public Private Consultative Forum
ESLSE	Ethiopian Shipping and Logistics Services Enterprise
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MTO	Multimodal transport operator
OECD	Organization for Economic Cooperation and Development
TFA	Trade Facilitation Agreement
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
WTO	World Trade Organization

Introduction

The high cost of doing business across borders in Ethiopia is said to have become a major constraint to economic development.[1] Ethiopia is one of the countries with the highest set of challenges in cross border trade. The World Bank study of trading across borders ranking puts the country at 166th in the world.[2] While, on average, sub-Saharan African customs delays are the longest in the world, the average delay is 12 days in the region compared with 7 days in Latin America; the longest delays in the region are in Ethiopia - where the average trader has to wait more than 30 days for customs to clear goods.[3] Transportation delays along the Ethiopia-Djibouti transport corridor are also widespread. Numerous stages in the process of clearing and transporting commercial goods in transit from the port of Djibouti to Addis Ababa can take more than 20 days. This has contributed to the country's current 132nd rank out of 189 nations in the World Bank doing business index.

The cost of accessing information, discrepancy and unpredictability in government policy decisions, general issues of custom which in particular includes customs valuation, and anticompetitive practices in transport, especially road and sea transport are directly related to the costs of trading in addition to the delay in time taken from the port to the inland destination, or the vice versa. The longer the time taken for import/export procedures or journey, the more expensive imports, exports and production becomes rendering Ethiopian exports less competitive.

The ability of countries to deliver goods and services on time and at the lowest possible cost is a key determinant of integration into the world economy today.[4] With the expansion in the volume of trade, policies that remove non-tariff barriers and expedite the movement of goods and services across borders, i.e., 'international trade facilitation', have emerged at the forefront of the trade

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[1] Tsegaye Teklu and Endris Negus (2011), *The Impact of Border Clearance Procedures on the Cost of Doing Business in Ethiopia*, Private Sector Development Hub, Addis Ababa Chamber of Commerce and Sectoral Associations.

[2] See World Bank Trading Across Borders (2013), <http://www.doingbusiness.org/data/exploretopics/trading-across-borders> (Last accessed April 2014).

[3] The country's score on the Logistics Performance Index (LPI), which measures the extent of trade facilitation in the country, is 2.59, on a scale of 1 to 5, ranked to be 104th among 160 countries. See World Bank Logistics Performance Index <http://lpi.worldbank.org/international/global/2014> (Last accessed April 2014)

[4] Jayanta Roy and Shweta Bagai (2005) "Key Issues in Trade Facilitation, Summary of World Bank/ EU Workshops in Dhaka and Shanghai – 2004", World Bank Policy Research Working Paper 3703, (September 2005), p. 4.

agenda.[5] As Grainger notes; "over the last few decades customs tariffs have been significantly reduced. […] Consequently, the gap between tariff duties and transaction costs has narrowed; … in view of such low trade tariffs, the transaction cost associated with paying duties is actually higher than the duties themselves."[6]

Experience shows that trade facilitation is highly dependent on infrastructural developments.[7] However, trade facilitation is not only about the physical infrastructure for trade.[8] Studies indicate now that, "only about a quarter of the [trade] delays is due to poor road or port infrastructure."[9] "Seventy five percent is due to administrative hurdles - numerous customs procedures, tax procedures, clearances and cargo inspections - often before the containers reach the port." [10] Accordingly, while undertaking the necessary infrastructural changes to implement deep trade facilitation is still important, most other measures seem to depend on strong political will.[11] Development of this political will requires a clear understanding of the needs and benefits of trade facilitation in an economy.

This seems to be one part of the trade facilitation challenges in Ethiopia which suffers from excessive border bottlenecks, lack of reform and drawbacks in private investment.[12] This has affected Ethiopia's international trade relation

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[5] Andrew Grainger (2008), "Customs and Trade Facilitation: From Concepts to Implementation", *World Customs Journal, Volume 2, Number 1,* p. 17.

[6] Andrew Grainger (2007) "Trade Facilitation: A Review", Working Paper: <www.tradefacilitation.co.uk> , p10 (Last accessed April 2014).

[7] Jean-Paul Rodrigue (2013), Transportation, Globalization and International Trade, chapter 5 <http://people.hofstra.edu/geotrans/eng/ch5en/conc5en/ch5c2en.html>, (last accessed April 2014) Also see UNDP, Global Event of Landlocked Developing Countries And Transit Countries On Trade And Trade Facilitation, Trade, Trade Facilitation and Transit Transport Issues For Landlocked Developing Countries, <http://www.unohrlls.org/UserFiles/File/Elle%20Wang%20Uploads/LLDCs%20Publication.pdf> .

[8] Gary Clyde Hufbauer (2012), Trade facilitation matters!, 14 September 2012. <http://www.voxeu.org/article/trade-facilitation-matters> (last accessed April 2014).

[9] Simeon Djankov et al. (2006), "Trading on Time", World Bank Policy Research Working Paper 3909, p. 9.

[10] Ibid.

[11] Dan Ciuriak (2010), "Supply And Demand Side Constraints As Barriers For Ethiopian Exports – Policy Options", *Bkp Development Research & Consulting, Trade and development discussion paper no. 02/2010* , p. 12.

[12] A report for instance states in this regard, "Customs administration and administrative entry barriers appear to be the major NTB affecting Ethiopia's trade with COMESA member states. The NTBs reported within this area with the greatest frequency include import licensing, customs valuation and formalities, and to a lesser extent,

and has hampered its trading across borders track record at the face of global competition for foreign direct investment. This article, *inter alia*, examines the extent to which reforms on import and export procedures in Ethiopia that target at reducing the cost and time needed to execute trade across border can effectively move it closer to the global economy. The focus will be on the legal, economic, political, and administrative framework, i.e. soft infrastructure, rather than on traditional infrastructural challenges.

The article is aimed at filling the information gap in Ethiopia that is important to the political impetus with the objective of carrying out a 'reality check' on ground level challenges and prospects for reform. A particular focus will be the role of trade facilitation – or lack of it - in explaining Ethiopia's trade performance, trade facilitation problems and the role of reform in this area. In doing so, this article examines whether Ethiopia's accession to the World Trade Organization (WTO) will provide strategic opportunity for the country to reinvigorate its trade facilitation reform objectives in line with international principles and standards. As indicated by the World Bank, "these standards are primarily found within WTO obligations and the Kyoto Convention. Meeting one's WTO obligations and pursuing the objectives of trade facilitation" are interrelated and this calls for "the additional trade policy efficiencies by adopting the trade facilitation agenda."[13] Moreover, joining the WTO binds member countries to commitments and rules that include transparency of trade laws and regulations and progressive liberalization and modernization of international trade procedures. It will also be emphasized that joining the WTO inspires confidence in the stability, predictability, and fairness of the country's treatment of its trading and investment partners.[14]

The article is organized into four sections. In the first section, a brief introductory review will be made on the nature, economics and benefits of trade facilitation. The section will also highlight on the current level of trade facilitation challenges in Ethiopia. The second section identifies the main trade facilitation challenges in Ethiopia that are mostly within customs law. In particular a detailed evaluation of the customs valuation practice in Ethiopia will be made with the aim of assessing the role and impact of the WTO Customs Valuation Agreement. Section three discusses the linkages between logistics

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classifications. There are also complaints pertaining to pre-shipment inspection as well as consular formalities and documentation", Imani Development International (Ltd), (2007) "Non-Tariff Barriers (NTB): Ethiopia," Final Report, p. 1.

[13] Brian Rankin Staples (1998), "Trade Facilitation", p 27 < http://www.acp-eu-trade.org/library/files/Staples%20-%20October%201998%20-%20Trade%20Facilitation.pdf> (Last accessed April 2014).

[14] USAID Ethiopia (2007), Ethiopia Commercial Law & Institutional Reform And Trade Diagnostic, p. 7.

sector reform and in particular maritime transport sector liberalization and its role for trade facilitation. To this end, brief review assessment will be made on the legislative and institutional framework of Ethiopia's maritime transport followed by an overview on Ethiopia's WTO accession negotiation and its role, if any, for maritime services reform in the country. Finally a short discussion is made on the new WTO Trade Facilitation Agreement and its implications on the state of trade facilitation in Ethiopia is presented.

1. The Nature, Economics and Benefits of Trade Facilitation

Traditionally, the meaning of 'trade facilitation' was delimited to border procedure facilitation to make trade procedures as efficient as possible through the simplification and harmonization of documentation, procedures and information flows.[15] It referred to policies and measures aimed at easing trade costs by improving efficiency at each stage of the international trade chain. According to the WTO definition, for example, trade facilitation is the "simplification of trade procedures", understood as the "activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade".[16]

Various international and regional organizations define trade facilitation according to their mandate and objectives.[17] As will be shown below, some define it narrowly, while others provide broad definitions. The WTO website puts it as "the simplification and harmonisation of international trade procedures… for collecting, presenting, communicating and processing data required for the movement of goods in international trade."[18] A slightly different focus emerges from the Doha Declaration which, in looking forward to its broad negotiation mandates, refers to "expediting the movement, release and clearance

[15] Jayanta Roy and Shweta Bagai, (2005) "Key Issues in Trade Facilitation, Summary of World Bank/ EU Workshops in Dhaka and Shanghai – 2004", World Bank Policy Research Working Paper 3703, (September 2005), p. 4.

[16] Moïsé, E., T. Orliac and P. Minor (2011), "Trade Facilitation Indicators: The Impact on Trade Costs", OECD Trade Policy Working Papers, No. 118, OECD Publishing, p 7. <http://dx.doi.org/10.1787/5kg6nk654hmr-en> (Last accessed April 2014).

[17] Gainmore Zanamwe, (2005) "Trade facilitation and the WTO: a critical analysis of proposals on trade facilitation and their implications for African countries", tralac Working Paper No 5/2005, p. 5.

[18] WTO, Trade Facilitation, <http://gtad.wto.org/trta_subcategory.aspx?cat=33121> (last accessed June 2012).

of goods, including goods in transit."[19] UNECE defines trade facilitation as a "comprehensive and integrated approach to reducing the complexity and cost of the trade transactions process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards, and best practices."[20] UNECE considers trade facilitation to encompass "the systematic rationalisation of procedures and documentation for international trade."[21]

The Organization for Economic Cooperation and Development (OECD) defines it as "the simplification and standardization of procedures and associated information flows required to move goods internationally from seller to buyer and to pass payment in the other direction."[22] The mission statement of UN/CEFACT envisages trade facilitation as "the simplification and harmonisation of processes, procedures and information flows, and so contribute to the growth of global commerce."[23] UNCTAD publications also pursue a broad definition. According to Poul Hansen and Liliana Annovazzi-Jakab (UNCTAD), "Trade and transport facilitation … addresses a wide agenda in economic development and trade that may include improving transport infrastructure and services, reducing customs tariffs, and removing non-tariff trade barriers including administrative and regulatory barriers."[24]

The definition of trade facilitation is constantly evolving. For example, trade facilitation issues, which can be termed as a component of trade costs, are being used differently in literature dealing with WTO issues, which again are very

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[19] WTO, Trade Facilitation: Negotiations The launching of negotiations on trade facilitation, <http://www.wto.org/english/tratop_e/tradfa_e/tradfa_negoti_e.htm> (last accessed June 2012).

[20] Economic Commission For Europe (2002), Committee For Trade, Industry And Enterprise Development Sixth session, 28 and 31 May 2002 Item 20 of the provisional agenda, Trade Facilitation In A Global Trade Environment, Note by the secretariat, Distr. GENERAL TRADE/2002/21, p. 14.

[21] Ibid.

[22] APEC-OECD (2002), Co-operative Initiative on Regulatory Reform Proceedings of the Second APEC-OECD Workshop on Regulatory Reform Merida, Mexico, April 2002: Merida, Mexico (April 2002).

[23] Economic Commission For Europe, (2005) United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government, Recommendation No. 33, p. 1.

[24] Poul Hansen And Liliana Annovazzi-Jakab, (2008) "Facilitating Cross-Border Movement of Goods: A Sustainable Approach", (in) The Global Enabling Trade Report (eds.), p. 67.

narrow in a sense to deal the barriers to trade in goods and services.[25] According to World Bank, "there is no standard definition of trade facilitation. In a narrow sense, trade facilitation simply addresses the logistics of moving goods through ports or more efficiently moving customs documentation associated with cross-border trade. In recent years, the definition has been broadened to include the environment in which trade transactions take place, including the transparency and professionalism of customs and regulatory environments, as well as harmonization of standards and conformance to international or regional regulations."[26]

Thus, trade facilitation looks at how the procedures and controls governing the movement of goods across national borders can be improved to reduce associated costs and maximize efficiency while safeguarding legitimate regulatory objectives.[27] In its narrow sense, it addresses the logistics of moving goods through ports or customs. More broadly, it encompasses several inter-related factors such as customs and border agencies, transport infrastructure, services and information technology (as it relates to better logistics), regulatory environment, product standards, technical barriers to trade etc. in order to lower cost of moving goods between destinations and across international borders.[28] It is thus clear that trade facilitation cuts across a wide range of issues and sectors, from government regulations and controls, business efficiency, transportation, information and communication technology to the financial sector. Not only is it a technical issue, but also includes economic, business, administrative and policy matters.[29]

This article uses the broader meaning for trade facilitation in evaluating the trade facilitation challenges, potentials and reform proposals in Ethiopia. This considers that the concept of trade facilitation has grown beyond "fixing borders".[30] The reason behind those efforts that aim to address the trade

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[25] Prabir De Cesifo (2006), "Regional Trade In Northeast Asia: Why Do Trade Costs Matter*?",Working Paper No. 1809 Category 7: Trade Policy,* p 3. Presented At Cesifo Venice Summer Institute,Workshop On Understanding The Latest Wave of Regional Trade And Cooperation Agreements July 2006.

[26] Ibid.

[27] Poul Hansen And Liliana Annovazzi-Jakab (2008), "Facilitating Cross-Border Movement of Goods: A Sustainable Approach", (in) The Global Enabling Trade Report (eds.), p. 67.

[28] Jayanta Roy and Shweta Bagai (2005), "Key Issues in Trade Facilitation, Summary of World Bank/ EU Workshops in Dhaka and Shanghai – 2004", *World Bank Policy Research Working Paper 3703*, p. 4

[29] Gainmore Zanamwe, *supra* note 17, p. 5.

[30] Barbara Rippel, (2011), "Why Trade Facilitation is Important for Africa", *Africa Trade Policy Notes,* Note #27, p. 2.

challenges beyond the traditional areas is the impact on trade costs of factors along the whole trading chain. The broader meaning examines the costs that traders and producers face from production until the delivery of their goods and services to the overseas buyer and thereby includes all the transaction costs both directly and indirectly associated with the trading process. Trade facilitation measures must therefore be designed to assist countries to lower trade costs and become more competitive in regional and global markets.

Accordingly, trade facilitation is a diverse and challenging subject with benefits for both business and government at national, regional and international levels.[31] It involves economic, political, business, administrative, technical and technological as well as financial issues all of which converge at easing the cost and time of trading across borders.[32] Thus any measure that eases transaction and leads to time and cost reductions in the transaction cycle fits into the category of trade facilitation.[33] Accordingly, the linkages between trade facilitation, trade, and development are relatively simple in theory.[34] Development is enhanced through income growth, which comes from the expansion of trade, investment, and production opportunities. Trade facilitation initiatives, with the aim of lowering trade transactions costs, can enhance trade competitiveness, and expand trade flows, while at the same time playing an important role in supporting a positive business climate.[35] As Krista Lucenti argues, "the benefits of improving trade facilitation include: increasing trade in goods and services; promoting competition which can spur productivity gains as well as lower prices; enhancing efficiency in both the state sector and the private sector; improving the business environment and so encouraging foreign direct

[31] Chris Milner, (2005) "Trade Facilitation in Developing Countries, Centre for Research in Economic Development and International Trade", University of Nottingham, CREDIT Research Paper No. 08/05, p. 7.

[32] Sarah Mellisa Ntabazi, (2010) "Combating Corruption in Customs Through Trade Facilitation: Case of East African Community", LLM Research Paper, University of Pretoria, p. 26.

[33] Ibid , p. 27.

[34] Otaviano Canuto, Facilitating Trade, Facilitating Development, Economic Monitor, <http://www.economonitor.com/blog/2012/07/facilitating-trade-facilitating-development/> July 18th, 2012 Also see John S. Wilson, Policy Research Working Paper ,298 8 Trade Facilitation and Economic Development Measuring the Impact, The World Bank Development Research Group Trade.

[35] Matthias Helble, "Aid for Trade Facilitation", *Policy Research Working Paper 5064, The World Bank Development Research Group Trade and Integration Team* (2009).

investment and increasing participation of small-and medium-sized enterprises in international trade."[36]

2. Customs Valuation in Ethiopia: The Role and Impact of the WTO Customs Valuation Agreement

Customs valuation refers to the process and method used by customs authorities to determine the value of a particular imported/exported good. Since tariffs are usually calculated as a percentage of the value of the goods (i.e., ad valorem), the particular method used to determine value will directly affect the amount of tariff duties collected on a particular import item. Due to this, customs valuation has historically been "a jealously guarded function of government with regard to international trade."[37] For many countries the discretion given to customs authorities in valuing trade for the imposition of tariffs and duties has been an important source of revenue. [38] This is more so in developing countries which are often characterized by shallow tax bases.[39]

This is therefore of great concern to traders, as non-transparent valuation mechanisms typically combined with inefficient or even absent advance ruling mechanisms "lead to uncertainties regarding the profitability of each trade transaction."[40] Accordingly, "customs valuation of goods becomes an important aspect of trade facilitation."[41] Various authors qualify it as "an important element in a variety of other aspects of international trade including statistics, quota and licensing arrangement, taxes and other charges levied on imports, and the application of preference systems." [42]

Ethiopia has introduced several trade facilitation related measures. The proactive strategy adopted by the Ethiopian Revenues and Customs Authority

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[36] Krista Lucenti, (2004), Is There A Case For More Multilateral Rules On Trade Facilitation? (in) Joseph E. Stiglitz (eds.) *Agenda for the Development Round of Trade Negotiations in the Aftermath of Cancun*, Commonwealth Secretariat, p 109.

[37] FlorianA. Alburo (2006) "Customs Valuation Issues and Research Methodologies", *UNDP/ESCAP ARTNeT Trade Facilitation Research Team Meeting, , Bangkok* (15 March 2006), p. 3.

[38] Id, p. 4.

[39] Ibid.

[40] Yann Duval (2007), "Trade Facilitation beyond the Doha Round of Negotiations", *Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 50*, p. 9.

[41] Pushpa Raj Rajkarnikar (2006), "Implementation of the WTO Customs Valuation Agreement in Nepal: An Ex-ante Impact Assessment ", *Asia-Pacific Research and Training Network on Trade , Working Paper Series,* No. 18, p 7.

[42] For instance see Walsh, T. J (2003), "Customs Valuation, Changing Customs", *IMF, Washington* , p. 2.

(ERCA) has helped in introducing several policy measures which have not only streamlined the role of the customs department but has also helped the economy in a major way without compromising the collection of essential government revenue. However, various private sector surveys in Ethiopia have been able to identify that customs valuation is still an issue of particular concern.[43]

2.1. The WTO Customs Valuation Agreement

The basic purpose of the Customs Valuation Agreement,[44] is to require countries to adopt a valuation system that is "fair, neutral and uniform" and to prevent the use of arbitrary or fictitious values.[45] The WTO Customs Valuation Agreement is based on a "positive" as opposed to a "normative" economic principle: what the value of the goods is, rather than what the value of the goods should be, is taken as the correct customs value.[46] Thus, the Agreement's primary basis of valuation is "transaction value" which is "the price actually paid or payable" by the buyer for the imported goods. If the sale was freely negotiated (and the Agreement contains rules for valuation of sales that are not), the price the buyer pays the seller can be said to best represent the actual, market value of the product, and should be used for customs purposes.[47] Toward this end, the agreement requires countries to determine the customs value of 'imported'[48] goods on the basis of the price paid or payable for export to the country of importation (for example, the invoice price), adjusted, where appropriate, to include certain payments made by buyers, such as cost of packaging and containers, assists (i.e. goods or services), royalties, and license fees. Buying commissions may not be included in the transaction value, discounts obtained by sole agents and concessionaires must be accepted, and no add-ins or exclusions other than those provided for in the agreement may be made to the invoice price.

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[43] Tsegaye Teklu and Endris Negus (2011), *supra* note 1.

[44] Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), World Trade Organization (1999), The Legal Texts, The Results of The Uruguay Round Of Multilateral Trade Negotiations, Marrakesh Agreement Establishing The World Trade Organization.

[45] Bernard Hoekman et al. (2002), *Development, Trade, and The WTO, A Handbook,* World Bank, p. 129.

[46] Sheri Rosenow and Brian J. O'Shea, (2010) *A Handbook on the WTO Customs Valuation Agreement Handbook of Customs Valuation,* Cambridge, p 22.

[47] Ibid.

[48] It should be noted here that although the general principles expressed in GATT Article VII – which the WTO Customs Valuation Agreement implements – refer to imports and exports, the valuation methods defined in the Agreement refer only to *imported* goods .

The customs authorities may reject the transaction value by following the procedures laid down in the WTO decision on shifting the burden of proof when they have doubts about the truth or accuracy of the transaction value declared by the importer. In all such cases the agreement puts limitations on the discretion of customs authorities in determining value, requiring that the value be determined by applying the following five methods, in the hierarchical (sequential) order in which they are listed: value of identical goods, value of similar goods, deductive value calculated on the basis of the unit price at which identical or similar imported goods are sold in the domestic market, less applicable deductions for costs incurred within the country of import; constructed value computed on the basis of cost of production and finally, the "fallback" method.

Except as provided in Article 4, it is only when the Customs value cannot be determined under the provisions of a particular Article that the provisions of the next Article in the sequence can be used. If the importer does not request that the order of Articles 5 and 6 be reversed, the normal order of the sequence is to be followed. If the importer does so request but it then proves impossible to determine the Customs value under the provisions of Article 6, the Customs value is to be determined under the provisions of Article 5, if it can be so determined.

The agreement also provides a list of methods that may not be used: selling price of competing domestic products, choice of the higher value when two alternative values are available, use of the selling price on the market of the exporting country or on another export market, use of production costs except if computing according to the fifth method, the price of goods for export to a country other than the country of importation, and minimum values, other arbitrary or fictitious values. The agreement requires customs authorities to accept transaction values not only in cases of "arm's-length transactions" but also in instances where transactions are between "related parties."[49] Such relationships may result, for example, from partnership, control by one company of the other, or transactions among parent companies and their subsidiaries or affiliates. In all these cases the agreement urges customs authorities not to reject customs value unless they consider that the relationship has influenced the value declared by the importer.

The Customs valuation agreement also contains several special provisions that apply to developing-country members. They have the right not to apply the agreement until five years after their accession to the WTO, (for original members, this means until January 2000), and may request an extension of this period. They are given an extra three years before they can use the fifth (computed value) method. Those developing countries which currently value

[49] WTO Customs Valuation Agreement, Article 1(d).

goods on the basis of officially established minimum values can, subject to possible conditions, retain these values on a limited and transitional basis. They can reserve the right to refuse requests of importers for the fifth valuation method to be applied before the fourth, as well as other requests for using the unit value of the goods after further processing.

2.2 Consistency of Current State of the Law and Practice with the WTO Customs Valuation Agreement

As highlighted above customs valuation is one of the challenging bottlenecks to trade facilitation. Generally, the existing rules virtually allowed customs authorities to exercise a large amount of discretion. Accurate, reliable and timely information is costly to acquire and the rules fail to provide specific instructions when to use one valuation rule over another. The virtually multiple valuation rules regime subject businesses to uncertainty and compel importers to make deals with customs authorities to secure the most privately profitable terms for their businesses.[50] Complications of this sort have compounded the situation by increasing the incentive to negotiate for the appropriate tariff and tax payments, and a favorable decision had to be reciprocated illegally. This regime and practice have spawned integrity problems in Ethiopian customs administration. In addition to the above, many business operators complain that when customs officers were dissatisfied with declared values, they frequently re-assess the value by uplifting it in accordance with administrative guidelines. No justification for increasing the import value was required other than the officer not being satisfied, and there were no adequate mechanisms for resolving valuation disputes.

Since the early 2000's, the Government of Ethiopia decided to gradually eliminate the systematic problems in the field of customs valuation (CV) via modernization of its customs practice. Yet the main observation in the context of the modernization program was the mere inclusion of valuation principles included in the WTO Customs Valuation Agreement (CVA). Recently ERCA has initiated efforts to introduce voluntary compliance of the customs and tax payers by implementing the Authorized Economic Operators program.[51] These measures certainly display obvious intention of the government to initiate some genuine reforms in the field of CV. Yet the problem still persists despite such endeavors. The first obstacle that hinders the effective operation of the CVA in Ethiopia is the absence of political will and sufficient legal framework that

[50] Ethiopia: Joining the WTO? (2008)The Challenge of Customs Valuation, JURIST Staffer Eric Linge, Pitt Law '10, Addis Ababa Saturday, July 05, 2008).

[51] Ethiopian Revenues and Customs Authority, Authorized Economic Operators (AEO), <http://www.erca.gov.et/index.jsp?id=faq&> (last accessed April 2014).

would ensure full realization of a WTO consistent valuation practice. The following sections provide several examples where the presently working rules and practices contradict the CVA provisions.

Meanwhile it should be noted that such evaluation is made for two main purposes. First, despite the fact that Ethiopia is not yet a member of the WTO, the country is well in the middle of a lengthy accession negotiation and the rules and principles of the former require Ethiopia to mainstream its national laws and practices to its rules at the time of accession, unless otherwise some exemption in terms of transition period is acquired in the negotiations. Therefore it is relevant to evaluate to what extent the current system is aligned to the expectations of the organization. Second and most importantly, it can be said that the rules and principles contained in the CVA have now become global standards. About 160 countries that are members of the WTO and two dozen countries that are either in the process of accession have adopted and largely implement rules and procedures that are provided in the CVA. In this sense we can say that implementation of the principles provided under CVA in Ethiopia is, with or without accession to the WTO, is timely and called for. It should be seen as alignment of oneself to globally harmonized rules.

2.2.1 The Customs Proclamation

The valuation chapter of the current Customs Proclamation contains several valuation rules which can be generally considered in line with the WTO Customs Valuation framework. Article 33 of the Customs Proclamation specifically deals with the issue of customs value of imported goods. As stated above, Article 33 (2) defines the customs value for imported goods as the actual total costs of the goods up to the first entry point to the customs territory of Ethiopia. This definition is consistent with Article 1 of CVA which stipulates transaction value of a good as a basis for customs valuation. However, despite being generally in line with the WTO customs valuation framework, the Proclamation still suffers from several consistency challengers against its WTO counterpart. First of all the currently applicable Customs Proclamation (as amended) provides under Article 32, that "the Authority shall … prescribe other methods to be applicable in the case where the method stipulated under this Proclamation could not be applied and be applicable in the case of second-hand goods". An important compliance concern would be when the said second-hand goods are imported into Ethiopia. Under such cases an issue arises whether other methods of valuation, except for the method provided for in this Proclamation would be used to value such second-hand goods.

The WTO Customs Valuation Agreement provides for seven methods of appraisement of the goods sold for export to the country of importation and does not differentiate between new and second-hand goods. Even though it is premature to comment on how the government intends to make use of this provision, the outcome of this exception will not be compatible with the WTO

Customs Valuation Agreement. ERCA currently uses minimum values for certain products. Second-hand goods are among the products for which minimum values are used.[52] Therefore, the "other method" mentioned in Article 32, paragraph 4 of the Proclamation is the use of minimum values, and the intention of the Proclamation is to issue detailed directive on the use of minimum values. This is of course not to mention that the exception itself, as it is, is inconsistent with the WTO Customs Valuation Agreement.

The second issue relates to the fact that the Customs Proclamation does not provide for the use of the lowest value in cases where multiple identical goods or similar goods values are found. The WTO Customs Valuation Agreement is clear on how to proceed in cases where plural prices of identical or similar goods are found. Articles 2 (3) and 3(3) unequivocally provide that in such cases the lowest price should be used to determine customs value. The Ethiopian Customs Proclamation is silent on this point as are the subsequent amending Proclamations and directives. However, in practice, ERCA takes the highest of the prices that it finds. Using prices of identical or similar goods produced in another country to determine customs value is itself inconsistent with CVA. The application of the highest of multiple values practice is not consistent with CVA.

Moreover, Article 36(1) of the Customs Proclamation provides that the value "shall be determined by using the unit price of identical or similar goods imported at or about the same time and which are sold in Ethiopia in their original states in the greatest aggregate quantity to persons who are not related to the seller". This is not consistent with the WTO Customs Valuation Agreement which states that if the goods being assessed, identical or similar goods are sold in the condition as imported at or about the date of importation of the goods being appraised, the price is the unit price at which the goods being appraised, identical or similar goods are sold in the greatest aggregate quantity at or about such date. Article 5 does not refer to the use of sale of identical or similar goods in Ethiopia. A similar inconsistency can also be observed of Article 36(2) with the CVA.

2.2.2 Ministry of Revenue Directives

A Directive on Customs Price Database Preparation, Distribution and Utilization was issued by the now defunct Ministry of Revenue in July 2004.[53] Its two main

[52] See detailed discussion on this below.

[53] Directive on Customs Price Database Preparation, Distribution and Utilization No. 10/1996, Ministry of Revenue. Before the recent BPR (Business Process Reengineering) reform the Ministry of Revenue used to be one of the three important tax and revenue administration organizations, together with the Inland Revenue Authority, Ethiopian Customs Authority and National Lottery. The reform resulted in

objectives are stated to be combating under-invoicing through provision of up-to date price information on goods and to set up a system where similar price information is available at all customs stations.[54] The first substantive element of this directive is setting up a two-tier pricing system which uses minimum prices for high risk goods and reference prices for other goods. Articles 6-10 of the directive govern the use of minimum prices. Article 6 provides that minimum prices are to be used for goods where there has been repeated under-invoicing. It identified four categories of goods namely; textiles, shoe wear, consumer electronics, and auto spare parts. For all other goods references prices are used. It is to be noted here that this system of minimum prices is inconsistent with Article 7(2) (f) of CVA which specifically prohibits determination of customs value on the basis of minimum customs values. This would mean that the ERCA has to abandon using minimum values if it is to implement the WTO CVA. However deserting the current system automatically could have severe revenue collection consequences on the country.[55] This process thus has to be coordinated with bringing about an enabling environment where importers declare the correct transaction value of imported goods.[56]

Further area of incompatibility is with regard to the valuation methods and hierarchy order under the CVA. This is seen under Article 9 of this directive which provides that the price of an identical or similar good produced in another country shall be used where the price of that good is not brought into list under the minimum prices database. According to the WTO CVA where customs value cannot be determined using the invoice price, the price of identical goods and the price of similar goods is to be applied sequentially.[57]Article 9 of this directive evidently contradicts its WTO counterpart by providing that the price of identical or similar goods produced in another country can be used for customs valuation purpose.

Another important directive is the Ministry of Revenue Directive on Used Vehicles and Goods - No.6/1996. This directive was also issued by the former Ministry of Revenue and amended by ERCA's directive on Imported Goods

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overhaul of the Ministry and the two tax authorities into the Ethiopian Revenues and Customs Authority now supervised by the Ministry of Finance while the National Lottery Administration was made accountable to the Ethiopian Revenue and Customs Authority, by Proclamation No.256/2001.

[54] Evgeny Polyakov and Wendwesson Shewarega (2006), *WTO Customs Valuation Agreement: Impact Assessment Study for Ethiopia,* Ministry of Trade and Industry, Ethiopia, Institutional Support to Trade Integration and Implementation of the IF Plan of Action in Ethiopia Project, Addis Ababa, Ethiopia , p. 21.

[55] Id, p. 22.

[56] Ibid.

[57] WTO Customs Valuation Agreement, Articles 2 and 3.

Customs Duty and Tax Value Price Tariff: directive number 94/2006, with the objective of making the valuation system of used vehicles and goods transparent, equitable and accountable. The directive implemented a valuation mechanism for used vehicles and goods that is not applicable on other goods. It generally provides that the value of used vehicles and goods is to be based on the C.I.F. price of the good when it was bought sold as a new good. Based on this price, a depreciation allowance of 10% is subtracted each year with a maximum allowance for three consecutive years. This valuation method does not conform to the methods listed in the WTO valuation Agreement.

2.2.3 Ethiopian Revenue and Customs Authority Directive

ERCA still makes use of a directive, apparently given a confusing name; Ethiopian Customs Authority Implementation Directive to implement the Directive on "customs price database preparation, distribution and utilization directive" No. 2/1996 (E.C.), issued by its predecessor (the former ECuA) with the objective of implementing Directive No. 10/1996. The directive, 2/1996, embodies new principles which contradict with provisions in the working Customs Proclamation 622/2009.

Primarily Article 3(2) of the directive provides for one additional test to be applied sequentially to determine identical good. It provides that identical goods include goods produced by a different producer but in the same country. Where no value is found using this method it provides that goods produced in another "country with similar level of development" can be used. The additional method of using a different producer in the same country is actually in line with CVA; however the second supplementary assessment of using products of other states is inconsistent with Article 15 of the WTO valuation agreement which clearly prohibits consideration of goods produced in different countries as identical goods.[58] Article 3 (4) of the directive establishes four sets of groups of countries which are considered to be in like economic development conditions. These groups are (1) European states including United States, Canada, Australia, Japan; (2) all countries in Asia except Japan; (3) countries in Latin American; and (4) all countries in Africa.[59] This system is not in line with the WTO Customs Valuation Agreement. It presupposes the same production and sale value for countries in one group simply because they have comparable levels of economic development. This is a simplistic basis to establish customs value of goods.

[58] Evgeny Polyakov and Wendwesson Shewarega, *supra* note 54.
[59] Ibid.

2.3 Analysis of the Impact and Role of WTO CVA for Trade Facilitation in Ethiopia

As illustrated in the above sections, the purpose of the Customs Valuation Agreement, as treaty among signatory countries, is to provide reciprocity between nations when they impose import duties. By using the same valuation methods in every signatory country, countries avoid the problem of using valuation as a tool for trade wars. Moreover, businesses can predict their cost of doing business in another country. Using the same valuation methods, each country then applies its own ad valorem import duty to the product. This enhances the predictability of the cost of transactions, thereby encouraging international trade.[60]

Today the majority of countries in the WTO share the common view that the introduction of the CVA provisions in their national customs law will play a significant positive role in the liberalization of their economies. Therefore, the reason why a number of countries choose to carry out these measures unilaterally before they join the WTO is understandable. Nevertheless, when it concerns the implementation of the WTO-CVA, many countries have incessantly confronted a number of problems that prevented the universal incorporation of the CVA provisions in their national laws. Even if most of these countries are developing countries like Ethiopia, they eventually can manage to adopt WTO-CVA amenable provisions. Today such countries have come to realize that applying the CVA means a lot more than simple introduction of the CVA articles in their national laws.[61]

Consequently this translates to addressing the trade facilitation needs of commerce and business in Ethiopia. Generally, the direct positive effect of switching to valuation based on CVA is the creation of a fair, uniform, and neutral system for the valuation of goods for customs purposes, that conforms to commercial realities and that prohibits the use of arbitrary or fictitious customs values, where all importers and producers are on the same level playing field. Accompanying reforms will lead to an improved trade environment, better compliance, and trade facilitation (with reduction in transaction costs).[62]

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[60] David Laro and Shannon P. Pratt (2005), Business Valuation and Taxes; Procedure, Law, and Perspective, John Wiley & Sons, Inc, p. 147.

[61] Azizjon Nazarov (2007), Contemporary Implementation Problems of the WTO Agreement On Customs Valuation Into Domestic Legislation: What Can The Experience Of Some WTO Members Teach Uzbekistan?, World Trade Institute, Master Thesis), p. 51.

[62] For example, the WTO Committee on Customs Valuation acknowledged strong link of implementation of this Agreement with trade facilitation. See Nirmal Sengupta & Moana Bhagabati, (2003) A Study of Trade Facilitation Measures From WTO Perspective, *Revised Interim Report, Madras Institute of Development Studies*, p. 7.

Changanaqui and Messerlin (in a study on minimum import prices), show the need to consider other perverse economic effects. The findings reveal that, in addition to the farness argument raised above, minimum import prices reduce price differentials between high-priced and low-priced imported goods falling within the same product category.[63] Consequently, adverse quality effects result, as there is an incentive for domestic producers to concentrate on the manufacture of low-quality goods, and an inducement for foreign suppliers to shift exports toward higher quality products.[64]

In the mean time, the basic implication of the Agreement in terms of trade facilitation objectives is to protect the interests of traders by requiring that Customs should accept, for determining dutiable value, the price actually paid by the importer in a particular transaction. This applies to both arms-length and related-party transactions. The Agreement recognizes that the prices obtained by different importers for the same products may vary. The mere fact that the price obtained by a particular importer is lower than other importers have imported the product, cannot be used as a ground for rejecting the transaction value. Customs can reject the transaction value in such situations only if it has reasons to doubt the truth or accuracy of the declared price of the imported goods. Even in such cases, it has to give importers an opportunity to justify their price and if this justification is not accepted, to give them in writing the reasons for rejecting the transaction value and for determining the dutiable value by using other methods. Furthermore, by providing importers the right to be consulted throughout all stages of the determination of value, the Agreement ensures that the discretion available to Customs for scrutinizing declared value is used objectively.

However, implementation of the WTO Customs Valuation Agreement should not be taken for granted in terms addressing all the trade facilitation needs of the country. It should also be noted that implementation of the WTO disciplines comes up with various capacity needs. In this regard Finger and Schuler rightly remarked that customs valuation is only an inch in the whole yard of customs operations.[65] Indeed, implementation of the customs valuation agreement cannot be done in isolation without undertaking extensive reforms and without putting in place institutional safeguards to prevent misuse of the liberal valuation methods under the agreement since its provisions mostly rely on transparency in

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[63] Federico Changanaqui and Patrick Messerlin, (19992), The Economic Effects of Minimum Import Prices (With an Application to Uruguay)," Policy Research, Trade Policy Country Economics Department The World Bank, p. 2.

[64] Id, p. i.

[65] J. Michael Finger and Philip Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge", p. 7. <http://policydialogue.org/files/publications/Uruguay_Round_Finger_Schulerpdf.pdf>

trade transactions. Moreover, as the abovementioned scholars have pointed out, "while implementing tariff changes may require "no more than the stroke of a Minister's or a legislature's pen", implementation of reforms in trade procedures and trade regulations require "purchase of equipment, training of people and establishment of systems of checks and balances", [66] which involve substantial expenditure. In brief, a simple look at the experience of many other developing member countries to the WTO demonstrates that an effective implementation of the Customs Valuation Agreement needs to be comprehensive, adequate and continuous. The ultimate outcome should be *de jure* as well as *de facto* compliance with all WTO CV rules in a country.[67]

The common concerns shared by the majority of developing countries such as Ethiopia regarding possible negative impact of the implementation of the WTO Customs Valuation Agreement relates to the possible reduction in customs revenues due to under-invoicing and lowered protection levels for domestic producers. This is an important concern as customs revenue still represents a significant share in its contribution to the national treasury combined with prevalent under-invoiced importation practices by the business community. In this sense under-invoicing of imported goods is an extremely serious and complex problem that negatively impacts on Ethiopia's economy in several ways. It means that the duties and taxes escape the tax net thereby resulting in gross economic distortions. This also leads to an uneven playing field, unfair competition and is disadvantageous to goods manufactured in Ethiopia. The challenges in under-invoicing are indeed issues of concern because there is no major decline in the instances of under invoicing even if there is a general decline in the customs duties in the last two decades.

In the mean time various strategies could be designed to address the problems of directing the country's custom valuation practice to that mandated by the WTO. Perhaps the first strategy should be a comprehensive movement towards narrowing the problem. i.e. the private sector has raised the point that under-invoicing is done only in the 50-60 percent of total transactions. It is important that those firms or sectors are identified so that all do not face the same treatment. One idea is to distinguish manufacturing and trading firms separately. In this context, there may be some choice between pre-clearance control and post-clearance control. It can be suggested that the manufacturing units may find it easier to deal with post clearance audit. In the case of the traders pre-clearance control should be made more preferred choice. The recent

[66] Id, p .3.

[67] Azizjon Nazarov (2007), Contemporary Implementation Problems of the WTO Agreement On Customs Valuation Into Domestic Legislation: What Can The Experience Of Some WTO Members Teach Uzbekistan?, World Trade Institute, Master Thesis, p 51.

introduction of risk management system at ERCA can be seen as an important step in this direction.

Another important issue of concern in this line also includes the fear of consequent reduction in government revenue as Ethiopia makes a transition toward strict adherence to the valuation stages under the WTO Customs Valuation Agreement. Apparently, a review of the valuation practice dictated by various directives issued by the Ministry of Finance and Economic Development, the Ethiopian Revenues and Customs Authority etc. all have a tendency to increase the transaction value of imported goods. This has presumably inflated the transaction value consequently leading to higher taxable prices. It is from this perspective that Ethiopia would be concerned not to lose a large share of its revenue as it moves to dispel its current valuation law and move towards the more disciplined and deeply regulated valuation hierarchy. The right solution to this of course lies on the principle of aligning all trade policy instruments. The most efficient and transparent way of addressing this challenge is shifting the trade protection and revenue raising role of customs valuation to actual tariffs thus avoiding dead weight loss to the overall economy.

3. Logistics Services Sector Reform and Liberalization: What Role for Trade Facilitation

> "the monopoly of the Ethiopian Shipping Lines on the transport of seaborne imports in effect constituted an indirect tax".[68]

Logistics services which include activities required for the transportation, storage and handling of production inputs and finished products from producer to consumer (or intermediary producer), play a critical role in international trade. Consumers of logistics services are typically suppliers of products themselves.[69] Consequently, the efficient supply of logistics services helps to facilitate international trade in a whole range of other products.[70] The more timely, reliable and efficient the logistics supply chain, the more efficiently and reliably goods can be delivered from the point of production to the point of

[68] UNCTAD (2004), *Investment Guide to Ethiopia; Opportunities and Conditions,* UNCTAD/ITE/IIA/2004/2, p 64.

[69] Institute for International Trade University of Adelade (2006) "The Relationship between Trade Liberalizatoin in the Logistics Sector and Trade Facilitation", *Asia Pacific Trade and Investment Review*, Vol 2, No 2, p 29, Geneally see Swedish National Board of Trade (2012) Everybody is in Services – The Impact of Servicification in Manufacturing on Trade and Trade Policy, Swedish National Board of Trade –Kommerskollegium.

[70] Prabir De and Amrita Saha (2013), "Logistics, Trade and Production Networks: An Empirical Investigation", *RIS Discussion Papers, Discussion Paper* # 181, p. 1.

consumption.[71] In particular, increased international trade in unfinished products, i.e. the movement of intermediate goods within production processes, requires logistics services of ever higher quality with regard to the reliability, safety, security and frequency of deliveries.[72]

Accordingly, competitive advantage in both international and regional trade is increasingly defined by logistics as other factors decline in importance.[73] The capacity to produce consumer goods, other than those protected by patents, can be replicated in most countries. Low labour cost is a common feature of developing countries and represents a decreasing portion of delivered cost. Tax benefits have become a standard offering with relatively little difference between countries. The traditional advantage of proximity to raw materials has increasingly been replaced by proximity to markets. Although labour cost and productivity create some basis for differentiation, these can be overcome through the introduction of low-cost computer-enhanced manufacturing equipment. As the opportunities for differentiation in price have diminished there is now more emphasis on product quality and order cycle.[74]

One key chain in this long list of logistics services involves international maritime transport. Historically, most industrialized countries used to own large national fleets, manned by national seafarers, built in national shipyards and flagged at home.[75] Today, globalization has made shipping a highly competitive industry. Hence, a ship may be registered in one country, its owner from another country and its operator from a third country and the "components" of the shipping service, such as insurance, equipment, the work of seafarers, bunkering, ship repair or certificates of classification societies are very likely to have been purchased in a number of different countries.[76] In the recent past, countries sought to increase their market share in the shipping industry in order to generate income.[77] Today, for most developing countries, having access to

[71] Ibid.
[72] UNCTAD (2003), Development Of Multimodal Transport And Logistics Services", Report by the UNCTAD secretariat, TD/B/COM.3/EM.20/2, p 3.
[73] John Arnold (2007), The Role of Trade Facilitation in Export Growth", (in) SADIQ AHMED and EJAZ GHANI (eds.), South Asia, Growth and Regional Integration, The World Bank, p 197.
[74] Ibid.
[75] UNCTAD (2003), "Efficient Transport And Trade Facilitation To Improve Participation By Developing Countries In International Trade" Note by the UNCTAD secretariat, TD/B/COM.3/60, p. 6.
[76] Ibid.
[77] These attempts were supported by the United Nations through a number of initiatives, such as the adoption, under the auspices of UNCTAD, of the Convention on a Code of Conduct for Liner Conferences, 1974.

adequate and inexpensive international transport services has become more important than generating income with the supply of such services.

In Ethiopia, problems in the maritime transport sector have become one of bottlenecks to international trade. The sector as will be seen below has fallen almost entirely into a state of state monopoly nearly without internal or external competition. This section attempts to demonstrate that the improvement in the performance of logistics services through domestic reform and international trade liberalization in Ethiopia may generate a virtuous cycle, whereby international trade is increased and that this, in turn, may increase the demand for logistics services.[78] The benefits of improved performance of logistics services could be enhanced through governmental measures that assist the flow of trade across national borders. Further, trade facilitation measures instituted by the government, including but not limited to more efficient, well-coordinated border control mechanisms, may promote greater demand for logistics services. The extent and pace of measures taken by governments to liberalize the supply of logistics services and to facilitate trade will determine whether or not a virtuous cycle will be generated and the extent of the benefits that will accrue from that cycle.[79]

3.1 Ethiopia's Maritime Transport Legislative and Institutional Framework: Restrictive Features

There are essentially few factors that characterize the Ethiopian logistics and in particular maritime transport services environment in Ethiopia. First of all Ethiopia is a landlocked country. Ethiopian Shipping Lines and Logistics Enterprise (ESLSE) is a parastatal company owned by the state. It enjoys a monopoly in maritime transport and logistics services of the country. The Maritime Sector Administration Proclamation establishes the Maritime Affairs Authority, which has regulatory powers on maritime passenger transport.[80] The Transport Authority, under the auspices of the Ministry of Transport and

[78] In a recent report prepared by the United States International Trade Commission (USITC) on the global market for logistics services, it was suggested that improving the performance of logistics services through liberalization may generate a virtuous cycle, whereby international trade is increased, which, in turn, increases the demand for logistics services., See U.S. International Trade Commission, (2005) *Logistic Services: An Overview of the Global Market and Potential Effects of Removing Trade Impediments,* Investigation No. 332-463.

[79] Institute for International Trade, University of Adelaide, *supra* note 69.

[80] Maritime Sector Administration Proclamation 549/2007, Federal Negarit Gazeta, September 2007.

communications, is authorized to represent the Flag State.[81] It is also responsible for the qualification, procedures, and technical standards for the supply of shipping services. The Ministry of Transport issues the competence certificate for Shipping and Forwarding Agents.[82]

Ethiopia's current level of investment regulation with respect to logistics services is highly restrictive. Among other maritime services, only forwarding and shipping agency services are expressly dealt with under Ethiopian laws. These services are reserved for Ethiopian nationals under the Investment Regulation No 270/2012.[83] This is one of the only eight investment areas that are exclusively reserved for Ethiopians under the Regulation. Other than the above, customs clearing services is restricted to domestic investors.

Ethiopian Shipping and Logistics Services Enterprise (ESLSE) is the sole sea freight transport service provider in Ethiopia although there is no express reservation by law reserving this service to ESLSE. It is a state-owned company that has *de facto* monopoly on transport of import goods. On the other hand, it can be said that there is no restriction on sea passenger transport under Ethiopian laws. The service is not clearly addressed under the investment regulations and there is also no provider of such services presently. Yet it seems that this service sector is less practical as Ethiopia is a landlocked country and its current access to sea is done via Djibouti. Despite its similarity to goods, provision of such service is currently outweighed by the ease and cost advantages of air transport, and is probably going to remain dormant as it will bring its own challenges in transit negotiations with Djibouti. Similarly maintenance and repair and pushing and towing services are not mentioned in any of the laws. This may be owing to the fact that, as a landlocked country, these services are not provided within Ethiopian jurisdiction.

Other service areas in the sector include auxiliary services to all modes of transport, and that contains three specific service types, namely, cargo-handling, storage and warehouse, and freight transport agency services. As explained above, freight forwarding and shipping agency services are reserved for Ethiopian nationals under the investment regulation. On the other hand, the Freight Forwarding and Ship Agency regulation lists cargo handling and

[81] Pursuant to Proclamation No. 468/2005, Transport Proclamation, Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 11th Year No.58, Addis Ababa- 6th August, 2005.

[82] As per the Regulations No. 37/1998, Council of Ministers Regulations No. 37/1998 Freight Forwarding and Ship Agency License Issuance Council of Ministers-Regulations, Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 41h Year No. 46, Addis Ababa – 19th June, 1998.

[83] Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No 270/2012.

warehousing services as part of activities of freight forwarders.[84] In doing so, Art 3(4&5) list that warehousing and delivery services, and cargo handling equipment services are the functions of the freight forwarder. Thus, the Regulation governs freight forwarding services in all modes of transport, as it contains no references to specific modes of transport it applies to. This means that cargo handling and storage and warehouse services are reserved for Ethiopian nationals. Essentially the service is highly capital intensive industry and the significance of investment liberalization in the area should be discussed. Moreover, as one major area of discussion in Ethiopia's accession bid to join the WTO, and as evidenced from the various inquires submitted by WTO members, the issue of accession commitments in GATS will have to be considered.

3.2 Multimodal Transport

In 2007, the House of Peoples Representatives came up with the Multimodal Transport Proclamation, first of its kind in Ethiopia, which is issued with the intention of providing a legal framework regulating duties and liabilities of parties to a multimodal transport contract.[85] A multimodal arrangement is a scheme whereby the transportation of goods is under a single contract but performed with two or more different means of transportation. The transporter is accountable for the entire journey, including the shipment's delivery at the final destination.[86] The Proclamation defines international multimodal transport as; "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery. The operations of pick-up and delivery or goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as multimodal transport." [87]

The Proclamation envisages that international transport of goods in Ethiopia is now to be carried out on a door-to-door basis under one contract and with one party bearing contractual responsibility. Accordingly the proclamation introduces what is called "Multimodal Transport Document" which is a document that evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to

[84] Freight Forwarding and Ship Agency License Regulation, Reg No. 37-1998.
[85] Multimodal - Transport of Goods Proclamation; Proclamation No. 548/2007, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 13th Year, No. 59, Addis Ababa, 04 September 2007.
[86] According to the government the multimodal service is aimed at streamlining shipments from Port of Djibouti to avoid warehouse fees in foreign currency.
[87] Multimodal - Transport of Goods Proclamation, Art 2(1).

deliver the goods in accordance with the terms of that contract.[88] In doing so, the scope of application of the proclamation is overarched to all multimodal transport contract after the conclusion of which a multimodal transport document is issued according to the relevant provisions of the Proclamation.[89]

Accordingly, the multimodal transport document is to be regarded as document of title. Thus, where every consignee named in the negotiable or non-negotiable multimodal transport document and every endorsee of such document as the case may be, to whom the property in the goods mentioned therein shall pass, upon or by each reason of such consignment or endorsement shall have all the rights and liabilities of the consignor.[90] The Proclamation further regulates liability for loss, damage or delay arising from multimodal transport. On final note however, the Proclamation does not regulate specific issues in multimodal transport administration such as licensing and supervision of the services providers. These issues were set to be dealt with under a more technical regulation that would be issued by the Council of Ministers. Unfortunately, despite various pronouncements from the Maritime Affairs Authority (MAA) on draft multimodal regulation, the Proclamation as it stands can hardly be put to use.

3.3 Directives on Multimodal Transport

Despite the lag in introducing a Multimodal Transport Regulation from the Maritime Affairs Authority, the Ministry of Transport (MoT), which has been encouraging the usage of a multimodal transportation system since 2007, and has issued a Multimodal Transport Implementation Directive, effective January 2012.[91] The new directive mandated that goods being shipped through the Ethiopian Shipping and Logistics Services Enterprise (ESLSE) use a multimodal (land, sea, or road) transportation service operated solely by state-owned ESLSE. As indicated above, the multimodal arrangement is a system whereby the transportation of goods is under a single contract but performed with two different means of transportation. The carrier is liable for the entire journey, including the shipment's delivery at the final destination. The transportation can be performed by rail, sea, and road.

Among others, the Directive instructs all vehicles of three tonnes or less to be under the new scheme. The directive also underlines that all shipments that use

[88] Id, Art 2(4).
[89] Id, Art 3 (1).
[90] Id, Art 7 (1).
[91] It is to be noted here that neither the content nor character of this instrument is officially and clearly indicated from the side of the Government. It appears now that there is still confusion on the status of the instrument between being a Directive or a Circular.

multimodal transport deliver their cargoes to dry ports or warehouses that are authorized by the Ethiopian Revenue and Customs Authority (ERCA). All private importers, that open Letter of Credit (LC) from local banks, are required to bring their container shipments to dry ports and ERCA's warehouses.[92] The Directive is said to be aimed at streamlining shipments from Djibouti Port to avoid warehouse fees in foreign currency. It also stipulates for the confiscation of imported goods after shipments lie at the port for more than six months. Officials state that these schemes will save foreign currency for the country, which totals 1.4 million dollars, annually incurred as warehouse fees at Djibouti Port.

The first directive, effective as of January, does not require private importers to use the multimodal scheme even if they use ESLSE's service. The circular issued on February 13, 2012 required not only state banks but also private banks to undertake their activity under the new directive right away. The letter from the National Bank of Ethiopia also indicated that all banks have to report logistical data of their customers to the Maritime Affairs Authority and the National Bank of Ethiopia within the first five days of the month.[93]

As the Directive did not see other options until the directive allows private companies to be involved in the multimodal transport scheme, various interested groups are now arguing that the government must provide options for the private firms to compete in the sector.[94] Those engaged in private forwarding business for instance argue that the government should undertake reform in this regard, *inter alia*, allowing freight forwarders and shipping agents to use other ships for cargo that transport from ports or countries that ESLSE's vessels do not call.[95]

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[92] It is interesting to not here that there are complaints against the legislative power of the Ministry. Freight forwarders said that the ministry does not have the power to amend these types of enforcements on state or private banks as private multimodal operators are allowed to be involved in the industry.

[93] Addis Fortune, Supra note 50, The directive did not talk about any monopoly concerning the multimodal transport operation and because of that the ministry office should wait until private operators can be included in the sector before it amends enforcement regulations on banks."

[94] Interview with Commander Tilahun, Manager, Ethiopian Freight Forwarding and Shipping Agents Association.

[95] According to a study by Addis Ababa Chamber of Commerce and Sectoral Association, waiver certificate allowing the sea voyage to be made by another carrier must be obtained by the importer, at a cost of USD 600-800 per container. See Private Sector Development Hub,(2009), *The Management of Commercial Road Transport in Ethiopia*, Addis Ababa Chamber of Commerce and Sectoral Associations, p. 159.

3.4 Ethiopian Shipping and Logistics Services Enterprise (ESLSE), Monopoly, Implications and Effects

Before ESLSE was established upon the amalgamation of three enterprises including Ethiopian Shipping Lines, the National Bank of Ethiopia has already issued, in 2008, a directive requiring importers to use Ethiopian Shipping Lines as a requirement for Letters of Credit (L/C). In cases where ESLSE vessels do not call on ports from which goods are shipped and ESLSE does not have a slot charter relationship with carriers calling on these ports, it provides waivers to importers to use other carriers. Since almost all commercial imports in Ethiopia require L/C to obtain foreign currency, ESLSE enjoyed an effective monopoly on most imports into Ethiopia excluding non-commercial imports.

It is thus the collective effect of the above directives that has granted *de facto* monopoly to ESLSE. This measure has turned what used to be a struggling enterprise in the country to one of the most profitable state companies. However, this has now resulted into corporate inefficiency and increase in prices for services rendered by ESLSE. Recent reports disclose that, for instance, importers that used to import minibuses from Europe, in particular the Netherlands, have claimed to have paid 1,492 dollars to ship one vehicle which is 75% more than they used to pay before the *de facto* monopoly was established by the introduction of the recent directives.[96] Importers claimed that the directive has taken away the opportunity of negotiations on shipment prices, since it is monopolized by the ESLSE. Importers have disclosed that they used to pay on average price not more than 900 dollars for each minibus after negotiations with many shippers. The same opinion is stated by Mulugeta Assefa, former president of the Ethiopian Freight Forwarders & Shipping Agents Association (EFFSAA).[97]

ESLSE rates in 2008 were about 70 per cent higher than the Far Eastern rates. Sea freight cost covers about 60 percent of the total import supply chain costs to Addis Ababa.[98] Considering the economic impact of the above finding, the impact on processing and manufacturing industries is easily noticeable. Apparently, many components and intermediates in the production of exported goods in Ethiopia need to be imported from abroad. Most of these components are subject to a five to ten percent tariff that adds to production costs. Packaging

[96] Transport Ministry Makes Waves with Multimodal Directive", Addis Fortune, Volume 12, Number 608, Dec 25, (2011). <http://addisfortune.com/Vol_12_No_608_Archive/Transport%20Ministry%20Makes%20Waves%20with%20Multimodal%20Directive.htm>

[97] Ibid.

[98] Nathan Associates (2009), Impact of WTO Accession on the Transport Services Sector of Ethiopia, Ministry of Trade and Industry, Draft Final Report, p IX.

materials like glass bottles imported for food processing are examples in this regard. They are not produced domestically and those that could be imported *via* road transport from neighboring countries are of poor quality. The available suspension schemes and drawback mechanisms are unable to reduce such costs for exporters and should be reformed. Accordingly, shipping costs will be brought to the forefront in increasing the costs for the nascent manufacturing sector in the country. Consequently, studies have indicated that the preference for ESLSE under the foreign exchange directives may increase shipping costs by an estimated 30% - 50%.[99] Currently ESLSE has also received very low mark for its punctuality.[100]

3.5 Ethiopia's WTO Accession and GATS Service Commitments: Implication for Maritime Services Liberalization

The General Agreement on Trade in Services GATS is an agreement that lays down a framework of international rules for trade in services. The main principles that apply to the GATS[101] are market access and national treatment while the schedule of commitments provides the basic framework for the results of negotiations. In terms of market access, GATS does not provide positive and normative definition for market access but only provides six types of restrictions that a member cannot impose, unless identified in its schedule.[102] Conceptually this is also similar to the principles of quantitative market access limitations under GATT Art XI. Generally, GATS Art XVI:2 provides for rules that prohibit members from imposing market access limitations. The existence of any limitation in respect of these areas has to be indicated with respect to each of the four modes of supply in scheduled sectors.[103] The idea is that such market access limitations are prohibited even if they are not discriminatory.[104]

However, GATS does not provide a comparable list in respect of national treatment restrictions, and it is up to members to ensure that all potentially

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[99] Ibid.

[100] Bemnet Aschenaki (2004), "Transport Costs in Ethiopia: An Impediment to Exports?", *Background study for the World Bank FY04 Country Economic Memorandum for Ethiopia*, p 9.

[101] GATS, World Trade Organization (1999), The Legal Texts, The Results of The Uruguay Round Of Multilateral Trade Negotiations, Marrakesh Agreement Establishing The World Trade Organization.

[102] Id, Art XVI.

[103] WTO, (2001), *Guidelines For The Scheduling Of Specific Commitments Under The General Agreement On Trade In Services (GATS),* Adopted by the Council for Trade in Services.

[104] N Icolas F. Di Ebold, (2010) *Non Discrimination In International Trade In Services 'Likeness' In WTO/GATS,* Cambridge University Press, p. 29.

relevant measures are listed in sectors where commitments are scheduled and, if they wish, members can inscribe various types of national treatment limitation (e.g., regarding taxation or regulations).[105] "If a member no longer wishes to conform to its specific commitments, it may modify its schedule by providing compensation in the form of alternative market access (even across sectors)."[106] "However, this undertaking may involve difficult negotiation and often creates confusion regarding the member's commitments."[107]

With respect to the final part of the GATS framework, the GATS schedules are key framework instruments providing the list of services with members' commitments in terms of market access, national treatment and additional commitments. The lists of services correspond to GATT secretariat classification,[108] which is a standardised harmonized framework also following numerical references to the Central Product Classification system of the United Nations.[109]

As explained above, the Ethiopian Shipping and Logistics Enterprise (ESLSE) enjoys monopoly advantages. It is, in effect, a price setter as no competitor can force it to lower its prices through competitive methods. This in turn means that the importer is forced to accept the price set by the shipper. [110] This setting will become an issue for WTO members in Ethiopia's accession negotiation. It is the objective of this section to exemplify how the interplay between liberalization of logistical services on the one hand, and trade facilitation on the other hand, is equally complimentary and should be borne in mind in the context of WTO negotiations on services and trade facilitation. Thus, negotiators in both contexts should at least explicitly recognize the

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[105] Art XVII, In particular Art XVII lit 2 states; A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

[106] International Monetary Fund, (2010) *Reference Note on Trade in Financial Services*, Prepared by the Strategy, Policy, and Review and Legal Departments, p. 5. <http://www.imf.org/external/np/pp/eng/2010/090310.pdf> General Agreement on Trade in Services (GATS), Art XXI: Modification of Schedules.

[107] Ibid.

[108] See Uruguay Round, *Services Sectoral Classification List, Note by the Secretariat*, MTN.GNS/W/120 (10 July 1991).

[109] Various versions available, see for instance, United Nations CPC classification (Statistical Papers, Series M, No.77, 1991) *Central Product Classification, CPC Version 1.1,* (Updated: 21.02.2002), *Version submitted to the United Nations Statistical Commission*, (5-8 March 2002).

[110] Derk Bienen *et al*. (2005), *Impact Assessment of WTO Accession,* Technical Assistance to Support Ethiopia in its Accession to the WTO, p. 69.

potential for mutual reinforcement of liberalization of the logistics sector together with trade facilitation.[111]

It is the position of this author that Ethiopia, as a least developing country have much to gain from the liberalization of logistics services. The benefits that may accrue to suppliers of logistics services, exporters and importers that are dependent upon such services and nations as a whole are clear. Logistics liberalization facilitates international trade, which, in turn, drives economic growth and development. Trade facilitation measures that promote trade may also consequently promote greater demand for logistic services, thereby generating a virtuous cycle.[112] The following paragraphs further investigate the nature of GATS negotiations and possible implications for reform.

3.5.1 National Treatment on Maritime Transport and related Logistics

National treatment, if committed, can be the most important principle applicable to maritime transport. Under the GATS, parties shall accord to other Parties no less than that accorded to domestic services or domestic service providers. Equality of treatment between foreigners and nationals imply that protectionist measures, such as cargo reservation and preference for national shipping, discriminatory taxes and charges towards foreign flag ships etc., are contrary to this principle.[113] The implementation of the National Treatment clause may bring about at least the following effects.

The first important effect of the implementation of National Treatment principle to shipping and the Maritime sector is related to the current cargo preference policy. One can anticipate that WTO members will seek at least a minimum of few commitments here. In doing so, the lifting of cargo preference policy will be an important step towards the integration of Ethiopian maritime sector to international shipping competition and the efficiency in multimodal transport.

In terms of the other investment regulations, only Ethiopian nationals are permitted to invest in shipping agency services. It is unclear whether this prohibition implies that non-resident shipping agents are barred from supplying services cross-border into Ethiopia - this would be Mode 1 in GATS terms. Also

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[111] UNESCAP (2007), *Trade Facilitation Beyond The Multilateral Trade Negotiations: Regional Practices, Customs Valuation And Other Emerging Issues,* A study by the Asia-Pacific Research and Training Network on Trade, 276.

[112] Ibid.

[113] H.E. Haralambides (1994), GATT and its Effects on Shipping and Ports", *Proceedings of the KMI/IAME Conference on International Trade Relations and World Shipping, Seoul* (1994), p. 13. <http://www.maritimeeconomics.com/downloads/papers/HH_GATT%20Seoul.pdf>

unclear is whether Ethiopians are barred from utilizing the services of foreign ships agents abroad. This is called consumption abroad or GATS Mode 2. In terms of national treatment provisions under GATS, it is clear that no investment license can be issued to a foreign company or national to invest in a shipping agency enterprise in Ethiopia. These restrictions will have to be kept in mind if Ethiopia decides to include these activities in its WTO accession commitments. "Given the international nature of the shipping agency business, Ethiopia should anticipate that other WTO members may seek market liberalization measures in this area".[114]

The implementation of National Treatment may also have its own implication in terms of multimodal transport services. As indicated in the sections above, Ethiopia has made some progress towards creating an enabling framework for integrated logistics services through the adoption of legislation on multimodal transport. However, restrictions on investment by foreigners in key areas such as shipping and the apparently confusing regulations relating to freight forwarding and shipping agency will effectively hinder foreign logistics providers from investing in multimodal services. It thus would be wise that the Ethiopian government reviews its investment policy with regard to all auxiliary transport services with a view towards liberalizing market access in this area. One thus could also anticipate that WTO members will seek express commitments from Ethiopia in this area.[115] Commitment of such nature thus may generally mean the entitlement of foreign shipping service providers to access Ethiopia's economy, customs clearance, maritime agency, freight forwarding and so on. With respect to all these facilities or services, foreign ships would then be treated in the same way as domestic ones.

