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ቅጽ ፰ ቁጥር ፪		ሰኔ ፪ሺ፲
Vol. 8 No. 2		June 2018

In This Issue	በዚህ ዕትም
Articles	ጥናታዊ ጽሁፎች
Selected Court Cases	የተመረጡ ፍርዶች

በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት
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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 8. No. 2 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

On this occasion, again, the Committee would like to make it clear that the *Bahir Dar University Journal of Law* is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome.

The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. The Bahir Dar University Journal of Law is here to serve as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the *Bahir Dar University Journal of Law* will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

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ቅጽ ፰ ቁጥር ፪		ሰኔ ፪ሺ፲፩
Vol. 8 No. 2		June 2018

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ቅጽ ፰ ቁጥር ፪		ሰኔ ፪ሺ፲፩
Vol. 8 No. 2		June 2018

Content

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The Autonomy Rules of Documentary Credit in Ethiopia: Is There a Fraud Exception?

Khalid Kebede Gelaw[*]

Abstract

The 1960 Commercial Code of Ethiopia incorporated the principle of autonomy of documentary credit. The principle requires an absolute separation of the credit from the underlying contract. It imposes an obligation on the bank to honor the credit notwithstanding that there is an allegation or actual fraud in the required documents or the underlying contract. It creates a dilemma that, on one hand, if the principle is strictly applied the system of documentary credit may create undesirable consequences of system-protected fraudsters and abuse of the credit. On the other hand, if it is applied loosely, it would degrade the autonomy of the credit and consequently extend unwarranted protection to unscrupulous parties who, in bad faith, demand enjoinment of payment under the credit for unfounded grounds. This article examined the issue of independence of documentary credit in the Ethiopian legal framework vis-à-vis the trending development of fraud exception rules. The study was conducted based on a qualitative research approach by analyzing laws, documents and data collected through interviews. The study revealed that, unlike the experience of other countries, there is no fraud exception to the autonomy rules of documentary credit in Ethiopia. The author recommended revising the Ethiopian law on documentary credit to incorporate fraud exception rules so as to maintain the equilibrium between ensuring autonomy of the credit and restraining fraudulent activities.

Keywords: Documentary Credits, Principle of Autonomy, Fraud Exception, Commercial Code of Ethiopia, National Bank of Ethiopia, Ethiopia

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Introduction

Commerce across national boundaries, sometimes, brings insecurity and uncertainty both to the importer and the exporter.[1] It is primarily due to the long-distance between the contracting parties and lack of information about the solvency of the parties. The problem is exacerbated due to the existence of divergent laws, different business practices and poor communication infrastructures across jurisdictions.[2] Parties in an international business transaction often take special precautions to ensure performance under their contract and protect their respective interests.[3] The exporter wants to avoid delivering goods or services for which he might not be paid. The importer, on the other hand, desires an assurance that the seller will not be paid until there is evidence that the required goods or services will be delivered.[4] Documentary credit along with other payment instruments mitigates the risks for both parties.[5]

Documentary credit provides the most secure modes of payment in international commerce. This security emanates from the legal protection it is accorded.[6] To ensure its effective operation, one of the major governing principles, the principle of autonomy, is developed.[7] It specifies that documentary credit is independent of any contracts accompanying it, including the underlying contract concluded between the buyer and the seller.[8] Thus, the obligations of the corresponding bank are limited in

[1] Hamed Alavi, Documentary Letters of Credit, Legal Nature and Sources of Law, *Journal of Legal Studies,* Vol. 16, Issue 31, (2016), p. 106, [hereinafter Hamed, *Documentary Letters of Credit*]

[2] Andreas Karl, Letters of Credit and the Doctrine of Strict Compliance*,* LL.M Thesis, University of Uppsala, School of Law, (2003), pp. 12-13

[3] Daniel C.K. Chow & Thomas J. Schoenbaum, *International Business Transactions, Problems, Cases and Materials*, Aspen Publisher, Austin, (2005), p. 61

[4] *Ibid.*

[5] There are several instruments used to finance international business transactions other than documentary credit. To name a few; documentary credit, cash against document, telegraphic transfer, advance payment, documentary collection and so on. However, in Ethiopia any import and export transaction more than $5000 should be processed through documentary credit or cash against document. *See* FXD/07/1998, National Bank of Ethiopia, Directive to Transfer NBE's Foreign Exchange Functions to Commercial Banks Directive No. FXD/07/1998, 18 August 1998

[6] Garth C. Wooler, *Legal and Practice Perspectives on Documentary Credit under the UCP600,* Brisbane, Australia, (2007), p. 45, [hereinafter Garth, *Legal and Practice perspective on Documentary Credit*]

[7] Jacqueline D. Lipton, 'Documentary Credit Law and Practice in the Global Information Age' *Fordham International Law Journal*, Vol. 22, (1990), p. 1979 (hereinafter Jacqueline, *Documentary Credit Law and Practice*)

[8] Rosmawani Che Hashim *et al,* Principle of Autonomy in Letter of Credit: Malaysian Practice, *Iium Law Journal*, Vol. 19 No. 2, (2011), p. 205 (hereinafter Rosmawani *et al, Principle of Autonomy in Letter of Credit*)

assuring compliance of the documents submitted and not goods actually shipped to the importer.[9] However, with the growing use of documentary credit in Ethiopia and elsewhere in the world, it has become an area of litigation over the extent of the independence of the credit from the underlying contract especially with regard to fraud. The fraudulent seller may forge documents to receive payment while he sends rubbish items or shipped nothing at all. Thus, the underlying purpose of this article is to identify the extent of recognition of the governing principle of the doctrine of autonomy and the fraud exception in the Ethiopian legal framework in light of the international trend.

In analyzing the subject matter, the author consulted the Uniform Customs and Practices for Documentary Credits 600 (hereinafter UCP600) and the experiences of the U.S. and the UK. The UCP600 is chosen because of its worldwide application in documentary credit transactions.[10]

The experience of the U.S. and the UK are chosen for various reasons. First, even though the Commercial Code of Ethiopia has been predominantly adopted from the European continental legal system, the provisions dealing with documentary credit are directly copied from the 1951 version of the UCP,[11] which is also known to have influenced the documentary credit customs and practices of the U.S. and the UK.[12] Second, the U.S. has advanced statutory and judicial documentary credit rules which are transplanted both to common law and civil jurisdictions, and the UK law somehow follows the U.S. law.[13] Third, considering that they have an

[9] Lu Lu, The Exceptions In Documentary Credits In English Law, PHD Dissertation, The University of Plymouth, Plymouth Law School, Faculty of Business, (2011), p. 34

[10] Svitlana Berezhna, Trade Customs, Usages and Practices: General Value and Application of the UCP600 in Particular Value and Application of the UCP600 in Particular, Masters Dissertation, Ghent University, (2012), p. 21

[11] Tilahun Teshome *et.al*, Position of the Business Community on the Revision of the Commercial Code, Addis Ababa Chamber of Commerce and Sectoral Associations, Addis Abeba, 2008, p. 79, [hereinafter Tilahun *et al, Position of the Business Community*]. The 1951 UCP is neither the first nor the latest version. The first version of the UCP was introduced by the ICC in its 1929 congress held in Amsterdam. Later on, it is followed by several revisions in 1933, 1951, 1962, 1974, 1984, 1994 and finally in 2007.

[12] Zsuzsanna Tóth, Documentary Credits in International Commercial Transactions with Special Focus on the Fraud Rule, PHD Dissertation, Pázmány Péter Catholic University, Faculty of Law and Political Sciences, (2006), p. 3, [hereinafter Zsuzsanna, Documentary Credits in International Commercial Transactions]

[13] Hamed Alavi, Autonomy Principle and Fraud Exception in Documentary Letters of Credit, a Comparative Study between United States and England, *ICLR*, Vol. 15, No. 2, (2015), p. 54 [hereinafter Hamed, *Autonomy Principle and Fraud Exception in Documentary Letters of Credit*]

important role in the practice of international trade involving documentary credits, it seems odd to ignore their system of documentary credits. [14]

The paper is divided into four parts. The first part provided a brief overview of the principle of autonomy and fraud exception in documentary credits. The second part is dedicated to appraisal of the autonomy principle and fraud exception in light of selected international experiences. In the third part, the Ethiopia approach to the issue of autonomy of documentary credit and fraud exceptions is explored. The fourth and final part ends up by providing conclusion and recommendations.

1. The Principle of Autonomy and Fraud Exception: An Overview

Documentary credit is an arrangement in which the issuing bank, at the request and in accordance with the instruction of the applicant, undertakes to pay a beneficiary or reimburse the paying bank against the presentation of documents and satisfactory compliance with the terms and conditions stipulated therein.[15] There are at least three contracting parties involved in documentary credit transactions.[16] The first party is the applicant, the buyer in the international trade that instructs the credit to be issued.[17] The second party in the documentary credit transaction is the beneficiary, the seller in whose favor the credit is issued.[18] The third party is an issuing bank where it is usually referred to as the buyer's bank. The bank issues the credit at the instruction of the buyer and undertakes to honor a draft or other demand for payment made by the beneficiary or to his order.[19] At times there may be a fourth party involved in the transaction as the corresponding bank. It is usually referred to as the seller's bank and undertakes to advise and/or honor presentation of the beneficiary.[20]

Depending on the parties' interests, documentary credit can be issued in different forms (having different legal consequences) such as revocable

[14] *Id*, p. 47

[15] Jacqueline, *Documentary Credit Law and Practice*, p. 1973, *supra* note 7

[16] Franck Chantayan, Choice of Law Under Revised Article 5 of the Uniform Commercial Code--§ 5-116, *Journal of Civil Rights and Economic Development*, Vol. 14, Issue 2, (1999), p. 201

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

credit, irrevocable credit, transferable credit and acceptance credit.[21] Irrespective of its form, the paying bank's obligation to pay (be it the issuing or the corresponding bank) arises out of the presentation of conforming documents, not on conforming performances in the sale or other contract on which it may be based. The documentary credit transaction is essentially independent of the underlying transaction(s). This characteristic of documentary credits is known as the autonomy principle.[22] The word autonomy originates from a Greek word called "*autonomia*" which means 'independent.'[23] The word in the context of documentary credit has a meaning of the credit being independent of the underlying contract, the payment under the credit is solely dependent on the presentation of complying documents, the role of the bank towards the credit is restricted only to check compliance of the documents to the terms and conditions of the credit and the like.[24]

In earlier times, there was no conflict of the independence of documentary credit as it was customarily accepted by traders and bankers that the main determinant factor for compliance of the contract is the goods or services specified under the contract.[25] Hence, banks were used to check the conformity of the goods or services as stated in the underlying contract.[26] However, the trend cannot go further due to sophistication and complication of trades across national boundaries.[27] Thus, recognition of the principle of autonomy of the credit developed as a matter of desperate choice.

The principle creates distinction between documentary credit and other contracts accompanying it such as the underlying contract between the buyer and the seller, and a credit agreement between the bank and the applicant.[28] The principle makes the obligation of the issuing bank independent from the

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[21] Susmitha P Mallaya, Documentary Credit Law: An Indian Perspective, PHD Dissertation, Cochin University of Science and Technology, School of Legal Studies, (2007), p. 13, [hereinafter Susmitha, *Documentary Credit Law*]

[22] Felicity Monteiro, Documentary Credits: The Autonomy Principle and the Fraud Exception: A Comparative Analysis of Common Law Approaches and Suggestions for New Zealand, *Auckland University Law Review*, P. 146 [hereinafter Felicity, *The Autonomy Principle and the Fraud Exception*]

[23] Rosmawani *et al, Principle of Autonomy in Letter of Credit*, *supra* note 8, p. 205

[24] *Ibid.*

[25] *Ibid.*, *see also* Harfield, Henry, The Increasing Domestic Use of the Letter of Credit, *4 Uniform Commercial Code Law Journal* (1972), p. 251

[26] *Ibid.*

[27] *Id*, p. 206

[28] Garth, *Legal and Practice Perspective on Documentary Credit, supra* note 6, p. 45

underlying contract.[29] It is considered as the foundation for the smooth operation of documentary credit in today's complicated international transactions by several scholars.[30] Felicity noted that the utility of documentary credit is contingent upon its inherent autonomy from the underlying transactions.[31] It is a foundation for allocating entitlements and liabilities of parties involved in documentary credit transactions.[32] Accordingly, the seller will be paid by the issuing bank provided that the former present complying documents. The issuer, in turn, will be reimbursed by the applicant or it may exercise its right of recourse against the applicant. The applicant does not have a right of recourse against the issuer for breach of the underlying contract by seller. The bank as a paying agent should not be held responsible for inspection of the actual goods or services delivered to the buyer as it would not be feasible and will causes unnecessary delay.[33]

However, the autonomy principle sometimes may cause unfair results as it imposes an obligation on the bank to honor the credit notwithstanding an alleged or actual fraud in the required documents or the underlying contract.[34] The doctrine of autonomy of documentary credit presupposes the beneficiary and the bank to honor their respective obligations with trust, commitment and professional integrity. However, good business conducts are eroded and the old assumption of 'the hand shake settles the deal' proves

[29] Ross P. Buckley & Xiang Gao, The Development of the Fraud Rule in Letter of Credit Law: The Journey So Far and the Road Ahead, *Penn law journals, U. Pa. J. Int'l L,* Vol. 23, Issue 4, (2002), p.663, [hereinafter Ross and Xiang, *The Development of the Fraud Rule in Letter of Credit Law*]

[30] Roberto refers it as a "cornerstone" principle for documentary credit operations (*see* Roberto Luis, The Autonomy Principle of Letters of Credit, *Mexican Law Review,* Vol. III, No. 1, (2009), p.75, [hereinafter Roberto, *The Autonomy Principle of Letters of Credit*]). Gao and Ross also refers it as a "foundation" for documentary credit operations (*see* Gao Xiang & Ross P. Buckley, The Unique Jurisprudence of LCs: Its Origin and Sources, *San Diego Int'l Law J*, Vol. 4, No. 9, (2003), p.119). Dolan, in turn, argues the principle of autonomy is the backbone for documentary credit operations (see Dolan J.F, *The Law of Letters of Credit: Commercial and Standby Credits*, 4th Edition, Warren, Gorham & Lamont, USA, (1996), p. 480)

[31] Felicity, *The Autonomy Principle and the Fraud Exception*, *supra* note 22, P. 144

[32] Roberto, *The Autonomy Principle of Letters of Credit, supra note 30*, p. 76

[33] Employees of the banks are not experts on the inspection of goods. They do not have the required qualification for inspecting the quality, quantity, content, substance, taste, smell or physical appearance of all types' of goods and services. It is hardly possible and uneconomical for bankers to employ hundreds of thousands of employees who have specialization in every goods and service. Due to this, banks only employ workers who are competent in checking documents' conformity towards the specification of the credit and the relevant regulatory rules.

[34] Nevin Meral, The Fraud Exception in Documentary Credits: A Global Analysis, *Ankara Bar Review*, issue 2, (2012), p. 44, [hereinafter Nevin, *The Fraud Exception in Documentary Credit*]

incompatible in today's business reality.[35] There occurs a frequent fraudulent act in documentary credit transactions.

The issue of fraud in relation to documentary credit transactions today is a universal phenomenon that threatens the credibility and effectiveness of the instrument.[36] Technological advancements that intended to enhance commercial transactions at the same time create an opportunity for fraudsters to easily manipulate the transactions. One writer explains, "L/C [letter of credit] fraud is not only widespread, [but] it is [also a] big business too, and its tentacles have spread throughout the world."[37] It has been reported that insurance companies cost millions of dollars each year due to maritime frauds.[38] Due to its undesirable effects, the learned judge Cresswell J describes it as "a cancer in the international trade."[39]

In the documentary credit, fraud refers to an action of misrepresentation of the truth, false making or concealment of a material fact in the credit or the underlying contract to induce the issuing bank (or confirming bank) to pay them or accept their draft.[40] It includes, but not limited to, the act of fraudulently making, completing, authenticating, issuing or transferring a false document or altering a real one to make the documents conform in their face to the terms and conditions of the credit. It is committed against importers, banks, exporters and the carriers of the cargo.[41] The UNCTAD report shows falsification of bill of lading, delivery of inferior goods, selling the same goods twice and issuing cargo documents twice for the same merchandise are the most frequent kinds of fraudulent activities in documentary credit transactions.[42]

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[35] *Ibid.*

[36] Chumah Amaefule, The Exceptions to the Principle of Autonomy of Documentary Credits, PHD Dissertation, University of Birmingham, School of Law, (2011), p.36, [hereinafter Chumah, *The Exceptions to the Principle of Autonomy of Documentary Credits*]

[37] Yanan Zhang, Approaches to Resolving the International Documentary Letters of Credit Fraud Issue, PhD Dissertation, University of Eastern Finland, (2015), p.21, [hereinafter Yanan, *Approaches to Resolving the International Documentary Letters of Credit Fraud Issue*]

[38] Tareq Al-Tawil, Letter of Credit and Sale Contract: Autonomy and Fraud, *International Trade and Business Law Review*, (2013), p. 183, [hereinafter Tareq, *Letter of Credit and Sale Contract*]

[39] *Standard Chartered Bank v Pakistan National Shipping Corporation and Others*, Queen's Bench Division(Commercial Court), 1 Lloyd's Rep. [April 1998] para. 684

[40] Tareq, *Letter of Credit and Sale Contract*, *supra* note 38, p. 183

[41] *Ibid.*

[42] UNCTAD report, UNCTAD secretariat, 'A Primer on New Techniques Used by the Sophisticated Financial Fraudsters with Special Reference to Commodity Market Instruments'

Prevalence of fraud in documentary credit transactions necessitates the development of an exception where the principle of autonomy can be pierced and fraud exception rules applied to suppress fraudsters and abuse of the credit.[43] As a result, the fraud exception has been established in all common law and many civil law countries.[44] Despite the fact that the fraud rule is recognized in several jurisdictions, it is still controversial over its necessity and the required standard of fraud to apply the rule.[45] Thus, it is important to consult the relevant international instruments and the experience of selected jurisdictions with a view to derive a lesson for Ethiopia.

2. The Autonomy Rules of Documentary Credit and Fraud Exception in Selected International Experiences

2.1. International Instruments

In the international arena, the International Chamber of Commerce (hereinafter ICC) published the UCP and its supplementary rules such as the Supplement to the Uniform Customs and Practice for Documentary Credit for Electronic Presentation (eUCP)[46] and the International Standard Banking Practice for the Examination of the Documents under Documentary Credits (ISBP)[47] to regulate documentary credit operations. The UCP is a product of the harmonization process of the ICC. It aims to facilitate the international trade and reduce conflicts, thereby, creating uniform documentary credit laws among different jurisdictions.[48]

The latest version of the UCP was adopted in 2007 as UCP600. It brought further improvements in the UCP and widely recognized as a business-

(UNCTAD/DITC/COM/39), (2003), p. 7, available at <http://www.unctad.org/en/docs/ditccom39_en.pdf> last accessed 12 May 2018

[43] Hamed, *Autonomy Principle and Fraud Exception in Documentary Letters of Credit*, *supra* note 13, p.52

[44] *Ibid.*

[45] Nevin, *The Fraud Exception in Documentary Credit, supra note 34, p. 45*

[46] The Supplement to the Uniform Customs and Practice for Documentary Credit for Electronic Presentation, Vo1.1, (2002), Article e1 [hereinafter eUCP]. The ICC introduced eUCP in 2002 to supplement UCP to accommodate the presentation of electronic records.

[47] It was introduced by the ICC in its meeting at Rome in October 2002 with a view to provide practical explanation for UCP on examination and rejection of documents under day to day Documentary credit operation of bankers. It is helpful for banks, insurance companies, logistic specialists, corporations and fright forwards. It has functions, among other things; explaining terms and conditions of the UCP, specification of elements which are not addressed under the UCP, management of errors in the documents and preparation of insurance documents

[48] Hamed, *Documentary Letters of Credit*, *supra* note 1, p. 111

friendly international documentary credit rule.[49] The rule regulated the autonomy of documentary credit under Article 4 and 5.

Article 4(a) of the rule reads;

> [a] credit by its nature is a separate transaction from the sale or other contracts on which it may be based. Banks are in no way concerned with or bound by such contracts, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honor, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defenses by the applicant resulting from its relationships with the issuing bank or the beneficiary.

It isolates the credit from any contract which might exist between the applicant and the issuing bank. Thus, any dispute arising out of such contracts will not affect the credit. Article 5 of the rule further emphasized the effect of the principle on the role of the banks by stating, "[b]anks deal with documents and not with goods, services or performance to which the documents may rely." The second limb of Article 4(a) of the rule strengthens the principle that the "beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank."

The rule further sanctions the principle under Article 4(b) by discouraging any attempt to include, as an integral part of the credit, copies of the underlying contract, pro forma invoice and the like.

The rule takes a serious stand on the autonomy of documentary credit. As can be seen from the above provisions it provides detailed regulatory rules for the subject matter at hand. The main idea behind these provisions is making a wall between documentary credit and other contacts between the buyer and the seller or a credit agreement between the applicant and the issuer. It gives a special emphasis on putting a visible demarcation between the underlying contract and documentary credit. It is to make sure that the former should not intercept in the operation of the latter. As a result, banks will deal with documents as per the terms and conditions of the credit. It does not have any responsibility for inspecting the goods or services to which the documents may rely. Nor can the beneficiary avail himself the

[49] Reduction of unnecessary provisions, clarifications of some sensitive terms under the instrument, exclusion of revocable documentary credit from its ambit, clarification on the scope of examination and rejection of documents by bankers are some of the improvements made under the latest version.

underlying contract or the credit agreement he has with the issuing bank. Finally, to avoid confusion and misunderstanding the banks should discourage any attempt to include any undertakings between the applicant and beneficiary or the applicant and the issuing bank as an integral part of the credit.

Besides, the eUCP under its disclaimer specified some independent features of the electronic credits.[50] It holds that electronic credits are independent from information not apparently included in the documents, the identity of their sender and source of the information.[51] Thus, banks responsibility to receive, authenticate and identify electronic documents is limited to what is plainly specified in the records. [52]

However, the UCP600 does not recognize fraud exceptions to the autonomy principle.[53] nor does its supplementary rules.[54] It does not incorporate fraud exceptions under its relevant provisions that deal with independent features of documentary credit.[55] The disclaimer incorporated under the rule emphasizes its position on the exclusion of fraud exception from its ambit. The provision is self-explanatory

> A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.[56]

Despite the aforementioned provision, it does not mean that the ICC denies a fraud exception. It in deed recognizes fraud exceptions in its different

[50] eUCP, *supra* note 46, Article e12

[51] eUCP, *supra* note 46, Article e12

[52] eUCP, *supra* note 46, Article e12

[53] The disclaimer incorporated under the Rule states its position on exclusion of fraud exception from its ambit. *See* The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP"), Article 37, [hereinafter UCP600]

[54] Ross and Xiang, *The Development of the Fraud Rule in Letter of Credit Law, supra* note 29, p. 700

[55] *See* UCP600, *supra* note 53, Article 4, 5 , 7 , 8 , 14, 15 and 16

[56] UCP600, *supra* note 53, Article 37

documents such as documents 470/371 and 470/373 and leaves the matter to the national laws and courts. It is because, first, the UCP is about uniform customs and practices. However, there is no uniformity of practices and customs in the area of fraud exception; thus, incorporating such a rule will compromise the universality principle the UCP stands for.[57] Second, the ICC rules, including UCP, are not rules of law in the strict sense. Rather they are rules of best banking practice. The issue of fraud, on the other hand, is a matter of rule of law, thus, it should be tackled by the national laws and the courts of the forum.[58]

2.2. National Laws

In the earlier times, it was only a few countries that have specific statutory rules applicable to documentary credit transactions. However, limitations on the international documentary credit rules and the desire of states to impose public policies urge some jurisdictions to promulgate their own documentary credit rules. In a survey conducted for the International Encyclopedia of Comparative Law, some countries developed specific domestic documentary credit laws.[59]

One of the prominent countries that introduce documentary credit law is the U.S. It addresses the autonomy principle and fraud exception in its court decisions and under the Uniform Commercial Code (hereinafter UCC). In this regard, the case *Maurice O'Meara Co v. National Park Bank* is notable. In this case, the plaintiff entered into a contract of sale of newsprint paper with the Sun-Herald Corporation where the latter opens documentary credit issued by the National Park Bank of New York. However, the bank rejected the payment despite the plaintiff presenting facially complying documents. The plaintiff sued the bank for damages. In its defense, the defendant bank argued the quality of the newsprint is lower than the contracted quality. The Court of Appeals rejected the bank's claim stating that the bank is absolutely

[57] Ross and Xiang, *The Development of the Fraud Rule in Letter of Credit Law, supra* note 29, p. 700

[58] Yanan, *Approaches to Resolving the International Documentary Letters of Credit Fraud Issue, supra* note 37, p.68

[59] Among others; Czechoslovakia, Colombia, Guatemalan, Honduras, Lebanon, Syria, German, and Mexico have domestic documentary credit laws. *See* Hamed, *Documentary Letters of Credit*, *supra* note 1, p. 111.

bound to make the payment under the credit, notwithstanding that there is a breach in the underlying contract.[60]

From the above assertion, the court recognizes the autonomy principle of documentary credit. It argues for an absolute separation of the credit from the underlying contract that a bank does not have a mandate to inquire into evidence indicating fraud. Such a position is, however, changed by the *Sztejn* Case.[61] It is a landmark case in the course of the development of the fraud rule. It has been embodied under statutory laws of the U.S. and shaped the fraud rules across several jurisdictions.[62]

In the *Sztejn* Case, the underlying contract was between Charles Sztejn, an American importer, and Transea Traders Ltd, an Indian exporter. The former opened an irrevocable documentary credit for the payment issued by Schroeder Bank and presented it to the exporter by Chartered Bank of India, provided that that the exporter will deliver the required bristles. Accordingly, the exporter submitted documents that on their face complied with the terms and conditions of the credit to the presenting bank for payment. However, before payment was made, Sztejn had filed a suit against the presenting bank at the New York Court to enjoin the bank from honouring the demand, alleging that the beneficiary shipped worthless and rubbish materials with the intent to stimulate genuine merchandise and defraud the plaintiff. The defendant, in turn, moved to dismiss the complaint on the grounds of lack of cause of action. It alleged that its responsibility is limited to examining the conformity of documents and the documents conform to the requirements of the credit.[63]

The Court examined the elements of fraud and drew a careful rule. First it acknowledged the independent nature of the credit from the underlying transaction. It states the "letter of credit is independent of the primary contract between the buyer and the seller". The issuing bank agrees to pay upon presentation of documents, not goods."[64] The Court argued that it would be a most unfortunate interference with business transactions if a bank before honouring drafts drawn upon it was obliged or even allowed to go

[60] *Maurice O'Meara Co v. National Park Bank*, 239 NY, (1925), para 386
[61] *Sztejn v Henry Schroder Banking Corporation*, 31 N.Y.S (1 July 1941), [hereinafter *Sztejn Case*]
[62] Ross and Xiang, *The Development of the Fraud Rule in Letter of Credit Law, supra* note 29, p.676
[63] *Sztejn Case, supra* note 61, para 631
[64] *Ibid.*

behind the documents for each and every allegation made by the other party.[65] However, the court did not absolutely close the room for behind scrutiny of the documents if fraud in document or transaction is established. It states the principle of autonomy shall be pierced and the fraud exception rule should be applied if fraud is involved in the transaction. Accordingly, it bluntly rejected the Chartered Bank's motion to dismiss the plaintiff's complaint and ruled for the plaintiff arguing that the exporter was engaged in a scheme to defraud the plaintiff, and that the Chartered Bank is not an innocent holder of the draft for value but merely attempting to procure payment of the draft for the exporter's account.[66]

In the Court's decision three parameters have been used for application of the fraud exception rules. First, payment under documentary credit may be interrupted in a case of fraud in the document or the underlying contract. Second, the payment can be interrupted only when the alleged fraud is proven or established. Third, the payment to the holder of due course or presenter with similar status will not be interrupted despite the existence of an established fraud.[67]

The U.S. also codified the UCC in 1952 to regulate commercial transactions, including documentary credit.[68] It is a well-crafted legislative enactment of contemporary documentary credit practices that combines both technical and legal concepts of documentary credit.[69] Article 5 of the UCC was revised in 1995 and a more comprehensive and advanced regulatory framework is introduced.[70]It is adopted, in a slightly modified form, in almost every state in the U.S.[71]

Article 5 of the UCC, specifically, is designed to regulate the issue of autonomy of the credit and fraud exception along with other issues of documentary credit. Section 5-103 (d) specifies that obligations of the issuing, confirming and advising bank are independent from validity, performance or non-performance of the contracts accompanying the credit.

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[65] *Ibid.*

[66] *Id*, para 634-35

[67] *Ibid.*

[68] Zsuzsanna, *Documentary Credits in International Commercial Transactions, supra* note 12, p. 14

[69] Boris Kozolchyk, Legal Aspects of Letters of Credit and Related Secured Transactions, *Lawyer of the Americas*, Vol. 11, No. 2/3, (1979), p. 270

[70] Zsuzsanna, *Documentary Credits in International Commercial Transactions, supra* note 12, p. 15

[71] Felicity, *The Autonomy Principle and the Fraud Exception*, *supra* note 22*,* P. 154

The principle is reinforced under Section 5-108 (1) that fortifies the assumption that the obligation of the issuing bank does not extend to performance or otherwise non-performance of the underlying contract or any other contracts accompanying the credit.

The UCC also incorporated fraud exception rules.[72] It specified the fraud exception rule under Section 5-109. The Code tries to approach the fraud issue in a balanced way.[73] It stipulates the fraud exception rule will be applied if "…a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant…" It adopts a "material fraud test"[74] as the standard of fraud.[75] The test necessitates the effect of the fraud should be significant to the participants in the underlying transaction, thus, fraudulent acts which have insubstantial or immaterial effect to the participants in the underlying contract are disregarded.[76]

If martial fraud is established in the transaction, the bank can legitimately dishonor the presentation provided that the person demanding honor is not a protected person in the sense of Section 5-109(a)(1).[77] It is also specified courts can temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons upon fulfillment of the following conditions. First, the person demanding honor is not a protected person mentioned under Section 5-109 (a) (1). Second, on the basis of the information submitted to the court, the applicant is more likely

[72] Susmitha, *Documentary Credit Law, supra* note 21, p. 160.

[73] Zhang Ruiqiao, A Comparative Study of the Fraud Exception Rule of Letters of Credit: Proposed Amendments to the Chinese Credit System, LLM Thesis, McGill University, Montreal, Faculty of Law, (2009), p. 60

[74] According to the official comment on Section 109 material fraud "requires that the fraudulent aspect of a document be material to a purchaser of that document or that the fraudulent act be significant to the participants in the underlying transaction." *See* Official Comment to the Revised UCC Article 5-109 In. Douglas G. Baird, Theodore Eisenberg, Thomas H. Jackson (comp), Commercial and Debtor-Creditor Law, Selected Statutes, New York, ((2002) p. 545, [hereinafter Official Comment]

[75] Uniform Commercial Code Revised Article 5, Letter of Credit, (1995), Section 5-109, [hereinafter *Revised UCC*]

[76] Official Comment*, supra* note 74

[77] Section 5-109 (a) of the *Revised UCC,* supra note 75, stipulated "negative conditions" that specified lists of four categories of persons who may be immune from application of the fraud rule. These are (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person

than not to succeed under its claim of forgery or material fraud. Third, the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer. Fourth, a party who may be adversely affected by such decision is adequately protected. Fifth, the conditions to entitle a person to the relief under the law of the State have been met.[78]

Despite involvement of material fraud in the transaction, sometimes, it might be difficult to prove existence of fraud having expedited nature of documentary credit transactions. Accordingly, payment in the credit might be honored despite material fraud being committed. To counterbalance this problem the Code devised a system of warranty under Section 5-110. Thus, if the presentation is honored, the beneficiary obliged to warranty absence of forgery or material fraud in the transaction and the drawing does not violate any agreement between the applicant and beneficiary.

The United Kingdom, on the other hand, introduced documentary credit law in the middle of the 19th Century. It is recognized as one of the oldest documentary credit laws developed through court cases. [79] It addresses the issue of autonomy of documentary credit and fraud exception in its court cases. In this regard the case *United City Merchant (Investment) Ltd v Royal Bank of Canada* comes in the forefront. In this case the defendant, Royal Bank of Canada, rejected the documents presented and refused to pay on the grounds that the shipment date on the bill of lading is fraudulently antedated.[80] However, the fraud was done by the shipping agents and the beneficiary had no knowledge of it. [81] The plaintiff sued the bank for wrongful dishonor. The case went to the House of Lords. The Court first emphasized the principle of autonomy. It stated, autonomy is the inherent feature of documentary credit and the *raison d'être* that the instrument is developed in the international trade.[82] The Court adds the bank is under

[78] *Revised UCC,* supra note 75, Section 5-109 (b)

[79] Frank Roland Hans Mueller, Letters of Credit with Focus on the UCP600 and the Exceptions to the Principle of Autonomy with Emphasis on the "Fraud Rule" Under The Laws of the USA, the UK and the RSA, Mini Thesis, University of the Western Cape, School of Law, (2013), p. 3

[80] The bill of lading showed that shipment had been made on 15th December 1976 (the last date for payment of the credit) when in fact shipment was on 16th December.

[81] *United City Merchants (Investments) Ltd v Royal Bank of Canada*, House of Lords, 1AC 168,183 [1983] (hereinafter *United City Merchants Case*)

[82] *Ibid.*

obligation to honor complying presentations made by the beneficiary, irrespective of a breach in the underlying contract. [83]

After elaborating on the autonomous nature of documentary credit, the Court confirmed that fraud is a well-known exception to the autonomy principle stating:

> To this general statement of principle [of independence] as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. [84]

The Court argued that the principle of autonomy is not meant to protect fraudsters. Equally so courts should not allow their process to be used by a dishonest person to carry out a fraud. [85]

Despite its recognition, the English Courts follow a strict approach towards the application of the fraud exception rule. [86] They usually require the cumulative presence of four requirements. [87] First, there should be material misrepresentation. In the aforementioned case, for instance, the court asserted that the fraud rule will be applied if there are "material representations of fact that to his [the beneficiary's] knowledge are untrue". [88] In the courts wording misrepresentation should be material to the value of goods under the transaction. This standard has been accepted by subsequent English cases. [89]

Second, the beneficiary should be involved or have knowledge of the fraud. [90] Unlike the experience of the U.S., "the seller's awareness of the fraud" is an additional criterion for application of the fraud exception in the

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[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] Hamed, *Autonomy Principle and Fraud Exception in Documentary Letters of Credit*, *supra* note 13, p.58

[87] Zsuzsanna, *Documentary Credits in International Commercial Transactions, supra* note 12, p.130

[88] *United City Merchants Case, supra* note 81

[89] Hamed, *Autonomy Principle and Fraud Exception in Documentary Letters of Credit*, *supra* note 13, p.63

[90] Zsuzsanna, *Documentary Credits in International Commercial Transactions, supra* note 12, pp. 131-132

UK law. In other words, it is only "intentional fraud" that can trigger application of the fraud exception rule. As dealt elsewhere above, existence of material fraud is sufficient enough in the US fraud exception rule. At this point, one can raise a question whether it is necessary to have an additional requirement of "intentional fraud" to apply the fraud exception rule? Literarily, the "intentional fraud" requirement made the application of the fraud rule most complied with the autonomy principle as it narrows down the ground where it can be applied and that it avoids the need to investigate the underlying contract to measure reasonability of the payment. However, the intentional standard is not as commendable as it intends to be. First and foremost, it is too difficult to prove the culpability of the beneficiary, having the complexity of international commerce. Besides, it might imperil the security interest of the paying bank. Paying for a materially fraudulent presentation *per se* may compromise the reimbursement rights of the bank, if the jurisdiction(s) (where the credit is issued or operated) has/have a law that out rightly prohibited any payment based on fraudulent documents. Thus, it would be unreasonable to force the bank to honor the credit at the expense of its security and equally so to require the bank to accept a materially fraudulent presentation only because there is no evidence to establish the fraudulent intent of the beneficiary. Furthermore, it may also cause circulation of fraudulent documents in documentary transactions which is considered as "a cancer in the international trade."[91]

Third, there should be clear evidence as to the fraud. In a case *Discount Records Ltd v. Barclays Bank,* the plaintiff requested for injunction of the payment under the credit alleging that the beneficiary committed fraud in the credit. The court dismissed the claim stating that the plaintiff failed to adduce clear evidence that shows involvement of material fraud in the transaction.[92]

Lastly, the fraud should be established to the paying bank timely, before the payment is paid to the beneficiary.[93]

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[91] *Standard Chartered Bank v Pakistan National Shipping Corporation and Others*, Queen's Bench Division(Commercial Court), 1 Lloyd's Rep, (April 1998), para 684

[92] *Discount Records Ltd v. Barclays Bank*, 1 WLR, (1975), para 320

[93]Zsuzsanna, *Documentary Credits in International Commercial Transactions, supra* note 12, p. 132

3. The Principle of Autonomy and Fraud Exception in Ethiopia

3.1. The Principle of Autonomy in Ethiopia

In Ethiopia, documentary credit operation was recognized in the banking business since 1905 with the introduction of modern banking upon the establishment of the Abyssinia Bank.[94] Its application in the import and export transactions grew in the 1990s following the country's re-introduction of market led economic policy.[95] Currently, due to escalation of import and export transactions, the documentary credit operation is augmented in Ethiopia.[96]

The laws regulating documentary credit in Ethiopia are a recent phenomenon. The landmark legislation in this regard is the 1960 Commercial Code of Ethiopia (hereinafter the Commercial Code). It introduces regulatory frameworks for documentary credit as provided under Book IV of the code. It allots nine provisions, from Article 959 through 967. Provisions on this section of the Code are verbatim copies of the oldest version of the UCP, the 1951 version. [97] Apart from the Commercial Code, regulatory rules can be found under the 1960 Civil Code of Ethiopia (hereinafter the Civil Code),[98] Banking Business Proclamation No. 592/2008,[99] FDRE Criminal Code[100]and several Directives and Circulars issued by the National Bank of Ethiopia (hereinafter NBE).[101]

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[94] Interview with Mesfin Getachew, Chief Legal Expert, National Bank of Ethiopia, (6 March, 2018)

[95] *Ibid.*

[96] Lubaba Mohammed *et al*, An Assessment of Letter of Credit in Import and Export Case of Commercial Bank of Ethiopia*,* Senior Essay, St. Mary's University, Faculty of Business, (2014), p. 35, (hereinafter Lubaba *et al*., *An Assessment of Letter of Credit in Import and Export Case of Commercial Bank of Ethiopia*)

[97] Tilahun *et al, Position of the Business Community, supra* note 11, p. 79

[98] Civil Code of the Empire of Ethiopia, Proclamation No.165, 19th year. No. 1, *Negarit Gazeta,* Extraordinary issue, (1960), Article 1676 and 1678, [hereinafter the Civil Code of Ethiopia]

[99] Banking Business Proclamation, Proclamation No. 592/2008, *Federal Negarit Gazeta,* (2008)

[100] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, *Federal Ngarit Gazeta*, (2004), (hereinafter the FDRE Criminal Code)

[101] See Directive No. FXD/07/1998; FXD/13/2000, National Bank of Ethiopia, Amendment to Directive No. FXD/07/1998, 18 February 2000; FXD/16/2001, National Bank of Ethiopia, Amendment to Directive No. FXD/07/1998, 29 March 2001; FXD/19/2001, National Bank of Ethiopia, Amendment to Directive No. FXD/07/1998, 01 December 2001; FXD/22/2004, National Bank of Ethiopia, Amendment to Directive No. FXD/07/1998, 19 March 2004; FXD/26/2004, National Bank of Ethiopia, Amendment to Directive No. FXD/07/1998, 01 January 2005; FEC/43/97, National Bank of Ethiopia, Exchange Control Directive Regarding Trade Transactions between Ethiopia and Eritrea Directive No. FEC/43/97, 19 December, 1997; FXD/45/2016, National Bank of Ethiopia, Directive on Transparency in Foreign Currency Allocation and Foreign Exchange Management, Directives No. FXD/45/2016 and FXD46/2017, National Bank of Ethiopia, Directive on Transparency in Foreign

Similar to the experience of the U.S. and UK, the principle of autonomy of documentary credit is enshrined in the Ethiopian legal framework. The Ethiopian Commercial Code under Article 959(2) stipulates "[a] documentary credit is independent of any contract of sale on which it may be based." The Code isolates the credit from any other accompanying sale contracts and grants the seller an absolute payment right as far as the documents are conforming to the terms and conditions of the credit. Besides, it has the implication that neither the seller nor the bank(s) can challenge payment under the documentary credit by raising fraud in the transaction. The aforementioned provision underlined that documentary credit is independent of what has been agreed between the seller and the buyer under their sale contract. If there is any dispute on the credit or the underlying contract between the seller and the buyer, the premise is 'pay now, sue later'. Meaning, the buyer should pursue his/her claims, if any, under the underlying contract by a separate suit against the seller and not by withholding all or part of the credit.[102] However, a look at the phrase "…any sale contract…" in the aforementioned provision indicates that the Code isolates the credit only from the sale contract made between the seller and the buyer. As we have seen from Article 4 of the UCP600 and Section 5-103 (d) of the UCC the credit is isolated not only from the sale contract, but also any contract accompanying the credit such as a contract between the buyer and the issuing bank, the issuing bank and the beneficiary or the issuing bank and the correspondent bank.

The principle of autonomy is also reinforced under Article 966 of the Commercial Code. It states "[t]he bank shall not incur any liability where the documents are on their face in conformity with the instructions received. It shall not incur any obligation in relation to the goods which are the subject of the credit opened." The provision restricts the responsibility of banks only to check the documents, presented by the seller, compliance with the facts stated under the credit. They are not required to check performance in the underlying contract. Any reference whatsoever included in the credit cannot compromise the credit's autonomy.

Currency Allocation and Foreign Exchange Management Directives No. FXD/46/2017, 20 March 2017.

[102] Chumah, *The Exceptions to the Principle of Autonomy of Documentary Credits*, *supra* note 36, p. 32

The issue of autonomy of documentary credit is also addressed under the Ethiopian Federal High Court case, *Ethiopian Grain Trade Enterprise v. Commercial Bank of Ethiopia.*[103] In the case, the plaintiff entered into a contract with Pakistani importer, M/S Patel & Co. or Nominee Grain Center, on 02 May 2008. In the contract they agreed that the plaintiff will deliver 400 Metric Tons of chickpeas to the importer and the importer will open irrevocable documentary credit for a price of $280,000.00. According to their agreement, the irrevocable documentary credit was issued by the Abn Amro Bank (Pakistan) with a credit No. NLNL1NL08E104142. With the request of the issuing bank, the Commercial Bank of Ethiopia (hereinafter CBE) became an advising bank. Then the plaintiff shipped the required goods to the Djibouti port and tendered the documents to the CBE. The CBE in turn forwarded the documents to the issuing bank. However, the Pakistani importer alleged that it found insects in the imported goods; hence the goods should have a price discount. Besides, the issuing bank rejected the documents by stating that some of the documents did not strictly comply with the terms and conditions of the credit and refused to effect payment upon them. When the plaintiff received such notification, it sued the CBE at the Federal High Court of Ethiopia.

The plaintiff argued contesting the independence of documentary credit that though the issuing bank rejected the complying documents; the defendant (CBE) has the obligation to effect the payment as far as it performs the underlying contract which the documentary credit relays. However, the Court rejected the plaintiff's assertion arguing:

> though the plaintiff argued that it performed its obligation to the importer, reside in Pakistan, in compliance with the contractual terms stipulated in the underlying contract, a look at Article 959(2) of the Commercial Code and Article 4(a) of the UCP, documentary credit and the underlying contract are independent of one another. Hence, the plaintiff's mere performance of the underlying contract does not guarantee him to claim the performance of the credit from the defendant.[104]

[103] *የኢትዮጵያ እህል ንግድ ድርጅት vs. የኢትዮጵያ ንግድ ባንክ፣ የፌደራል ከፍተኛ ፍርድ ቤት፣ መ.ቁ. 134400፣ 2006 ዓ.ም*

[104] *Ibid.,* translated by the author

In the courts wording, mere performance of the underlying contract does not guarantee the payment under the credit. The principle of autonomy restricts the contracting parties' right to argue based on the underlying contract for claiming an honor or otherwise dishonor of the credit. At this point it is wise to ask whether the principle of autonomy remains intact irrespective of any fraudulent acts of the parties in the credit in the Ethiopian documentary credit law. Thus, the subsequent topic will address the issue of a fraud exception under the Ethiopian documentary credit law

3.2. Fraud Exception in Ethiopia

As discussed above, documentary credits are independent of the underlying contract concluded between the parties and the credit agreement between the issuing bank and the applicant. The credit is disassociated with the actual performance of contracts accompanying it. Thus, when banks measure compliance of documents they restrict themselves to the terms of the credit and the documents presented. This principle no doubt promotes the smooth operation of documentary credit. However, the absolute separation of the credit from the actual performance of the contract might create ample opportunities for fraudsters to abuse the system. That makes fraud one of the major problems facing documentary credit transactions in the world. [105]

Studies show that developing countries are the main targets of documentary fraudsters.[106] At this point, one might ask the volume of fraud experienced in the Ethiopian import and export transactions. Thousands of documentary credits and billions of dollars are transacted in Ethiopia through its banks.[107] However, there is no official record either in the banks or NBE that shows the exact number of documentary credit fraud in Ethiopia. Most of the time fraud in documentary credit is unnoticed by the public. It comes to light only when one of the parties raises a dispute. Bankers and traders do not voluntarily disclose such fraud or like fraud situations as they justify it as protecting customer's information and indeed, some of the fraud cases are

[105] Yanan, *Approaches to Resolving the International Documentary Letters of Credit Fraud Issue, supra* note 37, p. 21

[106] Israel Woldekidan, Introduction and Regulation of Electronic Bill of Lading in Ethiopia: Appraisal of the Legal Environment and Lesson from International Recommendation, LL.M Thesis, Bahir Dar University, School of Law, (2018), p. 52 [hereinafter Israel, *Introduction and Regulation of Electronic Bill of Lading in Ethiopia*]

[107] Lubaba *et al*, *An Assessment of Letter of Credit in Import and Export Case of Commercial Bank of Ethiopia*, *supra* note 96, p .35

interlinked with corruption scandals.[108] However, its existence is undeniable. According to Israel Woldekidan, Ethiopia is one of the countries that face fraud in documentary credit transactions.[109] Common types of fraud experienced in Ethiopia are the issuance of forged bills of ladings, insurance policies and commercial invoices.[110] The first instance is falsification of bills of lading while no goods are in fact shipped. In collusion with shipping companies, shippers and insurers forge cargo documents to receive payments in the credit while in fact no goods are actually shipped. The other instance is issuance of commercial invoices, cargo documents and insurance certificates for goods that are actually inferior in terms of their quality and quantity to what the documents have denoted. It also happens that, fraudulently, the same good is sold to two or more persons and the same cargo document is issued twice for the same merchandise.[111]

There are certain cases which have come to the public's attention. In this regard the experience of *Yeju Honey and Honey products Processor PLC (importer)* with the Indian exporter named*, Filtron Limited* is worth mentioning. The parties entered into an agreement in 2013 for machine design, production and installation with the price of €214,180.00 payable through irrevocable documentary credit.[112] However, in breach of the contractual obligation, the exporter delivered incompatible and second-hand machineries while it received the payment by submitting a forged bill of lading and commercial invoice documents. The attempt by the Ethiopian importer to enjoin the payment by requesting the issuing bank, CBE, was fruitless. Consequently, the Ethiopian importer incurred significant losses.[113] In another case, the Addis Fortune unveils a case of fraud in documentary credit. Lubar Industries, a local company, made contractual agreements with an Italian Company, SAFET SPA, for delivery of wire-making machines. Lubar opened documentary credit for the payment. Unfortunately, the SAFET SPA delivered defective products that do not fit the contractual

[108] Yewondwossen, M., 'The role of National Bank of Ethiopia in foreign currency allocation', *The Ethiopian Herald,* Vol. 6, (2015), p.23

[109] Israel, *Introduction and Regulation of Electronic Bill of Lading in Ethiopia, supra* note 106, p. 52

[110] Interview with Melaku Mekonnen, Manager of Legal Service Division at Ethiopian Shipping and Logistics Services Enterprise, (4 April 2018)

[111] *Ibid.*

[112] Interview with Tegegn Zergawu, Former Legal Compliance Expert, Tiret Corporate, (8 April 2018)

[113] *Ibid.*

terms. Lubar's action to enjoin the seller's payment under the credit for breach of the underlying contract was futile.[114]

A key informant also mentioned a case that involves fraud in documentary credit. An Ethiopian importer entered into a contract with an Exporter residing in China. They agreed that the exporter would deliver a fiber silk and the importer in return will open an irrevocable documentary credit for the payment. Accordingly, CBE issued documentary credit at the request of the importer. The exporter, however, provided false documents to the bank showing that the required fiber silk was shipped. In fact, it was not the fiber silk, but instead it was crushed stone. The importer's effort to enjoin the payment claiming forgery in the transaction was unsuccessful. Consequently, criminal investigations were made against the Chinese export suspecting fraud in documentary credit. The Ethiopian importer was also under investigation suspecting its participation in the fraud and illegally expatriating foreign currency. However, the case against the importer was closed for lack of sufficient evidence while the case against the exporter continues in collaboration with the Chinese Government.[115]

The Reporter also reported a case of forgery of documentary credit to unduly transfer money. Defendants named *Micheal Maston* and *Aimen Abdela* were charged by the prosecutor for forgery of documentary credit. The defendants allegedly prepared overvalued forged bills of lading and commercial invoices for payment in the credit. With the use of these forged documents they unduly derived 62.3 million birr from CBE.[116] It is also reported that a significant amount of money was fraudulently taken from CBE, Development Bank, Dashen Bank, Abyssinia, Awash and Wegagen banks by opening counterfeit documentary credits for imports that never made it to the country.[117]

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[114] Fasika Tadesse, Central Bank Blacklists Italian Machinery Supplier, *Addis Fortune,* Vol. 20 , No. 1005, (3 August, 2019)

[115] Interview with Sifa Tamrat, Economic Crimes Public Prosecutor, the Federal General Public Prosecutor, (25 December, 2019)

[116] The Reporter, *Two Foreigners Charged with Forex Fraud,* available at <http://archiveenglish.thereporterethiopia.com/content/two-foreigners-charged-forex-fraud> last accessed on 19 May, 2018

[117] The Daily Monitor (Addis Ababa), *Ethiopia: About 56 million birr embezzled from banks in the past three years,* available at, <https://allafrica.com/stories/200004040045.html> last accessed on 10 January, 2020. The case gives as a lesson that banks can be a victim of fraud in documentary credit transactions. In the given cases, the whole documents were forged, drawn against non-existed import/export transactions.

There are also several cases where the forgery of documents is involved in documentary credit transactions by preparing over invoiced imports and under invoiced exports in order to unduly obtain excessive foreign exchanges and avoid tax liabilities respectively.[118] This problem is noticed by the public authorities of NBE, Ministry of Revenue and the Ministry of Trade. They established a joint task force to verify the actual approved documentary credit and the value of imported items.[119]

As discussed earlier, UCP from its inception in 1929 to its latest version of UCP600 did not incorporate fraud exception rules. It is the perception of the ICC that, the matter should be handled by national laws.[120] Accordingly, several jurisdictions adopted fraud exception rules.[121] Unfortunately, Ethiopia neither enacted fraud exception rules in the form of proclamation, regulation nor directives. Nor does the existing legal framework and court practice address the problem. The Commercial Code incorporates nine provisions only, from Articles 959 to 967, which more or less deal with the principle of independence, the principle of strict compliance, the concept of revocable and irrevocable credit and the respective rights and obligations of the issuing and confirming banks. No provision is incorporated which deals with the issue of fraud exception. Due to this, banks are not willing to enjoin payment even though fraud in the credit is established. They usually justify this because they do not have a statutory mandate and obligation to do so and they do not want to compromise their reputation in international commerce by engaging in such activities.[122] Besides, they argue if banks are required to check whether the documents presented by the beneficiary are forged or not, it will be against the expeditious payment which the nature of commercial transactions and banking business require most.[123]

However, to the contrary, the absence of rules that resolve disputes related to fraud under documentary credit transactions lefts with three undesirable options. The first one is to totally avoid the concept of fraud exception and stick to the independence features of documentary credit as mentioned under

[118] Eyader Teshome, Legal and Regulatory Issues of Ethiopian Currency (Foreign) Exchange Regime and Transactions, LLM Thesis, Bahir Dar University, School of Law, (2017), p. 97

[119] *Ibid.*

[120] Zsuzsanna, *Documentary Credits in International Commercial Transactions, supra* note 12, p. 144

[121] Hamed, *Documentary Letters of Credit*, *supra* note 1, p. 111

[122] Interview with Aster Alemu, Customers Relation Officer of Trade Service, Commercial Bank of Ethiopia, (2 April, 2018)

[123] *Ibid.*

Articles 959 and 960 of the Commercial Code. In the case *Ethiopian Grain Trade Enterprise v. Commercial Bank of Ethiopia* the Court stuck to the independence rule enshrined under Article 959(2) and 4(a) of the Commercial Code and the UCP500 respectively and rejected the arguments, made by the applicant, based on fraud exception.[124] However, this should not be considered as an appropriate choice as it will result in injustice against the innocent party who receives nothing, though the party performed the contractual obligation dully and effectively. It may also create undesirable consequences of system-protected fraudsters and abuse of the credit. The credit will be under the exclusive mercy of the seller that it will be his undue choice to collect his duty honestly by performing the contractual obligations or by simply forging documents.

The other option is to resort to the contract law. Article 1731 of the Civil Code dictates contractual agreements shall be binding on the parties as though they were law. In addition, Article 1745 of the Code requires the seller to perform its obligation(s) in accordance with the contract. In the provisions of the law of sales, enshrined under the Civil Code, the seller is required to guarantee the conformity of the goods as stipulated in the contract. In addition, he should also assure the goods are free from defect.[125]Pursuant to Article 2288 of the Code, the goods shall not be deemed to conform to the contract where the seller delivered to the buyer a thing different from that provided in the contract, or a thing of a different species.

If the seller prepares forged documents for payment while he ships defective goods or ships nothing at all, there comes a breach of the underlying contract. At this juncture, the innocent party can resort to the relevant provisions of the Civil Code to obtain a remedy by invoking a breach of contract. As a result, the party can claim forced performance,[126] purchase in replacement,[127]or cancellation of the contract.[128] Finally, apart from or in addition to other remedies, the buyer has the right to claim compensation for

[124] *የኢትዮጵያ እህል ንግድ ድርጅት vs. የኢትዮጵያ ንግድ ባንክ፣ የፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ. 10049፣ 2008 ዓ.ም*

[125] The Civil Code of Ethiopia, *supra* note 98, Article 2287

[126] *Id*, Articles 1771(1), 1790, 2329

[127] *Id*, Article 2330

[128] *Id*, Articles 1771(1), 1790 and 2336

damage caused to him by the other party who failed to perform his obligation.[129]

In general, this option focuses on bringing a law suit based on the underlying contract, rather than focus on enjoining the payment in the credit. This option, however, is not appropriate or advisable. Because the concept of fraud exception is required to enjoin payment of the fraudulent seller in the credit before he is actually paid by the bank. In other words, if the fraudulent seller is paid by the authorized bank, despite the fraudulent acts, the issue of fraud exception will be over. It will be very difficult and onerous for the innocent party to bring a suit based on the underlying contract when the parties' are residents in different jurisdictions that are very distant and have different legal systems, languages, political land-scape and other issues. Hence, by no means can it be taken as a substitute for fraud exception rules. It is, rather, the typical way of securing contractual rights. When it is seen in light of the underlying contract accompanied by documentary credit payment, it will have a message of pay now in the documentary credit and sue later based on the underlying contract.

Apart from the civil remedies, one can seek remedy under the Ethiopian Criminal Law. Article 375 through 390 of the FDRE Criminal Code makes it clear that forging documents with intent to injure the rights or interests of another, or to obtain for himself or to procure for another any undue right or advantage is punishable ranging from simple imprisonment and fine to 25 years rigorous imprisonment, which varies depending on the type of forgeries or counterfeits involved. The Criminal Code, also, outlawed any acts of falsification or alteration of goods.[130] If the person is found guilty, the bank can stop the payment and deny the beneficiary as it would be a fruit of criminal acts.[131] It basically emanates from the underlying principle of justice, "no man shall profit from his wrong."[132] In a criminal case *Public Prosecutor vs. Sergio Demi,* the latter was found guilty for a concurrent crime of use of forged instruments and goods in an export transaction

[129] *Id*, Articles 1771(2), 1790(1) and 2360

[130] The FDRE Criminal Code, *supra* note 100, Articles 391-395

[131] *Id*, Article 98

[132] John W. Van Doren, Theories of Professors H.L. A. Hart and Ronald Dworkin - A Critique, *Cleveland State Law Review,* Vol. Issue 2, (1980), p. 297

involving documentary credit. The defendant was sentenced for 15 years rigorous imprisonment.[133]

At this juncture, it has to be noted that the criminal remedy is independent of the civil one (fraud exception rule); hence, they should not be taken as a substitute for one another. The parties to the cases, the required standard of proof, the available remedies and the objectives behind the remedies sought are entirely different in civil and criminal cases. Therefore, existence of a criminal remedy in the FDRE Criminal Code should not be taken as an excuse for failure to have fraud exception rules.

In general, resorting to the laws of sale contact or the criminal law cannot sufficiently redress the problems of documentary credit fraud. Thus, Ethiopia needs to enact the fraud exception rule. First, Ethiopia needs to close the existing loopholes. It is known that documentary credit does not concern the underlying contract(s). This, obviously, will create a loophole for fraudsters to abuse the system and receive undue benefits. Enacting a fraud rule will shrink the loopholes under documentary credit and it will, at least, minimize the enormity.

Second, there are public policy reasons for controlling fraud. The government, as a responsible organ to correct and suppress acts which can distort the economy of the country, shall enact laws to halt fraud. No one should benefit from his or her wrong. Therefore, those involved in fraudulent activities should not be incentivized; rather they should be penalized, be it civilly or criminally.

The last, but not the least, reason to enact the fraud exception rule is to maintain the utility of documentary credit. Fraud does not only violate public policy, but it also poses a serious threat against the utility of the credit.[134] The utility of documentary credit highly depends on the fact that it will provide a fair and balanced treatment of the interests for both of the parties.[135] The fraud exception rule is needed to suppress fraudsters, thereby, encouraging others to use documentary credit that in turn will increase its credibility in the import and export transactions of Ethiopia.

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[133] Interview with Sifa Tamrat, Economic Crimes Public Prosecutor, Federal General Public Prosecutor, (25 December, 2019)

[134] Ross and Xiang, *The Development of the Fraud Rule in Letter of Credit Law, supra* note 29, p. 666

[135] *Ibid.*

Conclusion and Recommendations

Documentary credit accompanied by one of its governing principles, the principle of autonomy, provides a secure mode of payment in international trade. Similar to the experience of other countries, the principle is enshrined under the Commercial Code of Ethiopia. The principle makes documentary credit independent from any other contracts accompanying it. Thus, payment in the credit is confined to the documents presented and not on the terms specified in the underlying contract or the goods actually shipped. This principle no doubt promotes the smooth operation of documentary credit. However, the absolute separation of the credit from the sale or other contract on which it may be based creates ample opportunities for fraudsters to abuse the system.

Fraud in documentary credit is committed against banks, importers, exporters and the carriers of cargo. Common types of frauds experienced in Ethiopia and the world are falsification of bills of lading, insurance documents and commercial invoices to receive payments in the credit while they ship defective goods or ship nothing at all. It also happens that, the same good is sold to two or more persons and the same cargo documents are issued twice for the same merchandise with the intent to procure undue advantages. However, the international instruments of documentary credit do not recognize fraud exception rules. As stated by the drafters of the instruments, a fraud exception should be regulated by domestic laws. Due to that, countries develop a fraud exception rule. In this regard, the U.S. and the UK are pioneers. However in Ethiopia, the existing laws of the country do not address the problem nor do specific fraud exception rules exist in any form. Thus, the author recommends revision of the existing independent principle of the credit and incorporating a fraud exception rule. Enacting such a rule will help the government to close the loophole, control fraudsters and consequently maintain the utility of the instrument in the country's international transaction.

In crafting such a law, Ethiopia should take a lesson from the experiences of the U.S. and the UK, which have advanced fraud exception rules transplanted across several jurisdictions. Accordingly, the fraud exception rule should be crafted in such a way that ensures equilibrium between autonomy of the credit and fighting fraudulent activities. It should not be too strict to release real fraud nor too loose to destroy the inherent nature of

autonomy of the credit. Thus, application of the fraud exception rule should be upon existence of clear and cogent evidence that shows involvement of material fraud in the transaction. No injection (provisional or permanent) should be given by a court or a bank for mere suspicions or allegations made by one of the parties. It rather should be satisfied that the evidences submitted are clear and convincing. Besides, the fraudulent act should be significant to the participants in the transaction. Any fraudulent act which has insubstantial or immaterial effect to the participants of the transaction should be disregarded. Moreover, it should ensure that the fraud exception rule will not affect the rights of a holder of due course or a person with similar status. There should be an exception that preludes application of the rule, despite existence of material fraud, against a person who is not involved in the fraud and has given value, in good faith, for the credit. However, sometimes it might be difficult to prove existence of material fraud, despite its involvement in the transaction. To minimize the effects of such an unfortunate situation, the law should require the beneficiary to warrant that there is no forgery in the transaction and the drawing does not violate any agreement between the applicant and the beneficiary.

Export Processing Zone Development in Ethiopia: Law and Policy Review

Mulugeta Akalu[*]

Abstract

Export processing zones [EPZs] have been used for over a century to attract investors who are interested in manufacturing and exporting. Despite long usage, the role and benefits of EPZs remain one of the most controversial areas both in practice and theory. However, the fact that countries from South East Asia and Latin America have obtained several benefits from EPZs encouraged countries such as Ethiopia to adopt them. Even though Ethiopia began its EPZs programme recently, the number of zones being built is increasing dramatically. Experience shows that the success or failure of industrial parks depends upon the host country's condition. Most sub-Saharan African countries' programmes of EPZs failed due to inappropriate domestic policies, regulatory systems and administration. The aim of this article was to scrutinize the impact, role, and status of Ethiopia's export processing zones and to investigate the factors behind the success or failure of EPZs. To investigate the status of Ethiopian EPZs, the author has investigated the legal and policy frameworks of Ethiopia. Moreover, the EPZs of successful South East Asian countries and of those African countries who failed are also consulted to learn both from the success and failure stories. Using the teleological approach of comparing the realized goals against the targeted objectives, the author of this article finds that Ethiopian EPZs are not living up to their expectations. Since various factors are responsible for their underperformance, the government is advised to take numerous policy and regulatory improvements so as to reap the aspired benefits.

Keywords: Export processing zones, Ethiopia, law, policy

Introduction

Low income countries in their efforts to come out of the poverty trap have been trying various mechanisms to stimulate their economic growth. The most important way commonly used to bring economic growth has been the

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attraction of foreign direct investment (FDI) from developed nations. Sometimes FDI is praised as the only curative drug and the only way out from the vicious circle of deep-rooted poverty for developing countries[1].The commonly agreed view in our today's world is that FDI might have both positive and negative contributions depending upon the conditions, laws and policies of the host state and the way investment flow is regulated.[2] Developing countries including Ethiopia continue to compete to attract FDI through various mechanisms even though both the practice and the theory showed a mixed result.

One of the commonly used mechanisms used to attract FDI is the construction of export processing zones.[3] The creation of specific locations in cities in its rudimentary form to promote foreign trade had existed for many centuries[4]. The first export processing zone was believed to be established in 1896 in Manchester, England.[5] Some scholars argued that the first modern export processing zone was the Shannon export free zone of Ireland which was established in Ireland in 1959.[6] The initial success of this experiment led the organizations such as the United Nations Industrial Development Organization (UNIDO) to promote it as a model to be reproduced by developing countries.[7] It goes without saying that the number of countries establishing EPZs increased dramatically within a short period of time. By 1990, the number of EPZs built worldwide reached well over 200 with total employment exceeding 2.5 million people.[8]Sixteen years later, the number of EPZs reached well over 3,500 and the total number of

[1] Imad A. Moosa, *Foreign Direct Investment; Theory, Evidence and Practice* ,Palgrave, (2002), P. 72: [Herein after Imad A Moosa, Foreign Direct Investment Theory, Evidence and Practice]

[2] Guanghze Chen,Michael Geiger,Minghui Fu, Manufacturing FDI in Sub-Saharan Africa; Trends, Determinants and Impacts, World Bank group, (2015), P. 7: Theodore H. Moran, FDI and Development, A New Policy Agenda for Developing Countries and Economies in Transition, Institute for International Economics, Washington DC, (1998), P. 25

[3] Jarmila Vidova, Industrial Parks, History, Their Present and Influence on Employment (2010), *Review of Economic Perspectives*, Vol. 10(1), P. 36

[4] Sean Wulfrey, Special Economic Zones and Regional Integration in Africa, Tralac Working Paper, (2013), p. 6

[5] Petter Gibbon,et,at, An Assessment of the Impact of Export Processing Zones and an Identification of Appropriate Measures to Support Their Development, Danish Institute for International Studies, (2008), P. 13

[6] Akbar Noman et, al, *Africa, Industrial Policy, and Export Processing Zones: Lessons from Asia*, Oxford Scholarship Online, (2011), PP.2-28

[7] Ibid.

[8] UNCTAD, Export Processing Zones,Role of Foreign Direct Investent and Developmetal Impact, United Nations Publication, (1993), pp. 6-13

workers employed in them worldwide reached 66 million according to the 2006 census.[9] Despite the dramatic increase in the number of EPZs, the theoretical discourse as well as practical reality remains controversial.[10] Despite the controversies, experience shows that there are countries which have enormously benefited from EPZs whereas others have lost much because of regulatory defects.[11] Hence, it is agreed that whether EPZs help the economic progress of a given state depends upon the domestic conditions of each country.[12] If we see the EPZs performance and impact in Africa, most sub-Saharan African countries began implementing EPZs development programmes only recently, except Senegal, Mauritius and Kenya.[13] The findings from previous studies show that sub-Saharan African export processing zones have by and large underperformed, with the significant exception of Mauritius and the partial exception of Kenya and Madagascar.[14] The EPZs of many African countries have been put up with lack of attention to labor and displacement issues, and poor economic management skills have made it impossible for governments to tackle the numerous challenges of providing high-quality infrastructure, government services, and human capital.[15] It is on the backdrop of this understanding that the Ethiopian government spent billions of dollars for a massive EPZ construction. So far, Ethiopia has within ten years finished the construction of EPZs in Addis Ababa Bole Lemi and Kilinto, Hawassa, Dire Dawa, Mekelle, Kombolcha, Adama, Jimma, Bahir Dar, and Debe Berhan, while extra more zones are also under construction in different towns.[16] Moreover, these multi- purpose zones which are specific agro-processing zones were also built in the regions of Tigray, Amhara, Oromya and Southern Nations Nationalities region. The

[9] Ibid.

[10] Keijiro Otsuka & Tetsush Sonobe, A Cluster- Based Industrial Development Policy for Low-Income Countries, GRIPS Policy Research Center, Tokyo Japan,(2011), p. 4

[11] Hye young Cho, Industrial Park Development Strategy and Management Practices, Korean Ministry of Knowledge and Economics, (2012), p. 4; Hyeyoung Chu tells us that Korea is the most successful country in getting benefit from EPZs. He reckons that Korea prospered because it managed to properly regulate the EPZ business and applied them in areas which are in Koreas comparative advantages. Most Sub-Saharan African countries are the looser from EPZs due to lack of proper regulation and lack of political will and commitment.

[12] Bayisa Tesfaye,Prospects and Challenges of Industrial Zones Development, ACJTB,(2016), 2(1), PP. 1-64

[13] Zeng, Global Experience with Special Economic Zones, with a Focus on China and Africa, The World Bank Trade and Competitiveness Global Practice, Conference Paper,(2015), p. 7

[14] Ibid.

[15] Ibid.

[16] Ethiopian Industrial Parks Development Corporation website (June,2015) ; Available at; http://www.ipdc.gov.et/images/downloads/New/IPDCBrouchure.pdf last accessed on 08/01/2020

government has the plan to add 13 more agro-processing zones.[17] Just like any developing country, the government of Ethiopia aspires to reap the benefits of export diversification, foreign currency earning, employment creation, economic growth, forward and backward linkage and technology spillovers and transformation of the economy from EPZs expansion.[18] However, even though EPZs' transformational role in Ethiopia's industrialization process is believed to be enormous, efficient and feasible policies and institutional arrangements are yet to be developed in the Ethiopian regulatory system. Moreover, the Ethiopian EPZ development program suffers from lack of comprehensive regulatory framework (such as the absence of comprehensive legal, policy and organizational frameworks).[19] Some scholars argue that it is too early to say that the EPZs are successful or unsuccessful until they serve 5 to 10 years.[20] Nevertheless, the initial conditions seen within the first five years can give us sufficient information to predict their fate in the near future. The early result of Ethiopian EPZs that has been observed within the past five years of EPZs revolution time shows us that Ethiopia is not in the right track regarding its EPZs development programmes since the aspired advantages are not materializing despite nearly a decade is over since the EPZs development programme. Furthermore, the success of EPZs is not solely dependent on factors relating to EPZs, rather there are additional factors which might determine the failure or success of EPZs, such as ease of doing business, absence of risks, political stability which includes sound macroeconomic and exchange rate policies and so on.[21]

This article is divided into six sections. While the first section is devoted to the general concept and definition of EPZs, the second section tries to address the theoretical perspectives on the impacts of EPZs. The third section covers the status of EPZs in sub-Saharan Africa. The fourth section

[17] UNIDO, Integrated Agro-Industrial Parks in Ethiopia, (2018), p. 11 available at https://www.unido.org/sites/default/files/files/2018-08/Integrated-Agro-Industrial-Parks-in-Ethiopia-Overview-document.pdf last accessed on 08/01/2020

[18] Federal Plan Commission, Ethiopian Growth and Transformation Plan II, (2017),p. 138 see also Industrial Parks Development Corporation Website available at: http://www.ipdc.gov.et/images/downloads/New/IPDCBrouchure.pdf

[19] Bayisa Tesfaye,Prospects and Challenges of Industrial Zones Development, *supra* note 12 pp. 1-64

[20] Farole Thomas, Export Processing Zones of Sub Saharan Africa, Learning from the Global Experience, World Bank Publisher, (2011), p. 161

[21] Dorsati Madani, A Review of The Role and Impact of Export Processing Zones, World Bank, (1999), p. 52

of the article is devoted to models of success or failure of EPZs. The fifth and the sixth sections of this article deal with the status of EPZ in Ethiopia and the policy and legal recommendation for their success.

1. Concept and Definitions of Export Processing Zones

EPZ refers to a geographically limited and specially administered area within a country that is established to attract local investment and FDI, trade, employment and industrial development.[22] They refer to the land well prepared for industries based on the comprehensive plans.[23] EPZs are also defined as geographically delimited areas, commonly physically secured, that are usually, outside the customs territory of the host country.[24]

Different countries have been using diverse names to refer to EPZs, and analysts have varying definitions of what constitutes an EPZ.[25] Some of the lists of terms include, "Export Free Zone" in Ireland, "Maquiladora‟ in Mexico, "Duty Free Export Processing Zone‟ and "Free Export Zone‟ in South Korea, "Export Processing Zone‟ in the Philippines, "Special Economic Zone" in China, "Industrial Parks" in Ethiopia, "Foreign Trade Zone" in India and "Free Zone" in the United Arab Emirates.[26] World Bank defines them as geographically defined places within a country offering a free trade environment, a liberal regulatory regime, and/or tax and other incentives oriented to attracting FDI and with an expectation that firms operating within it focus on export oriented manufacturing.[27] UNIDO defines EPZs as:

> *A tract of land developed and subdivided into plots according to a comprehensive plan with or without built-up (advance)*

[22] UNCTAD, Enhancing the Contribution of Export Processing Zones to the Sustainable Development Goals, United Nationas, New York Geneva,(2015), p. 3

[23] Hyeyoung Cho , Industrial Park Development Strategy and Management Practices, *supra* note at 11, P.28

[24] Ibid.

[25] Jessie Adala, A Case Study of the Performance of Export Processing Zones Garment Firms in Mauritius and Kenya in the Dawn of Agoa Phase IV, Unpublished Theses, (2008), P.13

[26] Engman, M., Onodera, O. & Pinali, E., Export Processing Zones: Past and Future Role in Trade and Development. OECD Trade Policy Working Paper, (2007), P. 53.

[27] World Bank, EPZs, Washington, D.C, World Bank Industry and Development Division,(1992), P.

> *factories, sometimes with common facilities and sometimes without them, for the use of a group of industrialist.*[28]

The requirements needed to qualify as export processing zones include prior master planning, follow-up management through management organizations and facilities supporting production of resident enterprises.[29]

The Ethiopian industrial park proclamation used a term "Industrial Park" instead of EPZs and defined it as:

> *An area with distinct boundary designated by the appropriate organ to develop comprehensive, integrated, multiple or selected functions of industries, based on a planned fulfillment of infrastructure and various services such as road, electric power and water, one stop shop and have special incentive schemes, with a broad view to achieving planned and systematic development of industries, mitigation of impacts of pollution on environment and human beings and development of urban centers, and includes special economic zones, technology parks, export processing zones, agro-processing zone, free trade zones and the like designated by the Investment Board;*[30]

Based on this definition the term Industrial Park is used as a generic term that represents all the kinds of industrial estates with various degrees and kinds. Here, in the definition, EPZs are listed as one type of industrial parks among many. Nevertheless, the proclamation failed to define and explain the similarity, difference and purposes of the various industrial estates it listed.

For Nicolas Papadopoulos and Shavin Malhotrn, Special Economic Zones [SEZ], and EPZs are similar since they focus on manufacturing for export whereas the difference between the two is that EPZs are geographically

[28] UNIDO, Industrial Estates Principles and Practice. Technical Report. United Nations Industrial Development Organization, (1997), P.8 also available at:- https://www.unido.org/resources/publications/flagship-publications/industrial-development-report-series last accessed on 23/08/2019

[29] Imad A. Moosa, Foreign Direct Investment, Theory, Evidence and Practice , *supra* note 1, P. 72

[30] Industrial Parks Proclamation, (2015), Art.2 (1), Proc.No.886/2015, Fed. Neg. Gaz., year 21,no.39

restricted, and often fenced-in, enclave, whereas SEZs cover a large area extending to the territory of an entire city, province, or region.[31]

In the same fashion, UNIDO holds that EPZs can come in a variety of forms such as industrial zones, industrial estates, cities and districts; technology or innovation areas; science parks or cities; cyber parks; high-tech (industrial) parks; research and technology parks; science and technology parks; technology incubators; and eco-industrial parks.[32] These different forms can be situated in special economic zones, export processing zones and free trade zones, which can also be a part of a larger geographic and economic area, involving multiple countries along the transport corridors and forming the industrial and economic corridors.[33] Douglas Zhihua puts the various nomenclatures of EPZs as follows:

Table 1. Common types of EPZs

Name	*Meaning*
Free Trade Zones	Are fenced-in, duty-free areas, offering warehousing, storage, and distribution facilities for trade, transshipment, and re-export operations.
Export Processing Zones	Are industrial estates aimed primarily at foreign markets. They offer firms free-trade conditions and a liberal regulatory environment. There are in general two types of EPZs: one is a comprehensive type, open to all industries; another is a specialized type, only open for certain specialized sectors/products.
Comprehensive Special Economic Zones	Are zones of a large size that are a mix of different industrial service and urban-amenity operations. In some cases these zones can encompass a whole city or jurisdiction, such as Shenzhen (city) and Hainan (province) in China.
Industrial Parks	Bonded Areas (also known as "Bonded Warehouses") are specific buildings or other secured areas in which goods may be stored, manipulated, or may undergo manufacturing operations without payment of duties that would ordinarily be imposed. To some extent, a "bonded area" is similar to a "free trade zone" or "free port." However, the major difference is that a "bonded area" is subject to customs laws and regulations, while a "free trade zone" is exempt from these provisions.

[31] Nicolas Papadopoulos and Shavin Malhotra, The Role of Export Processing Zones in Development and International Marketing Strategy, Carleton University,(2005) P.3 available at; https://journals.sagepub.com/doi/10.1177/0276146707300070 last accessed on 23/08/2019

[32] Olga Memedovich UNIDO, Leveraging a New Generation of Industrial Parks and Zones for Inclusive and Sustainable Development, Vienna, (2018), P. 1

[33] Ibid.

Specialized Zones	Specialized Zones include science/technology parks, petrochemical zones, logistics parks and airport-based zones.
Eco-Industrial Zones or Parks	Eco-industrial zones or parks focus on ecological improvements in terms of reducing waste and improving the environmental performance of firms. They often use an "Industrial symbiosis" concept and green technologies to achieve energy and resource efficiency. Due to environmental challenges, increasing number of countries are embracing this new type of zone.

Source: Zeng (2012)

Although different nomenclatures are used in different countries with some variation in purpose and size, there are similar elements shared by these entities. Broadly, four characteristics describe the concepts of EPZs in various names: (1) they are geographically delineated area, usually physically secured; (2) they have single management or administration; (3) they offer benefits for investors physically within the zone; and (4) they have a separate customs area (duty-free benefits) and streamlined procedures.[34]

Terms such as Industrial Parks, Export Processing Zones (EPZ), Free Trade Zones (FTZ), Special Economic Zones (SEZ) and Export Processing Factories (EPF) refer to similar concepts with variations determined by policy prescriptions and objectives.[35] Given the fact that the phrase "EPZ" is the most commonly used terminology in most countries and in the literature, the author of this article uses EPZ for the purpose of this article to represent other nomenclatures. EPZs are entities or estates which allow for the creation of an 'enclave', isolated from the domestic economy, within which export-oriented manufacturing activities can freely operate without state intervention.[36]. Hence, EPZ shall be used to refer to any fenced-in industrial entities in different variants and naming typically established with the aim of achieving one or more of the policy objectives of attracting foreign direct investment and promoting exports and industrialization; serving as "pressure valves" to create large-scale employment opportunity; increasing the foreign currency reserves to support a wider economic reform strategy; and acting as experimental laboratories for the application of new policies and

[34] FIAS. Special Economic Zones: Performance, Lessons Learned, and Implications for Zone Development." Washington, DC: World Bank,(2008), P.13

[35] Madani, D., A Review of the Role and Impact of Export Processing Zones, The World Bank, (1999), P. 12: Available at; (http:// www.worldbank.org.)

[36] Kankesu Jayanthakumaran, An Overview of Export Processing Zones: Selected Asian Countries, Bangkok, Thailand, (2002), P. 13

approaches.[37] The common benefits provided in EPZs include preferential tax or duty treatment or exemptions from restrictions on the repatriation of profits, direct financial subsidies and improved physical infrastructure as well as expedited permission and related services.[38]

2. Theoretical Perspectives on the Impact of Export Processing Zones

Export processing zones are as popular as they are controversial.[39] The experience with EPZs shows a mixed picture. There has been a lot of intense polarized argument over the years as to the significance of EPZs as a policy instrument.[40] Most traditional economic analysis, including major analytical tools from the World Bank, view zones as a second-best policy, preferring economy-wide liberalization. The World Bank and several economists have expressed their worry about the possible distortion effects that zones bring because of subsidies and by allowing countries to delay general liberalization of the economy as a whole.[41] However, other researchers have noted the dynamic, long-run economic impacts of successful zone programs.[42] The extraordinary success stories in South East Asia coupled with serious disappointments in sub- Saharan Africa have intensified the debate on the rationale and justification for using EPZs as an instrument for economic development.[43] The gain that they could bring is a subject of much debate. For many, EPZs are a contrivance to develop a more general form of industrial organization through the creation of industrial "clusters", i.e. a concentration of interconnected firms in a particular field of activity. The

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[37] Douglas Zhihua Zeng, Special Economic Zones: Lessons From the Global Experience, Center for Economic Policy Research, PEDL Synthesis Serious, (2010), p.3 available at: https://assets.publishing.service.gov.uk/media/586f9727e5274a130700012d/PEDL_Synthesis_Paper_Piece_No_1.pdf last accessed on 23/08/2019

[38] UNCTAD, Enhancing the Contribution of Export Processing Zones to the Sustainable Development Goals, United Nations, (2015), P. 3

[39] Yannick Saleman and Luke Simon Jordan, The Implementation of Industrial parks; Some Lessons Learned in India, World Bank, , Washington, DC, (2013) P.99[Here in after Y. Saleman & L.S.Jordan The Implementation of Industrial Parks; Some Lessons Learned in India]

[40] Farole, Thomas, Special Economic Zones in Africa, Comparing Performances and Learning from Global experience,(2011), p.8 [Here in After Farole Special Economic Zones in Africa, Comparing Performances and Learning from Global Experience]

[41] Farole, Thomas; Moberg, Lotta, It Worked in China, So Why Not in Africa? The Political Economy Challenge of Special Economic Zones, Working Paper, No. 2014/152, ISBN 978-92-9230-873-5, WIDER, Helsinki (2014),p. 2,

[42] Vastveit, Export Processing Zones in Sub-Saharan Africa – Kenya and Lesotho, unpublished, (2013),P. 9 [Herein after Vastveit, Export Processing Zones in Sub-Saharan Africa – Kenya and Lesotho,]

[43] Douglas Zhihua Zeng, Special Economic Zones, Lessons From the Global Eexperience, Center for Economic Policy Research, (2011), P. 4

concentration of EPZs had been justified by two reasons. The first justification is easiness in providing infrastructure for a geographically limited space.[44] The second rationale is the concentration of firms within a certain space can generate considerable spillover effects both inside and outside the zones.[45] EPZs are praised to improve and diversify exports, create employment opportunity and increase foreign exchange earnings by attracting foreign capital, yield positive externalities such as technology and knowledge spillovers that may contribute to improving the host countries' competitiveness, establish links to global value chains through participating in international competition, and making full use of comparative advantages to promote the upgrading of industrial structure and persistently improve the country's position in the international division of labor.[46]

The theory for the development of EPZs hinges on the premise that governments must provide public goods such as infrastructure so as to make firms competitive.[47] If the firms are not there yet, the provision of infrastructure will encourage them to choose the parks. If the zones are built, but the general economic environment is difficult to do business, exemptions and incentives should be made to further attract firms and create competitiveness.[48]

One of the benefits said to be reaped from EPZs is agglomeration economic effects which could result from hub development around city centers and transportation centers.[49]According to Carol Newman and John Page, agglomeration economies are the firm-level productivity gains that result from spatial concentration of economic activity.[50] Marshal points out that there are three main justifications why firms should be situated closer to each other; namely, to reduce cost of transportation, to pool relevant workers

[44] Marshall, A., Principles of Economics. London: Macmillan, (1920), p. 2

[45] Sonobe, Tetushi, & Otsuka, K., Cluster-Based Industrial Development: An East Asian Model, Palgrave, Macmillan, (2006), p 3

[46] Vastveit, Export Processing Zones in Sub-Sahara Africa Lessotho and Kenya, *supra* note at 42,P. 2: See also Ziaodi Zhang et al, Industrial Park Development in Ethiopia, Case Study Development, UNIDO,(2018), p.2

[47] Y. Saleman & L.S.Jordan, The Implementation of Industrial Parks; Some Lessons Learned in India, *supra* note.39 P. 1

[48] Ibid.