Another important implication of commitment in national treatment would relate to the ability of foreign companies to own and operate a dry port infrastructure and facilities. Perhaps national treatment commitment in this area would carry a key tool to liberalize multimodal transport. If commitment is undertaken, the investment could be facilitated for instance through leasing and rental arrangement with the government. This option also seems economically compelling from experience.

3.5.2 Market Access

Together with National Treatment, Market Access is the second most important clause for implementing the principle of non-discrimination. Market access implies that Members will grant treatment to services and service providers of

[114] Nathan Associates, *supra* note 98, p. 110.
[115] Ibid.

other Members no less favorable than that provided for under the terms of their Schedule.[116]

Upon Ethiopia's accession, two issues immediately arise with regard to market access: the establishment/commercial presence by foreign companies and the right to provide services. Regarding the establishment of commercial presence, the effect could differ considerably among different market strategies by foreign companies. Commercial presence could take various forms and could be in charge of different activities. These activities may be the marketing and sale of maritime transport services; the purchase and use of any transport and related services; transport documentation; customs and other activities; provision of business information and freight forwarding and agency services and related activities.

The other issue which can be of fierce debate between Ethiopian negotiators and WTO members will be on the issue of freight forwarding and shipping agency services. Experience now shows that there is a considerable level of commitment undertaken by other acceded countries. Policy wise, one can find some shallow rationale and standing by the government. For instance, if one investigates the rationales behind current level of investment restrictions in shipping agency services, it seems that it is a genuine concern of the Ethiopian government to encourage the growth of the domestic shipping agency industry. However, this provision would prevent, in the long run, a foreign multimodal transport operator (MTO) which includes shipping agencies within its service offering, from setting up an agency office in Ethiopia. In effect, the restriction would force the MTO to locate itself outside Ethiopia. Such development will represent an investment loss for Ethiopia.[117] It thus seems logical for the Ethiopian government to amend the investment regulation to permit foreign investors to provide ship agency services in Ethiopia.

Inland transport can also be an objective of further liberalization. As international transport becomes more integrated, and considering the advantages of multimodal transport, many shipping companies, or their subsidiaries, are trying to start their business in inland transport, particularly in trucking. As a first step, the possibility of freely contracting with any local transport service providers might be granted to foreign shipping companies, especially those in liner shipping. This free choice of local transport suppliers will surely increase the competitiveness of the local transport market.

As indicated above, the provisions of National Treatment and Market Access are binding only in so far as Member's Schedules specify. If they are negotiated

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[116] Haralambides, H. E., et al (1994), GATT and its Effects on Shipping and Ports, <http://www.maritimeeconomics.com/downloads/papers/HH_GATT%20Seoul.pdf >

[117] Nathan Associates, *supra* note 98, p IX.

and become at least subject to minimal level of commitment, Ethiopian Maritime transport sector may see robust domestic competition, and increase its international competitiveness further promoting trade facilitation down the line. This objective could be promoted, at least in medium terms, without a commitment in market access if a standstill commitment which would prevent the introduction of new restrictive measures, within a given period of time, is acceptable as a compromise. During that time Ethiopian maritime transport sector (in particular the shipping industry) will have to strengthen itself and adjust in order to be able to compete with others under terms of free and fair competition.

3.6 The Role of Maritime Transport Sector Liberalization for Trade Facilitation in Ethiopia

Maritime services and related logistics are important to a large number of sectors in Ethiopia's economy because of their direct link to both exports and imports. Improving the efficiency of maritime transport and related logistics can have significant positive spillover effects on encouraging trade flows, private investments, and subsequently enhancing production and job creation in almost every sector of the economy; for instance by reducing costs of imports for producers and consumers, at the same time increasing government revenue.

The preceding discussion leads one to press the need for a general change in policy directions in the maritime transport sector in Ethiopia. Generally, the reliance on national shipping and maritime transport has proved an expensive venture. About 95% of Ethiopia's foreign trade by weight/volume and about 70% by value involve transportation by sea. Following liberalization and opening up of the economy in the early nineties, there has been a significant increase in Ethiopia's maritime trade. In this short time, considerable improvements of containerization of general cargo, carrying capacity, etc. have been brought about in the sector. Yet, there are still large gaps between what is needed and what is in existence.

Today, uncompetitive import and export terms have become emerging problems for Ethiopia's budding economy.[118] As long as semi value added goods dominate the industrial exports of the nation, transport costs constitute a large portion of the total export value. While the sector seems to have been given less attention from policy makers and economic research, findings by the World Bank (WB) now puts the average share of transport at 28 per cent of the

[118] Addis Fortune, Logistics Malaise Regulate, Monopolize Not!, Addis Fortune, (March 04, 2012). <http://addisfortune.com/Vol_12_No_618_Archive/Logistics%20Malaise%20Regulate%20Monopolise%20Not.htm >

value added to Ethiopian goods.[119] While it costs 0.07 dollar cents to transport a shirt from Bangkok, Thailand, to New York, the cost of transporting the same shirt from Addis Ababa to New York is 0.11 dollar cents. While it takes 27 days for a Thai exporter to send its goods to New York, studies show, it takes five more days for the Ethiopian exporter.[120]

The monopoly also has its own time constraints especially in areas where the ESLSE does not have routes and has yet to subcontract them. Under the current situation, all LC shipments must be handled by ESLSE. If that port is called by the ESLSE, then, it will be about ESLSE's capacity to pick it up. If ESLSE does not call that port, it has the slot system, agreements with other shipping lines to pick cargo up on its behalf at a premium price.[121] This venture is entirely dependent on the contractual arrangement to be reached by ESLSE and its client. This often takes considerable time and causes delays. The evidence could even be staggering if one looks into what is going on in the ground. Local experts and stakeholders state that it often takes ESLSE from 15 days – upto two months, at least, to collect goods from various import destinations by its slot partners.[122]

Yet, even when the port is called by ESLSE, the number of vessels it has and the volume of cargo that needs to be transported are often incompatible. Local experts state that ESLSE's ships cannot efficiently serve the import of the country, be it on a slot basis or on their own.[123] According to them, the problem starts at origin ports, where goods stay at the ports more than they have to; even if ESLSE picks them up, it may not pick them up on a timely basis. ESLSE could or should have outsourced the said services but rather chooses to handle the fright by its own ships while its ships are not available. In many cases its takes ESLSE ships to have round trips to the same port more than once to clear the goods waiting for shipment to Ethiopia. This entails costs not only for storage but for all programmes in Ethiopia waiting for the goods that face the delay.[124]

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[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Commander Tilahun, President of Ethiopian Freight forwarders and Shipping Agents Association, Interview with the author, July 2012 . This has high impact for trade and it is not difficult to calculate the economic implication of this delay. See Gael Raballand et al., (2012) Why Cargo Dwell Time Matters in Trade, World Bank Economic Premise, Number 81.
[123] Addis Fortune, *supra* note 118.
[124] Ibid,

Hummels, estimates that each day saved in shipping time is equivalent to about 0.8% reduction an *ad valorem* tariff.[125] For certain production processes which are recently booming in Ethiopia, such as in electronics, textile and apparel or other assembly-type operations (engines and motor vehicle), which require high import content and have small per unit profit margins, delay and high shipping costs can put investment in this areas out of picture.[126] Further, as these costs have ultimately to be borne by the end users, and where these users are potential exporters in the domestic market, these factors inevitably raise the cost of Ethiopia's exports in international markets and the prices of imports for the Ethiopian economy. As a local transport economist notes:

> for all practical reasons, we need the company to serve this country but not at the cost of the whole national economy. Compared to other lines serving Ethiopia from Europe, for example, using [ESLSE] has a 40% rise in price. For everything coming from India, the price increment is close to 30%. From Dubai, it is 20%. From China, it is close to 30%. Should we carry this burden for the survival of ESLSE? Or should we let it go free and have them work on competitive basis? One of the major factors hindering the fair distribution of logistic costs in the economy is the monopoly issue.[127]

In terms of the need for the liberalization of the maritime transport sector in Ethiopia (and the role of WTO accession in this regard), this article brings into attention a classical political economy argument in favor of undertaking commitments for this service in the WTO. The WTO accession efforts could bring fertile opportunities where genuine economic reform needs would meet with multilateral economic negotiations. Primarily, commitments in the sector could provide legal guarantees and certainty to services providers (foreign and local) thereby introducing foreign competition or fostering existing foreign competition) in transport services. This consequently could bring more investment through legal certainty and irreversibility of conditions of operations, wider choice of services for the consumer including state of the art services, such as supply chain management for instance, lower prices of services through competition with national incumbents and other foreign providers, and effective technology transfer through the use of modern equipment and management methods and through the employment and training of local staff which will then,

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[125] David Hummels, (2001) Time as a trade barrier" Purdue University, p 3.

[126] See Liliana Annovazzi-Jakab, (2003), Landlocked Countries: Opportunities, Challenges and Recommendations (in) Carol Cosgrove-Sacks and Mario Apostolov (eds.) *Trade Facilitation; The Challenges for Growth and Development,* United Nations Economic Commission for Europe, p 86.

[127] Addis fortune, *supra* note 118.

at least in the long run, will be able to create its own businesses at least in sub sectors with low costs of entry.[128]

Generally, experience over the last decade has shown that state-owned transport monopolies may not be the most efficient way to assist the trade of a country. Consequently, developing countries like Ethiopia should be encouraged to promote private transport companies, be they shipping companies, trucking companies or railways. It is argued that maritime and (road transport) monopolies often seal off developing economies from the natural growth of domestically based transport enterprises.[129] In Ethiopia, while there are not sufficient level studies evidencing the this conclusion, there are reports from various industry groups which show that industries in Ethiopia suffer from the current state of maritime transport performance in the country. Industries report a very serious disadvantage for Ethiopian industries vis-à-vis those that reside in Asian economies with respect to inventories and input costs. On average, the reports indicate that Ethiopian industries hold twice as much raw material and finished products compared to their Asian counterparts.[130] According to the reports, higher transaction costs explain a relevant part of the discrepancies in these inventories: Ethiopian industries faced with higher prices, uncertain demand and longer delays for small frequent shipments choose to maintain larger reserves.[131] As business people comment with frustration,

> there are certain ports wherein the [ESLSE] may not accept bulk cargo (i.e., un-containerized cargo). In order to containerize a cargo, the consignment needs to be at least 10,000 to 12,000 kilograms. For different reasons, bulk-purchasing is not widely practiced in Ethiopia, and the origins of imports are diverse. If a waiver is obtained from the [ESLSE], it is possible to nominate a foreign vessel for transporting such imports. But the mode of payment becomes C&F, instead of FOB. Arranging for such a change in bills of lading takes a lot of time and becomes a source of delay.[132]

Considering that the cost of capital is excessively high in Ethiopia than in Asia, the rest of Africa and Latin America, the commentators point out that these high inventory levels translate into considerable costs, and ultimately in lower

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[128] SADC "Advantages Of Gats Bindings For The Transport Sector" <https://tis.sadc.int/files/3413/2644/9883/Advantages_of_GATS_Bindings_for_the_Transport_Sector_2005_Latrille.pdf>

[129] Carlos F. de Castro, (1996) Trade and Transport Facilitation Review of Current Issues and Operational Experience, *A Joint World Bank/UNCTAD Publication, SSATP Working Paper No 27.*

[130] Tsegaye Teklu and Endris Negus, *supra* note 1, p 40.

[131] Ibid.

[132] Ibid.

competitiveness and diminished growth.[133] Considering liberalization of the maritime transport sector in the context of Ethiopia's WTO Accession, effort will thus be compelling and of high importance.

4. The New WTO Trade Facilitation Agreement and Ethiopia: A Cross-Check

While this article took a broad view to trade facilitation and analyzed issues such as logistics and customs valuation under this point of view, negotiations to reach agreement under a narrower perspective of the concept have already been under negotiation in the WTO since 2001 under Doha Development Agenda (DDA) negotiations.[134] Despite the ultimate failure to reach agreement on compressive Doha agenda, WTO members were able to ink deal on a Trade Facilitation Agreement (TFA) in its latest Ministerial Conference in Bali, December 2013, as a part of a wider 'Bali Package'.[135] At the time of this writing, the agreement still awaits ratification by at least two third of WTO members, to come into force. However a discussion on its potential implication for Ethiopia upon its accession to the system is necessary.

Generally the agreement covers provisions that aim to put discipline over various impediments to international trade such as cumbersome data and documentation requirements, disproportionate fees and charges, restrictive administrative regulations and excessive formalities and other border procedures. All of these are thought to impose unnecessary restriction on global

[133] Ibid.

[134] Initial steps started at the WTO Ministerial Conference in 1996 for examining how multilateral action by WTO Member governments might help to reduce these costs without interfering with legitimate border management objectives such as revenue collection and security. After some years of analysis and debate in the WTO, it was agreed in mid-2004 to address these obstacles by adding Trade Facilitation to the list of subjects that was being negotiated in the Doha Round. WTO Singapore Ministerial 1996: Ministerial Declaration WT/MIN(96)/DEC (1996); The Doha Work Programme Decision Adopted by the General Council on 1 August 2004 stated that – (Trade Facilitation) taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document. See World Trade Organization WT/L/579, 2 (August 2004).

[135] Bali Ministerial Declaration - WT/MIN(13)/DEC, Ministerial Conference Ninth Session Bali, 3-6 December 201; Agreement On Trade Facilitation – Ministerial Decision, WT/MIN(13)/36 - WT/L/911.

trade.[136] The following paragraphs provide brief highlights to the principal substantive contents of the agreement in light of Ethiopia's practical context.

4.1 Publication and Availability of Information

The final text of the agreement calls upon WTO members to promptly publish all information on trade-related regulations and procedures of border agencies, applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation, rules for the classification or valuation of products for customs purposes, regulations of general application relating to rules of origin and penalty provisions for breaches of import, export, or transit formalities and procedures for appellate review. This information should be available to all governments and traders in a non-discriminatory and convenient manner. The text of the agreement also lays down provisions on how WTO members should notify the WTO secretariat and others members including a specific provision on information that should be available through internet and provisions for the establishment of enquiry points to enhance the availability of trade-related information [137] The current status of Ethiopia in this regard is at various stages of potential compliance with the provisions of the TFA.

a) Publication of trade regulations:

Ethiopia has a modest variety of official means used to notify, publish, and make available trade-related information; most official publications are in Amharic and English. Official Proclamations on trade-related issues - namely trade-related laws which are approved by Parliament, Regulations approved by the Council of Ministers are all published in the Official Gazette (Negarit Gazeta), which is printed by the state-owned printing office (Berhanina Selam).[138] Occasionally, copies of these official documents run out and they can only be obtained from concerned government agencies.[139]

Directives that are approved by the Ministries, Agencies and various State Governments are not publicized in any formal way except in few cases where

[136] Richard Eglin, "The Doha Round Negotiations on Trade Facilitation", (in) World Economic Forum (eds.) *The Global Enabling Trade Report- 2008* (2008), p 35.

[137] Agreement On Trade Facilitation, WT/L/931, Article 1.

[138] It is to be noted here that the newly enacted Mass Media and Access to Information law requires each state body to publish ―its directives, regulations, guidelines. Federal Negarit Gazeta, 14th Year No 64, Freedom of the Mass Media and Access to Information Proclamation No 590/2008, Addis Ababa, 4th December, 2008. Article 13(1)(g).

[139] Generally *see* Mulugeta Getu, "Law Schools' Access to Legislation and Decisions: Current Trends and Suggested Outlets", *Ethiopian Journal of Legal Education,* Vol. 3, No.2 (December 2010).

the relevant agency maintains websites. Other than these circulars and guidelines issued by government agencies on administrative, procedures are printed as hard copies by the relevant institutions or departments. In terms of customs laws, the ERCA publishes a general tariff book with preferential tariff rates and taxes, relevant laws, regulations, and procedures on its websites, in addition to publishing such information through the Gazette.

b) Enquiry points/single national focal information centre:

On general customs issues, the ERCA has a consultation department that provides information on customs issues relating to importation and exportation in Addis Ababa. The other border agencies do not seem to have similar structures or designated information desks like Customs. Generally, Ethiopia's border agencies would therefore need to establish inquiry points/desks or collectively establish a central enquiry point to meet the specific proposals for WTO Members.

c) Notification of trade regulations:

While Ethiopia has a mechanism for notifying the general public when amending and introducing new measures, the Trade Facilitation Agreement demands that such amendments - especially the ones that relate to core measures that may have significant effects on trade with other Members, interested parties, and the WTO Secretariat - should be notified to enable such parties to submit comments before the amendment is finalized. This notification might have to be similar to what is provided for under Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements.

As far as the notification provisions of the TBT and the SPS agreements are concerned, to date, Ethiopia has only made preparations to establish national inquiry point under the TBT agreement.[140] Much work remains for Ethiopia to meet the rest of the notification requirements under the SPS agreement and the national notification authority. Notification obligations on the lines of the SPS Agreement and the TBT agreements will create additional pressure, even though this would be beneficial in adding transparency to the trading system. In some cases, the Ethiopian government has been given contributions from relevant stakeholders when establishing the inquiry point.

One of the challenges for Ethiopia will be the ability to make information available electronically and in a sustainable manner given limited connectivity, electric power interruptions and the limited availability of skilled manpower in information technology, at least in relevant government agencies. Most governmental agencies do not have official websites on which to publish

[140] See Ethiopian Standards Agency, WTO TBT Enquiry Point, <http://www.ethiostandards.org/ESA/Contacts.aspx>

information, and those that do only publish partial information which, in many cases, is outdated.

4.2 Opportunity to comment, information before entry into force and consultations

Article 2 of the Agreement contains provisions aimed at ensuring that there is a fair level of specified interval between publication and entry into force of laws and regulations applicable to international trade and consultations with stakeholders.[141]

Currently, in Ethiopia, time periods between publication and implementation varies from immediate to 4 days, 10 to 30 days, and 60 to 90 days. Information on when a Proclamation or Regulation would take effect is announced in the Official Gazette. The Customs Proclamation specifies immediate implementation while other instruments provide for some interim period of days between publication and implementation. Thus, the different time periods between publication and implementation present a potential problem for Ethiopia. Comparing the current situation with the relevant provisions of the Trade Facilitation Agreement for an agreed specific interval, Ethiopia would have to do away with the immediate enforcement provision, which does not provide for any time period between publication and implementation.

Moreover, Ethiopia does not have a well established mechanism for effective consultations. Very recently however, changes have been introduced with the support of International Financial Corporation (IFC). The Ethiopian Chamber of Commerce and Sectoral Associations has established The Ethiopian Public Private Consultative Forum (EPPCF).[142] Consultations on various customs related issues have taken place prior to the introduction of new laws, giving stakeholders an opportunity to contribute to, influence, and comment on proposed changes to either existing or new laws and regulations before entry into force. Both informal and formal meetings and workshops facilitate consultation with relevant stakeholders. Invitations to such events normally state the policy objectives sought by a new law or an amendment, and the stakeholders are normally informed of deadlines for submission of comments. Almost all of the authoritative laws (Proclamations or Regulations) however

[141] ARTICLE 2: Opportunity To Comment, Information Before Entry Into Force, And Consultations, 1 Opportunity to Comment and Information before Entry into Force 1.1 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit.

[142] See EPPCF website, <http://www.eppcf.com/?view=featured >

provide for consultations with the private sector when there is a need to change procedures.

Another issue of contention with some stakeholders is that these consultations are not encompassing enough and that in some cases the stakeholders lack technical capacity and information to engage effectively with the government on the issues under consultation. Generally, most of the institutions stated that there are no consultative mechanisms to provide an opportunity for stakeholders to comment before any new laws or regulations are introduced or before changes are made.

4.3 Advance ruling

Article 3 of the TFA contains provisions on advance rulings by WTO members. Generally the concept is defined as measures "designating the option for customs to issue a decision, at the request of the economic operator planning a foreign trade operation, relating to the regulation in force. The main benefit for the holder is the legal guarantee the decision will be applied."[143] The TFA provides a mandatory rule that "each Member shall issue an advance ruling in a reasonable, time-bound manner to the applicant that has submitted a written request containing all necessary information."[144]

Currently, there is no applicable legal rule or procedure that allows advance rulings in any of the international trade administration agencies. However, a draft to Ethiopia's New Draft Customs Proclamation, includes some provisions on advance rulings. These include provisions for advance rulings on tariff classification, applicable duties and taxes, and valuation based on currently applicable valuation norms which apparently are not in line with relevant WTO rules. According to Article 95(1) of the Draft titled 'Advance Rulings': "The importer or his agent may be allowed, at request, to calculate the duty and taxes based on the information provided by the Authority before the goods enter the customs territory". Even if the Draft embodies such a provision, Ethiopia has a long way to go until necessary regulations/directives are introduced which would put the provision to use.

As far as tariff classification is concerned, Ethiopia has implemented the international 8-digit HS code tariff nomenclature; it is also a member to the WCO HS Convention ("The International Convention on the Harmonized Commodity Description and Coding System"). Application of this rule might on the other hand require that Customs officials should be provided with targeted training on implementing and operating advance rulings. Ethiopia may need to develop a database for advance rulings given that it imports almost all of its

[143] See provisions of standard 9.9 of the Revised Kyoto Convention that define the term.
[144] See TFA Article 3.

industrial goods. The Draft has also considered providing for submission of a request for advance ruling through clearing agents. This provision would entail training clearing agents on how to determine value using transaction value, manage Advance Rulings, and maintain a database on Advance Rulings linked to the Customs database for Advance Rulings.

4.4 Procedures for Appeal or Review

The TFA contains rules that mandates WTO Members to provide any person the right to have access to 'an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision; and/or a judicial appeal or review of the decision.'[145] In Ethiopia, according to applicable rules, right of appeal for imports, exports, and transit goods is a nondiscriminatory legal right against the rulings and decisions of Customs and other border agencies. Moreover, companies or traders have a right to be represented at all stages of appeal procedures by an agent or legal representative.

Provisions for traders to raise complaints concerning administrative decisions informally before moving to a formal appeal procedure exist. Yet the procedure seems to be lengthy and ineffective. Most businesses opt to pay rather than appeal in order to avoid incurring additional cost or possibly because the appeal procedures are too onerous. Although considerable steps have been taken to improve the Appeal system, a lot more still needs to be done. Accordingly, Ethiopia may need both human resources and time to introduce necessary changes to ensure compliance should the proposals be incorporated in the Trade Facilitation Agreement under negotiation. In addition, Ethiopia will have to ensure that, with respect to determinations of particular customs values, there is a truly independent administrative review coupled with similarly independent judicial review.

4.5 Release and Clearance of goods

Another important set of proposals in the WTO concerns the release and clearance of goods.[146] The TFA requires Members to maintain pre-arrival processing and special procedures for express shipments.[147] This means

[145] Ibid, Article 4.

[146] TFA Article 7: 1 Pre-arrival Processing, 1.1 Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival., 1.2 Each Member shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.

[147] Ibid.

application and implementation of the provision would practically require Post-Clearance Audit by the relevant customs agencies.

Article 26(1) of Ethiopia's Draft Customs Proclamation allows pre-arrival clearance, and it provides: "The importer or his agent may lodge his declaration with supporting documents prior to the arrival of the goods and may request for a pre-arrival clearance to be issued upon examination of the declaration and supporting documents". Yet this statement in the draft is too generally and needs to be defined clearly in the implementing regulations. For express shipments, Ethiopia should enact and implement the principles contained in the WCO (World Customs Organization) Guidelines for the Immediate Release of Consignments by Customs. The Draft has also attempted to establish a formal system of creating authorized dealers who automatically qualify for accelerated clearance.

4.6 Border Agency Coordination and Single Window

Article 8 of the TFA Agreement requires WTO members to ensure that their 'authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.' To the extent possible it, *inter alia*, requires WTO members to establish a mechanism of one stop border post control.

Ethiopia currently meets some conditions specified in the text of the proposal but falls short on many others. As the current proposal is articulated with several enfeebling conditions ("endeavor," "encourage"), Ethiopia would be considered compliant insofar as its intentions are concerned. The reality on the ground however is more complex. There are some irregular meetings coordinated by Customs with various border agencies. Although Customs, Ministry of Finance and Ministry of Trade cooperate effectively, cooperation between other agencies is not really standardized. The situation is reflective of the overall dispersion of authorities in the area of international trade, where six ministries contribute - without adequate coordination - to the formulation of trade policy and where more than ten statutory bodies can be involved in the importation and exportation processes of the trade facilitation.

As the primary entity responsible for the importation and exportation of goods, ERCA is often held accountable for delays or data issues that lie outside its control. Yet ERCA itself it not progressing with the apt speed and vigor that the nation currently needs. There is also no efficient electronic exchange of information between the ERCA offices in Addis Ababa and the satellite offices at border posts and other regional stations. Ethiopia does not also have a single window for customs facilitation purposes. It thus might need to work further in this regard if it plans to fulfill what could become a WTO trade facilitation agreement.

Generally, while its progress is notable, Ethiopia nonetheless has much work ahead to bring its overall trade facilitation standards in line with the proposals that are under discussion in the WTO. And, it is only partially prepared to abide by the new set of rules under draft by the WTO Negotiating Group. The observations in the preceding paragraphs have shown both achievements and deficiencies and have noted where high level of early preparation may be advisable for bringing about the changes envisioned.

Conclusion

As the preceding section indicate the need for trade policy and other endogenous reform needs, in the area of trade facilitation. I generally argue that efforts toward streamlining economic development, trade and investment policy in Ethiopia with domestic legal and institutional reforms to facilitate trade are the very factors that render the country's pursuit of WTO accession and trade liberalization fruitful. In today's international business environment of global production network and just in time delivery, businesses seek cost-effective, efficient, and predictable facilitation in international trade.

As highlighted in this article, Ethiopia's customs administration is the foremost agency at the border and plays a prominent role in the release of goods. The implications of WTO membership include the development of trade-related institutions such as the laws and regulatory frameworks that govern trade as well as the administrative mechanisms and processes for designing, implementing and evaluating trade and trade-facilitation related policies.[148] One instance in this regard relates to the discussion made with respect to the legal regime on customs valuation of goods in Ethiopia. The current practice of customs valuation in Ethiopia demonstrates that the WTO valuation methods are not fully incorporated in legislative guideline. As they cannot be applied effectively until necessary legislation is prepared and passed, the first key reform measure should involve legislative upkeep. Thus, legal inadequacy in Ethiopia still remains. What is needed is a comprehensive customs regulation with detailed definition of valuation terms, transparent provision of price adjustment, clear guidance to valuation and other similar measures. We can thus expect that customs reform and trade facilitation in Ethiopia will be driven by the Ethiopian government's decision to accelerate its WTO accession application.

[148] Lesser, C. and E. Moisé-Leeman, (2009) "Informal Cross- Border Trade and Trade Facilitation Reform in Sub- Saharan Africa", *OECD Trade Policy Working Papers, No 86, OECD Publishing* <http://dx.doi.org/10.1787/225770164564> (Last accessed April 2014)

Meanwhile, the international movement of goods involves not only the customs administration but also other national economic activities and actors in the area of logistics and transport and national policies, regulations and authorities in the area of transport, health, agriculture, standards and other border agencies. Competition in the maritime transport sector in Ethiopia is indeed crucial for trade facilitation. However, Ethiopia has one of the most restrictive logistics regimes with a complete dominance of the state monopoly with almost no private competition. This has exacerbated other international trade barriers such as access to ports and location. The burden of high maritime transport cost is becoming one of the obstacles for industries in the country to function in a manner that is tuned into modern just in time international trade practice of the 21st century. Therefore, as highlighted in the preceding sections, the benefits of improved performance of transport and logistics services could be enhanced through governmental trade reform measures. Trade facilitation measures, including but not limited to more efficient, well-coordinated border control mechanisms, may promote greater demand for logistics services.

Indeed, the extent and pace of measures taken by governments to liberalize the supply of transport and logistics services and to facilitate trade will determine whether or not a virtuous cycle will be generated and the extent of the benefits that will accrue from that cycle.[149] This envisages a regulatory framework which can balance other domestic industrial policy with the need to foster the liberalization of logistics services.[150] Frequent consultation with all the relevant stakeholders – governmental bodies, suppliers of transport and logistics services, and exporters and importers dependent upon international transport and in particular maritime transport and logistics services – will help to realize the benefits of economic and policy reform in the area. With a clear understanding of such ground-level needs, the government can use Ethiopia's currently ongoing negotiation efforts to WTO accession as a tool of institutionalizing its reform objectives. ■

[149] Institute for International Trade, University of Adelaide, *supra* note 69.
[150] Ibid.

የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ

አስቻለው አሻግሬ*

አህጽሮተ-ጽሑፍ

በማንኛውም ዘመናዊ የታክስ ሥርዓት ውስጥ በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዮች መካከል ልዩ ልዩ አለመግባባቶች እንደሚከሰቱ እሙን ነው። ስለሆነም ማንኛውም የታክስ ሥርዓት እነዚህ አለመግባባቶች የሚፈቱባቸው ሕጋዊና ተቋማዊ ማዕቀፎችን መዘርጋትና ሥራቸውን በትክክል እንዲሠሩ ማድረግ ይጠበቅበታል። በእኛ ሀገርም ዘመናዊ የታክስ ሕጎች ከታወጁበት ጊዜ ጀምሮ እስካሁን ድረስ በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዮች መካከል የሚነሱ አለመግባባቶች የሚስተናገዱባቸው የሕግና የተቋማት ማዕቀፎች ተዘርግተዋል። የዚህ አጭር ጽሑፍ ዋና ዓላማ አሁን በኢትዮጵያ ተግባራዊ የተደረጉት የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓቶች የታክስ ከፋዩን ቅሬታዎች አስተማማኝና ሚዛናዊ በሆነ መልኩ በማስተናገድ፣ የታክስ ከፋዩን የመሰማትና ፍትሕ የማግኘት መብት በተሟላ መልኩ ለማረጋገጥ የሚያስችሉ መሆን አለመሆናቸውን መመርመር ነው። ይህ ጸሐፊ በዚህ የምርምር ሥራ እንደተገነዘበው በኢትዮጵያ ውስጥ የተዘረጉት የታክስ ከፋዮች ቅሬታ የሚፈቱባቸው ሥርዓቶች ለታክስ አስገቢው ባለሥልጣን ጥቅም ያደሉ በመሆናቸው የታክስ ከፋዩን ቅሬታዎች ፍትሐዊ በሆነ መልኩ በማስተናገድ የታክስ ከፋዩን ፍትሕ የማግኘት መብት በአስተማማኝ ሁኔታ የሚያረጋግጡ አይደሉም። በመሆኑም እንደዚህ ዐሐፊ አመለካከት የታክስ ከፋዩን የመሰማትና ፍትሕ የማግኘት የማይገሰስ መብት ትርጉም ባለው ሁኔታ ለማረጋገጥ ሚዛናዊ የሆነ የታክስ ቅሬታ አፈታት ሥርዓት መዘርጋት አስፈላጊ ስለሆነ አሁን ያለውን የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት እንደገና መፈተሸና ማሻሻል ያስፈልጋል።

ቁልፍ ቃላት

ታክስ፣ ግብር፣ ታክስ ከፋይ፣ የታክስ ከፋይ ቅሬታ፣ የታክስ ከፋይ ቅሬታ አፈታት፣ አጣሪ ኮሚቴ፣ የግብር ይግባኝ ጉባኤ፣ ይግባኝ፣ የሕግ ስህተት፣ የማስረዳት ሸክም።

DOI http://dx.doi.org/10.4314/mlr.v8i1.6

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የዚህ ጽሑፍ አዘጋጅ ቃለመጠየቅ ላደረገላቸውና እጅግ ጠቃሚ ሓሳቦችን ለሰጡት ለአቶ ጌታቸው ታደሰ፣ ለአቶ ዳዊት ተሾመና ለዶ/ር ታደሰ ሌንጮ ከፍ ያለ ምስጋና ያቀርባል። እንደዚሁም ደግሞ ይህ ጸሐፊ የዚህን ጽሑፍ ረቂቅ በማንበብ በጣም ጠቃሚና ገንቢ አስተያየቶችን የሰጡትን ስማቸው ያልተገለጸ የውስጥና የውጭ ገምጋሚዎች (anonymous internal and external assessors) ከልብ ያመሰግናቸዋል። ሆኖም ግን በዚህ ጽሑፍ ውስጥ አንዳች ስህተት ቢገኝበት ኃላፊነቱ የጸሐፊው ብቻ ነው። በጽሑፉ ላይ አስተያየት ወይም ትችት ቢቀርብበት ጸሐፊው ደስተኛ እንደሚሆን እየገለጸ፣ ለማንኛውም ግንኙነት የጸሐፊው የኢ-ሜይል አድራሻ gakidan.ashagre335@gmail.com ነው።

Tax Appeal Procedures in Ethiopia: Summary

No matter how good a tax system might be, disputes between the Tax Authority and the taxpayers are unavoidable, and this necessitates putting in place legal and institutional frameworks that regulate such disputes and give adequate remedies to aggrieved taxpayers. Since the 1940s, Ethiopia's tax laws embodied provisions on tax appeal procedures with a view to providing for the right of taxpayers to be heard. The same is true with the current tax laws of the country. The current tax appeal procedures include the *Review Committee* under the auspices of the Tax Authority. However, the accountability of this organ to the Tax Authority renders its neutrality and impartiality questionable. Moreover, the powers accorded to this organ are confined to tax assessment issues. Another challenge encountered by a taxpayer in the course of using this forum is the requirement to lodge complaints against a contested tax assessment within ten days from the reception of notice of assessment. This seems to be very short.

The second institution which receives complaints from taxpayers is the *Tax Appeal Commission* which is, at the federal level, accountable to the Ministry of Justice. However, lodging an appeal to this institution involves two requirements, namely, depositing or paying half of the disputed amount stated in the tax assessment notification, and filing the appeal within thirty days from the decision of the Review Committee or the date of reception of tax assessment made by the tax authority. It can be difficult for taxpayers to deposit half of the disputed amount in cash particularly when the tax assessment is made with bad intentions, such as unmet corruption expectations, on the part of a tax assessor.

Even if aggrieved taxpayers are able to take their cases to the Tax Appeal Commission, it may not guarantee fair and impartial treatment for the following reasons. First, although the Tax Appeal Commission seems to have an independent structure, it is directly accountable to the Ministry of Justice which may affect its independence and impartiality as its members are selected and appointed by the Minister. Secondly, some members of the Commission come from the Ethiopian Revenue and Customs Authority and Ministry of Finance and Economic Development which are sources of (or affiliated to) the tax assessments against which the appeal is lodged. In effect, these two organs of the government become judges on their own cases thereby adversely affecting the right of aggrieved taxpayers to an impartial decision.

In Ethiopia, taxpayers aggrieved by the decision of the Tax Appeal Tribunal can take their case to the competent appellate court on questions of law only. The gaps and ambiguities in the distinction between *questions of law* and *questions of fact*, however, necessitate guidelines that can positively contribute toward restricting the discretionary power of regular courts in rejecting appeals by misinterpreting questions of law as questions of fact.

መግቢያ

መንግሥት የተለያዩ ተግባራትን ለማከናወን ገቢ እንደሚያስፈልገው እሙን ነው። የማንኛውም መንግሥት ገቢ ምንጭ ደግሞ ታክስና[1] ታክስ-ነክ ያልሆኑ የገቢ ምንጮች ናቸው። የየትኛውም ሀገር መንግሥት ከፍተኛው ገቢውን የሚያገኘው ታክስ በመጣልና በመሰብሰብ ነው። ስለሆነም ማንኛውም መንግሥት ታክስ የመጣል እና የመሰብሰብ ሥልጣን አለው። መንግሥት ይህንን መብት የሚያገኘው ከታክስ ከፋዮች ጋር በሚያደርገው ስምምነት ሳይሆን መንግሥት በመሆኑ ብቻ ነው። ስለሆነም ማንኛውም ሰው ወይም ድርጅት ለመንግሥት ታክስ ለመክፈል የሚገደደው ለሚከፍለው ታክስ ተመጣጣኝ የሆነ አገልግሎት ከመንግሥት ወዲያውኑ ወይም ዘግይቶም ቢሆን ስለሚያገኝ ብቻ ሳይሆን፣ ይልቁንም ታክስ መክፈል የማይገዳደሩት ግደታ ስለሆነ ነው።[2] ይሁን እንጂ ታክስ የመክፈል ኃላፊነት ሰፊውን የማኅበረሰብ ክፍል የሚነካ ሕጋዊ ግዴታ እንደመሆኑ መጠን የታክስ ሥርዓቱ መልካም የታክስ ሥርዓቶች መግለጫ ባህሪያትን ሊያካትት ግድ ይለዋል።[3] ሆኖም ግን አንድ የታክስ ሥርዓት የቱንም ያህል መልካም የታክስ ሥርዓት መገለጫዎችን በማካተት የተዋቀረ ቢሆን፣ ታክስ አስገቢው ባለሥልጣን ታክሱን በሚያስተዳድርበት ወቅት በታክስ ከፋዮች ላይ የተለያዩ ቅሬታዎችን መፍጠሩ የማይቀር ነው።[4] እንኳንስ እንደ ኢትዮጵያ ባሉ የተሟላና ዘመናዊ የታክስ ሥርዓት ባልተዘረጋባቸው ሀገራት ቀርቶ የታክስ ሥርዓታቸው እጅግ ዘመናዊ ሆኗል በሚባሉት ሀገሮችም እንኳ የታክስ ከፋዮች ቅሬታ የሚስተዋል ክስተት ነው።

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[1] በእኛ ሀገር 'ግብር' የሚለው ቃል እጅግ የተለመደ ቢሆንም ግብርንና ታክስን በተለዋዋጭነት መጠቀምም የተለመደ አነጋገር ሆኗል። እንደሚታወቀው ታክስ የሚለው ቃል የእንግሊዝኛ ቃል ቢሆንም በአሁኑ ጊዜ ግን በሀገራችንም ውስጥ ልክ እንደማንኛውም የአማርኛ ቃል አገልግሎት በመስጠት ላይ ይገኛል። ልብ ማለት የሚያስፈልገው ግን ታክስ የሚለው ቃል ማንኛውንም ቀጥተኛም ሆነ ቀጥተኛ ያልሆነ ታክስ የሚያካትት ሲሆን፤ ግብር የሚለው ቃል ግን እንደ ገቢ ግብር ያሉትን ቀጥተኛ የታክስ ዓይነቶች ብቻ የሚሸፍን መሆኑን ነው። ለምሳሌ ያህል *ብላክስ ሎው* በመባል የሚታወቀው የሕግ መዝገበ-ቃላት ታክስ የሚለውን ቃል "a monetary charge imposed by government on persons, entities, transactions or property to yield public revenue…..most broadly, the term embraces all governmental impositions on persons, property, privileges, occupations, and enjoyments of the people and includes duties, imposts and excises," በማለት ይተረጉመዋል፤ Bryan A. Garner(ed.), *Black's Law Dictionary*, 8th ed., 2004, ገጽ 1496 ላይ ይመልከቱ። በአዲስ አበባ ዩኒቨርሲቲ የቋንቋዎች ጥናት ተቋም የተዘጋጀው የአማርኛ መዝገበ ቃላት *ግብር* የሚለውን ቃል *ገቢ ያለው ዜጋ ሁሉ በተወሰነ ጊዜ እንደገቢው መጠን ለመንግሥት የሚከፍለው የተወሰነ ገንዘብ* ነው በማለት *ይፈታዋል። የአማርኛ መዝገበ ቃላት*፣ የኢትዮጵያ ቋንቋዎች ጥናትና ምርምር ማዕከል፤ አዲስ አበባ ዩኒቨርሲቲ ማተሚያ ቤት፣ በ2001 ዓ.ም ተሻሽሎ የታተመ፣ ገጽ 499 ይመልከቱ። በመሆኑም ይህ ጸሐፊ በዚህ ጽሑፍ ውስጥ የሚጠቀመው ታክስ የሚለውን ቃል ሲሆን፣ ግብር የሚለውን ቃል የተጠቀመው አስፈላጊ በሆነበት ሥፍራ ብቻ ነው። ታክስና ግብር የሚሉት ቃላት በተለዋዋጭነት የማያገለግሉ በመሆኑ፣ ግብር የሚለው ቃል በዚህ ጽሑፍ ውስጥ ያለቦታው ገብቶ ቢገኝ ታክስ የሚለውንም ቃል ወክሎ የገባ እንደሆነ አንባቢዎች እንዲገነዘቡለት ጸሀፊው ከወዲሁ በአክብሮት ያሳስባል።

[2] HL Bhatia, *Public Finance*, 24th ed., 2005, ገጽ 37።

[3] ዝኒ ከማሁ፣ ገጽ 43።

[4] ዋና ዋና የሚባሉት የታክስ ከፋይ ቅሬታዎች ከተቀናሽ፣ ከወለድ፣ ከቅጣት፣ ከሂሳብ መዝገብ አያያዝ፣ ከሽያጭ መሣሪያ አጠቃቀም፣ ከተጨማሪ እሴት ታክስ ተመላሽ ክፍያዎች፣ ከጉምሩክ ቀረጥና ከመሰል ጉዳዮች ጋር ተያይዘው የሚነሱ ቅሬታዎች ናቸው።

በመሆኑም ማንኛውም የታክስ ሥርዓት የታክስ ክፋዮች ቅሬታዎች የሚስተናገዱበትን ሥርዓት መዘርጋት ይኖርበታል።[5] ምክንያቱም በታክስ አስገቢው ባለሥልጣንና በታክስ ክፋዮች መካከል የሚነሱ አለመግባባቶችና ግጭቶች በእነዚህ ሁለት አካላት መካከል ያለውንና ወደፊትም የሚኖረውን ግንኙነት ማበላሸታቸው አይቀርም። የእነዚህ ሁለት አካላት ግንኙነት መበላሸት ደግሞ በመካከላቸው ሊኖር የሚገባውን የመደጋገፍ፣ አብሮ የመሥራት ስሜትና ለአንድ ሀገራዊ ግብ የመሰለፍ ዝንባሌ በጣም ይጐዳዋል።[6] እንዲህ ያለው ሁኔታ በሀገር ላይ ከፍተኛ ጉዳት ማምጣቱም አይቀርም።[7] በመሆኑም በእነዚህ ሁለት አካላት መካከል የሚነሱ አለመግባባቶች ወይም ግጭቶች በአንድም ሆነ በሌላ መልኩ በሠለጠነ መንገድ መፈታት ይኖርባቸዋል። ይህንን ዓላማ እውን ለማድረግ የሕግና የተቋማት ማዕቀፍ በአግባቡ ሥራ ላይ መዋል አስፈላጊ በመሆኑ ሁሉም የዓለማችን ሀገሮች የታክስ ክፋዮች ቅሬታዎች የሚስተናገዱባቸውን ልዩ ልዩ ዘዴዎች ቀይሰው ሥራ ላይ አውለዋል።[8] የታክስ ክፋዮች ቅሬታዎች የሚፈቱባቸው (የሚስተናገዱባቸው) ሥርዓቶች ከሀገር ሀገር የተለያዩ ስያሜዎችና አደረጃጀቶች ቢኖሯቸውም በአጠቃላይ ግን እነዚህ ቅሬታዎች በአስተዳደራዊ ፍርድ ቤቶች (administrative tribunals)፣ በመደበኛ ፍ/ቤቶች ወይም በአማራጭ አለመግባባት መፍቻ ዘዴዎች[9] (alternative dispute resolution methods) የሚፈቱ ናቸው።

ሀገራችን ኢትዮጵያ ዘመናዊ የታክስ ሕጎች በማውጣትና ተግባራዊ ማድረግ የጀመረችው ከ1933 ዓ.ም በኋላ ነው። ከዚያ ጊዜ ጀምሮ የታክስ ክፋዮች ቅሬታዎች የሚስተናገዱባቸው የሕግና የተቋማት ማዕቀፎችና አሠራሮች ሥራ ላይ እንደዋሉ የሀገሪቱን የታክስ ሕግ ታሪክ በመመርመር የምንገነዘበው ነው።[10] የኢ.ፌ.ዲ.ሪ. ሕገ-መንግሥት ተግባራዊ መሆን ከጀመረ ወዲህ ኢትዮጵያ ከወሰደቻቸው ዋና ዋና ርምጃዎች

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[5] የታክስ ክፋዮች ቅሬታዎች የሚስተናገዱበት ሥርዓት ካልተዘረጋ የታክስ ክፋዮችን የመሰማት መብት ለማረጋገጥ የሚቻል አይሆንም።

[6] Misganaw Gashaw, 'The Room for Alternative Dispute Resolution (ADR) Process in Tax Disputes: A Message to the Ethiopian Tax Administrations,' in Yazachew Belew (ed.), The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication? *Ethiopian Business Law Series*, Vol.5, ገጽ 25።

[7] ዝኒ ከማሁ።

[8] ይህንን ጉዳይ አስመልክቶ የሚከተለውን የምርምር ሥራ ይመልከቱ፣ Victor Thuronyi, How Can an Excessive Volume of Tax Disputes Be Dealt With? December 2013, available at <www.imf.org/external/np/leg/tlaw/2013/eng/tdisputes.pdf>, accessed on September 30, 2014.

[9] Misganaw Gashaw፣ ከላይ በማስታወሻ ቁጥር 6 የተጠቀሰ፣ ገጽ 28። አቶ ምስጋናው ጋሻው በግልጽ እንዳቀረበው አማራጭ የአለመግባባት ዘዴዎች የታክስ ክፋዮች ቅሬታዎችን ለመፍታት በሀገረ እንግሊዝ፣ በአሜሪካ፣ በአውስትራሊያ፣ በቻይና፣በህንድ በብራዚል፣ በኔዘርላንድስ፣ በፓኪስታን፣ በደቡብ አፍሪካ፣ በግሪክ እና በመሳሰሉት ሀገሮች ተግባራዊ ይደረጋሉ።እንደዚሁም ደግሞ የሚከተለውን የምርምር ጽሁፍ መመልከቱ ጠቃሚ ነው፡- Melinda Jone and Andrew J Maples (2012), 'Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures', *Australian Tax Forum*, 27 ፣ available at <www.delta search.com/?q=melinda+jone+and+Andrew+J+Maples%2c+Mediation+AS+Alternative +Dispute+option+in Australia's Tax Dispute+R, pdf>, accessed on June 26,2013..

[10] ስለሀራችንን የታክስ ሕጎች፡- Taddese Lencho, "Towards Legislative History of Modern Taxes in Ethiopia (1941-2008)," *Journal of Ethiopian Law*, 25, No.2, 2012, ከገጽ 104-158 ያለውን ይመልከቱ።

አንዱ የታክስ ሥርዓቱን ማሻሻል ነው።[11] የታክስ ማሻሻያ ፕሮግራሙ መሠረታዊ የሆኑ ግቦችን ታሳቢ በማድረግ የተጀመረ ሲሆን ዋና ዋናዎቹ መሠረታዊ ግቦችም ለመንግሥት ገቢ ማስገኘት፣ የኢኮኖሚ ዕድገትና ልማትን ማረጋገጥ፣ ፍትሐዊ የሆነ የሀብት ክፍፍል ማረጋገጥና የታክስ ሥርዓቱን ማዘመን ናቸው።[12] በዚህም መሠረት እንደ ኢትዮጵያ ዘመን አቆጣጠር በ1980ዎቹ መጨረሻ አካባቢ የተጀመረው የታክስ ሥርዓት ማሻሻያ እርምጃ የተጠናቀቀው ዘመናዊነት የሚታይባቸው የተለያዩ የታክስ ሕጎችን በማውጣት ነው። ከእነዚህም ሕጎች ዋና ዋናዎቹ የገቢ ግብር ሕግ (እንደተሻሻለ)፣ የተጨማሪ እሴት ታክስ ሕግ (እንደተሻሻለ)፣ የተርን ኦቨር ታክስ ሕግ (እንደተሻሻለ)፣ የቴምብር ቀረጥ ሕግ (እንደተሻሻለ)፣ የጉምሩክ ቀረጥ ሕግ፣ የኤክሳይዝ ታክስ ሕግ እና የመሳሰሉት ናቸው።[13] እነዚህን አዋጆች ስንመረምራቸው ታክስ ከፋዮች ቅሬታዎች የሚስተናገዱባቸውን ሥርዓቶች የዘረጉ መሆናቸውን እንገነዘባለን።

የዚህ ጥናታዊ ጽሑፍ ዓላማ በእነዚህ ሕጎች ውስጥ ታክስ ከፋዮች ቅሬታዎች የሚያቀርቡባቸውን፣ የሚስተናገዱባቸውንና እልባት የሚያገኙባቸውን ሥርዓቶች መፈተሽና መተንተን ነው። በሌላ አነጋገር ይህ ጽሑፍ ዓላማ አድርጎ የተነሳው ታክስ ከፋዮች በታክስ አስገቢው ባለሥልጣን ውሳኔ ቅር በተሰኙ ጊዜ ቅሬታቸውን ለአጣሪ ኮሚቴ፣ ለታክስ ይግባኝ ሰሚ ጉባዔ አልያም ደግም ለመደበኛው ፍ/ቤት (በይግባኝና በሰበር ደረጃ) ለማቅረብና ለማሰማት ፍትሐዊነት የሚታይበት አካሄድ የተዘረጋላቸው መሆን አለመሆኑን ለመፈተሽ ነው። ይህንንም በማድረግ የዚህ ጽሑፍ አዘጋጅ መፍትሔ የሚያሻቸውን ዋና ዋና የሕግና የአተገባበር ችግሮችን ለመጠቆም ሙከራ አድርጓል። የዚህን ጽሑፍ ዓላማ እውን ለማድረግና ተጨባጭ ጠቀሜታ የሚኖረው ጥናታዊ ጽሑፍ ለማዘጋጀት መሠታዊ የሕግ ምርምር ዘዴዎች (legal research methods) ተግባራዊ ተደርገዋል። እነዚህ ዘዴዎችም አግባብነት ያላቸውን ጽሁፎች መዳሰስ (literature review)፣ ሕግንና ውሳኔዎችን የመተንተን ዘዴ (legal and case analysis)፣ ቃለ-መጠይቆችና ተያያዥ የምርምር ዘዴዎች ናቸው።

የዚህ ጽሑፍ መነሻና መድረሻ (scope of the research work) የተወሰነው የተመረጠውን ርእስ መሠረት በማድረግ ነው። በመሆኑም ለዚህ ርዕስ ተገቢውን ሽፋን ለመስጠት በፌደራል መንግሥት ሥራ ላይ የዋሉት ዋና ዋና የታክስ ሕጎች ተዳስሰዋል። ሆኖም ግን የታክስ ይግባኝ ጉዳይን በተመለከተ በሕጎቹ መካከል ከፍተኛ መመሳሰል ስለሚስተዋል በጽሑፉ ውስጥ አላስፈላጊ ድግግሞሽ እንዳይኖር ለማድረግ የማጣቀስ ዘዴ (cross-reference) ተግባራዊ ተደርጓል። ምንም እንኳን የጽሑፉ ርዕስ በአጠቃላይ ስለኢትዮጵያ የታክስ ቅሬታ አፈታት ሥርዓት የሚናገር ቢሆንም ጸሀፊው የምርምር ሥራውን በሠራበት ጊዜ የክልሎችን አሠራር ለመፈተሽ ሙከራ አላደረገም። ይሁን እንጂ የክልል የታክስ ሕጎች ከፌደራል መንግሥት የታክስ ሕጎች ጋር እጅግ ተመሳሳይ በመሆናቸው ይግባኝን አስመልክቶ በፌደራል መንግሥት የታክስ ሕጎች ላይ የሚደረግ ትንተና የክልሎቹንም ሕጎች ለመረዳት ያስችላል።

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[11] Alemayehu Geda, Readings on the Ethiopian Economy, 2011, Addis Ababa University Press, ከገጽ188-204::

[12] Taddese Lencho, '*Articulating Ethiopia's Current Tax Polciy: Sources and Fundamental Objectives*,' in Taddese Lencho and Kyle Logue (eds.), Ethiopian Tax System: Some Contemporaray Issues and Problems, Ethiopian Business Law Series, Vol.VI, 2014, ከገጽ 1-26 ያለውን ይመልከቱ።

[13] እነዚህን አዋጆች ወደፊት ስለምንጠቅሳቸው እዚህ ላይ ሙሉ ስማቸውንና የወጡበትንም ዓመተ-ምህረት መጥቀስ አላስፈለገም።

ይህ ጽሑፍ በሚከተለው አኳኋን ተዋቅሯል፡፡ በጽሑፉ የመጀመሪያ ክፍል የታክስ አስገቢውን ባለሥልጣን ሥልጣናትና ኃላፊነቶች፣ የታክስ ክፋዮች ዋና ዋና መብቶችና ግዴታዎች እንዲሁም በታክስ አስገቢው ባለሥልጣንና በታክስ ክፋዮች መካከል የሚነሱ ግጭቶች መነሻ ምክንያቶች በአጭሩ ተዳሰዋል፡፡ በሁለተኛው ክፍል የታክስ ክፋዮች ቅሬታ አፈታት ሥርዓት ታሪካዊ ዳራ ከተገለፀ በኋላ፣ በሦስተኛው የጽሑፉ ክፍል ታክስ ክፋዮች ለግብር አጣሪ ኮሚቴ፣ ለግብር ይግባኝ ሰሚው ጉባኤ እና ለመደበኛው ፍርድ ቤት ቅሬታቸውን በማቅረብ መፍትሔ የሚያገኙባቸው ሥነ-ሥርዓቶችና አሠራሮች ተፈትሸዋል፡፡ በመጨረሻም በምርምር ጽሑፉ የተገኙት ችግሮችና ማጠቃለያ ሓሳቦች ቀርበዋል፡፡

1. ስለታክስ አስገቢው ባለሥልጣን እና ስለታክስ ክፋዮች ጥቂት ነጥቦች

1.1 የታክስ አስገቢው ባለሥልጣን ሥልጣናትና ኃላፊነቶች

ቀደም ሲል እንደተገለጸው ከፍተኛውን የመንግሥት ገቢ ድርሻ የሚይዘው ከታክስ የሚገኘው ገቢ እንደመሆኑ፣ መንግሥት ይህንን ገቢ አስተማማኝ በሆነ መልኩ ለማግኘት ታክስን በሕግ መሠረት ለመሰብሰብና ለማስተዳደር ብቃት ያለው የመንግሥት ተቋም (የታክስ አስገቢ ባለሥልጣን) ማቋቋም ያስፈልገዋል፡፡ በሀገራችን ዘመናዊ የታክስ ሥርዓት ሥር መስደድ የጀመረው የጣሊያን ወረራ ከተቀለበሰበት ከ1933 ዓ.ም ወዲህ ስለሆነ ከዚያ ጊዜ ጀምሮ ታክስ አስገቢው ባለሥልጣን ሥራውን ሲያከናውን እንደቆየ የሀገሪቱ የታክስ ሥርዓት ታሪክ ያስገነዝበናል፡፡[14]

በአሁኑ ጊዜ በኢትዮጵያ በፌዴራል መንግሥትም ሆነ በክልል ደረጃ ታክስን የሚያስተዳድሩ የመንግሥት መ/ቤቶች ተቋቁመው ታክስ የማስተዳደሩን ሥራ በማከናወን ላይ ይገኛሉ፡፡ ቀደም ሲል በፌዴራል መንግሥት ደረጃ የነበሩት ተቋማት የፌደራል የአገር ውስጥ ገቢ[15]፣ የፌደራል መንግሥት ገቢዎች ቦርድ፣[16] የገቢዎች ሚኒስቴር[17] እና የጉምሩክ ባለሥልጣን[18] ቢሆኑም ከ2000 ዓ.ም ጀምሮ ደግሞ የኢትዮጵያ ገቢዎችና

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[14] Melkamu Belachew (2003), *Powers and Functions of the Federal Inland Revenue Authority and the Position of the Tax Appeal Commission,* Senior Thesis, unpublished,Faculty of Law, Addis Ababa University ,ገጽ 32:: ቀደም ሲል የነበረው የታክስ አስገቢው ባለሥልጣን የተለያዩ ስያሜዎች እንደነበሩት በየጊዜው የታወጁት ሕጐች ያስረዳሉ፡፡ እነዚህም ስያሜዎች የገቢ ግብር መምሪያ፣ የአገር ውስጥ ገቢ አስተዳደር፣ የአገር ውስጥ ገቢ ባለሥልጣን እና የመሳሰሉት ነበሩ፡፡

[15] የፌዴራል የአገር ውስጥ ገቢ ባለሥልጣን ማቋቋሚያ አዋጅ፣ አዋጅ ቁጥር 61/1989፣ ፌዴራል ነጋሪት ጋዜጣ፣3ኛ ዓመት፣ቁጥር 1፣ እንደዚሁም ደግሞ የፌዴራል አገር ውስጥ ገቢ ባለሥልጣን እንደገና ለማቋቋም የወጣውን አዋጅ፣ አዋጅ ቁጥር 367/95 ይመልከቱ፡፡

[16] የፌዴራል መንግሥት ገቢዎች ቦርድ ማቋቋሚያ አዋጅ፣ አዋጅ ቁጥር 5/1987፣ፌዴራል ነጋሪት ጋዜጣ፣ 1ኛ ዓመት፣ ቁጥር 5፡፡

[17] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ አስፈጻሚ አካላትን ሥልጣንና ተግባር ለመወሰን የወጣ አዋጅ (እንደተሻሻለ)፣ አዋጅ ቁጥር 471/1998፣ ፌዴራል ነጋሪት ጋዜጣ፣ 12ኛ ዓመት፣ ቁጥር 1፣ አንቀጽ 9(8) እና አንቀጽ 20ን ይመልከቱ፡፡

[18] የጉምሩክ ባለሥልጣንን እንደገና ለማቋቋሚያና አሠራሩን ለመወሰን የወጣ አዋጅ፣ አዋጅ ቁጥር 60/1989፣ ፌዴራል ነጋሪት ጋዜጣ፣ 3ኛ ዓመት፣ ቁጥር 18ን ይመልከቱ፡፡

ጉምሩክ ባለሥልጣን በአዋጅ ተቋቁሟል።[19] ይህ መ/ቤት የተቋቋመው የፌደራል አገር ውስጥ ገቢ ባላሥልጣን፣ የጉምሩክ ባለስልጣንና የገቢዎች ሚኒስቴር በአንድ ላይ ተዋህደው ነው።[20] ይህም የተደረገበት ምክንያት እነዚህ ሦስቱ ተቋማት በተመሳሳይ ዓላማ ላይ ያተኮሩ በመሆናቸውና ተመሳሳይ የሀብት አጠቃቀምና የአደረጃጀት ስልት የሚከተሉ በመሆናቸው የሦስቱ ተቋማት መዋሃድ ዘመናዊ የታክስና የጉምሩክ አስተዳደር ሥርዓትን ለመዘርጋት፣ የሀብት አጠቃቀምንና የአገልግሎት አሰጣጥ ሥርዓቱን ቀልጣፋና ውጤታማ ለማድረግ ታስቦ ነው።[21] እንደዚሁም ደግሞ ከጥር 1 ቀን 2003 ዓ.ም ጊዜ ጀምሮ የአዲስ አበባ አስተዳደር ገቢዎች ቢሮ እና የፌደራል መንግሥት ገቢዎችና ጉምሩክ ባለሥልጣን ሥራቸውን በአንድ ማእከል በማከናወን ላይ ይገኛሉ።[22]

አሁን በፌደራል ደረጃ በሥራ ላይ ያለው የታክስ ባለሥልጣን በማቋቋሚያ አዋጁ የተመለከቱት የላቁ ዓላማዎች ግባቸውን ይመቱ ዘንድ ተገቢውን ሥራ መሥራት ይጠበቅበታል። ለዚህም ይረዳው ዘንድ ማቋቋሚያ አዋጁ ዘርዘር ያሉ ሥልጣናትን የሰጠው ሲሆን ቁልፍ የሆኑ ኃላፊነቶችም አብረው እንደተጣሉበት አዋጁ ያስገነዝባል። እነዚህም የባለሥልጣኑ ሥልጣናትና ተግባራት በማቋቋሚያ አዋጁ አንቀጽ 6 ሥር ተዘርዝረዋል።

ከዚህም በተጨማሪ ቀደም ሲል ለገቢዎች ሚኒስቴር፣ ለጉምሩክ ባለሥልጣንና ለፌዴራል አገር ውስጥ ገቢ ባለሥልጣን ተሰጥተው የነበሩ ሥልጣናትና ኃላፊነቶች ለባለሥልጣን መ/ቤቱ እንደተላለፉ ማቋቋሚያ አዋጁ ያስገነዝበናል። በዚህም መሠረት ቀደም ሲል የገቢዎች ሚኒስቴር፣ የጉምሩክ ባለሥልጣንና የአገር ውስጥ ገቢ ባለሥልጣን ይሠሩባቸው የነበሩትን ሥልጣናት የአሁኑ መ/ቤት ይሠራባቸዋል፤ ይህ የፌደራል መንግሥት መሥሪያ ቤት የቀድሞዎቹን ተቋማት ኃላፊነቶች መወጣት ግዴታ አለበት ማለት ነው።[23] የገቢዎችና ጉምሩክ ባለስልጣን ሥልጣናት ሕግ የማውጣት የውክልና ሥልጣን ያለው ስለሆነ ልዩ ልዩ መመሪያዎችን በማውጣት ሥራ ላይ ያውላል።[24]

1.2 የታክስ ከፋዮች ዋና ዋና መብቶችና ግዴታዎች

መንግሥት ታክስ የመጣልና የመሰብሰብ ሥልጣኑን ሊሠራበት የሚገባው የሕግ የበላይነትንና የታክስ ከፋዮችን ዋና ዋና መብቶች ያለማወላወል በማክበር ነው።[25] ለምሳሌ

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[19] የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣንን ለማቋቋም የወጣ አዋጅ፣ አዋጅ ቁጥር 587/2000፣ ፌዴራል ነጋሪት ጋዜጣ፣ 14ኛ ዓመት፣ ቁጥር 44።

[20] ዝኒ ከማሁ፣ የዚህን አዋጅ መግቢያ ይመልከቱ።

[21] ዝኒ ከማሁ።

[22] በኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን እና በአዲስ አበባ ከተማ አስተዳደር ገቢዎች ቢሮ መካከል በተደረገው ስምምነት መሠረት ከአዲስ አበባ ገቢዎች ቢሮ የመጡ ሠራተኞች ድልደላ መመሪያ፣ መመሪያ ቁጥር 48/2003፣ ያልታተመ።

[23] ዝኒ ከማሁ፣ አንቀጽ 22ን ይመልከቱ።

[24] ምክንያቱም አሁን በሀገራችን ባለው የፖለቲካ ሥርዓት አጠቃላይ የታክስ መርሆች የተቀመጡት በ1987 ዓ.ም ተግባራዊ በተደረገው የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት ሲሆን ዝርዝር ጉዳዮችን የያዙ የታክስ አዋጆች በሕዝብ ተወካዮች ም/ቤት፣ አዋጆቹን ለማስፈፀም የሚጠቅሙ ደንቦች ደግሞ በሚኒስትሮች ም/ቤት ወጥተው በማገልገል ላይ ናቸው። በዚህ ረገድ የገቢ ግብር ድንብ፣ ደንብ ቁጥር 78/1994፣ ፌደራል ነጋሪት ጋዜጣ፣ 8ኛ ዓመት፣ ቁጥር 37 እና የተጨማሪ እሴት ታክስ ደንብ፣ ደንብ ቁጥር 79/1994፣ ፌደራል ነጋሪት ጋዜጣ፣ 9ኛ ዓመት፣ ቁጥር 19 ተጠቃሾች ናቸው።

[25] Satish C. Wadhawan and Clive Gray, Enhancing Transparency in Tax Administration: A Survey of African Economic Policy, Discussion Paper Number 3 July 1998, available at <www.Frp.2.org/…/Tax%20Administration/Enhncing%20Transparancey%,pdf\>, accessed on June 29 2013.

ያህል የታክስ አስገቢው ባለሥልጣን ግብር ከፋዩን በትህትናና በአክብሮት መያዝና መቀበል ይጠበቅበታል፡፡ ምክንያቱም ታክስ ከፋዩ ሕገ-መንግሥታዊ ዋስትና ያገኘ የራሱ መብትና ክብር ያለው ሲሆን፣ ይህም መብት መሠረታዊ ሰብአዊ መብት ነው፡፡[26] ከዚህም በተጨማሪ የታክስ አስገቢው ባለሥልጣን የታክስ ከፋዮችን በሕግ ፊት እኩል ሆኖ የመታየት መብታቸውን ማክበር ይኖርበታል፡፡[27] በመሆኑም የታክስ አስገቢው ባለሥልጣን አዋጆችን፣ ደንቦችንና መመሪያዎችን የጉዳዩ ፍሬ ነገር በሚመራው መሠረት ሥራ ላይ ማዋል ይኖርበታል እንጂ አድልኦ ማድረግ አይገባውም፡፡ ይህንንም የታክስ ከፋዩን መብት እውን ለማድረግ እያንዳንዱ የታክስ አስገቢው ባለሥልጣን ሠራተኛ ለዘመዶቹ ወይም ለወዳጆቹ ልዩ ጥቅም መስጠት የለበትም፤ በሌላው ታክስ ከፋይ ላይም ያልተገባ በደልና አድልኦ መፈጸም አይኖርበትም፡፡[28]

በሦስተኛ ደረጃ ማንኛውም ታክስ ከፋይ የግል ሕይወት ምስጢራዊነት ጥበቃ መብት ያለው[29] በመሆኑ የታክስ አስገቢው ባለሥልጣን ታክስ ሲጥልና ሲሰበስብ ከታክስ ከፋዩ የሚያገኘውን መረጃ ለሌሎች ሦስተኛ ወገኖች ከመግለጽ መቆጠብ አለበት፡፡[30] በአራተኛ ደረጃ ማንኛውም ታክስ ከፋይ ሀብት የማፍራትና በሀብቱም የመጠቀም ሕገ-መንግሥታዊ መብት ያለው በመሆኑ[31] ታክስ አስገቢው ባለሥልጣን በታክስ ከፋዩ ላይ የሕገ-መንግሥትና የሌሎች ተዋረድ ሕጎች መሠረት የሌለው ታክስ በመጣልና በመሰብሰብ የታክስ ከፋዩን በንብረቱ የመጠቀም መብት አላግባብ ሊያጣብብበት አይገባም፡፡ እንዲሁም የታክስ አስገቢው ባለሥልጣን ታክስ የመሰብሰብ ተግባሩን ሲወጣ በታክስ ከፋዩ ላይ ቅሬታ መፍጠሩ የማይቀር ስለሆነ ቅሬታ ያደረበት ታክስ ከፋይም ለቅሬታው ተገቢውን መፍትሔ ለማግኘት የሚያስችሉት አስተማማኝ የሕግና ተቋማዊ ማዕቀፍ ሊዘረጉለት ይገባል፡፡[32]

በሌላ በኩል ግን ማንኛውም መብት ተነፃፃሪ ግዴታ ያለበት ስለሆነ በታክስ ከፋዩም ላይ ሕግ የሚጥላቸው ልዩ ልዩ ግዴታዎች አሉ፡፡ የታክስ ከፋዩ ግዴታዎች ዓይነትና መጠን ከሀገር ሀገር የተለያዩ ቢሆኑም በታክስ ከፋዩ ላይ ግዴታ የማይጥል የታክስ ሥርዓት ይኖራል ብሎ ማሰብ ግን ፈጽሞ አይቻልም፡፡ አሁን በሀገራችን ውስጥ በሚሠራባቸው የታክስ ሕጐች መሠረት ዋና ዋና የሚባሉት የታክስ ከፋዮች ግዴታዎች የሚከተሉት ናቸው፡፡

ሀ) የታክስ ከፋይ መለያ ቁጥር የመያዝ ግደታ

በሕግ መሠረት ታክስ የመክፈል ግደታ ያለበት ማንኛውም ሰው የታክስ ከፋይ መለያ ቁጥር የመያዝ ግዴታ እንዳለበት በዘመናዊ የታክስ አስተዳደርና ሥርዓት ውስጥ ሁነኛ ቦታ የተሰጠው ጉዳይ ነው፡፡ ሀገራችን ኢትዮጵያም ታክስ ከፋዮች የታክስ ከፋይ መለያ

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[26] የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፑብሊክ ሕገ-መንግሥት፣ አዋጅ ቁጥር 1/1987፣አንቀጽ 18ን ይመልከቱ፡፡ እንደዚሁም ደግሞ ሀገራችን አባል የሆነችባቸው ዓለም አቀፍ የሰብዓዊ መብቶች ሰምምነቶችም ይህንን መብት በግልጽ ደንግገዋል፡፡ ለምሳሌ ያህል እ.ኤ.አ በ1948 ዓ.ም የወጣውን የተባበሩት መንግሥታት ሁሉን ዓቀፍ የሰብዓዊ መብት መግለጫ እና እ.ኤ.አ በ1966 ዓ.ም የወጣውን ዓለም አቀፍ የሲቪልና ፖለቲካዊ መብቶችን ስምምነት ይመልከቱ፡፡

[27] ዝኒ ከማሁ፣ አንቀጽ 25፡፡

[28] የገቢ ግብር አዋጅ፣ አዋጅ ቁጥር 286/1994 (እንደተሻሻለ) ፌዴራል ነጋሪት ጋዜጣ፣ 8ኛ ዓመት፣ ቁጥር 34፣ አንቀጽ 40(1)፡፡

[29] የኢፌዲሪ ሕገ-መንግሥት፣ ከላይ በማስታወሻ ቁጥር 26 የተጠቀሰ፣ አንቀጽ 26፡፡

[30] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 39፡፡

[31] የኢፌዲሪ ሕገ-መንግሥት፣በማስታወሻ ቁጥር 26 የተጠቀሰ፣አንቀጽ 40፡፡

[32] ዝኒ ከማሁ፣ አንቀጽ 37፡፡

ቁጥር እንዲኖራቸው የሚያስገድድ ሕግ ለመጀመሪያ ጊዜ በ1993 ዓ.ም አውጥታለች።[33] ይህም ሕግ በ1953 ዓ.ም የወጣውን የገቢ ግብር ሕግ ለማሻሻል የወጣ አዋጅ ሲሆን በዚህ የማሻሻያ አዋጅ ሥር በግልጽ እንደተደነገገው ማንኛውም ግብር የመክፈል ግዴታ ያለበት ሰው ወይም ድርጅት የግብር ከፋይ መለያ ቁጥር የመያዝ ግዴታ አለበት።[34] ይኸው ግዴታ በ1994 ዓ.ም በወጣው የገቢ ግብር አዋጅም ምንም ዓይነት መሠረታዊ ለውጥ ሳይደረግበት እንዲቀጥል ተደርጓል።[35]

ለ) ግብርን የመያዝና የመክፈል ግዴታ (Duty to withhold and pay)

ይህ ግዴታ በታክስ ከፋዮች ላይ የተጣለ ወሳኝ ግዴታ በመሆኑ በዘመናዊ የታክስ ሥርዓት ወስጥ ተግባራዊ የሚደረግ ግደታ ነው። በኢትዮጵያ ውስጥም በታክስ ከፋዮች ላይ ከተጣሉት ግደታዎች አንደኛው መሆኑን የሀራችንን የታክስ ሕጎች በመዳሰስ እንገነዘባለን። በገቢ ግብር አዋጅ[36] አንቀጽ 10 ሥር በግልጽ እንደተመለከተው ማንኛውም ቀጣሪ ለተቀጣሪው ከሚከፍለው የወር ደመወዝ ላይ ከተቀጣሪው የሚፈለገውን የገቢ ግብር ቀንሶ በማስቀረት የተቀነሰውን ግብር ለታክስ አስገቢው ባለሥልጣን በየወሩ ገቢ የማድረግ ግዴታ ተጥሎበታል።[37] ከዚህም በተጨማሪ በገቢ ግብር አዋጅ[38] አንቀጽ 53 በግልጽ እንደተደነገገው በሕግ ሰውነት የተሰጣቸው ገንዘብ ከፋዮች ከተከፋይ ሒሳቦች ላይ 2% ቀንሰው ለታክስ አስገቢው ባለሥልጣን ገቢ የማድረግ ግዴታ ተጥሎባቸዋል።[39] ከላይ ከተጠቀሱት በተጨማሪም የፈጠራ መብትን በመከራየት ለአከራዩ ክፍያ የሚፈጽም ከፋይ 5% የገቢ ግብር ቀንሶ በመያዝ የተቀነሰውን በገቢ ግብር በሕጉ በተጠቀሰው የጊዜ ገደብ ውስጥ ለታክስ አስገቢው ባለሥልጣን ገቢ ማድረግ የሚጠበቅበት ሲሆን፣[40] የአክሲዮን ድርሻ ለባለአክሲዮኖች የሚያከፋፍል ኃላፊነቱ የተወሰነ የግል ኩባንያ ወይም አክሲዮን ማኅበር ከክፍያው ላይ 10% የገቢ ግብር ቀንሶ በማስቀረት በሕጉ በተመለከተው የጊዜ ገደብ ውስጥ ለታክስ አስገቢው ባለሥልጣን ገቢ የማድረግ ኃላፊነት አለበት።[41]

ሐ) የሂሳብ መዝገብ የመያዝ ግዴታ

ይህ ግዴታ የታክስ ከፋዮች መሠረታዊ ግዴታ ነው። ምክንያቱም ታክስ ከፋዮች ይህንን ግዴታቸውን በትክክል የሚወጡ ከሆነ የታክስ ከፋዮችን ጠቅላላ ገቢ፣ ተቀናሽ የሚደረጉ ወጭዎችን፣ ግብይቶች የተደረጉባቸውን ክፍያዎች፣ ክፍያዎች የተፈፀመባቸውን ጊዜ እና

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[33] ከማናቸውም ገቢ ግብር ለማስከፈል የወጣ አዋጅ (ማሻሻያ)፣አዋጅ ቁጥር 227/1993፣ ፌዴራል ነጋሪት ጋዜጣ፣ 7ኛ ዓመት፣ ቁጥር 9፣

[34] ዝኒ ከማሁ፣ አንቀጽ 2(1) ይመልከቱ።

[35] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 43።

[36] የገቢ ግብር አዋጅ ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰው ነው።

[37] እዚህ ላይ መገንዘብ ያለብን ሁሉም ቀጣሪዎች ግብር ከፋዮች አለመሆናቸውን ነው። ለምሳሌ አንድ ሠራተኛ የትምህርት ሚኒስቴር ተቀጣሪ ቢሆን ሚኒስቴር መ/ቤቱ የሠራተኛውን የገቢ ግብር ቀንሶ ለታክስ አስገቢው ባለሥልጣን የማስተላለፍ ግዴታ ቢኖርበትም ግብር ከፋይ ግን አይደለም። በሌላ መልኩ የኢትዮጵያን ንግድ ባንክ ብንወስድ ይህ ቀጣሪ ራሱ በገቢ ግብር አዋጅ በሠንጠረዥ "ሐ" ሥር የቢዝነስ ታክስ ከፋይ ሲሆን በሠንጠረዥ "ሀ" መሠረት ከሠራተኞች ላይ የሚፈለገውን የገቢ ግብር ቀንሶ የማስቀረትና ለታክስ አስገቢው ባለሥልጣን የማስተላለፍ ሕጋዊ ግዴታ አለበት።

[38] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ።

[39] ዝርዝር ሁኔታውን በሚገባ ለመገንዘብ የገቢ ግብር ደንብ፣ ከላይ በማስታወሻ ቁጥር 24 የተጠቀሰ፣ አንቀጽ 24 እና 25ን ይመልከቱ።

[40] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣አንቀጽ 35(1)።

[41] ዝኒ ከማሁ፣ አንቀጽ 34(1)።

የታክስ ክፋዮችን ትርፍ ወይም ኪሣራ ለማወቅ ዓይነተኛ መሣሪያ በመሆን ያገለግላል። በ1952 ዓ.ም (እ.ኤ.አ. 1960) በወጣው የኢትዮጵያ የንግድ ሕግ መሠረት ማንኛውም በንግድ ሥራ ላይ የተሰማራ ሰው ወይም ድርጅት የሒሳብ መዝገብ የመያዝ ግዴታ ተጥሎበታል።[42] ወደ ታክስ ሕጐቻችን ስንመጣም በ1994 ዓ.ም የታወጀው የገቢ ግብር አዋጅ ሥር ከሚታወቁት ሦስት የግብር ክፋይ ደረጃዎች ውስጥ በንግድ ሥራ ላይ የተሰማሩ ወይም በሙሉ ወይም በከፊል የሚከራዩ ሕንጻዎች ባለቤት የሆኑ የደረጃ "ሀ" እና የደረጃ "ለ" ግብር ከፋዮች የሒሳብ መዝገብና ሰነዶችን የመያዝ ግዴታ እንዳለባቸው ይኸው ሕግ ደንግጓል።[43] ከዚህም መገንዘብ የሚቻለው የደረጃ ሐ ታክስ ከፋዮች የሂሳብ መዝገብ የመያዝ ግደታ የሌለባቸው መሆኑን ነው።

መ) ገቢን የማሳወቅና ታክስ የመክፈል ግዴታ

በኢትዮጵያ የገቢ ግብር ሕግና በሌሎች የታክስ ሕጐች በታክስ ከፋዮች ላይ ከተጣሉት ግዴታዎች ውስጥ ዋነኛዎቹ ገቢን ማሳወቅና ታክስን መክፈል ናቸው። በዚህም መሠረት ማንኛውም በገቢ ግብር አዋጅ የሚሸፈን ግብር ከፋይ በሕጉ በተመለከተው ጊዜ ገቢውን ማሳወቅና ታክሱን መክፈል ይኖርበታል።[44] እንደዚሁም ደግሞ በተጨማሪ እሴት ታክስ ሕግ[45]፣ በተርን ኦቨር ታክስ ሕግና[46] በኤክሳይዝ ታክስ ሕግ[47] ውስጥ እንዲህ ያለው ግዴታ

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[42] የኢትዮጵያ ንጉሠ-ነገሥት መንግሥት የንግድ ሕግ፣ አዋጅ ቁጥር 166/1952፣ ነጋሪት ጋዜጣ፣19ኛ ዓመት፣ ቁጥር 3፣ ከአንቀጽ 63-70 ያሉትን ድንጋጌዎች ይመልከቱ። ሆኖም ግን ይኸው ሕግ አነስተኛ ነጋዴዎች የሒሳብ መዝገብ የመያዝ ግዴታ እንደማይኖርባቸው በልዩ ሕግ ሊደነገግ እንደሚችል በግልጽ አስቀምጧል።

[43] የገቢ ግብር አዋጅ፣ ከላይ በማታወሻ ቁጥር 28 የተጠቀሰ፣ በዚህ አዋጅ አንቀጽ 2(16) መሠረት ሦስት የግብር ከፋዮች ደረጃዎች ቢኖሩም የደረጃ ሐ ግብር ከፋዮች ግን የሒሳብ መዝገብ የመያዝ ግዴታ እንደሌለባቸው የዚሁ አዋጅ አንቀጽ 48 ይደነግጋል። ከዚህ ጋር ተያይዞ የሚነሳው መሠረታዊ ጥያቄ ለመሆኑ በገቢ ግብር አዋጁ ውስጥ ታሳቢ የተደረጉትን ሦስት የግብር ከፋይ ደረጃዎች አንዱን ከአንዱ ለይተን የምናውቀው እንዴት ነው የሚለው ጥያቄ ነው። ለዚህ ጥያቄ ግልጽና የማያሻማ መልስ የሚሰጠን ደግሞ የገቢ ግብሩን ለማሚላት ተብሎ የወጣው የገቢ ግብር ደንብ ነው (ከላይ በግርጌ ማስታወሻ ቁጥር 24 የተጠቀሰ)። በዚህ ደንብ አንቀጽ 18 መሠረት የደረጃ "ሀ" ግብር ከፋይ የሚባለው በኢትዮጵያ ወይም በውጭ ሀገር ሕግ መሠረት የተቋቋመ የሕግ ሰውነት የተሰጠው ድርጅት ወይም የአንድ ዓመት ጠቅላላ ገቢው አምስት መቶ ሺህ ብር ወይም ከዚያ በላይ የሆነ ሌላ የንግድ ሥራ የሚሠራ የተፈጥሮ ሰው ነው። ከዚህ የሕግ ድንጋጌ መገንዘብ እንደሚቻለው ማንኛውም የሕግ ሰውነት የተሰጠው ድርጅት በዓመት ውስጥ የሚያገኘው ጠቅላላ ገቢ ወይም የካፒታሉ መጠን ምንም ይሁን ምን በደረጃ "ሀ" ሥር የሚወድቅ መሆኑን ነው። ማንኛውም የተፈጥሮ ሰው ደግሞ በደረጃ "ሀ" ሥር ሊወድቅ የሚችለው የካፒታሉ መጠን ወይም የሚያገኘው ዓመታዊ የትርፍ መጠን ግምት ውስጥ ሳይገባ ዓመታዊ ጠቅላላ ገቢው አምስት መቶ ሺህና ከዚያ በላይ የሆነ እንደሆነ ብቻ ነው። በሌላ በኩል አንድ ግብር ከፋይ የደረጃ "ለ" ግብር ከፋይ ነው የሚባለው የዓመት ጠቅላላ ገቢው ከ100,000.00 ብር በላይ እስከ 500,000.00 ብር የሚደርስ የሆነ እንደሆነ ነው። ዓመታዊ ጠቅላላ ገቢው እስከ መቶ ሺህ የሚደረስ ግብር ከፋይ (ግለሰብ መሆን አለበት) ደግሞ የደረጃ ሐ ግብር ከፋይ እንደሆነ ደንቡ ያስገነዝበናል።

[44] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰው፣ ከአንቀጽ 64-76 ያሉትን ዝርዝር ድንጋጌዎች ይመልከቱ። በተጨማሪም የገቢ ግብር ደንቡ ውስጥ ከአንቀጽ 18-25 ያሉትን ሀተታዎች ይመልከቱ፣ ከላይ በማስታወሻ ቁጥር 24 የተጠቀሰ።

[45] የተጨማሪ እሴት ታክስ አዋጅ፣ አዋጅ ቁጥር 285/1994፣ (እንደተሻሻለ)፣ፌደራል ነጋሪት ጋዜጣ፣ 8ኛ ዓመት፣ ቁጥር 33፣አንቀጽ 26።

[46] የተርንኦቨር ታክስ አዋጅ፣ አዋጅ ቁጥር 308/1995፣(እንደተሻሻለ)፣ፌደራል ነጋሪት ጋዜጣ፣9ኛ ዓመት፣ ቁጥር 21፣አንቀጽ 10።

በታክስ ከፋዮቹ ላይ ተጥሎባቸዋል። ነገር ግን ሁሉም ታክስ ከፋዮች ገቢያቸውን የሚያሳውቁትና የሚፈለግባቸውን ታክስ የሚከፍሉት በተመሳሳይ ጊዜ ሳይሆን እያንዳንዱ የታክስ ሕግ ለይቶ ባስቀመጠው የጊዜ ገደብ ውስጥ መሆኑን መገንዘብ ያስፈልጋል።

ሠ) ለተጨማሪ እሴት ታክስ የመመዝገብና ደረሰኝ የመቁረጥ ግዴታ

በኢትዮጵያ ውስጥ የተጨማሪ እሴት ታክስ ተግባራዊ የሆነው ከጥር 1995 ዓ.ም ጀምሮ ነው። በዚህ ሕግ[48] መሠረት ማንኛውም ዕቃ ወይም አገልግሎት የሚያቀርብና በንግድ ሥራ ላይ የተሰማራ ግለሰብ ወይም ድርጅት በተጨማሪ እሴት ታክስ ሕጉ የተመለከተውን አስገዳጅ የምዝገባ መስፈርት አሟልቶ የተገኘ እንደሆነ ወይም ወደፊት አሟላለሁ የሚል ተጨባጭ ምክንያት ሲኖረው ለተጨማሪ እሴት ታክስ የመመዝገብ ግዴታ አለበት።[49] በዚሁ አዋጅ አንቀጽ 22 እንደተደነገገው ለተጨማሪ እሴት ታክስ የተመዘገበና ታክስ የሚከፈልበት ግብይት የሚያካሂድ ሰው ዕቃዎቹን ወይም አገልግሎቶቹን ለሚያቀርብለት ሰው ደረሰኝ የመስጠት ግዴታ አለበት።[50]

ረ) የሽያጭ መመዝገቢያ መሣሪያ የመጠቀም ግዴታ

ይህ የታክስ ክፋይ ግዴታ በሌሎቹ ሀገሮች ቆየት ያለ[51] ቢሆንም በኢትዮጵያ ግን ይህ ግደታ በታክስ ከፋዮች ላይ የተጣለው የኢ.ፌ.ዴ.ሪ የሚኒስትሮች ም/ቤት በነሐሴ 11 ቀን 1999 ዓ.ም ባወጣው ደንብ መሠረት ነው።[52] ከዚህ ጊዜ ጀምሮ በታክስ አስገቢው ባለሥልጣን ባወጣው መመሪያ መሠረት ዝርዝራቸው የተወሰነ ታክስ ከፋዮች በዚህ ደንብ ድንጋጌዎች መሠረት ዕውቅና የተሰጣቸውን የሽያጭ መመዝገቢያ መሣሪያዎች በመጠቀም የሽያጭ ደረሰኞችን አዘጋጅተው የማውጣት ግዴታ አለባቸው።[53]

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[47] የኤክሳይዝ ታክስ አዋጅ፣አዋጅ ቁጥር 307/1995 (እንደተሻሻለ)፣ፌደራል ነጋሪት ጋዜጣ፣9ኛ ዓመት፣ ቁጥር 20፣አንቀጽ 6-7።

[48] የተጨማሪ እሴት ታክስ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 45 የተጠቀሰ።

[49] ዝኒ ከማሁ፣ ይህንንም ሓሳብ አስመልክቶ አዋጁ በአንቀጽ 16 ሥር ታክስ የሚከፈልበትን የንግድ ሥራ እንቅስቃሴ የሚያከናውን ሆኖ ለተጨማሪ እሴት ታክስ ለመመዝገብ ማመልከቻ ማቅረብ የሚኖርበት በማናቸውም የአሥራ ሁለት ወራት ጊዜ ውስጥ ያከናወነው ታክስ የሚከፈልበት ግብይት ከ500,000.00 (አምስት መቶ ሺህ) በላይ ከሆነ ወይም በማናቸውም የ12 ወራት ጊዜ ውስጥ ታክስ ከፋዩ የሚያከናውነው ታክስ የሚከፈልበት ግብይት ከ500,000.00 ብር በላይ ይሆናል ብሎ መገመት የሚያስችል ተጨባጭ ምክንያት የኖረ እንደሆነ ለተጨማሪ እሴት ታክስ መመዝገብ አንደሚኖርበት በግልጽ ደንግጓል።

[50] ዝኒ ከማሁ፣ ሆኖም ግን ሕግ በሚፈቅዳቸው ልዩ ሁኔታዎች ታክስ የሚከፈልበት እቃ ወይም አገልግሎት የሚያቀርቡ ሰዎች የተጨማሪ እሴት ታክስ ደረሰኝ ለመቁረጥ የማይገደዱባቸው አጋጣሚዎች አሉ። በዚህ ረገድ የአዋጁ አንቀጽ 22(6)(7) የደነገጉትን ይመልከቱ።

[51] ለመጀመሪያ ጊዜ የተሳካ ሥራ የሚሠራ የሽያጭ መመዝገቢያ ማሽን የፈጠረው በአሜሪካን ሀገር የኦሀዮ ግዛት ይኖር የነበረው ጀምስ ሪቲ (James Ritty) ሲሆን ለዚህ የፈጠራ ሥራውም እ.አ.አ በ1879 ዓ.ም የፈጠራ ሥራ ባለቤትነት (ፓተንት) ተሰጥቶታል። "Cash Register." Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008ን ይመልከቱ።

[52] በሽያጭ መሳሪያዎች ስለመጠቀም ግደታ የወጣ የሚኒስትሮች ምክር ቤት ደንብ፣ ደንብ ቁጥር 139/1999፣ ነጋሪት ጋዜጣ፣13ኛ ዓመት፣ ቁጥር 48።

[53] በዚህ ረገድ ዝርዝር ጉዳዮችን ለመገንዘብ ሁሉንም የደንቡን ድንጋጌዎች ማየቱ ጠቃሚ ነው። እንዲሁም ደግሞ ደንቡን ለማስፈጸም ይረዳ ዘንድ የገቢዎችና ጉምሩክ ባለስልጣንም ዝርዝር ጉዳዮችን የያዘ መመሪያ በማውጣት እየሰራበት ይገኛል። በዚህ መመሪያ መሠረት የሽያጭ መመዝገቢያ መሣሪያ የመጠቀም ግደታ የተጣለባቸው የደረጃ ሀ እና የደረጃ ለ ግብር ከፋዮች ናቸው።

1.3 በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዮች መካከል የሚነሱ ግጭቶች መነሻ ምክንያቶች፡ አጭር ዳሰሳ

ይህ የመንግሥት መ/ቤት በሕግ የተጣሉበትን አያሌ ተግባራት ሲያከናውንና ልዩ ልዩ ኃላፊነቶቹን ሲወጣ ከታክስ ከፋዮቹ ጋር መጋጨቱ የሚጠበቅና የማይቀር ነው።[54] በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዮች መካከል ለሚነሱ አለመግበባቶች ምክንያቶቹ በጣም በርካታ ቢሆኑም ዋና ዋና የሚባሉት የሚከተሉት ናቸው። *አንደኛ* አንድ የታክስ ሕግ የተፈጻሚነት ወሰን በግልጽ አለመታወቅ የአለመግባባት ምንጭ ሊሆን ይችላል። ምክንያቱም ብዙ ጊዜ እንደሚስተዋለው የታክስ አስገቢው ባለሥልጣን የሕጉን የተፈጻሚነት ወሰን በማስፋት ከፍተኛ ገቢ ለማግኘት ብርቱ ጥረት የሚያደርግ ሲሆን ታክስ ከፋዩ ደግሞ የሕጉን የተፈጻሚነት ወሰን አጥብቦ በመተርጎም ከታክስ ኃላፊነት ለማምለጥ ሙከራ ያደርጋል።[55] እንዲህ ያለው ሁኔታ በሚፈጠርበት ጊዜ በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዩ መካከል አለመግባባት ይፈጠራል።[56]

በ*ሁለተኛ* ደረጃ የአንዳንድ የሕግ ድንጋጌዎች ግልጽ አለመሆን አለመግባባትን ሊያስከትል እንደሚችል ጥርጥር የለውም። *ሦስተኛ* የታክስ አስገቢው ባለሥልጣን ወይም ታክስ ከፋዩ የታክስ ሕግ ድንጋጌዎች የሚያስተላልፉትን ትክክለኛ መልዕክት አለመረዳት አለመግባባትን ሊያስከትል ይችላል።[57] *አራተኛ* ታክስ ከፋዩ የታክስ ሕጎቹ የሚጥሉበትን ግዴታዎች በአግባቡ ሳይወጣ ሲቀር አለመግባባት ይከሰታል። ለምሳሌ ያህል ከዚህ በላይ እንደጠቀስነው ማንኛውም የደረጃ "ሀ" እና "ለ" ግብር ከፋይ የሂሳብ መዝገብ የመያዝ ግዴታ አለበት ብለናል። እነዚህ የሂሳብ መዝገቦች ሲያዙም ተቀባይነት ያለውን የሂሳብ አያያዝ መርህ በመከተል የሚዘጋጁ መሆን ይኖርባቸዋል።[58] ሆኖም ታክስ ከፋዩ የሂሳብ መዝገብ ሳይዝ ሲቀር፣ አልያም ደግሞ የሂሳብ መዝገቡ በታክስ አስገቢው ባለሥልጣን ዘንድ ተቀባይነት ሲያጣ፣ የታክስ አስገቢው ባለሥልጣን ከእንደዚህ ዓይነቱ ታክስ ከፋይ ላይ ታክሱን የሚሰበስበው በግምት ላይ ተመሥርቶ ነው።[59] በግምት ላይ ተመሥርቶ

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[54] P.P. Graig (2003), *Administrative Law*, Sweet and Maxwell, ከገጽ 93-121 ይመልከቱ።

[55] B.B. Lal and N.Vashisht (2006), *Direct Taxes: Income Tax,Wealth and Tax Planning*,26th ed., Pearson Education, ከገጽ 43-54 ያለውን ይመልከቱ።

[56] ዝኒ ከማሁ፣ ለምሳሌ ያህል ይህ ጸሐፊ በሙያ ሥራው አጋጣሚ የተረዳው አንድ ጉዳይ እዚህ ላይ ቢነሳ የተያዘውን ጭብጥ ይበልጥ ግልጽ ለማድረግ ይረዳል። ስሙን እዚህ ላይ ለመግለጽ ያልተፈለገ አንድ ድርጅት ዋና የንግድ ሥራው ሠራተኞችን ወደ ዐረብ ሀገራት መላክ ነበር። ይህ ድርጅት እነዚህን ሰዎች ወደ ዐረብ ሀገራት በመላክ ዐረብ ሀገራት ከሚገኙት አገናኝ ኤጀንሲዎች ገቢ የሚያገኝ በመሆኑ በኢትዮጵያ ውስጥ የሚፈለግበትን የገቢ ግብር ለታክስ አስገቢው ባለሥልጣን በየጊዜው ሲከፍል የነበረ ቢሆንም በአንድ ወቅት ግን የታክስ አስገቢው ባለሥልጣን ይህ ድርጅት የተርንኦቨር ታክስ መክፈል እንደሚኖርበት የታክስ ውሳኔ ማስታወቂያ ይልክለታል። ደርጅቱ ግን የሰው ኃይል አቅርቦቱ ተግባር ከኢትዮጵያ ውጭ የተሰጠ አገልግሎት ስለሆነ እኔን የሚመለከተኝ የተጨማሪ እሴት ታክስ ሕግ እንጂ የሀገር ውስጥ ግብይቶችን ለመግዛት የታወጀው የተርንኦቨር ታክስ ሕግ ሊሆን አይገባውም በማለት ተቃውሞውን አቀረበ። በዚህም ምክንያት በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዩ መካከል አለመግባባት ሊፈጠር ችሏል።

[57] ዝኒ ከማሁ።

[58] የሒሳብ መዝገብ የሚያዘው ተቀባይነት ያለውን የሒሳብ መዝግብ አያያዝ ደንብ ተከትሎ እንደሆነ የገቢ ግብር ሕጋችን የደነገገ መሆኑን ለመረዳት የገቢ ግብር አዋጁን (ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣) አንቀጽ 17ን ይመልከቱ። በተጨማሪም ደግሞ የሚከተለውን ጥናታዊ ጽሁፍ ይመልከቱ፡- Belay Eshetu, *Assessment of Income Tax Under the Ethiopian Income Tax Law: Examination of Current Practice*, Senior Thesis,unpublished, Faculty of Law, Addis Ababa University, 1998፣ ከጽ 17-25 ያለውን ይመልከቱ።

[59] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣አንቀጽ 67።

የሚወሰነው የታክስ መጠን ደግሞ በታክስ ከፋዩ ዘንድ ተቀባይነት ሳያገኝ ከቀረ በሁለቱ መካከል አለመግባባት ይፈጠራል። በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዩ መካከል ክርክር ሊፈጥር የሚችለው *አምስተኛ* ምክንያት አንድ ፍሬነገር ተከስቷል ወይም አልተከሰተም የሚል አለመግባባት ነው። ለአብነት ያህል አንድ ታክስ ከፋይ በአንድ የታክስ ዘመን ኪሳራ ገጥሞኛል ሲል የታክስ አስገቢው ባለሥልጣን ደግሞ ታክስ ከፋዩ ትርፍ አግኝቷል ሊል ይችላል።

2. የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ፡ ታሪካዊ ዳራ (1933 ዓ.ም. እስከ 1987 ዓ.ም)

ኢትዮጵያ እጅግ ጥንታዊ ከሚባሉት ሀገሮች አንዷ እንደመሆኗ መጠን[60] የታክስ ጉዳይም ጥንታዊነት ያለው ክስተት እንደሆነ በመስኩ የተደረጉ ጥናቶች ያሳያሉ።[61] ሆኖም ዘመናዊ የታክስ ሕጐች መውጣት የጀመሩትና ዘመናዊ የታክስ አስተዳደር ሥርዓት መዘርጋት የጀመረው የኢጣሊያ ወረራ በ1933 ዓ.ም ከተቀለበሰ በኋላ መሆኑ[62] ቀደም ሲል ተገልጧል። ከዚህ ጊዜ በኋላ የታክስ ከፋዮች ቅሬታዎች የሚፈቱባቸው ሥርዓቶች በሕግ ተደንግገው ሲሠራባቸው እንደነበር በተለያዩ ጊዜያት ወጥተው የነበሩት የታክስ ሕጐች ያሳያሉ። ይህንን ጥቅል አባባል አፍታትቶ ለማቅረብ አግባብነት ያላቸውን የታክስ ሕጎች እንደሚከተለው በአጭር በአጭሩ እንዳስሳቸዋለን።[63]

በመጀመሪያ ደረጃ በ1936 ዓ.ም ወጥቶ በነበረው የገቢ ግብር አዋጅ የገንዘብ ሚኒስቴር በወሰነበት የግብር ልክ ተጎዳሁ የሚል ግብር ከፋይ የግብር ማስታወቂያ በደረሰው በ21 ቀናት ጊዜ ውስጥ ለይግባኝ ሰሚ ኮሚቴ ይግባኙን እንደሚያቀርብ ተደንግጎ ነበር።[64] ከዚህም በመቀጠል በ1941 ዓ.ም ወጥቶ የነበረውም የገቢ ግብር አዋጅ የታክስ ከፋይ ቅሬታዎች የሚስተናገዱበትን ሥርዓት ዘርግቶ እንደነበር አዋጁን በማንበብ እንገነዘባለን።[65] ከዚህ አዋጅ በመቀጠል የወጣው የ1949 ዓ.ም የገቢ ግብር ድንጋጌ[66] ሲሆን በዚህ የገቢ ግብር ድንጋጌ አንቀጽ 50 *መሠረት ንጉሠ-ነገሥቱ* በአዲስ አበባና በወቅቱ በነበረው አጠራር በሸዋ ጠቅላይ ግዛት፣ በሌሎች ጠቅላይ ግዛቶችና ካስፈለገም በእያንዳንዱ አውራጃ የግብር ይግባኝ ኮሚሲዮኖች ሊሾም እንደሚችል ተደንግጓል። የእነዚህ የይግባኝ ኮሚሲዮኖች አሻሻምም ለሕዝቡ የሚገለፀው በመንግሥት ማስታወቂያ (በነጋሪት ጋዜጣ) እንደሚሆን

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[60] Margarey Perham (1968), *The Government of Ethiopia*, London: Faber & Faber Limited, ገጽ 10.

[61] Richard Punkhrust (1968), *The Economic History of Ethiopia,1800-1935,* Haileselassie University Press,Addis Ababa, Ethiopia, 504-544::

[62] Taddese Lencho፣ ከላይ በማስታወሻ ቁጥር 10 የተጠቀሰ ፣ ገጽ 105።

[63] *ያለፈውን ማወቅ የአሁኑን ለመገንዘብና የወደፊቱን ለመተንበይ እጅግ ጠቃሚ ነው።* በዚህ ረገድ ዶ/ር ታደሰ ሌንጮ ከላይ በማስታወሻ ቁጥር 10 በተጠቀሰው የምርምር ሥራቸው አንድ እውቅ የአሜሪካን ሀገር ደራሲ አባባል ጠቅሰው እንዳቀረቡት "*ያለፈው ጊዜ ሙት አይደለም፣ እንዳውም ያለፈው ጊዜ ያለፈም አይደለም።*" (ትርጉም የራሴ)

[64] ስለሰዎችና ሥራዎች ሁሉ ግብር እንዲከፈል የሚወስን አዋጅ፣ አዋጅ ቁጥር 60/1936፣ነጋሪት ጋዜጣ፣3ኛ ዓመት፣ቁጥር 9፣ አንቀጽ 5(i-vii)::

[65] ከሰዎችና ከሥራዎች ሁሉ ግብር እንዲከፈል የወጣ አዋጅ፣ አዋጅ ቁጥር 107/1941፣ነጋሪት ጋዜጣ፣8ኛ ዓመት፣ቁጥር 12፣ አንቀጽ 5(i-vii)::

[66] ከማናቸውም ዓይነት ገቢ ግብር ስለማስከፍል የወጣ ድንጋጌ፣ ድንጋጌ ቁጥር 19/1949፣ነጋሪት ጋዜጣ፣16ኛ ዓመት፣ቁጥር 1፣ አንቀጽ 5(i-vii)::

ይኸው ድንጋጌ ይገልጻል፡፡[67] በአዲስ አበባና በሸዋ ጠቅላይ ግዛት የሚቋቋመው የግብር ይግባኝ ኮሚሲዮን በጠቅላይ ሚኒስቴር ውስጥ የሚተዳደር አንድ ፕሬዝዳንትና ም/ፕሬዝዳንት ያሉበት ሲሆን፣ አባላቱም ከመንግሥት ሠራተኞችና ከነጋዴዎችም የተውጣጡ ሆነው ከአምስት የማያንሱ ከሰባት የማይበልጡ መሆን ነበረባቸው፡፡[68] በሌሎች ጠቅላይ ግዛቶች የሚቋቋመው የግብር ይግባኝ ኮሚሲዮን በጠቅላይ ገዥው ሰብሳቢነት ከመንግሥት ሠራተኞች ሦስት ሰዎች እና ከነጋዴዎች ሦስት ሰዎች ያሉበት ነበር፡፡ በአውራጃ ደረጃ የሚቋቋም የግብር ይግባኝ ኮሚሲዮንም ተመሳሳይ አባላት ሊኖሩት እንደሚችል በዚሁ ሕግ ውስጥ ተደንግጓል፡፡[69]

በዚህም መሠረት በአገር ውስጥ ገቢ መ/ቤት ባለሥልጣን በተወሰነው የግብር ውሳኔ ተበደልኩ የሚል ማናቸውም ግብር ከፋይ ቅሬታውን በመግለጽ ለተገቢው የግብር ይግባኝ ኮሚሲዮን በጽሑፍ ሊያመለክት እንደሚችል ተደንግጓል፡፡[70] ይግባኝ ማቅረብ የሚቻለውም የግብሩ ማስታወቂያ ለግብር ከፋዩ ከተሰጠበት ቀን አንስቶ በሠላሳ ቀናት ውስጥ ነው፡፡[71] ይግባኙ በዚህ የጊዜ ገደብ ውስጥ ካልቀረበ ግን በሀገር ውስጥ ገቢ መ/ቤት ባለሥልጣን የተወሰነው ግብር ትክክለኛና የመጨረሻ ውሳኔ ሆኖ በዚያው መሠረት እንደሚፈፀም በግልጽ ተደንግጓል፡፡[72] ይህ ድንጋጌ የግብር ይግባኝ የሚታይበትን የሥልጣን እርከን ጨምሮ ይዟል፡፡ በመሆኑም ግብር ከፋዩ ቅር የተሰኘው በገንዘብ ሚኒስቴር የሀገር ውስጥ ገቢ መሥሪያ ቤት በሰጠው ውሳኔ ላይ ከሆነ ይግባኙን የሚያቀርበው በአዲስ አበባ ለነበረው የግብር ይግባኝ ኮሚሲዮን ሲሆን ይግባኙ በማናቸውም ጠቅላይ ግዛት የአገር ውስጥ ገቢ መሥሪያ ቤት ባለሥልጣን ውሳኔ ላይ ከሆነ በዚያው ጠቅላይ ግዛት ለተሾመው የግብር ይግባኝ ኮሚሲዮን ወይም ለአውራጃው በተለይ ለተሾመ ኮሚሲዮን የሚቀርብ ነበር፡፡[73]

በማናቸውም ደረጃ የሚገኘው የግብር ይግባኝ ኮሚሲዮን ይግባኝ የተባለበትን የአገር ውስጥ ገቢ መሥሪያ ቤት ውሳኔ ለማጽናት፣ ለመቀነስ፣ ለመጨመር ወይም ለመሰረዝ እንዲሁም ደግሞ ለጉዳዩ ፍጻሜ አስፈላጊ መስሎ የሚታየውን ተጨማሪ ትዕዛዝ ሊሰጥ እንደሚችል ሥልጣን ተሰጥቶት ነበር፡፡[74] ይሁን እንጂ ማንኛውም የግብር ይግባኝ ኮሚሲዮን የሚሰጠው ውሳኔ የመጨረሻ ውሳኔ አልነበረም፡፡ ይልቁንም የአገር ውስጥ ገቢ መሥሪያ ቤት ወይም ግብር ከፋዩ የግብር ይግባኝ ኮሚሲዮን የሰጠው ውሳኔ ቅሬታ ከፈጠረበት የውሳኔ ማስታወቂያ ከተሰጠበት ቀን አንስቶ ባሉት ሠላሳ ቀናት ውስጥ ይግባኙን ለከፍተኛው ፍ/ቤት ማቅረብ እንደሚችል ተደንግጎ ነበር፡፡[75] ከፍተኛው ፍ/ቤትም በዚህ *ነገር የተነሳውን ክርክር ተመልክቶ የሚሰጠው ከሕግ የተቃወሰውን ብቻ አቃንቶ ወደ ኮሚሲዮኑ ይመልሳል እንጂ በግምቱ ሥራ አይገባም*።[76] (አንክሮ የተጨመረ)፡፡ የከፍተኛው ፍ/ቤት በሰጠው ውሳኔ ላይ ቅር የተሰኘው ወገን (የግብር አስገቢው ባለሥልጣን

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[67] ዝኒ ከማሁ፣ አንቀጽ 51፡፡
[68] ዝኒ ከማሁ፣አንቀጽ 50(ሀ)፡፡
[69] ዝኒ ከማሁ፣ አንቀጽ 50(ሐ)፡፡
[70] ዝኒ ከማሁ፣አንቀጽ 54፡፡
[71] ዝኒ ከማሁ፣ አንቀጽ 55፡፡
[72] ዝኒ ከማሁ፡፡
[73] ዝኒ ከማሁ፣አንቀጽ 56፡፡
[74] ዝኒ ከማሁ፣ አንቀጽ 57፡፡
[75] ዝኒ ከማሁ፣አንቀጽ 59፡፡
[76] ዝኒ ከማሁ፣አንቀጽ 60፡፡ ከዚህ መገንዘብ የሚቻለው ከፍተኛው ፍ/ቤት ውሳኔውን መስጠት ይችል የነበረው በሕግ ጉዳዮች ብቻ እንጂ የፍሬ ነገር ጉዳዮችን ለመመርመርና ውሳኔ ለማስተላለፍ ያልተፈቀደለት መሆኑን ነው፡፡

ወይም ግብር ከፋዩ) ቅሬታውን ለንጉሠ-ነገሥቱ ጠቅላይ ፍ/ቤት የማቅረብ መብት ነበረው።[77]

ስለግብር ይግባኝ በምናወሳበት ወቅት በኢትዮጵያ ዘመናዊ የታክስ ሕጎች ታሪክ ውስጥ ጐልቶ የሚታየው በ1953 ዓ.ም ወጥቶ የነበረውና የተለያዩ ማሻሻያዎች እየተደረጉበት እስከ 1994 ዓ.ም ሥራ ላይ የነበረው የኢትዮጵያ የገቢ ግብር አዋጅ ነው።[78] ይህ አዋጅ መጀመሪያ ሲወጣ በጠቅላላው 74 አንቀጾች የነበሩት ሲሆን ከአንቀጽ 49 እስከ 61 የነበሩት አንቀጾች የግብር ይግባኝ ሥርዓትን የሚመለከቱ ነበሩ። በአዋጁ አንቀጽ 49 እንደተገለፀው የግብር ይግባኝ ኮሚሲዮኖቹ የሚሾሙት በንጉሠ-ነገሥቱ ነበር።[79] የዚሁ አዋጅ አንቀጽ 50 እንደሚደነግገው እያንዳንዱ የግብር ይግባኝ ኮሚሲዮን አንድ ሊቀመንበር፣ አንድ ምክትል ሊቀመንበርና እንዲሁም ቢያንስ አምስት አባሎች የሚገኙበት ሲሆን የአባሎቹ ስብጥርም ግማሾቹ ከነጋዴዎችና ኸንሮፌሽናሎች ወይም የቮኬሽናል ሥራ ከሚሠሩ ሰዎች መካከል መመረጥ ነበረባቸው።

በዚሁ አዋጅ አንቀጽ 54(ሀ) መሠረት በአገር ውስጥ ገቢ ባለሥልጣን የግብር ውሳኔ ቅር የተሰኘ ማናቸውም ግብር ከፋይ አግባብነት ላለው የግብር ይግባኝ ኮሚሲዮን ይግባኙን ማቅረብ ይችል ነበር። ሆኖም ግን ግብር ከፋዩ ይግባኙን ማቅረብ የሚችለው በዚሁ አንቀጽ ንዑሳን አንቀጾች የተመለከቱትን ጥብቅ ቅድመ-ሁኔታዎች አሟልቶ ሲቀርብ ብቻ ነው። በአንቀጽ 54(ለ) ሥር እንደተመለከተው ሥራዎችንና ፕሮፌሽናል፣ ወይም ቮኬሽናል ሥራ የሚሠራ ሰው ወይም ማኅበር ይግባኝ ለማቅረብ በአንቀጽ 55 የተወሰነው ሠላሳ ቀን ከማለፉ በፊት ለይግባኝ መክፈቻ ይሆን ዘንድ ቢያንስ በሀገር ውስጥ መ/ቤት ከተወሰነው ግብር ላይ 75% ወይም በይግባኝ ባዩ ላይ ባለፈው የግብር ዘመን የመጨረሻው ግብር ታስቦ ከተወሰነው ልክ ላይ በመቶ ሰባ አምስት (75%) ዝቅተኛ የሆነው ተመርጦ በመያዣነት መከፈል አለበት። ይሁን እንጂ ይህ የመያዣ ገንዘብ ግብር ከፋዩ በአዋጁ አንቀጽ 46(ሀ) መሠረት ባስታወቀው ግብር በሚከፈልበት ገቢ ላይ ሊከፈል ከሚገባው ግብር በማናቸውም ምክንያት ማነስ አይኖርበትም።[80] በዚህ አዋጅ አንቀጽ 54(መ) እንደተመለከተው ግብር ከፋዩ ግብር እንዲከፍል የተጠየቀው ለመጀመሪያ ጊዜ በሚሆንበት ጊዜ ከዚህ በላይ በአንቀጽ 54(ለ) የተመለከተው ቅድመ-ሁኔታ ተፈጻሚነት አይኖረውም። ይልቁንም እንዲህ ዓይነቱ ግብር ከፋይ የግብር አስገቢው ባለሥልጣን በሰጠው ውሳኔ ቅር የተሰኘ እንደሆነ ቢያንስ ባስታወቀው ገቢው ላይ ሊከፍል የሚገባውን ግብር ሃምሳ በመቶ (50%) ወይም የገቢ ማስታወቂያ ያላቀረበ እንደሆነ በግብር አስገቢው መ/ቤት እንዲከፍል ከተጠየቀው ግብር ላይ ግማሹን (50%) ይግባኙን ለማቅረብ በተወሰነው የ30 ቀናት ውስጥ ለባለሥልጣን መ/ቤቱ መክፈል ይኖርበታል።[81]

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[77] ገዢ ከማሁ፣ አንቀጽ 61።

[78] ከማናቸውም ገቢ ግብር ስለማስከፈል የወጣ አዋጅ፣ አዋጅ ቁጥር 173/1953፣ ነጋሪት ጋዜጣ፣20ኛ ዓመት፣ቁጥር 13።

[79] ገዢ ከማሁ፣በገንዘብ ሚኒስቴር ሥር የነበረው የአገር ውስጥ ገቢ መ/ቤት የሚወሰነውን ግብር የሚመለከት አንድ የግብር ይግባኝ ኮሚሲዮንና ኮሚሲዮኖቹ ተሹመው በሚገኙበት ሥፍራ የነበሩ የአውራጃ፣ ወይም የወረዳ የአገር ውስጥ ገቢ መ/ቤቶች ስለሚወሰኑት ግብር የሚቀርበውን ይግባኝ የሚሰሙ የአውራጃ ወይም አስፈላጊ በሚሆንበት ጊዜ ለአንዳንድ ወረዳ የግብር ይግባኝ ኮሚሲዮኖች እንደሚሾሙ ተደንግጓል።

[80] ገዢ ከማሁ፣አንቀጽ 54(ሐ)።

[81] ገዢ ከማሁ፣ አንቀጽ 54(ሠ)። በአጠቃላይ የዚህን አዋጅ አንቀጽ 54 በማንበብ እንደምንገነዘበው የዚህ አንቀጽ ንዑሳን አንቀጾች ተፈጻሚነታቸው በሥራዎች (በንግድ ሥራዎች)፣ ፕሮፌሽናል ወይም ቮኬሽናል ሥራ በሚሠሩ ሰዎች (ግብር ከፋዮች) ላይ ብቻ ነው። በመሆኑም ከእነዚህ ግብር ከፋዮች ውጭ ያሉት ግብር ከፋዮች የአገር ውስጥ ገቢ መሥሪያ ቤት በሚሰጠው ውሳኔ ላይ ቅር

ለግብር ይግባኝ ኮሚሲዮን የሚቀርብ ማናቸውም ይግባኝ በጽሁፍ ሆኖ የይግባኝ ማመልከቻው ግልባጭ ለአገር ውስጥ ገቢ መሥሪያ ቤት ወዲያውኑ ይላክለታል፡፡ ነገር ግን ማናቸውም ይግባኝ ለይግባኝ ሰሚው ኮሚሲዮን መቅረብ የሚኖርበት የግብር ውሳኔ ማስታወቂያ ለግብር ከፋዩ ከተሰጠበት ቀን አንስቶ ባሉት 30 ቀናት ውስጥ ነው፡፡ ግብር ከፋዩ በዚህ በተባለው ቀን ውስጥ ይግባኝ ሳያቀርብ የቀረ እንደሆነ ወይም ደግሞ ማስያዝ የሚገባውን ገንዘብ ሳያስይዝ ወይም ሳይከፍል የቀረ እንደሆነ በአገር ውስጥ ገቢ መሥሪያ ቤት ባለሥልጣን የተወሰነው ግብር ትክክለኛና የመጨረሻ ውሳኔ ሆኖ በዚያው መሠረት በፍጥነት እንደሚፈፀም ተደንግጓል፡፡[82] በሌላ በኩል የአገር ውስጥ ገቢ መሥሪያ ቤት በሰጠው ውሳኔ ላይ ቅር የተሰኘና ቅድመ-ሁኔታዎቹን ያሟላ ግብር ከፋይ ይግባኙን ለግብር ይግባኝ ኮሚሲዮን ሲያቀርብ አምስት አባላት ያሉበት የግብር ይግባኝ ኮሚሲዮን ጉዳዩን ከመረመረና የሁለቱንም ወገኖች ክርክር ካዳመጠ በኋላ የአገር ውስጥ ገቢ መሥሪያ ቤት ባለሥልጣን የሰጠውን የግብር ውሳኔ ለማጽናት፣ ለመቀነስ፣ ለመጨመር ወይም ለመሰረዝ እንዲሁም ደግሞ ለጉዳዩ ፍጻሜ አስፈላጊ መስሎ የታየውን ተጨማሪ ትዕዛዝ ለመስጠት እንደሚችል ነው የተደነገገው፡፡[83] የግብር ይግባኝ ኮሚሲዮን የአገር ውስጥ ገቢ መሥሪያ ቤት የሰጠውን ውሳኔ ሙሉ በሙሉ ያልሰረዘው እንደሆነ ውሳኔው በፍጥነት ተፈጻሚ መሆን እንደሚገባው ሕጉ ይገልፃል፡፡[84]

ይሁን እንጂ የግብር ይግባኝ ኮሚሲዮን የሚሰጠው ውሳኔ የመጨረሻ ውሳኔ አልነበረም፡፡ ይልቁንም የአገር ውስጥ ገቢ መሥሪያ ቤትም ሆነ ግብር ከፋዩ የግብር ይግባኝ ኮሚሲዮን የሰጠው ውሳኔ "በአንዳንድ ምክንያት በሕግ ... ረገድ ስህተት ነው በማለት ያልተስማማ እንደሆነ የተባለው ውሳኔ ማስታወቂያ ከተሰጠበት ቀን አንስቶ እስከ 30 ቀን ድረስ ጉዳዩን መብቱ ለሚፈቅድለት [ሥልጣን ላለው ፍ/ቤት] አቅርቦ ስለሕጉ አፈጻፀም [ስለሕጉ አተረጓጐም] ሊጠይቅ ይችላል፡፡"[85] ከዚህ ድንጋጌ በመነሳት ይግባኝ ሰሚው ፍ/ቤት ሥልጣን የሚኖረው በሕግ ጉዳዮች ብቻ ነው ወይስ የፍሬ ነገሮች ክርክሮችንም ይጨምራል ለሚለው ጥያቄ ግልፅ ምላሽ ለማግኘት የሚያዳግት ቢመስልም በአንቀጽ 59 ግን *"መብቱ የሚፈቅድለት ፍ/ቤት በሕግ ረገድ የተነሳውን ክርክር ተመልክቶ ከሕግ የተቃወሰውን [የሕግ ስህተት ያለበትን] ብቻ አቃንቶ ከፈረደ በኋላ"* ወደ ኮሚሲዮኑ እንደሚመልሰው ደንግጓል፡፡ የመጀመሪያው ይግባኝ ሰሚ ፍ/ቤት የሚሰጠው ውሳኔም የመጨረሻ ውሳኔ አልነበረም፡፡ ምክንያቱም ይግባኝ ሰሚው ፍ/ቤት በሰጠው ውሳኔ ቅር የተሰኘ ግብር ከፋይ ወይም የአገር ውስጥ ገቢ ባለሥልጣን ወደሚቀጥለው ይግባኝ ሰሚ ፍ/ቤት ይግባኝ ማቅረብ እንደሚችል ተገልጿል፡፡[86] ይግባኙ መቅረብ የሚኖርበትም ይግባኝ የሚለው ወገን የመጀመሪያውን ይግባኝ ሰሚ ፍ/ቤት ውሳኔ ከተቀበለበት ቀን አንስቶ ባሉት ሠላሳ ቀናት ጊዜ ውስጥ ነው፡፡[87] ሁለተኛው ይግባኝ ሰሚ ፍ/ቤት ሊያይ የሚችለው የመጀመሪያው ይግባኝ ሰሚ ፍ/ቤት በይግባኝ የሚያየውን ጉዳይ ብቻ ነበር፡፡[88] ይህም ማለት

የተሰኙ እንደሆነ የ30 ቀን የጊዜ ገደብ ከማለፉ በፊት በአንቀጽ 46(ሀ) መሠረት አስቀድመው ባስታወቁት ገቢ ላይ ሊከፍሉ የሚገባቸውን ግብር ወይም ገቢያቸውን ያላስታወቁ እንደሆነ እንዲከፍሉ ከተጠየቁት ግብር ግማሹን (50%) ለአገር ውስጥ ገቢ መሥሪያ ቤት ገቢ በማድረግ ይግባኛቸውን ለግብር ይግባኝ ሰሚው ኮሚሲዮን ማቅረብ ይችላሉ፡፡

[82] ዝኒ ከማሁ፣ አንቀጽ 55፡፡
[83] ዝኒ ከማሁ፣ አንቀጽ 56፡፡
[84] ዝኒ ከማሁ፣ አንቀጽ 57፡፡
[85] ዝኒ ከማሁ፣ አንቀጽ 58፡፡
[86] ዝኒ ከማሁ፣አንቀጽ 60፡፡
[87] ዝኒ ከማሁ፡፡
[88] ዝኒ ከማሁ፡፡

የመጀመሪያው ይግባኝ ሰሚ ፍ/ቤት የሚያየው የሕግ ጉዳዮችን ብቻ እንደመሆኑ መጠን ሁለተኛው ይግባኝ ሰሚ ፍ/ቤትም ማየት የሚችለው የሕግ ጉዳዮችን ብቻ ነው ማለት ነው::[89]

ከዚህ በላይ ከመረመርናቸው ሕጐች በተጨማሪ በተለያዩ ጊዜያት የወጡ የታክስ ሕጐች ስለይግባኝ የደነገጉትን በመፈተሽ መገንዘብ ይቻላል:: ለምሳሌ ያህል በ1955 ዓ.ም ወጥቶ የነበረው የትራንዛክሽን ሕግ[90] በአንቀጽ 33 በግልጽ እንደተመለከተው፣ በአገር ውስጥ ለሚሠሩ ዕቃዎች ወይም በማናቸውም ስለሽያጭ ገቢ ወይም ስለሕንፃ ሥራ በሚደረገው ታክስ ውሳኔ የማይስማማ ታክስ ከፋይ፣ የሥራ ግብር ይግባኝ ለማየት ሥልጣን ለተሰጠው የግብር ይግባኝ ኮሚሽን የይግባኝ ቅሬታውን ለማቅረብ ይችላል:: ሆኖም ማናቸውም ቅሬታ ያደረበት ታክስ ከፋይ ይግባኙን ለኮሚሽኑ ማቅረብ ይችል የነበረው ሕጉ ያስቀመጣቸውን ቅድመ-ሁኔታዎች አሟልቶ ሲገኝ ብቻ ነበር::

በመጀመሪያ ደረጃ ይግባኙ መቅረብ የሚኖርበት የታክሱ ውሳኔ በአገር ውስጥ ገቢ ባለሥልጣን ለግብር ከፋዩ በተሰጠው በ60 ቀናት ውስጥ ነበር:: ሁለተኛ የግብር ከፋዩ ይግባኝ በግብር ይግባኝ ኮሚሲዮኑ ተቀባይነት ሊያገኝ የሚችለው ይግባኝ የሚባልበት 60 ቀን ከማለፉ በፊት የታክስ ባለሥልጣኑ ከወሰነው ታክስ 25% የከፈለ እንደሆነ ብቻ ነው::[91] ከዚያም በመቀጠል የግብር ይግባኝ ጉባኤ በሚሰጠው ውሳኔ ቅር የሚሰኘው ወገን ሥልጣን ወዳለው ፍርድ ቤት ይግባኝ ሊል እንደሚችል ተደንግጓል:: በመጀመሪያው ይግባኝ ሰሚ ፍ/ቤት ቅር ቅሬታ ያደረበት ወገን ደግሞ ወደሚቀጥለው ይግባኝ ሰሚ ፍርድ ቤት ቅሬታውን ከማቅረብ የሚከለክለው ነገር አልነበረም:: ሆኖም ሁለቱም ይግባኝ ሰሚ ፍ/ቤቶች አከራክረው ሊወስኑ የሚችሉት በሕግ ጉዳይ ብቻ እንጂ ወደ ፍሬ ነገር ጉዳዮች ለመግባት የሚያስችል ሥልጣን አልነበራቸውም::[92]

የቀዳማዊ ኃይለሥላሴ መንግሥት በመስከረም 1967 ዓ.ም ከሥልጣን ሲወርድ በትረ-ሥልጣኑን የጨበጠው የደርግ መንግሥት በርካታ ሥር-ነቀል ኢኮኖሚያዊና ፖለቲካዊ እርምጃዎችን የወሰደ ቢሆንም የታክስ ሕጎችን በተመለከተ ግን ቀድሞ የነበሩትን ሕጎች እያሻሻለ መቀጠልን ነበር የመረጠው:: ሆኖም ግን የደርግ መንግሥት በሀገሪቱ የታክስ ሕጎች ላይ ያደረጋቸው ማሻሻያዎች በታክስ ይግባኝ ሥርዓቱ ላይ ትርጉም ያለው ማሻሻያዎችን እንዳላደረገ በዚህያን ወቅት የወጡትን ጥቂት ማሻሻያዎች በመመረመር መረዳት ይቻላል:: ይህ ማለት ግን የደርግ መንግሥት ምንም ዓይነት የታክስ ሕጎች አላወጣም ማለት አይደለም:: ለምሳሌ ያህል በ1968 ዓ.ም የወጣው የገጠር መሬት መጠቀሚያና

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[89] ጉዳዮችን ወደ መደበኛው ፍ/ቤት መውሰድን በተመለከተ በ1953 ዓ.ም ተግባራዊ የተደረገው የገቢ ግብር አዋጅ በ1949 ዓ.ም ከወጣው የገቢ ግብር ድንጋጌ የተለየ አቋም የያዘ ነበር:: ምክንያቱም በ1949 ዓ.ም በወጣው የገቢ ግብር ድንጋጌ መሠረት የመጀመሪያው የግብር ይግባኝ ሰሚው ፍ/ቤት ከፍተኛው ፍ/ቤት ሲሆን ሁለተኛው ይግባኝ ሰሚ ፍ/ቤት ደግሞ የኢትዮጵያ ንጉሠ-ነገሥት ጠቅላይ ፍ/ቤት ነበር:: በኋለኛው ሕግ መሠረት ግን የመጀመሪያው ይግባኝ ሰሚ ፍ/ቤትም ሆነ ሁለተኛው ይግባኝ ሰሚ ፍ/ቤት እንደጉዳዩ ሁኔታ የሚወሰን ነበር:: ይህንም ልዩነት በሚገባ ለመገንዘብ የ1949ኙን ድንጋጌ አንቀጽ 59 እና የ1953ቱን አዋጅ አንቀጽ 60 ይመልከቱ::

[90] የትራንዛክሽን ታክስ አዋጅ ቁጥር 205/1955፣ ነጋሪት ጋዜጣ፣22ኛ ዓመት፣ቁጥር 18:: ከዚህም በተጨማሪ በ1960 ዓ.ም የወጣው የገቢ ግብር ማሻሻያ አዋጅ (አዋጅ ቁጥር 255/1960፣ነጋሪት ጋዜጣ፣ 27ኛ ዓመት፣ ቁጥር 4፣ አንቀጽ 2(የ እና ደ)) በ1953 ዓ.ም በወጣው የገቢ ግብር አዋጅ ላይ ይግባኝን አስመልክቶ ትንሽ ማሻሻያ አድርጐበታል::

[91] ዝኒ ከማሁ፣አንቀጽ 34::

[92] ዝኒ ከማሁ፣ አንቀጽ 36::

የእርሻ ሥራ ገቢ ግብር አዋጅ በዋነኛነት የሚጠቀስ ነው።[93] ይህ አዋጅ ልዩ ልዩ ድንጋጌዎችን በማቀፍ የተደራጀ ሲሆን ስለግብር ይግባኝ ጉዳይም የሚያወሱ ጥቂት ድንጋጌዎች ነበሩት። እነዚህም ድንጋጌዎች ግብር ከፋዩ ይግባኝ የማለት መብት የነበረው መሆኑን፣[94] ይግባኝ ለማለት መሟላት ስለሚገባቸው ቅድመ ሁኔታዎች፣[95] ስለይግባኝ ሰሚው ኮሚቴ አደረጃጀት፣[96] ስለይግባኝ ማመልከቻ አቀራረብና[97] ስለማስረዳት ሸክም[98] የሚደነግጉ ነበሩ።

በዚህ ሕግ አንቀጽ 27 መሠረት ማናቸውም ግብር ከፋይ በተሰጠው የግብር ውሳኔ ቅር የተሰኘ እንደሆነ ውሳኔው ከተገለፀለት አንስቶ ባሉት ሠላሳ ቀኖች ውስጥ ለወረዳ ግብር ይግባኝ ኮሚቴ ይግባኝ ለማቅረብ መብት እንደሚኖረው ተደንግጓል። ሆኖም በግብር ውሳኔው ላይ ቅሬታ ያደረበት ግብር ከፋይ በዚህ መብቱ ሊሠራበት የሚችለው እንዲከፍል ከተወሰነው ግብር ላይ 75% በመያዣ ለታክስ አስገቢው መሥሪያ ቤት የከፈለ እንደሆነ ብቻ ነው።[99] ማንኛውም ተከራካሪ ወገን የወረዳው ግብር ይግባኝ ኮሚቴ የሰጠው ውሳኔ በሕግ ትርጉም የተሳሳተ ነው ብሎ የማይቀበለው ከሆነ ኮሚቴው የወሰነበትን ግብር በሙሉ ከፍሎ ውሳኔው ከደረሰው ቀን ጀምሮ በሠላሳ ቀን ውስጥ ይግባኙን ለአውራጃው ፍ/ቤት የማቅረብ መብት ነበረው።[100] ይግባኝ የሚቀርብለት የአውራጃው ፍ/ቤትም በሕግ ትርጉም ረገድ ስህተት ያለ ሆኖ ሲያገኘው ይህንኑ ስህተት ብቻ አቃንቶ ኮሚቴው ውሳኔ እንዲሰጥበት መልሶ የሚልክለት ሲሆን የአውራጃው ፍ/ቤት ውሳኔም የመጨረሻ እንደሚሆን ተደንግጓል።[101] እንዲሁም በ1968 ዓ.ም ወጥቶ የነበረው የከተማ ቦታ ኪራይና የከተማ ቤት ግብር አዋጅ[102] በግብር አስገቢው ባለሥልጣን ውሳኔ ቅር የተሰኘ ግብር ከፋይ ይግባኙን ለግብር ይግባኝ ሰሚ ጉባኤ ለማቅረብ እንደሚችል ደንግጓል። የዚህ አዋጅ ዝርዝር ድንጋጌዎች ከዚህ በላይ ከተጠቀሰው አዋጅ (የገጠር መሬት መጠቀሚያ ክፍያና ከእርሻ ገቢ የሚገኝ አዋጅ) ድንጋጌዎች ጋር በእጅጉ ተመሳሳይ ናቸው።[103]