[49] Ibid.

[50] Carol Newman and John Page, Industrial Clusters, The Case for Special Economic Zones in Africa, UNU-WIDER, (2017), p. 2

in areas where there is high employment and to exchange knowledge spillovers among firms, which could be high.[51]

Nevertheless, EPZ development policies are strongly criticized for the large scale land grabs and speculation issues particularly if the parks built remain vacant or little occupied by investors for long periods of time, for the huge government money spent for the construction of parks, for the loss of revenue from the exemption policy to the parks, and for the insufficiency of wages paid for labor.[52]

There have been strong opposition and criticisms against the issues of large tracts of land allocated for their construction, particularly when zones are long delayed or not occupied, which may imply land speculation. It has also proven difficult to demonstrate additionality, i.e. the activities in zones would not have happened without their construction and the public money that has been spent to support it.[53] The disappointment with EPZs becomes stronger against policies that not only provide public money for zone construction but forego revenues in the forms of taxes or resort to specific regulations such as lax environmental laws. Although those zones can create jobs, promote investment, and catalyze regional development, they could be the sources of labor abuse, limited social and economic upgrading, low levels of investment, and excessive establishment costs.[54] Labor activists campaigned against restrictions on freedom of association, collective bargaining, and other basic rights in EPZs. Farmers who are dispossessed their lands due to EPZ expansion without appropriate compensation protest frequently.[55]

[51] Marshall, A., Principles of Economics, *supra* note,44 p. 3

[52] Peter Gibbon, An Assessment of the Impact of Export Processing Zones and an Identification of Appropriate Measures to Support their Development, Danish Institute for International Studies, (2008), p. 11 [Herein after An Assessment of the Impact of Export Processing Zones and an Identification of Appropriate Measures to Support Their Development]

[53] Mester Liana-Eugenia, Bugnar Nicoleta-Georgeta: The Role of Industrial Parks in Economic Development, Annals of Faculty of Economics, University of Oradea,Vol. 1 no.1, (2013), pp.123-130,

[54] Nel, Etienne L. and Christian M. Rogerson. , Special Economic Zones in South Africa: Reflections from International Debates. Urban Forum, (2013), Vol. 24: no. 2 pp. 205–217

[55] Peter Gibbon, An assessment of the Impact of Export Processing Zones and an Identification of Appropriate Measures to Support their Development, *Supra* note 52, P. 11

Nonetheless, successfully managed EPZs will continue to play an important role in increasing competitiveness.[56] Carefully planned EPZs could provide an environment conducive to the growth of foreign investment, generate employment opportunities, foreign exchange, backward, forward and demand linkages, self-generating capital accumulation, training and technological spillovers and significant local spin-offs and co-ownership opportunities.[57] The notable examples who have benefited from the development of EPZs are the East Asian Tigers or alternatively known as the Newly Industrialized Nations such as the Republic of Korea, Hong Kong, Singapore, China and Taiwan.[58] These countries have achieved a remarkable success from EPZs programs by reaping the full benefits from the zones such as employment creation, export diversification, backward linkages, foreign currency earnings, and overall economic growth of the countries.[59]

Those EPZs which are not appropriately planned and managed, however, may not yield the aspired benefits. Many EPZs operate in an unsustainable way due to the social and environmental problems caused by poor management.[60] It is not the presence of EPZs or a sufficient infrastructure that makes the difference in attracting FDI, icreating jobs, and generating spillovers to the host country. Rather, it is the relevance of the EPZ programs in the specific context in which they are introduced, and the effectiveness with which they are designed, implemented, and managed on an ongoing basis, that will determine success.[61] EPZs, under current conditions, may well be effective only if there is a generally helpful macroeconomic and business atmosphere in place and the expected impacts from EPZs as such are diminishing from time to time.[62] The world's most successful zones have been established in East Asian countries and their achievements have not

[56] Thomas Farole and Gokhan Akinci, Special Economic Zones:Progress, Emerging Challenges and Future Directions; the International Bank for Reconstruction and Development 1818 H street NW Washington DC,(2011), P. 8

[57] Howard Stein, Industrial Policy and Export Processing Zones, Lessons from Asia, University of Michigan, Paper Presented in Addis Ababa for Africa Task Force Meeting, Unpublished, (2008), P. 4

[58] Guanghze Chen,Michael Geiger,Minghui Fu, Manufacturing FDI in Sub Saharan Africa; Trends, Determinants and Impacts, World Bank group, (2015), P. 1

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid.

been uniformly replicated in the developing world's less prosperous environs, particularly in countries with small markets.[63]

3. Models of Evaluating the Success or Failure of Export Processing Zones

Some people argue that EPZs have a propensity to attract FDI and larger domestic investors mainly in the short term; they are not a direct cause of development of local small and medium enterprises. While certain zones have demonstrated more positive long-run economic impacts, many neoclassical and neoliberal thinkers and institutions criticized EPZs for hampering nation-wide economic liberalization.[64] The argument by neoclassical theorists holds that EPZs cannot encourage domestic investment since they provide lower return than the protected segment of the economy.[65] They also contend that EPZs create distortions and are welfare-reducing since the inflow of capital into the zones will attract labor from labor-intensive sectors of production to comparatively more capital-intensive sectors in the zones.[66] Investments in zone infrastructure have in many cases resulted in 'white elephants,' which cost more to maintain them than the benefits that they bring, or zones where investors take advantage of tax breaks without delivering substantial employment or export earnings.[67] Many of the traditional EPZs seem at the outset successful in attracting investment and generating employment opportunity in the short term, but fail to sustain competitiveness in the face of rising wages or erode trade preferences.[68] Nevertheless, Johansson strongly criticizes the neoclassical theory of failing to consider the spillovers from foreign direct investments within EPZs, and advocates new growth theory. According to him the enclave nature of EPZs and the low-skilled production process do not

[63] Ibid.

[64] Farole, Thomas; Moberg, Lotta, It Worked in China, So Why Not In Africa? The political Economy Challenge of Special Economic Zones, *supra* note at 41, p. 13

[65] Hamada, K.,"An Economic Analysis of the Duty Free Zone," Journal of International Economics,(1974), 4 (3), P. 231

[66] Ibid.

[67] Farole Thomas and Lotta Moberg, It worked in China, So Why Not in Africa? The political Economy Challenge of Special Economic Zones, *supra* note at 64, P. 8

[68] Ibid.

promote technology transfers and associated externalities to the outside society.[69]

Among the various models used to evaluate the success or failure of EPZs, two of them are famous, i.e. cost-benefit approach (which tries to compare the situation with the zone to the hypothetical situation without it, but under an alternative set of industrial policies) and teleological analysis of comparing the actual results of EPZs with the goals or objectives set.[70] Warr (1989) and Jayanthakumaran (2003) are well-known for their cost-benefit analysis of EPZs based on several case studies in South East Asia. Their research has shown that industrial park development programs bring net positive contribution to economic welfare of the country.[71]However, their models are criticized for generalizing from few selected EPZ. According to critiques, the conclusions of Warr are made only based on a case study made on few successful EPZs of South East Asia, which cannot represent EPZs of other countries.[72]The second model of evaluating the success of EPZs is by cross-checking the aspired goals against the actual achievements. This approach forms a way of developing well-written targets and their respective performance indicators that show a clear picture of the results expected from the EPZ programme activities.[73]

4. The Status of Export Processing Zones in sub-Sahara Africa

When compared to South East Asian countries, most African nations are latecomers to the concept of export processing zone. The earliest countries which embarked on establishing EPZs development programmes with the sole purpose of exporting commodities were Liberia in 1970, Mauritius in 1971 and Senegal in 1974 in an attempt to replicate the success of the Asian

[69] Johansson, H. 'The Economics of Export Processing Zones Revisited', Journal of Development Policy Review, Vol. 12(4), (1994), P. 395

[70] Jose Daniel Amado, Free Industrial Zones: Law and Industrial Development In The New International Division of Labour, *University of Pensilvania Journal of International Law*, (1989),Vol.11(1), P. 136

[71] Jayanthakumaran, K, Benefit-Cost Appraisals of Export Processing Zones: A Survey of The Literature. Development Policy Review, (2003),Vol.21(1), P. 58: See also Warr, P. G., Export Processing Zones: The Economics of Enclave Manufacturing. The World Bank Research Observer, 4(1), (1989), P. 72.

[72] Farole Thomas, Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience, *supra* note at 40, p.12

[73] Charles Dominican, An Evaluation of Tanzania's EPZ Program–Challenges and Prospects, conference paper, (2009), p. 32

countries of the 1960s and 1970s.[74] Most of the EPZ development programmes began only in the late 1990s or early 2000s, in response to the US Africa Growth and Opportunities Act (AGOA) and the Multi-Fiber Arrangement (MFA). Most comprehensive studies conducted on the effect of EPZ in sub-Saharan Africa revealed that these programmes have largely failed in view of small static benefits such as employment, investment, and export figures and dynamic impacts like structural transformation and economic development. By 2008, the number of zones built in Africa reached 114.[75] In fact, those zones were largely different from the modern large scale multiuse zones that are currently being proposed.[76] So far, Africa's EPZs have played a negligible role in both the static and dynamic contribution to growth and development. When assessed using a number of success indicators, EPZs in Africa have been largely unsatisfactory as compared to the experiences of many South East Asian countries.[77] Many observers agreed that except for few countries, EPZs have brought insignificant impact on economic growth of host states, have created little jobs, are footloose companies with poor quality of jobs, have attracted little foreign direct investment, lacked backward linkages with domestic industries, and brought limited foreign exchange earnings.[78]Senegal and Kenya are the best examples whose zones were left empty after being constructed at the cost of more than a billion dollars.[79]

A lot of factors are responsible for the underperformance of African EPZs, including problematic legal, regulatory and institutional frameworks, poor business environment and high cost of doing business, lack of strategic planning and a failure to adopt a demand-driven approach, lack of policy consistency, and a failure of host governments to maintain commitments to

[74] African Development Bank Group, Special Economic Zones in Fragile Situations, A Useful Policy Tool?,AFDB Publisher, (2015), P.13, available at: file:///C:/Users/user/Desktop/SEZ_anglais_SEZ_anglais.pdf

[75] Farole Thomas, Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience, *supra* note 40, P. 11

[76] Ibid.

[77] Howard Stein, Industrial Policy and Export Processing Zones, Lessons from Asia, *supra* note at 57, P. 14

[78] Ibid, See also Farole, Special Economic Zones Performance, Comparing Performance and Learning from Global Experience, *supra* note 26, P. 8

[79] Ibid.

zones, lack of infrastructure, weak planning and management and lack of administrative commitment.[80]

5. Export Processing Zones of Ethiopia

Ethiopia, though very late and newcomer to EPZs, is rushing towards revolutionarizing her EPZs development. The government has been taking economic policy reforms since 1991. The first reform measure was the structural adjustment program which was followed by the formulation of a full-fledged industrial strategy of the 2003 known as Agricultural Development Led Industrialization programme. Since then the government of Ethiopia has been adopting and implementing four five-year successive national plans, namely the Sustainable Development and Poverty Reduction Program (2002-2005), the Plan for Accelerated and Sustained Development to End Poverty (2005-2010), the GTP I (2010-2015) and GTP II (2015-2020). The objective of GTP I and II is to transform Ethiopia into a middle-income country by 2025 and one of the key pillars to reach the target is the development of light manufacturing industries.[81] The main strategy devised by the GTP I and II is to make Ethiopia African hub of light manufacturing industries with the help of EPZs and clusters in the different parts of the country.[82]

In the last five years alone, Ethiopia has got ten government built zones and three major foreigner private owned zones. Moreover, the construction of at least ten EPZs is underway throughout the country. While some of them are nearing completion, some are at their initial stages. The government of Ethiopia has been spending billions of dollars earned from foreign loan for the construction of these zones and infrastructure. Zones which are completed so far include Hawassa Industrial Zone, Kombolcha Industrial Zone, Mekelle Industrial Zone, Jimma Industrial Zone, Adama Industrial Zone, Bole Lemmi Industrial Zone, Kilinto Industial Zone, Eastern Industrial Zone, Dire Dawa Industrial Zone, Bahir Dar Industrial Zone,

[80] UNDP, Comparative Study on Special Economic Zones in Africa and China, If Africa Build the Nests Will the Birds Come? Working Group Series, (2015), p.12: see also Zeng, Douglas Zhihua, Special Economic Zones in Africa: Putting the Cart in Front of Horse?" Washington, DC: World Bank, (2012), P.16

[81] Federal Democratic Republic of Ethiopia, National Planning Commission, Growth and Transformation Plan II,(2016), P. 143

[82] Ibid.

Debre Berhan Industrial Zone and Arerty Industrial Zone.[83] In addition, other four EPZs are under construction whereas four agro-processing zones are already built with the plan to build thirteen more zones.[84] The government has established Ethiopian Industrial Zones Corporation with a mandate to own, regulate and control the day to day activities of EPZs. Moreover, the Industrial Parks Corporation, Ethiopian Investment Commission and Ministry of Trade and Industry are organs responsible for the management and governance of the zones.

5.1 Why Ethiopia Began Building Export Processing Zones?

The decision of the government to build EPZs emanates from the need to repeat the Asian Tiger development model so as to achieve fast economic development through industrialization.[85] Both the Growth and Transformation Plan I and II put it that EPZs are indispensable to bring economic structural transformation through industrialization through export diversification, foreign currency earnings, employment creation, technology transfer, and revenue generation.[86] While GTP I envisaged the establishment of five big industrial parks, GTP II increased the number of industrial parks to be built around thirty. The GTP II plan puts the objectives of industrial policy as follows:

> *The manufacturing industry plays a leading role in terms of production and productivity, contribution to export earnings, technology transfer, skills development and job creation. By fostering manufacturing value addition and the productive capacity of the sector, the aim is to substantially increase manufacturing products in kind, quality and quantity. This will in turn render the manufacturing industry a major source of foreign exchange earnings. It can also reduce pressure on foreign exchange by substituting imports of strategic products by local products and enable the manufacturing industry to play an important role in the overall economy. The GTP Plan aspired to earn 3. 6 billion USD at the end of 2020 from export revenue from the manufacturing industry and to increase the*

[83] *Supra* note at 16

[84] *Supra* note at 17

[85] UNIDO, Industrial Parks Development in Ethiopia Case Study, (2018), P. 16

[86] FDRE, National Planning Commission, Growth and Transformation Plan II, p. 136

share of manufacturing export in total merchandise export to 25% by 2020.[87]

While the EPZs of the south East Asia are praised for being successful in accelerating the economies of these countries, their counterparts in sub-Saharan Africa are used as examples of failures.[88] Despite those ambitious efforts and huge spending for the development of industrial parks, the impact those parks brought remains meager. The economic contribution of the EPZs programme remains insignificant and far below the targets in terms of size of investments, jobs created and value and volume of exports.[89] Even if the aspiration of the government in building the zones is to make Ethiopia a manufacturing hub of Africa by bringing light manufacturing industries, the fact on the ground is far from reality. Some of the intended benefits expected by the government in establishing parks include job creation, export diversification, foreign currency generation, technology spillover, balanced foreign trade, capital flow and economic structural transformation. However, there are indications that Ethiopia might not be in the right direction to achieve the aspired benefits from EPZs. One of the biggest concerns is in relation to employment including the poor quality of the jobs, inadequate wages, job benefits, health and safety standards, job security, and lack of adequate training,[90] The other concern focuses on fewer-than-expected spillovers, such as low levels of technology transfer, labor migration to city-based zones which burdens already weak urban infrastructure, and over-dependence on zone investors who may move to other countries when labor costs rise.[91]Sometimes no foreign investor may come in to EPZ and the zones may remain vacant for a long period of time.

Despite expending billions of dollars in constructing the zones, employment opportunities remain very low and if there any, they pay inadequate wages and have low labor standards. The exchange rate gains from exports remain

[87] Ibid.

[88] Zeng, Global Experiences with Special Economic Zones with a Focus on China and Africa, World Bank, *supra* note at 13 ,p. 9

[89] According to GTP II, Ethiopia plans to earn 3.6 billion USD from exports. But in 2018/2019 budget year only 108 Million USD is the total amount earned from export of the manufacturing sector despite the completion of ten EPZs.

[90] Petter Gibbon,et,at, An Assessment of the Impact of Export Processing Zones and an Identification of Appropriate Measures to Support their Development, *Supra* note 5, p.14

[91] Ibid.

one of the least gains much lower than the planned gain.[92] According to Growth and Transformation Plan II the government planned to earn 3.6 billion USD from exports.[93] The government of Ethiopia had a plan to earn 1 billion foreign currencies from Hawassa Industrial Park only.[94] However, in the Ethiopian 2018/ 2019 fiscal year the total revenue from the export of the manufacturing sector was only 103 million USD.[95] The figure shows that Ethiopia is very far away from realizing its goals. The other bad news about Ethiopia's EPZs is the failure in raising the employment rate. The plan of the government while developing industrial parks was to hire more than two million individuals by 2025. Nevertheless, so far only less than 70,000 people have got employed although half of the planned industrial parks are already completed.[96] Moreover, the quality of the jobs is very low standard. Evidence has proven that people who work in Ethiopian industrial parks are the lowest paid in the world.[97] Furthermore, there have been frequent complaints by the workers of poor labor conditions and human rights violations. One of the private EPZs marred by labor abuse is the eastern industrial zone located in Dukem, which is found 30 kilometers away from Addis Ababa. Hawasa Industrial Zone is the other zone, at which employee dissatisfaction is high. People who have been working there complain of insufficient wage payment, inability to make trade unions, being forced to work in unprotected conditions, absence of government response for their complaints.[98] Thousands of workers in Hawassa EPZ have left their work due to lack of response to their problems of low salary, unsafe working environment and being exposed to sexual abuses and abduction.[99]

Some of the EPZs which were completed more than a year ago remain still vacant. Some of these parks which remain unoccupied or partially occupied include Kombolcha, Jimma, Mekelle, Adama, and Debre Berhan EPZs

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[92] Ethiopian Embassy to Brussels, Available at, (March, 2019): https://ethiopianembassy.be/2019/05/02/ethiopias-industrial-parks-generate-103-million-export-income/ Last Accessed on February 26/2020

[93] FDRE, Federal Plan Commission Growth and Transformation Plan II, p. 136

[94] CNBC News, (May 2019), available at: https://www.ien.com/supply-chain/news/21067585/report-ethiopias-garment-workers-are-worlds-lowest-paid last accessed on 19/07/2019

[95] *Supra* note; at 92

[96] Ibid.

[97] See *supra* note at; 94

[98] Ibid.

[99] Addis Insight, (March 2019), Available at: https://www.addisinsight.net/2019/03/07/abduction-rape-and-low-salary-at-hawassa-industrial-park-resulted-in-workers-strike/

though the government has incurred cost of approximately three billion USD to build the sheds and infrastructure. Some of the EPZs are not fully operational even though they are occupied by companies. Evidence has shown that one of the potential benefits of EPZs, i.e. forward and backward linkage, has not yet materialized.[100] Some people also criticize the government for locating EPZs in wrong cites due to political pressure despite some other regions having better potential to be selected as locations for EPZs.[101]

5.2. Challenges of Export Processing Zone Development in Ethiopia

5.2.1. Insufficiency of the Existing Legal and Regulatory Framework

Ethiopia enacted industrial parks/EPZs proclamation in 2015 with the aim of regulating export processing zones. On the surface it shows that a lot of effort has been exerted to establish a regulatory framework. Nevertheless, Ethiopia's current legal and regulatory framework for EPZs and the various laws that are applicable in relation to EPZs are marred by numerous irregularities and complexities.

One of the areas of law with a proven gap is the land law particularly the law on compensation during expropriation. The compensation principle in Ethiopia is not clear. However, it is known that Ethiopian compensation principle is not in line with indemnity principle which gives an equal or equivalent amount of compensation to the loss sustained by the owner of the expropriated property.[102] The vagueness of the law of compensation has been the source of discontent for smallholder farmers, who have been victims of inadequate compensation. The government seizes large tracts of land from peasants with little compensation which is not adequate for peasants to support their livelihood.[103] The biggest problem arises from the FDRE Constitution itself when it failed to consider land as a compensable interest.[104] This is always followed by social crisis of hundreds of thousands of households. Dispossessed farmers angered by the government's move

[100] Bayisa Tesfaye, Prospects and Challenges of Industrial Zones Development, *supra* note 12

[101] Ibid.

[102] Daniel Weldegebriel, Land Rights and Expropriation in Ethiopia, PHD Dissertation, Unpublished, P. 230

[103] Ibid.

[104] See FDRE Constitution, Proclamation Number 1, year 1, p. 1, Article 40(8)

stage demonstrations and violence which leads to the closure of factories.[105] This is because the state denies the people the right to get compensation for the land, as if it is the sole owner of all the land.[106]

The other gap relating to EPZs is the gap seen on Ethiopian labor law. So far there is no minimum wedge limit both outside the parks and in the parks.[107] The labor proclamation of Ethiopia provided that the wage issue is to be decided by the agreement of the parties only.[108] In fact, the wage amount paid to Ethiopian daily laborers is registered as the lowest in the world. The labor laws of many other countries provide minimum wage limits for laborers.[109] This has led the firms investing inside EPZs to pay the lowest wage in the world.[110] One may argue that absence of minimum wage cannot be the reason for the failure of EPZs since they will benefit from the low wage. However, it should not be forgotten that the success of EPZs depends upon how much quality employment opportunity they have created. If they fail to create the required job opportunity which can support their livelihoods, then they are failures.

Lack of adequate regulatory law and implementation on environment is the other regulatory defect which poses a great problem on the wellbeing of the society and animals. The Ethiopian legal system lacks detailed standards on various environmental issues such as impact assessment and the amount of pollutant liquid allowed for release. The proclamation establishing the Environment Protection Authority, the Environmental Protection Organs Establishment Proclamation, and the Environmental Pollution Control Proclamation, has given the mandate at different times to the Environment Protection Authority (EPA) to set standards for water, air, soil, noise, and waste management. Nevertheless, EPA has failed to issue those standards until 2008 except for few "guidelines" for air, surface water, and

[105] Esther De Haan and Martje Theuws, Quick Scan of the Linkages Between the Ethiopian Garment Industry and the Duch Market,p. 5 available; https://www.somo.nl/quick-scan-linkages-ethiopian-garment-industry-dutch-market/

[106] Daniel W. Ambaye, Land rights an Eexpropriation, Unpublished, Phd dissertation, *supra* note at 102,at p. 287

[107] Yirgalem Germu, The Law and Practice of Minimum Wedge at Industrial Parks in Ethiopia, LL.B thesis, Unpublished, p. 38

[108] Labor Proclamation, Proclamation. Proclamation number 377/2003, Article 53(1), Fed. Neg.gaz. Year 10, no. 12

[109] Yirgalem Germu, The Law and Practice of Minimum Wedge at Industrial Parks in Ethiopia, p. 20

[110] Ibid.

groundwater.[111] Even then the guidelines were limited to effluent air and water discharges. [112] Moreover, there is also poor governmental supervision of environmental standards in the zones.[113] Although the majority of Ethiopia's policies and laws on paper are well-written and excellent, their implementation is not as such effective.[114] This difficulty is the possible cause of a significant gap between the official commitments and objectives and practices on the ground.[115]

The other inhibiting law on foreign investment by putting exclusionary provisions against foreign investment is the investment proclamation. The Ethiopian investment law is criticized for being exclusionary and illiberal.[116] As a result, many sectors remained closed only to the government or to domestic investors. This has an effect on other sectors. Building EPZs before establishing effective regulatory frameworks is like putting the cart before the horse.[117] Hence, the government must think carefully before rushing to spend billions of dollars.

The financial laws and policies used as an incentive to encourage foreign direct investment are also defective for they can damage the Ethiopian economy. One of the incentive policies severely criticized is the loan policy that the government follows to attract investment. The government of Ethiopia provides monetary loan of up to seventy per cent (70%) for investors who come up with 30% of the required capital through

[111] Environmental Protection Authority Establishment, Proc. No. 9/1995, art. 6(3). Fed. Neg. gaz. Year 1, no. 9; See also Environmental pollution control proclamation, proclamation number 300/2002, art. 4. Fed. Neg. gaz. year 9, no. 12; See also, Environmental Protection Organs Establishment Proc. No. 295/2002,, art. 15, year 9, number 16

[112] James Kruger, Aman Gebru and Inku Asnake, Environmental Permitting in Ethiopia, No Restraint on Unstoppable Growth, Haromaya Law Review, vol.1, no. 1, pp. 73-102

[113] Mulugeta Getu, the Ethiopian Environmental Legal Regime, Versus International Standards, Policy, Legal and Institutional Frameworks, Haromaya Law Review, Vol.1, No. I, pp. 43-72

[114] Ibid.

[115] Emelie Dahlberg, *Anders Ekbom, Menale Kassie, & Mahmud Yesuf, Ethiopian Environment & Climate analysis*, School of Economics and Commercial Law, Goteborg. Goteborg, Sweden. (2008), p. 13

[116] Investment Proclamation, Proclamation no.769/2012, art.3-8 Fed. .Neg. Gaz. Year 25, no, 4 and Investment Incentives and Areas Reserved for Domestic Investors Regulation no. 270/2012, art, 3-14, fed. Neg. gaz. Year 19, no. 4

[117] Douglas Zhihua Zeng, Global Experience with Special Economic Zones With a Focus on China and Africa, The World Bank Trade and Competitiveness Global Practice, A paper Presented at Investing in Africa Forum, Addis Ababa, (2015), P.9

development Bank of Ethiopia.[118]However, using financial incentive such as loan by one of the least developed countries like Ethiopia has a detrimental effect on its economy since it drains the budget of the government.[119]As a result, many developing countries are not advised and do not prefer to use financial incentives.[120]The credit policy followed by the development Bank of Ethiopia is also risky due to the failure of recollection after granting the loan requested by the potential investors.[121]The fact that banks provide credits of huge sum of government money for domestic as well as foreign 'investors' without sufficient collateral only with the conditions of the financial viability of the project itself and first-degree collateral security has paved the way for fraudulent entities to embezzle the taxpayers money and to disappear even before starting any investment project.[122]

Last but not least, there are challenges related to the tax laws. The tax incentives provided by Ethiopia are principally tax holidays and exemption from import duties.[123] These types of incentives are known in the literature as profit-based incentives.[124] Profit-based incentives, as opposed to cost-based incentives, though relatively simple to administer, are not less costly means of encouraging investment. Instead, the best incentive mechanisms are the cost-based incentive approaches.[125] Cost-based incentives consist of investment allowances, tax credits and accelerated depreciation, which decrease the cost of capital. The would-be extra investment gained per unit of revenue spent is higher for cost-based incentives, since the benefits to investors only accrued if capital investments are made.[126] Moreover, the

[118] Development Bank of Ethiopia, A Short Guide to Access the DBE's Loans, available at: https://www.dbe.com.et/BusnessPromotion/Policy/DBENewPolicyEng.pdf last accessed on 09/01/2020

[119] UNCTAD, Tax Incentives and Foreign Direct Investment, Aglobal survey, United Nations Publications,(2000), p.3

[120] Ibid.

[121] Fasika Tadesse, What Went Wrong With Ethiopia's Policy Bank? June1, (2019), *Addis Fortune*, available at: https://addisfortune.com/what-went-wrong-with-ethiopias-policy-bank-dbe/ last accessed on 09/01/2020

[122] Addis Ababa Chamber of Commerce and Sectoral Associations, Business Finance Guide,(2016), p. 6.

[123] Investment Incentives and Areas Reserved for Domestic Investors Regulation, *supra* note at 117.

[124] Economic and Social Research Council, Review of Corporate Tax Incentives For Investment in Low- and Middle-Income Countries, the Institute for Fiscal Studies, march (2018), p. 13

[125] Ibid.

[126] IMF, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment, a Report to the G-20 Development Working Group by the IMF, OECD, UN &WB, (2015), p. 20. Cost-based tax incentives involve specific allowances linked to investment expenses, such as accelerated depreciation schemes and special tax deductions and credits. Profit-based tax

principal benefit that the investors are said to benefit from EZS is a better tax incentive relative to other investors who invest outside the zones. Nevertheless, this principle is not applied in relation to Ethiopian EPZs since no separate incentive is provided to the EPZ investors. The sustainability of the investment policy of Ethiopia is seriously questionable given the fact that Ethiopia is in the process of accession to the WTO. The various incentive mechanisms and preferential treatment of EPZs will definitely be inconsistent with the international WTO rules since WTO doesn't allow export subsidy and preferential treatment of selective EPZS.[127]

5.2.2 Poor Business Environment

The costs of doing business are high in Ethiopia due to the bureaucracy during registration, licensing, taxation, trade logistics, customs clearance, foreign exchange, and service delivery. The one-stop-shop service introduced by the government could not bring the expected result. The investment and business environment in Ethiopia is very poor at the national level, and the cost of doing business is very expensive. An enabling business atmosphere is crucial not only to mobilize domestic resources but also to effectively attract foreign investment in the industrial parks.[128] The World Bank Annual Report (2018) shows a considerable correlation between the Doing Business (DB) indicators and flows of FDI into the industrial parks.[129] Based on the world ranking of cost of doing business, Ethiopia stands 168th among the 190 countries surveyed.

5.2.3 Civil Strife and Political Instability

Some of the most important causes responsible for Ethiopia's underdevelopment are prolonged civil wars, internal turmoil and civil strife that have been ravaging the country for many decades.[130] Ethiopia has been a

incentives generally reduce the tax rate applicable to taxable income. Examples include tax holidays, preferential tax rates or income exemptions.

[127] Dennis Arnold, Export Processing Zones, John Wiley & Sons, Ltd.(2017), p. 4

[128] Abbas Karami, et al, Ranking the Factors to Attract Foreign Direct Investment in Special Economic Zones, European Journal of Scientific Research, Vol. 101(4), (2013), P.489

[129] World Bank Group, Doing Business 2018, Reforming to Create Jobs, Comparing Business Regulation for Domestic Firms in 190 Economies, World Bank Flagship Report, The World Bank Group, 1818 H Street NW, Washington, DC, P. 2 also available at; https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full-Report.pdf last accessed on 23/08/2019

[130] Alemayehu Geda, Does Conflict Explain Ethiopia's Backwardness? Yes and Significantly Paper presented at Making Peace Work Conference at WIDER, Helsinki, Finland), (2004), P. 15,

country of ethnic polarization and conflicts for many centuries. Armed rebellions and border wars have been intense in many parts of the country.[131] Although the country has been relatively stable for over a decade, the civil strife and popular uprising resumed in 2016 due to frequent protests. This has brought a lot of challenges to the booming economy of the country.[132] The flow of foreign direct investment has decreased significantly following the unrest in major cities of the country.[133] Due to the unrest, EPZs such as Bahir Dar EPZ, Kombolcha EPZ, Debre Berhan EPZ, Dire Dawa EPZ, Mekelle EPZ and Bole Lemi II EPZ are still unoccupied or partially unoccupied even though over a year has passed since their completion.[134] Multinational companies will not dare to reside in the EPZs built by the government unless they are sure that their investments will be safe.

5.2.4 Lack of Adequate Infrastructure

This is an overall constraint for all the zones but at different levels. In general, power, gas, roads, ports, and telecom are the key constraints and many governments and developers try to resort to the PPP approach to solve the constraints. For instance, all the four EPZs which are built in Amhara region are not fully operational due to electric power shortage. Except for Dire Dawa, Adama and Bole Lemi EPZs, the rest of the zones are not connected to the harbour through railway line.

5.2.5 Expropriation and Compensation Challenges

The laws relating to compensation are so vague, unfair, and discriminatory and old that they are creating discontent everywhere.[135]

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[131] Ibid.

[132] International Crisis Group, Ethiopia Ethnic Federalism and Its Discontents, Sept. (2009), P.23; Available at; https://www.refworld.org/pdfid/4aa4c0c82.pdf, Last accessed on 01/01/2020

[133] Washington Post, Available at: https://www.washingtonpost.com/world/africa/investors-shy-away-from-ethiopia-in-the-wake-of-violent-protests/2016/11/01/2d998788-9cae-11e6-b552-b1f85e484086_story.html: Last accessed on 01/01/2020

[134] Ethiopian Industrial Parks development Corporation, available at: http://www.ipdc.gov.et/index.php/en/industrial-parks, Last accessed on 01/01/2020

[135] Brightman G/Michael, The power of Land Expropriation in the Federation of Ethiopia: The approach, Manner, Source and Implications, *BDU Journal of Law,* Vol.7(1), (2019), P.8: See also Daniel Wolde Gebreil, Land Rights and Expropriation in Ethiopia, *supra* note at p. 289

5.3 Legal and Policy Recommendations for a Better Achievement from EPZs

The success or failure of EPZs depends on the measures taken by each country and the socioeconomic and political situations of a given country. Each successful EPZ is the result of a number of internal and external factors. What has worked for one country may not work for the other country**.** Ethiopia must adopt policies and strategies which are appropriate for the conditions of the country. In fact, there is no one-size-fits-all rule for all EPZs. Ethiopia should customize the development of the zones to fit the domestic conditions and the needs of the time. For instance, South Korea's EPZs model was one of the most successful since the zones were developed for promotion of export-driven light industries with global competitiveness in 1960s, and laid the foundation for industrial growth in 1970s. Nevertheless, the model of Korea, which was adopted decades ago, cannot be the best solution for the condition that exists in Ethiopia now unless it is modified to fit the Ethiopian situation since international economic situations have greatly changed, and the development levels and circumstances of Ethiopia differ from the Korea of the 1960s.[136] That is why many African countries failed in their EPZ project.[137]The textile and garment factories of Ethiopia are unable to compete with other countries such as Bangladesh despite a lot of effort from the government.[138] Hence, the writer of this article suggests that the government could ameliorate the failure and profit from EPZs if it takes the following legal and policy measures.

5.3.1 Take Broad National Economic Reforms

Many scholars and institutions including the World Bank prove that EPZs should only be taken as a second best policy choice[139]. Effective and stable monetary and fiscal policies such as proper budget management, reduced inflation, and independent fiscal policy, legally protected private ownership of property and land and investment laws provide a general favorable environment for the success of EPZs. The government of Ethiopia is advised

[136] Hyeyoung Cho, Industrial Park Development Strategy and Management Practices, *supra* note at 11, p. 107

[137] Farole Thomas, Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience, *Supra* note at 72, P

[138] *Supra* note, at 105

[139] Dorsati Madani ,A Review of the Role and Impact of Export Processing Zones, World Bank, (1999), P.7

to take a broader economic reform regardless of whether targeted or general policies are deemed suitable. The prominent issue is that EPZs cannot be taken as isolated entities. It has been reported that the investment law has been amended more than eight times since 1991. Nevertheless, the fact that the government still controls some sectors such as the financial sector and excludes some sectors of the economy invites a lot of criticism against the economic policy the government follows. Some might argue that the government has registered a double digit economy with a restrictive policy and there is no need of liberalization. However, it should not be forgotten that the current economic growth is due to a huge loan from abroad and is temporary in nature since it is the result of service sector led growth. For dynamic gains to be possible EPZs must be part of a broader policy environment.[140] In this regard, Farole states:

> *One of the main differences between EPZ programs that have been successful and sustainable and those that have either failed to take off or have become stagnant enclaves is the extent to which they have been integrated in the broader economic policy framework of the country. Successful EPZ programs do not simply view zones as a static instrument of trade and investment policy. EPZs have not had a catalytic impact in most countries, in part because they have been disconnected from wider economic strategies. Often, EPZ programs are put in place and then left to operate on their own, with little effort to support domestic investment into the park or to promote links, training, and upgrading. Unlocking the potential of a park requires clear strategic integration of the program, and governments must play a leading role in potentiating the impact of the zone.*[141]

5.3.2 Improve the Supply of Utilities

The term utility includes electricity, water, land, etc. which are used by firms to carry out their production activities. When high-quality, consistent utilities are available, companies can install up to date production techniques and

[140] Peter Gibbon, et, al, An assessment of the Impact of Export Processing Zones and an Indication of Appropriate Measures to Support Their Development. *Supra* note at 40, P. 56

[141] Farole, Thomas, Special Economic Zones in Africa , Comparing Performance and Learning from Global Experience, *supra* note at 57, p 9

ensure the efficient use of resources; but if they are absent, costs rise, productivity suffers, and output is inconsistent.[142]Ethiopia is far from being satisfactory as regards utility supplies. Even though the cost of electricity and water, and investment land is considered one of the lowest in the world, the consistency of the supply remained highly unsatisfactory. Hence, if the government of Ethiopia wants to obtain positive impact from EPZs, it should work on improving utilities.

5.3.3 Establish Improved Business Regulation Mechanism

The reality in Ethiopia shows that there are very complex, rigid laws, regulations, procedures and bureaucracy which weaken competitiveness of firms by raising the costs and risks of doing business, consuming substantial management time, and distorting the incentives that are the basis of competition. It is needless to say that the procedure followed to start a business such as obtaining a business license, an investment permit, land access procedures, preparing facilities, and access to utilities and other services are more often than not time-consuming, costly, and prone to corruption by government officials.[143]Hence, it is better for the government to revisit its procedural hurdles.

5.3.4. Revise the Tax Incentive Legal Regime

The current Ethiopian investment law provides various fiscal incentives such as customs duty exemption for investors of importing of raw material and inputs including machineries, tax holiday on income taxes ranging from zero to nine years depending upon the type of the industry, and various other exemptions.[144] Nevertheless, those who reside in the export processing zones are not entitled to additional fiscal exemptions from investors residing outside export EPZs. Empirical research done on the area has shown that tax incentives are not the priority considerations for investors to invest in a given country.[145] Moreover, the various fiscal incentives provided by the government do not apply to all EPZs operating in the country since the investment incentives regulation excluded those EPZs operating in and

[142] Ibid.

[143] Ibid.

[144] Investment Incentives and Investment Areas reserved for Domestic Investors Council of Ministers Regulation Number 270,/2012, Art.3-13, Reg, Fed. Neg. Gaz. Year 19, no. 4

[145] Jose Daniel Amado, Free Industrial Zones: Law and Industrial Development In the New International Division of Labour, (1989),Vol.11(1), P. 136

surrounding Addis Ababa from the income tax holiday. Based on this law, EPZS such as Bole Lemmi I and I, Kilinto, Eastern Industrial Zone, etc. are not entitled to tax exemption.[146] The other gap in the tax and investment law of Ethiopia is it doesn't deal with tax issues if an enterprise re-registers in another name after its tax holiday is over. This is due to the fact that multinational companies change their names simply to use it as a tax avoidance scheme when the tax holiday comes to an end. The Ethiopia tax incentive scheme should also be changed from benefit-based incentive to cost-based incentive system. Hence, the tax regime must be amended to address these issues.

5.3.5 Improve the Labor Law and Labor Conditions

The Ethiopian labor law suffers from numerous defects and gaps relating to labor rights and conditions. For instance, it doesn't provide for minimum wage limits. Rather the employment proclamation leaves the issue of wage to the agreement of the parties.[147] Even though Ethiopia unlike some other developing countries did not adopt special lax labor regulations that apply only within the zones, the general labor proclamation couldn't address some of the basic rights and interests of the workers. This attitude has led to abuses by zone employers. In several EPZs, work environments are substandard, safety measures are almost nonexistent, strikes are banned, industrial injury compensation is lacking, and workers are employed on a temporary basis.[148] The biggest gaps in the Ethiopian labor law are the absence of minimum wage limit and the absence of minimum monthly overtime work. The government is urged to revise the labor proclamation in a way which entitles workers to rights such as a minimum required wage, bonuses, profit sharing, housing, education, and to bring administrative reform towards improving the labor conditions of the employees.

5.3.6 Encourage Domestic Content Requirement

No legislation or measure in Ethiopia put local content requirement on investors investing inside EPZs. Due to the right of complete exemption from import duties provided to investors by the investment regulation, investors in the EPZs prefer to satisfy their input needs from imported

[146] *Supra* note at 144, p. 9

[147] Labor Proclamation, Proclamation Number 377/2003, Art. 58, Fed. Neg. Gaz. Year 10, No. 12

[148] *Supra* note; at 78, p. 68

commodities.[149] In the absence of an explicit law obliging investors to cover a portion of their inputs from the domestic market and in the existence of tax free importing rights, investors are inclined to import their input needs from abroad. For example, the textile industries residing in Ethiopia are trying to satisfy their cotton needs by importing from abroad on the ground of scarcity of the cotton product produced domestically and/or the low quality of domestic cotton is as compared to the imported cotton raw material. This makes the textile industries less competitive vis-a-vis other foreign industries.[150] Due to this reason the net foreign exchange that the companies in EPZs bring is negligible although the gross foreign exchange looks huge. Thus, to maximize the net foreign exchange gain and improve the country's hard currency reserves, Ethiopia must specify in its laws the share of the local inputs that each operator in the EPZs must utilize.

5.3.6. Modify the Land Expropriation Law in a way which Improves EPZ Effectiveness

Ethiopia's current land expropriation law and policy suffers from numerous unfairness issues and weaknesses as it causes a rise in land prices and limits rights of ordinary citizens to own land**.** The approach in which the Ethiopian government has regulated land deals has been contested, and there are various known cases of land grabs.[151] Large-scale land deals are often led by government-led villagisation projects, in which local populations are forcibly removed from their land without proper compensation.[152] The existing land policy prohibits land from being sold, or exchanged and in whatever way transferred.[153] It also limits the ownership of land to the state and the nation's nationalities and peoples of Ethiopia.[154] The policy makes a different tenure system between rural and urban land. As long as the urban land is concerned, the urban land lease proclamation states that anyone can possess urban land only through lease system which is done only through

[149] Amado, Free Industrial Zones, Law and Industrial Development in the New International Division of Labor, *Supra* note at 55, P. 136

[150] *Supra* note, at 105

[151] The Oakland Institute, 'We Say The Land Is Not Yours: Breaking the Silence Against Forced Displacement in Ethiopia', (2015), p. 8

[152] Ibid.

[153] FDRE, Constitution, (1995), Art. 40(3), Proclamation No. 1/1995. Fed. Neg. Gaz. Year 1, No. 1

[154] Ibid.

auction.[155] As a result, getting access to residential and service sector urban land has become highly expensive whereas land for manufacturing is obtained for little price.[156] This has caused the increase in land prices which encouraged the rich to speculate urban land price.[157] Due to this reason the rich began accumulating urban land with a view that the price will increase in the future. Moreover, the law fails to take land as a compensable interest.[158] To fully exploit the urban lands and to reduce the disappointment of land holders in the land expropriation procedure, the government of Ethiopia must amend the land expropriation and land access law in a way which avoids land speculation and encourages genuine developers.

5.3.7 Improving Infrastructure and Service Provision

EPZs are more than simple physical infrastructure. The provision of devoted services, infrastructure and utilities are what is expected from sector specific parks. The so-called 'soft services' of EPZs related to the management support of a hosted company are of utmost importance. An effective EPZ must offer all of them; constant supply, high and consistent quality, and low cost of infrastructure are essential for all services. Grand infrastructures such as railways, airports, harbors, highways, national power grids, water supplies and power substations are essential. A lot is yet to be done if Ethiopia wants to be effective in EPZ. Factories need a range of inputs such as telephone, electricity, water, internet, sewage treatment, transportation, and residence. A service-driven approach means that EPZs will provide a variety of building accommodation to host investors and start-up companies.[159]

5.3.8 Improve the Business Environment and the Cost of Doing Business

One of the most important measures that should be taken by the government of Ethiopia to make EPZs successful is to improve the business environment and reduce the cost of doing business. An enabling business atmosphere is crucial not only to mobilize domestic resources but also to effectively attract

[155] Urban Lands Lease Holding Proclamation, (2011), Art. 3, Proc.no.721/2011, Fed. neg. Gaz. Year 18, no.4

[156] Ibid.

[157] Bayisa Tesfaye,Prospects and Challenges of Industrial Zones Development, *supra* note at 12, p. 12

[158] Daniel Weldegebriel Ambaye, Land Rights and Expropriation in Ethiopia, *supra* note at 106, p. 289

[159] UNIDO, Europe and Central Asia Regional Conference On Industrial Parks, As a Tool to Foster Industrial Development, Azerbaijan,(2012), P.15

FDI in the EPZs.[160] The World Bank Annual Report (2018) shows a considerable correlation between the Doing Business (DB) indicators and flows of FDI into the EPZs.[161] Based on the world ranking of cost of doing business, Ethiopia stands 168th among the 190 countries surveyed.[162] The 2018 aggregate ranking on the ease of DB was based on 10 indexes: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.[163] Even though the government has tried to introduce reforms like BPR, Kaizen and Deliverology, the world ranking on the ease of doing business report of the World Bank tells us that Ethiopia has a lot to do to improve its business environment.

5.3.9. Stabilize the Political Situation of the Country

Recent studies have shown that political stability ranks among the most important factors that multinational companies consider when deciding to invest in a third world country.[164]The political situation of Ethiopia for the past three years is not helpful to realize the expectations from EPZs. Hence, if the government wants to maximize the benefits, it must improve the volatile political landscape and must reduce the ethnic tensions that jeopardize the stability of the country.[165]

5.3.10 Situate EPZs in Appropriate Locations

The government of Ethiopia has been constructing some of the EPZs such as Jimma EPZ, Bahir Dar EPZ, Mekelle EPZ, Hawassa EPZ, and Debre Berhan EPZ in remote locations where there is no adequate infrastructure such as railway line connecting the zones with seaports. The lack of seaports is

[160] Abbas Karami, et al, Ranking the Factors to Attract Foreign Direct Investment in Special Economic Zones, European Journal of Scientific Research, *supra* note at 128, P. 492

[161] World Bank Group, Doing Business , Reforming to Create Jobs, Comparing Business Regulation for Domestic Firms in 190 Economies, *Supra* note at: 129

[162] Ibid.

[163] Ibid.

[164] For example, a linkage has been found between the political instability in Panama since late 1987 and a decrease in the interest of potential investors in visiting the Colon EPZs. See, Bettwy, Mexico's Development: Foreign Trade Zones and Direct Foreign Investment, Comp. Jud. Review. Vol.22(49),(1985), p.11

[165] Alemayehu Geda, Does Conflict Explain Ethiopia's Backwardness? Yes and Significantly, *supra* note at 130, p. 14

exacerbated by lack of modern large scale infrastructure. But EPZs have to be easily reachable and closer to seaport or an airport. Moreover, EPZs must be located in places where there is abundant supply of human resources. Building EPZs in remote and less accessible areas for the sole reason of balanced regional development will not make the zones efficient and effective if they are not located in places where there is natural resource, access to seaport, railway lines and utilities.

Concluding Remarks

In a nutshell, as it is observed from the various strategic documents of the country, the goals of designating and developing EPZs were to create a middle income country by 2025. They were set to provide dynamic and static benefits including the creation of two million jobs, 3.6 billion USD foreign currency earning, backward and forward linkage with the domestic investors, technology transfers and a catalyst effect on the economy. However, ten years after the launch of the EPZ programme and after ten EPZs have built throughout the country with the expenditure of more than three billion USD, the result appears that it is a disappointment for the country. When the results achieved so far are contrasted with the objectives set by the strategic plans of the government based on the teleological approach, the envisioned goals of employment generation, export diversification and foreign currency and technology spillover are not happening as expected. Absence of appropriate legal, regulatory framework on labor law, tax law and policy, environment law and policy, financial law and policy, expropriation law and policy, poor business environment, civil strife and political instability and lack of adequate infrastructure are identified by this paper as the main factors for the underperformance and lesser impact on the economy of the country. Well-designed reform in the laws and policies, improving the business environment to reduce the cost of doing business, restoring permanent peace and security are the suggestions that this paper makes for the authorities.

The Need to Endorse Corporate Environmental Responsibility and the Government Role in Ethiopia

Ayalew Abate Bishaw[*]

Abstract

In promoting corporate environmental responsibility (CER) governments play key roles. CER develops a common corporate environmental policy framework and commits itself to action areas such as awareness creation, partnering, soft law development and mandating. As such it encourages the business sector to play its role in protecting the environment. In this article an attempt has been made to examine whether the Ethiopian government has played these key roles as mentioned. Accordingly, CER has been described, the government action areas have been identified and elaborated, and whether there is a need to endorse CER in Ethiopia and whether the government plays a role in these areas have been assessed. Pertinent laws and policy documents including the related literature have been consulted and reviewed. The findings show that, although there are convincing reasons for the Ethiopian government to play its own roles, there are only limited efforts. Moreover, some self-initiated business community efforts don't also have government support and monitoring. Therefore, the government needs to develop a common corporate environmental policy framework and commits itself properly to the CER action areas so as to endorse and/or promote CER. Important suggestions are forwarded that can help make decisions in this regard.

Keywords: *Government role, corporate environmental responsibility (CER), business, environmental policy, common comprehensive framework*

Introduction

The role of government in corporate environmental responsibility (CER) has been debated over a century. Since recently, however, because of the failure to develop a common international corporate responsibility (CR) framework,

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various states are taking part in promoting corporate responsibility for the business sector to play its own role in protecting the environment. Hence, the government role in promoting CER has got extensive recognition and acceptance.[1] Among the most important action areas that governments are promoting the environmental responsibility of corporations include awareness creation, partnering, voluntary standard setting and mandating.[2] In the Federal Democratic Republic of Ethiopia where the business sector is recognized foundational to play a role in the economic development endeavor, the role of the government in promoting CER has not yet been explored and researched.

The purpose of this article is to review the policy development of the government of FDRE in relation to promoting CER. Accordingly, the conceptual frameworks for CER and the role of the government in promoting CER are assessed. To this effect, the Ethiopian current government policies such as environmental policy, economic policy and strategies, investment and industrial development policies are reviewed. This approach enables one to see the government's approach to CER from two key perspectives: from the overarching policy frameworks and implementation in terms of specific policies and programmes.

The article is organized into six sections. The first section deals with the definition of CER. In this section, the size and width of CR will be discussed and analyzed. The second section devotes itself to dealing with the government action areas in promoting CER. Hence, in this section action areas that governments in the world are taking to build systems of CER are

[1] See Ramon Mullerat, Corporate Social Responsibility: A European Perspective, Miami-Florida European Union Center of Excellence, (2013) Vol.13 No. 6

[2] Pavel Franc, JiříNezhyba, Cornelia Heydenreich: Taking Corporate Social Responsibility Seriously Ekologickýprávníservis – Environmental Law Service, Brno, (2006 1st edition) p.7 See also the IOB Study entitled as: CSR: the Role of Public Policy- a systematic literature review of the effects of government supported interventions on the CSR behavior of the enterprises in developing countries (April 2013., p 58-63. Further one can see the World Bank Report on Public Policy for Corporate Social Responsibility July 7–25, 2003 accessible at www.worldbank.org last accessed sep 24 2018 on 9:24 am

See also the report from Halina Ward, Public Sector Roles in Strengthening Corporate Social Responsibility; Taking Stock; Corporate Responsibility for Environment and Development International Institute for Environment and Development(2004) p. 5-6

Laura Albareda Josep M. Lozano TamykoYsa, Public Policies on Corporate Social Responsibility: The Role of Governments in Europe. Journal of Business Ethics (2007) 74:391–407 DOI 10.1007/s10551-007-9514-1

Constantina Bichta, Corporate Social Responsibility a Role in Government Policy and Regulation? Research Report 16, p.10

discussed. From this discussion, the parameters to evaluate the Ethiopian government's performance are set.

The third section presents the review of institutional and policy frameworks in Ethiopia to ascertain whether the government has discharged its role in promoting CER. This section is meant to assess government action areas in promoting CER. The fourth section deals with the government's role in Ethiopia while the fifth assesses CER public policy implementation. The last section provides concluding remarks and recommendations.

1.1. Corporate Responsibility and Environmental Responsibility

1.1.1. Environmental Responsibility (ER):

CER is at the core of corporate social responsibility (CSR).[3] CSR includes basically both the economic, social and environmental facets albeit the latter was not clearly and emphatically articulated in the earlier phase of development of CSR.[4] CER is a relatively contemporary conceptual framework in the corporate world. Therefore, defining CSR sheds light to ultimately understand CER and it is defined herein.

1.1.2. Corporate Social Responsibility (CSR)

There are several definitions of CSR. However, there is no agreed upon definition with a binding effect all over the world. The practices do also vary accordingly. Nonetheless, it has to be noticed that the variation is very contextual and doesn't call for destruction but perspective/approach. In this section, definitions from different but influential departments are forwarded to understand and derive a working definition which can be applied in this study. The first definition is from Pavel Franc et al. They defined CSR as a "concept within the scope of which corporations are expected to behave responsibly during everyday business decisions and during the creation of their strategy concerning employees, suppliers, clients, shareholders, and

[3] It is common understanding that corporate social responsibility basically enshrines social and environmental responsibilities of a corporate body, beyond the economy.

[4] A Review of previous definitions, as shown in this section, reflects the social aspect of the CSR. This may be partly because of the fact that environment has come to be an issue in time second to socio-economic generations. The current tendency shows, however, that more emphasis and separate treatment is being given to the environment.

other stakeholders[5] that include the environment." This definition is broad enough that covers all the stakeholders of the business. It clearly explains that CSR is a principle to be followed in everyday decision making and in strategic development.

The second definition is derived from the definitions given by the European Commission (EC). The EC has defined CSR various times.[6] These definitions reflect the evolution of the development of the concept in the European Union (EU). The third definition is one provided by the World Bank. It defined CSR as:[7] "the commitment of bank, business to contribute to sustainable economic development, working with the public, employees, their families, community and society at large to improve quality of life, in ways that are both good for business and good for development".

This definition does not have specific mention of the environment. It takes the banks' responsibilities as corporate finance institutions. It expressed its own commitment. The fourth definition considered in this article is the

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[5] Pavel Franc etl., Taking Corporate Social Responsibility Seriously, Environmental law service, Brno (2006) 1st edition p. 7. It can also be accessed from: https://frankbold.org/sites/default/files/publikace/taking_csr_seriously.pdf as last accessed 19 Sept. 2018

[6] Among others the following definitions are considered:

a) *CSR is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment."*

b) *"CSR is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."*

c) *"CSR is behavior by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest";*

d) *"CSR is intrinsically linked to the concept of sustainable development: businesses need to integrate the economic, social and environmental impact in their operations";*

e) *"CSR is not an optional "add-on" to business core activities - but about the way in which businesses are managed."*

f) *"CSR is the responsibility of enterprises for their impacts on society. Corporate social responsibility concerns actions by companies over) and above their legal obligations towards society and the environment. Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibilities.*

See Pavel Franc etl (2006), Taking Corporate Social Responsibility Seriously, Environmental law service, Brno 2006 1st edition p. 8 as mentioned in supra note 6. It can be accessed also from: https://frankbold.org/sites/default/files/publikace/taking_csr_seriously.pdf as last accessed 19 Sept. 2018

[7] See Halina Ward, Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock (2004) as accessed from: http://documents.worldbank.org/curated/en/548301468313740636/pdf/346560CSR1Taking1Stock.pdf, last accessed 13 Dec. 2019 @11:26 P 9. See also Maimunah Ismail, Corporate Social Responsibility and Its Role in Community Development: An International Perspective (Fall 2009) http://www.sosyalarastirmalar.com/cilt2/sayi9pdf/ismail_maimunah.pdf last accessed on 13 Dec. 2019 at 11:15am.

definition from the Corporate Responsibility Coalition. According to this institute, CSR *has been promoted by business as a way of realizing its 'social responsibilities' beyond making a profit for its shareholders.* In contrast to this view, NGOs and trade unions tend to dismiss CSR as a public relations tool at best, and at worst a means for corporations to avoid the creation of regulatory and legal mechanisms as a means of ensuring that they adhere to acceptable standards of conduct. The fifth definition is from the World Business Council for Sustainable Development (BCSD), 1997. It defined CSR as: "the continuing obligation of corporations to behave ethically and contribute to economic growth while simultaneously striving to improve the quality of life of employees and their families, and the local community and society as a whole."[8]

The last definition considered is from social capitalist State-China. The Chinese Ministry of Commerce (MoFCOM) defines CSR as "the concrete action taken by Chinese companies to implement the political aspiration of the new communist party collective leadership putting peoples 1st to create a harmonious society."[9]The Chinese definition takes CSR as the commitment from the companies. It then reinforces the company's commitment to the political aspiration of the government. The political aspiration of the government is set to be putting people first and is said to create a harmonious society. Though what harmonious society constitutes is not yet defined, still it seems clear that the people, from the triple bottom line (people, profit and planet), is given prime consideration in this definition. In this limited context, this definition may be said to reflect anthropocentrism than eco-centrism. For more definitions, one can refer to the footnote herein below.[10]

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[8] Ibid.. For the detail aspect of the definition visit www.wbcsd.org The definition was developed in 1998 for the first World Business Council for Sustainable Development (WBCSD) CSR dialogue in the Netherlands

[9] Chinese definition of CSR: as accessed from: http://www.ethicalcorp.com/content/chinese-definition-csr last accessed on 13 Dec. 2019 @12:03

[10] Definitions of CSR for additional reference include: "…these are the obligations of entrepreneurs to carry out the kinds of procedures, to adopt those kinds of resolutions, and to follow those kinds of directions of negotiations that are desirable with regard to the objectives and values of our society" (Carroll, A. B., Corporate Social Responsibility – Evolution of a Definitional Construct, 1999) "Social responsibility is the obligation of the decision-makers to take steps that lead to the protection and improvement of society as a whole while following their own interests" (Keith Davis and Robert Blom strom, 1966). "CSR is a way of doing business that meets or exceeds ethical, legal, commercial, and social expectations." (the international organization Business for Social Responsibility, http://www.bsr.org/) "Corporate social responsibility (CSR) represents the voluntary obligation of companies to behave responsibly towards the environment and the community where they do

The aforementioned definitions reflect fundamentally two broad standpoints: compliance with the minimum legal requirements (narrow) and the compliance plus broad concepts that grant them huge obligation to stakeholders. This is also the reflection of the dominant trend in the practice of CSR. The contemporary approach, however, credits the latter approach in that multi-stakeholder dimension of CSR is accepted. It is with this idea that the study is concerned.

1.1.3. The Three Facets of CSR-*the Triple Bottom Lines*

CSR rests on three facets nominated as a *triple-bottom line.*[11] The triple bottom lines refer to the economic, social and environmental facets. Accordingly, they comprise the comprehensive responsibilities of corporations in the economic, social and environmental spheres. Each of the triple bottom lines has its own constitute elements.

The first one is economic responsibility. Corporate economic responsibility includes the following[12]: a corporation's business code of conduct and ethics code of conduct, transparency, corporate governance, combating bribery, and shareholders dialogue, behavior towards customers/consumers, behavior towards suppliers, and behavior towards investors. Accordingly, corporations have the responsibility of doing business for profit to the shareholders and at times be responsible for these stakeholders.

Social Responsibility is the other aspect. Corporate Social Responsibility extends to include many things that comprises:[13] stakeholder dialogue, the health and safety of employees, the development of human capital, observance of labor standards, ban on child labor, balanced employee work and personal life (work-life balance), equal opportunities for men and women and other disadvantaged groups in general. It further includes accommodating issues such as diversity at the workplace, ethnic minority, the disabled and older people, providing requalification for laid-off employees to ensure their further employment, corporate philanthropy,

business." (Business Leaders Forum, an association of international and Czech businesses – http://www.blf.cz). One can also access this definitions from: Pavel Franc etl (2006), Taking Corporate Social Responsibility Seriously, Environmental law service, Brno 2006 1st edition p. 7-9. It can be accessed also https://www.frankbold.org last accessed 19 Sept. 2018

[11] Pavel Franc etl, Taking Corporate Social Responsibility Seriously, Environmental law service, Brno 2006 1st edition p. 7. It can be accessed also https://www.frankbold.org last accessed on 19 Sept. 2018

[12] Ibid.

[13] Ibid.

sponsorship and volunteering, principle of Community engagement, mentoring and consultancy and human rights.[14]

The third one is environmental responsibility. This responsibility fundamentally includes the following:[15]environmental friendly production, products and services (e.g. Eco-Management and Audit Scheme (EMAS) and International Organization Standardization (ISO) 14000 series audits, and FSC – Forest Stewardship Council - responsible forest management certification, etc.), environmental business policies (e.g. recycling, the utilization of environmentally friendly products, energy savings, etc.), the decrease of environmental impacts, investment into BAT (Best Available Techniques), the protection of natural resources. ER manifests itself in a strategy that the management of a company decides to follow relating to the level of environmental performance it wishes to attain; the levels ranging from mere compliance with legal requirements to following sustainable development principles.

2. Government Interventions and Action Areas in Promoting CER

As described above especially starting from the world submit on sustainable development (WSSD), governments in the world have shown their keen interest in the development of CER. As such different policy measures have been taken in the work towards promoting CER in the private sector. The most widely accepted types of government intervention usefully distinguished in promoting environmentally responsible business include awareness creation, partnering, soft law and mandating.[16]These intervention

[14] Ibid.

[15] Ibid.

[16] Various sources like: Pavel Franc, JiříNezhyba, Cornelia Heydenreich: Taking Corporate Social Responsibility Seriously Ekologickýprávníservis – Environmental Law Service, Brno 2006 1st edition, p. See also the IOB Study entitled as: CSR: the Role of public policy- a systematic literature review of the effects of government supported interventions on the CSR behavior of the enterprises in developing countries April 2013., p 58-63. Further one can see the World Bank Report on Public Policy for Corporate Social Responsibility July 7–25, 2003 accessible at www.worldbank.org last accessed Sept. 24 2018 on 9:24 am

See also the report from Halina Ward, Public Sector Roles in Strengthening Corporate Social Responsibility; Taking Stock; Corporate Responsibility for Environment and Development International Institute for Environment and Development (2004)p. 5-6

Laura AlbaredaJosep M. Lozano TamykoYsa, Public Policies on Corporate Social Responsibility: The Role of Governments in Europe. Journal of Business Ethics (2007) 74:391–407 DOI 10.1007/s10551-007-9514-1

Constantina Bichta, Corporate Social Responsibility a Role in Government Policy and Regulation? Research Report 16, p.10

areas are indeed very common and used in all the themes of CR public policy areas such as education, human rights, poverty, environment, health and safety, participation in society and social inequality.[17] So it is not limited to the environment only. The government does not have any requirement to distinctively apply them. It can use them altogether or may apply some of them at a period and then once only depending on the country's political economy context. For the sake of clarity, the discussion on each is summarized and presented below.

2.1. Awareness-raising

The government policy may first strategically focus on creating awareness about corporate environmental responsibility to enterprises in order to provide them with a deep understanding of the concept for its sustainable practice. It is a very strategic tool that can help the government to disseminate the idea (learning-teaching). It raises their awareness of contributing to sustainable development. It provides them with a common understanding of sustainable development among the company and stakeholders.[18] Most of the time raising awareness is an important first step leading to public sector engagement in CR. Specific examples of policy instruments include tax exemptions for social or philanthropic investments, Internet platforms and award schemes that increase the visibility of CR activities, training and capacity building for small- and medium-sized enterprises (SMEs), and providing funding for research on CR.[19]

2.2. Partnering

This is the area where the government is basically involved in building multi-stakeholders environmental protection. The government through such policy framework plans to foster common grounds or agendas for both the government and other private business partners to involve them in running common practices in partnership. Accordingly, public-private partnership or private partnership or public partnership will be created so as to tackle and sustainably manage the environmental problem that the public at large is facing. Partnering instruments lie at the heart of the CR public policy agenda. Partnerships combine the expertise, competencies, and resources of

[17] Ibid.
[18] Ibid.
[19] Ibid.

the public sector with those of businesses and other societal actors to address action areas within the CR agenda, thus creating benefits for all. In these partnerships, governments may be the initiators, moderators or facilitators. For example, governments can launch multi-stakeholder dialogues, undertake a collective action or capacity building efforts with companies, involve various stakeholders in standard-setting procedures or simply mobilize financial resources. Numerous partnerships have evolved in recent decades to tackle issues such as poverty reduction, access to health and safety, and educational infrastructure.

2.3. Soft law

Soft law interventions to promote CR are non-regulatory interventions. Examples of soft law policies include the promotion of universal principles such as the UN Global Compact and the OECD Guidelines for Multinational Enterprises, the inclusion of corporate responsibility criteria in public procurement procedures, and the establishment of a national action plan on CR. Soft forms of regulation may offer an attractive complement to legislation. Unlike mandatory instruments, which often require long and intensive negotiation processes, soft law instruments can provide a flexible approach that can be easily adapted to a variety of policy fields. However, there is no relevant evidence that shows that Ethiopia is a member to any of the soft laws mentioned hereinabove.

2.4. Mandating

Mandating instruments are often used to set and enforce minimum standards for business performance in CR-relevant areas such as environmental protection, anti-corruption, and labor laws. These standards can come in the form of laws, regulations or sanctions which regulate and enforce business activities. Legal frameworks for corporate responsibility vary widely depending on a country's socio-economic and cultural framework. Although CR is generally considered a voluntary tool, a number of governments have implemented mandatory measures in recent years that oblige companies to report on their CR-associated business activities or to initiate public-private partnerships. The governments of UK and Denmark may be at the forefront when it comes to mandating.

2.5. Major Public Policy Action Areas in CER

The environment is one of the major themes addressed by the CR public policy.[20]Many others include diverse areas such as education, human rights, poverty, health and safety, participation in society and social inequality.[21] The public CR policy areas may vary depending on context-related aspects such as socio-economic and cultural conditions. There is "no one size fits all approach".[22] Therefore, which aspect of the corporate affair is to be addressed by the public policy and how to govern them are critical aspects of the public policy action areas.

In the literature, there are basically at least five cross-cutting action areas to be covered by public policy. These are corporate governance, disclosure and reporting, community involvement and development and production and processing.[23]Taken together, they reflect broad trends in public CR policy development today.

3. The Private Sector Development in Ethiopia and the Need for the Government to Promote CER

3.1. Private Sector Development

Basically, in an analyzing the relation between state and business sectors in Ethiopia, there are three regimes to be taken into account: the imperial regime, the socialist regime and the current regime (Revolutionary Democratic State).

a) The Imperial Regime

At the time of the imperial regime (the reign of Emperor Haile Selassie), there was free market plus state plan for development.[24]Consequently, we

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[20] UN Global Compact and Bertelsmann Stiftung, The Role of Governments in Promoting Corporate Responsibility and Private Sector Engagement in Development (2010) as obtained/accessed from: www.vub.ac.be/klimostoolkit/sites/default/files/documents/role_of_governments_in_csr.pdf last accessed on 20 Nov. 2018

[21] Ibid.

[22] Halina Ward, Tom Fox, Emma Wilson, LyubaZarsky, CSR and Developing Countries; what scope for government action? (2003) http://pubs.iied.org/pdfs/G02247.pdf Sept. 25/2018

[23] UN Global Compact and Bertelsmann Stiftung, The Role of Governments in Promoting Corporate Responsibility and Private Sector Engagement in Development (2010)as obtained/accessed from: www.vub.ac.be/klimostoolkit/sites/default/files/documents/role_of_governments_in_csr.pdf last accessed on 20 Nov. 2018 pp. 16-20

[24] See the Decree on Commercial Registration of 25 August 1928. The Company law of 12 July 1933. The (Draft) Bankruptcy law (of 12 July 1933).The Imperial Goods Price Control Proclamation No 38

may say that the government was taking the upper hand role in business regulation than the market. This regime co-existed with the birth of CSR in America and Europe. But as there were not big corporations in Ethiopia and the dominant actors in the private sector were small-scale peasants, it is difficult to talk about corporate responsibility. Nevertheless, the attempt to regulate the private sector and recognition of private property rights were manifestations of a government determined to regulate the sector through public policy. Moreover, there was no proof of corporate (both government and private) self- ruling.

b) The Socialist Regime

The other most important period in Ethiopian history to be assessed was the socialist regime that came to power in 1974. This regime is commonly referred to as the military (Dergu) regime. During this period the feudal regime was totally abolished and socialism took root. Central planning and state ownership were exercised and private sectors were marginalized.[25] During this period the private sectors were so marginalized it was unthinkable for them to participate actively in the country's economic development, and it was really hard for them to survive. The government did not consider them useful in bringing development for the people because of the political beliefs and ideology of the government.

In the later stages of the military government an understanding regarding the role of the private sector was created and the government adopted mixed

of 1943.The Locally Produced Goods Price Control Proclamation No 53 of 1944.The Ten Years Programme of Industrial Development of 1947. The First five years plan of 1957 to 1961; the second five years plan of 1962 to 1967; the third five years plan of 1968 to 1973. The Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, NegaritGazeta, Year 19, No, 3, Addis Ababa, 5th May 1960. The Business Enterprises Registration Proclamation No. 184/1961, NegaritGazeta, Year 21, No. 3, Addis Ababa, 20 October, 1961. The Unfair Trade Practice Decree No 50/1963, NegaritGazeta, Year 22, No. 22, Addis Ababa, 2 September 1963 - enacted latter as Unfair Trade Practices Proclamation No. 228/1965, NegaritGazeta, Year 24, No. 19, Addis Ababa, 3rd September 1965. The Domestic Trade Proclamation No 294/1971 NegaritGazeta, Year 30 No 32, Addis Ababa, 3 September 1971. The Domestic Trade License Regulation No 413/1971 NegaritGazeta, Year 31 No 4, Addis Ababa, 22 November 1971. The Regulation of Trade and Price Proclamation No 301/1972 NegaritGazeta, Year 31 No 16, Addis Ababa, 17 June 1972

[25] See Declaration [on Economic Policy of Socialist Ethiopia] of the Provisional Military Government of Ethiopia (Official English Translation from the Amharic), Addis Ababa, December 20, 1974. Government Ownership and Control of the Means of Production Proclamation No 26/1975, NegaritGazeta, Year 34, No. 22, Addis Ababa, 11 March, 1975. Proclamation Relating to Commercial Activities Undertaken by the Private Sector Proclamation No. 76/1975, NegaritGazeta, Year 35, No. 18, Addis Ababa, 29th Dec., 1975.

market economy.[26] The CER did not have any recognition at all in its modern sense.

c) The Current Regime (From 19991 to the present)

In 1991 the current regime took power and from 1991 to 1995 it was a period of transition towards a bit liberalized (free) market economy.[27] Post-1995 the government declared officially that the economic policy follows agriculture-led industrialization, free market with government regulation, government intervention at the time of market failure when the development objective necessitates[28] and developmental state approach.

The private sector now has grown up better than ever before.[29] Both domestic and foreign investors are doing business on a large scale. Big corporations of both domestic and foreign origin are involved in the

[26] See the Regulation of Domestic Trade Proclamation No. 335/1987, NegaritGazeta, Year 46, No. 24, Addis Ababa, 23rd June, 1987; the Domestic Trade Regulations No. 109/1987, NegaritGazeta, Year 46, No. 27, Addis Ababa, 27th August, 1987, the Small-Scale Industry Development Council of State Special Decree No. 9/1989; the Hotel Services Development Council of State Special Decree No. 10/1989;the Joint Venture Council of State Special Decree No. 11/1989; the Council of State Special Decree on Investment No. 17/1990; the Industrial License Council of Ministers Regulations No. 8/1990; the License for Tourist and Hotel Facilities Council of Ministers Regulations No. 9/1990; and the Participation of Foreign Investors Council of Ministers Regulations No. 10/1990.

[27] See the Transitional Period Charter of Ethiopia No. 1/1991, NegaritGazeta, Year 50, No. 1, Addis Ababa, 22 July, 1991 and Ethiopia's Economic Policy during the Transitional Period (An Official Translation, Addis Ababa, November 1991)

[28] See: The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, Federal NegaritGazeta, Year 1, No 1 Addis Ababa, 21st August 1995 - with focus on the clauses for the making of economic policy. The Rural Development Policies, Strategies and Programs (Amharic Version, Addis Ababa, Hidar 1994 Eth. C. (2001)).The Industrial Development Strategy (Amharic Version, Mega Publishing Enterprise, Addis Ababa, Nehasie 1994 Eth. C.) The Five Years Development Plans: Ethiopia: Building on Progress, A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005/06-2009/10) (Volumes I & II), MoFED, September 2006. Growth and Transformation Plan 2010/11 - 2014/15 (GTP - I), Volume 1 - Main Text, MoFED, November, 2010. Growth and Transformation Plan of 2015/16 - 2019/20 (GTP - II), Main Text, MoFED. The competition laws: The Trade Practice Proclamation No 329/2003, Federal Negarit Gazeta, Year 9, No. 49, Addis Ababa, 17th April 2003 The Trade Practice and Consumers' Protection Proclamation No 685/2010, Federal Negarit Gazeta, Year 16, No. 49, Addis Ababa, 16th August 2010. The Trade Competition and Consumers' Protection Proclamation No 813/2013, Federal Negarit Gazeta, Year 20, No. 28, Addis Ababa, 21st March 2014

[29] Solomon Deneke, Private Sector Development In Ethiopia (2001) https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1036&context=africancenter_icad_archive , UNDP ,http://www.et.undp.org/content/ethiopia/en/home/operations/projects/sustainableeconomicdevelopment/project_PrivateSector.html, last accessed 09/10/2018. See also the report from the world bank group:https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/ethiopia_to_host_world_economic_forum

manufacturing and industrial sector.[30] The government has enacted various policy and legislative frameworks. These new developments of the current regime are in fact subjects of this discussion too. However, CER has not been recognized as the core policy of the government. Though various techniques of promoting the private sector has been employed (financial and non-financial incentives), its role in formulating a CER policy for the private sector is far below expectation.

3.2. The Need of Public Policy for CER in Ethiopia

CER has been widely characterized as voluntary and it looks strange to question the need for public policy in protecting the environment. Against the classic views that downsize the triple bottom line concept of the CSR, now there is a change in the trend of corporate responsibility to link the responsibility of corporations to the society at large and the environment.[31] No matter how much unsettled debates there are relating to the width and breadth of CSR and its features, countries are formulating public policies regarding CER. In the UK a distinct ministry has been established and government policy frameworks are formulated.[32] In Denmark, the government has a clear policy of promoting, controlling and enforcing CER.[33]

In Ethiopia which is one of the very least developing countries in the world, the intervention of the government in encouraging CSR is expected to be much broader in scope than others just because of the unique position policy the country holds and the imperative need to eradicate poverty and other problems. Thus, there are various reasons that could be mentioned to justify the need for public policy on CER. Among others the reasons may include economic, political, social, legal, cultural and environmental poor private sector recognition of CER.

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[30] Steurer, R.: The Role of Governments in Corporate Social Responsibility: Characterizing Public Policies on CSR in Europe; in: Policy Sciences, (2010)43/1, 49-72, http://www.wiso.buko.ac.at/papers.html.

[31] Pavel Franc etl, Taking Corporate Social Responsibility Seriously, Environmental law service, Brno 2006 1st edition p. 7. It can be accessed also https://www.frankbold.org last accessed 19 sep 2018

[32] Ramon Mullerat, Corporate Social Responsibility: A European Perspective; Miami-Florida European Union Center of Excellence (2013). Vol.13,No.6 P. 7-8. It is also available at: www.miami.edu/eucenter Last accessed on 20 Sep. 2018

[33] Ibid.

3.2.1. Economic Reasons

Ethiopia is one of the least developing countries in the world economically. The private sector is not well developed. The government is still acting both as regulator and economic actor, though the liberalized economic policy is said to be adopted since 1991. Therefore, public policy consideration of CSR will contribute to the sustainable development of enterprises and endowments that are state-owned. The private sector in Ethiopia has only a short history of development that underlies its weak capacity to compete at the international level with big multinationals. Therefore, the government's involvement in developing a guideline for CSR could encourage the private sector to adopt its own CSR policy based on the government guideline. Hence, it avoids the risk of the proliferation of various CSR policies.

The Ethiopian government has the constitutional economic duty to 'formulate policies which ensure that all Ethiopians can benefit from the country's legacy of both intellectual and material resources'.[34] This duty extends to a government responsibility to 'hold, on behalf of the people, land and other natural resources and to deploy them for their common benefit and development'.[35] Based on this, it is clear that the government has the responsibility to hold natural resources on behalf of the people and has to design a policy that ensures common benefits and development. The recent understanding of CSR goes as far as covering the *triple bottom line principle*, implying that businesses should not only serve the economy but also meet social and environmental needs,[36] albeit there exists opposing classic view too. The Ethiopian government, therefore, has a special interest in CSR because the respective business efforts can help to meet these economic policy objectives set in the constitution. CSR is now a common body of doctrine that requires businesses to play a leading part in achieving the shared objectives of public policy and making the world a better place.

Finally, the government has an economic interest in CSR as the tax from corporations is a major source of its revenue for a simple reason. The focus on the narrow view of CSR, i.e. keeping the interest of shareholders may

[34] Federal Democratic Republic of Ethiopian Constitution; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995, Article 89(1)

[35] Id, Article 89(5)

[36] Steurer, R.: The Role of Governments in Corporate Social Responsibility: Characterizing Public Policies on CSR in Europe policy sciences (2010)43/1, PP. 49-72. It may also be accessed from:,http://www.wiso.buko.ac.at/papers.html.

affect government interest because of tax dodging from big corporations as the tax administration framework in Ethiopia is not sophisticated. There is also a relative booming of the economy for the last two decades that otherwise affect the environment adversely. The steady increase in investment has also a negative impact on the environment in Ethiopia unless the government properly manages it.[37]

3.2.2. Political Reasons

The state political economy of Ethiopia is similar to or close to the developmental political economy. According to the developmental state political economy, there is a free market as a principle but with government regulation; there will be a government intervention at the time of market failure and when the development objective necessitates it.[38] CSR is one major strand that can encourage the private sector to contribute to the economic, social and environmental development objectives of the country. It has a development objective among others. Therefore, it is the natural political interest of developmental states to develop an interest in CSR management. Moreover, as mentioned above, there are big government endowments in which the government has great economic and political interest. Therefore, the adoption of the concept of CSR has a great contribution to the government to develop the system in government enterprises.

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[37] As Mizanie Abate (PhD) has described there is a need for the government to prudently regulate the investment sector. See Mizanie Abate Tadess (PhD), Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework 4 Mekelle U. L.J. 34 (2016)

[38] See the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, Federal NegaritGazeta, Year 1, No 1 Addis Ababa, 21st August 1995 – with a focus on the objective clauses for the making of economic policy (article 89). The Rural Development Policies, Strategies and Programs (Amharic Version, Addis Ababa, Hidar 1994 Eth. C. (2001)).The Industrial Development Strategy (Amharic Version, Mega Publishing Enterprise, Addis Ababa, Nehasie 1994 Eth. C.) The Five Years Development Plans: Ethiopia: Building on Progress, A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005/06-2009/10) (Volumes I & II), MoFED, September 2006. Growth and Transformation Plan 2010/11 - 2014/15 (GTP - I), Volume 1 - Main Text, MoFED, November, 2010. Growth and Transformation Plan 2015/16 - 2019/20 (GTP - II), Main Text, MoFED. The competition laws: The Trade Practice Proclamation No 329/2003, Federal NegaritGazeta, Year 9, No. 49, Addis Ababa, 17th April 2003 The Trade Practice and Consumers' Protection Proclamation No 685/2010, Federal NegaritGazeta, Year 16, No. 49, Addis Ababa, 16th August 2010. The Trade Competition and Consumers' Protection Proclamation No 813/2013, Federal NegaritGazeta, Year 20, No. 28, Addis Ababa, 21st March 2014

3.2.3. Social Reasons

To begin from the very philosophical conception of the idea of CSR, we may refer to the concept of social contract. According to this concept, there is an inherent contract between business and society in that businesses while running their activities need to take into consideration the interest of the society within the rule of the game. From the principle of triple bottom line, society is one major element.[39] As long as businesses take societal interests into consideration, together with economic and environmental objectives, the government will have a strong reason for showing interest in CSR. CSR is concerned with the distribution of corporate resources for the public good in which the government has an inherent interest to protect. Therefore, it is very clear that the government has a keen interest in CSR.

3.2.4. Environmental Reasons

The environment is one of the few common conceptions with universal understanding and goal. All the actors at the international level have a venture, albeit the range of participation varies. Stakeholders may include states, NGOs, and CSOs, business groups, multinational corporations and individuals. Currently, almost all stakeholders are working towards a common agenda relating to the environment – meeting sustainable development goals. CSR is understood as one of the major tools in an effort towards meeting sustainable development. In Ethiopia sustainable development is the prevailing constitutional environmental principle in which all stakeholders shall take into consideration the impact their activities can have on the environment.[40]

The environment in many parts of Ethiopia is very fragile and needs the utmost care. There is rapid deforestation, loss in the biodiversity, drought, endangered endemic wildlife, soil erosion and water pollution because of old manufacturing industries. As a result, the government has given special emphasis for its protection and has issued various policies and legislation. Therefore, the public policy interest in CSR is indefensible.

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[39] See Ayalew Abate Bishaw, Bahir Dar Law Review Journal Vol. 7

[40] Federal Democratic Republic of Ethiopian Constitution; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995), Article 9 and 43.