ከዚሁ ከደርግ ዘመነ-መንግሥት ሳንወጣ ሌላው የምንመለከተው አዋጅ በ1979 ዓ.ም የወጣውን የቱምብር ቀረጥ አዋጅ ነው።[104] በዚህ አዋጅ አንቀጽ 9 መሠረት የአገር ውስጥ ገቢ አስተዳደር በወሰነው የቱምብር ቀረጥ ሂሳብ የማይስማማ ቀረጥ ከፋይ አስተዳደሩ ውሳኔውን በጽሑፍ ካስታወቀበት ቀን አንስቶ ከ21 ቀናት በማይበልጥ ጊዜ ውስጥ ለከፍተኛው ፍ/ቤት ይግባኝ ለማቅረብ እንደሚችል ተደንግጐ ነበር።[105] በደርግ ዘመነ-

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[93] የገጠር መሬት መጠቀሚያ ክፍያና በእርሻ ሥራ ገቢ ላይ ግብር ለማስከፈል የወጣ አዋጅ፣አዋጅ ቁጥር 77/1968፣ነጋሪት ጋዜጣ፣35ኛ ዓመት፣ ቁጥር 19።

[94] ዝኒ ከማሁ፣አንቀጽ 27(2)ን ይመልከቱ።

[95] ዝኒ ከማሁ፣አንቀጽ 28።

[96] ዝኒ ከማሁ፣አንቀጽ 29።

[97] ዝኒ ከማሁ፣አንቀጽ 30።

[98] ዝኒ ከማሁ፣አንቀጽ 31።

[99] ዝኒ ከማሁ፣አንቀጽ 28።

[100] ዝኒ ከማሁ፣ አንቀጽ 34።

[101] ዝኒ ከማሁ፣ አንቀጽ 35።

[102] የከተማ ቦታ ኪራይና የከተማ ቤት ግብር አዋጅ፣አዋጅ ቁጥር 80/1968፣ነጋሪት ጋዜጣ፣35ኛ ዓመት፣ቁጥር 25።

[103] ዝኒ ከማሁ፣ ከአንቀጽ 9-12 ያሉትን የአዋጁን ድንጋጌዎች ይመልከቱ።

[104] የቱምብር ቀረጥ አዋጅ፣ አዋጅ ቁጥር 334/1979፣ነጋሪት ጋዜጣ፣46ኛ ዓመት፣ቁጥር 25።

[105] ይግባኝን በተመለከተ ይህ አዋጅ የወሰደው አቋም ከዚህ በፊት የመረመርናቸው የሀገራችን የታክስ ሕጐች ከወሰዱት አቋም በእጅጉ የተለየ ነበር። ምክንያቱም በመጀመሪያ ደረጃ በዚህ አዋጅ መሠረት አንድ ቅሬታ የገባው የቱምብር ቀረጥ ከፋይ ጉዳዩን ለግብር ይግባኝ ሰሚ ጉባኤ ለማቅረብ የሚችልበት ዕድል አልነበረውም። በሁለተኛ ደረጃ ቅሬታ ያደረበት ታክስ ከፋይ

መንግሥት ከወጡት የታክስ ሕጐች ውስጥ የታክስ ይግባኝን በሚመለከት ሳይጠቀስ የማይታለፈው ሌላው ሕግ በኢ.ሕ.ዴ.ሪ የመንግሥት ም/ቤት በ1982 ዓ.ም የወጣው የሽያጭ ታክስ ልዩ ድንጋጌ ነው።[106] በዚህ ልዩ ድንጋጌ አንቀጽ 12 እንደተገለፀው የታክስ ባለሥልጣኑ በወሰነው ታክስ ላይ ቅር የተሰኘ ታክስ ከፋይ ከተወሰነው ታክስ 75% በጥሬ ገንዘብ ለታክስ ባለሥልጣኑ በማስያዝ፣ የውሳኔ ማስታወቂያ በደረሰው በ30 ቀናት ውስጥ ለግብር ይግባኝ ኮሚሲዮን ይግባኝ የማቅረብ መብት ነበረው።[107]

የደርግ መንግሥት በ1983 ዓ.ም ከሥልጣን መውረዱን ተከትሎ በሀገሪቱ የሽግግር መንግሥት ተቋቁሞ ነበር።[108] ከ1983-1987 ዓ.ም ድረስ ሀገሪቱን ሲያስተዳድር የነበረው የኢትዮጵያ የሽግግር መንግሥት የተለያዩ መሠረታዊ የኢኮኖሚና የፖለቲካ ለውጦች ተግባራዊ ያደረገ ቢሆንም የታክስ ሕጐችን በተመለከተ ግን አነስተኛ የጥገና ለውጥ ከማድረግ በስተቀር ቀድሞ የነበረውን የታክስ ሕግና ሥርዓት አልለወጠም። ይሁን እንጂ በዚህ የሽግግር ወቅትም ቢሆን የወጡት የታክስ ሕጐች ወይም ማሻሻያዎች የታክስ ይግባኝን አስመልክተው ድንጋጌዎችን ይዘው መውጣታቸው አልቀረም። ለአብነት ያህል በ1985 ዓ.ም ወጥቶ የነበረው የሽያጭና ኤክሳይዝ ታክስ አዋጅ[109] በአንቀጽ 17 ሥር "የታክስ ባለሥልጣኑ በወሰነው ታክስ ቅር የተሰኘ ታክስ ከፋይ ከተወሰነው ታክስ 50% በጥሬ ገንዘብ ለታክስ ባለሥልጣኑ በማስያዝ የውሳኔ ማስታወቂያ በደረሰው በ30 ቀናት ውስጥ ለኮሚሲዮኑ ይግባኝ የማቅረብ መብት አለው" ሲል ደንግጎ ነበር። በዚሁ አንቀጽ ንዑስ አንቀጽ 3 ደግሞ በ1953 ዓ.ም በወጣው የገቢ ግብር አዋጅ (እንደተሻሻለ) የተደነገጉትና የግብር ይግባኝን የሚገዙት ድንጋጌዎች ተፈጻሚነት እንደሚኖራቸው ተደንግጓል።

ይግባኙን ለከፍተኛው ፍ/ቤት ማቅረብ የሚጠበቅበት በቀደሙት ሕጐች እንደተደነገገው የግብር ማስታወቂያው በደረሰው በ30 ቀናት ጊዜ ውስጥ ሳይሆን በ21 ቀናት ጊዜ ውስጥ ነበር። በሦስተኛ ደረጃ ደግሞ ይግባኝ ለማለት የሚፈልገው ሰው የአገር ውስጥ ገቢ አስተዳደር ከወሰነው ታክስ ውስጥ የተወሰነ መቶኛ አስቀድሞ ገቢ ማድረግ ወይም ማስያዝ እንደሚገባው አልተደነገገም ነበር። በአራተኛ ደረጃ ደግሞ የከፍተኛው ፍ/ቤት የይግባኝ ሥልጣን በሕግ ጉዳዮች ላይ ብቻ የተወሰነ ወይም የፍሬ ነገር ጉዳዮችንም ጨምሮ ለማየት የሚችል መሆን አለመሆኑ በሕጉ አልተመለከተም ነበር።

[106] የሽያጭ ታክስ የመንግሥት ምክር ቤት ልዩ ድንጋጌ፣ድንጋጌ ቁጥር 19/1982፣ነጋሪት ጋዜጣ፣ 49ኛ ዓመት፣ ቁጥር 11።

[107] ዝኒ ከማሁ፣የዚሁ ልዩ ድንጋጌ አንቀጽ 12 (3) ደግሞ በገቢ ግብር አዋጅ ቁጥር 173/1953 (እንደተሻሻለ) ስለይግባኝ የተወሰኑ ድንጋጌዎች ለሽያጭ ታክስ ጉዳዮችም ተፈጻሚ ሊሆኑ እንደሚችሉ አስቀምጧል። በመሆኑም በ1953 ዓ.ም የወጣው የገቢ ግብር አዋጅ ስለይግባኝ አቀራረብ፣ ስለማስያዣ፣ ስለይግባኝ ሰሚ ጉባኤ ሥልጣንና ተግባር፣ ስለይግባኝ ሰሚ ፍ/ቤቶች ሥልጣንና መሰል ጉዳዮች የደነገገው በ1982 ዓ.ም በወጣው የሽያጭ ታክስ ሕግ አፈጻፀም ላይ ለሚነሱ የግብር ይግባኝ ሥርዓት አካሄድና አፈጻፀም ተግባራዊ ይደረጋል ማለት ነው።

[108] Assefa Fiseha (2006), *Federalism and the Accomodation of Diversity in Ethiopia*,Wolf Legal Publishers, the Netherlands, ከገጽ 44-52 ያለውን ሐተታ ይመልከቱ።

[109] የሽያጭና ኤክሳይ ታክስ አዋጅ፣አዋጅ ቁጥር 68/1985፣ ነጋሪት ጋዜጣ፣52ኛ ዓመት፣ ቁጥር 61።

3. በኢፌዲሪ የታክስ ከፋይ ቅሬታዎች አፈታት ሥርዓት

3.1 የመንደርደሪያ ሐሳቦች

በ1987 ዓ.ም የወጣው የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት (ከዚህ በኋላ ሕገ-መንግሥቱ እየተባለ የሚጠቀስ) ከታወጀ በኋላ የሀገራችን የመንግሥት አወቃቀር ፌዴራላዊ መሆኑ ታወጀ።[110] ይኸው ሕገ-መንግሥት ዘጠኝ የክልል መንግሥታት[111] መቋቋማቸውን ከመደንገጉም በላይ በፌዴራል መንግሥቱና በክልል መንግሥታት መካከል ሕግ የማውጣት፣ ሕግ የማስፈፀምና የዳኝነት ሥልጣን ክፍፍል የተደረገ መሆኑን አረጋገጠ።[112] በፌዴራል ሥርዓት ውስጥ የሚደረግ የሥልጣን ክፍፍል ትርጉም የሚኖረው ታክስ የመጣልና የመሰብሰብ ሥልጣን ክፍፍል እውን ሲሆን ብቻ በመሆኑ የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥትም በፌደራል መንግሥት እና በክልሎች መካከል ሊኖር የሚገባውን የታክስ ሥልጣን ክፍፍል ደንግጓል::[113] በዚህም መሠረት ለፌዴራል መንግሥት ብቻ የተሰጡ የታክስ ሥልጣናት፣[114] ለክልሎች ብቻ የተሰጡ የታክስ ሥልጣናት[115]፣ ለፌዴራል መንግሥቱና ለክልሎች በጋራ የተሰጡ የታክስ ሥልጣናትና[116] ለየትኛውም የመንግሥት እርከን ያልተሰጡ የታክስ ሥልጣናት (undesignated powers of taxation)[117] ተለይተው ተገልፀዋል። ከዚህ መገንዘብ የሚቻለው የክልል መንግሥታት ለእነሱ ተለይተው በተሰጧቸው ሥልጣናት ላይ ታክስ ለመጣልና ለመሰብሰብ የሚያስችሏቸውን ሕጐች የማውጣት ሥልጣን የተሰጣቸው መሆኑን ነው። በዚህም ምክንያት በራሳቸው ክልል በታክስ ከፋዮችና በታክስ አስገቢ ባለሥልጣናት መካከል የሚነሱትን አለመግባባቶች ለመፍታት የሚያስችሏቸውን ሥርዓቶችም አብረው የመዘርጋት ሕገ-መንግሥታዊ ሥልጣን አላቸው።[118] ያም ሆኖ በኢትዮጵያ የተዋቀሩት ክልሎች የራሳቸውን ተጨባጭ ሁኔታ የሚያንፀባርቁ የታክስ ፖሊሲዎች ሲነድፉና የታክስ ሕግ ሲያወጡ አልተሰተዋሉም። ይልቁንም ክልሎቹ በተቋቋሙበት የመጀመሪያዎቹ ዓመታት የፌዴራል መንግሥት ሲገለገልባቸው የነበሩትን የታክስ ሕጐች እነሱም ሲገለገሉባቸው ነበር።[119]

የፌዴራል መንግሥት ከ1980ዎቹ መጨረሻ ጀምሮ የታክስ ሥርዓት ማሻሻያ ፕሮግራም ነድፎ በመንቀሳቀስ[120] በ1994 ዓ.ም እና 1995 ዓ.ም ዋና ዋናዎቹን የሀገሪቱን የታክስ ሕጐች ተግባራዊ አድርጓል።[121] ከዚህ ጊዜ በኋላም ቢሆን የክልል መንግሥታት

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[110] የኢፌዲሪ ሕገ መንግሥት፣ ከላይ በማስታወሻ ቁጥር 26 የተጠቀሰ፣ አንቀጽ 1 እና አንቀጽ 50።

[111] ዝኒ ከማሁ፣አንቀጽ 47።

[112] ዝኒ ከማሁ፣አንቀጽ 50።

[113] ዝኒ ከማሁ፣ከአንቀጽ 95-100 ያሉትን ዝርዝር ድንጋጌዎች ይመልከቱ።

[114] ዝኒ ከማሁ፣አንቀጽ 96።

[115] ዝኒ ከማሁ፣አንቀጽ 97።

[116] ዝኒ ከማሁ፣አንቀጽ 98።

[117] ዝኒ ከማሁ፣አንቀጽ 99።

[118] ዝኒ ከማሁ፣አንቀጽ 51ን እና 52ን ይመልከቱ።

[119] Solomon Nigussie,*Fiscal Federalism in the Ethiopian Ethnic Based Federal System*,Wolf Legal Publishers,the Netherlands, 2006፣ ከገጽ 124-140 ይመልከቱ፤ Taddese Lencho, *'Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About*,' *Mizan Law Review*, Vol. 4,N 1, March 2010፣ ገጽ 45 ይመልከቱ።

[120] Alemayehu Geda, ከላይ በማስታወሻ ቁጥር 11 የተጠቀሰ፣ ከገጽ 188-214 ያለውን ይመልከቱ።

[121] እነዚህም የገቢ ግብር አዋጅ፣ የተጨማሪ እሴት ታክስ አዋጅ፣ የተርን ኦቨር ታክስ አዋጅ፣ የጉምሩክ አዋጅ፣ የቴምብር ቀረጥ ሕግ አዋጅ፤ የኤክሳይዝ ታክስ አዋጅ እና የመሳሰሉት ናቸው።

ሕገ-መንግሥቱ የሰጣቸውን ሕግ የማውጣት ሥልጣን ተጠቅመው የራሳቸውን የታክስ ሕጎች ከማውጣት ይልቅ የፌዴራል መንግሥት ካወጣቸው ሕጐች ጋር ሙሉ ተመሳሳይነት ያላቸውን ሕጎች ሥራ ላይ አውለዋል።[122] አንዳንድ ክልሎች ደግሞ የፌደራል መንግሥትን የታክስ ሕጎች በአዋጅ ተቀብለዋቸዋል። ለዚህ ጥሩ ምሳሌ የሚሆነን የትግራይ ብሔራዊ ክልላዊ መንግሥት የገቢ ግብር አዋጅ ነው።[123] በዚህ የክልሉ የገቢ ግብር አዋጅ የፌዴራል መንግሥት የገቢ ግብር አዋጅ (ማለትም አዋጅ ቁጥር 286/1994) እጅግ አነስተኛ ማስተካከያ[124] ተደርጎበት በትግራይ ክልልም ተፈጻሚነት እንዳለው ተደንግጓል።[125]

ከዚህ በላይ ከተደረጉት ገለጻዎች መገንዘብ የሚቻለው ቁምነገር በኢትዮጵያ ውስጥ በፌደራል መንግሥት የታክስ ሕጎችና በክልል መንግሥታት የታክስ ሕጐች መካከል መሠረታዊ ልዩነት ስላልተፈጠረ የታክስ ከፋዮች ቅሬታዎች የሚፈቱበት ሕጋዊ ሥርዓትም መሠረታዊ የሆነ ልዩነት የሌለው መሆኑን ነው። በመሆኑም አሁን በመላ ሀገሪቱ የታክስ ከፋዮች ቅሬታዎች የሚያስተናግዱባቸው ተቋማት ሦስት ናቸው። እነሱም አቤቱታ አጣሪ ኮሚቴ፣ የግብር ይግባኝ ጉባኤና መደበኛ ፍ/ቤቶች ናቸው። ከዚህ በመቀጠል የምንመለከተው በእያንዳንዱ የግብር ቅሬታ ማስተናገጃ መዋቅር ሥር ያለውን የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት ነው።

3.2. የታክስ ከፋዮች ቅሬታዎች አጣሪ ኮሚቴ ስለሚፈታበት ሥርዓት[126]

የታክስ አስገቢው ባለሥልጣን በታክስ ከፋዮች ላይ የሚያሳድረውን ቅሬታ ለማረም ውስጣዊና[127]ውጫዊ[128] የመቆጣጠሪያ ሥልቶች (internal and external controlling

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[122] በዚህ ረገድ ጥሩ ምሳሌ የሚሆነው የኦሮሚያ ክልል የገቢ ግብር አዋጅ ነው፤ የኦሮሚያ ክልላዊ መንግሥት መስተዳድር የገቢ ግብር አዋጅ፣ አዋጅ ቁጥር 74/1995፣ መገለጥ ኦሮሚያ፣ 9ኛ ዓመት፣ ቁጥር 12። ይህ አዋጅ ሁለንተናዊ በሆነ መልኩ ከፌደራሉ የገቢ ግብር አዋጅ ጋር ተመሳሳይነት አለው። ሌላው ቀርቶ በአናቅጽ አቀማመጥና ብዛት እንኳን ሁለቱ ሕጎች አንድ ናቸው።

[123] የትግራይ ብሔራዊ ክልላዊ መንግሥት የገቢ ግብር አዋጅ፣ አዋጅ ቁጥር 68/1995፣ ነጋሪት ጋዜጣ ትግራይ፣11ኛ ዓመት፣ቁጥር 10፣

[124] ዝኒ ከማሁ፤የተደረጉትን ማስተካከያዎች ለመረዳት የአዋጁን አንቀጽ 3 ይመልከቱ።

[125] ዝኒ ከማሁ፣አንቀጽ 2።

[126] በዚህ ንዑስ ርዕስ ሥር ለምናደርጋቸው ገለጻዎች ተደጋግመው የሚጠቀሱት የገቢ ግብር አዋጁ (ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ) ድንጋጌዎች ናቸው። ምክንያቱም የሌሎቹ ታክስ ሕጎቻችን ድንጋጌዎች ከዚህ አዋጅ ድንጋጌዎች ጋር የሚመሳሰሉ በመሆናቸው እነሱን እየደጋገሙ መጥቀስ አንባቢን የሚያሰለች ከመሆኑም በላይ የጽሁፉንም ውበት ይቀንሰዋል። ስለሆነም ክቡራን አንባቢያን በተጨማሪ እሴት ታክስ አዋጅ፣በማስታወሻ ቁጥር 41 የተጠቀሰ፣ ከአንቀጽ 40-42 ያሉትን ድንጋጌዎች፣በተርን አቨር ታክስ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 42 የተጠቀሰ፣ ከ18-20 ያሉትን ድንጋጌዎች፣ በኤክሳይዝ ታክስ አዋጅ ቁጥር፣ ከላይ በማስታወሻ ቁጥር 43 የተጠቀሰ፣ ከ15-17፣ ያሉትን ድንጋጌዎች፣ የጉምሩክ አዋጅ፣ አዋጅ ቁጥር 622/2001፣ ፌደራል ነጋሪት ጋዜጣ፣ 15ኛ ዓመት፣ ቁጥር 27 በአንቀጽ 87 የተደነገጉትን እንዲመለከቱ ተጋብዘዋል። እንደዚሁም ደግሞ የፌደራል ሀገር ውስጥ ገቢ ባለሥልጣ ያወጣውን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያ መመሪያና የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን የጉምሩክ ጉዳዮች አቤቱታ አጣሪ ቡድን ማቋቋሚያና የአሠራር መመሪያ ቁጥር 45/2002 ይመልከቱ(ያልታተሙ ናቸው)።

[127] ይህንን ጉዳይ ይበልጥ ለመገንዘብ የሚከተለውን ሥራ መልከቱ፡- N.K.Jayakumar (2005), *Administrative Law*, New Delhi፡ Prentice-Hall of India Private Limited. ይህ የቁጥጥር ስልት የሚያመለክተው በአንድ የመንግሥት መሥሪያ ቤት ውስጥ በየደረጃው የሚደረገውን ቁጥጥር ነው። ለምሳሌ ያክል በአንድ የሚኒስቴር መ/ቤት ሚኒስትሩ የመምሪያ ኃላፊውን

mechanisms) በሕግ ማቋቋም የግድ አስፈላጊ ነው። በሀገራችን የታክስ ሕጐች እውቅና የተሰጠው አጣሪ ኮሚቴ ውስጣዊ የመቆጣጠሪያ ዘዴ ነው።

አሁን በሥራ ላይ ያሉት የታክስ ሕጐቻችን ከታወጁ ወዲህ በታክስ አስገቢው ባለሥልጣን ውሳኔ ቅር የተሰኘ ወገን ቅሬታውን *አቤቱታ አጣሪ ኮሚቴ* ተብሎ ለሚጠራውና በሕግ ዕውቅና ለተሰጠው አካል የማቅረብ መብት አለው። ይህ አጣሪ ኮሚቴ በፌዴራል መንግሥትም ሆነ በክልል ደረጃ ተቋቁሟል። በፌዴራል መንግሥት ደረጃ የአቤቱታ አጣሪ ኮሚቴው አባላት በታክስ አስገቢው ባለሥልጣን ኃላፊ አቅራቢነት በገቢዎችና ጉምሩክ ባለሥልጣን እንደሚሰየሙ የገቢ ግብር አዋጁ አንቀጽ 104 ይደነግጋል።[129] የገቢ ግብር አዋጅ የፌዴራል መንግሥት ሕግ እንደመሆኑ መጠን አጣሪ ኮሚቴዎች በክልሎች እንዴት መቋቋም እንዳለባቸው መደንገግ የማይገባው ቢሆንም ይኸው የአዋጁ አንቀጽ በክልል ደረጃ የአጣሪ ኮሚቴው አባላት አግባብ ባለው የክልል ባለሥልጣን እንደሚሰየሙ ያረጋግጣል።[130] የክልሎቹን የገቢ ግብር ሕግጋት ስንመለከትም የፌደራል መንግሥት የገቢ ግብር አዋጅ ከሚደነግገው ጋር በተጣጣመ መልኩ ደንግገው እናገኛቸዋለን።[131] ለምሳሌ ያህል የኦሮሚያ ክልላዊ መንግሥት የገቢ ግብር አዋጅ[132] አንቀጽ 104 የአቤቱታ አጣሪ ኮሚቴው አባላት በየደረጃው በሚገኙ የግብር ባለሥልጣን ኃላፊዎች አቅራቢነት እንደአግባብነቱ በገንዘብና ኢኮኖሚ ልማት ቢሮ ኃላፊ፣ በዞን የገንዘብና ኢኮኖሚ ልማት መምሪያ ኃላፊ፣ በወረዳ የገንዘብና ኢኮኖሚ ልማት ጽ/ቤት ወይም በከተሞች የገንዘብና ኢኮኖሚ ልማት መምሪያ ኃላፊ ይሰየማሉ በማለት ይደነግጋል።

በፌደራል የገቢ ግብር አዋጅ በግልጽ እንተደነገገው የአጣሪ ኮሚቴው ተጠሪነት ለሚመለከተው የግብር አስገቢው ባለሥልጣን ሆኖ፣[133] የዚሁ አዋጅ አንቀጽ 105 እንደሚያትተው የአቤቱታ አጣሪ ኮሚቴው በግብር ከፋዮች መቀጫ እንዲነሳ፣ ወለድ ቀሪ እንዲያደርግ እና የግብር ግዴታ እንዲሻሻል የሚቀርቡ ማመልከቻዎችን ተቀብሎ ለመመርምርና የውሳኔ ሐሳብ ለማቅረብ የሚያስችል ሥልጣን አለው። ይህንን ሥልጣኑን ተግባራዊ ማድረግ እንዲቻለውም ከቀረቡት አቤቱታዎች ጋር ግንኙነት ያላቸውን ማናቸውም የጽሑፍ ማስረጃዎች መሰብሰብ እንዲችል፣ በምርመራ ላይ የሚገኘውን ጉዳይ በሚመለከት የሚጠየቀውን ጥያቄ እንዲመልስ ከግብር አወሳሰን ጋር በቀጥታ ወይም ቀጥታ ባልሆነ መንገድ ግንኙነት ያለውን ማንኛውም ሰው የመጥራትና የግብር አስገቢው ባለሥልጣን የሰጠው የግብር ውሳኔ ትክክለኛ፣ የተሟላ እና ሕጉን ተከትሎ የተሰጠ

የሚቆጣጠር ሲሆን፣ የመምሪያ ኃላፊው ደግሞ ከእርሱ በታች ያለውን ባለሥልጣን የመቆጣጠር ኃላፊነት አለበት ማለት ነው።

[128] ስያሜው እንደሚያመለክተው ይህ ቁጥጥር ከመሥሪያ ቤቱ ውጭ ባሉ የመንግሥት ተቋማት የሚደረግ ቁጥጥር ነው። በአንድ የመንግሥት አስተዳደር መሥሪያ ቤት ላይ ውጫዊ ቁጥጥር በማድረግ በሰፊው የሚታወቁት ፍርድ ቤቶች፣ እንባ ጠባቂ ተቋም፣ የሰብአዊ መብት ኮሚሽን፣ መገናኛ ብዙሀን፣ የጸረ-ሙስና ኮሚሽንና የመሳሰሉት ናቸው።

[129] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ።

[130] ዝኒ ከማሁ

[131] የአማራ፣ የኦሮሚያ፣ የደቡብ፣ የጋምቤላ እና የትግራይ ክልሎች የገቢ ግብር አዋጆች የፌደራል መንግሥት የገቢ ግብር አዋጅ ከሚደነግገው የተለየ አቋም የላቸውም።

[132] የኦሮሚያ ክልል የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 122 የተጠቀሰ።

[133] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 104። መቀጫ ማንሳትን በተመለከተ መጀመሪያ በ1994 ዓ.ም አንድ መመሪያ በገቢዎች ሚኒስቴር ወጥቶ የነበረ ሲሆን፣ በ1996 ዓ.ም ይኸው የሚኒስቴር መሥሪያ ቤት መመሪያ ቁጥር 5/1996ን አሻሽሎ አውጥቷል።

መሆኑን የማረጋገጥ ሥልጣን ተሰጥቶታል።[134] በተጨማሪም የአቤቱታ አጣሪ ኮሚቴው የገቢዎችና ጉምሩክ ባለስልጣን በሚያወጣው መመሪያ መሠረት በግብር ከፋዩ ላይ የሚጣለውን አስተዳደራዊ መቀጫ በከፊል ወይም በሙሉ እንዲነሳ ለማድረግ እንደሚችል በዚሁ ሕግ ተደንግጓል።[135]

በታክስ አስገቢው ባለሥልጣን ውሳኔ ቅር የተሰኘ ማንኛውም ታክስ ከፋይ ቅሬታውን ለአጣሪ ኮሚቴው የሚያቀርበው ያለምንም ቅድመ ሁኔታ ነው። ሆኖም ግን ቅሬታው መቅረብ የሚኖርበት ታክስ ከፋዩ የግብር ውሳኔ በደረሰው አሥር ቀናት ውስጥ ብቻ ነው።[136] በዚህ ረገድ በሀገራችን ከሚሠራባቸው የታክስ ሕጎች ውስጥ ለየት ያለ አቋም የወሰዱት በ2001 ዓ.ም የወጣው የቴምብር ቀረጥ ማሻሻያ አዋጅ[137] እና በ2001 ዓ.ም የወጣው የጉምሩክ አዋጅ ናቸው።[138] ምክንያቱም በቴምብር ቀረጥ አዋጅ (ማሻሻያ) አንቀጽ 2(2) በማያሻማ ሁኔታ እንደተደነገገው ማንኛውም በቴምብር ቀረጥ ውሳኔ ላይ ቅሬታ ያደረበት ታክስ ከፋይ ቅሬታውን ለአጣሪ ኮሚቴው የሚያቀርበው ውሳኔው *በደረሰው በ30 ቀናት ውስጥ ነው*። (አንክሮ የጸሐፊው ነው)። በጉምሩክ አዋጅ አንቀጽ 87(2) *ሥር* ደግሞ ቀረጡን በተቃውሞ የከፈለ ሰው *ክፍያ በፈጸመ በ15 ቀናት ውስጥ* ቅሬታውን በባለስልጣኑ ለተቋቋመው አቤቱታ አጣሪ ቡድን ማቅረብ እንደሚችል ተደንግጓል። በእነዚህ አዋጆች ውስጥ የተመለከተው ልዩ ሁኔታ እንደተጠበቀ ሆኖ፣ ከዚህ የአሥር ቀን ገደብ *ጋር* ተያይዞ የሚነሳው ዋና ጥያቄ ለታክስ ከፋዩ የተሰጠው የአስር ቀን የጊዜ ገደብ በቂ ነው ወይስ አይደለም የሚለው ጥያቄ ነው።

እንደ ታክስ አስገቢው ባለሥልጣን *ሠራተኞች* አመለካከት ከሆነ በሕጉ የተመለከተው የአሥር ቀን ገደብ በቂ ነው የሚል ነው።[139] ለዚህም የሚያቀርቡት ምክንያት የታክስ አዲተሩ ገና ሥራውን ሲጀምር ግብር ከፋዩን አሳውቆ በእያንዳንዷ ሰነድ ላይ እየተወያዩ ግብሩ ስለሚወሰን ለግብር ከፋዩ እንግዳ የሚሆን ነገር ሊኖር አይችልም የሚል ነው። ከዚህም በተጨማሪ ማንኛውም ቅሬታ አቅራቢ ወደ አጣሪ ኮሚቴው ከመምጣቱ በፊት ታክሱን በሚወስነው የታክስ አስገቢው ባለሥልጣን *ሠራተኛና* በታክስ ከፋዩ *መካከል የመተማመን ውይይት* (exit conference) ስለሚደረግ ታክስ ከፋዩ ለጉዳዩ እንግዳ ስለማይሆን ግብር ከፋዩ በሕጉ በተቀመጠው የአሥር ቀን ገደብ ውስጥ ቅሬታውን ለአጣሪ ኮሚቴው ለማቅረብ እንደማያዳግተው የግብር አስገቢው *መሥሪያ* ቤት *ሠራተኞች* ይገልፃሉ።[140]

በአንፃሩ ደግሞ ቅሬታ የተሰማውን ታክስ ከፋይ አቤቱታ የማቅረብና የመስማት መሠረታዊ መብት እውን ለማድረግ ይህ የቀን ገደብ በመጠኑ ረዘም ቢል መልካም

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[134] ዝኒ ከማሁ፣አንቀጽ 105።

[135] ዝኒ ከማሁ፣አንቀጽ 106።

[136] ዝኒ ከማሁ፣አንቀጽ 105(2)።

[137] የቴምብር ቀረጥ (ማሻሻያ) አዋጅ፣ አዋጅ ቁጥር 612/2001፣ ፌደራል ነጋሪት ጋዜጣ፣ 15ኛ ዓመት፣ ቁጥር 9።

[138] የጉምሩክ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 126 የተጠቀሰ።

[139] ቃለ መጠይቅ፣ ከአቶ ጌታቸው ታደሰ *ጋር* የተደረገ፣ አቶ ጌታቸው ታደሰ በኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን፣ የምዕራብ አዲስ አበባ *መካከለኛ* ግብር ከፋዮች ቅ/ጽ/ቤት የትምህርት ድጋፍ ቡድን አስተባባሪና የአጣሪ ኮሚቴ አባል፣ ሐምሌ 03 ቀን 2005 ዓ.ም።

[140] ይሁን እንጂ እንዲህ ያለው የመተማመን ውይይት የሚደረገው በአዲስ አበባ ከተማ ብቻ መሆኑን በዚህ ረገድ የተደረጉ ጥናቶች ያሳያሉ፣ Misganaw Gashaw, ከላይ በማስታወሻ ቁጥር 6 የተጠቀሰ፣ ገጽ 41።

ሰለመሆኑ የሚቀርቡ አስተያየቶች አሉ።[141] በሌሎች ሀገራት ያለው ተሞክሮ ይህንን አስተያየት የሚያጠናክር ሆኖ እናገኘዋለን። ለምሳሌ ያህል በብራዚል የሪዮ ዲ ጀኔሮ ግዛት የታክስ ሕግ በግልጽ እንደሚደነግገው ማንኛውም የታክስ ውሳኔ የደረሰው ታክስ ከፋይ በውሳኔው ላይ ተቃውሞ ካለው ይህንን ተቃውሞውን ውሳኔውን ላስተላለፈው አካል የሚያቀርበው ውሳኔው ከደረሰው ጀምሮ ባሉት 30 ቀናት ውስጥ ነው።[142] በአሜሪካ ደግሞ *በሀገር ውስጥ የገቢ አገልግሎት መ/ቤት* (Internal Revenue Service) የታክስ ውሳኔ ቅር የተሰኘ ታክስ ከፋይ ቅሬታውን ለዚሁ መ/ቤት ቅሬታ ሰሚ አካል የሚያቀርበው የታክስ ውሳኔው በደረሰው በ90 ቀናት ውስጥ ነው። ታክስ ከፋዩ የሚኖረው ከአሜሪካ ውጭ የሆነ እንደሆነ በውሳኔው ላይ የሚኖረውን ቅሬታ ውሳኔው በተሰጠው በ150 ቀናት ጊዜ ውስጥ ማቅረብ ይችላል።[143] በቻይና የታክስ ሰብሳቢው ባለሥልጣን በሚሰጠው የግብር ውሳኔ ላይ ቅሬታ ለሚመለከተው አካል የሚቀርበው ውሳኔው ከተሰጠበት ጊዜ ጀምሮ ባሉት 60 ቀናት ውስጥ ነው።[144] በግብፅ እ.ኤ.አ በ2005 የወጣው የሀገሪቱ ገቢ ግብር ሕግ አንቀጽ 116 *መሠረት* የታክስ አስገቢው ባለሥልጣን በሚሰጠው የታክስ ውሳኔ ያልተስማማ ሰው ውሳኔ ከተሰጠበት ጊዜ ጀምሮ ባሉት 30 ቀናት ውስጥ ቅሬታውን ለሚመለከተው አካል የማቅረብ መብት አለው።[145] በአጠቃላይ ዓለም አቀፉ የኢኮኖሚ ትብብርና ልማት ድርጅት (Organization for Economic Cooperation and Development) ያደረገው ጥናት እንደሚያሳየው የጊዜው ገደብ ከሀገር ሀገር የሚለያይ ቢሆንም፣ ታክስ ከፋዮች እንዲህ ዓይነቱን ቅሬታ የሚያቀርቡበት ጊዜ ከ21 እስከ 90 ባሉት ቀናት ውስጥ ነው።[146]

በኢትዮጵያ የታክስ ከፋዮች ቅሬታ ማስተናገጃ ሥርዓት ውስጥ የተደነገገው የአሥር ቀናት የጊዜ ገደብ ከዓለም ዓቀፉ እውነታ ጋር ስለማይጣጣም ተገቢው ማሻሻያ ሊደረግበት ይገባል ብሎ መከራከር አግባብነት አለው። በዚህ ጽሑፍ አዘጋጅ አመለካከትም አንድ ታክስ ከፋይ በታክስ ውሳኔው ላይ ያለውን ቅሬታ ለማሰማት እንዲችል ዕድል ከተሰጠው በኋላ አቤቱታውን የሚያቀርብበትን ጊዜ ከመጠን በላይ አጭር ማድረግ በአንድ እጅ የተሰጠውን መብት በሌላ እጅ እንደመንፈግ የሚቆጠር ነው። በሕጉ የተገለፀው የአሥር ቀን ገደብ

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[141] ቃለመጠይቅ ከዶ/ር ታደሰ ሌንጮ ጋር (ሐምሌ 2 ቀን 2005 ዓ.ም)። ዶ/ር ታደሰ ሌንጮ በአዲስ አበባ ዩኒቨርሲቲ የሕግ መምህር ሲሆኑ በታክስ ጉዳዮች ላይ የተለያዩ የምርምር ሥራዎችን የሚሠሩ ናቸው።

[142] Marcelo Habib Garvalho (2013), Tax Appleal Processes in the Treasury Secretariat of the State of Rio De Jeneiro and the IUnternal Revenue Service, School of Business and Public Mnagement IBI-The Institute of Birazilian Issues, Minerva Program, Fall 2013, Washington D.C, available at <www.gwu.edu/~ibi/minerva/Fall2013/Marcelo_Carvalho.pdf>, accessed on 29 September 2014፣ ገጽ 7 ላይ ይመልከቱ።

[143] ዝኒ ከማሁ፤ ገጽ 24።

[144] Fuli Cao, Corporate Income Tax Law and Practice in the People's Republic of China, Oxford University Press, 2011,ገጽ.395.

[145] የግብጽን የገቢ ግብር ሕግ ይመልከቱ፤ Income Tax Law, 2005, available at <www.mof.gov.eg/MOFGallerySource/english/IncomeTaxLaw.pdf>, accessed on 29 September 2014.

[146] David Crowaford, Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean,Chapter 11, UASAID's Leadership in Management, 2013, available at <www.usaid.gov/where-we.../latin-american...caribbean/tax-administration>, accessed on 30 September 2014 ፣ ገጽ 20።

ከሀገራችን ተጨባጭ ሁኔታ አንፃር ሲታይ በጣም አጭር ጊዜ ነው። ምክንያቱም አብዛኞቹ የሀገራችን ታክስ ከፋዮች ስለታክስ ሕጐቻችን በቂ ዕውቀት የሌላቸው፣ በመስኩ ሙያ ያላቸውን ሰዎች የማያማክሩ እና ተገቢውን እርምጃ በተገቢው ጊዜና ቦታ መውሰድ የማይችሉ ስለሆኑ ለአጣሪ ኮሚቴው አቤቱታቸውን የሚያዘጋጅላቸው ባለሙያ መፈለግ፣ አግባብነት ያላቸውን ማስረጃዎችና መረጃዎችን መሰብሰብና ማጠናቀር ጊዜ ይጠይቃቸዋል። በመሆኑም የቴምብር ቀረጥ ማሻሻያ አዋጅና የጉምሩክ አዋጅ እንዳደረጉት ሁሉ፣ በዚህ ረገድ አስፈላጊው ጥናት ተደርጎ የአሥር ቀኑ የጊዜ ገደብ ወደ ሃያ ወይም ሠላሳ ቀን ከፍ ቢል ታክስ ከፋዩን ማጎበረሰብ የሚጠቅም ከመሆኑም በላይ በመንግሥት ገቢ ላይ የሚያሳድረው አሉታዊ ተጽዕኖ ይኖረዋል ለማለት የሚቻል አይሆንም።

በገቢ ግብር አዋጅ አንቀጽ 105(3) በግልጽ እንደተደነገገው የአጣሪ ኮሚቴው ውሳኔ የመጨረሻ አይደለም። ይልቁንም አጣሪ ኮሚቴው በቀረበለት ጉዳይ ላይ የመሰለውን ውሳኔ ከአሳለፈ በኋላ ይህንኑ የውሳኔ ሓሳብ ለሚመለከተው የግብር አስገቢ ባለሥልጣን ኃላፊ ውሳኔ የማቅረብ ግዴታ አለበት። የግብር አስገቢው ባለሥልጣን ኃላፊም የቀረበለትን የውሳኔ ሓሳብ እንዳለ ሊያጸድቀው፣ ውድቅ ሊያደርገው ወይም በውሳኔ ሓሳቡ ካልተስማማ ምክንያቱን በመግለጽ ጉዳዩ እንደገና እንዲታይ ለኮሚቴው ሊመልሰው ይችላል።

ከዚሁ ከታክስ አጣሪ ኮሚቴ ሥልጣን ጋር ተያይዞ የሚነሳው ሌላው ዐብይ ጥያቄ የታክስ አጣሪውን ኮሚቴ የሥልጣን ወሰን የሚመለከት ነው። ቀደም ሲል እንደተገለፀው የታክስ አጣሪ ኮሚቴው የሚመለከተው ከታክስ ውሳኔ ማስታወቂያ ጋር ተያይዘው የሚነሱ ጥያቄዎች ብቻ ናቸው። በዚህም ምክንያት ለምሳሌ ያህል አንድ በኢትዮጵያ ውስጥ የሚገኝ፣ ነገር ግን በኢትዮጵያ ውስጥ ምንም ዓይነት ገቢ የማያመነጭ ግለሰብ፣ ለኢትዮጵያ መንግሥት የገቢ ግብር እንዲከፍል ቢጠየቅና ይህ ግለሰብ የኢትዮጵያ የገቢ ግብር ሕግ በእኔ ላይ ተፈጻሚነት የለውም የሚል ክርክር ቢያነሳ አጣሪ ኮሚቴው እንዲህ ያለውን ጉዳይ ተቀብሎ ለመመርመርና እልባት ለመስጠት ሥልጣን አለው ብሎ በድፍረት ለመናገር አስቸጋሪ ነው። እዚህ ላይ እንዲህ ዓይነቶቹን ጉዳዮች በቀጥታ ወደ ፍርድ ቤት ይዞ መሄድ አይቻልም ወይ የሚል ጥያቄ ማንሳት ይቻላል። ነገር ግን የኢትዮጵያ ፍርድ ቤቶች ታክስ ጉዳዮችን ተቀብለው የሚያስተናግዱት ከግብር ይግባኝ ጉባኤ ላይ ይግባኝ ሲባል በመሆኑ እንዲህ ያለውን ጉዳይ በቀጥታ ያስተናግዳሉ ብሎ ለማሰብ ይከብዳል።

ይህንንም አስመልክቶ የዚህ ጽሑፍ አዘጋጅ ቃለመጠይቅ ያደረገላቸው አቶ ጌታቸው ታደሰ (የአጣሪ ኮሚቴ አባል)፣ እንዲህ ዓይነት ከባድ የሕግ ጥያቄ ሲያጋጥም ኮሚቴው እንደማይመለከተው አረጋግጠዋል።[147] ይልቁንም እንዲህ ዓይነት ወሳኝ የሆነ የሕግ ጥያቄ በሚያጋጥምበት ጊዜ ጥያቄው በዋናው መ/ቤት ተቋቁሞ ለነበረው የቴክኒክ ኮሚቴ ተብሎ ይጠራ ለነበረው አካል እንደሚተላልፍ አስረድተዋል። የቴክኒክ ኮሚቴውም ጉዳዩን ከመረመረ በኋላ የውሳኔ ሓሳቡን ለባለሥልጣኑ ዳይሬክተር እንደሚያቀርብ አቶ ጌታቸው ጨምረው አረጋግጠዋል።[148] ይሁን እንጂ ይህ የቴክኒክ ኮሚቴ በታክስ አስገቢው ባለሥልጣን የተቋቋመ እንጂ በዋና ዋናዎቹ የታክስ ሕጐች እውቅና ያልተሰጠው ስለሆነ የሚሰጠው ውሳኔውም የሕግ መሠረት ያለው ነው ለማለት ያስቸግራል። ስለሆነም፣ የአጣሪው ኮሚቴ አባላት በቂ ዕውቀት፣ ልምድና ሥነ-ምግባር ያላቸው ግለሰቦች እንዲሆኑ እስከተደረገ ድረስ ማናቸውንም ቅሬታዎች የማየትና አስተያየት የማቅረብ ሥልጣን ቢሰጣቸው ጠቀሜታ እንደሚኖረው የዚህ ጸሀፊ እምነት ነው።[149]

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[147] ጌታቸው ታደሰ፣ ከላይ በማስታወሻ ቁጥር 139 የተጠቀሰ።

[148] ዝኒ ከማሁ።

[149] አንዳንድ የሕግና ከሕግ ሙያም ውጭ የሆኑ ባለሙያዎች የቴክኒክ ኮሚቴ ተብሎ ይጠራ የነበረው አካል የሕግ መሠረት ያለው ተቋም ነው ብለው ሲከራከሩ ጸሐፊው ለመገንዘብ ችሏል።

ስለ አጣሪ ኮሚቴው ሥልጣንና ተግባር ስንነጋገር የሚነሳው ሌላ ነጥብ የአጣሪ ኮሚቴው ገለልተኛ የመሆን አለመሆን ጉዳይ ነው። በመሠረቱ አስተዳደራዊ ውሳኔ ሰጭ አካላት ከሚተቹባቸው ጉዳዮች አንዱ ገለልተኛ የሆነ ውሳኔ አይሰጡም በሚል ነው። ወደተያዘው ጉዳይም ስንመጣ አንዳንድ ጥናቶች[150] እንደሚያመለክቱት የኮሚቴው አባላት በታክስ አስገቢው ባለሥልጣን ኃላፊ የሚሾሙ እንደመሆናቸውና ተጠሪነታቸውም ለዚሁ ኃላፊ እንደመሆኑ ገለልተኝነታቸው በጣም አጠራጣሪ ነው የሚል አመለካከት አለ። ለምሳሌ ያህል በአንድ ወቅት በአዲስ አበባ ከተማ ውስጥ በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዮች መካከል በተደረገ የምክክር ስብሰባ ታክስ ከፋዮቹ የአጣሪ ኮሚቴው አባላት ለታክስ ባለሥልጣኑ እንደሚያደሉ ገልፀዋል።[151] ይህ ጸሐፊ ጥያቄ ያቀረበላቸው የአጣሪ ኮሚቴ አባል ግን "ሥራችን በምንሠራበት ጊዜ ምንም ዓይነት ጫና ተፈጥሮብን አያውቅም፤ ሥራችንን የምንሠራውም በፍፁም ገለልተኝነት ነው፣ ይልቁንም ቅሬታውን የሚያቀርበው ታክስ ከፋይ ቀድሞውንም ቢሆን አጣሪ ኮሚቴው ገለልተኛ አይደለም የሚል አመለካከት ይዞ ነው የሚመጣው" ብለዋል።[152]

3.3 የታክስ ከፋዮች ቅሬታዎች በግብር ይግባኝ ጉባኤ ስለሚፈቱበት ሥርዓት[153]

ከ1936 ዓ.ም ጀምሮ የወጡትን የታክስ ሕጎች በዳሰስንበት ጊዜ እንደተረዳነው የግብር ይግባኝ ጉባኤ ይቋቋም የነበረው እራሱን በቻለ ሕግ ሳይሆን ስለታክስ ጉዳዮች በሚደነግጉ ሕጐች አማካይነት ነበር። ነገር ግን በ1993 ዓ.ም የፌዴራል የግብር ይግባኝ ጉባኤ የሚባል ተቋም በአዋጅ ቁጥር 233/1993[154] ራሱን ችሎ ተቋቁሞ ነበር። ይህ አዋጅ ብዙም ሳይቆይ በ1994 ዓ.ም በወጣው የገቢ ግብር አዋጅ[155] ስለተሻረ የግብር ይግባኝ ጉባኤውም በዚሁ

ለምሳሌ ያህል የዚህ ጸሁፍ መነሻ ጥናት በግሉ ሴክተርና በመንግሥት መካከል ለሚደረገው ውይይት መነሻ ሓሳብ ሆኖ በዚህ ጸሐፊ በመድረክ ቀርቦ በነበረበት ጊዜ በርካታ ግለሰቦች የቴክኒክ ኮሚቴው ሕጋዊ መሠረት ያለው ተቋም ነው በማለት አጥብቀው ሲከራከሩ እንደነበር ጸሐፊው ተረድቷል። ይህ ተቋም በአሁኑ ጊዜ (በመስከረም 2007 ዓ.ም) አገልግሎት ከመስጠት ታግዷል።

150 Misganaw Gashaw, ከላይ በማስታወሻ ቁጥር 6 የተጠቀሰ፣ገጽ 43።

151 ዝኒ ከማሁ።

152 አቶ ጌታቸው ታደሰ፣ ከላይ በማስታወሻ ቁጥር 139 የተጠቀሰ።

153 በዚህ ንዑስ ርዕስ ሥር ለምናደርጋቸው ገለጻዎች ተደጋግመው የሚጠቀሱት የገቢ ግብር አዋጁ (ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ) ድንጋጌዎች ናቸው። ምክንያቱም የሌሎቹ ታክስ ሕጎቻችን ድንጋጌዎች ከዚህ አዋጅ ድንጋጌዎች ጋር የሚመሳሰሉ በመሆናቸው እነሱን እየደጋገሙ መጥቀስ አንባቢን የሚያሰለች ከመሆኑም በላይ የጽሁፉንም ውበት ይቀንሰዋል። ከምንም በላይ ደግሞ ከገቢ ግበር አዋጁ ውጭ ያሉት የታክስ ሕጎቻችን ይግባኝን በተመለከት አግባብነት ያላቸው የገቢ ግብር አዋጅ ድንጋጌዎች በሌሎች የታክስ ክርክሮችም ተፈጻሚነት እንዳላቸው አመላክተዋልና ነው። ስለሆነም አንባቢያን በተጨማሪ እሴት ታክስ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 45 የተጠቀሰ፣ ከአንቀጽ 43-44 ያሉትን ድንጋጌዎች፣በተርን ኦቨር ታክስ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 46 የተጠቀሰ፣ ከ21-22 ያሉትን ድንጋጌዎች፣ በኤክሳይዝ ታክስ አዋጅ ቁጥር፣ ከላይ በማስታወሻ ቁጥር 47 የተጠቀሰ፣ ከ18-19 ያሉትን ድንጋጌዎች፣ የጉምሩክ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 126 የተጠቀሰ፣ በአንቀጽ 87 የተደነገገውን እንዲመለከቱ ተጋብዘዋል።

154 የፌዴራል ግብር ይግባኝ ጉባኤ ማቋቋሚያ አዋጅ፣ አዋጅ ቁጥር 233/1993፣ ፌደራል ነጋሪት ጋዜጣ፣ 7ኛ ዓመት፣ ቁጥር 18።

155 የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 24 የተጠቀሰ።

በኋለኛው አዋጅ እንደገና ለመቋቋም ቻለ።[156] አሁን በሥራ ያለው የግብር ይግባኝ ጉባኤም ሥልጣኑን ያገኘውና ሥራውንም የሚሠራው በዚህ አዋጅ መሠረት ነው።

3.3.1 የግብር ይግባኝ ጉባኤው አደረጃጀት

በገቢ ግብር አዋጅ አንቀጽ 113 እንደተመለከተው የግብር ይግባኝ ጉባኤዎች በፌዴራል መንግሥት እና በክልል ደረጃ፣ በእያንዳንዱ ዞን ዋና ከተማና በእያንዳንዱ የወረዳ አስተዳደር ደረጃ እንደሚቋቋሙ ነው። ሆኖም በአዋጁ አንቀጽ 113(2) እንደተገለፀው የሚመለከተው የክልል መንግሥት በማንኛውም ደረጃ ላይ ለሚገኙት አካባቢዎች የተለየ የይግባኝ ጉባኤ ማቋቋም አስፈላጊ አለመሆኑን ሲረዳ እነዚህ ቦታዎች በአቅራቢያው በተቀቋመ የግብር ይግባኝ ጉባኤ ሥራቸውን እንዲያከናውኑ ለማድረግ ይችላል።[157] በዚሁ አዋጅ አንቀጽ 113(3) እንደተመለከተው የፌዴራል የግብር ይግባኝ ጉባኤ ተጠሪነቱ ለፍትሕ ሚኒስትሩ፣ የከተማ መስተዳድሮች ይግባኝ ጉባኤዎች ደግሞ ተጠሪነታቸው ለየመስተዳድሩ ሥራ አስፈጻሚ፣ የክልል፣ የዞን እና የወረዳ ግብር ይግባኝ ጉባኤዎች ተጠሪነታቸው በየደረጃው ላሉ ሥራ አስፈጻሚ አካላት ነው።[158] ለምሳሌ ያህል በኦሮሚያ ክልል ያለው የጉባኤዎች ተጠሪነት በዚህ አዋጅ የተደነገገውን ሙሉ በሙሉ የተከተለ መሆኑን እንገነዘባለን።[159] የትግራይ ክልል የገቢ ግብር አዋጅም የፌደራል መንግሥትን የገቢ ግብር አዋጅ የተቀበለ በመሆኑ የግብር ይግባኝ ጉባኤዎች አደረጃጀትም ሆነ ተጠሪነት የፌደራል መንግሥት የገቢ ግብር አዋጅ ከደነገገው የሚለይ አይደለም።[160]

ምን ጊዜም ቢሆን ስለአንድ ተቋም አደረጃጀትና አሠራር ስንነጋገር ሁነኛ ትኩረት ሊሰጠው የሚገባው ጉዳይ ተቋሙን የሚያንቀሳቅሱት ሰዎች አመራረጥና አሰያየም ነው። እዚህ ላይ ሊነሱ የሚችሉት መሠረታዊ ጥያቄዎች የጉባኤው አባላት የሚሰየሙት በማን ነው? ሰዎቹ የሚሰየሙት በምን መለኪያ ነው? የአባላቱ ስብጥር የሚወሰነው በምን ሁኔታ ነው? የሚሉ ናቸው። በዚህ ረገድ አግባብነት ያለው የአዋጁ[161] አንቀጽ 114 ሲሆን፣ በዚህ አንቀጽ ንዑስ አንቀጽ 2 መሠረት እንደ አግባብነቱ የፍትሕ ሚኒስትር፣ ወይም የከተማ

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[156] ከዚህም በተጨማሪ በ1994 ዓ.ም እና ከዚያም ጊዜ በኋላ የወጡት ሌሎች የታክስ ሕጐች የዚህን ጉባኤ መቋቋም በግልጽ የደነገጉ ቢሆንም ስለጉባኤው ሥልጣን፣ ኃላፊነትና የአሠራር ሂደት ዝርዝር ድንጋጌዎችን ከማካተት ይልቅ ዝርዝር ድንጋጌዎችን በማካተት ወደተደራጀው የገቢ ግብር አዋጅ ድንጋጌዎች ሲያመላክቱ ይስተዋላሉ። በዚህም ምክንያት በዚህ ጽሑፍ ውስጥ በዋነኛነት በገቢ ግብር አዋጅ ሥር የተካተቱት ድንጋጌዎች የሚተነትኑ ሲሆን አስፈላጊ ሆኖ ሲገኝ የሌሎች አዋጆችም ድንጋጌዎች ቢያንስ በግርጌ ማስታወሻ ይጠቀሳሉ።

[157] ይሁን እንጂ ይህ ድንጋጌ ሀገራችን የምትከተለው የፌዴራል ሥርዓት መሆኑን የዘነጋ ይመስላል። ምክንያቱም በክልል ደረጃ ምን ዓይነት የግብር ይግባኝ ጉባኤ ማቋቋምና በየትኛው ደረጃ መቋቋም እንዳለበት የመወሰኑ ሥልጣን የክልል መንግሥታትን እንጂ የፌዴራል መንግሥትን የሚመለከት ጉዳይ አይደለም። ስለሆነም እንዲህ ያለ ድንጋጌ በዚህ ሕግ ውስጥ ማስቀመጥ ፈጽሞ ሕገ-መንግሥታዊ አይደለም።

[158] ከዚህ በላይ እንደተገለፀው ይህም ድንጋጌ የክልሎችን በራሳቸው ጉዳይ ሕግ የማውጣት ሕገ-መንግሥታዊ ሥልጣን የሚጻረር ድንጋጌ ነው። ምክንያቱም ክልሎች እራሳቸው የሚያቋቁሙት የግብር ይግባኝ ጉባኤ ተጠሪነቱ ለማን እንደሚሆን መወሰን ያለባቸው እራሳቸው ናቸው እንጂ የፌደራል መንግሥት ሕግ አይደለም። ይህም የሚያመለክተው የገቢ ግብር አዋጁን ያረቀቀው አካል በሕገ-መንግሥቱ እውቅና የተሰጠውን የክልሎችን ሕግ የማውጣት ሥልጣን ቸል ያለው መሆኑን ነው።

[159] የኦሮሚያ ክልል የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 122፣ የተጠቀሰ አንቀጽ 113 ይመልከቱ።

[160] የትግራይ ክልል የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 123 የተጠቀሰ።

[161] የገቢ ግብር አዋጅ፣ በማስታወሻ ቁጥር 28 የተጠቀሰ።

አስተዳድሮችና የክልል ሥራ አስፈጻሚ አካላት የግብር ይግባኝ ሰሚ አባላት የሚመረጡበትን መመዘኛ እና ስብጥር የሚወስን መመሪያ የማውጣት ግዴታ ተጥሎባቸዋል። በክልል ደረጃ ስላለው ሁኔታ በርግጠኝነት መናገር ባይቻልም በፍትሕ ሚኒስቴር ደረጃ ግን ይህ መመሪያ እስካሁን አልወጣም።[162] በ1994 ዓ.ም የወጣው ሕግ ይህ መመሪያ መውጣት እንደሚኖርበት ደንግጎ ሳለ፣ ይህንን መምሪያ ለማውጣት ሥልጣን የተሰጠው አካል እስካሁን ድረስ መመሪያውን አለማውጣቱ አግባብ አይደለም። የመመሪያው አለመውጣት በግብር ይግባኝ ጉባኤ አባላት አሰያየም ላይ የራሱ ተፅዕኖ ማሳደሩ እንደማይቀር መገመት ይቻላል።

አሁን ባለው ሁኔታ የጉባዔው አባላት ከገቢዎችና ጉምሩክ ባለሥልጣን፣ ከገንዘብና ኢኮኖሚ ልማት ሚኒስቴር፣ ከፍትሕ ሚኒስትር፣ ከንግድ ሚኒስቴር እና ከንግዱ ማኅበረሰብ የተውጣጡ ናቸው። ቀደም ሲል የግብር ይግባኝ ጉባኤ አባል የነበሩ አንድ አባል ለዚህ ጸሐፊ እንዳረጋገጡለት በእያንዳንዱ ችሎት (panel) ከአምስቱ የችሎቱ አባላት ውስጥ አንዱ የንግዱ ማኅበረሰብ ተወካይ ነው።[163] ይሁን እንጂ ጉባኤው በአብዛኛው ከኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣንና ከገንዘብ ሚኒስቴር የሚመጡ አባላትን ማካተቱ ገለልተኝነቱ አስተማማኝ እንዳይሆን ያደርገዋል የሚል ከፍተኛ ስጋት አለ። የገቢዎችና ጉምሩክ ባለሥልጣን ራሱ በወሰነው የግብር ውሳኔ ላይ ታክስ ከፋዩ ይግባኝ በሚልበት ጊዜ የራሱን ሰዎች የሚልክ ከሆነ በራሱ ጉዳይ ዳኛ እየሆነ እንደሆነ ግልጽ ነው።

ከምንም በላይ ደግሞ የገቢዎችና ጉምሩክ ባለሥልጣን ዋና ዳይሬክተር ማንኛውንም በሙስና *የተጠረጠረ* ሠራተኛ ከሥራ ማባረር እንደሚችልና ውሳኔውም ይግባኝ የማይባልበት ውሳኔ መሆኑ በሕግ የተደነገገ ስለሆነ ከገቢዎችና ጉምሩክ ባለሥልጣን የሚመጡት የጉባኤው አባላት ገለልተኛ የሆነ ውሳኔ ይሰጣሉ ብሎ መገመት እጅግ በጣም አስቸጋሪ ነው።[164] የገንዘብና ኢኮኖሚ ልማት ሚኒስቴርም የታክስ ከፋዩን መብቶች የሚያጣብቡ ወይም ደግሞ ሸክሙን የሚያከብዱ መመሪያዎችን የሚያወጣው እና አደናጋሪ በሆኑ የታክስ ጉዳዮች ላይ ለገቢዎችና ጉምሩክ ባለሥልጣን ማብራሪያና ትርጉም የሚሰጥ አካል ሆኖ ሳለ የግብር ይግባኝ ጉባኤ ውስጥ ተሳትፎ ማድረጉ አግባብነት አለው ለማለት አስቸጋሪ ነው። ለምሳሌ ያህል የገቢዎችና ጉምሩክ ባለሥልጣን ባልተከፋፈል የአክሲዮን ድርሻ ላይ የገቢ ግብር ለመጣል ባሰበበት ወቅት የሕግ ምክር የጠየቀው የገንዘብና ኢኮኖሚ ልማት ሚኒስቴርን ነበር። የገንዘብና ኢኮኖሚ ልማት ሚኒስቴርም የገቢዎችና ጉምሩክ ባለሥልጣን እንዲህ ያለውን የገቢ ግብር ለመሰብሰብ እንደሚችል በደብዳቤ ስላረጋገጠለት ባለሥልጣኑ ግብር መሰብሰብ በመጀመሩ በባለሥልጣኑና በታክስ ከፋዮች መካከል እጅግ የከረረ አለመግባባት ተከስቶ እንደነበር ይታወሳል። እንዲህ ዓይነቱ ግብር የተጣለባቸው ታክስ ከፋዮች ቅሬታቸውን ለግብር ይግባኝ ጉባኤ ባቀረቡበት ጊዜ ደግሞ የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር ተቀጣሪዎች በግብር ይግባኙ ዳኝነት መንበር ላይ የግድ ተሰይመው

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[162] ከአቶ ዳዊት ተሾመ ጋር የተደረገ ቃለ-ምልልስ፣ ሰኔ 03 ቀን 2005 ዓ.ም፣ ቃለ-ምልልሱን ባደረግንበት ጊዜ አቶ ዳዊት ተሾመ በፍትሕ ሚኒስቴር ሠራተኛ የነበሩ ሲሆኑ በፍትሕ ሚኒስቴር ሥር ባለው የፌዴራል የግብር ይግባኝ ጉባኤ አባልና ሰብሳቢ ነበሩ። በአሁኑ ጊዜ (በመስከረም 2007) ግን የሕግ አማካሪና ጠበቃ ናቸው።

[163] ዝኒ ከማሁ።

[164] የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 155/2008፣ እንደዚሁም ይህንን ጉዳይ አስመልክቶ ጥሩ ግንዛቤ ለመጨበጥ የሚከተለውን ሥራ ይመልከቱ፡- Aron Degol and Abdulatif Kedir, 'Administrative Rulemaking in Ethiopia: Normative and Institutional Framework", *Mizan Law Review*, Vol.7, No. 1, September 2013፤ ከገጽ 1-28 ያለውን ይመልከቱ።

ይገኛሉ።[165] በመሆኑም ይግባኞቸውን ለግብር ይግባኝ ጉባኤ የሚያቀርቡ ታክስ ከፋዮች በግብር ይግባኝ ጉባኤው ላይ እምነት እንዲያድርባቸው ለማድረግ ከተፈለገ የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን ሠራተኞች እና የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር ሠራተኞች በጉባኤው ውስጥ አባል ሊደረጉ አይገባም።

በገቢ ግብር ማሻሻያ አዋጅ ቁጥር 608/2001[166] በአንቀጽ 2(11)[167] እንደተደነገገው በማንኛውም ደረጃ የሚገኙ የግብር ይግባኝ ሰሚ ጉባኤ አባላት የንግዱን ማኅበረሰብ ተወካዮች ጨምሮ[168] በሕዝብ ዘንድ ባላቸው ታዋቂነትና ታማኝነት፣ ባላቸው ጠቅላላና ልዩ ዕውቀት፣ እንዲሁም ከግብር እና ቀረጥ ጋር በተገናኘ ጥፋት ካልፈፀሙ ሰዎች መካከል ተመርጠው ይሰየማሉ። የጉባኤው አባላት ከግብርና ቀረጥ ጋር በተገናኘ ጥፋት ካልፈፀሙ ሰዎች መካከል ይመረጣሉ የሚለውን ሐረግ ገልብጠን (a contrario) ስንተረጉመው በሌሎች የኢኮኖሚ ወንጀሎችና በሙስና ወንጀሎች ጥፋተኛ የተባሉ ግለሰቦች የግብር ይግባኝ ጉባኤ አባላት ሆነው እንዲመረጡ የማይከለክሉ መሆኑን ለመረዳት የሚያዳግት አይደለም። በዚህ ፀሐፊ አምነት ማንኛውንም ዓይነት የኢኮኖሚ ወንጀል ፈጽሞ ጥፋተኛነቱ የተረጋገጠ ሰው በግብር ይግባኝ ጉባኤ አባልነት ሊሰየም አይገባውም።

በአዋጁ[169]አንቀጽ 114(4) በግልጽ እንደተደነገገው እያንዳንዱ የግብር ይግባኝ ጉባኤ ከአንድ የበለጡ ችሎቶች ሊኖሩት ይችላል። እያንዳንዱ ችሎትም አምስት አባላት የሚኖሩት ሲሆን ችሎቱም የራሱ ሊቀመንበር ከአባላቱ መካከል እንደሚመርጥ ተደንግጓል። ሆኖም ለግብር ይግባኝ ጉባኤው በአጠቃላይ አንድ ፕሬዝዳንት ሊኖረው እንደሚገባ በአዋጁ አንቀጽ 114(4) ሥር ተመልክቷል።