3.2.5. The Private Sector Low Level of Environmental Commitment and Practice

Since 1991, there has been a rapid expansion of the private sector in Ethiopia.[41] The public enterprises, foreign multi-lateral and transnational investment companies, government-foreign share and equity shareholders, foreign-private share companies, private companies including share companies, private limited companies, general partnerships, private limited partnerships and sole proprietors are doing business at various levels and paces.

Industries such as cement production, gypsum, manufacturing industries, chemical and extraction industries, pipeline and food processing and agricultural industries, brewery factories, leather industries are some of the industries involved in the economic sector and contributing a great deal to the GDP. Private investment has increased and the government is promoting foreign investment. There are various incentives including fiscal and non-fiscal, and there are many changes towards further improvement.

In Ethiopia the private sector does not have a CER framework at a country level or at a private level. The practice of CER is at its very infant stage of development[42] and is fragmented[43] too. It is completely run on a voluntary basis and is usually self-initiated. It is not strategically enforced, too.

Some companies undertake CER by their own initiation. The BGI Ethiopia Brewery can be mentioned in this regard.[44] It has a self-initiated code of

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[41] In Ethiopia the year 1991 is land mark as it refers a shift from command and control economy to a relatively free market economy system.

[42] Kassaye Deyassa, CSR From Ethiopian Perspective, International Journal Of Scientific and Technology Research (2016), Volume 5, Issue 04, April 2016 ISSN 2277-8616 299, IJSTR©2016 www.ijstr.org , Hailu FK and Nigatu, Practices and Challenges of Corporate Social Responsibility (CSR) in the Hospitality Industry: The Case of First Level Hotels and Lodges in Gondar City, Ethiopia TF.

[43] The absence of country level framework and unanimous practice are features of fragmentation.

[44] They have good CER code of conduct. They are promoting their product alleging that they produce environmentally friendly. See K. Rama MohanaRao, FentayeKassaHailu, Environmental Corporate Social Responsibility of Brewery Firms in Ethiopia International Journal of Applied Research (2016)p.1-7 http://www.allresearchjournal.com/archives/2016/vol2issue4/PartA/2-3-102.pdf last accessed on 6 10/2018. At their web: http://bgiethiopia.com/csr/ it particularly stated that:

"BGI Ethiopia is faithful to the principles of environmental responsibility and goes beyond set environmental protection laws, standards and industry practices. Its commitment to protecting the environment and eliminating production practices with negative environmental and social impact is not a passing fad. It is the logical extension of the quality commitments Castel Group first drew up in the 1990s, which is now consolidated within BGI Ethiopia's new Environmental Management System. At its core lies a clear economic logic: the company's future success and sustainable growth will be

corporate environmental governance. Some develop their own code of practice including CER. The floriculture[45] industry can be mentioned here. The business associations have CSR as their core value but they don't have detailed implementation guideline.[46] Corporate social responsibility is mentioned as the core value of business practice by the associations. The business practice in Ethiopia is repeatedly, however, reported as affecting the environment. There is no good environmental practice. The horticulture industry, the cement industry (Dejen), the leather industries in Addis Ababa were reported as polluting the environment including by the government media.

The government only requires the private sector to comply with the standards by environmental legislation. The environmental impact assessment proclamation, the pollution control proclamation, the bio-safety proclamation, solid waste management proclamations are some of the legislation by the government. The Ethiopian Standard Agency sets the compulsory standard for products (product quality) and still, the enforcement is satisfactory.[47] The production processes are not taken into consideration.

In a nutshell, these low standard practices and initiatives from the private sector imply that the government should involve and promote CER through various modalities.

3.2.6. Poor Law Enforcement Practice

Because of lack of resources and other factors, law enforcement in Ethiopia is not effective. This implies that environmental legislation is not enforced and the government needs a public-private partnership for better adoption and enforcement of environmental law and standards. The concept CR as

wholly dependent on achieving a close synergy with the "ecosystem". These principles and values, although costly, resulted in the adoption and implementation of activities that support sustainable protection of the environment. These activities include, but are not limited to, installing water treatment facilities in all breweries and the winery, the adoption of organic and natural farming methods in the Ziway vineyard, putting greater emphasis on proper waste management and recycling, and replacement of energy wasting machineries and practices with a more environmental friendly alternatives."

[45] Ethiopian Horticulture Producer Exporters Association, Code of Practice for Sustainable Flower Production Version 4.0(2015) , http://ehpea.com/files/downloads/EHPEA%20Code%20Version%204.0.pdf

[46] Chambers of Commerce and Sectorial Association (CCASA), Core Values, (2003) http://ethiopianchamber.com, last Accessed on 10/10/2018

[47] Ethiopian Standardization Agency (ESA) (2016), www.etihostandards.org

explained in the introduction of this paper, however, has a significant impact as well as contribution to law enforcement. It facilitates law enforcement by both the government and the private sector.

3.2.7. Cultural Reasons

Ethiopia has a very deep-rooted culture of assuming responsibility for the family, the community, the country and for nature and the environment. In some rural and remote parts of the country (as is the case in South and South West Ethiopia), people pay a lot of tributes to nature and the environment. Nature is, in fact, the direct source for their feeding, clothing, and housing. They consider destructing nature as the worst of things. In most parts of the South and South West Ethiopia, it is a taboo to cut down trees and pollute water.[48] In every part of the country, it is strictly forbidden to fell trees found in or near churches. Most people also depend on nature for their food. To disregard nature and the environment is considered as dishonest and is followed by social sanction.

In Ethiopia, the family system is so extended and as per the tradition, every Ethiopian has a responsibility for family members, neighbors and the community in general. For example, one can punish or discipline the child of one's neighbor or a child of a member of the community provided the child is caught doing something considered wrong by the community.[49] This is because people traditionally assume common responsibility for raising a child with socially acceptable behavior. The same responsibility extends to the environment people use commonly. As laws and policies are required to reflect culture, the government has a good reason for cultivating such practices in institutions strategically. It is against the environmental culture of the society to disregard taking responsibility.[50]

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[48] Jon Abbink Ritual And Environment: The Mosit Ceremony of the Ethiopian Me'en People, Journal of Religion in Africa XXV, 2, University of Nijmegen and African Studies Centre, Leiden, the Netherlands.(1995)P. 11. See also from: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1000.426&rep=rep1&type=pdf, Last Accessed 7 Oct 2018 @12:37

[49] By the custom of the community, you are entitled and have the honor as a community member to take disciplinary measures on children in the village. See from: https://www.younglives-ethiopia.org/sites/www.younglives-ethiopia.org/files/IWP_2016_25.pdf as last accessed on 13 Dec. 2019

[50] Allan Hoben, Paradigms and Politics: The Cultural Construction of Environmental Policy in Ethiopia World Development, Vol. 23, No. 6, (1995) pp. 1007-1021,

In a nutshell, as Ethiopia is a developing country facing many problems with ill-designed commitment structure, poor accountability and weak fiscal structure; a new form of regulation that takes its context into consideration is imperative.[51] The other modes of regulation adopted for the developed countries cannot work here. It cannot leave corporations to their own devices to regulate themselves, and at the same time the government can't also fully regulate the private sector alone. Therefore, it is required to promote CER using public policy.

4. The Government Role in Ethiopia

In the previous section, an attempt has been made to justify the basic reasons behind the need for the Ethiopian government to promote CER. Accordingly, it is asserted that the Ethiopian government has strong reasons to promote CER through its public policy. This section discusses the view the government has in relation to CER. Given the need to foster CER in Ethiopia and the emergence of CER in some public and private enterprises, it is appropriate to present the view the Ethiopian government has taken and the ideas that the government is currently trying to promote in relation to CER. As the discussion is limited to assessing the government's role in promoting CER through public policy, only selective and top framework level analysis is made based on the parameters of mandating, partnering, facilitating and awareness creations roles of the government.

4.1. Legislations (Mandating Role of the Ethiopian Government)

4.1.1. The FDRE 1991Constitution

The FDRE constitution is the supreme law that defines government powers and functions in Ethiopia.[52] It provides power to the federal government to formulate and implement national policies, strategies, and plans including economic, social and environmental matters.[53] The constitution is also the highest policy document that prescribes many of the government objectives

[51] http://shodhganga.inflibnet.ac.in/bitstream/10603/141275/9/09_chapter%201.pdf ,See also Johan den Hertog, General Theories of Regulation as accessed from: https://majandus.ut.ee/sites/default/files/mtk/dokumendid/e35f555bc5922cc21262fabfac7de2fc.pdf

[52] See Federal Democratic Republic of Ethiopian Constitution; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995),Article 45-51 and article 9

[53] Tadele Ferede (PhD), Mainstreaming Sustainable Development at National Level: The Ethiopian Experience (2015). www.unosd.org last accessed on 11 October 2018 p.2

and approaches with respect to the economy,[54] the society,[55] culture,[56]and environment.[57] Thus, the constitutional stipulation may have enormous implications.

The constitution decreed private property right under Article 40 and freedom of association under Article 30 which are the foundational principles for the development of corporate bodies (business groups) and their engagement in economic development. The right to development and the right to a clean and a healthy environment are also included in the constitution under Articles 43 and 44. The recognition of the right to owning property and the right to clean and healthy environment has its own implication for the business sector as it imposes limitation in using their property so as not to affect the environment and infringe upon others' rights to living in clean and healthy environment. As a matter of principle, every right has a corresponding duty and it is from such a constitutional principle that corporations will be bound with a duty to act within the rule of the game. The phrase "in the manner compatible with the rights of citizens"[58] clearly shows that there are requirements to acquire, use and dispose of property. Among others, the mode of acquiring, using and disposing of such property is required not to affect the public and individual rights of persons**.** An example of such citizen and public interest requirement includes the environmental rights[59] as recognized under Article 44(1). The constitution has many provisions to do with environmental protection and lays the very foundational principles for the environmental policy objectives of the country.

The FDRE Constitution is also the manifestation of radical policy determination to shift towards recognizing the role of free market economy in the country.[60] It recognizes the role of the private sector in the economic

[54] See the economic objective in the Constitution Article 89, Federal Democratic Republic of Ethiopian Constitution; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995)

[55] Id, Article 90

[56] Id, Article 91

[57] Id, Article 92

[58] Id, Article 40(1) It reads as: Every Ethiopian citizen has the right to the ownership of the private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.

[59] Id, see Article 44(1). It reads: "All persons have the right to a clean and healthy environment".

[60] Id, Article 40

development of the country.[61] It asserts a liberalized economy as the national political economy of the country.[62] It recognized sustainable development as the right of every person.[63] Based on these provisions in the constitution, it can be concluded that the government has shown due respect and regard for the private sector (business community) to play its role in the *triple bottom line*: economy, society and environment.[64]

The constitution also adopts foundational environmental principles related to corporate responsibility. Among other things, it has recognized the principle of sustainable development,[65] the principle of inter- and intra-generational equity[66] and precaution.[67] Sustainable development implies that development endeavors shall be holistic in approach: shall take economic, social and environmental elements into account.[68] Development shall not compromise future generation interests. It shall not be guided by short-term benefits and shall be feasible and visionary as CER requires.

The second principle, i.e. intergenerational equity, means the current government has a duty to establish a system that could allow the present generation to use resources wisely to pass it onto the next generation without deterioration.[69] Intra-generation equity means the duty of the current generation to use resources with fair allocation and responsibility.[70] Therefore, the constitutional environmental principles underscore the responsibility of actors to the environment. As per this constitutional provision, the private sector has the basic obligation to observe constitutional environmental principles. To this effect, the government has a duty to

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[61] Ibid.

[62] Id, see article 31, 40, 41, 42, 43 and 89. The cumulative reading of these provisions and the re-establishment of the chamber of commerce and other economic strategic documents assert the free (liberalized) market policy of the government.

[63] Id, Article 43

[64] Id, See Articles 89-92. The constitution has set political, economic, and social and environmental objectives. It recognized the role the private sector can play in the triple bottom line and traced (refered) them to that effect.

[65] Id, Article 89(1), Article 43 and Article 92

[66] Id, Article 89

[67] Id, See Article 92

[68] International Institute of Sustainable Development, https://www.iisd.org/topic/sustainable-development

[69] Federal Democratic Republic of Ethiopian Constitution; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995)Article 89 and 92

[70] Ibid..

encourage the private sector to meet its constitutional goals. In this regard, the constitution has set the foundational principles to the promotion of CER.

Generally, this cursory review of the constitutional provisions has indicated that the government has a stake to promote and mainstream the corporate responsibility towards environmental protection. The constitutional duty that the government holds and the principles and rights enshrined in the constitution reinforce the belief that the government has to promote CER in Ethiopia.

4.1.2. Other Legislations of the Federal Government

Environmental legislations are enacted basically in order to set minimum acceptable conduct towards the environment. They are not meant only for the business sector but for all sectors having a stake in the environment. It includes individuals, families, groups, associations, CSOs, government bodies and business. The government is responsible for enacting environmental laws. Others have the duty of enforcing government laws under the threat of sanctions.

In Ethiopia, the government has enacted various environmental legislations mostly in the form of proclamations. These environmental legislations prescribe what is prohibited, permitted and the measures to be taken during violations. Accordingly, the business sectors are duty-bound to observe the laws. Some of the environmental legislation include the environmental organs establishment proclamation,[71] environmental impact assessment proclamation,[72] the pollution control proclamation[73] and other sectoral laws that are related to water,[74] ozone,[75] bio-safety,[76]and waste management.[77]

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[71] The Environmental Organs Establishment Proclamation of the Federal Democratic Republic of Ethiopia, Negarette Gazette Proclamation No. 295/2002

[72] The Environmental Impact Assessment Proclamation of Federal Democratic Republic of Ethiopia, Negarette Gazette 9th Year No. 11 ADDIS ABABA-3rd December, 2002. Proclamation number 299/300

[73] The pollution Control Proclamation of the Federal Democratic Republic of Ethiopia, Negarit Gazette of the Proclamation N0.300/2002 Environmental Pollution Control Proclamation, 9th Year, Negarette Gazette No. 11 ADDIS ABABA-3rd December, 2002.

[74] Water Resource Management Proclamation No. 197/2000 of the Federal Democratic Republic of Ethiopia, 6th year Negaritte Gazette No.25 Addis Ababa, 9th March 2008

[75] Control of Ozone Layer Depleting Substances Proclamation, 17th year Negarit Gazette No.93 Addis Ababa 4th November 2011

[76] See the Bio-safety (amendment) Proclamation 21st year Negarit gazette No. 66 Addis Ababa 14th August, 2015.

Most of these environmental proclamations lack regulations and directives that enforcement the law.

Beyond the environmental legislation, the government of Ethiopia has legislation to regulate business conduct that includes the commercial code, business practice proclamations, the civil code, the criminal code, and the consumers' protection proclamations. These laws have set the minimum legal standards business has to follow while making a profit. The laws regulate business formation requirements, competition and protect customers' interests. These pieces of legislation don't have specific provisions for the environment.

4.2. Partnering Role of the Government to Promote CER in Ethiopia

Partnering role is creating cooperation between various stakeholders such as multilateral agencies, civil society, business and government towards shouldering environmental responsibility. It involves providing a forum for public-private partnership debate, dialogue, negotiating in standard development and guidelines. In this case, the government and the business sector could get the opportunity to develop an innovative guideline for the business sector to contribute to the environment. They will also be in the position to understand the environmental agenda which helps them later in enforcing the law.

The government of Ethiopia has a very short history of partnering with the business sector. As can also be understood from the evolution of development of the private business sector in Ethiopia, it has only short history. Therefore, there is no well-developed partnership between the government and the private sector. Nevertheless, a partnership between the government and the private sector could play a big role in the economy, and their partnership can contribute enormously to the environment. The government has now enacted public-private partnership (PPP) proclamation and established an agency.[78]The recently enacted proclamation is to support economic growth and improve the quality of the public service. Its review revealed that there is no legal framework for corporate responsibility for the environment.

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[77] Solid Waste Management Proclamation 13th year Negarit Gazette No.13 Proclamation number 513/2007

[78] The Public Private Partnership Proclamation No. 1076/2018 ("PPP Proclamation")

With an attempt to create a platform for the business sector, the government has amended the well-established chamber of commerce and sectoral association proclamation. The detailed aspect of the proclamation is discussed hereinbelow. Still, however, it shall be remarked that there is no significant partnership between government and the business sector towards environmental responsibility.

4.2.1. Government Role and Chamber of Commerce and Sectoral Association (CCSA) Establishment

The Ethiopian CCSA is the apex organ of the private sector in Ethiopia. It was first established during the reign of Emperor Haile Selassie in 1947.[79] It was established with the motto of promoting trade and investment relations to basically harness the export and import sector to maintain the balance of foreign exchange. Especially in the late periods of the imperial regime private property right was recognized. The chamber of commerce was established to assist the sector to that effect. It was given big support from the government.[80] In 1974 the imperial regime was abolished once and for all in Ethiopia and the military junta took power and ruled the country with socialist ideology over seventeen years. During the socialist regime (Derge) it was transformed to align with the political economy of the time, i.e. command market economy.[81] In 2003 after thirteen years following the coming into power of revolutionary democrats (1991) another big reform has been made and the government used it as a channel to reach the private sector.[82]

Among the objectives of the establishment of the association include the provision of various services to the business community, safeguarding the overall rights and benefits of their members, promotion and publicity of products and services of the country, enhancement of trade and investment of the country, and serving as a bridge between the business community and

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[79] See from: http://www.ethiopianchamber.com/new-page.aspx as last accessed on 25th of Sep. 2018 at 4:35pm. The concept was first introduced in 1943. But it was established by Charter No. 90/1947 in 1947.

[80] See from: http://www.ethiopianchamber.com/new-page.aspx as last accessed on 25th of Sep. 2018, at 4:35pm.

[81] The Military regime has enacted proclamation No. 148/1974 that oblige compulsory membership.

[82] The association has been basically run by the government political ideology. The shift in government politics has made it shift and reform time and again. In 2007 it is once again restructured to attain the current form.

the government.[83] Based on this, we may understand that the chamber creates wonderful forum or platform for both the public sector and the business community to work in collaboration to meet the development goals of the country that may include environmental goals. It is thus through this channel that both the government and the private business sector get in touch with each other to discuss as well as embark upon their common undertakings.

Most important in relation to corporate responsibility is the establishment of the chamber of commerce, which includes value clauses. It clearly indicated that among the values promoted included CSR.[84] Whether the business sector in Ethiopia is really guided on the basis of these value clauses may, however, be questionable. This is because studies on the general understanding of the concept of CSR show a low level of awareness and performance among different sectors.[85] In its organizational set-up there is also no specific department responsible for CSR and stakeholder to represent the environment. The overall organization is weak and non-functional relating to the environment. There is no mechanism for environmental accountability, transparency, public involvement, and information disclosure. Hence, though the inclusion of CSR in the value promoted is to be considered a good prospect, to implement it on the ground has limitations beginning with its structural arrangement. There is no emphasis given for CER. Environment is not mainstreamed.

4.3. The 1997 Environmental Policy of Ethiopia

The fact that the government has incorporated the CER concept in adopting its environmental policy[86] is very important because it has helped the government to increase its commitment to promoting CER. Two of the nine policy objectives mentioned, among others, in section two, i.e. the guiding principles, sectoral and cross-sectoral policies reflect the government's

[83] See article 3 of the Chamber of Commerce and Sectoral Association Establishment Proclamation, Proclamation No. 341/2003, 9th Year Negarit Gazette No. 61 ADDIS ABABA 1 May, 2003.

[84] Basic values promoted include commitment to excellence, CSR and transparency and accountability.

[85] Mathias Nigatu Bimir, CSR learning in the Ethiopian Leather and Footwear Industry, International Journal of Scientific and Engineering Research, Vol. 7, Issue 10 (2016) p. 228 -232

[86] See EPRDF, Environmental Policy (1997). Section one deals with the resource base, section two is about the policy goal, objectives, and guiding principles, section three is devoted for sectoral environmental policies; section four is about cross-sectoral environmental policies, and section five deals with policy implementation

commitment to CER. The two objectives[87] are stated as "…incorporating environmental concerns into all economic and development activities and valuation of the environmental services, and ensure the empowerment and participation of the people."

According to the first objective, all activities in the country whether run by the government or the private sector, shall consider the environment. Thus, the government entrusts environmental responsibility to all economic and development actors in the country. Obviously, this includes business entities. Environmental protection is mainstreamed and the environmental services are also to be audited. These activities are really promising, though their actual implementation seems protracted.

The second objective refers to the government's concern of citizens' environmental participation and empowerment. The role of citizens and public participation in environmental protection is underscored. So, public participation is the cardinal principle in environmental protection and environmental law enforcement. It paves the way for citizens to challenge government decision making. This means that the Ethiopian government has pledged as per this policy document to the people that they will participate in decision making and will challenge the government's decision affecting the environment and their public interest. Furthermore, as citizens of a country can't simply be powerful (environmentally active participants) only through proclamations. The policy also implies that the government will initiate different ways of reaching the people to create environmental awareness and facilitate the means to empower citizens to stand for public environmental interest. Hence, these policy stipulations are more than just participation. It means that the government has the intention to work closely with citizens and the private sector to protect the environment.

Setting the key guiding principles, this section further revealed that natural resource and environmental management (EMGT) activities shall be integrated laterally across all sectors and vertically among all levels of the organization.[88]Accordingly, this public policy document has the objective of entrusting environmental responsibility both to the private and government sectors and to whatever activity they engage in and to whatever level they

[87] Id, Section two 2.2 (h and i)

[88] EPRDF Environmental Policy (1997) section two 2.3 (p).

are working at. Therefore, one can conclude that, though there is no specific mention of CER, the government through its environmental policy has convinced corporations or the private sector to integrate the environment into their policies and run their businesses responsibly.

The section dwelling on the sectoral and cross-sectoral elements also emphasize what is described in the objectives section. It has explicitly mentioned EIA, environmental education and awareness, community participation,[89]etc. EIA is a basic tool for environmental management and protection.[90] Under the implementation section, the policy encourages the establishment of relevant institutional frameworks, mandates differentiation among government organs and coordination in the respective discharge of environmental responsibilities including the private sector.[91]

Generally speaking, the Ethiopian environmental policy framework is a comprehensive document with inspirational provisions to mandate especially the concerned government bodies with various responses to its actual implementation. It also encourages citizen participation at various levels. Nonetheless, the policy has in general weak articulation to explicitly recognize and promote the private business sector to play a role in the corporate environmental responsibility. It positions the government dominantly at the very center.

5. Assessment of Government CER Public Policy Implementation

As we can understand from the above discussions of government policy frameworks, there is no clear recognition and incorporation of the CER in Ethiopia. What we have is only a constitutional arrangement, environmental policy framework, environmental legislation and the chamber of commerce proclamation that could potentially be interpreted as the application of CER. However, there is no evidence to show that the government has used CER as a policy option for the business sector to employ and contribute to environmental protection.

As a result, the implementation has gone through only law enforcement and voluntary corporate self-initiative. The law enforcement is achieved

[89] Id, Section 4 p. 2o-25

[90] Id, Section 4.9 p. 24

[91] Id, Section five 5.1.(b and e)

fundamentally through the application of EIA proclamation for projects that require legally reporting EIA. The environmental law enforcement is one of the lowest and we can't get practical cases from the courts. In Ethiopia there are no fundamentally clear and comprehensive public policies and public programs to implement CER. CER in the business sector is basically run by the initiative of the sector. Nevertheless, climate change and resilience programs, sustainable development strategies, and environmental legislation could be taken as government implementation of CER though its role in the private sector is still very limited.

5.3.1. Assessment of the Existing Institutional Frameworks

The current Ethiopian government has gone through several amendments to the re-establishment of executive organs of the government. The federal executive organs establishment proclamation is the most frequently amended proclamation of all in Ethiopia. Depending on the government strategies and plan, there exists frequent amendment of the law. The environment had been under the Ministry of Agriculture then organized as an authority, then again merged with the agency for forest and climate change at a ministerial level, and now it is organized as a commission.[92] Other ministries are still changing. Even now the cabinet has decided to lower the number of ministries from 28 executives to 20 and the same proclamation is amended.[93] The government has claimed that reducing the government bureaucracy will help reduce costs. From among the current ministries, the Ministry of Agriculture and Natural Resources, the Ministry of Industry and the Environment Commission have specific mandates to protect the environment. However, since any of the activities of the ministries could impact the environment and since the environmental policy requires environmental mainstreaming the activities of the ministries should have included any environment-related responsibility. Or there should have been an organ particularly responsible for CER. A close examination of the existing proclamation proves that many of the government executive organs don't

[92] See Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Proclamation No. 916./2015, Federal Negarit Gazette 22nd Year No.12 ADDIS ABABA 9th December , 2015 and Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Proclamation No. 1097/2018

[93] See Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Proclamation No. 1097/2018

have any role to play in CER. There is also no specific government organ to work towards CER.

6. Conclusions

The role the Ethiopian government has played in establishing a common and comprehensive CER policy framework is insignificant. If some practices exist, they are not organized and strategic ways of establishing a system. The reality in the business sector is no different. There is no organized and strategically adjusted CER. Some corporations and/or investment companies have nominal CER framework but is still fragmented and is based on their personal initiative and not managed in a coordinated way. The government's decision to review the economic policy to establish a free market system is not followed by the embracing of a framework regulating corporate environmental conduct. The development projects and plans don't have any corresponding environmental duties they should comply with when running the project of corporations. There is no organized government action to raise environmental awareness and partnerships are weakly coordinated and integrated. The government doesn't have soft regulatory CER frameworks developed purposefully for businesses to follow in leveraging environmental responsibility. The laws are not adequate and do not involve corporate accountability. They are mostly nominal and the enforcement is weak. The institutional framework is not based on the concept of CER. Moreover, the initiative and practice mostly developed by the self-motivated business companies were not compiled towards a common framework establishment and system creation. The government's role in rewarding and fostering this approach is almost non-existent. The code of conduct and voluntary movements by corporations are not effective, and there is no mechanism for the government to monitor their activities either. The community and active citizens do not have opportunities to participate and get environmental information. Some of the activities by few government organs were simply projects and fund-based and were not mainstreamed. Therefore, the overall assessment shows that there is a need to promote CER by the government in a planned, institutionalized, coordinated and organized manner. The government needs to work towards awareness creation, partnering, soft-law development and mandating via a clear and enforceable legal framework.

7. Recommendations

The following steps or actions are recommended to be taken by the Ethiopian government to harness the potential advantages of CER to accelerate the ongoing sustainable development process. The first is to incorporate CER in the existing government development policy as one of the strategies for development. As a result, CER should be considered as one of the pillars of the forthcoming development policy. The second is to establish an ad hoc task force of experts for CER with a special task to review the existing sectoral policies, rules, and regulations and then prepare a draft national CER strategy. The third one is to approve and promote the CER strategy of the country. Among other points, the strategy shall explain the objectives of adopting CER in the process of development, the expected roles of partners, and the central role of the government in safeguarding or protecting the interest of citizens and the environment in the process of CER operation. The basic intention of the government is to introduce CER into the system. The final step is to work towards institutional and policy framework development related to CER.

በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ፤ አዙሪት ጥያቄዎችና መውሰብሰቦች

*መሐመድ ዳውድ አልቃድር**

አህጽሮተ ጥናት

በኢትዮጵያ የታክስ አስተዳደር ሥርዓት ውስጥ የተጨማሪ እሴት ታክስ እና የተርን ኦቨር ታክስን በመጠቀም ከሕግ አገልግሎት ላይ የሽያጭ ታክስ እንደ ሁኔታው በፌዴራሉና በክልል መንግስታት በመጣሉ በተግባርም እየተሰበሰበ ይገኛል። ይሁን እንጅ ይህ ታክስ ሕጋዊ መሠረቱን እና አግባብነቱን በተመለከተ፤ ከታክስ መሠረቱ፣ ከታክስ ምጣኔው እና ከአስተዳደር ሂደቱ ጋር ተያይዞ በርካታ አዙሪት ጥያቄዎችና መውሰብሰቦች ይስተዋላሉ። የዚህ ጥናት ዓላማም እነዚህን አዙሪት ጥየቄዎችና መውሰብሰቦች በዓይነታዊ የምርምር ዘዴ በማጥናት የመፍትሔ ኃሳብ መጠቆም ነው። ለዚህም ያስችል ዘንድ የተለያዩ መዛግብቶች፣ ቃለመጠይቆችና ቡድንተኮር ውይይቶች በግብዓትነት ጥቅም ላይ የዋሉ ሲሆን ለንፅፅር ይረዳ ዘንድ የሌሎች አገራት ተሞክሮንም ለመቃኘት ተሞክሯል። በዚህም መሠረት ጥናቱ ባለሶስት አማራጭ የመፍትሔ ኃሳብ ያቀረበ ሲሆን የመጀመሪያው አሁን ከሕግ አገልግሎት በአገሪቱ እየተሰበሰበ ያለውን የሽያጭ ታክስ እንዳለ በማስቀጠል ለፍትሕ ተደራሽነትና ለሕገመንግስታዊ መብቶች መከበር ምቹ ሁኔታ ለመፍጠር መወሰድ ያለባቸውን ርምጃዎች አመላክቷል። በሌላኛው የአማራጭ መፍትሔ ከሕግ አገልግሎት የሚሰበሰበውን የሽያጭ ታክስ ሙሉ በሙሉ በማስቀረት ሌሎች አማራጭ የገቢ ምንጮችን መጠቀም እንደሚቻል ጠቁሟል። የመጨረሻው የመፍትሔ ኃሳብ ደግሞ ሁኔታዎችን ያገናዘበ ስልት በመቀየስ ለሕግ አገልግሎት ራሱን የቻለ አዲስ ሠንጠረዥ ማዘጋጀትን የሚጠይቅ ነው። ለዚህም ያግዝ ዘንድ የሕግ አገልግሎቶችን አስፈላጊነትና በሕገመንግስት ጥበቃ ከተደረገላቸው መብቶች ጋር ያላቸውን ቁርኝት፣ የሕግ አገልግሎት ተጠቃሚውን የመክፈል አቅምና የመንግስትን የገቢ ፍላጎት ባገናዘበ መልኩ በሠንጠረዥ በመከፋፈል በተለያዩ የታክስ ምጣኔዎች የሽያጭ ታክስ እንዲሰበሰብ የሚመክር ነው።

ቁልፍ ቃላት፤ የሕግ አገልግሎት፣ የሽያጭ ታክስ፣ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ

መግቢያ

ተመራማሪውን ለዚህ ጥናት ያነሣሣው በአማራ ክልል የጠበቆች ማኅበር አቤቱታ አቅራቢነት ለአማራ ብሔራዊ ክልላዊ መንግስት (ከዚህ በኋላ አብክመ) የሕገመንግስት ጉዳዬች አጣሪ ጉባኤ የቀረበው አቤቱታ ነው።[1] አቤቱታው በምንም መልኩ ቢወሰን ውሳኔው የመጨረሻ የሚሆነው በክልሉ ብቻ ስለሆነ ጥያቄው ለወደፊቱ በሌሎች ክልሎችና በፌዴራል ደረጃ

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* በሕግ የመጀመሪያ ዲግሪ (ጎንደር ዩኒቨርሲቲ)፣ በንግድና ኩባንያ ሕግ የሁለተኛ ዲግሪ (ባሕር ዳር ዩኒቨርሲቲ)፣ ሌክቸረር፣ በባሕር ዳር ዩኒቨርሲቲ የሕግ ትምህርትቤት። ጥናቱ እውን ይሆን ዘንድ በቃለመጠይቅና ቡድንተኮር ውይይት የተሣተፉትን ማመስገን ይኖርብኛል። የመጀመሪያ ረቂቁን የተሻለ ለማድረግ በመተቸትና ምክር በመስጠት የተሣተፉትን ምስጋናውንና ኻሊድን ከልብ አመሰግናቸዋለሁ። እንዲሁም የጥናቱን ገምጋሚዎች፣ የመጽሐፉን ዋና-አርትኦትና የአርትኦት ቡድን አባላትንም ማመስገን እወዳለሁ። ኢሜይል፡ muhmetgusl@gmail.com

[1] የአማራ ክልል ጠበቆች ማህበር vs በአብክመ የገንዘብና ኢኮኖሚ ትብብር ቢሮ፣ የአማራ ብሔራዊ ክልል ምክርቤት የሕገመንግስት ጉዳዮች አጣሪ ጉባኤ፣ መ.ቁ 02/2011፣ 2011 ዓ.ም (ይህ መግት ገና በሂደት ላይ ያለ ሲሆን አቤቱታ አቅራቢ መልስ ሰጭ ያላካተቱ ቢሆንም የሕገመንግስት አጣሪ ጉባኤው ግን የአብክመ የገንዘብና ኢኮኖሚ ትብብር ቢሮን መልስ ሰጭ ሆኖ እንዲቀርብ አድርጓል።)

ለፌዴራሽን ምክርቤትና ሌሎች ተቋማት ሊቀርብ የሚችል በመሆኑ ጉዳዩ ላይ ከወዲሁ ጥናት ማድረጉ አስፈላጊ ነው።[2]

የፌደራልም ሆነ የክልል መንግስታት በሕገመንግስቱ የተሰጧቸውንና ሌሎች ግዴታዎችን በመወጣት አንድን አገር ወይም ክልል ለማስተዳደር ብሎም የሕዝብ መብትና ጥቅም ለማስከበር ከፍተኛ የሆኑ ወጭዎችን ማውጣት ይጠበቅባቸዋል። ይህ ወጭ *(Public Expenditure)* ደግሞ የሚሸፈነው በዋናነት በመንግስት በልዩ ልዩ የማህበረሰብ ክፍሎች ከሚደረጉ ኢኮኖሚነክ እንቅስቃሴዎች ከሚሰበሰብ ግብር ነው። ለነዚህና ለሌሎች ማህበራዊና ኢኮኖሚያዊ ዓላማዎች የሚሰበሰቡት ግብሮችም ቀጥታ ግብር (Direct Tax) እና ቀጥተኛ ያልሆነ ታክስ (Indirect Tax) ይባላሉ። ቀጥታ ግብር የሚባሉት ግብሩን የከፈለው ሰው እስከመጨረሻው ራሱ የሚወጣው ሆኖ ከሌሎች ሰዎች መልሶ መተካት የማይችለውና ማስተላለፍ *(Shift of Burden)* የሌለበት የግብር ዓይነቶች ሲሆኑ እንደገቢ ግብር፣ ንብረት ግብር፣ የውርስ ግብርና የመሳሰሉት በዚሁ በቀጥታ ግብር ምድብ ውስጥ እንደአብነት የሚነሱ ናቸው።[3] ቀጥታ ያልሆኑ የታክስ ዓይነቶች ደግሞ የመጨረሻ ኃላፊነቱ የሚወድቀው ታክሱን ለመንግስት የሚከፍለው ሰው ላይ ሳይሆን ሌሎች ሰዎች ላይ ነው።[4] ይህም ማለት ለመንግስት ታክሱን ገቢ ያደረገው ሰው ታክሱን የሚከፍለው ከራሱ ካገዘና ሳይሆን ከሌሎች ሰዎች በመሰብሰብ ወይም ከራሱ ካገዘና የከፈለውን ታክስ ደግሞ የአቅርቦቱ ዋጋ ላይ በመጨመር ወደተጠቃሚው በማስተላለፍ ነው። የነዚህ የታክስ ዓይነቶችን በተመለከተ እንደዋና ምሳሌነት የሚጠቀሱት የሽያጭ ታክስ፣ የኤክሣይዝ ታክስና ቀረጥ ናቸው።[5]

ወደ ኢትዮጵያ የታክስ ታሪክ ስንመለስም የሽያጭ ታክስ ከንጉሱ ስርዓት ጀምሮ በዘመነ ደርግና በሽግግር መንግስቱ ወቅትም ሲሰበሰብ የኖረና ከነሐሴ 15፣ 1987 ዓ.ም ጀምሮ ተፈፃሚ በሆነው የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ (ከዚህ በኋላ ኢፌዴሪ) ሕገመንግስትም እውቅና ተሰጥቶት እንደሁኔታው በፌዴራሉና በክልል መንግስታት የሚጣልና የሚሰበሰብ መሆኑን ከኢፌዲሪ ሕገመንግስት መገንዘብ ይቻላል።[6]

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2 በደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልልም ተመሳሳይ ጥያቄ ተነስቶ የነበረ ሲሆን በክልሉ የሚገኙ ጠበቆች የአስተዳደር መስመሩን በመከተል እስከፌዴራል ገቢዎች ድረስ መቅረቡን ሁነኛው ማሞ አውስተዋል። ሁነኛው ማሞ፣ በደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት ገቢዎች ባለስልጣን የደምበኞች አገልግሎት፣ የታክስ አወሳሰንና ተመላሽ ዳይሬክቶሬት ዳይሬክተር፣ በደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 3፣ 2011ዓ.ም

3 Misrak Tesfaye Abate, Ethiopian Tax Accounting: Principles and Practices, 2nd Edition, 2014, p. 72 [Hereinafter Misrak, Ethiopian Tax Accounting: Principles and Practices]

4 Alan Schenk & Oliver Oldman, Value Added Tax: A Comparative Approach, Cambridge University Press, Cambridge Tax Law Series, 2007, p. 5 [Hereinafter Alan Schenk & Oliver Oldman, Value Added Tax: A Comparative Approach]፤

በአማርኛ ቋንቋ ቀጥታ ያልሆኑ ታክሶችን በተመለከተ "ታክስ" የሚለውን ቃል መጠቀም የተለመደ ሲሆን ለቀጥታ ግብሮች ደግሞ "ግብር" የሚለውን ቃል መጠቀም የተለመደና ይህ የቃል አጠቃቀም በሕጎች ላይም አየተስተዋለ መጥቷል። ከጌታቸው መስፍን (በአብክመ ገቢዎች ባለስልጣን የገቢ አሰባሰብና ክትትል ባለሙያ) ጋር በአብክመ ከሕግ አገልግሎት የሚሰበሰብ ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 1 ቀን 2011 ዓ.ም

5 Misrak, Ethiopian Tax Accounting: Principles and Practices, Supra Note 3, p. 73

6 Desalegn Mosissa Jalata, The Value Added Tax Styles: Which is Adopted by Ethiopia?, Journal of Economics and Sustainable Develoement, Vol. 5, No. 11, 2014, p. 77 & 80; Desalegn Mosissa Jalata, The Value Added Tax and Sales Tax in Ethiopia: A Comparative Overveiw, European Journal of Business and Management, Vol. 6, No. 23, 2014, p. 246፡ **የኢፌዴሪ ሕገመንግስት አዋጅ ቁጥር** 1/1987፣ **ነጋሪት ጋዜጣ**፣ 1987 ዓ.ም.፣ **አንቀጽ** 96(3) **እና** 97(4) & (7)

ከታህሳስ 23፣ 1995 ዓ.ም ጀምሮ *የሽያጭ ታክስን* በዘመነ መልክ ለማስተዳደርና በተግባር ላይ የነበረው የሽያጭ ታክስ ተደራራቢ ግብር የማስከፈል ውጤት *(Cascading Effect)* ያለውና ሌሎች ውስንነቶች የነበሩበት በመሆኑ በ'ተጨማሪ እሴት ታክስ'ና በ'ተርን ኦቨር ታክስ' እንዲተካ ተደርጓል።[7] በአሁኑ ወቅት የተጨማሪ እሴት ታክስ የሚሰበሰበው ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በላይ የሆኑ የዕቃ ወይም የአገልግሎት (የሕግ አገልግሎትን ጨምሮ) አቅራቢዎች በሚያደርጉት አቅርቦት ላይ ሲሆን የማስከፈያ ምጣኔውም 15% እና 0% መሆኑን ከተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/1994 አንቀጽ 7 መገንዘብ ይቻላል።[8] ከተጨማሪ እሴት ታክስ ነፃ የሆኑ ግብይቶች ደግሞ በአንቀጽ 8 ላይ ተዘርዝረዋል። የተጨማሪ እሴት ታክስን መጣልና መሰብሰብ የፌዴራል መንግስቱ ስልጣን እንዲሆን በኢፌዴሪ ሕገመንግስት አንቀፅ 99 መሠረት በህዝብ ተወካዮች ምክርቤትና በፌዴሬሽን ምክርቤት ጣምራ ጉባዔ ተወስኗል።[9] በተመሳሳይ ዓመታዊ የሽያጭ መጠናቸው ከአንድ ሚሊየን ብር በላይ የሆኑት ላይ የተጨማሪ እሴት ታክስ እየሰበሰቡ ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በታች የሆኑትን ነፃ ማድረግ ገበያውን ለውድድር ያልተመቸና ኢፍትሓዊ[10] የሚያደርግ በመሆኑ እንደሁኔታው የፌዴራሉና የክልል መንግስታት ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በታች የሆኑ አቅራቢዎች (የሕግ አገልግሎትን ጨምሮ) ላይ የተርን ኦቨር ታክስ እንዲሰበስቡ ተደርጓል።[11]

የሌሎች አገራት ተሞክሮን በተመለከተ የሽያጭ ታክስ በተለያዩ ዓይነቶች ተቀርጾ እናገኘዋለን። በአብዛኛው የዓለማችን አገራት "የተጨማሪ እሴት ታክስ" በመሰብሰብ ይታወቃሉ።[12] ከዚህም ባሻገር የአውሮፓ ህብረትና የገልፍ ትብብር ጉባኤ አባል አገራት አንድ የ"ተቀናጀ" የተጨማሪ እሴት ታክስ አስተዳደር ስርዓት መዘርጋት ችለዋል።[13] በሌላ በኩል እንደአውስትራሊያ፣ ኒውዝላንድ፣ ካናዳና ህንድ ያሉ የ"ኮመን" ሕግ ስርዓት (Common Law Legal System) የሚከተሉ አገሮች "የዕቃና አገልግሎት ታክስ"

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7 የኢፌዴሪ የተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/1994፣ ነጋሪት ጋዜጣ፣ 1994ዓ.ም.፣ በመግቢያው እንተገለጸውና የኢፌዴሪ የተርን ኦቨር ታክስ አዋጅ ቁጥር 308/1995፣ ነጋሪት ጋዜጣ፣1995ዓ.ም፣ በመግቢያው እንደተገለጸው

8 የኢፌዴሪ የገንዘብና ኢኮኖሚ ትብብር ሚኒስቴር፣ ለተጨማሪ እሴት ታክስ የግዴታ ምዝገባ የተቀመጠውን የግብይት ዋጋ መጠን ማሻሻያ ውሳኔ ማሳወቂያ ደብዳቤ፣ ለኢትዮጵያ ገቢዎችና ጉምሩክ የተጻፈ ደብዳቤ፣ ቁጥር ታ/ክ/ቀ/5/161፣ 26/03/2010 ዓ.ም በኢፌዴሪ የተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/1994 አንቀጽ 16(2) መሠረት ለግዴታ ምዝገባ የተቀመጠው አምስት መቶ ሽህ ብር ወደአንድ ሚሊየን ብር ያደገበት።

9 የኢፌዴሪ 2ኛው የህዝብ ተወካዮችና የፌዴሬሽን ምክርቤቶች 2ኛ ዓመት የስራ ዘመን 2ኛ የጋራ ስብሰባ ቃለጉባዔ፣ሚያዚያ 3/1994 ዓ.ም.፣ አዲስ አበባ፣ ገጽ 2-6፡

10 የኢፌዴሪ የተርን ኦቨር ታክስ አዋጅ ቁጥር 308/1995፣ ነጋሪት ጋዜጣ፣ 1995 ዓ.ም፣ መግቢያ (ከዚህ በኋላ የኢ.ፌ.ዴ.ሪ.የተርን ኦቨር ታክስ አዋጅ)

11 በኢፌዴሪ ሕገመንገስት አንቀጽ 97 ላይ የክልል መንግስታት የሽያጭ ታክስ እንዲሰበስቡ ስልጣን በተሰጣቸው የዕቃና አገልግሎት አቅርቦቶች ላይ የተርን ኦቨር ታክስ እየሰበሰቡ ሲሆን በአንቀጽ 96 መሠረት የፌዴራል መንግስቱ የሽያጭ ታክስ እንዲሰበሰብ ስልጣን ያገኘባቸው አቅርቦቶች ላይ ደግሞ የፌዴራል መንግስቱ የተርን ኦቨር ታክስ ይሰበስባል። ይሁን እንጅ የፌዴራል መንግስቱ የሽያጭ ታክስ እንዲሰበሰብ ስልጣን ያገኘባቸው አቅርቦቶች አሻሚ በሆነ መልኩ ነው የተገለፁት። የኢፌዴሪ ሕገመንግስት አዋጅ ቁጥር 1/1987፣ ነጋሪት ጋዜጣ፣ 1987 ዓ.ም.፣ አንቀጽ 96 እና 97

12 Sijbren Cnossen, "Global Trends and Issues in Value Added Taxation", Feb. 1998, p.4, Available at https://www.researchgate.net/publication/5148446, Last accessed on 01 October 2019. በጥናቱ እንተገለጸው የተጨማሪ እሴት ታክስ ከመቶ በላይ በሚሆኑ አገራት ይሰበሰባል።

13 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide", 2018 Edition, April 2018, p.334ff and p.439ff [Hereinafter EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide"] Available at https://www.ey.com/Publication/vwLUAssets/ey-2019-Worldwide-VAT-GST-and-Sales-Tax-Guide/$FILE/ey-2019-Worldwide-VAT-GST-and-Sales-Tax-Guide.PDF, Last accessed on 01 October 2019.