3.3.2 ለግብር ይግባኝ ጉባኤው አቤቱታ የማቅረብ መብት

ታክስ ከፋዮች የታክስ አስገቢው ባለሥልጣን በደል ፈጽሞብናል የሚል እምነት ካላቸው ቅሬታቸውን የማሰማት የማይገሰስ መብት አላቸው። ይህም በኢፌዲሪ ሕገ-መንግሥትና በዓለም አቀፍ ሰብኣዊ መብቶች ስምምነቶችም ጭምር የተረጋገጠ መሠረታዊ መብት ነው።[170] በመሆኑም በገቢ ግብር አዋጅ አንቀጽ 107 እንደተደነገገው በማንኛውም ግብር አወሳሰን ቅር የተሰኘ ታክስ ከፋይ በሕግ የተመለከቱትን ቅድመ-ሁኔታዎች አስካሚላ ድረስ ለግብር ይግባኝ ጉባኤ ቅሬታውን የማቅረብ መብቱ የተጠበቀ ነው። በዚህ ሕግ መሠረት ማንኛውም ታክስ ከፋይ የይግባኝ መብቱን ሊሠራበት የሚችለው ግን በሕጉ ውስጥ

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[165] ይህ ጸሐፊ የዚህን ጽሑፍ ረቂቅ ለውይይት ባቀረበበት ጊዜ ይህንን ችግር በምሬት ሲገልጹ የነበሩ ታክስ ከፋዮች እንደነበሩ ለመታዘብ ችሏል። ከዚህም በተጨማሪ ጸሐፊው ይህንን የምርምር ሥራ በሰራበት ወቅት የሚ/ር መ/ቤቱ ይህንን ጉዳይ አስመልክቶ ለባለስልጣን መ/ቤቱ የጻፈውን ደብዳቤ ለማንበብ እድል አግኝቷል። በአጠቃላይ ስለ ጉዳዩ ዝርዝር ግንዛቤ ለመጨበጥ የሚከተለውን የምርምር ሥራ ይመልከቱ፡-Taddese Lencho and Hanna Arayaselassie, '*Divided over Divideneds: The Recent Controversies over the Meaning and Scope of Dividends and Lessens from Comparative Experience*', in Taddese Lencho and Kyle Logue(eds.), Ethiopian Tax System: Some Contemporaray Issues and Problems, Ethiopian Business Law Series, Vol.VI,2014፤ ከገጽ 147-182።

[166] የገቢ ግብር ማሻሻያ አዋጅ፣ አዋጅ ቁጥር 608/2001፣ ፌደራል ነጋሪት ጋዜጣ፣ 15ኛ ዓመት፣ ቁጥር 15።

[167] በዚህ አንቀጽ በግልጽ እንደተመለከተው የገቢ ግብር አዋጁ አንቀጽ 114(1) ሙሉ በሙሉ ተሰርዟል።

[168] በተሻረው የገቢ ግብር ድንጋጌ(ማለትም በአንቀጽ 114(1)) ሥር ነጋዴዎች የግብር ይግባኝ ጉባኤ አባል እንዲሆኑ አልተፈቀደላቸውም ነበር።

[169] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ።

[170] የኢፌዲሪ ሕገ-መንግሥት፣ ከላይ በማስታወሻ ቁጥር 26 የተጠቀሰ፣አንቀጽ 37።

የተመለከቱትን ሁለት ጥብቅ ቅድመ ሁኔታዎች በአንድነት አሟልቶ ሲገኝ ነው። በዚህም መሠረት የአንድ ታክስ ከፋይ የይግባኝ ማመልከቻ በግብር ይግባኝ ጉባኤ ተቀባይነት የሚኖረው ታክስ ከፋዩ አከራካሪ የሆነውን የታክስ መጠን ሃምሳ በመቶ (50%) ለግብር አስገቢው ባለሥልጣን ካስያዘ እና የግብር ውሳኔ ማስታወቂያ በደረሰው ወይም በአጣሪ ኮሚቴ ውሳኔ በተሰጠ በ30 ቀናት ውስጥ ይግባኙን ማቅረብ ከቻለ ነው።[171]

እነዚህ ሁለት የይግባኝ ቅድመ-ሁኔታዎች ከ1930ዎቹ ጀምሮ በኢትዮጵያ የታክስ ሥርዓት ውስጥ የነበሩ ናቸው። ይሁን እንጂ አሁን በሀገራችን ካለው ተጨባጭ ሁኔታ አንፃር ሲታይ አቤቱታውን ለግብር ይግባኝ ጉባኤ ለማቅረብ የፈለገ ታክስ ከፋይ አከራካሪ የሆነውን የግብር መጠን 50% ለግብር አስገቢው ባለሥልጣን እንዲያስይዝ መገደዱ በመርህ ደረጃ የማያከራክር ቢመስልም በአተገባበር ግን አስቸጋሪ ነው።[172] አንዳንድ የታክስ ውሳኔ የሚሰጡ የታክስ አስገቢው ባለሥልጣን ሠራተኞች ታክስ ከፋዩ ፊጸሞ ሊወጣው የማይችለውን ግብር ይጭነብታል። እንዲህ በሚሆንበት ጊዜ ታክስ ከፋዩ የይግባኝ መብቱን ለማስከበር የዚህን ግማሽ ገንዘብ ማስያዝ ይኖርበታል። ታክስ ከፋዩ ይህንን ግማሽ ገንዘብ ለማስያዝ ካልቻለ ግን የይግባኝ መብቱን ሳይወድ በግድ ያጣዋል ማለት ነው። እንዲህ ያለውን ያልተፈለገ ውጤት ለማስቀረት ሌሎች ሀገሮች በእኛ ሀገር ካለው ጥብቅ የይግባኝ ቅድመ-ሁኔታ በእጅጉ የተሻሉ ቅድመ-ሁኔታዎችን ተግባራዊ ሲያደርጉ ይስተዋላሉ። ለምሳሌ ያህል በቻይና በታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔ ቅሬታ ያደረበት ታክስ ከፋይ ይግባኙን ለታክስ አስተዳደር ይግባኝ ሰሚ ባለሥልጣን ለማቅረብ የተወሰነበትን ታክስ ለመክፈል ካልቻለ ወይም ካልፈለገ ተቀባይነት ያለው የሰው ዋስ በማቅረብ ወይም የንብረት ዋስትና በማቅረብ ይግባኙን ማቅረብ ይችላል።[173]

በኢትዮጵም የታክስ ከፋዩን የይግባኝ መብት እውን ለማድረግ አከራካሪ የሆነውን ግብር 50% በጥሬ ገንዘብ ብቻ ታክስ ከፋዩ እንዲከፍል ከማስገደድ ይልቅ ሌሎች ዘዴዎችንም በአማራጭነት መመልከት አግባብነት ይኖረዋል። ለምሳሌ ያህል በጣም ከፍተኛ የሆነ ግብር እንዲከፍል የተደረገ ታክስ ከፋይ አከራካሪ የሆነውን ግብር 50% ከፍሎ አቤቱታውን ለግብር ይግባኝ ጉባኤ ለማቅረብ ምንም ዓይነት ጥሬ ገንዘብ ከሌለው ከፍተኛ ችግር ይገጥመዋል። እንዲህ ያለው ታክስ ከፋይ አንድም ንብረቶቹን በዋስትና እንዲያስይዝ ቢፈቀድለት አልያም ደግሞ በገንዘብ ተቋማት በተለይም በባንኮች የሚሰጥ የገንዘብ ዋስትና ቦንድ (financial guarantee bond) እንዲያቀርብ ቢፈቀድለት ጠቀሜታው የጎላ ነው። ምክንያቱም እንዲህ ዓይነቱ ዋስትና ሕጉ ባስቀመጠው እጭር ጊዜ ውስጥ (በ30 ቀናት ውስጥ) ለግብር አስገቢው ባለሥልጣን የሚያስይዘውን ጥሬ ገንዘብ በማጣት የይግባኝ መብቱን የሚያጣውን ታክስ ከፋይ ይታደጋልና ነው።

ወደ ሁለተኛው የይግባኝ ቅድመ-ሁኔታ (የ30 ቀናት የጊዜ ገደብ) ስንመጣም አንዳንድ ነጥቦች አነጋጋሪ ናቸው። በመጀመሪያ ደረጃ ይህ የ30 ቀናት ጊዜ ገደብ አጭር ጊዜ በመሆኑ የይግባኝ ባዮችን መብት የሚያጣብብ ነው የሚል አስተያየት አለ። በአንዳንድ

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[171] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 107።

[172] ይህ ችግር ትኩረት ሊሰጠው የሚገባ ችግር እንደሆነ አንዳንድ የሀገራችን ምሁራን አበክረው አሳስበው ነበር። ለምሳሌ ያህል ፕሮፌሰር ጥላሁን ተሾመ በአንድ ወቅት ባቀረቡት ጽሁፍ የችግሩን አሳሳቢነት ገልፀው ነበር፣ ጥላሁን ተሾመ፣ *የሕግ የበላይነትና ልማት በኢትዮጵያ፡ ሣሬና ዮዛሬ ሃያ አምስት ዓመት*፣ ኢትዮጵያ ከአንድ ትውልድ በኋላ፡ የኢትዮጵያ የኢኮኖሚክስ ባለሙያዎች ማኅበር ባዘጋጀው ርዕይ 2020 የውይይት መድረክ ላይ የቀረበ ጽሁፍ፣ 1996 ዓ.ም፣ ገጽ 263። ይህን የፕሮፌሰር ጥላሁን ስጋት አቶ ዳዊት ተሾመና ዶ/ር ታደሰ ሌንጮም እንደሚጋሩት የዚህ ጽሑፍ አዘጋጅ ቃለመጠይቅ ባደረገላቸው ጊዜ ለመገንዘብ ችሏል።

[173] Fuli Cao፣ ከላይ በማስታወሻ ቁጥር 144 የተጠቀሰ፣ ከገጽ 395-396 ያለውን ይመልከቱ።

ደግሞ እስካሁንም በወጡት የግብርና ታክስ ሕጐቻችን የተመለከተው የጊዜ ገደብ 30 ቀን በመሆኑና ይህ አዋጅ አዲስ ነገር ይዞ ስላልመጣ የ30 ቀኑ የጊዜ ገደብ እንደተጠበቀ መቀጠሉ ምንም የሚያመጣው ችግር የለም የሚል አስተያየት የሚሰጡ ወገኖች አሉ፡፡ እንደዚህ ጸሐፊ አመለካከት ይህ የ30 ቀናት የጊዜ ገደብ የይግባኝ አቤቱታን በሚገባ አዘጋጅቶና በማስረጃ ደግፎ[174] ለማቅረብ የሚያንስ ይመስላል፡፡ ነገር ግን ለዚህ ጥያቄ አጥጋቢ መልስ ማግኘት ይቻል ዘንድ እስካሁን በነበረው ሁኔታ ምን ያህል ግብር ከፋዮች ቀኑ በማጠሩ ምክንያት ይግባኞቸውን ለግብር ይግባኝ ጉባኤው ሳያቀርቡ የቀሩ መሆናቸውን የሚያሳይ ተግባራዊ ጥናት ማድረግ ያስፈልጋል፡፡

ከዚሁ ጉዳይ ጋር ተያይዞ መነሳት ያለበት ሌላው ነጥብ የታክስ አስገቢው ባለሥልጣን በሰጠው ውሳኔ ላይ ቅር የተሰኘ ወገን ለግብር ይግባኝ ጉባኤ ይግባኙን ማቅረብ የሚችለው የአጣሪ ኮሚቴ ውሳኔ በሰጠበት በ30 ቀናት ጊዜ ውስጥ ነው የሚለው አነጋገር የሚፈጥረው ችግር ነው፡፡ በአዋጁ አንቀጽ 105(3) በግልጽ እንደተመለከተው አጣሪ ኮሚቴው የሚሰጠው ውሳኔ የመጨረሻ ውሳኔ ሳይሆን በውሳኔ ሓሳብነት ለታክስ አስገቢው ባለሥልጣን ኃላፊ የመጨረሻ ውሳኔ የሚቀርብ ነው፡፡ ይህም የሚያመለክተው አጣሪ ኮሚቴው ውሳኔ የሚሰጥበት ቀንና የታክስ አስገቢው ባለሥልጣን ኃላፊ ውሳኔውን የሚሰጥበት ቀን ፈጽሞ የተለያዩ መሆናቸውን ነው፡፡ በመሆኑም በሕግ የተመለከተውን የ30 ቀናት የጊዜ ገደብ ለመቁጠር እንደመነሻ መወሰድ የሚኖርበት የታክስ አስገቢው ባለሥልጣን ኃላፊ ውሳኔ የሰጠበት ቀን ነው እንጂ አጣሪ ኮሚቴው ውሳኔ የሰጠበት ቀን መሆን አይገባውም፡፡ ይህም የቀን አቆጣጠር በሕጉ በግልጽ መደንገግ ይኖርበታል፡፡[175]

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[174] ማንኛውም ታክስ ከፋይ በታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔ (tax assessment notice) ቅሬታ በሚያድርበት ጊዜ ቅሬታውን በቀጥታ ለግብር ይግባኝ ሰሚ ጉባኤ ለማቅረብ ይችላል፡፡ በዚህ ጊዜ ግብር ከፋዩ የይግባኝ አቤቱታውን አሉኝ በሚላቸው ማናቸውም አግባብነትና ተቀባይነት ባላቸው ማስረጃዎች ደግፎ የማቅረብ መብቱ ጥያቄ የሚያስነሳ አይደለም፡፡ እንደዚሁም ደግም ታክስ ከፋዩ የቅሬታ አጣሪ ኮሚቴው በሚሰጠው ውሳኔ ያልተስማማ እንደሆነ ይግባኙን ለግብር ይግባኝ ጉባኤ ሲያቀርብ ከአቤቱታው ጋር ማናቸውንም ማስረጃዎች የማቅረብ መብት አለው፡፡ ምክንያቱም አጣሪ ኮሚቴው እንደመጀመሪያ ደረጃ ፍርድ ቤት ስለማይቆጠር ማናቸውም ማስረጃዎች በአጣሪ ኮሚቴው ደረጃ መቅረብ አለባቸው ብሎ ማሰብ አይቻልም፡፡ በተጨማሪም ማንኛውም ታክስ ከፋይ ቅሬታውን ለአጣሪ ኮሚቴው የሚያቀርበው እርሱ ራሱ የፈለገ እንደሆነ ነው እንጂ የሚያስገድደው ሕግ የለም፡፡ ይህም ማለት አንድ ቅሬታ ያደረበት ታክስ ከፋይ ቅሬታውን በቀጥታ ለግብር ይግባኝ ሰሚው ጉባኤ ለማቅረብ ይችላል ማለት ነው፡፡ ስለሆነም በማናቸውም ሁኔታ ቢሆን ታክስ ከፋዩ አሉኝ የሚላቸው ማስረጃዎች ከይግባኝ ማመልከቻው ጋር በቀጥታ ለግብር ይግባኝ ጉባኤው የሚቀርቡ መሆናቸው አነጋጋሪ አይደለም፡፡

[175] በሕጉ የተቀመጠው የ30 ቀናት የጊዜ ገደብ በይግባኝ ሰሚው ጉባኤ ዘንድ ክርክር ከሚደረግባቸው ጉዳዮች መካከል አንዱ ነው፡፡ ለምሳሌ ያህል በይግባኝ ባይ ማስኮ ኢንተርናሽናል ኃላፊነቱ የተወሰነ የግል ማኅበርና በመልስ ሰጭ በኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን መካከል በተነሳ ክርክር የአቤቱታ አጣሪው ኮሚቴ ውሳኔ ለይግባኝ ባይ የደረሰው መጋቢት 9 ቀን 2001 ዓ.ም ነበር፡፡ ይግባኝ ባይ የይግባኝ አቤቱታውን ለግብር ይግባኝ ጉባኤ ያቀረበው ደግሞ ሰኔ 6 ቀን 2001 ዓ.ም ነው፡፡ ይህም ሊሆን የቻለው ይግባኝ ባዩ የአጣሪ ኮሚቴው ውሳኔ እንደደረሰው ባሉት 30 ቀናት ውስጥ ይግባኙን ለግብር ይግባኝ ጉባኤ በማቅረብ ፋንታ ለግብር አስገቢው ባለሥልጣን አዲስ ማመልከቻ በማቅረቡ ይግባኝ ባይ ላቀረበው ማመልከቻ መልስ ሰጭው መልስ ሳይሰጠው የይግባኝ ጊዜው ሊያልፍ በመቻሉ ነው፡፡ ይግባኝ ባይ ከላይ በተመለከተው ጊዜ ይግባኙን ለግብር ይግባኝ ጉባኤው ሲያቀርብ መልስ ሰጭው ደግሞ በሕጉ የተመለከተው የይግባኝ ማቅረቢያ ጊዜ ያለፈ በመሆኑ ይግባኙ ተቀባይነት ሊያገኝ አይገባውም የሚል የመጀመሪያ ደረጃ መቃወሚያ አቀረበ፡፡ የግብር ይግባኝ ጉባኤውም የቀረበውን የመጀመሪያ ደረጃ መቃወሚያ በመቀበል የይግባኝ ባይን አቤቱታ ውድቅ አድርጎታል፡፡ *ማስኮ ኢንተርናሽናል ኃላፊነቱ የተወሰነ የግል ማህበር V.*

3.3.3 የይግባኝ የአቀራረብ ሥርዓትና የማመልከቻው ይዘት

ለግብር ይግባኝ ጉባኤ የሚቀርበው የይግባኝ ማመልካቻ በአካል አልያም ደግሞ በሪኮማንዴ ደብዳቤ በፖስታ ቤት በኩል ሊላክ እንደሚችል በሕጉ ተደንግጓል። ይግባኙ በቀጥታ ለግብር ይግባኝ ጉባኤው የሚቀርብ ከሆነ ይግባኙ የቀረበበት ቀን ነው የሚባለው የይግባኝ ማመልከቻው በመዝገብ ቤት የተመዘገበበት ቀን ነው። የይግባኝ ማመልከቻው በሪኮማንዴ ደብዳቤ በፖስታ ቤት በኩል የሚላክ ሲሆን ይግባኙ የቀረበበት ቀን ሆኖ የሚያዘው የይግባኝ ማመልከቻው በፖስታ ቤት የተመዘገበበት ቀን ነው።[176]

በፍትሐብሔር ሥነ-ሥርዓት ሕጋችን የተደነገጉት የይግባኝ ማመልከቻ አዘገጃጀት መመሪያዎች የታክስ ይግባኝ ማመልከቻን ለማዘጋጀት የሚኖራቸው ጠቀሜታ አጠያያቂ ባይሆንም፣[177] ለግብር ይግባኝ ጉባኤ የሚቀርብ የይግባኝ ማመልከቻ በገቢ ግብር ሕጉ ውስጥ በልዩ ሁኔታ የተቀመጡትን መስፈርቶች ማሟላት ይጠበቅበታል። ይህንን ጉዳይ በሚመለከት አግባብነት ያለው የሕግ ድንጋጌ የገቢ ግብር አዋጅ አንቀጽ 109 ነው። በዚህ አንቀጽ ንዑስ አንቀጽ 1 መሠረት የይግባኝ ማመልከቻው ግልጽ በሆነ ሁኔታ የይግባኙን ፍሬ ነገርና የይግባኙን ምክንያቶች፣ የግብር ከፋዩን ስም አድራሻ እና የግብር ከፋይ መለያ ቁጥር መያዝ ይኖርበታል። በተጨማሪም የይግባኝ ማመልከቻው ከይግባኝ ማመልከቻው ጋር በአባሪነት ሊቀርቡ የሚገባቸው አግባብነት ያላቸውን ደጋፊ ሰነዶችና በታክስ አስገቢው ባለሥልጣን መያዣ የተከፈለባቸውን ደረሰኞች አብሮ መያዝ አለበት።

የይግባኝ ማመልከቻው እነዚህን መስፈርቶች[178] ሳያሟላ የቀረ እንደሆነ የግብር ይግባኝ ጉባኤው ይግባኝ ባዩ ጉድለቶቹን እንዲያሟላ ይጠይቀዋል። ይግባኝ ባዩም በአምስት ቀናት ውስጥ ጉድለቶቹን ካላሟላ የቀረበው የይግባኝ ማመልከቻ ወዲያውኑ ውድቅ እንደሚሆን ተደንግጓል።[179] ሆኖም ይህ የአምስት ቀናት ጊዜ ገደብ በጣም አጭር ጊዜ ነው። እንዲህ ዓይነቱ አጭር የጊዜ ገደብ ታክስ ከፋዩ ይግባኝ የማቅረብና ፍትሕ የማግኘት መሠረታዊ መብቱን በአግባቡ እንዳይጠቀምበት የሚያደርግ ነው። በመሆኑም በዚህ ፀሐፊ እምነት ይህ የአምስት ቀናት የጊዜ ገደብ ወደ አሥር ቀናት ወይም አሥራ አምስት ቀናት ከፍ ማለት ይገባዋል።[180]

ይግባኝ ባዩ ያቀረበው የይግባኝ ማመልከቻ በግብር ይግባኝ ጉባኤው ተቀባይነት አግኝቶ ከተመዘገበና ቁጥርም ከተሰጠው በኋላ የይግባኝ ማመልከቻውና የአባሪዎቹ ግልባጭ በይግባኝ ጉባኤው አማካይነት ለሚመለከተው የታክስ አስገቢ ባለሥልጣን እንዲደርሰው ይደረጋል። የግብር አስገቢው ባለሥልጣንም የግብር ይግባኝ ጉባኤው በያዘው የቀጠሮ ቀን መልሱን ማቅረብ ይኖርበታል። እንደዚሁም ደግሞ የግብር አስገቢው ባለሥልጣን የመልሱን ግልባጭ ለይግባኝ ባዩ የመስጠት ግዴታ ተጥሎበታል።[181]

የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን፣ፌደራል ግብር ይግባኝ ጉባዔ፣ መዝገብ ቁጥር ከመ819፣ ያልታተመ፣ ታህሳስ 19 ቀን 2002 ዓ.ም ይመልከቱ።

176 የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 108።

177 የኢትዮጵያ ንጉሠ ነገሥት መንግሥት የፍትሐብሔር ሥነ ሥርዓት ሕግ፣ ነጋሪት ጋዜጣ ቁጥር 3/1958፣ በተለይ የወጣ፣ድንጋጌ ቁጥር 52/1958፣ አንቀጽ 327ን ይመልከቱ።

178 እነዚህ መስፈርቶች የሚለው አገላለጽ የሚወክለው በገቢ ግብር አዋጁ አንቀጽ 109 ሥር የተዘረዘሩትን ጉዳዮች ነው።

179 የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 109(2)።

180 ከዚህ ጸሐፊ ጋር ቃለ-ምልልስ ያደረጉት ምሁራን ዶ/ር ታደሰ ሌንጮና አቶ ዳዊት ተሾመም ይህ የአምስት ቀን ጉዳይ እንደሚያሳስባቸው ለዚህ ጸሐፊ ገልጸውለታል።

181 የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 24 የተጠቀሰ፣ አንቀጽ 110።

3.3.4. የይግባኝ ክርክሩን ስለመስማት፣ ስለማስረዳት ሸክም እና ውሳኔ ስለመስጠት

በመደበኛው የፍትሐብሔር ይግባኝ ክርክር ጊዜ ፍርድ ቤቱ መልስ ሰጭውን ከመጥራቱ በፊት የቀረበውን ይግባኝ በሚገባ መመርመርና ይግባኝ ባዩንም ማዳመጥ አለበት፡፡ ፍርድ ቤቱ የቀረበውን ይግባኝ ከመረመረና ይግባኝ ባዩንም ከአዳመጠ በኋላ የሥር ፍርድ ቤት የሰጠው ውሳኔ ምንም ዓይነት እንከን የለበትም ብሎ ካመነ መልስ ሰጭውን መጥራት ሳያስፈልገው መዝገቡን ይዘጋዋል፡፡[182] ሆኖም ይግባኝ ሰሚው ፍርድ ቤት የሥር ፍ/ቤት የሰጠው ውሳኔ በይግባኝ ሊፈተሽ ይገባዋል የሚል እምነት ካለው ለመልስ ሰጭው መጥሪያ እንዲደርሰው ተደርጐ የይግባኝ ክርክር መደረግ ይኖርበታል፡፡[183]

የግብር ይግባኝ ጉባኤው የፍትሐብሔር ሥነ ሥርዓት ሕጉን ተከትሎ ይግባኙን የመስማት ኃላፊነት እንዳለበት ወይም ደግሞ ሌላ ሥነ-ሥርዓት መከተል ይችል እንደሆነ በገቢ ግብር ሕጉ አልተመለከተም፡፡ ይሁን እንጂ የግብር ይግባኝ ማመልከቻው በአንቀጽ 109 የተመለከቱትን መስፈርቶች አሟልቶ ከተገኘ ለታክስ አስገቢው ባለሥልጣን መጥሪያ እንደሚላክለት ከዚሁ አንቀጽ ይዘት መረዳት ይቻላል፡፡ ይህም ማለት የግብር ይግባኝ ጉባኤው የታክስ አስገቢው ባለሥልጣን ከመቅረቡ በፊት ይግባኝ ባዩን በተናጠል የመስማት ሥልጣንም የለውም፤ ይህንን የማድረግ ኃላፊነትም የለበትም፡፡ በሌላ አነጋገር ቀደም ሲል የጠቀስናቸው ይግባኝ ለማቅረብ የሚያስችሉ ቅድመ-ሁኔታዎች እስከተሟሉ ድረስ የግብር ይግባኝ ጉባኤው መልስ ሰጭው ከመጠራቱ በፊት የግብር ይግባኝ ማመልከቻው *"ያስቀርባል ወይም አያስቀርብም"* ብሎ ብይን የመስጠት ሥልጣን አይኖረውም፡፡

በግብር ይግባኝ ሰሚ ጉባኤው የሚካሄደው ክርክር ሰነዶችን በመለዋወጥ ብቻ ተወስኖ የሚቀር አይደለም፡፡ ይልቁንም ተከራካሪ ወገኖች በጉባኤው ፊት ቀርበው ክርክራቸውን በቃል እንዲያሰሙ ሊፈቀድላቸው ይገባል፡፡ ምክንያቱም ተከራካሪ ወገኖች የቃል ክርክር በሚያደርጉበት ጊዜ የጉባኤው አባላት ያልገቧቸውን ነጥቦች ለመጠየቅና ለመረዳት ዕድል ስለሚያገኙ ተከራካሪዎቹ የተለያዩት በምን ጉዳይ ላይ እንደሆነ ለመረዳትና ለውሳኔው አስፈላጊ የሆነውን ጭብጥ ነቅሰው ለማውጣት በእጅጉ ይረዳቸዋል፡፡ ስለዚህም የገቢ ግብር ሕጉ በይግባኝ ሰሚው ጉባኤ ደረጃ የቃል ክርክር የመስማት ሂደት ሊኖር እንደሚገባው በግልጽ መደንገግ አልያም ደግሞ አግባብነት ያላቸው የፍ/ብ/ሥ/ሥ/ሕግ ድንጋጌዎች ተፈጻሚነት ይኖራቸዋል ማለት ይገባው ነበር፡፡ ይሁን እንጂ በዚህ ረገድ የፌዴራል ግብር ይግባኝ ጉባኤ የሰጣቸውን ውሳኔዎች በመመልከት ተከራካሪ ወገኖቹ ክርክራቸውን በቃል እንደሚያደርጉ መረዳት እንችላለን፡፡ ከዚህም በተጨማሪ በፌዴራል የግብር ይግባኝ ጉባኤ በሚደረገው ክርክር የቃል ክርክር እንደማይታሰፍ የጉባኤው አባልና ሰብሳቢ የሆኑ ባለሙያ ለዚህ ጸሐፊ አረጋግጠውለታል፡፡[184]

ከታክስ ይግባኝ ክርክር ጋር ተያይዞ የሚነሳው ሌላው ነጥብ የማስረዳት ሸክም ጉዳይ ነው፡፡[185] የታክስ ክርክር በባህሪይውም ሆነ በውጤቱ ለየት ያለ በመሆኑ በዚህ ክርክር የማስረዳት ሸክም /ኃላፊነት/ በማን ላይ ሊያርፍ ይገባዋል የሚለው ጥያቄ በሁሉም የሕግ

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[182] የፍትሐብሔር ሥነሥርዓት ሕግ፣ ከላይ በማስታወሻ ቁጥር 176 የተጠቀሰ፣አንቀጽ 337፡፡

[183] ዝኒ ከማሁ፣ አንቀጽ 338፡፡

[184] አቶ ዳዊት ተሾመም በግብር ይግባኝ ክርክር ጊዜ የቃል ክርክር እንደሚደረግ ለዚህ ጸሀፊ ገልጸውለታል፤ ከላይ በማስታወሻ ቁጥር 162 የተጠቀሰ፡፡

[185] Bruce L. Hay & Kathryn E. Spier, '*Burden of Proof in Civil Litigation: An Economic Perspective,*' The Journal of Legal Studies, Vol. 26, No. 2 (June 1997), pp. 413-431.

ሥርዓቶች ትኩረት የሚስብ ጉዳይ ነው።[186] የሌሎችን ሀገራት የሕግ ሥርዓት ስንመለከት በመርህ ደረጃ በታክስ ክርክር ወቅት የማስረዳት ሸክም የሚያርፈው በታክስ ከፋዩ ላይ ነው።[187] ለምሳሌ ያህል የካናዳ የታክስ ሕግ በታክስ ከፋዩ ላይ እጅግ ጠንከር ያለ የማስረዳት ሸክም ይጥላል። በዚህ ረገድ የካናዳ የገቢ ግብር ሕግ ታክስ ከፋዩ ተቃራኒ ማስረጃ አቅርቦ ካላስረዳ በስተቀር፣ ምንም እንኳን ስህተት ወይም ግድፈት ቢኖረበትም ማንኛውም የታክስ አስገቢው ባለሥልጣን ያስተላለፈው የታክስ ውሳኔ ትክክለኛ እንደሆነ ተደርጎ ይቆጠራል በማለት ይደነግጋል።[188]

በሌላ በኩል ደግሞ ማንኛውም ዓይነት የታክስ ክርክር በሚደረግበት ጊዜ የማስረዳት ሸክም ሙሉ በሙሉ በታክስ ከፋዩ ላይ ማረፍ የለበትም፤ ይልቁንም ይህንን ሸክም የታክስ አስገቢው ባለሥልጣንም ሊጋራው ይገባል የሚሉ ክርክሮች አሉ። ይህንን ክርክር የሚደግፉ የፍርድ ቤት ውሳኔዎችም እንዳሉ በመስኩ የተደረጉት የምርምር ሥራዎች ያረጋግጣሉ።[189] ለምሳሌ በአሜሪካ በታክስ ክርክር ወቅት የማስረዳት ኃላፊነት በመርህ ደረጃ የታክስ ከፋዩ ቢሆንም የሀገሪቱ ይግባኝ ሰሚ ፍ/ቤት እ.ኤ.አ በ2006 በሰጠው አንድ ውሳኔ የማስረዳት ሸክሙን ወደ ታክስ አስገቢው ባለሥልጣን አዙሮት ነበር።[190] እንደዚሁም ደግሞ በአውሮፓ መደበኛ ፍርድ ቤቶችና በአውሮፓ የሰብአዊ መብቶች ፍርድ ቤት የተሰጡ ውሳኔዎች የይገባኛል ጥያቄ ባነሳው ወገን ላይ የሚያርፈው የማስረዳት ሸክም ከመጠን በላይ የከበደ ወይም ኢፍትሐዊ የሆነ እንደሆነ የማስረዳት ሸክሙ ወደ ሌላኛው ተከራካሪ ወገን ሊዛወር እንደሚችል ይጠቁማሉ።[191]

የኢትዮጵያ የታክስ ሕጐች ዝርዝር የማስረጃ ደንቦችን ባያካትቱም የታክስ ክርክር ሲነሳ የማስረዳት ኃላፊነት ያለበት ታክስ ከፋዩ እንደሆነ በማያሻማ ሁኔታ ይደነግጋሉ።[192] እነዚህ የታክስ ሕጎች የወሰዱት አቋም በሌሎች ሀገሮች ተግባራዊ የተደረጉ የታክስ ሕጎች ከወሰዱት አቋም ጋር ተመሳሳይነት ቢኖረውም[193] የታክስ ሕጐቻችን አቋም ሁልጊዜም ትክክል ነው ብሎ መቀበል ግን ያስቸግራል። ሁልጊዜም ቢሆን የማስረዳት ሸክም በታክስ ከፋዩ ላይ የሚያርፍ መሆኑን በመረዳት አንዳንድ የታክስ ውሳኔ የሚያስተላልፉ የታክስ አስገቢው ባለሥልጣን ሠራተኞች (ኦዲተሮች) በሥልጣናቸው አላግባብ በመገልገልና ለራሳቸው ያልተገባ ጥቅም ከታክስ ከፋዩ ለማግኘት በመሻት ምንም ዓይነት የፍሬ ነገር መሠረት የሌለው የታክስ ውሳኔ በሚያስተላልፉበት ወቅት ታክስ ከፋዩ ይህንን ውሳኔ ለማፍረስ የሚያስችል ምንም ዓይነት ማስረጃ ላይኖረው ይችላል። ስለሆነም ጉዳዩን ወደ አጣሪ ኮሚቴው ወይም ደግሞ ወደ ግብር ይግባኝ ጉባኤ በማቅረብ ፋንታ ከኦዲተሮቹ ጋር መደራደርን ይመርጣል፤ ወይም ደግሞ ሊከፍል የማይገባውን ግብር ለመንግሥት ለመክፈል ይገደዳል።

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[186] Vern Krishna, '*Reverse Onus of Proof in Tax Litigation,*' The Lawyers Weekly,Vol. 27, No. 42(March 14, 2008), available at <www. Commonlaw.uttowa.com/index-php?option=com_docman>, accessed on July 5, 2013 ገጽ 1።

[187] ዝኒ ከማሁ፣ገጽ 2።

[188] ዝኒ ከማሁ።

[189] David E. Kahen and Elliot Pisem, *The Burden of Persuasion in Tax Litigation*, December 21, 2006, originally published in the Newyork Law Journal, available at <www.robertstandholland.com/Dkahen>, accessed on July 11,2013፣ ገጽ 1።

[190] ዝኒ ከማሁ።

[191] ዝኒ ከማሁ።

[192] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ አንቀጽ 110(2) እና አንቀጽ 116 ይመልከቱ።

[193] ከላይ በግርጌ ማስታወሻ ቁጥር 186 እና 189 የተጠቀሱትን ሥራዎች ይመልከቱ።

ይህንን ችግር በሚመለከት የዚህ ጽሁፍ አዘጋጅ በሥራው አጋጣሚ የተረዳውን አንድ አስቸጋሪ ሁኔታ እዚህ ላይ ቢገለጽ የችግሩን አሳሳቢነት አጉልቶ ያሳየናል፡፡ በዚህ ጽሁፍ ውስጥ ስሙ እንዲጠቀስ ያልተፈለገ የአንድ የንግድ ድርጅት ሥራ በየሥፍራው የወዳደቁ ቁርጥራጭ ብረታብረቶችን እየለቃቀሙ ከሚሸጡ ግለሰቦች[194] ላይ እነዚህን ብረታብረቶች እየገዛ ለብረታብረት ፋብሪካዎች ማቅረብ ነው፡፡ ይህ ድርጅት ብረታ ብረቶችን ከእነዚህ ግለሰቦች ሲገዛ ብረቱን ለሚሸጡት ግለሰቦች ገንዘብ መክፈሉ እሙን ቢሆንም ክፍያውን ሲፈጽም ግን ከእነዚህ ግለሰቦች ደረሰኝ ለመቀበል የሚችልበት ዕድል የለውም፡፡ ነገር ግን ገንዘቡን ወጭ የሚያደርገው በገንዘብ መክፈያ ሰነድ ነው፡፡ ይሁን እንጂ የታክስ አስገቢው ባለሥልጣን ኦዲተሮች የድርጅቱን የታክስ ኃላፊነት ሲተምኑ ድርጅቱ ብረታብረቶቹን ለመግዛት ያወጣውን ገንዘብ በተቀናሽነት ለመያዝ ፈቃደኛ አልሆኑም፡፡ ኦዲተሮቹ ድርጅቱ ያወጣውን ገንዘብ በተቀናሽ ለመያዝ ፈቃደኛ ሳይሆኑ የቀሩት ድርጅቱ ክፍያውን ብረታ ብረት ላቀረቡለት ግለሰቦች የፈጸመ መሆኑን የሚያረጋግጥ ደረሰኝ ለማቅረብ ባለመቻሉ ነው፡፡ እንዲህ ያለው ሁኔታ ሲከሰት የታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔው ላይ እንዴት ሊደርስ እንደቻለ አለኝ የሚለውን ማስረጃ እንዲያቀርብ ሊገደድ ይገባል፡፡ ምክንያቱም የታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔውን ያስተላለፈው ሕግንና መረጃን መሠረት አድርጎ ከሆነ የውሳኔውን ትክክለኛነት ለማሳየት ማስረጃ ማቅረብ አይቸግረውም፡፡ የታክስ አስገቢው ባለሥልጣን የሚወስነውን የታክስ ውሳኔ ሁሉ እውነት ነው ብለን የምንቀበለው ከሆነ በታክስ ካፋዩ ላይም ሆነ በሀገር ላይ ከፍተኛ የሆነ አሉታዊ ተጽዕኖ እንደሚያስከትል አያጠራጥርም፡፡

በመሆኑም በመርህ ደረጃ የማስረዳት ሸክም በታክስ ከፋዩ ላይ ማረፍ ቢገባውም በልዩ ሁኔታ ግን በግብር አስገቢው ባለሥልጣንም ላይ የሚያርፍበት ሥርዓት መፈጠር አለበት፡፡ በሌላ አነጋገር በጥንቃቄና በተጠና ሁኔታ በግብር አስገቢው ባለሥልጣንና በግብር ከፋዩ መካከል የማስረዳት ሸክም ክፍፍል (sharing of burden of proof) መደረግ ይኖርበታል፡፡ አንዳንድ ጊዜ ካለፈው ተሞክሮና ከተሻሩ ሕጎችም ትምህርት ማግኘት ስለሚቻል የማስረዳት ሸክም ክፍፍልን በተመለከት ጥሩ ግንዛቤ ለመያዝ በ1968 ዓ.ም የደርግ መንግሥት አውጥቶት የነበረውን የገጠር መሬት መጠቀሚያ ክፍያና የእርሻ ሥራ ግብር አዋጅ[195] መመልከት ጠቃሚ ነው፡፡ የዚህ አዋጅ አንቀጽ 31(1) በግልጽ እንደደነገገው ይግባኝ የቀረበበት ገቢ የተወሰነው በግምት ሲሆን ይግባኝ ባዩ ግብር አስገቢው መሥሪያ ቤት የጠየቀው ግብር አወሳሰን ትክክለኛነት የተቃወመበትን ምክንያት በመጀመሪያ ደረጃ የማስረዳት ሸክም ነበረበት፡፡ በዚሁ አንቀጽ ንዑስ አንቀጽ 2 ሥር እንደተነገረው ደግሞ የግብር አስገቢው ባለሥልጣን በበኩሉ ከግብር ከፋዩ የሂሳብ መዝገብ ወይም ሌላ ሰነድ ያልቀረበለት መሆኑን ወይም የቀረበ መዝገብ ወይም ሰነድ ካለም ይኸው ግብር አስገቢው መ/ቤት ከሰጠው መመሪያ ጋር ሲነጻጸር የማያጠግብ ወይም ያልተሟላ ወይም የማይታመን በመሆኑ ተቀባይነት ያለማግኘቱን ወይም በዚህ ዓይነት የተገመተው ገቢ የይግባኝ ባዩ እርሻ ይዞታ ወይም ሁኔታና የኑሮ ደረጃ ታይቶ ሊደረግ የሚገባው ምርመራ ሁሉ ተጠናቅቆ

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[194] እነዚህ ግለሰቦች በተለምዶ "ቆራሊዎ" እየተባሉ የሚጠሩት ሰዎች ናቸው፡፡ እነዚህ ሰዎች ደግሞ በአመዛኙ ቋሚ አድራሻ የሌላቸውና የንግድ ፈቃድም የማያወጡ ተዘዋዋሪ ሰዎች በመሆናቸው ለሚያቀርቧቸው ቁርጥራጭ ብረታ ብረቶች ክፍያ ሲፈጸምላቸው ለከፋዩ ደረሰኝ እንዲሰጡ መጠበቅ የሚቻል አይደለም፡፡

[195] የገጠር መሬት መጠቀሚያ ክፍያና የእርሻ ሥራ ግብር መሰብሰቢያ አዋጅ፣ ከላይ በማስታወሻ ቁጥር 93 የተጠቀሰ፡፡

በትክክለኛ የሕሊና ፍርድ በማመዛዘን የተወሰነ መሆኑን በሁለተኛ ደረጃ የማስረዳት ግዴታ አለበት።[196]

ወደ ታክስ ይግባኝ የመስማት ሂደት ስንመጣ ደግሞ፣ ማንኛውም በታክስ አስገቢው ባለሥልጣን ቅሬታ የተሰማው ግብር ከፋይ ቅሬታውን ለግብር ይግባኝ ጉባኤ ካቀረበ በኋላ ጉዳዩን የመከታተል ግዴታ አለበት። በመሆኑም ይግባኝ ባዩ በሁለት የቀጠሮ ጊዜዎች ሳይገኝ የቀረ እንደሆነ ወይም የመልስ መልስ ሳያቀርብ ቢቀር የግብር ይግባኝ ጉባኤው ይግባኝ ባዩ በሌለበት ውሳኔ የመስጠት ሥልጣን አለው።[197] ከዚህም የምንገነዘበው ይግባኝ ባዩ ይግባኙ በሚሰማበት ቀን ያለምንም ምክንያት ቢቀር ይግባኙን የመስማቱ ሥራ ለሌላ ጊዜ ሊዛወር እንደሚችል ነው። እንዲህ ያለው አካሄድ በኢትዮጵያ የሥነ-ሥርዓት ሕግ ውስጥ ከተደነገገው ፈጽሞ የተለየ አካሄድ ነው። ምክንያቱም በፍ/ብ/ሥ/ሥ/ሕግ[198] አንቀጽ 69(2) በማያሻማ መልኩ እንደተደነገገው ይግባኙ በሚሰማበት ቀን ይግባኝ ባዩ ካልቀረበ ይግባኙ እንደሚዘጋ ነው። ይህም የሚያስገነዝበው የፍትሐብሔር ሥነሥርዓት ሕጋችን ያስቀመጠው ጥብቅ መስፈርት በታክስ ሕጎቻችን ተቀባይነት አለማግኘቱንና የግብር ይግባኝ ጉባኤው የላላ ሥነ-ሥርዓት እንደሚከተል ነው። ይህ አካሄድ ደግሞ ተቀባይነት ያለው አቀራረብ ነው። ምክንያቱም እንደግብር ይግባኝ ሰሚው ጉባኤ ያሉ የአስተዳደር ፍ/ቤቶች ከመደበኛው ፍ/ቤት በባህሪያቸውና በዓላማቸውም ጭምር የተለዩ በመሆናቸው ይግባኝ ባዩን የሚጠቅሙ ላላ ያሉ ሥነ-ሥርዓቶችን እንዲከተሉ መደረጉ አግባብ ነው።[199]

እንዲሁም የታክስ አስገቢው ባለሥልጣን የይግባኝ ባዩ ማመልከቻ ከደረሰው በኋላ በሁለት የቀጠሮ ቀናት ሳይገኝ የቀረ እንደሆነ ወይም ለይግባኙ መልስ ሳይሰጥ ቢቀር በሌለበት ውሳኔ እንደሚሰጥ በአንቀጽ 111(4) ሥር ተደንግጓል። እዚህም ላይ የግብር ሕጉ የፍ/ብ/ሥ/ሥ/ሕጉ የመረጠውን አካሄድ ያልተከተለ እንደሆነ እንገነዘባልን። ይህም ማለት በፍ/ብ/ሥ/ሥ/ሕግ በግልጽ እንደተመለከተው ይግባኙ በሚሰማበት ጊዜ መልስ ሰጭው ካልቀረበ ጉዳዩ በሌለበት የሚታይ ሲሆን፣[200] ግብር አስገቢው ባለሥልጣን(መልስ ሰጭው) ይግባኙ በሚሰማት ቀን ሳይቀርብ ቢቀር የግብር ይገባኝ ጉባኤው ይግባኙን ለመስማት ተለዋጭ ቀጠሮ ስለሚሰጥ በመልስ ሰጭው የመሰማት መብት ላይ የሚያመጣው ተጽዕኖ ሊኖር እንደማይችል ነው።

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[196] እንደዚህ ጸሐፊ አመለከካት ከዚህ ሕግ ትምህርት መውሰድ ተገቢ ነው። ምክንያቱም በማናቸውም ጊዜ ታክስ ከፋዩ የማስረዳት ሸክም አለበት ማለት፣ ታክስ ከፋዩ ከማይወጣው ማጥ ውስጥ ገብቶ፣ ታክስ አስገቢው ባለሥልጣን በማናቸውም ዘዴ የወሰነው የግብር ውሳኔ እንዲፈጸም መፍቀድ ነው። እንዲህ ያለው አካሄድ ደግሞ የታክስ አስገቢው ባለሥልጣን ተጠያቂነት እንዳይኖርበት ከማድረጉም በላይ ለሙስናም ሰፊ በር የሚከፍት ነው። ስለዚህ በሁሉም ፍሬነገሮች ላይ የማስረዳት ኃላፊነት የታክስ ከፋዩ ብቸኛ ኃላፊነት ነው በማለት ነው በማለት ሕጎቻችን የያዙትን አቋም በተጠና መልኩ ማለዘብ ይኖርብናል።

[197] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣አንቀጽ 111(4)።

[198] የፍትሐብሔር ሥነሥርዓት ሕግ፣ ከላይ በማስታወሻ ቁጥር 177 የተጠቀሰ።

[199] P.P. Craig፣ ከላይ በማስታወሻ ቁጥር 54 የተጠቀሰ፣ገጽ 253፣ ይህ የአስተዳደር ሕግ ምሁር የአስተዳደር ፍርድ ቤቶችን አስፈላጊነት "The reasons for the creation of tribunals have been considered in the historical discussions. A word or two more is warranted at this juncture. It is important to realize that a number of different arguments have been used to justify assigning tasks to tribunals. First, tribunals are often preferred to courts because they have the advantages of speed, cheapness, informality and expertise. …Second,…. ordinary courts might not be sympathetic to the protection of substantive interests contained in the legislation that laid the foundation of welfare state." ሲል ይገልፀዋል።

[200] የፍትሐብሔር ሥነ-ሥርዓት ሕግ፣ ከላይ በማስታወሻ ቁጥር 177 የተጠቀሰ፣አንቀጽ 70።

በመጨረሻም የግብር ይግባኝ ጉባኤው በሁለቱ ወገኖች መካከል የተደረገውን ክርክር ከመረመረ በኋላ ውሳኔ መስጠት ይጠበቅበታል። ይህ ውሳኔ በገቢ ግብር ሕጉ አንቀጽ 111(1-3) በተደነገገው መሠረት ውሳኔው የተሰጠበትን ቀን፣ በጉባኤው ስብሰባ የተገኙ አባላት ዝርዝር፣ የሊቀመንበሩን ስም፣ አግባብነት ኖሯቸው የተጠቀሱትን የሕግ አንቀጾችና የሚገኙበትን ሕግ የሚያብራራ ሆኖ ጉባኤው የደረሰበትን ድምዳሜ፣ ይግባኝ ባይ ሊከፍል የሚገባውን የግብር መጠን፣ የተረጋገጡትን ፍሬ ነገሮችና በይግባኙ ውስጥ የተጠቀሱትን የሕግ ድንጋጌዎች ትርጉም፣ ይግባኙ በተሰማበት ወቅት በሙሉ በተነሱት አግባብነት ባላቸው በእያንዳንዱ ጭብጦች ላይ የተሰጠውን እልባትና ውሳኔውን በሚመለከት የተሰጠ የሓሳብ ልዩነት ካለ ማካተት አለበት። በመጨረሻም የተገኙት አባላት ፊርማና የግብር ይግባኝ ጉባኤው ማህተም በውሳኔው ላይ ማረፍ አለባቸው።

ከውሳኔ መስጠት ጋር ተያይዞ መነሳት የሚኖርበት ጥያቄ የግብር ይግባኝ ጉባኤ ውሳኔ መስጠት ያለበት በምን ያህል ጊዜ ነው የሚለው ነው። በኢትዮጵያ ውስጥ የግብር ይግባኝ ጉባኤው በምን ያህል ጊዜ ውስጥ ጉዳዩን መጨረስ እንዳለበት የሚያስገድድ ድንጋጌ ካለመኖሩም ባሻገር፣ ቢያንስ የታክስ ይግባኝ ክርክር በተቻለ መጠን በፍጥነት ውሳኔ ማግኘት እንዳለበት ማሳሰቢያ የሚሰጥ የሕግ ድንጋጌ እንኳ በሕጎቻችን ውስጥ አልተካተተም።[201] እንደ ግብር ይግባኝ ጉባኤ ያሉ የአስተዳደር ፍርድ ቤቶች ከመደበኛው ፍርድ ቤቶች ተለይተው የሚቋቋሙበት ምክንያት በተከራካሪ ወገኖች መካከል ለሚነሱ ክርክሮች በፍጥነት እልባት ይሰጣሉ ተብሎ ስለሚታመን ነው።[202] ስለዚህም ይህንን ጠቃሚ ግብ እውን ለማድረግ ይቻል ዘንድ ወደፊት የታክስ ሕጎቻችንን በሚሻሻሉበት ጊዜ ለዚህ ነጥብ ተገቢውን ትኩረት መስጠት ያስፈልጋል። ምክንያቱም የግብር ይግባኝ ጉባኤው ልዩ የክርክር መፍቻ ተቋም እንደመሆኑ መጠን ከመደበኛው ፍርድ ቤት እጅግ ባጠረ ጊዜ ውሳኔ ሊሰጥ ይገባዋል።[203]

3.4 በመደበኛ ፍ/ቤቶች የግብር ከፋዮች ቅሬታ አፈታት ሥርዓት

የታክስ ክርክሮች በመጀመሪያ ደረጃ በአስተዳደር ፍርድ ቤቶች እንዲስተናገዱ መደረጉ የራሱ ምክንያት ቢኖረውም የታክስ ክርክሮችን በማስተናገድ ረገድ መደበኛ ፍርድ ቤቶችም የሚጫወቱት ሚና ሊኖር ይገባል። ይህ አሠራር በአብዛኞቹ ሀገሮች የተለመደ ሲሆን በኢትዮጵያም ውስጥ ቢሆን መደበኛ ፍርድ ቤቶች የተወሰነ ሚና እንደነበራቸው ቀደም ሲል ባቀረብነው ገለጻ ተመልክተናል። በአሁኑ ጊዜም የታክስ ክርክሮችን በማስተናገድ ረገድ መደበኛ ፍርድ ቤቶቻችን የተወሰነ ሚና እንደሚጫወቱ የታክስ ሕጎቻችን ያሳያሉ። በዚህ ረገድ ሁሉንም የታክስ ሕጎቻችን ስንመለከት ተመሳሳይ አቋም እንዳላቸው እንገነዘባን።

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[201] ምንም እንኳን በአተገባበር ደረጃ ሙሉ በሙሉ ተሳክቷል ባይባልም በ1996 ዓ.ም የወጣው የኢትዮጵያ አሠራና ሠራተኛ ሕግ በዚህ ረገድ እንደመልካም ምሳሌ መጠቀስ የሚገባው ሕግ ነው። ይህ ሕግ በመጀመሪያ ደረጃ ፍ/ቤት የሚታይ የሥራ ክርክር በ60 ቀናት ጊዜ ውስጥ መጠናቀቅ አለበት ብሎ ደንግጓል።

[202] P.P.Craig, ከላይ በማስታወሻ ቁጥር 54 የተጠቀሰ፣ ገጽ 253።

[203] በኢትዮጵያ የፍርድ ቤት ክርክር እጅግ አዝጋሚ መሆኑ የሚያነጋግር አይደለም። ለአብነትም ያክል ዮሴፍ አእምሮ፣ *'የፍትሐብሔር ክርክሮች ሂደት፡ ፈተናዎችና ተስፋው'*፣ in Yazachew Belew (ed.), The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Ajdudication? Ethiopian Business Law Series, Vol.5፣ ከገጽ 1-24 ያለውን ይመልከቱ፣ መንበረፀሐይ ታደሰ፣ *የኢትዮጵያ ሕግና ፍትሕ ገጽታዎች*፣ አዲስ አበባ፣ ጎዳር 1996 ዓ.ም፣ ከገጽ 1-77 ያለውን ይመልከቱ።

የገቢ ግብር አዋጁ[204] አንቀጽ 112(1) የይግባኝ ጉባኤ የሰጠው ውሳኔ በሕግ ረገድ ስህተት ነው በማለት ያልተስማማ ማንኛውም ተከራካሪ ወገን የይግባኝ ጉባኤው የጽሑፍ ውሳኔ በደረሰው በ30 ቀናት ውስጥ ጉዳዩን ሥልጣን ላለው ፍ/ቤት አቅርቦ ስለሕጉ ስህተት ፍርድ ሊጠይቅ ይችላል በማለት ይደነግጋል። ከዚህ የሕግ ድንጋጌ ውስጥ ሦስት ነጥቦችን በመለየት አጽንኦት ልንሰጣቸው ይገባል። እነኝህም በመጀመሪያ ደረጃ ይህ ንዑስ አንቀጽ *"ማንኛውም ተከራካሪ ወገን"* ሲል ግብር አስገቢው ባለሥልጣንም ሆነ ግብር ከፋዩ ቅሬታውን ሥልጣን ላለው ፍ/ቤት ለማቅረብ እንደሚችል መናገሩ ነው። ምንም እንኳን በአጣሪ ኮሚቴው ወይም በግብር ይግባኝ ጉባኤ ፊት ቅሬታውን የሚያቀርበው ታክስ ከፋዩ ብቻ ቢሆንም፣ ለምሳሌ የግብር ይግባኝ ጉባኤው የግብር አስገቢው ባለሥልጣን ወይም አጣሪ ኮሚቴ የሰጠውን ውሳኔ የሻረው እንደሆነ ለፍ/ቤት ይግባኝ ማለት የሚኖርበት ግብር አስገቢው ባለሥልጣን ስለሚሆን ግብር ከፋዩ መልስ ሰጭ ሆኖ ይቀርባል ማለት ነው።

ከዚሁ ጋር ተያይዞ የሚነሳው ሁለተኛው ጥያቄ ማንኛውም ይግባኝ ባይ ለፍርድ ቤት ይግባኝ ማቅረብ የሚችለው በሕግ ስህተት ብቻ ነው ተብሎ ስለተደነገገ የሕግ ስህተት ማለት ምን ማለት ነው የሚለው ጥያቄ ነው። ይህ ጥያቄ በሌሎችም ሀገሮች በተደጋጋሚ የሚነሳ አስቸጋሪ ጥያቄ ነው። ይሁን እንጂ እንኳንስ የሕግ ሥርዓታቸው በሚገባ ባላደገባቸው እንደ ኢትዮጵያ ባሉ ሀገሮች ቀርቶ የዳበረ የሕግ ሥርዓት ባላቸው ሀገሮችም ዘንድ ቢሆን ለዚህ ጥያቄ የማያሻማ መልስ መስጠት ቀላል ጉዳይ አይደለም፤ ቢሆንም በእነዚህ ሀገሮች ለዚህ አወዛጋቢ ጥያቄ አግባብነት ያለው መልስ ለመስጠት የተለያዩ ጥረቶች እንደተደረጉ በዚህ ረገድ የተደረጉ የምርምር ጽሁፎች ያረጋግጣሉ።[205]

ለዚህ ጥያቄ መልስ ለመስጠት ሁለት ዓይነት ዘዴዎች ሥራ ላይ እንደሚውሉ በመስኩ የተደረጉ የምርምር ሥራዎች ያሳያሉ። እነዚህ ዘዴዎች የትንተና ዘዴ (analysis method) እና እንደሁኔታው ሥራ ላይ የሚውል ዘዴ (pragmatic method) የተሰኙ ናቸው።[206] ከትንተና ዘዴ ምልከታ (analysis method) አኳያ አንድ አከራካሪ ነጥብ የፍሬ ነገር ጉዳይ ጭብጥ ነው ሊባል የሚችለው የአንድን ኩነት መኖር ወይም አለመኖር የሚመለከት ሲሆን ነው፤ የሕግ ጉዳይ ነው ሊባል የሚችለው ደግሞ ይህ ክስተት በሕግ ረገድ የሚኖረው ፋይዳ ነው።[207] እንደ ሁለተኛው ዘዴ ከሆነ ደግሞ አንድ ፍርድ ቤት ጉዳዩን የፍሬ ነገር ጉዳይ ነው ወይስ የሕግ ጉዳይ ነው ብሎ ለመወሰን በሀገሪቱ ያለውን የፖሊሲ አቅጣጫ በሚገባ ማጤን ይገባዋል የሚል ነው።[208] ለምሳሌ ያህል አንድ የውጭ ሀገር ነዋሪ ግለሰብ ከግንቦት ጀምሮ እስከ ጥር ድረስ በኢትዮጵያ ውስጥ ቢኖርና የኢትዮጵያ ግብር አስገቢ ባለሥልጣን ይህ ግለሰብ በውጭ ሀገር በሚያገኘው ገቢ ላይ ግብር እንዲከፈል ቢወሰንበትና አለመግባባት ቢነሳ ይህ የውጭ ሀገር ዜጋ በውጭ ሀገር ገቢ ነበረው ወይስ አልነበረውም የሚለው ጥያቄ በማስረጃ መንጠር የሚገባው ጉዳይ ስለሆነ የፍሬነገር ጉዳይ ነው። ከዚህ

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[204] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ።

[205] Taddese Lencho, 'The Ethiopian Tax System: Cutting Through the Labyrinth and Padding the Gaps,' *Journal of Ethiopian Law*, Vol.25, No 1,2011፣ ገጽ 106:: ዶ/ር ታደሰ ሌንጮ በዚህ በምርምር ሥራቸው እንደገለጹት ለምሳሌ በሀገረ እንግሊዝ ይኸው ነጥብ ተደጋግሞ የሚነሳ ጥያቄ ከመሆኑ አንጻር በዚች ሀገር ውስጥ ሰነዶችን ወይም ሕጐችን የመተርጐም ጉዳይ የሕግ ጥያቄ ተደርጐ ሲወሰድ ይህ ሰነድ መቼ ተፈረመ የሚለው ጉዳይ ግን የፍሬ ነገር ጉዳይ እንደሆነ ተደርጐ ይወሰዳል።

[206] K.C.Davis (1958), *Administrative Law Treatise*, St. Paul, Minn. ,West Publishing House Compan, ገጽ 192 ይመልከቱ።

[207] Peter Cane, *An Introduction to Administrative Law*, 3rd ed., London Black Stone Press Limited, 1996, ገጽ 64.