(Goods and Services Tax) የሚለውን የሽያጭ ታክስ ዓይነት ይጠቀማሉ።[14] ኩራካኦ (Curacao) እና ሱሪኔም (Suriname) የተርን ኦቨር ታክስ የሚለውን ማለትም "Omzetbelasting" አገር በቀል የሽያጭ ታክስ ዓይነት ሲጠቀሙ ጃፓንና ጆርዳን ደግሞ እንደየቅደምተከተላቸው "የፍጆታ ታክስን"ና "ጠቅላላ ሽያጭ ታክስ"ን ይጠቀማሉ።[15] ፒወርቶ ሪኮ ደግሞ "Sales and Use Tax" የምትሰበስብ ሲሆን 45 የዩናይትድ ስቴትስ ግዛቶች ይህንኑ በመሰብሰብ ይታወቃሉ።[16]

በአጠቃላይ የዚህ ጥናት ዓብይ ዓላማ በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰበውን የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ በተመለከተ ከሕጋዊ መሠረቱና አግባብነቱ ጋር ተያይዞ፤ የታክስ መሠረቱን፣ ምጣኔውንና የአስተዳደር ሂደቱን በተመለከተ የሚስተዋሉ አሻሚ ጉዳዮችንና ውስብስብነቶችን መመርመር ሲሆን ለዚህም ያስችል ዘንድ ዓይነታዊ *(Qualitative)* የምርምር ዘዴን በመከተል የተለያዩ መዛግብቶች፣ ቃለ መጠይቆች እና ቡድን ተኮር ውይይቶች በግብዓትነት ጥቅም ላይ ውለዋል። በተጨማሪም ለንፅፅር ይረዳ ዘንድ የሌሎች አገራት ተሞክሮንም ለመቃኘት ተሞክሯል።

የጥናቱን አደረጃጀት በተመለከተ በመጀመሪያው ክፍል በአገራችን ከሕግ አገልግሎት የሽያጭ ታክስ ለመሰበሰብ ያለውን ሕጋዊ መሠረትና ተግባር ተያይዞ የሚነሱ ጥያቄዎች ይተነተናሉ። በቀጣዩ ክፍልም የታክሶቹ ሕገመንግስታዊነት ይዳሰሳል። በሶስተኛው ክፍል ደግሞ የሌሎች አገራት ከሕግ አገልግሎት የሚሰበስቡት የሽያጭ ታክስ የሚተነተን ሲሆን በአራተኛው ክፍል በአገራችን ከሕግ አገልግሎት የሚሰበሰብ የሽያጭ ታክስ አግባብነት ጋር በተያያዘ የሚነሱ ጥያቄዎችን እናጠናለን። በመጨረሻም መደምደሚያና የመፍትሔ ኃሳቦችን የምናይ ይሆናል።

1. በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰብ የሽያጭ ታክስና ሕጋዊ መሠረቱ ላይ የሚነሱ ጥያቄዎች

በዚህ ክፍል ለማየት የተሞከረው በፌዴራል መንግስቱና በአራት የክልል መንግስታት ያለውን የሽያጭ ታክስ አስተዳደር ሕጋዊ መሠረት ነው። ለዚህም ይረዳ ዘንድ ከሕግ አገልግሎት የሚሰበሰቡት የተጨማሪ እሴት ታክስንና የተርን ኦቨር ታክስን የታክስ መሠረት፣ ምጣኔንና አስተዳደሩን የተመለከቱ ጥየቄዎችና መውሰብሰቦች ይጠናሉ። ሕገመንግስታዊነቱን በተመለከተ በሌላ ክፍል ስለሚሸፈን የዚህ ክፍል ከሕገመንግስት በታች ባሉ የሽያጭ ታክስ ሕጎች ላይ ብቻ ያተኮረ ነው።

1.1. በፌዴራል መንግስቱ ከሕግ አገልግሎት የሚሰበሰቡ የሽያጭ ታክሶችና ሕጋዊ መሠረትን የሚመለከቱ ውዝግቦች

1.1.1. ከሕግ አገልግሎት ስለሚሰበሰብ የተጨማሪ እሴት ታክስ

በኢትዮጵያ በፌዴራል መንግስቱ የሚሰበሰቡ የሽያጭ ታክሶች ሁለት ዓይነት ማለትም የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ሲሆኑ የተጨማሪ እሴት ታክስን በተመለከተ

14 ዝኒ ከማሁ፣ ገጽ 36, 814, 158 እና 483 እንደየቅደምተከተላቸው

15 ዝኒ ከማሁ፣ ገጽ 239, 1105, 570 እና 586 እንደየቅደምተከተላቸው

16 ዝኒ ከማሁ፣ ገጽ 939 እና 1254

የፌዴራል መንግስቱ ስልጣን ብቻ እንዲሆን በፌዴሬሽን ምክርቤትና በህዝብ ተወካዬች ምክርቤት ጣምራጉባዔ በኢፌዲሪ ሕገመንግስት አንቀጽ 99 መሠረት ስለተወሰነ[17] የፌዴራል መንግስቱ የተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/1994[18]፣ የሚኒስትሮች ምክርቤት የተጨማሪ እሴት ታክስ ደንብ ቁጥር 79/1995[19] እና ማሻሻያዎችን[20] መሠረት በማድረግ የተጨማሪ እሴት ታክስ በሁሉም የአገሪቱ ግዛቶች ላይ ጥሏል። ይህ ታክስም እየተሰበሰበ ያለው ዓመታዊ ሽያጫቸው ከአንድ ሚለዮን ብር በላይ በሆኑ የዕቃና አገልግሎት አቅራቢዎች በሚከናወኑ ሽያጮች ላይ ሲሆን[21] የፌዴራል መንግስቱ የክልል ገቢዎችን በክልላቸው ውስጥ የሚገኙ ተመዝጋቢዎች ላይ ከመስከረም 1፣ 1997 ዓ.ም ጀምሮ የተጨማሪ እሴት ታክስ እንዲሰበስቡ ውክልና ሰጥታቸዋል።[22] ይሁን እንጅ በአማራና[23] በትግራይ[24] ክልል እስካሁን ድረስ ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በላይ የሆኑ ጠበቆች ባለመገኘታቸው የውክልና ስልጣኑ በሕግ አገልግሎት ላይ አልተተገበረም። በኦሮሚያም ዓመታዊ ሽያጩ ከአንድ ሚሊየን ብር በላይ የሆነ ጠበቃ አንድ ብቻ በመሆኑ በውክልና ሥልጣኑ መሠረት የተጨማሪ እሴት ታክስ ይሰበሰብበታል።[25] የደቡብ ክልል ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በላይ የሆኑ ጠበቆች ላይ በውክልና የተጨማሪ እሴት ታክስ እየሰበሰበ ይገኛል።[26]

የተጨማሪ እሴት ታክስ መደበኛ ምጣኔን[27] በተመለከተ በተጨማሪ እሴት ታክስ አዋጅ በግልፅ እንደተቀመጠው 15% በመሆኑ ዓመታዊ ሽያጫቸው ከአንድ ሚሊዮን ብር በላይ በሆኑ አቅራቢዎች የሚደረጉ የዕቃና አገልግሎት አቅርቦቶች በፌዴራል መንግስቱ 15%

17 የግርጌ ማስታወሻ ቁጥር 9ን ይመለከቷል፤ የውሳኔውን ሕገመንግስታዊነት በተመለከተ ግዛቸው ስለሽን ይመለከቷል። Gizachew Silesh, VAT and the FDRE Constitution: Is VAT Really an Undesignated Tax?, Bahir Dar University Journal of Law,Vol.5, No.2, July 2015, p. 355-390 [Hereinafter Gizachew, VAT & the FDRE Constitution: Is VAT Really an Undesignated Tax?] p. 355-390

18 የኢፌዴሪ የተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/1994፣ ነጋሪት ጋዜጣ፣ 1994ዓ.ም.፣ (ከዚህ በኋላ የኢፌዴሪየተጨማሪ እሴት ታክስ አዋጅ)

19 የኢፌዴሪ የሚኒስትሮች ምክርቤት የተጨማሪ እሴት ታክስ ደንብ ቁጥር 59/1995፣ ነጋሪት ጋዜጣ፣ 1995ዓ.ም.፣ (ከዚህ በኋላ የኢፌዴሪ የተጨማሪ እሴት ታክስ ደንብ)

20 የኢፌዴሪ የተጨማሪ እሴት ታክስ (የተሻሻለው) አዋጅ ቁጥር 609/2001፣ ነጋሪት ጋዜጣ፣ 2001 ዓ.ም

21 የግርጌ ማስታወሻ ቁጥር 8ን ይመለከቷል፤

22 Gizachew Silesh, VAT and the FDRE Constitution: Is VAT Really an Undesignated Tax?, Supra Note 17, p.369

23 ክስንታየሁ ታደሰ (በአብክመ ገቢዎች ባለስልጣን የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ገቢ አሰባሰብና ክትትል ባለሙያ) ጋር በአብክመ ክሕግ አገልግሎት በውክልና የሚሰበሰብ የተጨማሪ እሴት ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 1 ቀን 2011 ዓ.ም

24 ከመብርሃቱ ልጁ ካሳ (በትግራይ ብሔራዊ ክልላዊ መንግስት ገቢዎች ባለስልጣን ሲኒየር ታክስ ኦዲተር) ጋር በትግራይ ብሔራዊ ክልላዊ መንግስት ክሕግ አገልግሎት በውክልና የሚሰበሰብ የተጨማሪ እሴት ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 1 ቀን 2011 ዓ.ም

25 ከቶማስ ተክሌ ገመዳ (በኦሮሚያ ክልላዊ መንግስት ገቢዎች ባለስልጣን የታክስ አሰባሰብና ክትትል ዳይሬክቶሬት ዳይሬክተር) ጋር በኦሮሚያ ክልላዊ መንግስት ክሕግ አገልግሎት በውክልና የሚሰበሰብ የተጨማሪ እሴት ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 4 ቀን 2011 ዓ.ም

26 ከሀሩኛው ማሞ (በደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት ገቢዎች ባለስልጣን የደምበኞች አገልግሎት፣ የታክስ አወሳሰንና ተመላሽ ዳይሬክቶሬት ዳይሬክተር) ጋር በደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት ክሕግ አገልግሎት በውክልና የሚሰበሰብ የተጨማሪ እሴት ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 3 ቀን 2011 ዓ.ም

27 መደበኛ ምጣኔ ማለት አገራት በመርህ ደረጃ የሚሰበስቡበትን የምጣኔ መጠን ማለታችን ነው። የዜሮ ምጣኔ አቅርቦት ውስጥ የተካተቱ ዕቃዎችና አገልግሎቶች ሲሸጡ በመጀመሪያ ምንም አይነት የሽያጭ ታክስ አይሰበሰብም። በተጨማሪም አቅርቦት ለማከናወን ያማዝ ዘንድ የመጨረሻውን አቅርቦት ያደረገው ሰው በግብዓትነት ለመጠቀም ዕቃዎችንና አገልግሎቶችን በጥሬ ዕቃነት ሲገዛ የከፈለው የሽያጭ ታክስ ካለ ተመላሽ ይደረግለታል። ከታክስ ነፃ የተደረጉ ግብይቶች ግን የሽያጭ ታክስ የማይሰበስባቸው ቢሆንም የተከፈሉ የግብዓት ታክሶች ተመላሽ አይደረጉም።

የተጨማሪ እሴት ታክስ ይሰበስብባቸዋል ማለት ነው።[28] እዚህ ላይ አዋጁ ካናዳና ህንድ[29] ወይም የተርን ኦቨር ታክስ አዋጁ[30] እንዳደረጉት የተለያዩ መደበኛ ምጣኔዎችን ከማስቀመጥ አልያም እንደፈረንሣይ ተሞክሮ[31] የተቀነሰ ምጣኔ ከማካተት ይልቅ ወጥ 15% መደበኛ ምጣኔ ብቻ ማስቀመጡ የሕግ አገልግሎትን ጨምሮ ሌሎች ትኩረት የሚሹ አቅርቦቶች አላግባብ በአንድ መደበኛ ምጣኔ ውስጥ እንዲታጨቁ ምክንያት ሆኗል።

ከመደበኛ ምጣኔ በተጨማሪ በተጨማሪ እሴት ታክስ አዋጅና[32] በተጨማሪ እሴት ታክስ ደንብ[33] መሠረት "*ወደውጭ የሚላኩ ዕቃዎችና አገልግሎቶች፣ የዕቃዎች ወይም የመንገደኞች ዓለምአቀፍ የትራንስፖርት አገልግሎት፣ ለኢትዮጵያ ብሔራዊ ባንክ የሚቀርብ ወርቅና በመንቀሳቀስ ላይ የሚገኝ ድርጅትን መሸጥ*" በዜሮ ምጣኔ የተጨማሪ እሴት ታክስ የሚስተናገዱ በመሆናቸው ምክንያት ምንም ዓይነት የሽያጭ ታክስ የማይሰበሰብባቸው ሲሆን ከዚህ በፊት የተከፈሉ የግብዓት ታክሶች ካሉ ለአቅራቢው ተመላሽ ይሆናሉ።[34] የዜሮ ምጣኔ የተጨማሪ እሴት ታክስን በተመለከተ የሕግ አገልግሎት በዚህ ስብስብ ውስጥ ቢካተት ውጤቱ ምን ሊሆን ይችል ነበር? የሚለውን ማጤን ተገቢ ነው። የሕግ አገልግሎትን የዜሮ ምጣኔ አቅርቦት ማድረግ ትርፉ ለጠበቃው የሚኖረው የአስተዳደር ውስብስበነት ነው። ምክንያቱም አገልገሎቱን ለመስጠት ጠበቆች የሌሎች ተመዝጋቢ አቅርቦቶችን በግብዓትነት ከመጠቀም ይልቅ በአብዛኛው የሚጠቀሙት የራሳቸውን ዕውቀትና ክህሎት በመሆኑ ተመላሽ የሚደረጉ የግብዓት ታክሶች እምብዛም አይኖሯቸውም። ይሁን እንጅ ይህ ጉዳይ ከሕግ አገልግሎት ለሚሰበሰብ የተርን ኦቨር ታክስ እንደአጀንዳ ሊነሳ አይችልም። ምክንያቱም የተጨማሪ እሴት ታክስን ዓይነት የዜሮ ምጣኔ ጣጣ ዓመታዊ ገቢው ከአንድ ሚሊየን ብር በታች የሆነ ሰው ሊወጣው አይችልም ተብሎ ስለሚታሰብ በተርን ኦቨር ታክስ አስተዳደር ውስጥ የዜሮ ምጣኔ አቅርቦቶች አለመኖራቸው ነው።[35]

ከተጨማሪ እሴት ታክስ ነፃ የተደረጉ ግብይቶችን በተመለከተ ደግሞ በተጨማሪ እሴት ታክስ አዋጅ[36] እና በተጨማሪ እሴት ታክስ ደንብ[37] እንተገለጸው፤

- ያገለገሉ መኖሪያ ቤቶች ሽያጭና ኪራይ፣
- የፋይናንስ አገልግሎቶች፣
- የህክምና አገልግሎቶችና በሀኪም የሚታዘዙ መድሀኒቶች፣
- የትምህርት አገልግሎቶች፣
- የፖስታ አገልግሎቶችና
- የትራንስፖርት አገልግሎቶች ዋና ዋናዎቹ ሲሆኑ የዋስትና ሰነዶችን መሸጥ ወይም ማስገባት፣ ለኢትዮጵያ ብሔራዊ ባንክ የሚቀርብ ወርቅ ወደ

28 የኢ.ፌ.ዴ.ራ.የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 7(1)

29 በዚሁ ጥናት ክፍል ሶስት ላይ የሌሎች አገራት ተሞክሮን በተመለከተ የተደረገውን ማብራሪያ ይመለከቷል።

30 በዚሁ ክፍል በፌዴራል መንግስት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገውን ማብራሪያ ይመለከቷል።

31 በዚሁ ጥናት ክፍል ሶስት ላይ የሌሎች አገራት ተሞክሮን በተመለከተ የተደረገውን ማብራሪያ ይመለከቷል።

32 የኢ.ፌ.ዴ.ራ. የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 7(2)

33 የኢ.ፌ.ዴ.ራ. የተጨማሪ እሴት ታክስ ደንብ፣ በግርጌ ማስታወሻ ቁጥር 19 እንደተገለጸው፣ አንቀጽ 34-38

34 የኢ.ፌ.ዴ.ራ. የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 27፤ እና የኢ.ፌ.ዴ.ራ. የተጨማሪ እሴት ታክስ ደንብ፣ በግርጌ ማስታወሻ ቁጥር 19 እንደተገለጸው፣ አንቀጽ 15

35 የኢ.ፌ.ዴ.ራ. የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው

36 የኢ.ፌ.ዴ.ራ. የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 8(2)

37 የኢ.ፌ.ዴ.ራ. የተጨማሪ እሴት ታክስ ደንብ፣ በግርጌ ማስታወሻ ቁጥር 19 እንደተገለጸው፣ አንቀጽ 19-33

> አገር ማስገባት፣ የሃይማኖት ወይም ከሃይማኖት ጋር የተያያዙ አቅርቦቶች፣ ለሰብዓዊ ዕርዳታ የሚውሉ አቅርቦቶች፣ በፋብሪካ ከታሸጉ ውጭ ያሉ የውሃ ሽያጮች፣ የኤሌክትሪክና የኬሮሲን አቅርቦቶች፣ መጻሕፍት፣ ፈቃድ ለማግኘት የሚፈፀሙ ክፍያዎችና ከ60% በላይ አካል ጉዳተኛ ተቀጣሪዎች ባሏቸው ድርጅቶች የሚደረጉ አቅርቦቶችም ይገኙበታል።

እዚህ ላይ የሕግ አገልግሎት ከተጨማሪ እሴት ታክስ ነፃ አለመደረጉን በተመለከተ የፍትሕን አስፈላጊነት ከላይ ካሉት መዘርዝሮች በተለይም ከመጠለያ፣ ፋይናንስ፣ ህክምናና ትምህርት አሰፈላጊነት ጋር ማነፃፀር ተገቢ ነው። በተጨማሪም ፍትሕ እነዚህን ፍላጎቶች ከማሟላት አኳያ የሚኖረው ሚናም ሊጤን ይገባል።

ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስን በተመለከተ ከላይ እንደተገለጸው በተጨማሪ እሴት ታክስ ሕጎች ከታክስ ነፃ ያልተባለ ወይም ዜሮ ምጣኔ ውስጥ ያልተካተተ "አገልግሎት" በመሆኑ የሕግ ባለሙያው ዓመታዊ የገቢ መጠን ከአንድ ሚሊየን ብር በላይ እስከሆነ ድረስ በመደበኛ ምጣኔ 15% የተጨማሪ እሴት ታክስ ይሰበሰብበታል።[38] በተጨማሪም አገልግሎትን የሚተረጉመው የሕጉ ክፍል በግልጽ እንዳስቀመጠው "አገልግሎት" ማለት *የዕቃን ዝውውር የማይጨምር በክፍያ የሚከናወን ማናቸውም ተግባር ነው*[39] ሲል ሰፊ ትርጉም በመስጠት በፌዴራል ፍርድቤት ጠበቆች አዋጅ "የጠበቃ አገልገሎት" የተሰጠውን ፍቺ የሚያካትት ትርጉም ሰጥቶት እናገኛዋለን።[40]

ይህ በእንዲህ እንዳለ ከነዚህ በግልፅ ከተጨማሪ እሴት ታክስ ነፃ ከተደረጉ ግብይቶች በተጨማሪ የገንዘብና የኢኮኖሚ ልማት ሚኒስትር በሚያወጣው *መመሪያ* ሌሎች አቅርቦቶችም ነፃ እንዲሆኑ ሊፈቀድ እንደሚችል ከተጨማሪ እሴት ታክስ አዋጅ መገንዘብ ይቻላል።[41] ከዚህም መረዳት የሚቻለው ምንም እንኳ አሁን ባለው የሕግ ስርዓት *መሠረት* የሕግ አገልግሎት 15% የተጨማሪ እሴት ታክስ የተጣለበትና በተግባርም እየተሰበሰበበት ያለ ቢሆንም በቀድሞው የገንዘብና ኢኮኖሚ ልማት ሚኒስትር[42] በአሁኑ የገንዘብ ሚኒስትር[43] አዋጁ ሳይነካ በመመሪያ ከተጨማሪ እሴት ታክስ ነፃ ሊደረግ የሚችልበት የሕግ አግባብ መኖሩን ነው። እዚህ ላይ ሌሎች ሊነሱ የሚችሉ ጥያቄዎች የገንዘብ ሚኒስትር የሕግ አገልግሎትን በዜሮ ምጣኔ ውስጥ ማስገባት አልያም የተቀነሰ የታክስ ምጣኔ መጣል ይችላል ወይ? የሚሉት ናቸው። የመጀመሪያውን ጥያቄ በተመለከተ የውክልና ስልጣኑ በግልጽ ያላካተተው ከመሆኑ በተጨማሪ ከተሰጠው ከታክስ ነፃ የማድረግ ስልጣን አልፎ የግብዓት ታክስን ተመላሽ የማድረግ ውጤት ስለሚኖረው የሕግ አገልግሎትን በመመሪያ ዜሮ ምጣኔ ውስጥ የምናስገባበት የሕግ ማሕቀፍ አለመኖሩን መረዳት አያዳግትም።[44]

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38 ደረጀ መኮንን (በኢፌዴሪ. ገቢዎችና ጉምሩክ ባለስልጣን የታክስ ስርዓት ማጣጣምና ድጋፍ ዳይሬክቶሬት ዳይሬክተር) በፌዴራል መንግስት ክሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 5 ቀን 2011 ዓ.ም

39 የኢፌዴሪ.የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 2(16)

40 የኢፌዴሪ የፌዴራል ፍርድቤቶች ጠበቆች ፈቃድ አሰጣጥና ምዝገባ አዋጅ ቁጥር 199/1992፣ ነጋሪት ጋዜጣ፣ 1992ዓ.ም.፣ አንቀጽ 2(2) (ከዚህ በኋላ የኢፌዴሪ የፌዴራል ፍርድቤቶች ጠበቆች ፈቃድ አሰጣጥና ምዝገባ አዋጅ)

41 የኢፌዴሪ.የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 8(4)

42 ዝኒ ከማሁ

43 በኢፌዴሪ. የአስፈፃሚ አካላትን ስልጣንና ተግባር መወሰኛ አዋጅ ቁጥር 1097/2011፣ ነጋሪት ጋዜጣ፣ 2011 ዓ.ም.፣ አንቀጽ 9(4) እና አንቀጽ 16

44 ከተጠቃሚው ጥቅም አንፃር ሲታይ ግን የሕግ አገልግሎት ከታክስ ነፃ ከሚደረግ ይልቅ ዜሮ ምጣኔ ቢሆን ይመረጣል።

በተጨማሪም የሕግ አገልግሎትን በዜሮ ምጣኔ ውስጥ ማካተት የሚኖረውን ጫና በተመለከተ ከዚህ በፊት የተሰጠውን ማብራሪያ መመልከት ተገቢ ነው። የሁለተኛውን ጥያቄ በተመለከተ የውክልና ስልጣኑ በግልጽ ያላካተተው ከመሆኑ ባሻገር የህዝብ ተወካዮች ምክርቤት ያልተከተለውን የተቀነሰ የተጨማሪ እሴት ታክስ ምጣኔ የመጣል ተሞክሮ በውክልና ለሕግ አገልግሎት ተግባራዊ ማድረግ የሚከብድ ነው።

1.1.2. በፌዴራል መንግስት ከሕግ አገልግሎት ስለሚሰበሰብ የተርን ኦቨር ታክስ

ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በላይ የሆኑ አቅራቢዎች ላይ የተጨማሪ እሴት ታክስ እየሰበሰቡ ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በታች የሆኑ አቅራቢዎችን ከታክስ ነፃ ማድረግ የንግድ ሚዛንን የሚያዛንፍና ኢፍትሓዊ በመሆኑ ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በታች የሆኑ አቅራቢዎች የሚያደርጓቸው አቅርቦቶች የተርን ኦቨር ታክስ ይሰበሰብባቸዋል።[45] በዚህም መሠረት በኢፌዴሪ ሕገመንግስት የፌዴራል መንግስቱ የሽያጭ ታክስ ስልጣን ባገኘባቸው ግብይቶች ላይ የተርን ኦቨር ታክስ እየሰበሰበ ይገኛል።[46] ለዚህም ሕጋዊ መሠረቱ የተርን ኦቨር ታክስ አዋጅ ቁጥር 308/95[47] እና የተርን ኦቨር ታክስ ማሻሻያ አዋጅ ቁጥር 611/2001[48] ናቸው። በመሆኑም በተርን ኦቨር ታክስ አዋጅ እንደተገለጸው በዚሁ አዋጅ አንቀጽ 7 ወይም አዋጁን መሠረት በማድረግ በወጣ መመሪያ ነፃ ካልተደረጉ በስተቀር ለተጨማሪ እሴት ታክስ ያልተመዘገቡ ሰዎች በአገር ውስጥ በሚያደርጓቸው አቅርቦቶች ላይ የተርን ኦቨር ታክስ ይከፈላል።[49] በአዋጁ በአንቀጽ 4 እንደተገለጸውም የተርን ኦቨር ታክስ መደበኛ ምጣኔ በሚከተለው መጠን ማለትም፤

- በማናቸውም በአገር ውስጥ በሚሸጡ ዕቃዎች ላይ 2%፤
- የሥራ ተቋራጮች፣ የዕህል ወፍጮቤቶች፣ የትራክተሮችና ኮምባይን ሀርቨስተሮች አገልግሎት 2%፤ እና
- በሌሎች አገልግሎቶች 10% እንዲሰበሰብ ያስገድዳል።

ከዚህም መረዳት የሚቻለው ከዕቃ የሚሰበሰበው የተርን ኦቨር ታክስ መደበኛ ምጣኔ አንድ ወጥ 2% መሆኑን ነው።[50] ይሁን እንጅ የአገልግሎት የተርን ኦቨር ታክስ መደበኛ ምጣኔ ከተጨማሪ እሴት ታክስ አዋጁ በተለየ ሁለት የተለያዩ ምጣኔዎችን ማለትም 2% እና 10% ምጣኔዎች ዕውቅና አግኝተዋል።[51] ይህም የሚያሳየው በተርን ኦቨር ታክስ ሕጉ የአገልግሎት አቅርቦቶች እንደአስፈላጊነታቸው በተለያየ ምጣኔ እንዲስተናገዱ የተደረገውን ጥረት ነው። ነገርግን የሕግ አገልግሎት 2% የተርን ኦቨር ታክስ ከሚሰበሰብባቸው የአገልግሎት ዝርዝር ውስጥ ባለመካተቱ 10% የተርን ኦቨር ታክስ እንዲሰበሰብበት ሕግ ያስገድዳል።[52] ሆኖም የሕግ አገልግሎትን አስፈላጊነት 2% የተርን ኦቨር ታክስ

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45 የግርጌ ማስታወሻ ቁጥር 10ን ይመለከቷል፤

46 የኢፌዴሪ ሕገመንግስት አዋጅ ቁጥር 1/1987፣ ነጋሪት ጋዜጣ፣ 1987 ዓ.ም፣ አንቀጽ 96 (ከዚህ በኋላ የኢፌዴሪ ሕገ-መንግስት) በዚህ ድንጋጌ መሠረት በፌዴራል መንግስት ባለቤትነት ሥር በሆኑ የልማት ድርጅቶች ላይ የሽያጭ ታክስ የመሰብሰብ ስልጣን የፌዴራል መንግስቱ በመሆኑ የልማት ድርጅቶቹ በሚያቀርቧቸው ዕቃዎችና አገልግሎቶች ላይ የተርን ኦቨር ታክስ የመሰብሰብ ስልጣን የፌዴራል መንግስቱ ይሆናል ማለት ነው።

47 የኢፌዴሪ.የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው

48 የኢፌዴሪ የተርን ኦቨር ታክስ /ማሻሻያ/ አዋጅ ቁጥር 611/2001፣ ነጋሪት ጋዜጣ፣ 2001 ዓ.ም

49 የኢፌዴሪ.የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው፣ አንቀጽ 3

50 ዝኒ ከማሁ፣ አንቀጽ 4(1)

51 ዝኒ ከማሁ፣ አንቀጽ 4(2) እና (3) እንደየቅደምተከተላቸው ይመለከቷል።

52 ዝኒ ከማሁ፣ አንቀጽ 4(2)

ከሚሰበሰብባቸው የአገልግሎት ዝርዝር ማለትም የሥራ ተቋራጮች፣ የእህል ወፍጮቤቶች፣ የትራክተሮችና ኮምባይን ሀርቨስተሮች አገልግሎት አስፈላጊነት ጋር ማነፃፀር ተገቢ ነው። በሌላ በኩል ለ"አገልግሎት" የተሰጠውን ትርጉም ስንመለከት እንደተጨማሪ እሴት ታክስ አዋጁ "አገልግሎት" ማለት *'የዕቃን ዝውውር የማይጨምር በክፍያ የሚከናወን ማናቸውም ተግባር ነው*[53]' ሲል ሰፊ ትርጉም በመስጠት በፌዴራል ፍርድቤት ጠበቆች አዋጅ "የጠበቃ አገልገሎት" የተሰጠውን ፍቺ የሚያካትት ትርጉም ሰጥቶታል።[54] ስለዚህ የፌዴራል መንግስቱ ዓመታዊ ገቢያቸው ከአንድ ሚሊየን ብር በታች የሆኑ የፌዴራል ጠበቆች የሚሰጡት አገልገሎት ላይ የሕግ ስርዓትን ተከትሎ 10% የተርን ኦቨር ታክስ በመጣል በተግባርም እየሰበሰበ ይገኛል።[55]

ከተርን ኦቨር ታክስ ነፃ የተደረጉ ግብይቶችን በተመለከተ በዚሁ አዋጅ አንቀጽ 7(1) በግልፅ የተዘረዘሩ ሲሆን ከተጨማሪ እሴት ታክስ ነፃ ከተደረጉ ግብይቶች ጋር ምንም አይነት ልዩነት የሌለ በመሆኑ ከተጨማሪ እሴት ታክስ ነፃ ስለተደረጉ ግብይቶች የተሰጠውን ማብራሪያ መመልከት በቂ ነው። በዚሁ አንቀጽ የተዘረዘሩት ከታክስ ነፃ የመሆን መብቶች አፈፃፀም በገቢዎች ሚኒስትር በሚወጣ መመሪያ እንዲወሰን የተርን ኦቨር ታክስ አዋጅ ይደነግጋል።[56] በተጨማሪም እንደተጨማሪ እሴት ታክስ ሁሉ የገንዘብ ሚኒስትር በሚያወጣው መመሪያ ሌሎች ግብይቶችን ከተርን ኦቨር ታክስ ነፃ ሊያደርግ እንደሚችል ተደንግጓል።[57] እዚህ ላይ ሊነሳ የሚችለው ጥያቄ የገንዘብ ሚኒስትር የሕግ አገልግሎት ላይ የተቀነሰ የታክስ ምጣኔ ማለትም 2% መጣል ይችላል ወይ የሚለው ነው። ይህን በተመለከተ ሚኒሰትሩ የተሰጠው የውክልና ስልጣን ስለሆነ በግልጽ የተሰጠውን ከተርን ኦቨር ታክስ ነፃ የማድረግ የውክልና ስልጣን ብቻ ነው መተግበር ያለበት የሚል ሙግት ሊነሳ ይችላል። ይሁን እንጂ ሙሉ ለሙሉ ከተርን ኦቨር ታክስ ነፃ ለማድረግ የውክልና ስልጣን ከተሰጠው በይበልጥ አመክንዮ ትርጉም የሕግ አገልግሎት ላይ የሚሰበሰበውን የተቀነሰ ምጣኔ ማለትም 2% የተርን ኦቨር ታክስ ለማድረግ የሚከብድ አይሆንም። ሆኖም ይህን ውዝግብ ለመፍታት ያስችል ዘንድ ውክልናው በግልጽ ተሰጥቶ ቢሆን መልካም ነበር። ስለዚህ ከሕግ አገልግሎት ላይ የሚሰበሰበውን የተርን ኦቨር ታክስ ቀሪ ለማድረግም ሆነ ለመቀነስ የግድ አዋጁን ማሻሻል አይጠይቅም። ሌላው በተርን ኦቨር ታክስ አዋጅ የዜሮ ምጣኔ ታክስ አይታወቅም።[58]

1.2. በክልል መንግስታት ከሕግ አገልግሎት ስለሚሰበሰብ የሽያጭ ታክስና ሕጋዊ መሠረትን የሚመለከቱ ውዝግቦች

በዚህ ክፍል የኦሮሚያ ክልል፣ የደቡብ ብሔር ብሔረሰቦችና ሕዝቦች ክልል፣ የትግራይና የአማራ ብሔራዊ ክልል የሽያጭ ታክስ ተሞክሮ እንደየቅደምተከተላቸው ይዳሰሳል። በኢትዮጵያ የታክስ አስተዳደር ውስጥ የተጨማሪ እሴት ታክስ የመሰብሰብ ስልጣን ለፌዴራል መንግስት ብቻ የተሰጠ ስልጣን በመሆኑ የክልል መንግስታት በስልጣናቸው

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53 ዝኒ ከማሁ፣ አንቀጽ 2(9)

54 የግርጌ ማስታወሻ ቁጥር 40ን ይመለከቷል።

55 ደረጀ መኮንን፣ በኢፌዴሪ. ገቢዎችና ጉምሩክ ባለስልጣን የታክስ ስርዓት ማጣጣምና ድጋፍ ዳይሬክቶሬት ዳይሬክተር፣ በፌዴራል መንግስት ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 5 ቀን 2011 ዓ.ም

56 የኢፌዴሪ.የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው፣ አንቀጽ 7(3)

57 ዝኒ ከማሁ፣ አንቀጽ 7(2)

58 የኢፌዴሪ.የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው

የሚሰበስቡት የሽያጭ ታክስ የተርን ኦቨር ታክስ ብቻ ነው።[59] በመሆኑም በአራቱም ክልሎች ከሕግ አገልግሎት የሚሰበሰበው የተርን ኦቨር ታክስ ይጠናል። ሌሎች ክልሎች ካለው የጊዜ ጥበት እና የክልሎቹ ሕጎች ተደራሽ አለመሆናቸው በጥናቱ እንዳይሸፈኑ ምክንያት ሆኗል። ይሁን እንጅ ከአራቱ ክልሎች የተርን ኦቨር ታክስ አስተዳደርና ክልሎች ካላቸው የሕግ ተሞክሮ አንፃር በጥናቱ ያልተሸፈኑት ክልሎች ላይ የተለየ ነገር ይኖራል ተብሎ አይታሰብም።[60] ለዚህም ሌላኛው ማጠናከሪያ በአገሪቱ የተጣጣመ (*Harmonized*) የታክስ አስተዳደር ለመዘርጋት ያስችል ዘንድ በኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን መዋቅር ውስጥ በሚገኘው የታክስ ስርዓት ማጣጣምና ድጋፍ ዳይሬክቶሬት ጥረት እየተደረገ ነው።[61]

1.2.1. በኦሮሚያ ክልላዊ መንግስት ከሕግ አገልግሎት ስለሚሰበሰብ የተርን ኦቨር ታክስ

በኦሮሚያ ክልል ዓመታዊ ሽያጫቸው ከአንድ ሚሊዮን ብር በታች የሆኑ ግለሰብ አቅራቢዎች ላይ የተርን ኦቨር ታክስ የሚሰበሰብ ሲሆን ሕጋዊ መሠረቱም በክልሉ መንግስት ምክርቤት ጠባቂነት የወጣው የተርን ኦቨር ታክስ አዋጅ[62] እና ማሻሻያው[63] ናቸው። አዋጁ በይዘትም ሆነ በቅርጽ ከፌዴራሉ የተርን ኦቨር ታክስ አዋጅ መሠረታዊ ልዩነት የሌለው ሲሆን፤

- ማናቸውም በአገር ውስጥ የሚሸጡ ዕቃዎች ላይ 2%፣
- በስራ ተቋራጮች፤ የዕህል ወፍጮ ቤቶች፣ የትራክተሮችና ኮምባይን ሀርቨስተሮች አገልግሎቶች 2%፣ እና
- ሌሎች አገልግሎቶች 10% የተርን ኦቨር ታክስ ይሰበሰብባቸዋል።[64]

ለ"አገልግሎት" የተሰጠውን ትርጉም ስንመለከትም እንደ ፌዴራሉ ሁሉ "አገልግሎት" ማለት *'የዕቃን ዝውውር የማይጨምር በክፍያ የሚከናወን ማናቸውም ተግባር ነው*[65]' የሚል ሰፊ ትርጉም ነው። በአጠቃላይ በክልሉ ያለውን የሕግ ስርዓት በተከተለ መልኩ የሕግ አገልግሎት በመደበኛ የአገልግሎት ተርን ኦቨር ታክስ ምጣኔ 10% የተርን ኦቨር ታክስ ይሰበሰብበታል ማለት ነው።[66] በተግባር ላይ ያለው የታክስ አስተዳደር ሂደትም የሚያሳየው ይህንኑ ነው።[67]

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59 የግርጌ ማስታወሻ ቁጥር 17ን ይመለከቷል።