[208] ዝኒ ከማሁ።

በተቃራኒው ግን ይህ ግለሰብ ለኢትዮጵያ መንግሥት የገቢ ግብር የመክፈል ግዴታ አለበት ወይስ የለበትም የሚለው ጥያቄ አጥጋቢ ምላሽ ሊያገኝ የሚችለው የገቢ ግብር ሕጉን ተፈጻሚነት ወሰን በመተንተን በመሆኑ የሕግ ጥያቄ ነው።[209]

የዚህ ጽሁፍ አዘጋጅ እስከሚያውቀው ድረስ በኢትዮጵያ ውስጥም የሕግ ስህተት ምንድን ነው ለሚለው ጥያቄ አንድም ሕግ ወይም የፍርድ ቤት ውሳኔ የሚሰጠው አጥጋቢ መልስ የለም። ይህ ማለት ግን በኢትዮጵያ ውስጥ ይህ ጥያቄ ተነስቶ አያውቅም ማለት አይደለም። ይህ ጥያቄ በተለያዩ ጊዜያት ተነስቶ እንደሁኔታው እልባት ሲያገኝ እንደነበር የፍርድ ቤት ውሳኔዎች ያመለክታሉ።[210] ለምሳሌ ያህል በአቶ ፒዛኖ ኢማኖ እና በክልል አሥራ አራት ዞን አምስት ፋይናንስ ቢሮ መካከል ተነስቶ በነበረ ክርክር የመልስ ሰጭ የአቶ ፒዛኖ ይማኖ ክርክር የግብር አስገቢው ባለሥልጣን በግምት ግብር መወሰኑ አግባብነት ስለሌለው እና እኔም የሂሳብ መዛግብት ስላሉኝ ውሳኔው ውድቅ ሊደረግ ይገባል የሚል ነበር።[211] ይግባኝ ባይ በበኩሉ መልስ ሰጭው የሂሳብ መዛግብትን ያልያዙ በመሆኑ የግብር ውሳኔው በግምት መወሰኑ አግባብነት አለው የሚል ክርክር አንስቶ ነበር። በመሆኑም የዚህ ክርክር መሠረታዊ ጭብጥ ለመሆኑ አቶ ፒዛኖ የሂሳብ መዝገብ ይዘው ነበር ወይስ አልነበረም የሚለው ነጥብ በመሆኑ ይግባኙ የቀረበለት ፍርድ ቤት ጉዳዩ የፍሬነገር ጉዳይ ነው በማለት ይግባኙን ውድቅ አድርጐታል። ይህም የፍርድ ቤቱ ውሳኔ ትክክለኛ ውሳኔ ነው። ምክንያቱም ይህ ነጥብ በማስረጃ የሚነጥር የፍሬነገር ጉዳይ እንጂ ሕግ በመተንተን መልስ ሊሰጠው የሚችል ጭብጥ አይደለም።

እንዲሁም የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የተያዘውን ጉዳይ አስመልክቶ በ2002 ዓ.ም የሰጠውን ገዥ ውሳኔ ማንሳቱ አግባብነት አለው። በዚህ ክርክር አመልካች የነበረው አቶ አብደላ ሁሴን ከለር ኃላፊነቱ የተወሰነ የግል ማኅበር ሲሆን መልስ ሰጭው ደግሞ የፌዴራል ሀገር ውስጥ ገቢ ባለሥልጣን ነበር።[212] መልስ ሰጭው መ/ቤት ለአመልካቹ በገቢ ግብርና በተጨማሪ እሴት ታክስ ላይ የግብር ማስታወቂያ ሲሰጠው አመልካቹ በበኩሉ በታክስ አስገቢው ባለሥልጣን ውሳኔ ባለመስማማት ይግባኙን ለግብር ይግባኝ ጉባኤው ለማቅረብ በመፈለጉ በሕጉ መሠረት የሚያስይዘውን ገንዘብ ለሁለቱም የታክስ ዓይነቶች ሁለት የተለያዩ ሲፒኦዎችን አሠርቶ ለባለሥልጣኑ አቅርቧል። ይህ የመያዣ ሲፒኦ የቀረበው ግን አመልካቹ የግብር ውሳኔው ማስታወቂያ በደረሰው በ30ኛው ቀን ዓርብ ሰኔ 8 ቀን 1999 ዓ.ም ነበር። ባለሥልጣኑም የገቢ ግብርን አስመልክቶ የቀረበውን ሲፒኦ ተቀብሎ ለአመልካች ደረሰኝ ቢሰጥም ተጨማሪ እሴት ታክስን በተመለከተ የቀረበውን ሲፒኦ ተቀብሎ የኮምፕዩተር ብልሽት አጋጥሞናል በማለት ለአመልካቹ ደረሰኝ ሳይሰጥ ቀርቷል። ቀጣዩቹ ቀናት (ማለትም ሰኔ 9 እና ሰኔ 10) ቅዳሜና እሁድ ስለነበሩ ተጠሪው ለአመልካቹ ደረሰኙን የሰጠው ሰኞ ሰኔ 11 ቀን 1999 ዓ.ም ነበር።

ከዚህ በመቀጠል አመልካቹ ይግባኙን ለግብር ይግባኝ ጉባኤ ቢያቀርብም የግብር ይግባኝ ጉባኤው ግን በሕጉ የተመለከተው የ30 ቀን ገደብ አልፏል በማለት ይግባኙን ሳይቀበለው

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[209] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ ከአንቀጽ 3-5 ያሉትን ድንጋጌዎችይመልከቱ።

[210] Taddese Lencho፣ ከላይ በማስታወሻ ቁጥር 205 የተጠቀሰ፣ ገጽ 107።

[211] Melkamu Belachew፣ ከላይ በማስታወሻ ቁጥር 17 የተጠቀሰ፣ ገጽ 60::

[212] አቶ አብደላ ሁሴን ከለር ኃላፊነቱ የተወሰነ የግል ማኅበር V. የፌደራል ሀገር ውስጥ ገቢ ባለሥልጣን፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ ሰኔ 30 ቀን 2002 ዓ.ም፣ የሰበር መዝገብ ቁጥር 48621፣የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 10፣ ከገጽ 365-367።

ቀረ፡፡ አመልካች በዚህ ውሳኔ ቅር በመሰኘት ይግባኙን ለፌዴራል ከፍተኛ ፍ/ቤት አቅርቧል፡፡ አመልካቹ ለይግባኝ ምክንያት ያደረገው በሕጉ የተመለከተው የ30 ቀን የጊዜ ገደብ ሊያልፍብኝ የቻለው የግብር አስገቢው ባለሥልጣን ደረሰኙን በወቅቱ ባለመቁረጡ ነው እንጂ በእኔ ጥፋት ባለመሆኑ ለግብር ይግባኝ ጉባኤ ያቀረብኩት ይግባኝ ተቀባይነት ሊያገኝ ይገባዋል በማለት ነው፡፡ ጉዳዩ የቀረበለት የፌዴራል ከፍተኛ ፍ/ቤት ግን ክርክሩ የፍሬ ነገር ክርክር እንጂ የሕግ ክርክር ባለመሆኑ በፍ/ቤት ሊታይ አይገባውም በማለት ይግባኙን ሰርዞታል፡፡ በዚህም ምክንያት አመልካቹ ሁለተኛ ይግባኝ ለፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ቢያቀርብም ሁለተኛው ይግባኝ ሰሚ ችሎትም በተመሳሳይ ምክንያት ይግባኙን ሳይቀበለው ቀርቷል፡፡ ስለዚህ አመልካቹ የሥር ፍ/ቤቶች የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት የተፈፀመበት ነው በማለት አቤቱታውን ለፌ/ጠ/ፍ/ቤት ሰበር ሰሚው ችሎት አቅርቧል፡፡ ሰበር ሰሚው ችሎትም ጉዳዩን ከመረመረ በኋላ ሥር ፍርድ ቤቶች የሰጡትን ውሳኔ የሚከተለውን ሀተታ በማስፈር ሽሮታል፡-

> … ሕግ አውጭው የግብር ውሳኔ ማስታወቂያ የደረሳቸው ሰዎች የውሳኔ ማስታወቂያ በደረሳቸው በሠላሳ ቀን ውስጥ ማስያዝ የሚገባቸውን ገንዘብ 50% ለግብር አስገቢው ባለሥልጣን በማስያዝ ይግባኝ ማቅረብ እንዳለባቸው በአዋጅ ቁጥር 285/94[213] አንቀጽ 43(1) ሲደነግግ ግብር ከፋዩ ለግብር አስገቢው ባለሥልጣን ገንዘቡን ገቢ እንዲያደርግ ለማስገደድ እንጂ ገንዘቡ ገቢ ሆኖ ግብር አስገቢው ባለሥልጣን ደረሰኝ ሳይሰጥ ቢቆይ በመ/ቤቱ የአሠራር ድክመትና ችግር ምክንያት ግብር ከፋይ ይግባኝ የማቅረብ መብቱ እንዲጣበብበት በማሰብ አይደለም፡፡ … በግብር ሰብሳቢው መ/ቤት በኩል ያሉ የአሠራር ችግሮችና ጉድለቶች መሠረታዊ የሆነውን የአመልካችን ይግባኝ የማቅረብ መብት በማያጣብብ ሁኔታ በመተርጉም፣ የግብር ይግባኝ ጉባኤው የሰጠው ውሳኔ የሕጉን ድንጋጌ አተረጓጎምና ተፈጻሚነት የሚመለከት እንጂ የፍሬ ጉዳይ ክርክር አይደለም፡፡ በመሆኑም የከፍተኛው ፍ/ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ችሎቶች ጉዳዩ የፍሬ ጉዳይ ክርክር ነው በማለት ይግባኝ ሰሚ ጉባኤ … የሰጠውን የተዛባ ውሳኔ ሳያርሙ ማለፋቸው መሠረታዊ የሕግ ስህተት ያለበት ነው፡፡

ከዚህ መገንዘብ እንደሚቻለው የግብር ይግባኝ ጉባኤው፣ የፌደራል ከፍተኛው ፍርድ ቤትም ሆነ የፌዴራል ጠቅላይ ፍርድ ቤት መሠረታዊ የሕግ ስህተት እንደፈጸሙ ነው፡፡ ምክንያቱም እንዲህ ያለው አቤቱታ አግባብነት ያለውን ሕግ የመተርጎም ዘዴ በመከተል የሕግ አውጭውንም ሓሳብ መመርመርና ማረጋገጥ የሚጠይቅ ጉዳይ በመሆኑ የፍሬነገር ጉዳይ ነው ተብሎ የሚታለፍ ጉዳይ አይደለም፡፡ ስለሆነም የሰበር ሰሚው ችሎት የሰጠው ውሳኔ ትክክለኛ የሕግ አተረጓጎምን የተከተለና የታክስ ክፋዩንም የመሰማት መብት በጥሩ ሁኔታ ያገናዘበ ውሳኔ ነው፡፡

ከዚህ በመቀጠል ሊነሳ የሚገባው ነጥብ የገቢ ግብር አዋጁ በአንቀጽ 112(1) *ሥር ይግባኙ የሚቀርበው ሥልጣን ላለው ፍ/ቤት* ነው ሲል ምን ማለቱ ነው የሚለው ነጥብ ነው፡፡ እንደሚታወቀው ሀገራችን የፌዴራል ሥርዓት የምትከተል ሀገር እንደመሆኗ መጠን ፍ/ቤቶቻችንም የተዋቀሩት በክልልና በፌዴራል ደረጃ ነው፡፡[214] በፌዴራል ደረጃ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት፣ የፌዴራል ከፍተኛ ፍ/ቤትና የፌዴራል ጠቅላይ ፍ/ቤት

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[213] ይህ አዋጅ ከላይ በግርጌ ማስተወሻ 45 የተጠቀሰው የተጨማሪ እሴት ታክስ አዋጅ መሆኑን ልብ ይሏል፡፡

[214] የኢፌዲሪ ሕገ-መንግሥት፣ ከላይ በማስታወሻ ቁጥር 26 የተጠቀሰ፣ አንቀጽ 50(2)፡፡ በተጨማሪም ከአንቀጽ 78-82 ያሉትን ሕገ-መንግሥቱን ድንጋጌዎች ይመልከቱ፡፡

ተቋቁመዋል።[215] ከእነዚህ የፍርድ ቤቶች እርከን ውስጥ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ስሙም እንደሚጠቁመው ይግባኝ ሰሚ ፍ/ቤት ባለመሆኑ ከግብር ይግባኝ ጉባኤው የሚቀርብ ይግባኝ ተቀብሎ ለመመልከት እንደማይችል ግልጽ ነው።[216] በመሆኑም በግብር ይግባኝ ጉባኤው ውሳኔ ቅሬታ ያደረበት ወገን ለመጀመሪያ ጊዜ ወደ መደበኛው ፍ/ቤት የሚሄደው ለፌዴራል ከፍተኛ ፍ/ቤት ይግባኝ በማቅርብ ነው። ይግባኙ የሚቀርብለት የፌዴራል ከፍተኛ ፍ/ቤትም ጉዳዩን ተቀብሎ የፍትሐብሔር ሥነ-ሥርዓት ሕጋችን በሚያዘው መሠረት በሕግ ረገድ የተነሳውን ክርክር ከመረመረ በኋላ የግብር ይግባኝ ጉባኤው የወሰነው ውሳኔ ምንም እንከን የለበትም ብሎ ካመነ መልስ ሰጭውንም መጥራት ሳያስፈልገው መዝገቡን ሊዘጋው ይችላል።[217]

በሌላ በኩል ግን ይህ ይግባኝ ሰሚ ችሎት የግብር ይገባኝ ጉባኤው በሰጠው ፍርድ የሕግ ስህተት መፈጸሙን የሚያመላክት ነገር አለው ብሎ ካመነ ይግባኙ ያስቀርባል ይልና ለመልስ ሰጭው መጥሪያ እንዲደርሰው በማድረግ ሁለቱን ወገኖች ከአከራከራቸው[218] በኋላ የግብር ይግባኝ ጉባኤውን ውሳኔ ሊያፀናው፣ ሊያሻሽለው ወይም ሊሽረው ይችላል።[219] ይህንን ስንል ግን ይግባኝ ሰሚው ፍርድ ቤት ለቀረበለት ጉዳይ የመጨረሻ እልባት (final disposition) ይሰጠዋል ማለታችን አይደለም። ይልቁንም ይህ ፍ/ቤት የግብር ይግባኝ ጉባኤው የሰጠው ውሳኔ የሕግ ስህተት አለበት ብሎ የሚያምን ከሆነ የተፈፀመውን ስህተት ለይቶ በማውጣትና ስህተቱን በማቃናት ውሳኔ ከሰጠ በኋላ ጉዳዩን ለግብር ይግባኝ ጉባኤው ይመልስለታል።

ሆኖም ግን እዚህ ላይ ሁለት መሠረታዊ ትችት አዘል አስተያየቶች ይሰነዘራሉ። የመጀመሪያው አስተያየት ከፍተኛው ፍ/ቤት የሚመለከተው የሕግ ስህተትን ብቻ ነው ተብሎ በሕግ መደንገጉ የታክስ ከፋዮችን ይግባኝ የማቅረብ መብት በእጅጉ የሚያጣብብ በመሆኑ በግብር ይግባኝ ጉባኤው ውሳኔ ላይ ማንኛውም ዓይነት ቅሬታ (በሕግም ሆነ በፍሬ ነገር ጉዳይ ላይ) ያለው ግብር ከፋይ ይግባኙን ለከፍተኛው ፍ/ቤት እንዲያቀርብ ቢፈቀድለት መልካም ነው የሚል ነው።[220] ሁለተኛው አስተያየት ደግሞ ይግባኝ ሰሚው ፍ/ቤት የቀረበለትን ይግባኝ ከመረመረ በኋላ የሕግ ስህተት መፈፀሙን ከተረዳ ጉዳዩን ወደ ግብር ይግባኝ ጉባኤው እንዲመለስ ከማስገደድ ይልቅ ጉዳዩን ራሱ እንዲመለከተው ወይም ደግሞ ለግብር ይግባኝ ጉባኤው እንዲመልስ የማዘዙ ሥልጣን ለፍ/ቤቱ ቢተውለት ጠቀሜታ ይኖረዋል የሚል ነው።[221] ምክንያቱም አንዳንድ ጊዜ የግብር ይግባኝ ጉባኤው

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[215] ዝኒ ከማሁ፣ አንቀጽ 78(2) የፌደራል ጠቅላይ ፍርድ ቤት በዚህ ሕገ-መንግሥት የተቋቋመ መሆኑን ይደነግግና የሕዝብ ተወካዮች ምክር ቤት አስፈላጊ ሆኖ ሲያገኘው የፌደራል ከፍተኛ ፍርድ ቤትና የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት እንደሚያቋቁም አረጋግጧል። በዚህም መሠረት የፌደራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ በ1988 ዓ.ም ሲታወጅ የኋለኞቹ ሁለት ፍርድ ቤቶች ተቋቁመዋል፤ የፌደራል ፍርድ ቤቶች አዋጅ፣ አዋጅ ቁጥር 25/1988፣ 2ኛ ዓመት፣ቁጥር 13 ይመልከቱ።

[216] የግብር ይግባኝ ጉባኤው ደረጃና ሥልጣን ከፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት ጋር እኩል ነው እንደማለት ነው።

[217] የፍትሐብሔር ሥነሥርዓት ሕግ፣ ከላይ በማስታወሻ ቁጥር 177 የተጠቀሰ፣ በአንቀጽ 337 የተደነገገውን ይመልከቱ።

[218] ዝኒ ከማሁ፣ አንቀጽ 338።

[219] ዝኒ ከማሁ።

[220] ይህንን አቋም የዚህ ጽሁፍ አዘጋጅ በጣም የሚደግፈው ሲሆን፣ሌሎች ግለሰቦችም ተመሳሳይ አቋም እንዳላቸው ጸሀፊው በተለያዩ ጊዜያት የታክስ ሕግን ሲያስተምር ለመገንዘብ ችሏል።

[221] ዝኒ ከማሁ።

በሕግ ረገድ የሰጠው ውሳኔ ስህተት ነው ብሎ በከፍተኛው ፍ/ቤት ውሳኔ በሚሰጥበት ጊዜ ይኸው ውሳኔ ለጉዳዩ መቋጫ ሊያበጅለት ይችላልና ነው።[222]

አሁን በሥራ ላይ ያለው የፍርድ ቤቶቻችን ማቋቋሚያ አዋጅ እንደሚደነግገው አንድ ተከራካሪ ወገን ያለው የይግባኝ መብት ከዚህ የተለየ ነው። ምክንያቱም በገቢ ግብር አዋጁ በአንቀጽ 112(3) በግልጽ እንተደነገገው የመጀመሪያው ይግባኝ ሰሚ ፍ/ቤት[223] በሕግ ረገድ በሰጠው ውሳኔ ላይ ቅር የተሰኘ ተከራካሪ ወገን ውሳኔው በተሰጠ በ30 ቀናት ውስጥ ለሚቀጥለው ይግባኝ ሰሚ ፍ/ቤት ይግባኝ ለማለት ይችላል። ይህም የሚያሳየው በታክስ ክርክር ጊዜ ሁለት ጊዜ ይግባኝ ማለት የሚቻል መሆኑን ነው። ሁለተኛው ይግባኝ ሰሚ ፍርድ ቤትም ሊያይ የሚችለው የመጀመሪያው ይግባኝ ሰሚ ፍርድ ቤት በይግባኝ የሚያየውን የሕግ ጉዳይ ብቻ ነው። ከዚህም መገንዘብ የሚቻለው ይህ ሕግ በ1988 ዓ.ም የወጣው የፌዴራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ ይግባኝን አስመልክቶ የወሰደውን አቋም ያልተከተለ መሆኑን ነው።

እንዲሁም ማንኛውም ተከራካሪ ወገን የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የሕግ ጉዳይን አስመልክቶ በሰጠው ውሳኔ ቅሬታ ያደረበት እንደሆነ አቤቱታውን ለፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የማቅረብ መብት አለው። ተካራካሪ ወገኖች በዚህ መብት ሊሰሩበት የሚችሉት ይህ መብት በታክስ ሕጐቻችን ውስጥ ስለተደነገገ ሳይሆን በሕገ-መንግሥቱና በፌዴራል ፍ/ቤቶች ማቋቋሚያ አዋጅ የተደነገገ መብት ስለሆነ ነው። በሕገ-መንግሥቱ አንቀጽ 80(3)(ሀ) እንደተነገረው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ማንኛውም የበታች ፍ/ቤት የሰጠው የመጨረሻ ውሳኔ መሠረታዊ የሕግ ስህተት ካለበት ጉዳዩን ተቀብሎ የማየትና የመወሰን ሥልጣን አለው። በተጨማሪም የፌዴራል ፍ/ቤቶች ማቋቋሚያ አዋጅ በአንቀጽ 10 ሥር የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት መሠረታዊ የሕግ ስህተት ያለባቸውን የመጨረሻ ውሳኔዎች የማየት ሥልጣን እንዳለው ዘርዘር ባለ መልኩ ደንግጓል። ከዚህ መረዳት የሚቻለው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ተራ የሕግ ስህተቶች ያሉባቸውን ጉዳዮች ተቀብሎ የማየት ሥልጣን የሌለው መሆኑን ነው።[224] ነገር ግን በኢትዮጵያ ውስጥ እስካሁን አስቸጋሪ ሆኖ የዘለቀው ጉዳይ አንድን የሕግ ስህተት ተራ ወይም መሠረታዊ የሕግ ስህተት ነው ለማለት የሚያስችል መመሪያ አለመኖሩ ነው። በዚህም ምክንያት የፌዴራል ጠቅላይ ፍርድ ቤት

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[222] ለምሳሌ ያህል አንድ ስጦታ የተደረገለት ሰው ባገኘው የስጦታ ገንዘብ ላይ የገቢ ግብር መክፈል አለበት ወይስ የለበትም የሚል ጭብጥ ለከፍተኛው ፍ/ቤት በይግባኝ ቀረበለት እንበል። ይግባኝ ሰሚው ፍርድ ቤትም ከስጦታ የሚገኝ ገቢ በኢትዮጵያ የገቢ ግብር አዋጅ ሥር ከተመለከቱት የገቢ ግብር ማስከፈያ ሠንጠረገሮች ሥር ያልተካተተ በመሆኑ ስጦታ ተቀባዩ የገቢ ግብር መክፈል አይኖርበትም ብሎ ቢወስን ለጉዳዩ የመጨረሻ እልባት ሰጥቶታል ማለት ነው። በመሆኑም ጉዳዩ ለግብር ይግባኝ ጉባኤው ተመልሶ የሚላክበት አንዳችም ምክንያት ሊኖር አይገባውም።

[223] ከግብር ይግባኝ ጉባኤ ይግባኝ ተቀብሎ የሚሰማውን ፍርድ ቤት (በፌደራል ደረጃ የፌደራል ከፍተኛ ፍርድ ቤት) የመጀመሪያው ይግባኝ ሰሚ ፍ/ቤት ነው የምንልበት ምክንያት ይግባኝ ጉባኤው እንደ ፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የሚቆጠር አስተዳደራዊ ፍርድ ቤት በመሆኑ ነው። በመሆኑም ለፌ/ከ/ፍ/ቤት የሚቀርበው ይግባኝ መደበኛው ፍርድ ቤትን በተመለከተ የመጀመሪያ ይግባኝ ነው። ከዚህ በመቀጠል ወደ ፌ/ጠ/ፍርድ ቤት ይግባኝ የሚባል ከሆነ ሁለተኛ ይግባኝ እንደሆነ የሚያነጋግር አይደለም።

[224] የኢፌዲሪ ሕገ-መንግሥት፣ ከላይ በማስታወሻ ቁጥር 26 የተጠቀሰ፣ አንቀጽ 80(3(ሀ) እና የፌደራል ፍርድ ቤቶች አዋጅ፣ ከላይ በማስታወሻ ቁጥር 216 የተጠቀሰ፣ አንቀጽ 10።

ሰበር ሰሚ ችሎት ማንኛውንም የሕግ ስህተት አለበት የተባለውን ውሳኔ ተቀብሎ ለማየት ተገድዷል።[225]

ምንጊዜም ቢሆን ማንኛውም ተከራካሪ ወገን ይግባኝ ሰሚው ፍርድ ቤት በሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ፈጽሟል ብሎ ሲያምን ጉዳዩን ለፌዴራል ሰበር ሰሚ ችሎት የሚያቀርበው አግባብነት ያላቸውን የሕግ ድንጋጌዎች መሠረት በማድረግ ነው። እናም ለሰበር ሰሚው ችሎት የሚቀርበው የሰበር አቤቱታ ይዘት አግባብነት ባላቸው የፍትሐብሔር ሥነሥርዓት ሕግ ድንጋጌዎች የተገለፁትን መስፈርቶች ማሟላት አለበት።[226] በተጨማሪም ይግባኝ ሰሚ ችሎት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት አለበት ብሎ የሚያምን ተከራካሪ ወገን አቤቱታውን ለሰበር ሰሚው ችሎት ማቅረብ የሚገባው ውሳኔው ከተሰጠ ጀምሮ ባሉት 90 ቀናት ውስጥ ነው።[227] በዚህ ዓይነት የቀረበው የሰበር ማመልከቻ ለአምስት ዳኞች ከመቅረቡ በፊት ሦስት ዳኞች ለሚሰየሙበት የማጣሪያ ችሎት መቅረብ ይኖርበታል።[228] እነዚህ ሦስት ዳኞች ጉዳዩ መሠረታዊ የሕግ ስህተት ያለበት ስለሆነ በሰበር ችሎት ሊታይ ይገባዋል ካሉ ከአምስት ያላነሱ ዳኞች ለሚሰየሙበት የሰበር ሰሚ ችሎት ይቀርብና ክርክር ይደረግበታል።[229]

ሰበር ሰሚው ችሎትም የተከራካሪ ወገኖቹን ክርክር ከመረመረ በኋላ በጉዳዩ ላይ የመጨረሻ ውሳኔ ይሰጣል። የሰበር ሰሚው ችሎት ከአምስት ያላነሱ ዳኞች በተሰየሙበት የሰበር ችሎት የሚሰጠው የሕግ ትርጉም በየትኛውም ደረጃ ላይ በሚገኝ የፌዴራል ወይም የክልል ፍ/ቤት ላይ አስገዳጅነት አለው።[230] በመሆኑም በየትኛውም ደረጃ የሚገኙ የፌዴራልም ሆነ የክልል የግብር ይግባኝ ጉባኤዎች የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የሚሰጠውን የሕግ ትርጉም መከተል ይኖርባቸዋል። ምንም እንኳን እነዚህ ጉባኤዎች መደበኛ ፍ/ቤቶች ባይሆኑም የታክስ ሕግን በተመለከተ ግን እንደፍርድ ቤት ሆነው ሕግን የሚተረጉሙና ውሳኔ የሚሰጡ አስተዳደራዊ ፍ/ቤቶች በመሆናቸው የሰበር ሰሚ ችሎቱ የሚሰጠው አስገዳጅ ውሳኔ እነሱንም ይመለከታቸዋል።[231]

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[225] ይህን ጉዳይ የበለጠ ለመረዳት የሚከተሉትን የምርምር ሥራዎች ይመልከቱ፦ ዮሐንስ ጎሩይ፣ *'ስለሰበር ሥልጣንና ሥርዓቱ ጥቂት ማስታወሻዎች'*፣ የኢትዮጵያ ጠበቆች የህግ መጽሄት፣ቮልዩም 3፣ ቁጥር 1, መጋቢት 2001፣ ከገጽ. 131-148፣ Muradu Abdo, '*Review of Decisions of State Courts over State Matters by the Federal Supreme Court*,' *Mizan Law Review*, Vol. 1, No 1, June 2007, pp. 60-74. *መሀሪ ረዳኢ፣ 'የፌደራል የሰበርና የሰበር ሰበር የሥልጣን ምንጭ ገልጠን ብናየው! (በሰበር መ.ቁ 26996 እና 31601 መነሻነት የቀረበ ትችት)'*፣ የኢትዮጵያ የሕግ መጽሔት፣ ቮልዩም 24 ፣ቁጥር 2, ታህሳስ 2003፣ ዓ.ም፣ ከገጽ. 201-213።

[226] በፍትሐብሔር ሥነሥርዓት ሕጋችን ውስጥ ሰበርን በተመለከተ የሚደነግጉ አናቅጽ ባይኖሩም፣ ለሰበር ሰሚው ችሎት የሚቀርበው አቤቱታ በቅርፅና በይዘት ከይግባኝ ማመልከቻ የተለየ አይደለም። በመሆኑም በፍትሐብሔር ሥነሥርዓት ሕጋችን ውስጥ ይግባኝን በሚመለከት የተደነገጉት አንቀጾች የሰበር አቤቱታ ለማዘጋጀትም ያገልግላሉ። ሰበር ሰሚው ችሎት ክርክሩን የሚመራውም ሆነ ውሳኔ የሚያስተላልፈው የፍትሐብሔር ሥነሥርዓት ሕጉን ተከትሎ እንደሆነ የሚታወቅ ጉዳይ ነው።

[227] የፌደራል ፍርድ ቤቶች አዋጅ፣ ከላይ በማስታወሻ ቁጥር 215 የተጠቀሰ፣ አንቀጽ 22(1)።

[228] ዝኒ ከማሁ፣ አንቀጽ

[229] ዝኒ ከማሁ፣አንቀጽ 21(2(ሐ)።

[230] የፌዴራል ፍርድ ቤቶች አዋጅን እንደገና ለማሻሻል የወጣ አዋጅ፣ አዋጅ ቁጥር 454/1997፣11ኛ ዓመት፣ ቁጥር 42፣ አንቀጽ 2(1)።

[231] የፌዴራል ጠቅላይ ፍ/ቤት አስገዳጅ የሕግ ትርጉም የተሰጠባቸውን ውሳኔዎች በየደረጃው ላሉ ፍ/ቤቶችና ሌሎች የሚመለከታቸው አካላት አሳትሞ ያሰራጫል በማለት የአዋጅ ቁጥር 454/1997 አንቀጽ 2(1) ይደነግጋል።

በመጨረሻም መነሳት ያለበት ነጥብ የፌዴራል ጠቅላይ ፍርድ ቤት የቀረበለትን የሰበር አቤቱታ ከመረመረ በኋላ መሠረታዊ የሕግ ስህተት አለበት ብሎ ውሳኔ ቢሰጥ ለጉዳዩ እራሱ የመጨረሻ እልባት ይሰጥበታል? ወይስ ወደታች ፍ/ቤቶች መልሶ ይልከዋል? ወይስ በቀጥታ ወደሚመለከተው ግብር ይግባኝ ጉባኤ ይመልሰዋል? የሚለው ጥያቄ ነው። የዚህ ጽሁፍ አዘጋጅ እስከሚያውቀው ድረስ የታክስ ሕጐቻችንን አልያም ሌሎች ሕጐቻንን በመመርመር ለዚህ ጥያቄ መልስ ማግኘት አንችልም። ሆኖም ግን የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት በአንድ የታክስ ክርክር ጉዳይ ላይ የሰጠው ውሳኔ ይህንን ነጥብ በሚመለከት የሰበር ሰሚው ችሎት አቋም ምን እንደሆነ ሊያስገነዝበን ይችላል። በዚህ ጉዳይ ላይ የሰበር ሰሚው ችሎት የፌዴራል ከፍተኛ ፍ/ቤትና የፌዴራል ጠቅላይ ፍ/ቤት የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ፈጽመዋል በማለት ውሳኔያቸውን ውድቅ ካደረገ በኋላ ጉዳዩን በቀጥታ ለፌዴራል ግብር ይግባኝ ጉባኤ መልሶታል።[232] ሰበር ሰሚው ችሎት የወሰደው አቋም ትክክለኛ አቋም ነው። ምክንያቱም የፌዴራል ከፍተኛ ፍ/ቤትና የፌ/ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎቶች መሠረታዊ የሕግ ስህተት ፈጽመዋል ተብሎ ውሳኔያቸው ውድቅ ከተደረገ በኋላ ጉዳዩ ወደእነሱ ተመልሶ የሚሄድበት ምንም ምክንያት ሊኖር አይገባውምና ነው። ይሁን እንጂ የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት የወሰደውን አቋም በማያሻማ መልኩ የሚደነግግ ሕግ ባለመኖሩ ወደፊት የታክስ ሕጐቻችንም ሆነ አግባብነት ያላቸውን ሌሎች የሥነ-ሥርዓት ሕጐች በምናሻሽልበት ጊዜ ለዚህ ጉዳይ ትኩረት ልንሰጠው እንደሚገባ የጸሀፊው እምነት ነው።

3.5. በአፈጻፀም ጊዜ የሚነሱ ክርክሮች እንዴት ይስተናገዳሉ?

በሀገራችን የተደረገው የታክስ ማሻሻያ ፕሮግራም ካመጣቸው መሠረታዊ ለውጦች መካከል አንዱና ዋነኛው የታክስ ውሳኔ አፈጻፀም ጉዳይን የሚመለከተው ነው። ስለሆነም አዳዲሶቹ የታክስ ሕጎች ከወጡ ወዲህ የታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔዎችን ለማስፈጸም ፍርድ ቤት መሄድ አያስፈልገውም።[233] ምክንያቱም እነዚህ ሕጎች በማያሻማ ሁኔታ እንደደነገጉት የታክስ አስገቢው ባለስልጣን የማንኛውንም የታክስ ውሳኔ የተላለፈበትንና ታክሱን ያልከፈለ ታክስ ከፋይ ንብረት በማገድና በመሸጥ ከሽያጩ የሚገኘውን ገንዘብ ከታክስ ከፋዩ ላይ የሚፈለገውን ታክስ ለመሸፈን ያውለዋል።[234]

ይሁን እንጂ በአሁኑ ጊዜ በሥራ ላይ ያሉትን የሀገራችን የታክስ ሕጎች ስንመረምራቸው የታክስ ውሳኔ በሚፈጸምበት ጊዜ በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዩ መካከል የሚነሱ አለመግባባቶች እንዴት ሊፈቱ እንደሚችሉ የሚደነግጉት ነገር የለም። ነገር ግን የታክስ አስገቢው ባለሥልጣን በአፈጻጸም ጊዜ በታክስ ከፋዩ ላይ በደል ቢያደርስበት በደል የደረሰበት ታክስ ከፋይ የደረሰበትን በደል አስመልክቶ ቅሬታ የማቅረብና መፍትኄ የማግኘት የማይገሰስ መብት አለው። ይህንንም ለማለት የሚቻለው በሕገ-መንግሥቱ የተደነገገውን አቤቱታ የማቅረብና የመሰማት መሠረታዊ መብት ግምት ውስጥ በማስገባት ነው።[235] በመሆኑም በታክስ ውሳኔ አፈጻጸም ወቅት ቅሬታ ያደረበት ታክስ ከፋይ ቅሬታውን ለአጣሪ ኮሚቴው ወይም ለግብር ይግባኝ ጉባኤው ከማቅረብ የሚከለክለው ነገር ሊኖር አይገባም ብሎ መከራከር ይቻላል። በአንዳንዶች፣ በአፈፃጸም ጊዜ የሚነሱ አለመግባባቶች የግድ በግብር ይግባኝ ጉባኤ በኩል ማለፍ አለባቸው የሚል የሕግ ድንጋጌ

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[232] ከላይ በማስታወሻ ቁጥር 213 የተጠቀሰውን የሰበር ሰሚ ችሎት ውሳኔ ይመልከቱ።

[233] የገቢ ግብር አዋጅ፣ ከላይ በማስታወሻ ቁጥር 28 የተጠቀሰ፣ ከአንቀጽ 77-83 ያሉትን ድንጋጌዎች ይመልከቱ።

[234] ዝኒ ከማሁ።

[235] የኢፌዲሪ ሕገ-መንግሥት፣ ከላይ በማታወሻ ቁጥር 26 የተጠቀሰ፣ አንቀጽ 37።

በታክስ ሕጎቻችን ውስጥ ስለሌለ በአፈጻጸም ጊዜ ቅሬታ ያደረበት ታክስ ከፋይ ቅሬታውን ሥልጣን ላለው መደበኛ ፍ/ቤት ከማቅረብ የሚያግደው ነገር ሊኖር አይችልም ብሎ መከራከር ተቀባይነት ሊኖረው ይችላል።

ከዚሁ ጋር ተያይዞ የሚነሳም ሌላ ጥያቄ አለ። የታክስ አስገቢው ባለሥልጣን በወሰደው የአፈጻጸም እርምጃ ቅር የተሰኘ ታክስ ከፋይ ቅሬታውን ለግብር ይግባኝ ጉባኤው አቅርቦ የግብር ይግባኝ ጉባኤውም ቅሬታውን ቢቀበለውና፣ ከዚያም በመቀጠል ቅሬታ ያደረበት ታክስ ከፋይ የግብር ይግባኝ ጉባኤው በጉዳዩ ላይ ውሳኔ እስኪሰጥ ድረስ የአፈጻጸም ሂደቱ ታግዶ እንዲቆይ የሚል አቤቱታ ቢያቀርብ የግብር ይግባኝ ጉባኤው የጥያቄውን አግባብነት ገምግሞ በአፈጻጸሙ ላይ የእግድ ትዕዛዝ ለመስጠት ይችላል ወይ ብሎ መጠየቅ ተገቢ ነው። በመሠረቱ በአፈጻጸም ሂደት የሚነሱ ክርክሮችን (አለመግባባቶችን) ተቀብሎ ለማስተናገድ የሚያስችለው ግልጽ ሥልጣን ያልተሰጠው የግብር ይግባኝ ጉባኤ አፈጻጸሙ እንዳይቀጥል የእግድ ትእዛዝ ለመስጠት የሚያስችለው ሥልጣን በሕግ እንዳልተሰጠው ሊሰመርበት ይገባል። በመሆኑም አሁን ባለው ሁኔታ በኢትዮጵያ ውስጥ ያሉት የግብር ይግባኝ ጉባኤዎች በአፈጻጸም ላይ የሚነሱ ክርክሮች እልባት እስኪያገኙ ድረስ አፈጻጸሙ እንዳይቀጥል የእግድ ትዕዛዝ ሊያስተላልፉ ይችላሉ ብሎ መጠበቅ የሚቻል አይመስልም።[236]

በመሆኑም በታክስ ውሳኔ አፈጻጸም ሂደት ቅሬታ የሚኖረው ታክስ ከፋይ ሁለንተናዊ መፍትሔ ማግኘት የሚችለው ጉዳዩን ወደ መደበኛ ፍ/ቤት ቢወስደው ነው። ይሁን እንጂ ታክስ ከፋዩ ጉዳዩን ወደ መደበኛ ፍ/ቤትም ሲወስደው ከፍ/ቤቱ በኩል ፈተና እንደሚገጥመው መገመት ይቻላል። ምክንያቱም የታክስ ውሳኔ የማስፈጸም ተግባር ከመደበኛ ፍርድ ቤቶች የወጣ በመሆኑ እንዲህ ያለው ጉዳይ ለመደበኛው ፍ/ቤት ሊቀርብ የሚችል አይደለም የሚል አቋም ከፍ/ቤቶቹ በኩል ሊነሳ ስለሚችል ነው። ከዚህ ሁሉ መገንዘብ የሚቻለው በታክስ ውሳኔ አፈጻጸም ጊዜ በደል የሚደርስበት ታክስ ከፋይ በደሉን የሚያቀርብበትና መፍትሔ የሚያገኝበት ግልጽ ሥርዓት ያልተበጀለት መሆኑን ነው። ለዚህ ዋና ችግር ዘላቂ መፍትሔ የሚሆነው የታክስ ሕጎቻችንን በማሻሻል እንዲህ ዓይነቱ ችግር የሚፈታበትን ዘዴ በማያሻማ አኳኋን መደንገግ ነው።

መደምደሚያ

በዚህ ጽሑፍ ውስጥ በዝርዝር እንደተገለጸው የታክስ ከፋዮች ቅሬታዎች የሚስተናገዱባቸው የሕግና ተቋማዊ ማዕቀፍ ሥራ ላይ መዋላቸው ባይካድም የታክስ ከፋዮች ቅሬታ የሚስናገዱበት ሥርዓት በርካታ ችግሮች ያሉበት ስለሆነ ለእነዚህ ችግሮች ተገቢውን መፍትሄ መስጠት በጣም አስፈላጊ ነው። ከእነዚህ ችግሮች ውስጥ ዋና ዋናዎቹ የሚከተሉት ናቸው።

በታክስ አስገቢው ባለሥልጣንና በታክስ ከፋዮች መካከል ሊነሱ የሚችሉት አለመግባባቶች በጣም ዘርፈ-ብዙ ቢሆኑም፣ ለአጣሪ ኮሚቴው የተሰጠው ሥልጣን በታክስ ውሳኔ ላይ (tax assessment) የሚቀርቡ አቤቱታዎችን መመርመርና የውሳኔ ሓሳብ መስጠት ብቻ ነው። የአጣሪ ኮሚቴው ሥልጣን በጣም ጠባብ በመሆኑ ለኮሚቴው የሚሰጠው ሥልጣን በታክስ አስገቢው ባለሥልጣንና በግብር ከፋዩ መካከል ሊነሱ የሚችሉትን ክርክሮች ሁሉ ለማስተናገድ የሚያስችለው መሆን ይገባዋል። እንደዚሁም ደግሞ በታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔ ላይ ቅሬታ ያለው ወገን አቤቱታውን ለአጣሪ ኮሚቴው ማቅረብ

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[236] ይህንን አሳሳቢ ጉዳይ በሚመለከት አቶ ምስጋናው ጋሻው የሰጠውን ትንታኔ ይመልከቱ፤ በማስታወሻ ቁጥር 6 የተጠቀሰ፣ ከገጽ 49-51።

የሚኖርበት የታክስ ውሳኔው በደረሰው በአሥር ቀናት ውስጥ ነው መባሉ አግባብነት ሊኖረው አይችልም። ምክንያቱም ይህ ጊዜ ከመጠን በላይ አጭር ነው። ስለሆነም በዚህ ጉዳይ ላይ ተገቢ ጥናት ተደርጎበት ይህ የአሥር ቀን የጊዜ ገደብ ወደ ሃያ ወይም ደግሞ ወደ ሠላሳ ቀናት ከፍ ቢደረግ የታክስ ክፋዮችን የመሰማት መብት ለማረጋገጥ በእጅጉ ይረዳል።

የይግባኝ አቤቱታ ለግብር ይግባኝ ጉባኤው ለማቅረብ በቅድሚያ የሚከፈለው አከራካሪው የታክስ መጠን 50% ክፍያ በጥሬው ገንዘብ ብቻ እንዲከፈል መደረጉ የታክስ ክፋዮችን ይግባኝ የማለት መብት የሚያጣብብ ስለሚሆን የታክስ ክፋዮች ይህንን ግዴታ በአግባቡ ለመወጣት የሚያስችሏቸው ሌሎች አማራጮችም (ለምሳሌ እንደ ፋይናሻል ጋራንቲ ቦንድ) ቢታዩ የታክስ ሥርዓቱን ፍትሐዊነትና የግብር ይግባኝ ጉባኤውን ብሎም የፍርድ ቤቶችን ተደራሽነት ለማረጋገጥ በጎ አስተዋጽኦ ይኖራቸዋል።

የግብር ይግባኝ ጉባኤው አባላት በምን መስፈርት እንደሚመረጡ እና ከየትኛው መሥሪያ ቤት ወይም ድርጅት እንደሚመረጡ የሚደነግግ መመሪያ ማውጣት እንደሚገባ በሕግ የተደነገገ ቢሆንም፣ ይህ ኃላፊነት የተጣለበት የፍትሕ ሚኒስቴር ይህንን መመሪያ እስካሁን ድረስ አለማውጣቱ ይታወቃል። ስለሆነም ይህ መ/ቤት በውክልና የተሰጠውን ሕግ የማውጣት ግደታውን በማክበር ይህንን መመሪያ ማውጣትና ተግባራዊ ማድረግ ይኖርበታል። ምክንያቱም የመመሪያው መውጣት የግብር ይግባኝ ጉባኤው አባላት የሚመረጡበትን መስፈርቶችና ስብጥር ለመወሰን ስለሚረዳ የግብር ይግባኝ ጉባኤውንም አሠራር እንደሚያሻሽለው ይገመታል።

አሁን ባለው የግብር ይግባኝ ጉባኤው አሠራር የጉባኤው አባላት የሚመለመሉት ከገቢዎችና ጉምሩክ ባለሥልጣን፣ ከንግድ ሚኒስቴር፣ ከገንዘብና ኢኮኖሚ ልማት ሚኒስቴር እና ከፍትሕ ሚኒስቴር ሠራተኞች መካከል ነው። ከዚህም በመነሳት የተወሰኑት የጉባኤው አባላት ከገቢዎችና ጉምሩክ ባለሥልጣን እና ከገንዘብና ኢኮኖሚ ልማት ሚኒስቴር ሠራተኞች መካከል መመረጣቸው የጉባኤውን ነፃነትና ገለልተኝነት አጠያያቂ ያደርገዋል። ምክንያቱም በታክስ ክፋዮች ላይ ቅሬታ የሚያሳድሩት አንድም በገቢዎችና ጉምሩክ ባለሥልጣን የሚወሰኑ የታክስ ውሳኔዎች አልያም ደግሞ የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር የሚያወጣቸው መመሪያዎች ወይም የሚያስተላልፋቸው ውሳኔዎች በመሆናቸው እነዚህ የመንግሥት ተቋማት የታክስ ክፋዮችን ቅሬታዎች ለመስማት ተወካዮቻቸውን እንዲልኩ ከተፈቀደላቸው በእራሳቸው ጉዳይ እራሳቸው ዳኛ መሆናቸውን የሚያረጋግጥ ነው። እንዲህ ያለው አሠራር ደግሞ የታክስ ክፋዮችን ፍትሕ የማግኘት መሠረታዊ መብት በእጅጉ የሚፃረር ስለሆነ ተቀባይነት ሊያገኝ አይገባውም። ስለሆነም የጉባኤውን ነፃነትና ገለልተኝነት ለማረጋገጥ ከገቢዎችና ጉምሩክ ባለሥልጣን እና ከገንዘብና ኢኮኖሚ ልማት ሚኒስቴር የሚወከሉ ግለሰቦች የጉባኤው አባላት መሆን አይገባቸውም። ይልቁንም በእነዚህ ግለሰቦች ምትክ በታክስ ዕውቀታቸውና ልምዳቸው የታወቁ ግለሰቦች ከንግዱ ማኅበረሰብና ከሕግ ባለሙያዎች በግብር ይግባኝ ጉባኤው ውስጥ በአባልነት ቢካተቱ የጉባኤውን ነፃነትና ገለልተኝነት ለማረጋገጥና የታክስ ክፋዮችንም ፍትሕ የማግኘት መብት በተግባር ለመተርጎም አመቺ ሁኔታ ሊፈጠር ይችላል።

ማንኛውም ግብር ከፋይ በግብር አስገቢው ባለሥልጣን የግብር ውሳኔ ላይ ቅር በመሰኘት ይግባኙን ለግብር ይግባኝ ጉባኤ ሲያቀርብ የይግባኝ ማመልከቻው በሕጉ የተመለከቱትን ቅድመ ሁኔታዎች ማሟላት እንደሚኖርበት እሙን ነው። ሆኖም አንዳንድ ጊዜ ሕጉ የሚጠይቃቸውን መለኪያዎች የይግባኝ ማመልከቻው ሳያሟላ ሲቀር ይግባኝ ባዩ ማመልከቻውን አሻሽሎ ወይም መያያዝ ያለባቸውን ሰነዶች አያይዞ እንዲቀርብ የሚፈቀድለት መሆኑ በሕጉ መደንገጉ መልካም ሆኖ ሳለ፣ ማመልከቻውን አሻሽሎ ወይም መያያዝ የሚገባቸውን ሰነዶች አያይዞ ማቅረብ የሚችለው በአምስት ቀናት ብቻ ነው ተብሎ በአዋጅ መደንገጉ አግባብነት ሊኖረው አይችልም። ምክንያቱም ይህ የአምስት ቀን ገደብ

አጅግ አጭር ከመሆኑም በተጨማሪ እንዲህ ያለው ጉዳይ ዝርዝር ጉዳዮች ውስጥ የሚመደብ ስለሆነ በውክልና ሕግ የማውጣት ሥልጣን በተሰጠው አካል የሚወሰን ጉዳይ እንጂ በሕግ አውጭው የሚወሰን ሊሆን አይገባውም፡፡ ስለዚህ ወደፊት የታክስ ሕጎቻችን በሚሻሻሉበት ጊዜ ለእነዚህ ነጥቦች ተገቢውን ትኩረት መስጠት ያስፈልጋል፡፡

አሁን በኢትዮጵያ ውስጥ ያሉት የታክስ ሕጎቻችን በማናቸውም ጉዳይ ላይ የማስረዳት ኃላፊነት ያለበት ግብር ከፋዩ እንደሆነ ደንግገዋል፡፡ ይሁን እንጂ እንዲህ ያለው አካሄድ በታክስ ከፋዮች ላይ የማይገባ ጫና የሚፈጥርና የታክስ ከፋዮችንም አቤቱታ የማቅረብና የመስማት መብት በእጅጉ የሚጎዳ ነው፡፡ በመሆኑም የታክስ ሕጎቻችንን በማሻሻል የማስረዳት ሸክም እጅግ በተጠና መልኩ በታክስ ከፋዮችና በግብር አስገቢው ባለሥልጣን መካከል የሚከፋፈልበትን ዘዴ መቀየስና ሥራ ላይ ማዋል ያስፈልጋል፡፡

በግብር ይግባኝ ጉባኤ ውሳኔ ቅር የተሰኘ ግብር ከፋይ ጉዳዩን ወደመደበኛው ፍ/ቤት መውሰድ የሚችለው በሕግ ጉዳዮች ብቻ ነው፡፡ ይሁን እንጂ በኢትዮጵያ ውስጥ አንድ ጉዳይ የሕግ ጉዳይ ይሁን ወይም የፍሬነገር ጉዳይ ለመለየት የሚያስችል ምንም ዓይነት መመሪያ ባለመውጣቱ ታክስ ከፋዮች ጉዳያቸውን ለመደበኛ ፍርድ ቤት አቅርበው መፍትሔ ለማግኘት ችግር እየገጠማቸው ነው፡፡ ምክንያቱም አንድ ጉዳይ የሕግ ጉዳይ ነው ወይስ የፍሬነገር ጉዳይ ነው የሚለው ነጥብ በፍርድ ቤቱ ነፃ ፈቃድ (discretionary power) የሚወሰን ስለሆነ ነው:: በመሆኑም በታክስ ከፋዮች ላይ በዚህ ረገድ የሚደርሰውን ችግር ለመቀነስ አንድ ጉዳይ የፍሬነገር ጉዳይ ወይም የሕግ ጉዳይ መሆኑን ለመወሰን የሚያስችሉ መመሪያዎችን በሕግ መደንገግ ወይም ደግሞ ይህንን ማድረግ የማይቻል ከሆነ መደበኛው ፍርድ ቤት በማናቸውም ጉዳዮች ላይ የሚነሱ የግብር ይግባኝ ክርክሮችን የማየት ሥልጣን እንዲኖረው ማድረግ ያስፈልጋል፡፡ ሁለተኛውን አማራጭ መከተል የሚያስፈልግ ከሆነ በፍርድ ቤቶቻችን ውስጥ የታክስ ችሎቶች ማቋቋምና በታክስ ላይ በቂ ዕውቀትና ልምድ ያላቸው ዳኞች መመደብ ተገቢ ይሆናል፡፡

በመጨረሻም በታክስ ውሳኔ አፈጻጸም ጊዜ በታክስ ከፋዮች ላይ የሚደርሱ በደሎች እንደምን ሊስተናገዱ እንደሚችሉ የሀገራችን የታክስ ሕጎች የሚደነግጉት ነገር የለም፡፡ ስለሆነም የታክስ ሕጎቻችንን በማሻሻል የታክስ አስገቢው ባለሥልጣን የታክስ ውሳኔዎችን በሚፈፅምበት ወቅት በደል የደረሰበት ታክስ ከፋይ ቅሬታ የሚያሰማበትንና መፍትሔ የሚያገኝበትን ግልጽ ሥርዓት መዘርጋት ያስፈልጋል፡፡ ■

COMMENT

DOI http://dx.doi.org/10.4314/mlr.v8i1.7

Setting the Law Straight:

Tanganyika Law Society & anor *v.* Tanzania and Exhaustion of Domestic Remedies before the African Court

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Abstract

The rule of exhaustion of domestic remedies is an integral part of the right of individuals to bring international claim against a State. This rule is expressly required in the African Charter on Human and Peoples' Rights and the Protocol of the African Court on Human and Peoples' Rights. Nevertheless, as the various types of domestic remedies and the various circumstances in which they are pleaded by respondent States are still unfolding, the jurisprudence of the African Court is understandably at an infantile stage and continues to undergo development and refinement. This short comment examines the view of the African Court, following that of the African Commission on Human and Peoples' Rights, that non-judicial remedies are not valid remedies that need to be exhausted before claims are brought before the African Court by individuals. It is argued that this is an unduly wide and indiscriminate proposition that would have the effect of unjustifiably excluding administrative remedies that may have effectively remedied a breach if approached by individuals before coming to the African Court. It was consequently argued that there is need for reconsideration now before the view becomes too entrenched.

1. Introduction: Overview of the Rule of Exhaustion of Domestic Remedies

Every system of international adjudication in which an individual has capacity to bring claims against States necessarily interferes with the sovereignty of

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States in two significant ways. First, it denigrates the rule of international law by which only States have international law rights of action, *inter se*, in that an obligation of a State to answer to an international claim brought by an individual, whether its national or an alien, diminishes the sovereign character of a State, an aspect of which is the rule that a State is not compellable to submit to arbitral or judicial settlement. Second, it interferes with the reserved domain of municipal law by touching on that sensitive part of the bond of nationality between a State and its citizens or at the very least, the link of territorial jurisdiction between a State and an alien resident within its jurisdiction.

One of the essential elements of the bond of nationality is that, except the State otherwise limits its absolute power and jurisdiction over its nationals, no other State or international organisation can claim protection over such a national for events that occurred within the territory of the State.[1] Indeed it is now a rule of practical relevance, following the notable case of *Jurisdiction of the Courts of Danzig,*[2] that a State could confer international law benefits on individuals by international agreement. These include both the conferment of rights and the capacity on the individual to enforce the rights, not just before the courts of an individual's State of nationality, but also before an international court or tribunal having jurisdiction. The existence of such a treaty invariably encroaches on the reserved domain of States and necessarily limits the otherwise absolute powers of States respecting events occurring within their territories.

In spite of the degree of limitation, however, a State still retains an aspect of its sovereignty which it could assert in appropriate circumstances. As rightly pointed out by Anzilotti in his Separate opinion in *Customs Regime between Germany and Austria:*[3]

> The legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing States of de facto dependence which characterize the relation of one country to other countries. It also follows that the restrictions upon a

[1] In deference to this, in the *Reparation for Injuries Suffered in the Services of the United Nations,* ICJ Rep. 1949, 174, 185, while affirming the right of the United Nations to bring international claims to protect its nationals, the International Court of Justice (ICJ) carefully avoided denigrating the overall rights of the State of nationality of an official being protected by the United Nations.

[2] *Advisory Opinion*, Series B, No. 15 (1928) 17 – 18. This rule was seamlessly followed by the African Court in the recent case of *Frank Omary & Ors. v. Tanzania,* Application no 001/2012, wherein former employees of the dissolved East African Community (before it was later re-established in 1999) where allowed to litigate an agreement between Tanzania, Uganda and Kenya before the municipal courts of Tanzania.

[3] (1931) PCIJ series A/B No. 41, p. 58

> State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.

In the event of international litigation against a State by individuals, therefore, there is always the domestic jurisdiction of a respondent State to be asserted in defence to the claim. As a consequence, whenever an additional international level of enforcement jurisdiction is created in favour of individuals, primus status is accorded to municipal institutions (as the institutions that have the most proximate link with the aggrieved individual and the cause of action) over any international enforcement mechanism there may be. This primus place is clothed in the doctrine of exhaustion of domestic remedies.

This rule of customary international law of antiquity origin was first developed in relation to the right of diplomatic protection. It requires that an individual whose rights have been violated by a State should first seek remedies under the laws of that State as a condition precedent to the individual's State of nationality bringing an international claim on the individual's behalf. It is thus well established in the case law of international courts and tribunals that the purpose of the rule is to allow the State to resolve the problem by its internal law before being confronted with an international proceeding, and that this is particularly true respecting the jurisdiction of international human rights courts, because the latter reinforces or complements domestic jurisdiction.[4] The reason for the rule within the context of diplomatic protection, according to Judge Winiarski of the ICJ, is to enable a State in which the rights of a foreign national are alleged to have been injured in breach of international law to provide a remedy by its own means within the framework of its own laws.[5]

The requirement for aliens, who have no bond of nationality with a defaulting State to exhaust the domestic remedies available in the State before the alien's State of nationality could exercise diplomatic protection on the

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[4] *Velasquez v. Honduras,* Judgment of July 29 1988, Series C No 4, para 61; *Emanuel Mjawasi& 748 Ors v. The Attorney General of the Republic of Kenya*, Application 009/2011, para 34 (holding that "[t]he rule is to the effect that a state should be given an opportunity to address an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question'); also see *William Campbell & Ors v. The Republic of Zimbabwe* Case No SACDT: 03/2009 of June 5, 2009, para 26; Candedo Trinidade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights,* Cambridge University Press, 1983, p. 1

[5] Dissenting Opinion of Judge Winiarski in *Interhandel case* (*Switzerland* v. *United States of America*) ICJ Rep 1959, 6, 83

alien's behalf, emphasizes the general inexcusable character of the rule of exhaustion of domestic remedies in respect of international claims by individuals against their State of nationality. The rule is however subject to several exceptions.

The emergence of, and indeed the proliferation of international courts in which individuals could sue their States of nationality and even third States has given more usage to the rule of exhaustion of domestic remedies as much as it has given rise to the temptation to diminish its application. This is even as it has become the consistent view of some international tribunals that they are not bound by the rule of exhaustion of domestic remedies even respecting a claim brought under the African Charter on Human and People's Rights (hereafter African Charter).[6] Such a view is not only an arrogation of a power essentially reserved in the territorial State, absent the recognised exceptions under international law, it also alienates the international human rights court and its eventual judgment from the institutions of the territorial State.[7] This is of particular importance as the implementation of the judgments of international human rights courts usually rests upon the legal structures of the respondent State.

The rule of exhaustion of domestic remedies is contained in article 56(5) of the African Charter and article 6(2) of the Protocol of African Court on Human and Peoples' Right (Hereafter, the African Court). It is thus one of the conditions to be fulfilled before an individual can bring an international right action under the Charter, and more so, before the African Court. Though the African Court faithfully adheres to the requirement and had declared several cases inadmissible on account of failure to exhaust domestic remedies, but as the recent case of *Tanganyika Law Society & anor v. Tanzania*[8] manifestly shows, the African Court, as does the African Commission, has been failing to give full effect to the rule in one important respect. This assertion is based on the recurrent view of the African Court that the domestic remedies needed to be exhausted are judicial remedies to the exclusion of remedies of political or administrative nature.

This comment challenges that position and argues that the view of the Court is not in keeping with the position of international law as established by

[6] See Amos O Enabulele (2012), 'Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice', 56(2*) Journal of African Law*, 268

[7] Amos O Enabulele (2010), "Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States" 12 *International Community Law Journal*, 11

[8] Application 009/2011. This case was consolidated with *Mtikila v. Tanzania application,* No 011/2011

international courts and tribunals. In holding this view, however, the writers consider that it will be easier for an international court to find that there are indeed no remedies to be exhausted by an individual, when the remedies, being administrative or political, are predominantly discretionary. Nevertheless, the writers hold the firm view that it does not follow from that position that administrative or political remedies do not count as exhaustible domestic remedies in all circumstances.

2. Tanganyika Law Society & Anor v. Tanzania

In the case, the Tanganyika Law Society and Rev. Mtikila brought separate applications before the African Court on the claim that Tanzania had, through certain amendments to its Constitution, violated its citizens' right of association, the right to participate in public/governmental affairs, among others. The applications were later consolidated. The main grouse of the second applicant was the Eight Constitutional Act, by which the Constitution of Tanzania was amended to make it mandatory for an electoral candidate to be a member of, and be sponsored by a political party and thus prohibiting independent candidacy.

Following this amendment, the 2nd applicant filed a case in the High Court of Tanzania, challenging the amendment on the ground that it conflicted with the Constitution of Tanzania. The Court held in his favour and declared the amendment which sought to bar independent candidacy null and void. Meanwhile, the government continued to pursue its desire to exclude independent candidacy by seeking to nullify the right of independent candidates to contest elections by a new proposal for constitutional amendment – the eleventh amendment. By this amendment, which was eventually passed by the legislature and assented to by the President, the High Court judgment was made nugatory.

In consequence, the 2nd Applicant commenced another suit at the High Court on the ground that the amendment yet violated the Constitution. The High Court found in his favour, holding that the impugned amendment violated the democratic principles and the doctrine of basic structures enshrined in the Constitution. On appeal to the Court of Appeal by the respondent, the High Court judgment was reversed in favour of the amendment banning independent candidature.

In its judgment, the Court of Appeal held that the matter was a political matter that should be resolved by Parliament. As a result, Parliament began a consultative process aimed at obtaining the views of the citizens of Tanzania on the possible amendment to the Constitution. This process was still ongoing by the time the case before the African Court was decided. The prevailing constitutional order in Tanzania by the time this case was decided by the African Court barred independent candidature.

At the African Court, the applicants prayed the Court to declare that Tanzania was in violation of articles 2 and 13(1) of the African Charter and articles 3 and 25 of the Interantional Covenant on Civil and Political Rights. They urged the Court to direct the Respondent to put the necessary constitutional, legislative and other measures in place to give effects to the rights contained in the aforementioned provisions and to report to the Court within a 12 month period. The 2nd Appellant prayed the Court to specifcally find that his right had continuously been violated.

In response to the claim, the Respondent raised a preliminary objection challenging the admissibility of the claim on the ground that domestic remedies had not been exhausted. The respondent based its argument on the judgment of theTanzanian Court of Appeal, which directed that the matter be settled by Parliament, and argued that the processes initiated by Parliament towards this end were still ongoing.

On their part, the Respondents contended that constitutional amendment did not constitute a viable remedy within the contemplation of the rule of exhaustion and that what constitutes viable remedies to be exhausted are judicial remedies. In its ruling, the Court began by noting that the remedies envisaged by the combined reading of articles 6(2) of its Protocol and 55 of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency.[9] The Court further held that human rights jurisprudence equates the term "local [domestic] remedies" with judicial remedies.[10]

Accordingly, the Court held that the 2nd appellant exhasuted domestic remedies since the matter had been decided by the Court of Appeal, which is the final Court in Tanzania.[11]In the reasoning of the Court:

> The parliamentary process, which the respondent states should also be exhausted is a political process and is not an available, effective and sufficient remedy because it is not freely accessibile to each and every individual; it is discretionary and may be abandoned anytime. No matter how democratic the parliamentary process will be, it cannot be equated to an independent judicial process for the vindication of the rights under the charter. In conclusion, we find that the applicants have exhausted local remedies….[12]

Though the decision of the Court that there were no viable remedies left unexhausted is unassailable in the circumstances of the case, the reasoning upon

[9] *Id*, para 82.1
[10] *Id,* para 82.3
[11] *Id,* para 82.2
[12] *Id*, para 82.3

which that decision was based is untenable and remains to be demonstrated in international jurisprudence on the point in the light of the discussion below.

3. Domestic Remedies is not Limited to Judicial Remedies

It is indeed difficult to agree with the Court that viable domestic remedies are limited to judicial remedies. It is even more difficult to agree with the Court that this view, as the Court consistently claimed, represents the established international jurisprudence on the point. In any event, the reasoning of the Court went beyond the bounds of what was necessary to deal with the claim of in-exhaustion raised in the case, in that, it was completely possible for the Court to have reached the same conclusion given that the unexhausted domestic remedies in Tanzania were actually not viable. To all intent and purposes, the so called parliamentary consultation was never intended to yield any result in time for it to be useful to the 2nd respondent. After all, it was the same Parliament that reversed the decision of the High Court via constitutional amendment. It was thus credible for the African Court to have simply relied on the obvious fact that the parliament was already an interested party that could not have acted in good faith in the entire process without seeking to discredit all administrative or political remedies that a State party may genuinely put in place to deal with specific breaches.

In any event, the parliamentary procedure was not a preexisting remedy; it was rather a product of the order of the Court of Appeal. In a technical sense, the case before the African Court was in effect an appeal against the decision of the Tanzania Court of Appeal. This is even more convincing when seen in the light of the eventual decision of the African Court, which in overruling Court of Appeal, restored the view earlier taken by the High Courts.

It is pertinent to note at this point that the view of the African Court is not an isolated interpretation of the exhaustion provision of the Charter as it has been the recurrent view of the African Commission on Human and Peoples' Rights that only judicial remedies are viable for the purpose of the exhaustion rule. In *Constitutional Rights Project v. Nigeria*,[13] it was shown that a conviction rendered by a Special Armed Robbery Tribunal which the complaint before the Commission was against was subject to the power of the Governor of a State to confirm or reject. Moreover, the judgment of the Tribunal was not subject to judicial review. Based on this, Nigeria had argued that the complainant should not be held to have exhausted domestic remedies until the Governor exercised this power either way. The Commission held that the remedy, being discretionary and not of a judicial character, was not viable and effective. In

[13] Communication 60/91

Adocat Sans Frontieres (on behalf of Bwampanye) v. Burundi,[14] the Commission held that the failure to seek to be pardoned by the relevant authority did not violate the rule of exhaustion, as pardon, not being judicial remedy, was ineffective. The same view was held in *Amnesty International v. Sudan*, wherein the Commission demanded the exhaustion "…of all internal remedies, if any, if they are of judicial nature, are effective and are not subordinated to the discretionary power of public authorities".[15]

While it may be true that judicial remedies are the most viable remedies, it does not mean that non-judicial remedies should be completely foreclosed, nor does it mean that judicial remedies are effective in all circumstances. The goal of the exhaustion rule should always be towards allowing a State to resolve a matter by means of its own choosing, provided the choice of remedy relates to the breaches alleged and are available, accessible, effective and sufficient, not only in theory but also in practice.[16] It is thus incumbent upon a court assessing in-exhaustion of domestic remedies to consider the end the domestic remedies pleaded before it are ultimately intended to serve, irrespective of whether the remedies are of a judicial, political or administrative character. It may well happen, particularly in a majority of African States, where the judicial process is slow, costly and cumbersome, that an administrative or political solution adopted for the purpose of resolving issues of the nature submitted to an international court may be more viable than judicial remedies.

This is even so as there is settled international jurisprudence on the point that domestic remedies are not effective simply because they are of a judicial nature. In *Akdivar v. Turkey*,[17] for instance, the remedies that were found not to be viable were of judicial nature before administrative courts. In *Media Rights Agenda v. Nigeria*,[18] by reason of the failure of the then Military Government in Nigeria to obey a decision of a High Court which nullified a Decree, the Commission held that judicial remedies were ineffective as the failure to obey the court order was seen as "a dramatic illustration of the futility of seeking a remedy from Nigerian courts". In effect, judicial remedies would be held not to be valid remedies where it is shown that the government is in the habit of disobeying court judgments.

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[14] Communication 231/99

[15] Communications 48/90, 52/91 & 89/93

[16] *De Jong, Baljet& van den Brink v. Netherlands* (1984) 8 EHRR 20, 38; *Vernillo v. France*, 20 February 1991, Series A no. 198, pp. 11-12, 27; *Akdivar and Others v. TurkeyApplication no. 21893/93,* para 66**;** *Dalia v. France***,** 19 February 1998, *Reports* 1998-I, 87-88, para 38)

[17] Ibid.

[18] Communication 102/93, para 50-51.

It thus defies judicial economy to dismiss a remedy, simply because it is not of a judicial nature, when in actual fact, the remedy is capable of resolving the complaint with minimal delay. It also unduly encroaches on the right of a State to determine the means by which conflicting claims and interests are resolved within its municipality. It is the writers' considered view that as "it is not entirely sufficient for a claimant to merely allege that the available remedies are futile without having made an attempt to exhaust them",[19] so is it not sufficient for an international court to dismiss a domestic remedy on the basis of a preconceived distinction between judicial and non-judicial remedies.

The futility of such approach was shown in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt,*[20] which came before the African Commission**.** Here, the Commission was willing to accept that police inquiry into sexual violence against the victims of the crime constituted domestic remedies to be exhausted, if the inquiry had not been stopped. The Commission noted that the decision not to prosecute, as well as the confirmation of that decision, following the Victims' appeal, is sufficient evidence that the conditions for the exhaustion of domestic remedies had been met, as the Victims were left with no other remedy because the inquiry procedures had been stopped.[21] Furthermore, the Commission declared:

> It is the African Commission's view that the Respondent State's submission on the temporary halt of inquiry procedures cannot justify the reason why Victims should be left without any recourse until a potential reopening of a matter, following new evidence. The African Commission notes that eighteen (18) months have passed since the alleged violations occurred and probabilities for the inquiry to be re-opened are slim since evidence has already been gathered and examined. The Respondent State, also did not supply the African Commission with any evidence that it has instituted actions to find the new evidence.[22]

What this confirms, is that investigation, a non-judicial remedy, being an obligation upon a State, constitutes legitimate expectation in the minds of individuals, and is therefore a domestic remedy to be exhausted. This view is reinforced by *Tanrikulu v. Turkey,* wherein the European Court of Human Rights (hereafter "ECtHR) held that the Turkish government was in breach of the right to life of the deceased for failure to effectively investigate the cause of

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[19] Henry Onoria (2003), "The African Commission on Human and Peoples' Rights and the Exhaustion of Domestic Remedies Under the African Charter*"* *African Human Rights Law Journal* 13 (2003)

[20] Communication 323/06

[21] *Id,* para 65

[22] *Id,* para 66

death.[23] The existence of a duty to investigate on the part of a State invariably eventuates into a corresponding duty on an applicant to submit to investigative procedures in fulfilment of exhaustion requirement prior to seising an international court, except where evidence shows that the procedure was not accessible by the plaintiff or that it was unduly prolonged. The fact that it is not a judicial remedy does not discharge the complainant from exhausting that remedy as a first step towards obtaining redress in line with the laws of the respondent State. Nor does it give an international court the faculty to question the mode of redress available in the respondent State without proof by evidence that the mode of redress is actually not suitable to redressing the legal wrong. A State party to an international human rights instrument assumes an obligation of result which may be in form of prevention or satisfaction. It is absolutely the province of the State to determine what measures best give effect to its obligations. This view is in tandem with article 1 of the African Charter, by which:

> The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

This provision has been variously espoused by the African commission without a single case in which it has been restricted to implementation only by way of judicial remedies. In *Association of Victims of Post Electoral Violence & Interights v. Cameroon,*[24] the African Commission declared that article 1 imposes an obligation of result and not just of diligence. This was to the effect that a State cannot be discharged of its obligation under the Charter by showing that it had exercised diligence in the protection of human rights if the diligence did not in fact prevent human rights abuses. Accordingly:

> … the obligations which ensue from Article 1 impose on the State of Cameroon the need to implement all the measures required to produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the State of Cameroon claims to have did not produce the expected result, namely that of guaranteeing the protection of human rights.[25]

The Commission also stated that article 1 imposes on the State parties to the Charter, the need to put in place, within their territories, all measures conducive to producing the result of preventing all violations of the African Charter,

[23] Application No. 23763/94 of July 8, 1999
[24] Communication 272/03
[25] *Ibid,* para 115

irrespective of whether the violations are committed by a machinery of the State itself or by non-State actors.[26] In *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* the Commission made it clear that the crust of the African Charter obligation is to ensure that any person whose right is violated would have an effective and enforceable remedy.[27] In the writers' view, enforceable remedies are not limited to judicial remedy. A political or administrative remedy properly determined is enforceable.

Also relevant here is the decision of the ICJ in *Avena and Other Mexican Nationals.*[28] In this case, Mexico brought an Application instituting proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations" of 24 April 1963, allegedly committed by the United States.

Mexico claimed that the United States, in arresting, detaining, trying, convicting, and sentencing 54 Mexican nationals to death, violated its international legal obligations to Mexico. This claim was made in its own right and in the exercise of its right of consular protection over its nationals, as provided for under articles 5 and 36, respectively of the Vienna Convention on Consular Relations (VCCR). As a consequence, Mexico claimed, *inter alia*, *restitutio in integrum* and restoration of *status quo ante*, by re-establishing the situation that existed before the detention, trial, convictions and sentencing of Mexico's nationals in violation of the United States' international legal obligations.

In its decision, the ICJ held that the United States was in breach of its international obligation towards Mexico under the VCCR. This was for its failure to notify the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals and thereby depriving Mexico of the right, in a timely fashion, to render the assistance provided for by the VCCR to the individuals concerned.[29] Accordingly, the court directed that:

> …should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under … the Convention having been respected, the

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[26] *Id*, para 119

[27] CommunicationNo.245 (2002**),** para 171; Communication 251/02, *Lawyers of Human Rights v. Swaziland*, para 61 holding that by ratifying the charter without taking appropriate steps to bring its laws in line with the charter, the state failed to comply with its obligation under article 1; Communication 241/2001, *Purohit Moore v. The Gambia*, paragraph 43, holding that 'when a State ratifies the African Charter it is obligated to uphold the fundamental rights contained therein. Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated'.

[28] (*Mexico v.United States of America*), ICJ Rep. 2004, 12, 36, para 40.

[29] *Id*, p. 71, para 153 (4) and (5).

> United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention.[30]

In line with the decision of the ICJ, the President of the United States, by a Memorandum, directed the courts of the States within the US, where the trials and convictions took place, to give effect to the ICJ judgment. In the consequential proceedings at the Supreme Court of the United States – *Jose Ernesto Medellin v. Texas*[31] – it was argued before the court that the President's determination was lawful and binding on the affected States' courts and that the ICJ decision was binding on organs of the US, including the courts of the land. In its decision, the Supreme Court was of the firm view that the expression of the obligation to comply in article 94(1) of the United Nations Charter (UNC) precluded the judicial branch from taking steps to comply and that the phrase, "undertake to comply" in article 94(1) of the UNC is simply a commitment by member States of the United Nations (UN) to take future actions through their political branches to comply with ICJ decisions. The Supreme Court therefore declared that the UNC did not vest decisions of the ICJ with immediate legal effect in domestic courts.

Sequel to the foregoing, Mexico returned to the ICJ in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*,[32] wherein Mexico sought an interpretation of the judgment with a view to showing that the failure of the US Supreme Court to enforce the judgment of the ICJ in the main *Avena case*[33] was a violation of the obligation on the US to comply with the judgment of the Court under article 94(1) of the UNC. Mexico argued that the United States had an obligation of result under paragraph 153(9) of the main judgment and that the United States must provide review and reconsideration of the conviction and sentences of the Mexican Nationals.[34]

In its decision, the Court refused to prescribe to the United States a means of fulfilling the obligation imposed on it by the judgment of the Court, despite the trenchant argument of Mexico towards that end. According to the Court:

> The obligation laid down … is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the judgment leaves it to the United States to choose the means of implementation, not excluding the

[30] *Id*, p. 72, para 153(9)
[31] Supreme Court Reporter, Vol. 128, 2008, 1346
[32] *(Mexico v. United States of America)*, ICJ Rep, 2009, p. 3
[33] *Supra*, note 28
[34] *Supra* note 32, p. 6, para 9

> introduction within a reasonable time of an appropriate legislation, if deemed necessary under domestic constitutional law….[35]

The important question to be asked is whether the remedy adopted by the respondent State effectively deals with a grievance of the nature brought by the applicant. As the Inter-American Court of Human Rights rightly held in *Velasquez v Honduras*, domestic remedies should simply be weighed on the basis of their suitability to redressing a legal wrong of the nature before an international court. According to the Court:

> Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.[36]

The Court further stressed the importance of determining whether a remedy is capable of producing the result for which it was designed.[37] The test of the capability of an existing remedy to produce the expected result does not include an expectation that the complaint's case must be upheld. It is indeed the law that the fact that a remedy does not produce a result favourable to the complainant does not, in and of itself, demonstrate that domestic remedies are inexistent or ineffective.

Contrary to the claim of the African Court that it is well-established in international jurisprudence that only judicial remedies are viable remedies for the purpose of exhaustion, the International Court of Justice (ICJ) looks beyond judicial remedies in determining whether domestic remedies have been exhausted. For the avoidance of doubt, in *Ahmadou Sadio Diallo,* the ICJ declared:

> The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority … the court nevertheless recalls that, while the local remedies that must be exhausted included all remedies of a legal nature, judicial redress as well as redress before administrative bodies,

[35] *Ibid*, p. 17, para 44
[36] *Supra* note 4, para 64.
[37] *Id,* para 66.

> administrative remedies can only be taken into consideration for the purpose of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for consideration of the expulsion decision to the administrative authority having taken it – that is to the prime minister – in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.[38]

As should be the case, the strength of the approach of the ICJ in this case is in the fact that, while leaving the possible remedies that could be relied upon seemingly open-ended, the Court carefully inserted the useful proviso that completely eradicates non-judicial remedies that are discretional.

In addition to the requirement that a non-judicial remedy must not be discretionary in nature, the remedy must by nature be aimed at resolving the breach suffered by the applicant. Following the established view of international human rights courts, it could be stated that an administrative remedy is not viable unless it is aimed at resolving the breach complained of. Indeed, a non-judicial remedy that merely turns individuals asserting their rights to beggars waiting on the magnanimity of a particular individual or authority, or a remedy which does not have clear and objective rules governing its outcome, needs not be exhausted. Where however a public officer's discretion is guided by clear rules and the remedy is assessable and fitting for dealing with a breach, it should be mandatory for an applicant to exhaust it.

4. Conclusion

The narrow but salient point this case comment set out to address was the blanket exclusion of non-judicial remedies from the class of domestic remedies mandatory to be fulfilled by an applicant before siesing the African Court. The writers have argued that though the Court was right to have held that there were no viable domestic remedies to be exhausted by the applicants in this case, the Court had no basis for declaring that only judicial remedies are required to be exhausted by applicants.

It is therefore the writers' considered view that it is essential for the Court to jettison the view that non-judicial remedies are not viable and thus need not to be exhausted to enable it assess domestic remedies within the context of each case and on the merit. This would be of benefit to the Court, the respondent State, and more so, the complainant who avoids being locked in a long and

[38] *(Republic of Guinea* v. *Democratic Republic of the Congo) (Preliminary Objection),* ICJ Rep 2007, 582, 601, para. 47

costly litigation for what he or she could possibly have got through a remedy, albeit non-judicial, put in place by the respondent State.

Indeed, the African Court immensely benefits from the jurisprudence of older international human rights courts that complement municipal law in human rights protection. The ECtHR, in particular, has been able to settle its jurisprudence on this point, maintaining the right balance to be struck between the need to provide effective remedies to individuals and the need to respect domestic competences. Like the African Court, the European Court is bound by the exhaustion rule, and it has espoused the rule in its jurisprudence. The policy consideration of the ECtHR in its approach towards exhaustion is the acknowledgement that the machinery of protection established by the European Convention on Human Rights and Fundamental Freedom is subsidiary to the national systems safeguarding human rights.[39] Accordingly, it primarily aims at affording the Contracting States the opportunity of preventing or putting right a violation alleged against them before the allegation is submitted to Court.[40] In this regard, the Court is not fixated on judicial remedies. Indeed as clearly stated by the Court in *Cardot v. France*,[41] what is required is for the complainant to have made the complaint – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law.

The Court has been unequivocal in stating that the application of this rule must make due allowance for the context and that in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This, according to the Court, means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.[42] The methods of the ECtHR towards the exhaustion rule are therefore recommended to the African Court. ■

[39] See the *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A no. 24, p. 22, para 48

[40] *Hentrich v. France,* Judgment of 22 September 1994, Series A no. 296-A, p. 18, para 33, and *Remli v. France* judgment of 23 April 1996, *Reports* 1996-II, p. 571, para 33

[41] Judgment of 19 March 1991, Series A no. 200, p. 18, para 34

[42] V*an Oosterwijck v. Belgium*, Judgment of 6 November 1980, Series A no. 40, pp. 17-18, para 69; Akdivar's case para 69

NOTE

DOI http://dx.doi.org/10.4314/mlr.v8i1.8

Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases

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Abstract

In jurisdictions that subscribe to adversarial mode of litigation, burdens and standards of proof have significant roles in the adjudication and determination of criminal cases. The operation of the principle of presumption of innocence in such jurisdictions determines issues of who bears what burden and the extent thereof. The Ethiopian criminal procedure system predominantly exhibits adversarial features, and there is the need for the comprehension and enforcement of the respective burdens and standards of proof borne by litigants. The constraints in clarity are more pronounced in those criminal law provisions that embrace some form of presumptions such as provisions on corruption offences. This note highlights how issues of burden and standard of proof are allocated as between prosecuting authorities and accused persons. Apart from explaining the nexus between the principle of presumption of innocence, burdens of proof and standards of proof, it indicates the implications of the operation of the principle of presumption of innocence upon the allocation of evidential and persuasive burdens of proof as between the state and the accused. It further outlines the effects of the various forms of presumptions upon the different kinds of burdens of proof.

Key words

Burden of proof, standard of proof, easing of burden of proof, criminal cases, presumption of innocence

Introduction

Prosecution of corruption offences especially those involving possession of unexplained property in Ethiopia appear to be somewhat marred by confusions and dilemmas. Some court cases[1] demonstrate the nature and extent of problems

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[1] See for example, the *Workineh Kenbato & Amelework Dalie V. the SNNP Ethics & Anti- Corruption Commission* case (Cassation Division of the Federal Supreme Court, Cassation File No. 63014, Judgment given on Miazia 9, 2004 E.C). This is a case that involved prosecution of possession of unexplained property. It started at Hawasa City

pervading in this area of the criminal law. Limitations in comprehending the unique nature and varying forces of the different forms of presumptions upon the different kinds of burdens of proof arising in criminal trials complicate matters. Sometimes we witness contradictory decisions among the different hierarchies of courts in identical cases that bear similar issues and similar evidence. It is apparent that the term **የማስረጃ ሸክም** is employed in many legal proceedings, but often with less clarity. There are confusions regarding the interrelationship between burdens of proof and presumptions, and their interface with other issues such as the principle (right) of presumption of innocence.

This Note sets out to expound how issues of burden and standard of proof are allocated as between prosecuting authorities and accused persons in criminal trials in general. It explains the nexus between the principle of presumption of innocence, burdens of proof and standards of proof; it treats the implications of the principle of presumption of innocence upon the allocation of evidential and persuasive burdens of proof as between the state and the accused. It further outlines the effects of the various forms of presumptions upon the different kinds of burdens and standards of proof.

The first section of the note highlights the notion of burdens of proof and their operations in criminal trials. Section 2 considers the interaction that exists between the different kinds of presumptions and the various forms of burdens of proof. The third section addresses issues relating to standards of proof, followed by concluding remarks.

1. The Notion of Burdens of Proof and their Operations

1.1 Overview

Issues of burden and standard of proof are analyzed in the light of the material (*actus reus*) and moral (*mens rea*) elements of an offence in a charge. The analysis involves: (1) an examination of the allocation (distribution) of obligations to introduce evidence and to prove particular material and moral facts that establish an offence in a charge, and (2) a determination of the degree to which those facts must be proved.

High Court. Then it went all through the Appellate and Cassation divisions of the Southern Nations, Nationalities and Peoples Regional State Supreme Court and then after reached to the Cassation Division of the Federal Supreme Court. After thoroughly reviewing and revoking the decisions of the regional courts, the Cassation Division of the Federal Supreme Court remanded this case again to the Hawasa City High Court for re-trial. This Division has given a binding interpretation of Art 419 (1) of the Criminal Code (2004). The interpretation has to do with burdens of proof standards of proof and presumptions.

It is a legal truism that burdens of proof and standards of proof have meanings in relation to 'facts in issue' and 'relevant facts' in particular cases. There are no burdens of proof in the vacuum.[2] Likewise, standards of proof cannot be perceived in the vacuum- both burdens of proof and standards of proof do exist in relation to facts, more specifically, 'facts in issue' and/or 'relevant facts'.[3]

Allocation of burdens of proof, the evidential and persuasive burdens in particular, is basically a substantive law matter.[4] Often, the legislative body (sometimes judges during legislative silence in a given common law-adversarial jurisdiction) determines, ahead of litigation, as to which party is under duty to lead evidence and also determines the party which bears the obligation to prove particular facts which may fall within the 'facts in issue' or other 'relevant facts'. Such allocation of burdens of proof is made taking into account various factors and policy determinations. These include:[5]

a) The natural tendency to place the burdens on the party desiring change,
b) Special policy considerations such as those disfavouring certain defences,
c) Convenience,
d) Fairness, and
e) The judicial estimate of the probabilities.

Apart from or in lieu of these, the pleading of parties may sometimes locate and determine as to which party bears one or another form of burden of proof. Above all, the principle of presumption of innocence, locates and determines, ahead of litigation, as to which party is under duty to lead evidence and as to

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[2] The notion of burdens of proof is properly raised in jurisdictions that adhere to the party-driven, common law- adversarial systems of procedure and evidentiary styles. It is equally important in continental law - inquisitorial (non-adversary) systems as there are no, strictly speaking, parties' evidence and parties' presentation of evidence. For further details on this issue and for better knowledge on the underlying distinctions between adversarial and inquisitorial (non-adversarial) systems read Mirjan Damaška (1973), 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', 121 *U. Pa. L. Rev*., at 506 ff; Ronald J. Allen (2012), 'Burdens of Proof', at 1- 24; available at: <http://ssrn.com/abstract=2146184> (Visited on 2 December 2013).

[3] Generally speaking, the 'facts in issue' in criminal proceedings are those *disputed issues of fact* which the prosecution must *prove* in order to succeed along with the *issues of fact*, if any, which the accused must show that there is some (admissible) evidence in support of his defence. On the other hand, 'relevant facts' are those other facts that are connected or have some relationship with facts in issue. (See Raymond Emson (2004), *Evidence,* 2nd Ed., at 7 & 421).

[4] Dennis, I. H. Dennis (2002), *The Law of Evidence*, 2nd ed., (Reprinted, 2004), at 371.

[5] See Stephen I. Dwyer, 'Presumptions and Burden of Proof', 21 *Loy. L. Rev. (1975)*, at 380 (quoting McCormick).

which party bears the obligation to prove the 'facts in issue' or other 'relevant facts' as may arise in each individual case.

1.2 The Notion, kinds and Operations of Burdens of Proof

The notion of "burden of Proof" is one of the most elusive terms in the law of evidence,[6] and it may be used in a number of different senses.[7] Depending on the context, it may refer to *evidential burden*, or it may denote *persuasive burden*, or it may signify *tactical burden.* In the literature, academic discourse and law-making, it is often employed indiscriminately without implying any one of these specific meanings. In such cases, one will be required to search for the particular meaning in which the term is employed in that particular context. As there are varieties of meanings of this term, it is more appropriate to use the expression 'burdens of proof' than simply to employ the singular term 'burden of proof'. In the strictest legal parlance, however, *evidential* and *tactical* burdens of proof are not truly burdens of "proof".[8]

In the sense of *evidential burden*, the term 'burden of proof' refers to the obligation of a party to a dispute *to lead evidence* to show his case. This is what is commonly referred to as 'burden of adduction (production) of evidence' or 'burden of going forward with evidence', or simply as 'evidential burden'. A party that bears evidential burden is required to *point out* and *to present* or

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[6] Id, at 377; CRM Dlamini (2003), 'The Burden of Proof: Its Role and Meaning', *14 Stellenbosch L. Rev*. at 68; Colin Tapper (1999), *Cross and Tapper on Evidence*, 9th ed., at 106.

[7] Tapper, *supra* note 6, at 106-108; A.A.S Zuckerman (1989), *The Principles of Criminal Evidence,* at 104-109; Emson, *supra* note 3, at 420-421; Dennis, *supra* note 4, at 369-373.

[8] These two do not envisage a duty of convincing of fact-finders about the truthfulness of one's side of story in a case. Only the *legal burden of proof* (*persuasive burden*) stands to be the proper burden of *proof* deserving the name in judicial proceedings. There is yet another unfortunate circumstance in relation to the usage of the term "proof" both in law-making and in scholarly works. In its strict and proper sense the term "proof" refers to the process and *end result of evidence* and/or *other probative materials* (such as formal admission (*plea of guilt*), *judicial notice* and to some extent *presumptions*) upon the minds of decision-makers; yet, the word 'proof' is often used as a synonym of the term 'evidence'. The Amharic equivalent for the proper sense of proof is '*ማረጋገጥ*/*መረጋገጥ*' while the equivalent of the term 'evidence' is '*ማስረጃ*'. 'Evidence' is just one, actually the basic one, of probative materials (device) that help proving facts under investigation. This input (means) must be distinguished from the process and end product- state of factual persuasion, i.e., the degree of conviction created in the mind of the judge by the force of evidence and/or other probative device, or state of being proved or disproved in the process. N.B. 'proof' is the noun form while 'prove' is the verb.

introduce enough evidence that help *putting a matter in issue*. As Tapper observed, evidential burden refers to: "The obligation to show, if called upon to do so, that there is sufficient evidence to *raise an issue as to the existence* or *non-existence of a fact in issue*, due regard being had to the standard of proof demanded of the party under such obligation." [Emphasis added].[9]

A party upon whom such an obligation is imposed is not required to *prove* something thereby *convincing* decision-makers as to the truthfulness of his side of the story in respect of that issue for which he bears evidential burden. In other words, evidential burdens do not envisage an obligation of *proving*. As Emson notes, "[t]he evidential burden is not a burden of *proof* as such but rather an obligation to demonstrate that sufficient evidence has been adduced or elicited in support of an assertion of fact so that it can become a live issue" [Emphasis in the original]. [10] Zuckerman also states that such burden "imposes an obligation to adduce some evidence in support of the existence of some facts in issue, without imposing any duty to generate any particular degree of confidence in the adjudicator's mind."[11]

In criminal proceedings, in respect of the substantive matters in a criminal charge, it is the prosecutor that always has to *open the case* and *lead evidence*.[12] The prosecutor has to adduce evidence in support of the *facts in issue*, which pertain to the *material* and *moral elements* of the offence in its charge. The principle of presumption of innocence to which any criminally accused person is entitled compels prosecuting authorities to bear this initial evidential burden.[13]

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[9] Tapper, *supra* note 6, at 109

[10] Emson, *supra* note 3, at 420.

[11] Zuckerman, *Supra* note 7, at 107.

[12] The presumption of innocence protects the accused from being compelled to lead evidence. But, if collateral issues such as criminal irresponsibility due to minor age, or insanity are raised by an accused person, the accused bears the burden of leading evidence on such collateral issues. See Rinat Kitai (2002), 'Presuming Innocence', *55 Okla. L. Rev*. at 258 (footnote omitted); Andrew Ashworth (2006), 'Four Threats to the Presumption of innocence', *10 Int'l J. Evidence & Proof*, at 249.

[13] As Ashworth (Ibid) noted the "presumption of innocence is a moral and political principle, based on a widely shared conception of how a free society (as distinct from an authoritarian society) should exercise the power to punish." It is not factual presumption. Ashworth (Ibid) wrote "there is no rational connection between being prosecuted and being innocent, and indeed the statistics on guilty pleas and convictions suggest that most of those prosecuted are guilty." It is important to note that the principle of presumption of innocence places evidential and persuasive burdens of proof upon the state (prosecutor) and that determines the extent of proof that is required of the prosecutor to discharge its ultimate burden of proof. In its broader sense, it could go to the pre-trial criminal process to imply, guide and

In some *exceptional* circumstances provided by law, the prosecutor may be *partly* relieved of this burden for *some of the material* or *moral elements of* the offence or in respect of some incidental or circumstantial matters in the charge.[14] This occurs in cases where the accused, unlike the prosecutor, is in a better position to produce some form of evidence that is within his personal knowledge or within his reach. In such circumstances the legislature may determine to *ease* (but *not to exonerate totally*) the evidential burden of the prosecutor by employing some form of *presumption* to particular facts or related circumstances that are deemed to be within the knowledge or reach of the accused.[15] This scenario involves the *reversal ("shift") of evidential burden of proof* in respect of such material or moral or other circumstantial facts. This is more appropriately referred to as *easing of the evidential burden of the prosecutor*.[16] What is eased or reduced in such instances is the partial (and not the whole) evidential burden of the prosecutor.

The prosecutor loses on the case if it fails to *preliminarily* discharge its normal or reduced evidential burden with the required degree of persuasion. Failure to produce *prima facie proof* [17] in criminal proceedings leads into the

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regulate the behavior of the state, state organs and the general public on how they should treat suspected persons.

[14] See Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger (2012), *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*; Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9454-0. License: Creative Commons Attribution CC BY 3.0, at 30-31, available at: <http://creativecommons.org/licenses/by/3.0>(last visited 15/8/2013); International Council on Human Rights Policy (2010), 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities', at 65-66; available at: <www.ichratorg/files/reports/58/131b_report.pdf>, (last visited on 12/08/ 2013); Ndiva Kofele-Kale *(2006)*, 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes', *40 Int'l Law*, at 931-942.

[15] Kofele-Kale, *Supra* note 14, at 931-942; Bertrand de Speville (1997), 'Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights', paper presented to the 8th International Anti-Corruption Conference, available at: <http://8iacc.org/papers/despeville.html> (last visited on 21 November 2013).

[16] See Byron M. Sheldrick (1986), 'Shifting Burdens and Required Inferences: Constitutionality of Reverse Onus Clauses', *44 U. Toronto Fac. L. Rev*., at 182; Maud Perdriel-Vaissiere (January 2012), 'The Accumulation of Unexplained Wealth by Public Officials: Making the offence of illicit enrichment enforceable', *U4 Brief*, No 1, at 2-3, available at: <www.U4.no>, at 33 (last visited on 17/08/2013). Many scholars and court judges have expressed their opinion that such a reversal (easing of) an evidential burden would not contradict with the basic essence of presumption of innocence (Ibid); See also Kofele-Kale, *Supra* note14, at 924-944.

[17] The expression *prima facie proof* (also loosely, but awkwardly, employed as *prima facie evidence* or as *prima facie case)* signifies that state of condition in which in the

acquittal of the accused in the middle of the trial process. This is what is often expressed as the order of 'no case motion' or 'no case to answer'.[18]

On the other hand, if the prosecutor successfully discharges the normal or reduced evidential burden, the court orders the accused to enter into his defence. It is at this point that the accused will be required to shoulder and to discharge his burden by leading rebuttal or counter-evidence. This is the point whereupon the other type of burden of "proof", in the broad sense of the term, will come into the picture- that is *tactical burden of proof*. Often, this is expressed by the term "shift of burden of proof". More appropriately, this is referred to as the 'placing of an evidential burden on an opponent' or, as 'a shift of the evidential burden of proof from the prosecutor to the accused'.

In the sense of *tactical burden*, the term 'burden of proof' refers to what a party to a dispute may do if the other party that bears evidential burden successfully discharges its evidential burden. This is what is also termed as the *provisional burden*.[19] In brief, this refers to the obligation of the other party (against whom *prima facie proof* is submitted) to lead some counter or rebuttal evidence. This burden does not come into the picture if the court, after making a preliminary (provisional) assessment of the evidence of the party that bears persuasive burden (and thus leads evidence) concludes that there is 'no case to answer'. In criminal proceedings, a judge of a given court orders an accused to enter into his defence *only if* it is *sufficiently convinced* that a reasonable fact finder will convict such an accused if he fails to produce some counter or rebuttal evidence. Once the judge gives an order that the accused has to enter

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absence of evidence to the contrary some fact is (or may or must be) considered as proved or established. In criminal proceedings, it often refers to the provisional (temporary) proof beyond a reasonable doubt degree of conviction. It is said to be *provisional* or *temporary* for there is a possibility for the accused to rebut or counter such degree of proof. It is this *state of conviction created in the mind of judges* that is provisional not the *evidence* introduced. See Zuckerman, *Supra* note 7, at 53-54.

[18] Ibid.

[19] Tapper, *supra* note 6, at 107; Emson, *supra* note 3, at 422. Emson wrote:

"If the party bearing an evidential burden on an issue manages to discharge it this is said to place on his opponent a 'tactical' or 'provisional' burden to adduce evidence in rebuttal. The tribunal of law's ruling means that sufficient evidence has been adduced on the issue for the tribunal of fact to find, at the end of the trial, that it has been proved. If the opponent fails to adduce evidence to show the contrary it is quite possible that the issue will be proved against him. It would therefore be to the opponent's advantage to adduce evidence in rebuttal rather than simply hope the tribunal of fact does not find in the proponent's favour: he is obliged, in a tactical sense, to adduce evidence of his own. If the prosecution [has] established a prima facie case against the accused it is not incumbent on him to adduce evidence of his own, for the jury may decide in his favour anyway."

into his defence, it would be the responsibility of that accused to lead some counter or rebuttal evidence. Failure on the part of the accused to discharge his tactical burden by adducing some rebuttal (counter) evidence in such circumstances entails a potential *risk* of conviction. As Dennis's observes:

> When a party has discharged an evidential burden and raised an issue for the court to consider, there arises a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligation to adduce (further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge the evidence.[20]

In the strict legal parlance, the term 'burden of proof' refers to *the obligation of a party to persuade* the existence or non-existence of a disputed matter of fact to *the satisfaction of judges* with the necessary amount and quality of evidence and/or other probative devices. As Tapper notes, it denotes "the obligation of a party to meet the requirement that a fact in issue be proved (or disproved) either by a preponderance of the evidence [in civil cases] or beyond reasonable doubt [in criminal cases]."[21] This is the true burden of proof that determines which party in a proceeding is responsible to prove or disprove a particular fact(s) in issue under risk of losing on an issue or on the whole of the case, as the case may be. It is this burden that determines which party is under an obligation to lead evidence of a particular fact and *convince* the court thereof; it this burden that mainly determines the *party who will lose* if the court is not satisfied that the fact has been proved. This burden of proof is also referred to as legal (persuasive) burden, or probative burden, or risk of non-persuasion, and it fixes the party that loses on an issue of fact or on the whole of the case.[22] Emson writes:

> The legal burden of proof […] is the obligation the law imposes on a party to prove a fact in issue. In effect it is no more than a risk-allocation mechanism: the party who bears the legal burden on an issue carries the risk of losing on that issue if the evidence relevant to it is evenly balanced or non-existent. It is for that party to adduce sufficient evidence to persuade the tribunal of fact that his version of events is correct.[23]

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[20] Dennis, *supra* note 4, at 373-374.

[21] Tapper, *supra* note 6, at 108.

[22] Other interchangeable terms include 'fixed burden of proof', or simply as 'ultimate burden', See Ibid., 108; Emson, s*upra* note 3, at 419; Zuckerman, s*upra* note 7, at 106; Dennis, *supra* note 4, at 371. Zuckerman notes (at 106) that each of the alternative terms may, depending on the context, carry much more specific connotations.

[23] Emson, *supra* note 3, at 419.

As Professor Allen noted "the substantive law determines who has the burden of persuasion through its articulation of elements and defenses."[24] And, under normal circumstances, the party bearing the legal burden of proof on a fact in issue also bears the evidential burden to make it a live issue.[25] Many legal scholars have observed that the evidential burden is a function of the burden of persuasion.[26] In respect of the substantive contents (ingredients of an offence) of a criminal charge, it is the prosecutor that normally bears legal burden of proof. The prosecutor is duty bound to *convince* that the accused has committed the *actus reus.* It is also duty bound to *persuade* judges that the accused did it with blameworthy state of mind (*mens rea*) unless the specific offence is one of strict criminal liability.

Unless the law makes partial easing (reducing) of the prosecutor's burden,[27] the prosecutor is required to establish or prove *each and every essential material and moral ingredients of an offence* stated in a charge. The operation of the principle of presumption of innocence commands that the prosecutor bears the duty of proving *guilt* beyond a reasonable doubt. Proving of guilt in turn presupposes establishment of each and every essential material and moral ingredients of an offence. No accused person is required to prove his *innocence* in modern criminal justice systems. It is the accuser- the prosecutor- that must prove *guilt*. And the prosecutor's legal burden is *fixed*; it does not shift to an accused any time during the course of a trial.[28] The expression 'fixed burden of proof' is thus interchangeably used with 'persuasive burden' or 'legal burden' of proof. As Dennis observes, "[l]egal burdens are allocated by rules of law and are *fixed* at the beginning of the case. They *do not shift* during the course of a trial" [Emphasis added].[29]

Only in very few exceptional circumstances may a *reversal of legal burden of proof* be allowed in respect of *some* (but not all) ingredients in certain offences.[30] This occurs in cases where the legislative body finds it that doing so

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[24] Ronald J. Allen (2011), 'Standards of Proof and the Limits of Legal Analysis', at 3; available at: <http://ssrn.com/abstract=1830344> (Last visited on 23 December, 2013).

[25] Emson, *supra* note 3, at 421; Zuckerman, *supra* note 7, at 108.

[26] See Allen, s*upra* note 2, at 11 citing John T. McNaughton (1955), 'Burden of Production of Evidence: A Function of Burden of Persuasion', 68 *Harv. L. Rev*., at 1382.

[27] If the law made partial easing (reducing) of the prosecutor's burden, the obligation of the latter to establish/prove would be limited to those that remain under its shoulder.

[28] See Dennis, *supra* note 4, at 371.

[29] Ibid.

[30] Kofele-Kale, *supra* note 14, at 943; de Speville, Supra note 15, at 2. See also David Hamer (2007), 'The presumption of Innocence and Reverse Burdens: A Balancing

is *necessary*, *appropriate, reasonable and proportional* vis-à-vis the threat an exceptionally serious crime poses to society, and in view of the difficulty the prosecuting authorities face to produce evidence.[31] In some cases, the accused, not the prosecutor, may be in a better position to produce evidence that is within his personal knowledge or within his reach. Such may be the case in grand public corruption criminal cases wherein higher or senior public officials are prosecuted. Even in such cases the ultimate burden of proof remains with the prosecution. The other name for persuasive burden is thus known as the '*ultimate burden'*.

From this brief exposition, it is understandable that the form of burden of proof that is placed upon litigating parties differs greatly and the duty that each form of burden of proof imposes upon a party varies substantially. Failure to successfully discharge one's form of burden of proof at the right time with the required intensity of proof entails irreversible consequences. As most of the confusions and dilemmas in Ethiopian criminal trials seem to surface in these areas, it is appropriate to quote at length what Dennis states in respect of the distinction between evidential burden and persuasive burden:

> When a judge is deciding whether an evidential burden has been discharged, he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise an issue for the court to consider; the fact that there may be substantial other evidence contradicting the favourable

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Act', 66 *Cambridge L. J*., at 148-149 (discussing the compatibility or otherwise of reversal of persuasive burdens of proof with the principle of presumption of innocence and further analyzing the various factors that could be considered in determining such compatibility or incompatibility. The factors listed are 'seriousness of offence', 'gravamen of offence', 'exigency of threat posed', and 'pragmatics of proof'.)

[31] Ibid; Jayawickrama *et al* have written: ... with the emergence or escalation of organized crime, drug trafficking, terrorism and corruption, in many legal systems the operation of other statutory presumptions of law or fact have been considered necessary for the effective administration of criminal justice. The pre-eminent position accorded to the presumption of innocence means that these presumptions of law or fact require to be confined within reasonable and appropriate limits. In no circumstances should an accused be required to do more than raise a reasonable doubt as to his or her guilt. Accordingly, a presumption that relieved the prosecution of part of its burden of proving all the elements of a criminal charge, so that a conviction could result despite the existence of a reasonable doubt as to the guilt of an accused person, would be inconsistent with the presumption of innocence.

See Nihal Jayawickrama, Jeremy Pope & Oliver Stolpe (2002), 'Legal Provisions to Facilitate the gathering of evidence in Corruption Cases: Easing the Burden of Proof', 2 *Forum on Crime and Society,* No.1, at 27 (footnotes omitted).

> evidence is immaterial at this stage. When a fact-finder (judge, jury or bench of magistrates) is deciding whether a legal burden has been discharged, the fact-finder looks at all the evidence adduced in the case. Thus the fact-finder will take into account the evidence which first served to discharge the evidential burden plus any other evidence which tends to confirm or rebut it. […] The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact; the decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. [….] The discharge of the legal burden occurs at a later stage in the trial, when the fact-finder is required to decide on the existence or non-existence of facts whose possible existence is in issue [Emphasis added]. [32]

The next section briefly deals with some distinct scenarios that arise in the course of the interplay between burdens of proof and presumptions.

2. Interplay between Burdens of Proof and Presumptions in Criminal Trials

Burdens of proof and presumptions are intimately related concepts.[33] The latter are legal devices that enable courts to draw conclusions regarding the existence or otherwise of facts from the establishment of other preliminary facts. As briefly discussed below, the operations of various forms of presumptions entail different consequences as they affect the normal operation of the various forms of burdens of proof thereby determining the respective roles and responsibilities of parties.[34]

Of the two types of presumptions, presumptions without basic facts and presumptions with basic facts,[35] only the latter type is relevant for us now. This is because many of the presumptions that we find in criminal law provisions

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[32] Dennis, *supra* note 4, at 371 (Emphasis in the original) (Also, footnote omitted). David Hamer also writes: "Whereas the reverse persuasive burden requires the defendant to prove his innocence on the balance of probabilities, the reverse evidential burden only requires the defendant to raise a matter of exculpation as a genuine issue. The Prosecution will then carry the persuasive burden of negating the matter." See Hamer, *supra* note 30, at 143.

[33] Allen, *supra* note 2, at 24 & 30; Dennis, *supra* note 4, at 419-421; Dwyer, *supra* note 5, at 377.

[34] Dwyer writes: "In most cases, a presumption imposes the burden of proof upon the party against whom the presumption is operable. In certain cases, however, a presumption creates a burden which legally cannot be overcome" (Ibid).

[35] Tapper, *supra* note 6, at 120; Dennis, *supra* note 4, at 419.

including those dealing with corruption offences such as the offence of illicit enrichment and procuring of an undue advantage relate to the type of presumption that comes into the picture only after a prosecuting body succeeds in establishing (proving) at least some facts that constitute the offence in the charge.[36] To draw some conclusion (conclusively or provisionally) about the existence or non-existence, the truthfulness or falsity of a fact in issue, such presumptions with basic facts presuppose a *prior establishment* or *proof of some basic fact(s)*. No such presumption could come into the picture without a prior establishment of some basic fact(s). Again, such presumptions could be either presumptions of fact or presumptions of law;[37] and, presumptions of law could be either rebuttable or irrebuttable.

In the case of irrebuttable presumptions of law, the party against whom such presumption operates does not have any opportunity to adduce any countering or rebuttal evidence. In the case of rebuttable presumption of law, however, the party against whom a fact is presumed to exist can adduce evidence to counter or rebut those provisionally assumed facts or state of affairs. Rebuttal of presumed facts, whether deriving from presumptions of fact or rebuttable presumptions of law, may take either of three forms: *provisional presumptions, evidential presumptions,* and *persuasive presumptions* .[38]

a) Provisional presumptions

These derive from presumptions of fact. Whether one has to draw a conclusion from a proved basic fact is to be determined case by case. Judges *may* exercise their discretionary power either to draw or not to draw a conclusion about the existence or non-existence of some presumed fact. Once such an inference is drawn, however, the party against whom such a presumption of fact is taken bears a *provisional or tactical burden*. If such party wants to challenge the drawing of such a tentative conclusion or wants to avoid a *likely* risk it has to introduce some rebuttal evidence to create some *reasonable doubt as to the existence of a presumed fact*.[39]

b) Evidential Presumptions

Here the law requires judges to draw a conclusion from a proved basic fact. Once a basic fact is established, judges *must* draw a conclusion about the

[36] See for example what Arts 403 and 419 of the Criminal Code of Ethiopia enact.

[37] See Dennis, *supra* note 4, at 420. In the case of *presumptions of fact* (provisional presumption) conclusions *may* be drawn from proof of basic facts at the discretion of judges while in the case of *presumptions of law*, the law *requires* judges to draw conclusions from proved basic facts.

[38] Ibid.

[39] Ibid.

existence of a presumed fact *in the absence of any evidence to the contrary*.[40] The conclusion stands intact in the absence of contrary evidence. This form of rebuttable presumption of law therefore requires the party against whom such a conclusion is drawn to bear *evidential burden.* This signifies a "shift" or transfer of evidential burden from the party that is beneficiary of the presumption to the other party. It entails that the party against whom such a conclusion is drawn has to adduce *sufficient evidence to bring into question the truthfulness of the presumed fact,* because otherwise judges are *required* to uphold the drawn conclusion.[41] The presumption vanishes only if such a party introduces some rebuttal evidence which puts the presumed fact in doubt. Obviously, such forms of presumption do not affect the *legal burden* of proof that is applicable in the proceeding. Emson writes:

> An evidential presumption *does not affect the incidence of the legal burden of proof* but places an evidential burden upon the opposing party once certain basic facts have been proved or admitted. *The party relying on the presumption still bears the legal burden of proving the presumed fact* but *this burden will be deemed to have been discharged*, and the tribunal of fact will be obliged to accept its truth, *if the opposing party has failed to adduce sufficient evidence to suggest the contrary*. If the evidential burden has been discharged, the tribunal of fact will have to *weigh in the balance the probative value of the evidence adduced by the opposing party against that of the basic facts and any other evidence adduced by the party bearing the legal burden*, in order to determine whether the legal burden has been discharged [Emphasis added]. [42]

c) Persuasive Presumptions

Here the law requires judges to draw a conclusion from a proved basic fact *unless and until such conclusion is disproved by the party disputing it.*[43] In such cases, the party against whom such a conclusion is drawn is required to bear *persuasive burden* on and only on the *presumed fact.* This signifies a "shift" or transfer of legal burden of proof *in respect of the presumed fact only*. It must be noted that there is only "shift" of legal burden of proof in respect of a specified (identified) presumed fact. If such a party wants to avoid losing on that

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[40] Ibid.

[41] Ibid; See also Ashworth (s*upra* note 12, at 269) stating: "Discharging the evidential burden does place an obligation on the defendant, and for that reason it requires justification and should not be casually imposed. But the burden is much lighter than the onus of proving an issue on the balance of probabilities, and hence it is less objectionable."

[42] Emson, *supra* note 3, at 461-462.

[43] Dennis, *supra* note 4, at 421.

presumed fact or on the whole of the case, as the case may be, he has to *prove* the non-existence of the presumed fact. It is not sufficient for such a party to merely create doubts as to the truthfulness of the presumed fact. He should rather *convince* on a balance of probabilities that his side of the story is true in relation to the presumed fact. Emson notes:

> A *persuasive presumption* is effectively a rule *which places the legal burden of proof on a particular party once certain basic facts have been proved or admitted*. The basic facts give rise to the presumed fact, and *it is for the opposing party to prove the contrary [*Emphasis added*]*.[44]

It is thus essential to identify the types of rebuttable presumptions that are embodied in statutory laws and to appreciate their specific impacts on specific forms of burdens of proof envisaged thereupon by paying particular attention to how specific offences have been defined or formulated. Apart from paying good attention to terms such as "may", "must", "shall", or any other equivalent term in statutory formulations, one has to critically examine whether there are expressions such as "*.... in the absence of any evidence to the contrary....*", or "*...unless and until disproved...*". The manner in which rebuttable presumptions are formulated in the provisions that articulate particular offences indicate intended consequences.

3. The Notion, Kinds and Application of Standards of Proof in Criminal Trials

A related concept to the notions of burdens of proof and presumptions is standards of proof. Basically the idea of 'standard of proof' is concerned with the question of the *degree* or *level* to which the facts in issue or relevant facts must be proved or, to be shown or supported to exist, as the case may be. It refers to "the degree of probability to which facts must be proved to be true."[45] In criminal proceedings, the principle of presumption of innocence determines the essence and roles of such standards. This fundamental principle of criminal law and criminal procedure law directs litigating parties to carry out their respective burdens of proof; it also determines the standards of proof that has to be met by parties.[46]

The notion of 'standards of proof' may signify different things in various contexts. In the loose sense, it connotes different levels or degrees of "proof". It may, for example, signify the *extent or level of intensity* of the evidence that is

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[44] Ibid, at 461.
[45] Dennis, *supra* note 4, at 370.
[46] Ashworth, *supra* note 12, at 249; Kitai, *supra* note 12, at 258; Dlamini, *supra* note 6, at 396.

required for a party that bears *evidential burden* to successfully discharge this burden and thereby to trigger "shift" of burden of adduction of evidence to the other party. In criminal cases, this may arise in two different circumstances.

Firstly (and primarily), it arises in the context of the initial evidential burden of the prosecutor. The prosecutor is required to carry out its evidential burden on the substantive elements of the offence in its charge on the basis of the principle of presumption of innocence and the evidential maxim that 'he who asserts shall prove his assertion'. After the adduction of the evidence of the prosecutor in respect of the substantive matters in the charge is over, the evidence is *provisionally* (temporarily) assessed or evaluated bearing in mind the *ultimate burden of proof* which would be used to evaluate the overall evidence at the end of the trial. Although proof beyond a reasonable doubt is not the *scale* a judge is employing to measure the intensity of the prosecution's evidence at this phase of the litigation, in actuality the intensity of the evidence is assessed in view of that scale. Accordingly, the prosecutor is said to have discharged its evidential burden only if it has introduced an amount of evidence that enables the court to order the accused to enter into his defence. This standard of proof, often referred to as *prima facie proof,* is a degree of proof that leads into the conviction of the accused if the latter fails to introduce any rebuttal or counter evidence for any reason, or where the accused who has submitted evidence, fails to introduce an amount of evidence that creates such an intensity to spark some doubt(s).

Secondly, in some exceptional circumstances stipulated by law, an evidential burden of proof may be imposed upon the accused for some material and/or moral elements in certain criminal offences. As already stated, such a measure is adopted only in certain justifiable circumstances and only with a view to minimize, to some extent, the evidential burden of proof borne by the public prosecutor. This pertains to evidential presumptions, which is different from those of provisional presumptions as well as persuasive presumptions. The degree of "proof" required of the accused in such instances is one which has the intensity to *raise or create some reasonable doubt(s)* as to the existence or truthfulness of the presumed fact. In the real sense, it could be argued that the accused is not required to create or raise 'a reasonable doubt' against the prosecutor's evidence or the presumed fact. It is rather the prosecutor that should prove its case *beyond* a reasonable doubt degree of proof.

There is also another sense of standard of proof. This is what one may find in criminal proceedings when judges draw a presumption of fact as to the truthfulness (or as to the existence) of some presumed fact thereby imposing some tactical burden of proof on an accused in respect of such presumed fact. In such instances, accused persons would be required to introduce some rebuttal or counter evidence. With regard to the degree of "proof" that is required to discharge such tactical (provisional) burden of proof, (in the strict sense) the accused is *not under any legal burden of proof* in such instances; the accused is

not expected to *convince* judges to his side of the story in respect of a presumed fact drawn at the discretionary power of judges. No legal obligation is imposed on the accused requiring him to *prove* his innocence or to *disprove* what is presumed to exist. By virtue of the principle of presumption of innocence, it is the prosecutor that should *convince* judges about the *actus reus* and the *mens rea* elements appearing in the charge. This goes in line with the maxim 'he who asserts [not he who denies] shall prove his assertion'.

This raises the issue as to what is required of the accused in the event of tactical burden of proof. As stated earlier, such burden only demands the accused to adduce some counter or rebuttal evidence that has a potential cogency to *spark some doubt(s)* against the evidence of the prosecutor or against the presumed fact. This is very different from *convincing* judges about the truthfulness of one's side of the story.[47] To a greater extent, we observe that this standard of "proof" is similar to the one that eventuates in cases of evidential presumptions.[48] Conviction, in both cases, does not depend on the extent of an accused person's defence. Judges pass judgment of conviction only if the prosecutor proves the case *beyond a reasonable doubt*.

Further still, there is another very rare, theoretically available, form of standard of proof which arises under circumstances wherein persuasive presumptions may be applicable. Theoretically, the legislative body in a national jurisdiction may, arguably, resolve to employ some form of persuasive presumptions (reverse persuasive burden) for a few categories of offences that pose exceptional severe threats to the public such as in respect of organized crime, drug trafficking, crimes of terrorism and public corruption.[49] If such a measure is to be adopted validly, the law could obligate judges to presume the existence of a presumed fact (following the establishment of basic fact(s))

[47] See Dennis, *supra* note 4, at 373 (it only requires to "respond with some rebutting evidence").

[48] Evidential burden requires the accused to raise or create reasonable doubt, a standard of proof which is much lighter than preponderance of proof (balance of probabilities). (See Ashworth, *supra* note 12, at 269.)

[49] Kofele-Kale, *supra* note 14, at 942-943; Hamer, *supra* note 30, at 148-149. No jurisdiction has so far recognized persuasive presumptions in criminal offences. Courts of law have interpreted entrenched presumptions as only amounting to evidential presumptions. See Professor Kofele-Kale writing "extant jurisprudence reads reverse onus clauses as casting an *evidential burden* on the accused" despite advocating for recognition of persuasive presumptions in some very exceptional criminal offences (*supra* note 14, at 942-943). Ashworth *(supra* note 12, at 269) also wrote "Where courts have found the reverse onus of proof incompatible with the presumption of innocence, the relevant provision has generally been reinterpreted as imposing only an evidential burden."

unless and until an accused person disproves the presumed fact. Such a presumption transfers *persuasive burden of proof* on some fact(s) from the prosecutor to the accused.[50] If such a measure is to be validly adopted by the legislature (which must be made in explicit terms), *what standard of proof* is to be required of an accused to *disprove* or *refute* the truthfulness (or the existence) of the presumed fact? Would it be acceptable or justifiable if the legislature determines it to be one of 'proof beyond a reasonable doubt' degree? What would be the implication if such a standard of proof is to be recognized?

These questions are beyond the scope of this note, and it suffices here to briefly state that 'proof beyond a reasonable doubt' standard of proof is required of the prosecutor to minimize risk of mistaken conviction. Demanding such high degree of proof from an accused for the facts presumed otherwise would open dangerous loopholes toward the conviction of an accused despite the existence of some reasonable doubt. This goes against many fundamental values and interests including the principle of presumption of innocence and equality of arms. Under such thresholds, innocent persons can be easily convicted for merely failing to persuade judges about the contrary version of facts presumed.

Various jurisdictions such as Canada have maintained that requiring an accused to bear even a preponderant degree of proof is antithetical to the principle of presumption of innocence. In this regard, it has been noted that "where the accused bears the burden of proving an essential element of an offence on a balance of probabilities, it would be possible for conviction to occur despite the existence of a reasonable doubt, if the accused adduces sufficient evidence to raise a reasonable doubt of his guilt but fails to convince the jury on the balance of probabilities."[51] As could be gathered from various writings of scholars and the case law of other jurisdictions that recognize a reasonable limitation of the presumption of innocence under certain justifiable circumstances, a preponderance degree of proof suffices to maintain public interests without obliterating the fair trial rights of accused persons.[52]

In the strict and proper sense, the concept of standard of proof in criminal trials denotes the *ultimate* degree or *quantum* of proof that is required to satisfy

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[50] Note the distinction between reversal (easing) of evidential burdens of proof and reversal (easing) of persuasive burdens of proof. The former only requires the accused to *raise reasonable doubt* while the latter requires him to *prove* to the *required standard* that the fact presumed does not hold to be true or to exist.

[51] See Lilian Y. Y. Ma (1991), 'Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bills of Rights, 21 *Hong Kong L. J*., at 307-308. To require the accused to shoulder more than the balance of probabilities (preponderance degree of proof) would be beyond an acceptable degree of tolerance and compromise in any modern criminal justice system.

[52] Kofele-Kale, *supra* note 14, at 942-943; Hamer, s*upra* note 30, at 148-149.

the minds of judges to decide upon the existence or non-existence of an issue of fact under inquiry. In this strict sense, the degree of proof which a prosecutor, in an adversarial criminal proceeding, bears to obtain conviction is *proof beyond a reasonable doubt*.[53] There is the need to properly understand what this standard means in practical terms. It means that in order to convict, judges must be *almost certain* that *the crime is committed* and that *the accused did it*. In other terms, judges must be *overwhelmingly* convinced; the probability that the crime might not have been committed or the probability that it might not have been committed by the accused must be found *unlikely*.[54]

Concluding Remarks

The principle of the presumption of innocence requires the prosecution to bear both initial *evidential burden of proof* and *persuasive or ultimate burden of proof* in criminal trials. It has to lead evidence and prove each ingredient of the

[53] Like the notion of burdens of proof, there are some distinctions in the conceptions and applications of the notion of *standards of proof* between common law and continental law jurisdictions. Continental lawyers often employ the expression *in dubio pro reo* (in case of doubt favour the defendant). Unlike 'a reasonable man's standard' requirement of the common law and some continental law jurisdictions, judges in civil law countries are allowed to use *subjective* evaluation (*intime conviction*) when they assess and evaluate evidence presented to them. Yet, both common law and civil law jurisdictions require highest degree of persuasion to convict an accused. Of the three commonly applied degrees of proof recognized in judicial proceedings (i.e., 'preponderance of the evidence', 'clear and convincing evidence' and 'proof beyond a reasonable doubt' or '*in dubio pro reo'),* criminal proceedings require the prosecutor to prove the guilt of each accused *beyond a reasonable doubt* or *in dubio pro reo.* For further conceptual clarity and analysis see, for example, Damaška, *supra* note 2, at 540-544; Dwyer, *supra* note 5, at 377-404; J. P. McBaine, 'Burden of Proof: Degrees of Belief', 32 *Cal. L. Rev. (1944),* at 242-268. See also Christoph Engel (2008-2009), 'Preponderance of the Evidence versus *Intime Conviction:* A Behavioral Perspective on a Conflict between American and Continental European Law', 33 *Vt. L. Rev*., at 435ff; Kitai, *supra* note 12, at 258 (footnote omitted); Ashworth, s*upra* note 12, at 249.

[54] It goes without saying that the judicial search of truth is a matter of probability. So far, no society has invented a mechanism that helps ascertaining truth in criminal cases an absolute mathematical certainty. See Zuckerman, *supra note* 7, at 19-28; Dennis, *supra* note 4, at 3, 90-122. Dennis writes (at 3): "Because of the limitations of human knowledge 'truth' […] has to be regarded as a question of probability. We can never be confident to the point of absolute certainty that our evidence is always accurate and complete, and that we have always drawn the correct inferences from it. Perfect knowledge is unattainable in an imperfect world. The law, like other fields of human inquiry, has to be satisfied with degrees of probability of accurate truth-finding" (footnote omitted).

offence. It should also establish that the crime is committed and that it is committed by the accused with a culpable state of mind.

An accused person, on the other hand, is not required to open the case and to lead evidence to show or to prove his innocence. It would be antithetical to the principle of presumption of innocence and other fundamental societal values to require an accused to make a defense or to disprove guilt (or to prove innocence) before the prosecutor has successfully established guilt. Even in cases where the prosecutor might have successfully discharged its initial evidential burden, the accused is not required to *convince* judges about the truthfulness of his side of story in respect of facts in his defense or to *persuade* the falsity of the prosecution's evidence, partly or as a whole. Instead, the accused is required to raise or spark some doubt against the evidence of the prosecutor bearing a *tactical burden of proof*. Only in exceptional cases is the accused required to bear *evidential burden of proof* in respect of certain material and/or moral elements of an offence in a charge. That occurs in cases where the law embodies a rebuttable form of presumption (evidential presumption) in respect of certain material and/or moral elements of an offence that poses serious threats to the public. Under such circumstances where evidential burden of proof is imposed on an accused in respect of some elements of an offence, the evidential burden of proof of the prosecutor is said to be eased or reduced. In such cases the accused is only required to *create or raise reasonable doubt*, which is much lighter than establishing at a balance of probabilities.

As the judicial jurisprudence and the experience of various jurisdictions indicate, endorsing persuasive presumptions against accused persons cannot stand valid in the face of the fundamental human right to, and principle of, the presumption of innocence. The risk of convicting and punishing innocent individuals requires society to prefer erring on acquitting criminal persons rather than erring on the conviction of innocent persons.

By virtue of the operation of the presumption of innocence, the prosecutor is required to *convince* judges by creating such an intensity of belief in their minds that the crime stated in the charge is committed by the accused with a blameworthy state of mind. This persuasion of the guilt of the accused should indeed reach at the standard of proof envisaged by and compatible with the principle of presumption of innocence. The degree of proof envisaged by this principle as a prerequisite for conviction and punishment is *proof beyond a reasonable doubt*. ■

The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law

Hanna Arayaselassie Zemichael ♣

Abstract

The standard of proof plays a vital role in the process of administration of justice. In criminal proceedings, the standard stipulates the degree to which the party who has the burden of proof needs to establish the facts constituting the elements of the crime. This article gives an overview of the meaning and scope of the 'beyond a reasonable doubt' standard and subsequently argues that this standard is adopted in the Ethiopian legal system although it is nowhere clearly stated. It discusses the normative legal framework from which this standard can be inferred. It then explores the practice of the Federal Supreme Court Cassation Division by summarizing and analyzing cases most pertinent to the issue of standard of proof.

Key words

Standard of proof, beyond reasonable doubt, criminal proceedings, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v8i1.3

"Certainty, absolute certainty, is a satisfaction which on every ground of inquiry we are continually grasping at, but which the inexorable nature of things has placed forever out of reach. Practical certainty, a degree of assurance sufficient for practice, is a blessing, the attainment of which, as often as it lies in our way to attain it, may be sufficient to console us under the want of any such superfluous and unattainable acquisitions". - Jeremy Bentham♣♣

Introduction

The standard of proof, along with other basic notions in the law of evidence, plays a vital role in the process of administration of justice. The process of adjudication necessitates the settlement of facts of the case and this is to be ascertained through the introduction of evidence from which the court may draw warranted inferences. While decision-making based on facts is a common

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♣♣ Jeremy Bentham (quoted in Terence Anderson, David A. Schum, William Twining (2005), *Analysis of Evidence* 2nd Ed., (Cambridge: Cambridge University Press), p. 228.

phenomenon in everyday life, the legal system lays down a number of rules governing the decision-making process so as to ensure that the system facilitates correct decisions at least most of the time.

The Ethiopian legal system nowhere clearly states the requisite standard of proof in criminal proceedings. With such a gap in the normative framework, the understanding of this standard is as diverse as the courts themselves resulting in divergent outcomes of cases. This article aims at exploring the meaning and scope of the '*beyond a reasonable doubt standard*' and how it found its way into the Ethiopian legal system. It also looks into policy instruments and draft documents to determine the general direction towards which the legal system is headed as far as the standard of proof is concerned. Giving a detailed account of selected decisions of the Cassation Bench of the Federal Supreme Court, the article provides a comprehensive account of the jurisprudence of this Court on the issue.

The first section discusses the meaning of the *beyond a reasonable doubt standard* drawing from the experience of other countries that apply the same standard. It also explores the effect of affirmative defenses and presumptions on the scope of the standard. After a look at various legislations, the second section then argues that 'beyond a reasonable doubt' is the standard impliedly included in the Ethiopian legal system. The third section provides a brief overview of legal presumptions in Ethiopian criminal law with a view to determine whether and to what extent such presumptions affect the burden and standard of proof in criminal proceedings. The practice of courts in Ethiopia, particularly that of the Federal Supreme Court, Cassation Division is discussed in the fourth section by analyzing selected cases that are most pertinent to the issue. It notes that the practice is divergent and inconsistent with the normative framework.

1. *Beyond a Reasonable Doubt* Standard

This section explores the meaning of the *beyond a reasonable doubt* standard. It gives an overview of the prevalent formulations of the standard under the US legal system and the criticisms leveled against each after which a discussion of affirmative defenses and presumptions follow.

1.1 Meaning

The *beyond a reasonable doubt* standard was developed from the realization that in human affairs what can be achieved at best is 'moral certainty'- as opposed to 'full certainty' as in mathematics or logic.[1] When it comes to moral certainty, what is required is not proof beyond all doubt, but rather establishing

[1] Larry Laudan (2006), *Truth, Error and Criminal Law: An Essay in Legal Epistemology*, (New York: Cambridge University Press), p. 32.

the fact *as firm and settled* with the help of the presented evidence and testimony. Among the different theories and formulations surrounding the beyond a reasonable doubt standard, Larry Laudan has identified five formulations, discussed them as the major variations and identified the problems with each.[2]

a) Analogy with important life decisions:

According to this formulation, beyond a reasonable doubt is compared with important decisions one has to make in everyday life. Laudan criticizes this formulation by pointing out that in almost all important life decisions, people act despite the fact that there are reasonable doubts.[3] The degree of doubt that is considered acceptable under the beyond a reasonable doubt standard is much lesser than what people entertain in their private decisions no matter how important. Thus equating the beyond a reasonable doubt standard with making important life decisions is erroneous because it would amount to allowing a guilty verdict despite the existence of reasonable doubt.

b) Doubt that would make a prudent person hesitate to act:

Instead of describing what belief beyond reasonable doubt is, this test attempts to explain what a 'reasonable doubt' is. Accordingly, a reasonable doubt is described as a doubt that would cause a prudent person to hesitate to act on that belief (as opposed to the kind of doubt despite which you would act without hesitation). This analogy can be criticized for the same reason as the first since one may hesitate to act in an important affair not only when there are reasonable grounds. It has also been criticized for being too vague in its formulation.[4]

c) An abiding conviction of guilt:

This is very similar with the historical 'moral certainty' formulation. The literal meaning of the word 'abiding' envisages that the fact-finder must believe in the

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[2] This section of the discussion is based on what is presented by Laudan who outlined the various definitions in his book drawing from the experience of US courts in jury instructions on the standard of proof and the decisions of appellate courts on the issue. For a detailed discussion of each of the definitions see *Id*, pp. 34-51.

[3] *Id.*, p. 36.

[4] After citing this standard, one judge has written "I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to "hesitate to act in a matter of importance," what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?", *See*, Jon O. Newman (1993), "Beyond "Reasonable Doubt"", *New York University Law Review*, Vol. 68, No. 5, p. 4.

guilt and conviction of the accused and that this belief will last for a considerable period of time. But making such determination prospectively is very difficult, if not impossible. The problem with this definition is that it puts too much emphasis on the subjective belief of the fact-finder instead of laying down objective criteria such as the level of evidence required. This, in turn, may result in conviction being doled out without a high degree of guilt having been established thereby defeating the very purpose of the beyond a reasonable doubt standard.

d) Doubt for which a reason could be given:

Here the beyond a reasonable doubt standard is explained by requiring that the fact-finder is to find the defendant not guilty if, after considering the evidence, he has a lingering doubt about such guilt for which a reason can be given. By simply requiring 'a reason' (and failing to qualify the degree), this description of the standard has the effect of distorting what it stands for; it fails to incorporate the qualification of the doubt as 'reasonable'.

e) High probability:

Under this definition, a belief beyond reasonable doubt is considered as one that is highly probable. It is an attempt to quantify the degree of likelihood to be attached to the truth of a belief. The fact-finder is to convict the defendant when he is convinced of the guilt of the defendant close to certainty measured by a numerical degree of confidence. This formulation, though advocated by some legal scholars,[5] has been expressly rejected by various courts.[6] An objection leveled against this definition is that it involves an explicit admission that the criminal justice system admits a certain number of wrongful convictions. This in turn, it is argued, will erode public confidence in the whole process.[7]

Proponents of this view thus hold that it is better for us to refrain from expressly admitting the possibility of wrongful convictions although it is impossible to set up a perfect system of criminal procedure that avoids all errors. Another problem with attaching mathematical probability to the standard is that there is no agreement as to where it is to be set. The first attempt to quantify beyond a reasonable doubt was made in 1970 where, after a research, it was concluded that the standard stood between a 0.70 and 0.74 probability. Others

[5] One writer, for example, stated "…the criminal beyond-a-reasonable-doubt standard is akin to a probability greater than 0.90 or 0.95. Perhaps, as most courts have ruled, the prosecution is not allowed to quantify "reasonable doubt," but that is only an odd quirk of the math-phobic legal system" (Edward K. Cheng (2012), "Reconceptualizing the Burden of Proof", *122 Yale Law Journal* (2012) Working Draft of June 18, 2012), p. 1.

[6] See, for example, McCulloch v. State, 99 Nev. 72, (1983).

[7] *Id*, p. 46.

who have tried to put it in those terms have generally stated that it is much higher than the civil standard of 0.5 probability.[8]

Even if the problem of defining the standard could be overcome, there are a host of issues that inevitably stem from the very nature of human decision-making. Although fact-finders may do their level-best to base their decisions according to the dictates of the law, there are certain extraneous factors that will affect their decisions.[9] All these issues attest to the fact that the ultimate decision in a criminal case will be affected by factors external to the legal system itself. Properly defining the standard of proof will do little to dispel these issues because the standard aims at setting the final degree of certainty required of decision-makers while these factors will entail a variation on the starting point for analysis. Even if we were to succeed in our attempt to define what is meant by the *beyond a reasonable doubt standard*, some lingering problems that are embedded in the decision-making process remain. This by no means suggests that such an attempt is futile; it merely points out that defining the standard is not a panacea to the problems. We would go a long way in the right direction if we manage a more precise definition of the standard of proof in a legal system as it will help to significantly reduce, if not do away with, the element of arbitrariness.

1.2 Scope of the Standard

When we say the prosecutor has the burden to prove the crime beyond a reasonable doubt, it implies that each element of the crime needs to be proved by this high threshold. What constitutes 'elements of the crime' is a matter to be determined by the substantive criminal law. While this is the general rule, there are certain issues that are considered exceptions to it. The two main areas that

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[8] *See*, for example, Robert D. Bartels (1981), "Punishment and the Burden of Proof in Criminal Cases: a Modest Proposal", 66 *Iowa Law Review* 899, p. 900.

[9] *See* Jack B. Weinstein and Ian Dewsbury (2006), "Comment on the Meaning of 'Proof Beyond a Reasonable Doubt' ", *Law, Probability and Risk*, (Advance Access publication on January 15, 2007), p. 6; They identified the following external factors affecting the decision of judges:

- personal experience,
- degree of confidence in the police, the prosecutor, the court and the justice system as a whole,
- perception of the danger of the moment,
- defendant's past crimes or problematic life style,
- beliefs about the future dangerousness of the defendant.

raise issues of compatibility with the principle are: presumptions, and affirmative defenses.[10]

1.2.1 Affirmative Defenses

Writing about the English law of evidence, Emson notes that '[A]s a general rule, the prosecution are obliged (i) to prove that the accused committed the *actus reus* of the offence with the requisite *mens rea* and (ii) to disprove any defense (in respect of which the accused has discharged a mere evidential burden).'[11] The accused is required to discharge an evidential (and not legal) burden when it comes to affirmative defenses.[12] Therefore, in addition to proving the elements of a crime, the prosecutor need also prove the absence or non-applicability of any defenses the accused may raise.

Murphy argues that '…such cases do not violate [the beyond a reasonable doubt standard]… because the accused is not called upon to disprove any essential element of the charge; they merely provide that if he raises an affirmative defense or an issue of his own, he may be called upon to prove or adduce evidence in support of such defense or issue."[13] The House of Lords in 2009 similarly held that provisions that put on the accused an evidential burden to prove affirmative defenses were compatible with the notion of presumption of innocence found in the European Convention on Human Rights.[14]

1.2.2 Presumptions

As regards the effect of presumptions on the burden of proof, Murphy notes two views.[15] According to the first view, a presumption creates an evidential burden on the opponent i.e. 'the presumed fact will be taken as proved unless the opponent produces some evidence to rebut the presumption.'[16] If the opponent succeeds in doing this, the normal burden of proof comes to be applied as if the presumption never existed. The second view, on the other hand, holds that a presumption has the effect of shifting the legal burden of proof of the presumed fact to the opponent who will be required to disprove it to the applicable

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[10] *See* Vivian Deborah Wilson (1980), "Shifting Burdens in Criminal Law: A Burden on Due Process", *Hastings Constitutional Law Quarterly*, Vol. 8, Issue 4, p. 733; Chief Justice M. Monir (2006), *Textbook on the Law of Evidence* 7th Ed., (New Delhi: Universal Law Publishing), p. 55.

[11] Raymond Emson (2004), *Evidence* 2nd Ed., (Basingstoke: Palgrave Macmillan), p. 424.

[12] Gavin Dingwall (2002), "Statutory Exceptions, Burdens of Proof and the Human Rights Act 1998", *Modern Law Review*, Vol. 65, Issue 3, p. 451.