60 ከደሳለኝ ጥጋቡ (በሕግ ትምህርትቤት የፌዴራሊዝም መምህርና በኢትዮጵያ ፌዴራሊዝም ላይ ምርምሮችን ያደረጉ) ጋር በፌዴራልና ክልል መንግስታት መካከል ስላለው የሕግ ስርዓት ተመሳሳይነትና ልዩነት ላይ የተደረገ ቃለመጠይቅ፤ ሰኔ 28 ቀን 2011 ዓ.ም

61 ከደረጀ መኮንን (በኢፌዴሪ. ገቢዎችና ጉምሩ ባለስልጣን የታክስ ስርዓት ማጣጣምና ድጋፍ ዳይሬክቶሬት ዳይሬክተር) ጋር በፌዴራልና ክልል መንግስታት መካከል ስላለው የታክስ ሕግ ስርዓት ተመሳሳይነትና ልዩነት ላይ የተደረገ ቃለመጠይቅ፤ ሐምሌ 5 ቀን 2011ዓ.ም፤

62 የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ ቁጥር 75/1995፣ መገለተ ኦሮሚያ፣ 1995ዓ.ም.፣ (ከዚህ በኋላ የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ)

63 የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ ቁጥር 75/1995ን ለማሻሻል የወጣ አዋጅ ቁጥር135/2000፣ መገለተ ኦሮሚያ፣ 2000 ዓ.ም

64 የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 62 እንደተገለጸው፣ አንቀጽ 4

65 ዝኒ ከማሁ፣ አንቀጽ 2(9)

66 ዝኒ ከማሁ፣ አንቀጽ 4

67 ከቶማስ ተክሌ ገመዳ (በኦሮሚያ ክልላዊ መንግስት ገቢዎች ባለስልጣን የታክስ አሰባሰብና ክትትል ዳይሬክቶሬት ዳይሬክተር) ጋር በኦሮሚያ ክልላዊ መንግስት ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፤ ሐምሌ 4 ቀን 2011 ዓ.ም፡

በተጨማሪም በዚህ ክልል ከተርን ኦቨር ታክስ ነፃ የተደረጉ ግብይቶች በፌዴራል የተርን ኦቨር ታክስና የተጨማሪ እሴት ታክስ ነፃ ከተባሉ ግብይቶች ጋር ፍፁም ተመሳሳይ በመሆናቸው መድገም አስፈላጊ አይደለም።[68] በሌላ መልኩ ደግሞ የክልሉ መስተዳደር ምክርቤት በሚያወጣው መመሪያ በሌሎች ዕቃዎችና አገልግሎቶች ላይ የሚሰበሰብ የተርን ኦቨር ታክስ ቀሪ እንዲሆን ሊፈቅድ ይችላል።[69] ከዚህም መረዳት የሚቻለው የሕግ አገልግሎት ምንም እንኳ በክልሉ የተርን ኦቨር ታክስ አዋጅ ነፃ ያልተደረገ ቢሆንም የክልል መስተዳደር ምክርቤት በሚያወጣው መመሪያ ቀሪ ሊያደርገው ወይም ወደ 2% ዝቅ[70] ሊያደርገው እንደሚችል ነው። በተጨማሪም በዚሁ አዋጅ እንደተገለጸው በሕጉ የተዘረዘሩት ከተርን ኦቨር ታክስ ነፃ የመሆን መብቶች አፈፃፀም የኦሮሚያ የገንዘብና ልማት ቢሮ በሚያወጣው መመሪያ ይወሰናል።[71]

1.2.2. በደቡብ ብሔር ብሔረሰቦችና ሕዝቦች ክልል ከጥብቅና ስለሚሰበሰብ የተርን ኦቨር ታክስ

በዚህ ክልል የተርን ኦቨር ታክስ አስተዳደር በክልሉ የተርን ኦቨር ታክስ አዋጅ ቁጥር 57/95[72] እና በክልሉ የተርን ኦቨር ታክስ ማሻሻያ አዋጅ ቁጥር 134/05[73] የሚከናወን ሲሆን እንደኦሮሚያ ክልል የተርን ኦቨር ታክስ አስተዳደር ሁሉ የፌዴራሉን የተርን ኦቨር ታክስ አዋጅ ቁጥር 308/95 በቀጥታ በመውሰዱ ተመሳሳይ የሆነ መደበኛ ምጣኔና ከታክስ ነፃ አሰራር ስለሚከተል መድገም አስፈላጊ አይደለም።[74] ይህ በእንዲህ እንዳለ የክልሉ የተርን ኦቨር ታክስ መደበኛ ምጣኔ በአዋጅ ቁጥር 57/95 አንቀጽ 4 ላይ የተመለከተ ሲሆን አንቀጽ 7 (1) ከተርን ኦቨር ታክስ ነፃ የተደረጉ ግብይቶችን ይዘረዝራል። በተጨማሪም ለአገልግሎት የተሰጠው ትርጉም ከዚህ በፊት እንዳየናቸው ሁሉ ሰፊና የሕግ አገልግሎትንም የሚጨምር ሆኖ እናገኘዋለን።[75] በመሆኑም የሕግ አገልግሎት በመደበኛ የአገልግሎት ተርን ኦቨር ታክስ

68 የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 62 እንደተገለጸው፣ አንቀጽ 7(1) ላይ የተዘረዘሩትን ከኢፌዴሬሪ.የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ አንቀጽ 8(2)፣ ከኢፌዴሬ. የተጨማሪ እሴት ታክስ ደንብ፣ በግርጌ ማስታወሻ ቁጥር 19 እንደተገለጸው፣ አንቀጽ 19-33 እንዲሁም ከኢፌዴሬ.የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው፣ አንቀጽ 7(1) ከተዘረዘሩት ጋር ማነፃፀር ይቻላል።

69 የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 62 እንደተገለጸው፣ አንቀጽ 7(2)

70 የፌዴራል የተርን ኦቨር ታክስ አስተዳደርን በተመለከተ የተደረገውን ማብራሪያ ይመለከቷል።

71 የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 62 እንደተገለጸው፣ አንቀጽ 7(3)

72 የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ ቁጥር 57/1995፣ ደቡብ ነጋሪት ጋዜጣ፣ 1995ዓ.ም.፣ (ከዚህ በኋላ የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ)

73 የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ ማሻሻያ አዋጅ ቁጥር135/2003፣ ደቡብ ነጋሪት ጋዜጣ፣ 2003ዓ.ም

74 የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 72 እንደተገለጸው፣ አንቀጽ 4 እና 7ን ከኢፌዴሬ.የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው፣ አንቀጽ 4 እና 7 ጋር ማነፃፀር ይቻላል። እዚህ ላይ የሁለቱ ሕጎች መመሳሰል የይዘት ብቻ ሳይሆን የቅርፅም መሆኑ ከተጠቀሱት የድንጋጌ ቁጥር ተመሳሳይነት መገንዘብ ይቻላል።

75 የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 72 እንደተገለጸው፣ አንቀጽ 2(7) እዚህ ላይ ይህ አዋጅ አገልግሎትን ትርጉም ሳይሰጠው ነው ያለፈው። ይሁን እንጅ በዚሁ አዋጅ ትርጉም ያልተሰጣቸው ቃላትና ሐረጉች በተጨማሪ እሴት ታክስ አዋጅ ውስጥ የተሰጣቸውን ትርጉም እንዲይዙ ይጠይቃል።

ምጣኔ 10% ይሰበሰብበታል ማለት ነው።[76] በክልሉ በተግባር ያለው የታክስ አስተዳደር ሂደትም የሚጠቁመው ይህንኑ ነው።[77]

ከታክስ ነፃ የመሆን መብቶች አፈፃፀም የክልሉ የገቢዎች ቢሮ በሚያወጣው መመሪያ የሚወሰን ሲሆን ሌሎች አቅርቦቶችን ከታክስ ነፃ የማለት ስልጣን ደግሞ ለፌዴራሉ የገንዘብ ሚኒስትርና ለክልሉ ፋይናንስና ኢኮኖሚ ልማት ማስተባባሪያ ቢሮ ኃላፊ ተስጥቷል።[78] ከዚህም መገንዘብ የሚቻለው ከኦሮሚያ ክልል በተለየ በክልሉ ከሕግ አገልግሎት የሚሰበሰበውን የተርን ኦቨር ታክስ ያለው አዋጅ ሳይሻሻል በሁለት ዓይነት አስተዳደራዊ ውሳኔዎች ቀሪ ወይም ዝቅ ማድረግ እንደሚቻል ነው። የመጀመሪያው የክልሉ ፋይናንስና ኢኮኖሚ ልማት ማስተባባሪያ ቢሮ ኃላፊ በሚያወጣው መመሪያ ሲሆን ሌላኛው ደግሞ የፌዴራሉ የገንዘብ ሚኒስትር በሚያወጣው መመሪያ ነው።[79] ነገርግን ሁለቱ አስፈፃሚዎች ከሕግ አገልገሎት በሚሰበሰበው የተርን ኦቨር ታክስ ላይ የሚጋጭ መመሪያ ቢያወጡስ? ለምሣሌ አንደኛው ከሕግ አገልግሎት የሚሰበሰበውን የተርን ኦቨር ታክስ ቀሪ የሚያደርግ መመሪያ ሲያወጣ ሌላኛው ደግሞ የተቀነሰ[80] ማለትም 2% እንዲከፈልበት የሚያደርግ መመሪያ ቢያወጣስ የሚል ነው። በርግጥ በኋላ የወጣው መመሪያ ቀድሞ የወጣውን መመሪያ እንደሻረው መቁጠር ይቻል ይሆናል። መመሪያዎቹ በተለያዩ ተቋማት መውጣቸው ችግሩን ይበልጥ ስለሚያጎላው ክፍተቱን አስቀድሞ መድፈን አስፈላጊ ነው።

1.2.3. በትግራይ ብሔራዊ ክልላዊ መንግስት ከሕግ አገልግሎት ስለሚሰበሰብ የተርን ኦቨር ታክስ

በትግራይ ክልል የተርን ኦቨር ታክስ አስተዳደር ተገዥ የሚሆነው በክልሉ የተርን ኦቨር ታክስ አዋጅ ቁጥር 72 /96[81] እና በተርን ኦቨር ታክስ ማሻሻያ አዋጅ ቁጥር 182/02[82] ነው። ክልሉ የራሱ የተርን ኦቨር ታክስ አስተዳደር ከመቅርፅ ይልቅ በክልሉ የተርን ኦቨር ታክስ አዋጅ አንቀፅ 3 ከተደረጉ ሦስት ለውጦች[83] ውጭ የፌዴራል የተርን ኦቨር ታክስ አዋጅ ቁጥር 308/95ን ሙሉ በሙሉ በክልሉ ተፈፃሚ አድርጓል።[84] ይህም ማለት በፌዴራል የተርን ኦቨር ታክስ አዋጅ ከታክስ ነፃ የተባሉ ግብይቶች በትግራይም ከተርን ኦቨር ታክስ ነፃ ይሆናሉ ማለት ሲሆን የሕግ አገልግሎትም በመደበኛ የአገልግሎት የተርን

76 ዝኒ ከማሁ፣ አንቀጽ 4(2)

77 ከሁነኛው ማሞ (በደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልል ገቢዎች ባለስልጣን የደምበኞች አገልግሎት፣ የታክስ አወሳሰንና ተመላሽ ዳይሬክቶሬት ዳይሬክተር) ጋር በደቡብ ክልል ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን ላይ የተደረገ ቃለመጠይቅ፣ ሐምሌ 3፣ 2011 ዓ.ም

78 የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 72 እንደተገለጸው፣ አንቀጽ 7 ንዑስ አንቀጽ 3 እና ንዑስ አንቀጽ 2ን በቅደም ተከተል ይመለከቷል።

79 ዝኒ ከማሁ፣ ይህም ክልሉ ታክስ በአገርአቀፍ ደረጃ አንድ የኢኮኖሚ ማህበረሰብ በመገንባት ረገድ የሚኖረውን ሚና በመገንዘብ የተጣጣመ የታክስ ስርዓት ለመዘርጋት አርዓያ መሆኑን ያሳየበት ነው።

80 የገንዘብ ሚኒስትር ከሕግ አገልግሎት ላይ የተቀነሰ የተርን ኦቨር ታክስ ምጣኔ መጣል ይችላል ወይ በሚል የተደረገውን ማብራሪያ ይመለከቷል።

81 የትግራይ ብሔራዊ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ ቁጥር 72/1996፣ ነጋሪት ጋዜጣ ትግራይ፣ 1996ዓ.ም.፣ (ከዚህ በኋላ የትግራይ ብሄራዊ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ)

82 የትግራይ ብሔራዊ ክልላዊ መንግስት የተርን ኦቨር ታክስ ማሻሻያ አዋጅ ቁጥር 182/2002፣ ነጋሪት ጋዜጣ ትግራይ፣ 2002ዓ.ም.፣

83 የተደረጉት ለውጦችም 1ኛ የታክስ ባለስልጣን የሚለው በክልሉ የፋይናንስና ኢኮኖሚያዊ ልማት ቢሮ እንዲተካ፣ 2ኛ ሚኒስቴርና ሚኒስትር እንደ ቅደም ተከተላቸው በክልሉ የፋይናንስና ኢኮኖሚያዊ ልማት ቢሮና የቢሮው ኃላፊ እንዲለወጥ፣ እና 3ኛ በአዋጁ ከተርን ኦቨር ታክስ ነፃ ከተባሉ ግብይቶች ውጭ ያሉ አቅርቦቶች የሚሰበሰበው የተርን ኦቨር ታክስ በመመሪያ ቀሪ ስለሚሆንበት አግባብ ሲሆን ይህ ስልጣንም በውክልና ለክልሉ ፋይናንስና ኢኮኖሚያዊ ልማት ቢሮ ተሰጥቶታል።

84 የትግራይ ብሔራዊ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 81 እንደተገለጸው፣ አንቀጽ 2

ኦቨር ታክስ ምጣኔ መሠረት 10% የተርን ኦቨር ታክስ ይሰበሰብበታል ማለት ነው።[85] በክልሉ በተጨባጭ ከሕግ አገልግሎት እየተሰበሰበ ያለው የተርን ኦቨር ታክስም በከፍተኛው የአገልግሎት ተርን ኦቨር ታክስ ምጣኔ ልክ 10% ነው።[86]

በክልሉ የተርን ኦቨር ታክስ አዋጅ ከተደረጉት ለውጦች አንዱና መሠረታዊው በአዋጁ ከተርን ኦቨር ታክስ ነፃ ከተባሉ ግብይቶች ውጭ ያሉ አቅርቦቶች የሚሰበሰበው የተርን ኦቨር ታክስ በመመሪያ ቀሪ ስለሚሆንበት አግባብ ሲሆን ይህ ስልጣንም በውክልና ለክልሉ ፋይናንስና ኢኮኖሚያዊ ልማት ቢሮ ብቻ ተሰጥቶታል።[87] ክልሉ የፌዴራሉን የተርን ኦቨር ታክስ አዋጅ እንዳለ ቢቀበለውም ከደቡብ ክልል በተለየ መልኩ የፌዴራሉ የገንዘብ ሚኒስትር በሚያወጣው መመሪያ የሚደረጉ ለውጦችን ግን መቀበል አልፈለገም።[88] ለውጡ በአዋጅ የተደረገ ቢሆንስ የሚለው ሌላ መልስ የሚሻ ጥያቄ ነው። ይህም ማለት የፌዴራሉ የተርን ኦቨር ታክስ አዋጅ ቢሻሻል በክልሉ የተርን ኦቨር ታክስ አስተዳደር ላይ ውጤቱ ምንድን ነው? የሚል ነው። ይህን በተመለከተ አዋጁ በዝምታ ያለፈው ስለሆነ ለትርጉም ተጋላጭ ነው። ስለዚህ ከሕግ አገልግሎት የሚሰበሰበው የተርን ኦቨር ታክስን በተመለከተ በፌዴራል መንግስቱ በአዋጅም ሆነ በመመሪያ የሚደረጉ ለውጦችና ማሻሻያዎች በትግራይ ክልል ተፈፃሚ አይሆኑም ማለት ሚዛን የሚደፋ ነው።

1.2.4. በአማራ ብሔራዊ ክልላዊ መንግስት ከሕግ አገልግሎት ስለሚሰበሰብ የተርን ኦቨር ታክስ

በአብክመ የተርን ኦቨር ታክስ ተገዥ የሚሆነው በዋናነት በክልሉ የተርን ኦቨር ታክስ አዋጅ ቁጥር 83/95[89] ሲሆን በማሻሻያ አዋጅ ቁጥር 191/03[90] እና 212/06[91] ማሻሻያዎች ተደርገውበታል። በፌዴራልና በሌሎች ክልሎች ከተርን ኦቨር ታክስ ነፃ የተደረጉት የዕቃና አገልግሎት አቅርቦቶች ሁሉም በአማራ ክልል ከተርን ኦቨር ታክስ ነፃ ከመባላቸው በተጨማሪ በገጠር ሴቶች ላይ የሚኖረውን የሥራ ጫና ለመቀነስ ሲባል በፌዴራልና በሦስቱ ክልሎች 2% የተርን ኦቨር ታክስ የሚሰበሰብበት የእህል ወፍጮቤቶች አገልግሎት ከተርን ኦቨር ታክስ ነፃ ተደርጓል።[92] በዚህም ክልሉ አስፈላጊ ነው ብሎ ያመነበትን የእህል ወፍጮቤቶች አገልግሎት ከፌዴራሉና ከሌሎች ክልሎች አካሄድ ተለይቶ ከተርን ኦቨር ታክስ ነፃ በማድረግ ምሣሌ መሆን ችሏል። የሕግ አገልግሎትን በተመለከተ ግን ከሌሎች ስርዓቶች መለየት አልፈለገም አልያም አላሰበበትም። ይሁን እንጅ ከሌሎች የመለየት ተሞክሮ ያለው ክልል በመሆኑ የሕግ አገልግሎትን አስፈላጊነት ለክልሉ ሕግ አውጭ ወይም ገንዘብና

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85 በፌዴራል መንግስቱ ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገውን ማብራሪያ ይመለከታል።

86 ከመብርሃቱ ልጆ ካሳ (በትግራይ ብሔራዊ ክልላዊ መንግስት ገቢዎች ባለስልጣን ሲኒየር ታክስ ኦዲተር) ጋር በትግራይ ብሔራዊ ክልላዊ መንግስት ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 1 ቀን 2011 ዓ.ም

87 የትግራይ ብሔራዊ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 81 እንደተገለጸው፣ አንቀጽ 3(1)ሐ

88 ምክንያቱም የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት የተርን ኦቨር ታክስ አስተዳደር እንዳደረገው በፌዴራሉ የገንዘብ ሚኒስትር የሚደረጉ ለውጦች በክልሉ ተፈፃሚ እንዲሆኑ አላደረገም።

89 የአብክመ የተርን ኦቨር ታክስ ማስከፈያ አዋጅ ቁጥር 83/1995፣ ዝክረሕግ፣ 1995 ዓ.ም፣ (ከዚህ በኋላ የአብክመ የተርን ኦቨር ታክስ አዋጅ)

90 የአብክመ የተርን ኦቨር ታክስ ማስከፈያ አዋጅ ማሻሻያ አዋጅ ቁጥር 191/2003፣ ዝክረ ሕግ፣ 2003 ዓ.ም

91 የአብክመ የተርን ኦቨር ታክስ አዋጅ እንደገና ማሻሻያ አዋጅ ቁጥር 212/2006፣ ዝክረ ሕግ፣ 2006ዓ.ም

92 የአብክመ የተርን ኦቨር ታክስ ማስከፈያ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 89 እንደተገለጸው፣ አንቀጽ 7(1)ሐ፣ በተጨማሪም በክፍል 3 የኮርሲካ ደሴት ከማዕከላዊው መንግስት በማፈንገጥ በተመረጡ አቅርቦቶች ላይ የተቀነሰ የተጨማሪ እሴት ታክስ የጣለችበትን ተሞክሮ ይመለከታል።

ኢኮኖሚ ልማት ቢሮ ኃላፊ ማስረዳት እስከተቻለ ድረስ ከሌሎች በተሻለ ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን ቀሪ ማድረግ አልያም ወደ 2% መቀነስ ይቻላል። በተጨማሪም የክልሉ ገንዘብና ኢኮኖሚ ልማት ቢሮ ኃላፊ በሚያወጣው መመሪያ በሌሎች ዕቃዎችና አገልግሎቶች ላይ የሚከፈለው ታክስ ቀሪ እንዲሆን ሊፈቀድ እንደሚችል እየገለጸ ከታክስ ነፃ የመሆን መብቶች አፈፃፀም ደግሞ ቢሮው በሚያወጣው መመሪያ እንደሚወሰን ያሳያል።[93] በአጠቃላይ የክልሉ የተርን ኦቨር ታክስ አስተዳደር እንደፌዴራልና ሌሎች ክልሎች ሁሉ የሕግ አገልግሎትን በመደበኛ የአገልግሎት ምጣኔ 10% የተርን ኦቨር ታክስ ይሰበስብበታል።[94] በተግባር ያለውም የሚያሳየው ይህንኑ እንደሆነ ተረጋግጧል።[95] ሆኖም ከሕግ አገልግሎት የሚሰበሰበውን የተርን ኦቨር ታክስ በተመለከተ አዋጁ ሳይሻሻል የክልሉ ገንዘብና ኢኮኖሚ ልማት ቢሮ ኃላፊ በሚያወጣው መመሪያ ቀሪ ሊያደርገው አልያም ቀንሶ 2% ሊያደርገው[96] የሚችለበት የሕግ አግባብ መኖሩን መገንዘብ ያስፈልጋል።[97]

2. ከሕግ አገልግሎት ላይ የሚሰበሰብ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ሕገመንግስታዊ መሠረት

በኢፌዲሪ ሕገመንግስት መሠረት የክልል መስተዳደሮች በክልሉ ውስጥ በሚገኙ ግለሰብ ነጋዴዎች ላይ የሽያጭ ታክስ የመጣልና የመሰብሰብ ሥልጣን ተሰጥቷቸዋል።[98] እዚህ ላይ ግለሰብ ነጋዴዎች የሚለው ቃል በጠባቡ ሳይሆን በልዩ ድንጋጌ የሚተዳደሩ ዘርፎችን ጨምሮ በሰፊው መተርጎም ይኖርበታል።[99] በተጨማሪም በተሻሻለው የአብክመ ሕገመንግስት የክልሉ መንግስት ለክልሉ በተወሰኑ የገቢ ምንጮች ላይ ግብርና ታክስ የመጣልና የመሰብሰብ ስልጣን እንዳለው ያሳያል።[100] ተመሣሣይ ድንጋጌም የኦሮሚያ ክልል፣[101] የደቡብ ብሔር ብሔረሰቦችና ሕዝቦች ክልል፣[102] እና የትግራይ ብሔራዊ ክልል[103] በሕገመንግስታቸው አካተዋል። ከዚህ የምንረዳው የክልል መንግስታት ከሕግ አገልግሎት የሽያጭ ታክስ (የተርን ኦቨር ታክስ) የመጣልና የመሰብሰብ ሕገመንግስታዊ ስልጣን ያላቸው መሆኑን ነው።

ከዚህ በፊት እንደተገለጸው የፌዴራል መንግስቱ ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በላይ ባላቸው ጠበቆች የሚሰጡ የሕግ አገልግሎቶች ላይ 15% የተጨማሪ እሴት ታክስ ይሰበስባል። ለዚህም እንደሕገመንግስታዊ መሠረትነት የሚጠቀሰው በኢፌዲሪ ሕገመንግስት

93 ዝኒ ከማሁ፣ ንዑስ አንቀጽ 2 እና 3

94 ዝኒ ከማሁ፣ ንዑስ አንቀጽ 4(2)

95 ከጌታቸው መስፍን (በአብክመ ገቢዎች ባለስልጣን የገቢ አሰባሰብና ክትትል ባለሙያ) ጋር በአብክመ ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 1 ቀን 2011 ዓ.ም፡ ከስንታየሁ ታደለ (በአብክመ ገቢዎች ባለስልጣን የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ገቢ አሰባሰብና ክትትል ባለሙያ) ጋር በአብክመ ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 1 ቀን 2011 ዓ.ም

96 የፌዴራል የተርን ኦቨር ታክስ አስተዳደርን በተመለከተ የተሰጠውን ማብራሪያ ይመለከቷል።

97 የአብክመ የተርን ኦቨር ታክስ ለማስከፈል የወጣ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 89 እንደተገለጸው፣ አንቀጽ 7(2)

98 የኢፌዴሪ ሕገመንግስት፣ በግርጌ ማስታወሻ ቁጥር 46 እንደተገለጸው፣ አንቀጽ 97(4)

99 በክፍል አራት ለሕግ አገልግሎት ራሱን የቻለ የሕግ ሥርዓት ያስፈለገበትን ዓላማ በተመለከተ የተደረገውን ማብራሪያ ይመለከቷል።

100 የተሻሻለው የአብክመ ሕገመንግስት ማፅደቂያ አዋጅ ቁጥር 59/1994፣ ገዝረ ሕግ፣ 1994ዓ.ም፣ አንቀጽ 47 (2.8)

101 የተሻሻለው የኦሮሚያ ክልል ሕገመንግስት ማፅደቂያ አዋጅ ቁ. 46/1994፣ መገለተ ኦሮሚያ፣ 1994 ዓ.ም.፣ አንቀጽ 47(2) ሸ

102 የደቡብ ብሔሮች ብሔረሰቦችና ሕዝቦች ክልል ሕገመንግስት ማፅደቂያ አዋጅ ቁጥር1/1987፣ ደቡብ ነጋሪት ጋዜጣ፣ 1987ዓ.ም፣ አንቀጽ47(2)ሠ

103 የትግራይ ብሔራዊ ክልል ሕገመንግስት ማፅደቂያ አዋጅ ቁጥር 1/1987ዓ.ም፣ ነጋሪት ጋዜጣ ትግራይ፣ 1987ዓ.ም፣ አንቀጽ 47(2) 2.5

አንቀጽ 99 መሠረት በሕዝብ ተወካዮች ምክር ቤትና በፌዴራሽን ምክርቤት ጣምራ-ባዔ የተጨማሪ እሴት ታክስ ተለይቶ ያልተሰጠ የታክስ ሥልጣን ስለሆነ በፌዴራል መንግስቱ እንዲጣልና እንዲሰበሰብ በመወሰኑ ነው።[104] የጣምራ-ባዔው ውሳኔን ሕገመንግስታዊነት በተመለከተ በሌሎች ጥናቶች በበቂ ሁኔታ የተሸፈነ ነው።[105] የዚህ ጥናት ዓብይ ዓላማም ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስን ሕገ-መንግስታዊነት ማጥናት እንጅ በየትኛው የመንግስት ደረጃ ይጣል/ይሰብሰብ የሚለው ስላልሆነ ይህ ጉዳይ ለዚህ ጥናት ጭፍጫፊ ነው። በርግጥ አንድ ጠበቃ የፌዴራልና የክልል ወይም የሁለትና ከዚያ በላይ ክልሎች የጥብቅና ፈቃድ ሲኖረው የሽያጭ ታክሱ በየትኛው መንግስት ይጣል/ይሰብሰብ፤ የሚለው ሌላ ራሱን የቻለ ሰፊ ጥናት የሚጠይቅ ጉዳይ ነው። በፌዴራል መንግስቱ ከሕግ አገልግሎት የሚሰበሰብ የተርን ኦቨር ታክስን በተመለከተም የፌዴራል ጥብቅና ፈቃድ በሳቡና ዓመታዊ ሽያጫቸው ከአንድ ሚሊየን ብር በታች በሆኑ አቅራቢዎች የሚደረጉ አቅርቦቶች ላይ የተርን ኦቨር ታክስ የመጣልና የመሰብሰብ ሕገ-መንግስታዊ ሥልጣን ይኖረዋል።[106]

3. ስለሌሎች አገራት ተሞክሮ

በዚህ ክፍል የካናዳን፣ የህንድን፣ የፈረንሳይን፣ የኬንያንና የኡጋንዳን የሽያጭ ታክስ ልምድ ለመዳሰስ ተሞክሯል።[107] መደበኛ ምጣኔን በተመለከተ በህንድ የዕቃዎች አቅርቦት ላይ እንደሁኔታው 0.25%፣ 3%፣ 5%፣ 12%፣ 18% እና 28% የዕቃ ታክስ የሚሰበሰብ ሲሆን አገልግሎቶችም 5%፣ 12%፣ 18% እና 28% የአገልግሎት ታክስ ይሰበሰብባቸዋል።[108] ከዚህም መረዳት የሚቻለው ህንድ እንደዕቃውና አገልገሎቱ አስፈላጊነት ከ0.25% እሰከ 28% የተለያዩ (*graduated*) ምጣኔዎች መጠቀሟን እንደተሞክሮ መውሰድ ተገቢ ነው። በፈረንሳይ ደግሞ ከ20% መደበኛ የተጨማሪ እሴት ታክስ በተለየ መልኩ በመድሃኒት አቅርቦቶች ላይ 2.1%፤ በምግብነክ ሸቀጦች ላይ 5.5%፤ እንዲሁም በአኮምዶሽን ላይ 10% የተጨማሪ እሴት ታክስ የሚሰበሰብ ሲሆን የፈረንሳይ ግዛት በሆነችው የኮርሲካ *(Corsica)* ደሴት ደግሞ በተወሰኑ አቅርቦቶች ላይ የ0.9% እና የ13% የተጨማሪ እሴት ታክስ ይሰበሰባል።[109] እነዚህ ምጣኔዎችም በፈረንሳይ *"የተቀነሱ ምጣኔዎች"* በመባል ይታወቃሉ።[110] በዚህም ፈረንሣይ የተቀነሱ የተጨማሪ እሴት ታክስ ምጣኔዎችን ዕውቅና በመስጠት ምሣሌ መሆን የቻለች ሲሆን የፈረንሳይ ግዛት የሆነችው የኮርሲካ ደሴት ደግሞ በተወሰኑ አቅርቦቶች ላይ ከማዕከላዊው መንግስት የተለዩና የተቀነሱ የተጨማሪ እሴት

104 የግርጌ ማስታወሻ ቁጥር 9ን ይመለከቷል።

105 Gizachew Silesh, VAT and the FDRE Constitution: Is VAT Really an Undesignated Tax?, Supra Note 17, p. 355-390

106 የኢፌዴሪ ሕገ-መንግስት፣ በግርጌ ማስታወሻ ቁጥር 46 እንደተገለጸው፣ አንቀጽ 96

107 ከኢትዮጵያ ጋር የሚቀራረብ የሽያጭ ታክስ ስርዓት ኣላቸው የሚባሉት ኡጋናዳና ኬንያ ከኢትዮጵያ ጋር ተመሳሳይ የሆነ የፖለቲካ፣ የኢኮኖሚና ማህበራዊ ሁኔታ እንዳላቸው መገንዘብ ተገቢ ነው። ካናዳና ህንድ የኮመን ህግ ስርዓት ተከታይ ቢሆኑም እንደኢትዮጵያ ሁሉ የፌዴራል ስርዓት የሚከተሉ አገራት ሲሆኑ፣ ፈረንሳይም የሲቪል ሕግ ስርዓት የምትከተል አገር ከመሆኗ በተጨማሪ የተጨማሪ እሴት ታክስ በመጣል ግንባር-ቀደም ናት። ይህ በእንዲህ እንዳለ በዚህ ጥናት አዘጋጅ በጥናቱ ከተካተቱ አገራት በተጨማሪ የሌሎች በርካታ አገራት የሽያጭ ታክስ ስርዓትን ለመፈተሽ ቢሞክርም የሕግ አገልግሎትን ከሽያጭ ታክስ ነፃ ያደረገ አገር ማግኘት አለመቻሉ ግንዛቤ ቢወሰድ መልካም ነው።

108 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p. 484 & 488

109 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p. 362 & 367

110 ዝኒ ከማሁ፣ የተቀነሱ ምጣኔዎች ማለት የተጨማሪ እሴት ታክስ የሚሰበሰብባቸው የዕቃና የአገልግሎት አቅርቦች ሲሆኑ ከአቅርቦቶቹ የሚሰበሰበው የታክስ ምጣኔ ግን ከመደበኛው ምጣኔ በታች እንዲሆን ይጠበቃል።

ታክስ መጣልን አስተምራናለች። ይሁንና በኛ የፌዴራል ሥርዓት አወቃቀር ክልሎች በሕግ አገልግሎት ላይ የተቀነሰ የተጨማሪ እሴት ታክስ መጣል ይችላሉ ወይ? የሚለው ሰፊ ጥናት ይጠይቃል።

በሌላ በኩል በነዚህ አገራት የዜሮ ምጣኔ የዕቃና አገልግሎት አቅርቦቶች ይገኛሉ። በካናዳ ወደውጭ አገር የሚላኩ ዕቃዎችና አገልግሎቶች፣ መሠረታዊ የምግብ ሸቀጦች፣ አለማቀፋዊ ማጓጓዞች፣ የታዘዙ መድሃኒቶች፣ የህክምና መገልገያዎች የግብርናና የዓሣ ዕርባታ ግብዓቶችና ሌሎችም ተካተዋል።[111] በህንድ[112]፣ በኬንያ[113] እና ኡጋንዳም[114] መሠል አቅርቦቶች በዚሁ ምጣኔ ይስተናገዳሉ። በፈረንሳይ የዜሮ ምጣኔ ግብይት የሚባል ሕገስያሜ የለም። ይሁን እንጂ የተመረጡ የፋይናንስ ተግባሮችና ከአውሮፓ ህብረት ውጭ ወደአሉ አገራት የሚላኩ አቅርቦቶች ከተመላሽ ጋር ከተጨማሪ እሴት ታክስ ነፃ የተደረጉ በመሆናቸው በግብዓትነት የተከፈለ የተጨማሪ እሴት ታክስ ካለም ለመጨረሻ አቅራቢው ይመለሳል።[115] ይሁን እንጅ በሁሉም አገራት የሕግ አገልግሎት በዜሮ ምጣኔ አቅርቦቶች ዝርዝር ውስጥ አይገኝም።[116]

ከታክስ ነፃ ግብይቶችን በተመለከተ በካናዳ[117] የአገለገሉ መኖሪያቤት ሽያጮች፣ የፋይናንስ አገልግሎቶች፣ በግብረሰናይ ድርጅቶችና በመንግስት ተቋሞች የሚከወኑ አቅርቦቶች፣ የጤና አገልግሎቶች፣ ትምህርትና የመሳሰሉት አቅርቦቶች ከታክስ ነፃ ሲሆኑ በፈረንሳይም[118] የመሬት ግብይቶች፣ የፋይናንስ ግብይቶች፣ ከተጠናቀቁ አምስት ዓመት የሆናቸው ህንፃዎች ላይ የሚደረጉ ግብይቶች፣ ትምህርት፣ ጤናና ደህንነትና ውርርዶች በዚሁ ዝርዝር ውስጥ ይገኛሉ። በኡጋንዳና ኬንያ ደግሞ በዛ ያሉ ግብይቶች ከተጨማሪ እሴት ታክስ ነፃ የተደረጉ ሲሆን በኡጋንዳ የፋይናንስ አገልግሎቶች፣ ከጤና መድን ጋር የተያያዙ አገልግሎቶች፣ የትምህርት አግልግሎት፣ ሎቶሪና ውርርዶች፣ የቀብር አገልግሎቶች፣ የሕክምና ዕቃዎች፣ የህፃናት ንጽህና መጠበቂያ ጨርቆች (*Diapers*)፣ የሴቶች ንጽህና መጠበቂያና የፀሐይ ብርሃን ኃይል ዕቃዎች ምሳሌዎች ናቸው።[119] በኬንያ ያልተቀነባበሩ የግብርና ምርቶች፣ አውሮፕላኖች፣ የአቅጣጫ መፈለጊያ ኮምፓሶች፣ የተፈጥሮ ጋዝ፣ የፋይናንስ አገልግሎቶች፣ የህክምና አገልግሎቶችና ሌሎች ተመሳሳይ አቅርቦቶች ከተጨማሪ እሴት ታክስ ነፃ ሆነዋል።[120] ከዚህም መገንዘብ የሚቻለው እነኝህ አፍሪካዊያን ታዳጊ አገራት የህዝባቸውን የኑሮ ሁኔታና ፍላጎት ባገናዘበ መልኩ የሽያጭ ታክስ ለመጣል ሙከራ ያደረጉ መሆኑን ነው። በህንድም ብራንድአልባ ጥራጥሬዎች፣ አትክልቶችና ፍራፍሬዎች፣ ለመኖሪያቤት

111 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p.166

112 ዝኒ ከማሁ፣ ገጽ 489 እና 493ን ይመለከቷል።

113 ዝኒ ከማሁ፣ ገጽ 609 እና 612፤ እና Republic of Kenya the Value Added Tax Act 35/2013, Harambe, (2013), Article 7 & Second Schedule

114 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p. 1181 & 1184

115 ዝኒ ከማሁ፣ ገጽ 368 እና 370ን ይመለከቷል። በአጠቃላይ ከዚህ የምንረዳው በሌሎች አገሮች የዜሮ ምጣኔ ግብይት በሚባሉትና በፈረንሳይ ከተመላሽ ጋር ከታክስ ነፃ የተባሉ ግብይቶች መካከል የሥያሜ እንጂ የውጤት ልዩነት አለመኖሩን ነው።

116 ዝኒ ከማሁ፣ ገጽ 368፤ 370፤ 1181፤ 1184፤ 609፤ 612፤ 489፤493 እና 166ን ይመለከቷል። The Republic of Kenya the Value Added Tax Act 35/2013, Harambe, (2013), Article 7 & Second Schedule

117 የግርጌ ማስታወሻ ቁጥር 111ን ይመለከቷል።

118 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p. 367

119 ዝኒ ከማሁ፣ ገጽ 1181 እና 1185ን ይመለከቷል።

120 ዝኒ ከማሁ፣ ገጽ 609፤612 እና 613ን ይመለከቷል። The Republic of Kenya the Value Added Tax Act 35/2013, Harambe, (2013), Article 7 & First Schedule

የሚከራዩ ቤቶች፣ በቀን ከአንድ ሽህ የህንድ ገንዘብ በታች የሚከፈልባቸው በሆቴል የሚሰጡ አገልግሎቶች (accomodations)፣ በእንቅስቃሴ ላይ ያሉ ድርጅቶችን የተመለከቱ ማስተላለፎችና የመሳሰሉት አቅርቦቶች ከታክስ ነፃ የተደረጉ ቢሆንም የሕግ አገልግሎት ግን የአገልግሎት ታክስ የሚሰበሰብበት ግብይት ነው።[121] በአጠቃላይ በነኝህ አገራት የሕግ አገልግሎት የዜሮ ምጣኔ ግብይትም ሆነ ከታክስ ነፃ የተደረገ ግብይት ባለመሆኑ መደበኛ የሽያጭ ታክስ ይሰበሰብበታል ማለት ነው።[122]

የአስተዳደር ሂደቱን በተመለከተ በሁሉም አገሮች የዕቃና አገልግሎት ታክሶች በአቅራቢዎች ተሰብስቦ ለመንግስት ገቢ የሚደረግ ቢሆንም በጠበቆች የሚሰጥ አገልግሎትን በተመለከተ ግን በህንድ በተለየ ሁኔታ አገልግሎት የተሰጠው ሰው በራሱ ቀንሶ (*Reverse Charge Mechanism*) ለመንግስት ገቢ እንዲያደርገው ይጠበቃል።[123] ከዚህም መገንዘብ የሚቻለው ከሕግ አገልግሎት የሚሰበሰብ የሽያጭ ታክስ በጠበቃው ብቻ ሳይሆን በተጠቃሚው ተቀንሶ ለመንግስት ገቢ እንዲያደርገው ማድረግ የሚቻል መሆኑን ነው።

4. በኢትዮጵያ ስለጥብቅና አገልግሎት የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ አግባብነት የሚነሱ ጥያቄዎች

ከላይ ለመግለጽ እንደተሞከረው በሕጉ በግልጽ ነፃ ያልተደረገ ቢሆንም የተለያዩ ምክንያቶችን በመጥቀስ ከጥብቅና አገልግሎት የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ ሊሰበሰብ አይገባም፤ በማለት መሞገት የተለመደ ሲሆን ከነዚህ ምክንያቶች አንዱ ከሕገመንግስት ትርጓሜ ጋር በቀጥታ የተገናኘ ሲሆን ሌሎቹ ግን ከሕገመንግስት ትርጓሜ ጋር ይገናኛሉ ለማለት ያዳግታል። ይሁን እንጅ ሁሉንም አብሮ ማየቱ ከሕግ አገልግሎት በሚሰበሰብ ታክስ ላይ የሚስተዋሉ ውስንነቶችን ሙሉ በሙሉ ለመቅረፍ የሚያስችል በመሆኑ በዚህ ክፍል በመጀመሪያ ከሕገመንግስት ትርጓሜ ጋር የተገናኘውን ምክንያት ከመዘንን በኋላ የሕገ-መንግስት ትርጓሜ የማይፈለጉ ምክንያቶችንም የምንመዝን ይሆናል።