[13] Peter Murphy (2007), *Murphy on Evidence* 10th Ed., (Oxford University Press), p. 82.

[14] Dingwall, *supra* note 12, p. 451.

[15] Murphy, *supra* note 13, p. 74.

[16] *Ibid.*

standard of proof. However, this distinction is relevant only to civil cases because in criminal cases presumptions do not have the effect of shifting the legal burden of proof. When a presumption is applied in a criminal case, it will only have the effect of shifting the evidential burden to the accused.[17]

Since presumptions in criminal proceedings raise issues of compatibility with the presumption of innocence and the beyond a reasonable doubt standard, different jurisdictions have come up with certain criteria that must be met for a presumption to be found in line with these notions. The US Supreme Court, for example, developed several tests such as "comparative convenience" and "rational connection."[18] The European Court of Human Rights also stated that the European Convention does not prohibit the use of presumptions, but that they should be kept 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense.'[19] The British jurisprudence on the matter, recognizing that the presumption of innocence is not absolute, reflects a two-stage test to check if the exceptional measure of shifting the evidential burden of proof to the defendant is justified: a clear and proper public objective and a reasonable relationship of proportionality.[20]

Despite the justifications and explanations given by courts and writers, the issues discussed above pose at least a theoretical problem since shifting the evidential burden of proof goes contrary to the requirement that the prosecution prove all elements of the crime by a high degree of proof. They result in an unequal treatment between cases in which these 'exceptions' come into operation and other ordinary cases. Let us take a murder case as an example. Ordinarily the prosecutor would be required to prove- beyond a reasonable doubt- every element of the crime of homicide against the defendant. If, on the other hand, the defendant is to raise self-defense as a justification, he will bear the evidential burden having to prove it, as some argue, on the balance of probabilities standard. In this latter case we are implying that a wrongful conviction and a wrongful acquittal are equally undesirable errors thereby contradicting the very purpose of the standard of proof being set high in criminal cases.[21]

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[17] *Id.*, p. 75.
[18] Wilson, *supra* note 10, p. 742.
[19] Salabiaku v. France, 13 EHRR, (1988), p. 379.
[20] Dingwall, *supra* note 12, p. 457.
[21] Laudan, *supra* note 1, p. 113.

2. The Standard of Proof in Criminal Proceedings in the Ethiopian Legal System: The Normative Framework

The standard of proof in criminal proceedings is not clearly stipulated in any piece of Ethiopian legislation. The absence of a codified and comprehensive law of evidence in Ethiopia requires us to explore the diverse substantive and procedural laws in order to examine a particular evidentiary notion such as the standard of proof. Studying this standard in criminal proceedings requires a discussion of the related concept of presumption of innocence of the accused.

The beyond reasonable doubt standard is a definitional element of the notion of 'presumption of innocence' of the defendant in criminal proceedings. By requiring that the fact-finder begins his inquiry 'with a skeptical mindset'[22], the presumption of innocence ensures that such presumption is rebutted if and when the prosecution proves the guilt of the defendant by a high standard of proof namely the beyond a reasonable doubt standard. The presumption of innocence is a fundamental principle that has gained recognition in a number of countries with diverse legal systems.[23]

Since the presumption defines the starting point of the fact-finding at trial, it necessitates the introduction of powerful evidence to prove the contrary i.e. the guilt of the accused. As Chambers notes, 'the presumption of innocence and reasonable doubt work in tandem to produce sound verdicts while serving similar, but not identical, purposes…'[24] As will be subsequently argued, therefore, in a legal system where presumption of innocence is recognized, the beyond reasonable doubt standard follows as the standard of proof required of the prosecution to prove guilt before the court can lawfully convict the defendant. This section examines the laws and other instruments in the Ethiopian legal system relevant to the issue of standard of proof in criminal proceedings.

2.1 The FDRE Constitution

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) recognizes the principle of presumption of innocence in no uncertain terms. It provides that "[d]uring proceedings accused persons have the right to be presumed innocent until proved guilty according to law..." [25] There is a discrepancy between the Amharic and English versions of this constitutional

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[22] Henry L. Chambers, Jr. (1998), "Reasonable Certainty and Reasonable Doubt", *Marquette Law Review*, Vol. 81, No. 3, p. 18.

[23] *Ibid.*

[24] *Id*, p. 20.

[25] *Constitution of the Federal Democratic Republic of Ethiopia,* Proc. No. 1/1995, (Hereinafter the FDRE Constitution). Art. 20 (3).

provision. Roughly translated the Amharic states that accused persons have the right 'not to be presumed guilty in legal proceedings'.[26] This is also the protection accorded to the accused under the previous constitutions and is much narrower than the concept of presumption of innocence. Although the Amharic is the binding version,[27] we must look into whether this discrepancy in terminology is an intentional measure or a mere semantic error.

The rights and freedoms found in the Third Chapter of the Constitution are to be interpreted in light of the Universal Declaration of Human Rights (UDHR) and the International Covenants on Human Rights and international instruments adopted by Ethiopia.[28] The UDHR, ICCPR and several other international instruments recognize the right of the accused to be presumed innocent.[29] According to these international instruments and the FDRE Constitution, this presumption of innocence will be rebutted when the defendant is 'proved guilty according to the law', but they do not specify the standard of proof. The Human Rights Committee has discussed the meaning of presumption of innocence under General Comment 32 in which it clarified the obligation of states parties to the Covenant by specifying that the presumption requires the prosecution to prove the charge and '…guarantees that no guilt can be presumed until the charge has been proved *beyond reasonable doubt*…'[30] (emphasis added). The beyond a reasonable doubt standard can, therefore, be regarded as part of the constitutionally guaranteed right of the accused to be presumed innocent.

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[26] *Ibid.* The Amharic version states: "[የተከሰሱሰዎች] በፍርድ ሂደት ላይ ባሉበት ጊዜ በተከሰሱበት ወንጀል እንደ ጥፋተኛ ያለመቆጠር... መብት አላቸው።"

[27] FDRE Constitution, Art. 106.

[28] FDRE Constitution, Art.13 (2).

[29] *See Universal Declaration of Human Rights*, (10 December 1948, 217 A (III)), Art. 11 (1); *International Covenant on Civil and Political Rights*, (16 December 1966, United Nations, Treaty Series, Vol. 999), Art.14 (2); *African Charter on Human and People's Rights* Art. 7(1)(b); *African Charter on The Rights and Welfare of the Child* Art. 17(2)(c)(i); *European Convention on the Protection of Human Rights and Fundamental Freedoms*
Art. 6(2); *Convention on the Rights of the Child* Art. 40(2)(b)(i); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* Principle 36(1).

[30] UN Human Rights Committee (2007), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, (23 August 2007, CCPR/C/GC/32), para. 30.

2.2 The Criminal Procedure Code

Promulgated in 1961, the Criminal Procedure Code is still applicable as the basic procedural law regulating criminal proceedings in Ethiopia.[31] It has predominantly adopted the adversarial system and is influenced by the Malayan Code of Criminal Procedure.[32]

The rules governing trial do not clearly stipulate the degree of proof that is required. There are, however, some provisions from which inferences can be made. After the case for the prosecution is concluded, the court is to weigh the presented evidence.[33] Upon such evaluation, if it finds that what is presented by the prosecution (if unrebutted) would not suffice for a guilty verdict, then the court is to enter an order of acquittal without the need to call the accused to defend himself. If on the other hand, the prosecution's evidence is found sufficient to warrant conviction, then the accused will be called to enter into his defense.[34] Article 141 reads: "When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant a conviction, shall enter an order of acquittal."[35] The

[31] Since the power of promulgating the procedural laws (civil or criminal) is not listed as a federal power in the Constitution, it is arguably within the mandate of the Regional States to enact their own criminal procedure laws. However, no Regional State has passed its own law of criminal procedure to date nor has the federal government enacted a law on the matter; hence the 1961 Code remains the major law that is operational and governs the process of criminal litigation all over the country. It is important to note that even if no other comprehensive law has been promulgated, there are pieces of legislation, both federal and regional, that provide for certain areas in deviation from, or in addition to the Code. *See*, Wondwossen Demissie Kassa (2012), *Ethiopian Criminal Procedure: A Textbook*, (Addis Ababa: American Bar Association), p. 22-23.

[32] Stanley Z. Fisher (1969), *Ethiopian Criminal Procedure, A Sourcebook* (Addis Ababa: Haile Selassie I University), introduction, p. xii.

[33] Worku Yaze explains "The court is supposed to assess the evidence adduced by the prosecution and foresee the probable outcome in case the accused fails to adduce defense and evidence. That is, in order for the court to order the accused to enter into his defense, the court should weigh the evidence adduced by the prosecution and, on the basis of the evidence, it should be convinced that it would automatically convict the accused in case he has no defense" Worku Yaze Wodage (2010), "Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law" in Wondwossen Demissie (Ed.), *Human Rights in Criminal Proceedings: Normative and Practical Aspects, Ethiopian Human Rights Law Series*, Vol. III, p. 128.

[34] *Criminal Procedure Code of Ethiopia*, Proclamation 185/1961, (hereinafter Cr. Pro. Code), Art. 142. Cr. Pro. Code, Art. 142.

[35] Cr. Pro. Code, Art. 141.

Amharic, roughly translated, states: 'After the public prosecutor concludes his case, if it is found that [the evidence] is *insufficient to find the defendant guilty* without the need to present evidence to rebut it *and if the court finds the evidence [of the prosecution] insufficient*, the court shall order the acquittal of the accused' (emphasis added).[36] The question then is what the Code means by evidence that 'would warrant a conviction'.[37]

As discussed above, the Criminal Procedure Code was greatly influenced by the Malayan Code of Criminal Procedure. Article 141 of our Code is a verbatim copy of Section 180 of the Malayan Code which provides for the same procedure.[38] It is thus safe to conclude that this provision in our Criminal Procedure Code was meant to carry the same meaning as its Malayan counterpart. In explaining the meaning of Section 180 of the Malayan Code, Fisher cites a case entertained by the High Court of Malaya in 1946. In this case, the Court reasoned that it is the duty of the prosecution to prove the guilt of the accused and 'only evidence beyond all reasonable doubt' is sufficient to warrant conviction.[39] Given its close connection with this Code and the special similarity of this particular provision, one may argue that the Ethiopian Criminal Procedure Code also had the beyond a reasonable doubt standard in view. This is buttressed by the fact that the Code was fashioned after the adversarial system of procedure in which this standard is an established norm. Therefore, there are strong reasons to conclude that the Criminal Procedure Code provision is to be understood as implying the beyond a reasonable doubt standard.

Because of British influence in the country since 1941, such adversarial elements in the Ethiopian legal system were prevalent.[40] Since we now have a

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[36] The Amharic version reads "**ዐቃቤ ሕጉ ማስረጃውን አሰምቶ ከጨረሰ በኋላ ማፍረሻ ማስረጃ ማቅረብ አስፈላጊ ሳይሆን ተከሳሹን ጥፋተኛ የሚያደርገው ሆኖ ባልተገኘ ጊዜ እና ማስረጃውን በቂ ሆኖ ሳያገኘው የቀረ እንደሆነ ተከሳሹ እንዲለቀቅ ፍርድ ቤቱ ያዛል**" Art. 141 Cr. Pro. Code.

[37] Relying on *a contrario* reading of the Amharic version of this provision, some argue that what is implied in this provision is the 'clear and convincing' standard of proof; some court decisions also reflect this standard.

[38] Sec. 180 of the Malayan Code of Criminal Procedure reads: "When the case for the prosecution is concluded, the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defense." in Fisher, *supra* note 32, p. 311.

[39] *Ibid.*

[40] Simeneh Kiros Assefa (2012), "The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process", *Mizan Law Review*, Vol. 6, No. 2, pp. 293- 294. Note: The corresponding standard of proof used in inquisitorial systems is what's known as *conviction in time* of the judge. Similar to the beyond reasonable doubt standard, this sets the bar high for the prosecution to prove the crime by requiring the judge to favor the defendant in cases of doubt. *See* Mirjan R. Damaska

constitutional provision upholding the principle of presumption of innocence, the argument for applying this standard is all the more relevant.

The other issue that needs to be addressed is what degree of proof is required of the defendant to rebut the evidence of the prosecution once he is called to enter into his defenses. It is argued that the accused need only produce evidence that would taint the prosecution's evidence with reasonable doubt; he is not required to prove more.[41] When the case for the defense is concluded, the court is to give its final judgment on the guilt of the accused.[42] Hence, on the conclusion of all the evidence, first by the prosecutor and then by the defendant, if the court finds that there exists a reasonable doubt as to the guilt of the accused then it is to acquit him; but if his guilt has been established by the prosecutor beyond a reasonable doubt, then the defendant will be found guilty as charged.

2.3 The Draft Evidence Rules

The Draft Evidence Rules was a document prepared in 1967 that never came into force. It was meant to supplement the Criminal Procedure Code of 1961 and the Civil Procedure Code of 1965. Although not a binding source of law, it has influenced the Ethiopian legal community and court decisions in terms of providing a reference for basic evidentiary notions. It still forms the major part of what law students study in their law of evidence classes.

Article 81 of the Draft states that the burden of proof lies on the party who wishes to rely on the facts he asserts.[43] In light of the provisions of the Criminal Procedure Code, the burden of proof in criminal cases lies on the prosecution. Based on the provision discussing exceptions to the burden of proof in criminal cases,[44] we can infer the following points: (1) The Draft Evidence Rules recognize the beyond a reasonable doubt standard; (2) What is required of the accused while rebutting the case presented by the prosecution when called to enter into his defenses is to raise reasonable doubts about what is presented by the prosecutor, nothing more; (3) If the accused wishes to rely on any legal exception, he will bear the evidential burden of proof (while the legal burden remains with the prosecutor); and (4)The prosecution bears the burden of proving each and every element of the charged crime.

(1973), "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", *Faculty Scholarship Series*, Paper 1591, p. 558, available at <http://digitalcommons.law.yale.edu/fss_papers/1591>

[41] Worku, *supra* note 33, p. 130.

[42] Cr. Pro. Code, Art. 149.

[43] *Draft Evidence Rules*, Art. 81, (1960 E.C., Unpublished).

[44] *Id*., Art. 84.

2.4 The Criminal Justice Administration Policy

The Criminal Justice Administration Policy was adopted by the Council of Ministers in March 2011 to direct basic governmental actions and decisions in enforcing the criminal justice system in line with constitutional principles, rules and values.[45] Its objectives include improving the various aspects of the criminal justice system and providing indicators for laws within the system that need to be introduced and others that need amendment.[46]

In outlining the principles and strategies on which it is based, the Policy confirms the commitment to uphold and enforce constitutional rules and principles as well as the various international legal instruments to which Ethiopia is a party. 'The decision-making process in criminal proceedings', it continues, shall be one in which 'the innocent are properly sorted out apart from the guilty.'[47] The Policy is applicable on all bodies and institutions that take part in criminal matters and the criminal justice system.[48]

Part Four of the policy contains provisions that are meant to improve the effectiveness and fairness of the criminal justice system. In a section titled 'circumstances under which the burden of proof may shift to the accused', it envisages the possibility that the defendant may be required to prove his innocence after the public prosecutor has ascertained only certain basic facts.[49] However, the procedure that is laid down under our Criminal Procedure Code and the presumption of innocence dictate otherwise.

The purpose of the notion of presumption of innocence and setting the standard of proof as high as the beyond a reasonable doubt standard is to protect innocent individuals from wrongful convictions. It stems from the assumption that it is better to err on the side of impunity rather than find an innocent person guilty. And this is because of the serious consequences that may result from the case as well as the stigma associated with being a convict. The more serious the crime, the more we must insist on the proper enforcement of this high standard (since serious crimes entail dire consequences such as long incarceration or even death). The Criminal Policy, on the other hand, has allowed relaxing of this standard in some of the most serious crimes in our system.

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[45] Council of Ministers of the FDRE (2011), The Criminal Justice Administration Policy of 2011, (Hereinafter Crim. Policy), Sec. 1.1; For a detailed discussion of this policy and its implications, *see* generally, Simeneh, *supra* note 40, pp. 282- 284.
[46] Crim. Policy, Sec. 1.3.
[47] *Id.*, Sec. 1.4.
[48] *Id.*, Sec. 1.6.
[49] *Id.*, Sec. 4.4.

2.5. The Draft Criminal Procedure Code

The drafting of a new code of criminal procedure has been underway for a number of years now. It is meant to be applicable in both Federal and State courts in the country.[50] The draft has undergone several revisions and substantial changes may take place before it is submitted to parliament and possibly become a binding law. The following discussion is based on the Draft by the Ministry of Justice as it stood in 2003 E.C. (2011) and numerous changes may have been made to it since. Its provisions relating to the issue of burden and standard of proof are discussed here as useful indicators of where our law is generally headed in dealing with these issues.

The Draft reiterates the constitutional principles of presumption of innocence and freedom from self-incrimination.[51] It states that the prosecution bears the burden to prove and ascertain the crimes charged while the accused has the right to defend himself. However, the same provision goes on to provide for exceptions to this rule. It states: "Notwithstanding the principle [set above] where the accused is charged with crimes against the constitutional order, terrorism, corruption or conspiracy, or when the law provides, the burden of proof may shift to the accused upon the prosecution proving the primary facts."[52] Another provision adds that the accused shall bear the burden of proof if he wants to rely on an affirmative defense or to prove alibi.[53] The Draft further stipulates that 'it shall be considered that the accused has committed the offence when the charge has been proved sufficiently.'[54] The court is to record a verdict of not guilty and acquit the defendant when the prosecutor fails to prove the charge sufficiently or the defendant, through his evidence, sufficiently proves that he did not commit the crime.[55]

Although this Draft has accomplished the commendable task of filling the multiple gaps found in the 1961 Criminal Procedure Code, it still leaves many questions unanswered in relation with burden and standard of proof. In providing exceptions to the rule that the prosecution bears the burden of proof, it does not specify whether it is the legal or the evidential proof that shifts to the

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[50] Ministry of Justice (2003 E.C), *Draft Criminal Procedure Code*, (Unpublished, Amharic), Preamble, Art. 1.

[51] *Id*., Art. 5; The Amharic version reads "ጥፋተኛ ሆኖ አለመቆጠር" which is also the expression the FDRE Constitution uses under Art. 20(3) to describe presumption of innocence.

[52] *Id*., Art. 5(3).

[53] *Id*., Art. 380.

[54] *Id*., Art. 396.

[55] *Ibid*.; It reads: "ዓቃቤ ሕጉ ክሱን በበቂ ሁኔታ ካላረጋገጠ ወይም ተከሳሹ ባቀረበው የመከላከያ ማስረጃ ወንጀል አለመፈፀሙን በበቂ ሁኔታ ካረጋገጠ ፍርድ ቤቱ ተከሳሽን በነፃ ያሰናብተዋል።"

defendant.[56] It allows such shift in very serious crimes such as terrorism. In stipulating the requisite standard of proof, it simply provides that the charge needs to be 'sufficiently proved' which is far from an adequate description. What does 'sufficient' mean? Should the court convict the accused on the balance of probabilities or do we require a higher standard? It further states that the court is to acquit the defendant when he 'sufficiently proves that he did not commit the crime.' This clearly deviates from the presumption of innocence and the principle that the prosecution bears the burden of proof, to which the Draft Criminal Procedure Code claims to be committed. The Draft has thus failed to discharge its expressly stated objectives of upholding constitutionally guaranteed rights of individuals.

3. Presumptions in Ethiopian Criminal Law

Ethiopia's 2004 Criminal Code stipulates that "[a] crime is only completed when all its legal, material and moral ingredients are present."[57] The same provision which indicates the *legal*, *material* and *moral* elements of a crime states that "[a] crime is punishable where the Court has found the crime proved and deserving of punishment."[58] A joint reading of these two stipulations shows us that all the three elements have been proved for a Court to find it proved and 'deserving of punishment'. Art. 57(1) of the Code reiterates the requirement of the existence of the mental element by stating: "No one can be punished for a crime unless he has been found guilty thereof under the law. A person is guilty if, being responsible for his acts, he commits a crime either intentionally or by negligence." And since, as discussed under Section 2 above, the requisite standard of proof for criminal proceedings in the Ethiopian legal system, is expected to be beyond a reasonable doubt, all the three elements of a crime need to be proved at the thresholds of this standard.[59]

There are, however, some provisions that presume the existence of one or more of these three ingredients thereby relieving the prosecution from the need to prove them. One such provision is Article 43 that provides for 'liability for

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[56] Although these two are theoretically distinct, one scholar validly questions the practical significance of distinguishing between the two when the evidential burden is shifted to the accused. He argues, since it is nearly impossible for the defendant to discharge this burden, it is equivalent to requiring him to bear the legal burden. *See* Dingwall, *supra* note12, p. 457.

[57] *Criminal Code of the Federal Democratic Republic of Ethiopia*, Proc. No. 414/2004, (Hereinafter Cr. Code), Preamble, Art.23(2).

[58] Cr. Code, Art. 23(4).

[59] For a detailed discussion of elements of a crime that need to be proved beyond a reasonable doubt *See* Simeneh, *supra* note 40, pp. 289-291 (Sec. 2.2.1.).

crimes committed through the mass media'.[60] By presuming the existence of the moral element of the crime, the provision not only relieves the prosecutor from having to prove it, but also forbids the defendant from introducing any evidence to prove its absence.

A provision headed 'Presumption of intent to obtain advantage or to injure' also equates the material element with the criminal act and relieves the prosecutor of the need to prove the mental element of the crime- an essential ingredient that needs proof as per Art. 23 of the Code.[61] In this connection Simeneh has noted that '…this presumption is rebuttable and the defendant may produce contrary evidence. However, disproving a presumed state of mind is more difficult than proving it. Thus, the burden on the defendant is unreasonable.'[62] Article 419 on 'Possession of unexplained property' also requires the defendant to give a 'satisfactory explanation' of the sources of such income/property for possession of which he was charged.[63]

Article 477 of the Code criminalizing 'Dangerous vagrancy' raises some questions. According to this provision, a person may be found guilty of this crime when the prosecution proves that such person possessed 'weapons or instruments fitted by their nature to the commission of a crime.'[64] Another provision on the use of poisonous or narcotic and psychotropic drugs also criminalizes any person who 'plants, buys, receives, makes, possesses, sells or delivers' these substances.[65] At first glance these words may seem to require the prosecutor to prove intention. But a question arises whether it is sufficient to prove (beyond a reasonable doubt) that the defendant intentionally planted, bought or possessed such substance, or whether the prosecutor should go on to prove that the defendant knew of the nature of the substance under his control. Moreover the question as to who bears the burden of proving that the accused had this knowledge deserves attention. These provisions seem to imply that

[60] Cr. Code, Art. 43(5).

[61] Cr. Code, Art. 403; it reads "Unless evidence is produced to the contrary, where it is proved that the material element (the act) has been committed as defined in a particular Article providing for a crime of corruption perpetrated to obtain or procure undue advantage or to cause injury, such act shall be presumed to have been committed with intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person."

[62] Simeneh, *supra* note 40, p. 304.

[63] The Cassation Bench of the Federal Supreme Court has given a recent ruling on this provision which is discussed in Section 4.

[64] Cr. Code, Art. 477(2); *See* also *Vagrancy Control Proclamation*, Proc. No. 384/2004, Art. 4 expanding on the definition of 'Vagrancy'.

[65] Cr. Code, Art. 525 (4)(a).

knowledge of the nature of the object is presumed and it is up to the defendant to prove the absence of such knowledge.

Some controversies have ensued from similar provisions found in the laws of other countries. Criticizing the Misuse of Drugs Act 1971 of England (which also stipulated that possession was to be criminalized), Dingwall wrote:[66]

> ... [P]ossession is an inherently 'neutral' concept that does not in itself carry any implication of moral blameworthiness. [The requirement of 'possession' under… the… Act 1971] is in effect an offence of strict liability as there is no further *mens rea* requirement that the defendant has to be aware that the item he was in possession of is a controlled drug.

Yet another provision that introduces a presumption against the defendant is found in Art. 675(3) according to which the mental element of 'intent to obtain… an unjustifiable enrichment' required for this crime of breach of trust is presumed to exist where the defendant is 'unable upon call, to produce, or repay the thing or sum entrusted…'[67]

In addition to the crimes specified in the Criminal Code, other pieces of legislation promulgated over the years have added to the list of offences that are punishable as crimes in Ethiopia. Some of these proclamations have some import on the issue of standard of proof. The Anti-Corruption Proclamation of 2005 contains a provision on the standard of proof that is required to prove that the defendant 'benefited from criminal conduct' and proof of 'the amount to be recovered.' In these cases, the provision holds that the standard of proof 'shall be that applicable in civil proceedings.'[68] The prosecutor need only show the existence of some basic facts for the evidential burden to be shifted to the defendant; the accused is then expected to rebut the presumption of guilt that stands against him.[69]

Likewise, the Value Added Tax Proclamation provides that the manager of an entity 'is treated as having committed the offence [with which the entity itself is charged] and is liable to a penalty under this proclamation.'[70] It provides an exception to this rule by stating that the person will not be liable if the crime was committed without his knowledge or consent and if the person exercised 'the degree of care, diligence and skill that a reasonably prudent person would

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[66] Dingwall, *supra* note 12, p. 454.

[67] Cr. Code, Art. 675 (3).

[68] *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation*, Proc. No. 434/2005, Art. 33.

[69] *See*, generally, Hiwote Mekonnen (2001), *Burden of Proof and Standard of Proof under the Anti-Corruption Special Procedure and Rules of Evidence Proclamation*, (Faculty of Law, AAU, Unpublished).

[70] *Value Added Tax Proclamation*, Proc. No. 285/2002, Art. 56(1).

have exercised in comparable circumstances to prevent the commission of the offence.'[71] Although it does not specify who is to prove this exception, it is presumably up to the defendant to show the existence of these facts. The Turnover Tax and the Excise Tax proclamations also contain similar provisions.[72]

The presumptions contained in these legislations have the effect of shifting the evidential burden of proof to the accused and he is required to adduce evidence to prove otherwise.[73] Similar legislations that shift the evidential burden of proof to the defendant are found in other legal systems that recognize presumption of innocence and the principle of proof beyond a reasonable doubt. In a case contesting such a law in England, the House of Lords held that the presumption of innocence protected in the European Convention of Human Rights is not absolute and hence, not every reverse burden of proof would be contrary to the Convention.[74] The European Court of Human Rights similarly held that provisions containing a reverse burden of proof can be compatible with the presumption of innocence as long as they are 'confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense.'[75] The Privy Council found such limitation on the right to be presumed innocent as an 'implicit flexibility' that 'allows a balance to be drawn between the interest of the person charged and the state.'[76]

The recognition of presumption of innocence under the FDRE Constitution, some argue, is an absolute right that admits no limitations.[77] For proponents of

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[71] *Id*., Sub. 3.

[72] *See Turnover Tax Proclamation*, Proc. No. 308/2002, Art. 33; *Excise Tax Proclamation*, Proc. No. 307/2002, Art.24; *Customs Proclamation*, Proc. No. 622/2009, Art.92(3). See also, *The National Bank of Ethiopia Establishment Proclamation*, Proclamation No. 591/2008, Art. 26.

[73] Here the standard of proof required of the defendant is the civil standard of 'preponderance of evidence.'

[74] Emson, *supra* note 11, p. 428.

[75] Salabiaku v. France (1988) 13 EHRR 379 at 388; Hoang v. France (1992) 16 EHRR 53 at 78 (as quoted in *Id*., p. 428); Emson lays down certain criteria that need to be met for such provisions to be compatible with the presumption of innocence. Such shifting of legal burden must be: 1.directed towards a legitimate public objective, 2.proportional, and 3. Necessary (in the sense that an evidential burden on the accused would not suffice to achieve the same objectives). (*See*, generally, Emson, *supra* note 11, pp. 427- 434).

[76] Attorney-General of Hong Kong v. Lee Kwong-Kut [1993] 3 WLR 329. (as quoted in *Id*., p. 429).

[77] Simeneh, *supra* note 40, p. 288; the House of Lords however found that the presumption of innocence is not absolute and some derogation in some circumstances is acceptable. (See Dingwall, *supra* note 12, p. 457).

this view, these subsequent pieces of legislation that shift the evidential burden of proof to the defendant would be clearly unconstitutional. Even if we were to accept certain limitations to the principle, whether our laws would meet the strict criteria set out for compatibility like those of England is debatable.[78]

4. The Practice of Ethiopia's Federal Supreme Court (FSC) regarding Standard of Proof in Criminal Proceedings

After briefly touching on court practice in general in relation to the standard of proof, this section provides a summary of select cases decided by the Federal Supreme Court Cassation Bench and analyzes them to identify their implications on the issue.

4.1 Court Practice: General Overview

Although the writer believes that the *beyond a reasonable doubt* standard is recognized under the Ethiopian legal system, the fact remains that it is nowhere mentioned in any binding legal instrument. The legal academia seems to be of the opinion that the beyond a reasonable doubt standard can be inferred from, *inter alia*, the constitutional principle of presumption of innocence and hence courts should apply this rigorous standard in criminal cases.[79] Legal research done in related topics seem to take the existence of the beyond a reasonable doubt standard for granted.[80] The practice, on the other hand, depicts a completely different picture with various courts using very different formulations of the degree of proof required of the prosecutor to prove the guilt of the defendant. Although one may frequently find the beyond a reasonable doubt in older judgments given by Ethiopian courts, the current trend seems to have digressed from that. Since there has not been a change in the normative standard, such development appears to have stemmed from a change in the attitude of the legal community. As WorkuYaze duly observes:[81]

> … plenty of court cases prove that Ethiopian courts and litigating parties ritually invoke proof beyond reasonable doubt. This does not mean, however, that they always employ this same standard, understand what it means and apply it in its proper sense. To the contrary, they use various

[78] The House of Lords in England, for example, found that the presumption of innocence is not absolute and some derogation in some circumstances is acceptable. (*See Id*, p. 457).

[79] *See*, in general, Worku, *supra* note 33; Simeneh, *supra* note 40; Wondwossen, *supra* note 31.

[80] *See*, for example, Hiwote, *supra* note 69.

[81] Worku, *supra* note 33, p. 133 (footnote omitted).

expressions including 'beyond doubt', 'beyond the least shadow of doubt', 'absolutely beyond any doubt' and 'beyond reasonable doubt' and so on.

4.2 The Jurisprudence of the Cassation Bench of the Federal Supreme Court

Proclamation 454/2005 has rendered interpretations of law by the Federal Supreme Court, Cassation Division binding on federal and regional courts of all levels.[82] In addition to their significance as part of court practice, therefore, the decisions of the Cassation Bench are binding sources of statutory interpretation on cases that involve similar issues, and other courts are required to abide by the Cassation Bench's interpretations of legal provisions.

Although the Federal Supreme Court Cassation Bench has nowhere clearly stated the standard of proof to be employed in criminal cases, there have been a number of cases brought before it contesting either the sufficiency of evidence upon which lower courts made their decisions or the degree of proof itself. In such cases the Court has rendered its opinion on whether or not the decision of the trial court is justified without however going into an analysis of the standard of proof itself.

We will, here-below briefly look at the relevant parts of thirteen FSC Cassation Bench decisions followed by a brief analysis of their significance and implications. The cases discussed will help us see, not only the position of the Cassation Bench, but also the line of reasoning of various courts from which the Cassation petition is brought.

4.2.1 Court Decisions

a) Minase A. v. Public Prosecutor [83]

The case, charging the defendant with the crime of fraudulent misrepresentation, was first brought before the Benishangul Gumuz High Court, and to the State's Supreme Court on appeal both of which found the defendant guilty as charged. He contested such decision claiming that he was not given the chance to defend himself and brought an application before the FSC Cassation Bench. The Court stated: '[s]ince the guilt of the applicant has been established by *sufficient evidence* in the lower court, we found that neither the process nor the decision

[82] *Federal Courts Proclamation Re-amendment Proclamation*, Proc. No. 454/2005, Art.2(4).

[83] *Minae A. v. Public Prosecutor* (Federal Supreme Court, Cassation File No. 12025) Federal Supreme Court Cassation Bench Decisions, Vol. 4, pp. 115-116.

shows the existence of a fundamental error of law'[84] (emphasis added), and it upheld the decisions of the State courts.

b) Kurat T. et. al. v. Public Prosecutor[85]

The defendants were first brought before the North Gondar High Court in Amhara Region charged with attempted aggravated homicide which, after hearing the prosecution case, acquitted them without calling them to enter into their defenses. The case was brought before the FSC Cassation Bench by the defendants contesting the appellate decision of the Amhara Supreme Court which remanded the case back to the trial court after finding that prosecution witnesses have established the guilt of the accused and that the defendants 'should defend themselves to the extent of their established culpability.'[86] The trial court, after hearing the defense, held that the testimony of the prosecution witnesses has not been rebutted by the defense witnesses and hence found the defendants guilty as charged. The FSC Cassation Bench, after looking into the evidence presented before the trial court, held that the defendants should have been charged under ordinary homicide instead and found them guilty under that provision.[87]

c) Oromia Prosecutor General v. Zerihun T.[88]

In this case, the trial court- namely the West Wolega Zone High Court of Oromia Region, after hearing the case of the prosecution, acquitted the defendant who was charged for the crime of rape. The court held that the prosecutor failed to establish the facts of the case as found in the charge. On appeal, the decision was upheld by the Oromia Supreme Court and the Cassation Bench of the same court. The public prosecutor brought a petition before the Federal Cassation Bench arguing that the decisions of these three courts were erroneous.

The Court noted that five prosecution witnesses, a police report as well as medical evidence were presented before the trial court. It examined whether the

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[84] 'አመልካች በሥር ፍርድ ቤት የቀረበበት ክስ በበቂ ማስረጃ የተረጋገጠበት በመሆኑ... ሂደቱም ሆነ ውሳኔው መሠረታዊ የሕግ ስህተት መፈፀሙን የሚያሳይ ሆኖ አላገኘነውም።' (*Id*., p. 116).

[85] *Ato Kurat T. et. al. v. Public Prosecutor* (Federal Supreme Court, Cassation File No. 22514) Federal Supreme Court Cassation Bench Decisions, Vol. 7, pp. 262-264.

[86] 'ተከሳሾች በዓቃቤ ሕግ ምስክሮች የተመሠከረባቸው ስለሆነ በተመሠከረባቸው መጠን ሊከላከሉ ይገባል፡' (*Id*, p. 262).

[87] It based its decision on Art. 113(2) of the Criminal Procedure Code which provides for the case where an accused may be convicted for a crime other than the one charged with if the crime proved by evidence is of lesser gravity and all its elements are also found as elements of the charged crime.

[88] *Oromia Prosecutor General v. Zerihun T.* (Federal Supreme Court, Cassation File No. 31731) Federal Supreme Court Cassation Bench Decisions, Vol. 7, pp. 278-282.

prosecution's case was sufficient in light of the legal elements of the crime and concluded that the pieces of evidence presented by the prosecutor are complementary and '*properly establish the occurrence of the offence*' (emphasis added).[89] The Cassation Bench criticized the decision of the trial court for disregarding the prosecution evidence stating that every court must rely on evidence presented to it to decide on the contested issues and reach a decision. It went on to add that in this case the evidence brought forth by the prosecutor '*clearly ascertains the commission of the crime'* (emphasis added). And hence the failure on the part of the lower courts to take this evidence into account 'is not only contrary to the law but also very damaging to the cause of justice.' Accordingly the Court quashed the judgments given by the lower courts and ordered that the defendant be called on to defend himself 'since the commission of the crime has been established by the prosecution's evidence.'[90]

d) Amhara Region Justice Bureau Public Prosecutor v. Kebede W.[91]

The defendant was charged with the crime of arson and intentional homicide (or negligent homicide in the alternative) and the case was entertained by an Amhara High Court which found the accused guilty of arson and negligent homicide. The Amhara Supreme Court on appeal found that the mental element that constitutes the crime of negligent homicide was not present and found the defendant not guilty of this crime, but upheld the conviction on the crime of arson.

The Cassation Bench in this case found that the Amhara Supreme Court failed to take into account the whole content of the evidence presented by the public prosecutor. It held that such evidence on the whole indicates that the defendant purposely set the house of the victim on fire and that he should also be held liable for negligent homicide for the persons who died.

e) Jamila M. et. al. v. Federal First Instance Public Prosecutor[92]

The case was first brought before the Federal First Instance Court where the defendants were charged with using arbitrary action to safeguard a right. After recording the defendants' plea of not guilty and hearing the evidence of the

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[89] 'ዓቃቤ ሕግ ያቀረባቸው ማስረጃዎች … እርስ በርሳቸው የሚደጋገፉ ናቸው። ሲጠቃለሉም በጊዜው ተፈፀመ የተባለው ድርጊት በሚገባ መፈፀሙን የሚያረጋግጡ ናቸው።' (*Id*., p. 281).

[90] 'ተጠሪ ዓቃቤ ሕግ ባቀረበው ባቀረበው ማስረጃ የተከሰሰበት ወንጀል ስለመፈፀሙ የተመሰከረበት ስለሆነ ሊከላከል ይገባል ብለናል።' (*Id*., p. 282).

[91] *Amhara Region Justice Bureau Public Prosecutor v. Kebede W.* (Federal Supreme Court, Cassation File No. 35697) Federal Supreme Court Cassation Bench Decisions, Vol. 9, pp. 2-4.

[92] *Jamila M. et. al. v. Federal First Instance Public Prosecutor* (Federal Supreme Court, Cassation File No. 38161) Federal Supreme Court Cassation Bench Decisions, Vol. 9, pp. 11-12.

prosecution, the trial court ordered the defendants to enter into their defenses. The court then held the accused guilty stating that the evidence presented in defense 'do not suffice to rebut the prosecution's evidence.'[93]

Upon the petition presented to it, the Cassation Bench framed the issue on whether or not the action of the defendants constitutes a crime. Citing Article 23 of the Criminal Code, it concluded that not all the three ingredients of the crime are present, and accordingly found that the defendants were free of any criminal liability.

f) Shega M. v. Oromia Region Public Prosecutor [94]

The petition was brought by the defendants contesting the verdict given by the Oromia High Court finding them guilty of homicide which was confirmed by the Oromia Supreme Court and the Cassation Bench of the same court. In answer to the petition, the prosecutor responded that 'since the applicants' guilt has been established *without a doubt* through the evidence presented, the verdict as well as the sentence given by the lower court should stand' (emphasis added).

In this case, the Federal Supreme Court Cassation Bench held that it was not within its jurisdiction to go into 'particulars of the offence and weighing of evidence.'[95] The Court looked into whether the action of the defendants would fall under legitimate defense, and concluded that the defendants had not adduced evidence to prove that the elements of such justification exist. Therefore, it found that the defendants should be held liable under extenuated homicide since the circumstances indicate that they exceeded the limits of legitimate defense.

g) Burqeso W. v. Public Prosecutor[96]

The case was first brought before the High Court in Gamo where the defendant was charged with homicide. The trial court heard the prosecution case and after calling the accused to defend himself, found the accused guilty as charged because he did not present any defense and thus failed to rebut the evidence presented by the prosecution. The defendant, in his petition to the FSC

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[93] 'የአመልካቾች የመከላከያ ማስረጃዎች የዓቃቤ ሕጉን ማስረጃዎች ለማስተባበል በቂ አይደሉም' (*Id*., p. 11).

[94] *Shega M. v. Oromia Region Public Prosecutor* (Federal Supreme Court, Cassation File No. 43501) Federal Supreme Court Cassation Bench Decisions, Vol. 10, pp. 196-199.

[95] 'ስለወንጀሉ አፈፃፀም እና የማስረጃ ምዘና ጉዳይ በዚህ ሰበር ሰሚ ችሎት ሥልጣን የሚታይ ባለመሆኑ በሥር ፍ/ቤት የተረጋገጠውን ፍሬነገር እንዳለ በመቀበል በሕግ ረገድ የሚኖረውን ውጤት ብቻ... መርምረናል።' (*Ibid*.).

[96] *Burqeso W. v. Public Prosecutor* (Federal Supreme Court, Cassation File No. 41248) Federal Supreme Court Cassation Bench Decisions, Vol. 10, pp. 207-208.

Cassation Bench, claimed that the lower court convicted him 'without the public prosecutor proving guilt beyond a reasonable doubt' and upon false evidence.[97]

The Cassation Bench held that the fact that the applicant committed the criminal offence was appropriately established by the public prosecutor through evidence and ascertained by the lower courts.[98] It then stated, similarly with the case discussed above, that it was outside its jurisdiction to examine issues involving weighing of evidence and hence rejected the claim of the applicant.[99]

h) Girma T. v. Federal Ethics and Anti-Corruption Commission [100]

The defendant was charged with a corruption offence, and he brought an application before the Cassation Bench claiming that the public prosecutor had not discharged his burden of proof as required by law and that the evidence produced by the prosecutor in fact proves his innocence. He also contested the decision of the Federal Supreme Court that affirmed the judgment of the trial court. And hence, he argued, the case presented by the prosecution is not sufficient to conclude that he committed the offence and the guilty verdict was based on the false testimony of prosecution witnesses.

The Cassation Bench gave an analysis on the issue of burden of proof in criminal proceedings basing itself on basic principles of evidence law and the applicable legal provisions. It stated that before the defendant is called to enter into his defenses, the court needs to ascertain that the pieces of evidence brought forth by the prosecutor are complementary. Failing this test, it continued, the trial court's decision requiring the accused to defend himself was inappropriate.

> From the provisions of Articles 141 and 149 of the Criminal Procedure Code we can gather that the prosecutor has the duty to prove that the defendant

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[97] '…የወንጀል ድርጊቱን ስለመፈፀሙ ዓቃቤ ሕግ ከምክንያታዊ ጥርጣሬ ውጭ ባላስረዳበት ሁኔታ በሀሰተኛ ማስረጃዎች ጥፋተኛ መባሌ ያላግባብ ነው።' (*Id*., p. 208).

[98] '…ዓቃቤ ሕግ ማስረጃ አቅርቦ አመልካች የወንጀል ድርጊቱን መፈጸሙን በሚገባ አካኂን ማረጋገጡን የበታች ፍርድ ቤቶች ያረጋገጡት ፍሬ ጉዳይ ነው።' (*Id*.).

[99] It stated 'ይህ ችሎት በኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት አንቀጽ 80(3)(ሀ) እና በአዋጅ ቁጥር 25/1988 አንቀጽ 10 ድንጋጌ መሠረት ያለው ሥልጣን መሠረታዊ የሆነ የሕግ ስህተት ማረም እንጂ የማስረጃ ምዘናን ሚመለከት ጉዳይ የማጣራት ሥልጣን ካለመሆኑ አንፃር ሲታይ ተቀባይነት ያለው አይደለም።' (*Id*.) The Court reiterated this position that it was beyond its legal mandate to go into weighing of evidence in a number of subsequent cases. In Volume 12 of the Court's Decisions itself, the Court stated this in the following cases: File no. 59855, File No. 52075, File No. 57446, File No. 64813, File No. 61275, File No. 66767, File No. 55649.

[100] *Girma T. v. Federal Ethics and Anti-Corruption Commission* (Federal Supreme Court, Cassation File No. 51706) Federal Supreme Court Cassation Bench Decisions, Vol. 10, pp. 211-218.

committed the crime mentioned in the charge by sufficient evidence [101]. We say that this burden of proof is sufficiently discharged when the evidence presented have reliability and are capable of proving the charge. Reliability of evidence is to be checked by looking at whether it is coherent and does not contain contradictory elements…

After giving the above explanation the Court decided that the public prosecutor had not effectively discharged his burden of proof and ordered that the defendant be set free.

i) Aregahegn M. v. Federal Ethics and Anti- Corruption Commission[102]

The case was first brought before the Federal High Court which found the defendants guilty of the crime of corruption. The decision was confirmed by the Federal Supreme Court on appeal and one of the defendants brought this petition. In his application for cassation, the defendant contended that the prosecution evidence does not establish his guilt 'beyond the appropriate doubt'[103], that he was convicted and sentenced simply for giving his legal opinion, and that this constitutes a 'fundamental error of law.' The prosecutor responded by saying that the claim of the applicant involves an issue of fact and not an issue of law, and thus the decisions of the lower courts should be upheld.

The Court did not frame the standard of proof as an issue and instead held that the evidence presented does not constitute the crime of corruption and that the defendant should have been charged under a different provision of 'crimes committed in dereliction of duty'.

j) Oromia Region Public Prosecutor v. Eyosiyas A. et. al. [104]

The case was first brought before the East Shoa Zone High Court where the first defendant was charged with aggravated homicide involving two victims while the other four defendants were accused for having participated in the offence in different capacities. The trial court passed a guilty verdict for the first and third defendants and found the other three not guilty stating that they had defended themselves. On appeal, the application of the public prosecutor was rejected and

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[101] 'ተጠሪ አመልካች በክሱ የተገለፀውን የወንጀል ድርጊት በአጥጋቢ ማስረጃ የማስረዳት ግዴታ እንዳለበት ከወንጀለኛ መቅጫ ሥነ-ሥርአት ሕግ ቁጥር 141 እና 149 ድንጋጌዎች ለመረዳት ይቻላል።' (*Id*., p. 216).

[102] *Aregahegn M. v. Federal Ethics and Anti- Corruption Commission* (Federal Supreme Court, Cassation File No. 43049) Federal Supreme Court Cassation Bench Decisions, Vol. 12, pp. 217-220.

[103] 'የዓቃቤ ሕግ ማስረጃ ወንጀል መሥራቱን ከተገቢው ጥርጣሬ ውጪ አላስረዳብኝም።' (*Id.* 218).

[104] *Oromia Region Public Prosecutor v. Eyosiyas A. et. al*. (Federal Supreme Court, Cassation File No. 45595) Federal Supreme Court Cassation Bench Decisions, Vol. 12, pp. 229-237.

the Oromia Supreme Court decided that the guilt of the third defendant had not been properly established and set her free.[105] The prosecutor again appealed to the Cassation Bench of the Oromia Supreme Court which did not accept the claim of the prosecutor and instead held that the first defendant should have been charged under ordinary homicide and reduced his sentence.

In its petition for cassation, the prosecutor contested this last decision concerning the sentence of the first defendant and the verdict of the other four. After framing the issues for each defendant, the Court reversed the decision of the Cassation Bench of the Oromia Supreme Court as regards the first defendant and held that he should be convicted under aggravated homicide as first decided by the trial court. The Cassation Bench gave an analysis of the evidence presented against the second defendant and decided that the lower courts had erroneously acquitted him. It reversed the verdict and convicted him. With regard to the third defendant, the Court noted that the Oromia Supreme Court found that the evidence presented by the prosecutor does not sufficiently establish her participation in the crime. As it had done in a number of cases, it went on to state that weighing of evidence would be beyond the mandate of the court to rectify fundamental error of law; and disregarded the prosecutor's petition against the verdict given on the third defendant. However, the court analyzes the evidence presented before the lower courts. The relevant part of this judgment reads:

> The evidence clearly shows that [the third defendant] intentionally aided the first defendant after commission of the offence in order to save him from prosecution and punishment. And this implies criminal responsibility... Therefore, although this Court cannot go into weighing of evidence, [we found that]… the decision of the Oromia Supreme Court, appellate bench finding the third defendant free of criminal responsibility despite what has been *sufficiently established*… is a fundamental error of law.[106]

The Court gave a similar analysis of the evidence as regards the fourth defendant and reversed the decision of the lower courts finding both the third and fourth defendants guilty of participating in a crime of aggravated homicide.

k) Awet T. v. Tigrai Public Prosecutor[107]

The accused was convicted for participation in an offence of aggravated homicide along with other criminal defendants before the Eastern Zone High Court of Tigrai Region and the decision was confirmed by the Tigrai Supreme

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[105] '…3ኛ ተጠሪ ድርጊቱን መፈጸማቸው በሚገባ አልተረጋገጠባቸውም በሚል ምክንያት የሥር ፍርድ ቤት ውሳኔ ተሸሮ በነጻ እንዲሰናበቱ ተወስኗል።' (*Id*., p. 230).

[106] *Id*., p. 234.

[107] *Awet T .v. Tigrai Public Prosecutor* (Federal Supreme Court, Cassation File No. 57644) Federal Supreme Court Cassation Bench Decisions, Vol. 12, pp. 264- 268.

Court as well as the Cassation Bench of the same court. In his petition for cassation, the defendant claimed that the prosecution evidence presented before the trial court does not establish his participation in the crime and that his conviction, in the absence of any evidence establishing his guilt, was a fundamental error of law.

The Cassation Bench noted that the lower courts that had the power to weigh the evidence presented failed to ascertain in their judgments that the prosecutor discharged his burden of proving the elements of the crime under which the defendant was charged for participation. The Court observed that the judgment of the trial court itself shows that the prosecutor did not prove the criminal liability of the defendant by sufficient evidence.[108] The Cassation Bench stated that the trial court should have acquitted the defendant as per Article 141 of the Criminal Procedure Code without calling on the defendant to enter into his defenses. The Cassation Bench found this decision as one involving a fundamental error of law and reversed it.

l) Afework L. et. al. v. SNNPR Prosecutor[109]

The defendants were charged with aggravated homicide before the Hawassa High Court. The Court found that although the prosecution did not present any direct evidence, the circumstantial evidence was 'sufficient and convincing to reach a conclusion'[110] and found them guilty of ordinary homicide. The decision was confirmed by the SNNPR Supreme Court. In their petition to the FSC Cassation Bench the defendants claimed that their individual guilt had not been ascertained and that none of the prosecution witnesses were direct witnesses.

The Cassation Bench stated that circumstantial evidence is allowed under the Criminal Procedure Code; and that since the prosecution evidence ascertained that the victim's death was caused by the defendants, they shall not be free from criminal liability whether or not their individual participation was proved separately.[111] It also stated that the guilty verdict decided by the trial court was something to be deduced from the evidence, and hence falls outside the mandate

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[108] 'ተጠሪ አመልካች የተከሰሰበትን የወንጀል ድርጊት ወይም ከተከሰሰበት የወንጀል ድርጊት ውጪ የሆነ በወንጀል የሚያስጠይቅ ድርጊት የፈፀመ መሆኑን በበቂ ማስረጃ እንዳላስረዳ የሥር ፍርድ ቤት... በውሳኔው ካሰፈረው መመልከት ችለናል። (*Id*., p. 268).

[109] *Afework L. et. al. v. SNNPR Prosecutor* (Federal Supreme Court, Cassation File No. 75922) Federal Supreme Court Cassation Decisions, Volume 13, pp. 329- 331.

[110] 'በዓቃቤ ሕግ ማስረጃ የተረጋገጡት ፍሬነገሮች... ድርጊቱ በተከሳሾች የተፈፀመ ለመሆኑ በአካባቢ ማስረጃነታቸው በቂና ለድምዳሜ አጥጋቢ መነሻ ሆነው ተገኝተዋል።' (*Id*., p. 329).

[111] 'ለሟች ሞት መንስኤ የሆነው ተግባር በአመልካቾች የተፈፀመ ስለመሆኑ ማስረጃው አረጋግጧል እስከተባለ ድረስ የትኛውን ተግባር የትኛው ተከሳሽ አንደፈፀመ ለይቶ ያስረዳ ማስረጃ አልቀረበብንም የሚለውም ክርክር ቢሆን የየግላቸው የወንጀል ተሳትፎ ተለይቶ አለመታወቁ በሕሳብም ሆነ በተግባር በመተጋገዝ በግብረአበርነት ከፈፀሙት ድርጊት ነፃ ናቸው ከሚል መደምደሚያ ሊያደርስ የሚችል አይደለም።' (*Ibid*.).

of this court which only looks into issues of law. The Court found that even if it is said that it raises an issue of law in relation to whether it complies with Art. 141 of the Criminal Procedure Code… it does not warrant the conclusion that they should have been acquitted before they were called to enter into their defenses. The Court decided that the defendants' guilt had been ascertained by evidence that meets the standard required by the law of criminal procedure.[112]

m) Workneh K. et.al. v. SNNPR Ethics and Anti-Corruption Commission Prosecutor [113]

The case was first brought before the Hawassa High Court where the defendants were charged with a corruption crime of 'possession of unexplained property' under the Criminal Code. After hearing the evidence, the trial court acquitted the defendants finding that the evidence they presented rebutted the case of the prosecution.[114] This decision was confirmed by the SNNPR Supreme Court. The Cassation Bench of this same court reversed these decisions and convicted the defendants stating that the evidence presented by the defense did not have sufficient probative value to rebut the case of the prosecution.

The Cassation Bench of the Federal Supreme Court looked into whether the SNNPR Cassation Bench had the mandate to look into the evidence and render the decision that it did. Basing itself on the provisions of the Federal and Regional constitutions as well as a proclamation of the Region, it found that the SNNPR Cassation Court lacked the jurisdiction to evaluate facts and weigh evidence. The Federal Supreme Court Cassation Bench concluded that the decision given by the SNNPR Cassation Bench has a 'fundamental error of law.'

The Court went further to make a distinction between evaluation of evidence, which lies outside the jurisdiction of cassation, and related issues such as the burden of proof. Since the latter is a question of law, it argued, the Cassation Bench can evaluate the decisions of lower courts and give a decision thereon. The Court examined the elements of Art. 419 of the Criminal Code which criminalizes "possession of unexplained property", in light of the facts of the case. According to this provision it is up to the defendant to give a 'satisfactory explanation' of the source of the property for possession of which he was

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[112] 'አመልካቾች የተከሰሱበትን የወንጀል ድርጊት ለመፈፀማቸው የወንጀል ሕግ ሥርዓት የሚጠይቀውን ሚዛን በጠበቀ ማስረጃ የተረጋገጠባቸውመሆኑ [ይታወቃል]…' (*Id*., p. 331).

[113] *Workneh K. et. al. v. SNNPR Ethics and Anti-Corruption Commission Prosecutor* (Federal Supreme Court, Cassation File No. 63014) Federal Supreme Court Cassation Decisions, Vol. 13, pp. 359- 365).

[114] 'አመልካቾች የተጠሪን ክስና ማስረጃ ያስተባበሉ መሆኑን ገልፆ ከተከሰሱበት ወንጀል … በነፃ አሰናብቷቸዋል።' (*Id*., p. 360).

charged.[115] Therefore, the Court stated that once the public prosecutor proves the existence of property in excess of the known legal income of the accused, it is up to the defendants to prove the exact source of such excess.[116]

The Court found that both the trial and the appellate courts failed to frame and examine these issues. It then stated the evidence that should have been required if such issues were framed. It found that the decisions of all the three courts contained fundamental error of law and remanded the case to the trial court so that these issues could be considered.

4.2.2 Analysis

The Cassation Bench of the Federal Supreme Court has made some important findings in the cases discussed above. In *Girma T. v. Federal Ethics and Anti-Corruption Commission*, for example, it unequivocally stated that the burden of proof is on the public prosecutor to prove all the particulars of the offence as mentioned in the charge. Accordingly, it acquitted the defendant after finding that the prosecutor did not prove all the elements of the crime. It restated the requirement under Article 141 of the Criminal Procedure Code by noting that the trial court must engage itself in weighing of evidence and order the acquittal of the accused if the evidence of the prosecution does not prove the particulars of the offence 'sufficiently' as mentioned in the charge (and is not sufficient to warrant conviction if unrebutted). And by sufficient evidence, the Court continued, it is meant that the evidence presented must be coherent, consistent, and must have the necessary probative value to prove the charge- the closest the court has come to defining what standard of proof is to be applied in criminal proceedings. In a similar case (*Awet T. v. Tigrai Public Prosecutor*), the Court held that if a court fails to acquit a defendant in the face of evidence that does not warrant conviction and instead orders him to enter into his defenses that decision would amount to a 'fundamental error of law.'

In *Workneh K. et.al.*, the FSC Cassation Bench gave a ruling on the controversial criminal provision of 'possession of unexplained property' looking into what was required of the defendant to discharge his burden of giving 'satisfactory explanation' of the property in his possession. The Cassation Bench implied that what was required of the accused was much higher than simply raising doubts on the case of the prosecution.

A look at these cases shows that the standard of proof employed by the various regional and federal courts from which the cases were referred to cassation is not uniform. Some stated that the guilt of the accused was

[115] Cr. Code, Art. 419(1).

[116] *Workneh K. et. al. v. SNNPR Ethics and Anti-Corruption Commission Prosecutor*, *supra* note 113, p. 363.

established by '*sufficient evidence*' presented by the prosecutor while others held that the accused failed to '*effectively rebut the case of the prosecution*' before passing a guilty verdict. The FSC Cassation Bench has also failed to develop a clear jurisprudence on the standard of proof that should be used in criminal cases. In *Burqeso W. v. Public Prosecutor* where the claimant clearly contested the standard of proof on the basis of which he was convicted, the Bench held that the guilt of the accused was '*appropriately established*' by the prosecutor without, however, explaining what it meant by that. And in the case of *Aregahegn M. v. Federal Ethics and Anti- Corruption Commission*, the Court failed to take up standard of proof as an issue for consideration.

The Court repeatedly held that the evidence presented before the trial courts was sufficient to warrant the convictions. Differing from the findings of the trial courts, the FSC Cassation Bench in some cases held that the guilt of the accused had been sufficiently established by the prosecution and, reversing the judgment, found the defendant guilty as charged. After a similar analysis, it held the reverse in some other cases and quashed a guilty verdict. In still others it went into examining the prosecution case after which it decided that the crime charged was not proved and instead convicted the defendant under a different provision containing a crime of lesser gravity.

In a civil case *(Senait Temesgen v. Etifwork Bekele*), the FSC Cassation Division had made a distinction between the issue of weight of evidence as an issue of fact and consideration of whether such evidence constitutes issue of law.[117] It stated that the Court has the mandate to look into the latter, but not the former adding that the question of whether the established facts constitute the legal elements of an issue at hand squarely falls under its jurisdiction.[118] Such analysis and distinction seem to be missing from its jurisprudence in criminal cases.

In various criminal cases, the Court repeatedly stated that it was beyond its mandate to go into weighing of evidence. However, we find that the Cassation Bench evaluated evidence in some cases. In *Oromia Region Public Prosecutor v. Eyosiyas A. et. al.*, for example, the court discussed the evidence presented against each defendant based on which it changed the verdict given by the lower courts.[119] Contrary to the principle of presumption of innocence of the accused and the requirement that his guilt be proved beyond a reasonable doubt, the FSC

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[117] *Senait Temesgen v. Etifwork Bekele*, (Federal Supreme Court, Cassation File No. 44804) Federal Supreme Court Cassation Decisions, Vol. 11, pp. 525- 529.

[118] Id., p. 528; The same was held in *Ethiopian Commercial Bank v. Ashebir Tadesse et al*. (Federal Supreme Court, Cassation File No. 57288) Federal Supreme Court Cassation Decisions, Vol. 12, pp. 506-511.

[119] *Oromia Region Public Prosecutor v. Eyosiya sAberra et. al.*, *supra* note 104.

Cassation Division required higher thresholds of evidence from the defendant than what would suffice to raise doubts on the prosecutor's case.

As mentioned earlier, the Cassation Bench has indeed raised some important points by restating the obligation of the public prosecutor to prove all elements of the crime. However, it has failed to clarify the requisite standard of proof in criminal proceedings.[120]

Conclusion

The standard of proof significantly affects the outcome of cases that are brought before the court. In criminal cases where the two litigants are the state (represented by the public prosecutor) and an individual, the standard of proof required of the state to prove guilt is set high reflecting the need to protect the innocent individual from wrongful conviction. The *beyond a reasonable doubt* standard is the construction of this high standard in common law countries. It found its way into the Ethiopian legal system through the Criminal Procedure Code which was fashioned after the common law tradition and court practice set in place by British judges in the country after the Italian occupation. The right of the accused to be presumed innocent found in the FDRE Constitution and in various international instruments which are integral parts of Ethiopia's law (by virtue of Article 9(2) of the FDRE Constitution) envisage the standard of proof beyond a reasonable doubt in criminal cases.

While this is the general framework set in place, there are a number of laws that introduce presumptions in favor of the prosecutor. Such provisions in the Criminal Code as well as other criminal legislation have the effect of shifting the evidential burden of proof to the defendant as regards some element of the crime. The trend reflected in the Criminal Justice Administration Policy and the Draft Criminal Procedure Code also seems to suggest that the types of crimes for which a presumption against the accused exist are growing. Even though some exceptions to the rule can be introduced, no yardsticks have been developed that set out conditions these exceptions must meet. In the absence of such '*limit to the limits*', encroachment on the right of the individual to be presumed innocent may go unchecked as more presumptions continue to erode

[120] Looking at the wording in some of the cases discussed, one may argue that the Court is in favor of the 'clear and convincing evidence' standard in determining guilt of the accused; a look at other cases, however, will lead us to conclude that the Court has not taken a clear stand on the issue. Even if we were to accept the position that the Court has accepted the 'clear and sufficient evidence' formulation, since the requisite standard of proof implied in the normative framework is the higher standard of proof beyond a reasonable doubt, such stand of the Court is not in accordance with the law.

the prosecutor's responsibility to prove all elements of the crime beyond a reasonable doubt. Apart from these exceptional provisions, even in the ordinary cases of crimes that form the bulk of what courts entertain on a daily basis, the practice in Ethiopia shows that many variations of the standard are being used by different courts.[121] This has a number of implications on the criminal justice system as a whole.

The *first* caveat is that by deviating from the high standard of proof required in criminal cases, more innocent people may be convicted than what is considered tolerable.[122] Although avoiding errors altogether would be an impossible task, the existence of a high degree of such errors greatly undermines the moral force of the criminal justice system. This in turn results in people losing faith in the criminal justice process.

Secondly, the prevalence of such divergent practice introduces a level of arbitrariness into the system. If courts employ various standards in reaching their verdict, the fate of the defendant will, at least partly, depend on which court and more particularly which judge before whom he is brought. Depending on these circumstances, therefore, a person accused of a crime may be convicted on a much lower threshold than another charged with the same crime. Such difference in treatment is a violation of the constitutional principle that all persons are equal before the law and are entitled to equal protection of the law. Article 4 of the Criminal Code holds that: "Criminal law applies to all alike… [n]o difference in treatment of criminals may be made except as provided by this Code…" Since the decision for conviction or acquittal ultimately lies with individual judges, the subjective element will inevitably affect the case. While some level of such variation may be tolerable, it must be checked to make sure that it does not amount to arbitrary outcomes in criminal cases.

Thirdly, the practice shows that enough attention is not being given to the issue of standard of proof in general. The reluctance of trial and appellate courts alike to discuss it even when it is raised as an issue for consideration by the

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[121] There seems to be a general understanding that courts must employ a more rigorous standard of proof in criminal proceedings than in civil cases. (*See Tariku C. v. Federal Ethics and Anti- Corruption Commission* (Federal Supreme Court, Cassation File No. 78470) Federal Supreme Court Cassation Bench Decisions, Vol. 15, pp. 352). The question, however, is how much more rigorous it should be.

[122] Without doing an empirical research into the number of convictions and acquittals and such related issues, one cannot conclusively say that our system is erring on one side or the other. The existence of too many wrongful acquittals remains a possibility. However, having had the chance to observe a number of criminal proceedings entertained in federal first instance and high courts, I have noted that accused persons were convicted on evidence which, in my opinion, does not suffice to meet the rigorous standard of proof beyond a reasonable doubt.

litigants attests to this; in some of the cases, the question of standard of proof as an issue of law was not properly distinguished from the factual issue of weighing the presented evidence. Courts mostly state that the evidence presented was 'sufficient' to warrant the guilty verdict. This statement is too vague and susceptible to discretion because it does not expressly state what is expected from courts in terms of specifying to what degree the prosecutor is required to prove guilt. The very purpose of the standard of proof is answering the question of what we mean by 'sufficient evidence.' A mere qualification of evidence as 'sufficient', as is done by various courts, only tells us that a certain standard has been met and not what that standard is.

The importance of defining and correctly applying the standard of proof in criminal cases cannot be overstated. The object and purposes of the criminal law, such as ensuring peace and security of the society and punishing the guilty, hinge on the correctness of the decisions of courts. The standard of proof, reflecting the acceptable ratio of wrongful convictions to wrongful acquittals, plays a major role on the outcome of such decisions. Pending legislative remedy to fill the gap that now exists in the Ethiopian system, the practice of courts, particularly that of the Federal Supreme Court Cassation Bench, is an important source of provisional remedy. The Ministry of Justice, as per the extensive powers given to it under the Criminal Justice Administration Policy, can also play a big role in clarifying this area of the law through the issuance of indicative practical guidelines.

The notion of proof *beyond a reasonable doubt* is found not only in the writings of scholars, but it is also expressed in public statements, various public prosecutor documents and some court judgments. For example, Prime Minister Hailemariam Desalegn, addressing the House of People's Representatives, stated that the Ethiopian criminal justice system made sure that individuals were convicted only when their crime has been established *beyond a reasonable doubt*. Public prosecutors, in passing a decision for the discontinuity of investigation, usually state that the evidence presented does not suffice to warrant the conviction of the defendant establishing guilt '*beyond sufficient doubt*'. The practical aspects of these expressions and sincere allegiance to the pledges that are made toward the protection of individual rights indeed require steps to make sure that the standard of proof is set high in criminal cases and that such standard is properly understood and applied by courts. ■