4.1. ከጥብቅና አገልግሎት የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሰብሰብ በሕገመንግስት ጥበቃ የተደረገላቸውን መብቶች የሚገደብ ስለመሆን/ስላለመሆኑ

በሕገመንግስት እውቅና የተሰጣቸው መብቶችን በመጥቀስ ከሕግ አገልግሎት የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ መሰብሰብ እነዚህን ሕገመንግስታዊ መብቶች ይገድባል፤ በማለት መሞገት የተለመደ ነው።[124] በርግጥ የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ የመጨረሻ የመክፈል ኃላፊነት የሚወድቀው ከጥብቅና አገልግሎት ተጠቃሚው ላይ ነው።[125] ይህም በአገልግሎት ተጠቃሚው ላይ የራሱን አሉታዊ ተፅዕኖ ማሳደሩ ግልፅ ነው። እነዚህ ታክሶች የሚሰበሰቡት የዳኝነት፣ የጠበቃና ሌሎች ተጨማሪ

121 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p. 488

122 ዝኒ ከማሁ፣ ገጽ 166፣ 367፣ 1181፣ 1185፣ 609፣612 እና 613ን ይመለከቷል። The Republic of Kenya the Value Added Tax Act 35/2013, Harambe, (2013), Article 7 cum First & Second Schedule

123 EYGM Limited, "Worldwide VAT, GST and Sales Tax Guide" Supra Note 13, p. 487

124 ለአብነትም በአማራ ክልል የጠበቆች ማህበር በቀን 05/10/10 ዓ.ም የቀረበ አቤቱታ በሕገመንግስት ዕውቅና የተሰጣቸው እንደፍትሕ የማግኘት፣ የታሰሩ፣ የተከሰሱና የተፈረደባቸው ሰዎች መብት፣ እንዲሁም የቤተሰብ፣ የንብረትና የሠራተኞች መብትንና የመሳሰሉትን በመጥቀስ፣ ከሕግ አገልግሎት የተርን ኦቨር ታክስ መሰብሰብ አንችህን ሕገመንግስታዊ መብቶች ይገደባል በማለት ሞግቷል። የአማራ ክልል ጠበቆች ማህበር vs የአብክመ የገንዘብና ኢኮኖሚ ትብብር ቢሮ፣ የአብክመ ምክርቤት የሕገመንግስት ጉዳዮች አማሪ ጉባኤ፣ መ.ቁ 02/2011፣ 2011 ዓ.ም.(በሂደት ላይ ያለ)

125 የግርጌ ማስታወሻ ቁጥር 4ን ይመለከቷል፣

ወጭዎች ካሉባቸው ፍትሕ ፈላጊዎች መሆኑ ችግሩን የከፋ የሚያደርገው በመሆኑ ዜጎች ጉዳያቸውን ወደፍርድቤት ከመውሰድ ይልቅ በጃቸው መጠቀምን እንዲመርጡ ሊያስገድዳቸው ስለሚችል አለመረጋጋትንም ያመጣል።[126] በአገራችን ያለው ነፃ የሕግ ድጋፍ ሽፋን ውስን ከመሆን ባለፈ መንግስት ተከላካይ ጠበቃ የሚያቆምባቸው አግባቦች መጥበብም ችግሩን ይበልጥ ያጎላዋል።[127] ከዚህም የምንረዳው ከሕግ አገልገሎት የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሰብሰብ አቅም የሌላቸው ሰዎች ፍትሕ እንዳያገኙ ምክንያት መሆኑን ነው።[128]

እንዲሁም የሕግ አገልግሎት ተጠቃሚው ወደ ባለሙያው የሚሄደው ተገዶ እንጅ እንደሌሎች አቅርቦቶች ፈልጎ ባለመሆኑ ፍትሕ ደግሞ እንደሌሎች ሸቀጦች አለመሆኑ ታሳቢ ተደርጎ የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ ሊሰበሰብበት አይገባም።[129] የፍትሕ አገልግሎትን ከፍይናንስ፣ ሕክምናና ትምህርት ነጥሎ ማየት ተገቢ ሊሆን አይችልም።[130] መንግስት በተመረጡ የወንጀል ጉዳዮች ላይ ተከላካይ ጠበቃ የሚያቆምበት መሠረታዊ አመክንዮም ፍትሕ ከሌሎች ሸቀጦች የተለየና በሕይወት ከመኖርና ከነፃነት መብት ጋር በቀጥታ ስለሚገናኝ እንደሕክምናና ትምህርት አንገብጋቢ በመሆኑ ነው።[131] በሌላ በኩልም ፍትሕ ማግኘት ለፋይናንስ፣ ሕክምና፣ ትምህርትና ሌሎች መብቶችና ጥቅሞች መከበር የሚኖረውን ሚና ግምት ውስጥ ማስገባትም ያሻል።[132] በተጨማሪም የሕግ አገልግሎት ዘርፍ በአገሪቱ ገና በጅምር ያለና ልዩ ትኩረት የሚሻ አስፈላጊ ዘርፍ በመሆኑና በሕጉ መሠረትም ከዘርፉ ሊሰበሰብ የሚችለው የመንግስት ገቢ አናሳ በመሆኑ መንግስት ሌሎች አማራጭ የገቢ ምንጮችን እንዲጠቀም የሚመክሩ አሉ።[133]

ይሁን እንጂ እዚህ ላይ መጤን ያለባቸው ሌሎች እይታዎችም አሉ። በመጀመሪያ እነዚህ ሕገመንግስታዊ መብቶች እንዲከበሩ ጠበቆች ብቻቸውን ይቻላቸዋል ወይ? የሚለው ነው። ከዚህም የምንረዳው ጠበቆች ብቻቸውን እነዚህን ሕገመንገስታዊ መብቶች ማስከበር

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126 ከዓለሙ ዳኛው (በወንጀል ፍትሕ አስተዳደር እና ሰብዓዊ መብት ረ/ፕሮፌሰር፣ ባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት) ጋር በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስ እና የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቡድንተኮር ውይይት፣ ሐምሌ 2 ቀን 2011 ዓ.ም

127 Mizane Abate, Alebachew Birhanu & Mihret Alemayehu, Advancing Access to Justice to the Poor and Vulnerable through Legal Clincs in Ethiopia: Constraints and Opportunities, Mizan Law Review, Vol.11, No. 1, Sep.2017, P.7-13, [Hereinafter Mizane et al , Advancing Access to Justice to the Poor & Vulnerable through Legal Clincs in Ethiopia: Constraints & Opportunities]

128 ክተመስገን ሲሳይ (ጠበቃ እና በሕገ-መንግስት ሕግ ረዳት ፕሮፌሰር፣ ባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት) ጋር በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስ እና የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቡድንተኮር ውይይት፣ ሐምሌ 2 ቀን 2011 ዓ.ም (ከዚህ በኋላ ተመስገን ሲሳይ፣ ቡድንተኮር ውይይት)

129 Fred C. Zacharias, The Role of Lawyers in a Contemporary Democracy, Promoting Social Change and Political Values, True Cofessions About the Role of Lawyers in a Democracy, Fordham Law Review, Vol. 77, Issue 4, Article 16, 2009, P. 1596-1607 የፍትሕ አስፈላጊነት በጥናቱ ተረጋግጧል።

130 ክተመስገን ሲሳይ ጋር የተደረገ ቡድንተኮር ውይይት በግረጌ ማስታወሻ ቁጥር 128 እንደተገለጸው፣

131 European Union Agency for Fundamental Rights, Access to Justice in Europe: An Overview of Challenges and Opportunities, Luxumbourg, Publication Office of EU, 2011, P.3 በጥናቱ ፍትሕ ለሌሎች መብቶች መከበር የሚኖረው ሚና ተካቷል።

132 ዝኒ ከማሁ

133 Michele Guttman with the assistance of Caroline Mary Sage and Clara Mathieu, Legal and Judicial Sector Assessment: Ethiopia, The International Bank for Reconstruction and Development/ The World Bank, 2004, P. 28, Available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf, Last accessed on 30 August 2019.

የማይችሉ ከመሆናቸውም በላይ እንደፍርድቤት፣ ዓቃቢ ሕግ፣ ፖሊስ፣ መከላከያ፣ እንባጠባቂ፣ የሰብዓዊ መብት ኮሚሽን ወዘተ ያሉ በመንግስት ፋይናንስ የሚደረጉ ተቋማት የሚጫወቱት ሚና ከፍተኛ መሆኑ ግልጽ ነው። በዚህ ረገድ መንግስት ከጠበቆች የበለጠ ኃላፊነት ያለበት ከመሆኑ በተጨማሪ ከፍተኛ ወጭ በሚጠይቅ መልኩ እነዚህን መብቶች የማክበር፣ የማስከበርና የማሟላት ኃላፊነት ተጥሎበታል።[134] ለአብነትም መንግስት ፍትሕን ተደራሽ ለማድረግና ለድሆች ተከላካይ ጠበቃ ለማቆም የሚያወጣው ወጭ ከፍተኛ መሆኑ ግልፅ ነው።[135] ይህን ኃላፊነት ለመወጣት ሲባል ደግሞ መንግስት የግድ ገቢ መሰብሰብ ያለበት በመሆኑ ከሕግ አገልግሎት የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ መሰብሰብ ሕገመንግስታዊ መብቶችን ያጣብባል፤ ብሎ ለመደምደም ያዳግታል። መንግስት ይህን በማድረጉ የመክፈል አቅም ካላቸው ሰዎች በመሰብሰብ አቅም ለሌላቸው ሰዎች ሕገመንግስታዊ መብቶች መከበር የራሱን ሚና መጫወት ይኖርበታል።[136] ይህን አለማድረግ ደግሞ የታክስ መሠረትን በማጥበብ መንግስትን ማዳከም በመሆኑና ደካማ መንግስት ደግሞ ሕገመንግስትን የማስፈፀም አቅም ስለማይኖረው በሕገመንግስታዊ መብቶች መከበር ላይ አሉታዊ ተፅዕኖ ይኖረዋል።[137] በአሁኑ ወቅትም እንኳንስ ደካማ ኢኮኖሚ ላላቸው ታዳጊ አገራት ጠንካራ ኢኮኖሚ ላላቸው የአደጉ አገራትም የታክስ መሠረቶችን ማስፋት የሚመከር ነው።[138] በአጠቃላይ ከሕግ አገልግሎት የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሰብሰብ በሕገመንግስታዊ መብቶች ላይ ከሚያደርሰው አሉታዊ ተፅዕኖ የሚጫወተው አዎንታዊ ሚና ከፍተኛ በመሆኑ ሕገመንግስታዊ መብቶችን የሚገድብ ነው፤ ለማለት አያስደፍርም። ለዚያም ይመስላል በምርምሩ በተሸፈኑ ሌሎች አገራትም ሆነ በኢትዮጵያ ከሕግ አገልግሎት የሸያጭ ታክስ መሰብሰብ የተለመደ ነው።[139]

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134 የዓለምአቀፉ የሲቪልና የፖለቲካ መብቶች ቃልኪዳን፣ መጋቢት 1976 እ.አ.አ፣ አንቀጽ 2፤ የዓለምአቀፉ የኢኮኖሚ፣ ማህበራዊና የባህል መብቶች ቃልኪዳን፣ ታህሳስ 1976 እ.አ.አ፣ አንቀጽ 2፤ የኢፌዴሪ ሕገመንግስት፣ በግርጌ ማስታወሻ ቁጥር 46 እንደተገለጸው፣ አንቀጽ 13(1) የአማርኛው ድንጋጌ በሁሉም የመንግስት መዋቅሮች ላይ ሕገ-መንግስታዊ መብቶችን የማክበርና የማስከበር ኃላፊነት የሚጥል ሲሆን የእንግሊዝኛ ትርጓሜው ደግሞ "respect" እና "enforce" የሚሉትን ቃላት ተጠቅሟል። ይሁን እንጅ በዚሁ አንቀጽ ንዑስ አንቀጽ 2 በግልጽ እንደተቀመጠው ስለመሠረታዊ መብቶችና ነፃነቶች የሚደነግጉ የሕገመንግስቱ ድንጋጌዎች አገሪቱ ከተቀበለቻቸው ዓለምአቀፍ የሰብዓዊ መብቶች ሕግጋትና መርሆዎች ጋር በተጣጣመ መልኩ እንዲተረጎሙ ስለሚጠይቅ እነኝህን ሕገመንግስታዊ መብቶችና ነፃነቶች በተመለከተ መንግስት የማክበር፣ የማስከበርና የማሟላት ግዴታ ይኖርበታል።

135 Mizane et al , Advancing Access to Justice to the Poor & Vulnerable through Legal Clincs in Ethiopia: Constraints & Opportunities, Supra Note 127, P. 8 & 9 በጥናቱ እንደተገለጸው መንግስት በሶስት መንገድ ማለትም በህፃናት ፍትሕ ፕሮጀክት ቢሮ፤ ህፃናት፣ ሴቶችና አረጋውያንን በጠቅላይ ዓቃቢሕግ፤ እንዲሁም ህዝብ ተከላካይ ጠበቃ ቢሮ አማካይነት በከፍተኛ ወጭ የሕግ አገልግሎት እየሰጠ ይገኛል።

136 Richard A. & Peggy Musgrave, Public Finance in Theory and Practice, 5th Edition, New York, McGraw Hill, 1989, P.9-10

137 George E. Lent, Milka Casanegra, and Michele Guerard, The Value Added Tax in Developing Countries, Internatioal Monatery Fund Staff Papers, Vol. 20, No. 2, July 1973, P. 326

138 ከምስጋናው ጋሻው በዛ (ጠበቃ እና በኢንቨስትመንት እና የታክስ ሕግ ረዳት ፕሮፌሰር፣ ባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት ቤት) ጋር በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስ እና የተርን ኦቨር ታክስን በተመለከተ የተደረገ ቡድንተኮር ውይይት፣ ሐምሌ 2 ቀን 2011 ዓ.ም (ከዚህ በኋላ ምስጋናው ጋሻው በዛ፣ ቡድንተኮር ውይይት)፤ Alan Schenk & Oliver Oldman, Value Added Tax: A Comparative Approach, Supra Note 4, P. 16: በዚህ ረገድ የሽያጭ ታክስ በብዙ አገሮች በዋና የገቢ ምንጭነት የሚያገለግል ሲሆን ለአብነትም በብራዚል ከ50 በመቶ በላይ የመንግስት ገቢ የሚገኘው ከዚሁ የታክስ ዓይነት መሆኑን ጥናቶች ይጠቁማሉ። Bird, Richard M. & Gendron, Pierre-Pascal,VATsin Federal States: International Experience and Emerging Possibilities, March 2001, p.3-4; and Ter-Minassian, Teresa, Reform Priorities for Sub-national Revenues in Brazil, Inter-Americn Development Bank, 2012, p.5 as cited in Gizachew Silesh, VAT and the FDRE Constitution: Is VAT Really an Undesignated Tax?, Supra Note 17, p.357

139 በክፍል ሶስትና አንድ እንደየቅደምተከተላቸው የተደረገውን ማብራሪያ ይመለከታል።

በሌላ በኩል የሕግ አገልገሎት ምንድን ነው የሚለውን በቅጡ መረዳት ተገቢ ነው። አብዛኛውን ጊዜ ከሕግ አገልግሎት የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ሊሰበሰብ አይገባም፤ ሲሉ የሚሞግቱ ባለሙያዎች መነሻቸው የሕግ አገልግሎት ጠባብ ትርጓሜ ነው። በፌዴራልም ሆነ በክልል ፍርድቤት ጠበቆች አዋጅ እንደተገለፀው የሕግ አገልግሎት ማለት በወንጀልና ፍትሐብሔር ጉዳዮች ፍርድቤት ቀርቦ ከመካራከር ባለፈ የውል ስምምነት፣ የድርጅት ማቋቋሚያ፣ ማሻሻያና ማፍረሻ ሰነዶችን እንዲሁም ኑዛዜና ፍርድቤት የሚገቡ አቤቱታዎችና መልሶች ማዘጋጀትን ጨምሮ ማናቸውንም ዓይነት የሕግ ምክር አገልግሎት መስጠትን የሚያጠቃልል ሰፊ ተግባር ነው።[140] የድርጅት ማቋቋሚያ፣ ማሻሻያና ማፍረሻ ሰነዶች ዝግጅት አገልግሎት ከተሰጠው ደንበኛ ታክስ መሰብሰብ አግባብ ቢሆንም ራሱን ካልተገባ የወንጀል ኃላፊነት ለማዳን የጠበቃ አገልግሎት ከሚጠቀም ፍትሕፈላጊ ታክስ መሰብሰብ በምንም መለኪያ ተገቢ ሊሆን አይችልም። የዳኝነት ክፍያ የመክፈል አቅም እንደሌለው በመረዳት ከዳኝነት ክፍያ ነፃ የተደረገ ሰውም ቢሆን ነፃ የሕግ አገልግሎት በማጣቱ የጠበቃ አገልግሎት በክፍያ ቢጠቀም ታክስ እንዲከፍል ይገደዳል። ይህ ደግሞ ፍትሕ እንዲያገኝ ዕድል ከተሰጠው በኋላ መልሶ በመነጠቁ መልሶ የመውሰድ (claw-back) ውጤት ይኖረዋል።[141] የሕግ አገልግሎት ለመንግስት የሰጠ ጠበቃም ቢሆን 'ከመንግስት' 'ለመንግስት' ታክስ እንዲሰበሰብ ይገደዳል።[142] ይህ ሁሉ የሆነበት ምክንያትም ከሕግ አገልግሎት ታክስ የሚሰበሰብበት የታክስ መሠረት ሰፊ በመሆኑ ነው። ከዚህም የምንረዳው ከሁሉም የሕግ አገልግሎቶች ታክስ ከመሰብሰብ፤ ወይም ከሁሉም የሕግ አገልግሎቶች የሚሰበሰበውን ታክስ ሙሉ በሙሉ ቀሪ ከማድረግ ይልቅ ለሕግ አገልገሎት ራሱን የቻለ አዲስ ሠንጠረዥ ማዘጋጀት እንደሚሻል ነው።[143] ለዚህም ያግዝ ዘንድ የሕግ አገልግሎቶችን አስፈላጊነት እና በሕገ መንግስት ጥበቃ ከተደረገላቸው መብቶች ጋር ያላቸውን ቁርኝት፤ እንዲሁም የሕግ አገልግሎት ተጠቃሚውን የመክፈል አቅም ባገናዘበ መልኩ በሠንጠረዥ በመከፋፈል በተለያዩ የታክስ ምጣኔዎች የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሰብሰብ ይሻላል። ሠንጠረዡ የመንግስትን የገቢ ፍላጎትም ግምት ውስጥ ያስገባ ሊሆን ይገባል።[144] ከሕግ አገልግሎት ይሰበሰብ የነበረውን የታክስ ገቢ በሌሎች የገቢ ምንጮች በጥንቃቄ መተካትንም የሚጠይቅ አማራጭ ነው።[145] በሌላ በኩል መንግስት በሠንጠረዡ መሠረት ከሕግ አገልግሎት ታክስ ሲሰበስብ ከዘርፉ በሰበሰበው መጠን ትይዩ ፍትሕን አቅም ለሌላቸው ተደራሽ ለማድረግ ያስችል ዘንድ ነፃ የሕግ ድጋፍ የሚሰጡ ተቋማትን ማጠናከርና ማስፋፋት፣ እንዲሁም ተከላካይ ጠበቃ የሚያቆምባቸውን የሕግ አግባቦች ማስፋት

140 የኢፌዴሪ የፌዴራል ፍርድቤቶች ጠበቆች ፈቃድ አሰጣጥና ምዝገባ አዋጅ ፣ በግርጌ ማስታወሻ ቁጥር 40 እንደተገለጸው፣አንቀጽ 2(2)፤ የአብክመ ጥብቅና ፈቃድ አሰጣጥ፣ ምዝገባና የጠበቆች ሥነምግባር መቆጣጠሪያ አዋጅ ቁጥር 75/1994፣ ነጋሪት ጋዜጣ፣ 1994ዓ.ም.፣ አንቀጽ 2(2)

141 David Williams, Value Added Tax, in Victor Thuronyi, Tax Law Design & Drafting, Vol. 1, IMF, 1996, P. 212 በጥናቱ እንደተቀመጠው ፖለቲካዊና ማህበራዊ ሁኔታዎች ከታክስ ነፃ ለማድረግ እንደምክንያትነት ይጠቀሳሉ።

142 በርግጥ ለመንግስት በሚደረጉ ሌሎች አቅርቦቶችም ቢሆን ታክስ ይሰበሰባል። ይሁን እንጅ ህንድ እንዳደረገችው ለመንግስት የሚሰጥ የሕግ አገልግሎትን ነፃ ማድረግ ይቻል ነበር።

143 ከምስጋናው ጋሻው በዛ ጋር በተደረገ ቡድንተኮር ውይይት፣ በግርጌ ማስታወሻ ቁጥር 138 እንደተገለጸው፤

144 David Williams, Value Added Tax, in Victor Thuronyi, Tax Law Design & Drafting, Vol. 1, IMF, 1996, P. 207 በጥናቱ እንደተቀመጠው የታክስ ውሳኔዎች የመንግስትን የገቢ ፍላጎት ያገናዘቡ እንዲሆኑ ይመክራል

145 ዝኒ ከማሁ፣ ገጽ 210፣ ጥናቱ መንግስታት ከታክስ ነፃ በማድረግ ያጡትን ገቢ በሌላ የታክስ ወይም የግብር ዓይነት እንዲተኩ ይመክራል።

ይኖርበታል።[146] ጠበቆች የሚሰጡት የ50 ሰዓት ነፃ የሕግ አገልግሎት በአግባቡ መፈፀሙን መከታተልም ተገቢ ነው።[147]

4.2. የጥብቅና አገልግሎት በልዩ ፈቃድ የሚተዳደር ስለመሆኑ

ጥብቅና እንደሌሎች በንግድ ሕግ መርህ የማይመራና በልዩ ሕግ የሚመራ ስለሆነ በልዩ ፈቃድ አሰጣጥ የሚተዳደር በመሆኑ እንደሌሎቹ የአገልግሎት ንግድ ዘርፎች የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ ሊሰበሰብበት አይገባም የሚል ሙግትም የተለመደና በተጨባጭም ጥያቄ የቀረበበት ጉዳይ ሆኗል።[148] እዚህ ላይ መታየት ያለበት ዋና ነጥብ ጥብቅናን በልዩ ሕግና ፈቃድ ማስተዳደር ያስፈለገበትን ዓላማ ነው። በመሠረቱ ጥብቅና በአግባቡ ካልተያዘ በደንበኞች ላይ የሕይወትና ነፃነት አላግባብ ማሳጣትን ጨምሮ የፍትሕ መጓደልን የሚያስከትል በመሆኑ የተለየ ጥንቃቄ የሚጠይቅ ሙያ ከመሆኑ በተጨማሪ የዕውቀትና የአቅም ደረጃ ልዩነት ባላቸው ሰዎች መካከል ያለ ግንኙነት በመሆኑ በዓይነት የተለየና የጠበቀ ድንጋጌ ያስፈልገዋል።[149] ከዚህም የምንረዳው ልዩ ፈቃድና ድንጋጌ ያስፈለገው ለታክስ ዓላማ አለመሆኑን ነው።

ከዚህ ጋር በተያየዘ ሌሎች የሚነሱ ሁለት ጉዳዮች ያሉ ሲሆን የመጀመሪያው የሕግ አገልግሎትን ማስተዋወቅ የማይቻል በመሆኑ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ሊከፈልበት አይገባም የሚል ነው።[150] ይሁን እንጂ ይህ ገደብ ታክስ ከመክፈል ጋር የሚያገናኘው ነገር የለም። በተጨማሪም የማስተዋወቅ ገደብ የተጣለው ጠበቃው ላይ ሲሆን ታክስ የሚከፍለው ደግሞ አገልግሎት ተጠቃሚው መሆኑ ምክንያቱን የበለጠ ደካማ ያደርገዋል። ሁለተኛው ተያያዥ ጉዳይ ደግሞ የጥብቅና አገልግሎት ክፍያ ምጣኔ በሕግ የተወሰነ ስለሆነ የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ ሊሰበሰብበት አይገባም የሚል ነው።[151] የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሠረት ሲጀመር ዋጋን መሠረት ያደረገ የዕቃና አገልግሎት ግብይት በመሆኑ በሕግ የተወሰነ የክፍያ ምጣኔ መኖር የሚሰበሰብ ታክስን አያግድም።[152] እንዲያውም የተወሰነ የክፍያ ምጣኔ መኖር የታክስ አስተዳደር ሂደቱን የበለጠ ግልፅና ውጤታማ (*Efficient*) ያደርገዋል።[153]

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146 Richard A. & Peggy Musgrave, Public Finance in Theory and Practice, 5th Edition, New York, McGraw Hill, 1989, P.7-9 መጽሐፉ በግልጽ እንዳስቀመጠው መንግስት በሰበሰበው ገቢ ልክ አገልግሎቱን ተደራሽ ማድረግ ይጠበቅበታል።

147 Kokebe Wolde (ed.), Assessent of Legal Aid in Ethiopia: A Research Report and Proceedings of the National Workshop of Legal Aid Providers, Center for Human Rights, AAU, 2013, P. 38

148 የአማራ ክልል ጠበቆች ማህበር vs በአማራ ብሔራዊ ክልላዊ መንግስት የገንዘብና ኢኮኖሚ ትብብር ቢሮ፣ በግርጌ ማስታወሻ ቁጥር 1 እንደተገለጸው፣ የአቤቱታ አቅራቢን አቤቱታ፣ ገጽ 3

149 የኢፌዴሪ የፌዴራል ፍርድቤቶች ጠበቆች ፈቃድ አሰጣጥና ምዝገባ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 40 እንደተገለጸው፣ መግቢያውን ይመለከታል፤ የአብክመ ጥብቅና ፈቃድ አሰጣጥ፣ ምዝገባና የጠበቆች ሥነ ምግባር አዋጅ ቁጥር 75/1994፣ ዝክረ-ሕግ፣ 1994ዓ.ም.፣ መግቢያውን ይመለከታል።

150 የአማራ ክልል ጠበቆች ማህበር vs በአብክመ የገንዘብና ኢኮኖሚ ትብብር ቢሮ፣ በግርጌ ማስታወሻ ቁጥር 1 እንደተገለጸው፣ የአቤቱታ አቅራቢን አቤቱታ፣ ገጽ 4፤ አቤቱታ አቅራቢዎች የጠበቆች አገልግሎት ስራ ማስተዋወቅ የሚከለክለውን የክልሉን የጠበቆች አዋጅ ቁጥር 75/1994 አንቀጽ 56ን በመጥቀስ ሞግተዋል።

151 ዝኒ ከማሁ፣ አቤቱታ አቅራቢዎች ስለክፍያ የደነገጉትን የክልሉን የጠበቆች አዋጅ ቁጥር 75/1994 አንቀጽ 50፣51ና 52ን በመጥቀስ ሞግተዋል።

152 የኢፌዴሪ የተጨማሪ እሴት ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 18 እንደተገለጸው፣ የኢፌዴሪ የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 10 እንደተገለጸው፣ የአብክመ የተርን ኦቨር ታክስ ማስከፈያ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 89 እንደተገለጸው፣ የትግራይ ብሔራዊ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 81

4.3. የሕግ አገልግሎት ክፍያ ተግዳሮቶች

የሕግ አገልግሎት ሲሰጥ መሸነፍ ያለ በመሆኑ፤ ነፃ የሕግ አገልግሎት መስጠት ግዴታ ስለሆነ፤ ክፍያ አለማግኘት የተለመደ ስለሆነ፤ ክፍያ ዘግይቶ ከዓመታት በኋላ መፈፀም የተለመደ ስለሆነና ሌሎች የመሳሰሉ የክፍያ ተግዳሮቶች ያሉ በመሆኑ ከጥብቅና የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ሊሰበሰብ አይገባም የሚሉ ሙግቶች አሉ።[154] ይህ ሙግት በመጀመሪያ በሕግ የተወሰነ የክፍያ ምጣኔ አለ ከሚለው ጋር የሚቃረን ሲሆን በተጨማሪም ከታክስ ሕጎችና ከተግባር እንደምንረዳው ክፍያ እስካልተፈፀመ ድረስ የተጨማሪ እሴት ታክስም ሆነ የተርን ኦቨር ታክስ የማይሰበሰብ መሆኑን ነው።[155] ይሁን እንጅ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ አስተዳደር በጠበቃው ላይ ያልተገባ ጫና ስለሚፈጥር ሙያዊ ግዴታውን እንዳይወጣ ስለሚያደርገው በአገሪቱ ያለውን የፍትሕ እጦት ያባብሳል።[156] ጠበቃው በሂሣብ አያያዝ በቂ ዕውቀት የሌለውና ባለሙያም ለመቅጠር እንደሌሎች ንግዶች በካፒታል የሚተዳደር ስላልሆነ አስቸጋሪ ነው። ለዚህም ነው የጥብቅና ፈቃድ ለማውጣት የብቃት እንጅ የካፒታል ቅድመሁኔታ ያልተቀመጠው።[157]

መደምደሚያና የመፍትሔ ኃሳብ

በጥናቱ እንደተመለከተው የተለያዩ አገራት ከሕግ አገልግሎት የሽያጭ ታክስ ይሰበስባሉ። ለአብነትም ካናዳና ህንድ ከሕግ አገልግሎት በመደበኛ ምጣኔ የአገልገሎት ታክስ የሚሰበስቡ ሲሆን ፈረንሳይ፣ ኡጋንዳና ኬንያም የተጨማሪ እሴት ታክስ በመሰብሰብ ይተወቃሉ። ይሁን እንጅ ከሌሎቹ በተለየ በህንድ ለመንግስት የሚሰጥ የሕግ አገልገሎት ከአገልግሎት ታክስ ነፃ ከመደረጉ በተጨማሪ ከሌሎች አቅርቦቶች በተለየ በጠበቆች ከሚሰጥ አገልግሎት የሚሰበሰብ የአገልግሎት ታክስን አገልግሎት የተሰጠው ሰው በራሱ ቀንሶ ለመንግስት ገቢ እንዲያደርገው ይጠበቃል። ካናዳና ህንድ የኮመን ሕግ ስርዓት ተከታይ ቢሆኑም እንደኢትዮጵያ ሁሉ የፌደራል ስርዓት የሚከተሉ አገራት ሲሆኑ ፈረንሳይም ብትሆን እንደኢትዮጵያ የሲቪል ሕግ ስርዓት የምትከተል አገር ከመሆኗ በተጨማሪ የተጨማሪ እሴት ታክስን በመሰብሰብ ግንባርቀደምና አርዓያ የሆነች አገር ናት። ኡጋናዳና ኬንያም ከኢትዮጵያ ጋር የሚቀራረብ የሽያጭ ታክስ ስርዓትና ተመሳሳይ የሆነ የፖለቲካ፣ የኢኮኖሚና ማህበራዊ ሁኔታ አላቸው። ይህ ማለት ግን ኢትዮጵያ ከነዚህ አገሮች ጠቃሚ ኃሳቦች በመውሰድ የራሷን ውጤታማ ስልት መቅረጽ እንጅ የታክስ ሕጋቸውን እንዳለ መውሰድ ተገቢ አለመሆኑን መገንዘብ ያሻል።

እንደተገለጸው፣ የደ.ብ.ብ.ሕ. ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 72 እንደተገለጸው፣ እና የኦሮሚያ ክልላዊ መንግስት የተርን ኦቨር ታክስ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 62 እንደተገለጸው

153 ከምስጋናው ጋሻው በዛ ጋር የተደረገ ቡድንተኮር ውይይት፣ በግርጌ ማስታወሻ ቁጥር 138 እንደተገለጸው

154 የአማራ ክልል ጠበቆች ማህበር vs በአብክመ የገንዘብና ኢኮኖሚ ትብብር ቢሮ፣ በግርጌ ማስታወሻ ቁጥር 1 እንደተገለጸው፣ የአቤቱታ አቅራቢን አቤቱታ፣ ገጽ 3ና 4ን ይመለከቷል።

155 የግርጌ ማስታወሻ ቁጥር 152ን ይመለከቷል፤ ከምስጋናው ጋሻው በዛ ጋር የተደረገ ቡድንተኮር ውይይት፣ በግርጌ ማስታወሻ ቁጥር 138 እንደተገለጸው

156 David Williams, Value Added Tax, in Victor Thuronyi, Tax Law Design & Drafting, Vol. 1, IMF, 1996, P. 212 በመጽኃፉ እንደተቀመጠው ቴክኒካዊ ውስብስብነት ከታክስ ነፃ ለማድረግ እንደምክንያት ሊወሰድ ይችላል፤ ከተመስገን ሲሳይ ጋር የተደረገ ቡድንተኮር ውይይት፣ በግርጌ ማስታወሻ ቁጥር 128 እንደተገለጸው

157 የኢፌዴሪ የፌዴራል ፍርድቤቶች ጠበቆች ፈቃድ አሰጣጥና ምዝገባ አዋጅ ፣ በግርጌ ማስታወሻ ቁጥር 40 እንደተገለጸው፣ አንቀጽ 3(1) እና 4(2)፤ ሌሎች የንግድ ፈቃዶችን ለማውጣት ቢያንስ የካፒታል መጠንን ማስመዝገብ አስፈላጊ መሆኑን ከንግድ ምዝገባ ሕጎቻችን መረዳት ይቻላል።

ወደኢትዮጵያ ስንመለስም ዓመታዊ የአገልግሎት አቅርቦታቸው ከአንድ ሚሊየን ብር በላይ በሆኑ ጠበቆች ከሚሰጥ የሕግ አገልግሎት የፌዴራል መንግስቱ የተጨማሪ እሴት ታክስ በብቸኝነት ይሰበስባል፡፡ ይህም የሆነው የተጨማሪ እሴት ታክስን የፌዴራል መንግስቱ በብቸኝነት እንዲጥልና እንዲሰበሰብ በፌዴሬሽን ምክርቤትና በህዝብ ተወካዬች ምክርቤት የጣምራ ኀላፊነት በመወሰኑ ነው፡፡ የተርን ኦቨር ታክስም የፌዴራል መንግስቱና የክልል መንግስታት በመዘገቧቸው ጠበቆች በሚሰጡ የሕግ አገልግሎቶች ላይ ይሰበስባሉ፡፡ በርግጥ ይህ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ አሰባሰብ ሕግን የተከተለ ነው፡፡ ይሁን እንጅ ከጥናቱ ለመገንዘብ እንደሚቻለው የታክስ መሠረቱን፣ ምጣኔውንና የአስተዳደር ሂደቱን በተመለከተ በአዙሪት ጥያቄዎችና መውሰብሰቦች የተሞላ ከመሆኑ ባሻገር አግባብነቱ ላይም ጥያቄዎች ይስተዋላሉ፡፡ በመሆኑም ለችግሩ መፍትሄ ማበጀት አስፈላጊ ነው፡፡ ለችግሩ መፍትሄም ሦስት አማራጮችን ማበጀት ይቻላል፡፡

የመጀመሪያው አማራጭ አሁን እየተደረገ እንዳለው ከሕግ አገልግሎት በመደበኛ ምጣኔ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሰብሰብ ነው፡፡ ይሁን እንጅ ፍትሕን አቅም ለሌላቸው ተደራሽ ለማድረግ ያስችል ዘንድ ነፃ የሕግ ድጋፍ የሚሰጡ ተቋማትን ማጠናከር የሚጠይቅ ሲሆን መንግስት ተከላካይ ጠበቃ የሚያቆምባቸውን የሕግ አግባቦችም ማስፋት ይኖርበታል፡፡ በተጨማሪም ጠበቆች የሚሰጡት የ50 ሰዓት ነፃ የሕግ አገልግሎት በአግባቡ መፈፀሙን መከታተል ያስፈልጋል፡፡ እዚህ አማራጭ ላይ ታክሱ በጠበቆች ከሚስበሰብ ይልቅ ህንድ እንዳደረገችው አገልግሎት የተሰጠው ሰው በራሱ ቀንሶ ለመንግስት ገቢ እንዲደርግ ሀሳቦች ይነሳሉ፡፡ ይሁን እንጅ ይህ የአሰባሰብ ሂደት የሕግ አገልግሎት ተጠቃሚውን ሁኔታ ግምት ውስጥ ያላስገባ ነው፡፡ በተጨማሪም የአሰባሰብ ሂደቱን ውጤታማነትም ይቀንሰዋል፡፡

ሌላኛው አማራጭ ክሕግ አገልግሎት የሚሰበሰበውን የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ማስቀረት ነው፡፡ ሌሎች አገራት ከሕግ አገልግሎት የሽያጭ ታክስ ስለሰበሰቡ ኢትዮጵያም የግድ መከተል አለባት ሊባል አይገባም፡፡ ይህን አማራጭ ለመተግበር ሁለት መንገዶች ይኖሩታል፡፡ የመጀመሪያው ከሕግ አገልግሎት የሚሰበሰበውን ታክስ ለማስቀረት ያስችል ዘንድ የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ አዋጆችን ማሻሻል ነው፡፡ ሌላኛው መንገድ ደግሞ በተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ አዋጆች ከታክስ ነፃ ከተደረጉ አቅርቦቶች በተጨማሪ ሌሎች አቅርቦቶችን ከታክስ ነፃ የማድረግ ሥልጣን በውክልና ለአስፈፃሚው ስለተሰጠው ይህንን የውክልና ሥልጣን በመጠቀም አስፈፃሚው በመመሪያ የሕግ አገልግሎትን ከተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ ነፃ ማድረግ ነው፡፡ ነገርግን መንግስት ይህን አማራጭ ካስቀደመ ከሕግ አገልግሎት ይሰበስብ የነበረውን የታክስ ገቢ በሌሎች የገቢ ምንጮች በጥንቃቄ መተካት ያስፈልጋል፡፡

ሦስተኛው አማራጭ መነሻው ሁለቱም አማራጮች ሁኔታዎችን ግምት ውስጥ ያላስገቡ ናቸው፤ የሚል በመሆኑ ሁኔታዎችን ያገናዘበ ስልት መቀየስ ያሻል፡፡ ይህ አማራጭ ለሕግ አገልግሎት ራሱን የቻለ አዲስ ሠንጠረዥ ማዘጋጀትን የሚጠይቅ ነው፡፡ ለዚህም ያግዝ ዘንድ የሕግ አገልግሎቶችን አስፈላጊነትና በሕገመንግስት ጥበቃ ከተደረገላቸው መብቶች ጋር ያላቸውን ቁርኝት፣ እንዲሁም የሕግ አገልግሎት ተጠቃሚውን የመክፈል አቅም ባገናዘበ መልኩ በሠንጠረዥ በመከፋፈል በተለያዩ የታክስ ምጣኔዎች የተጨማሪ እሴት ታክስና የተርን ኦቨር ታክስ መሰብሰብ ይሻላል፡፡ ሠንጠረዡ የመንግስትን የገቢ ፍላጎትም ግምት ውስጥ ያስገባ ሊሆን ይገባል፡፡ ከዘርፉ ይሰበሰብ የነበረውን የታክስ ገቢ በሌሎች የገቢ ምንጮች በጥንቃቄ መተካትንም የሚጠይቅ አማራጭ ነው፡፡ በሌላ በኩል መንግስት

በሠንጠረዡ መሠረት ከሕግ አገልግሎት ታክስ ሲሰበስብ ከዘርፉ በሰበሰበው መጠን ትይዩ ፍትሕን አቅም ለሌላቸው ተደራሽ ለማድረግ ያስችል ዘንድ ነፃ የሕግ ድጋፍ የሚሰጡ ተቋማትን ማጠናከርና ማስፋፋት፣ እንዲሁም ተከላካይ ጠበቃ የሚያቆምባቸውን የሕግ አግባቦች ማስፋት ይኖርበታል። ጠበቆች የሚሰጡት ነፃ የሕግ አገልግሎት በአግባቡ መፈፀሙን መከታተል በሶስቱም አማራጮች የሚመከር ነው።

በአጠቃላይ ከዚህ ጥናት ለመደምደም የሚቻለው ከላይ የተሰጡትን አማራጭ መፍትሔዎች በመተግበር በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰቡ የሽያጭ ታክሶች ላይ የሚስተዋሉ ችግሮችን ለመቅረፍ የሚያስፈልገው የሕገመንግስት ትርጓሜ ሳይሆን የአዋጅ ማሻሻያዎች አልያም የውክልና ስልጣንን መሠረት ያደረጉ የአስፈፃሚው መመሪያዎች ናቸው።

"*Value Added Tax and Turnover Tax on Legal Services in Ethiopia: Vexing Questions and Qualms*"

Mohammode Doude Alkadir[*]

Abstract

In the current tax system of Ethiopia sales tax is levied and being collected on legal services either by the federal government or the regional governments, on case by case basis, through instrumentality of value added tax and turnover tax. There are, however, vexing questions and qualms related to the legal basis and justifiability of the tax base, rate and the administration thereof. The main objective of this study is designing solutions by qualitatively scrutinizing these vexing questions and qualms. To this end the author made use of documents, interviews and focus group discussions as tools. The study also endeavors to examine the experience of other jurisdictions. The study, as a result, offered three alternative solutions of which the first is maintaining the existing scene by taxing legal services and urging the government to do its best in ensuring justice and protecting constitutional rights. On the other extreme, the study alternatively pleads for the abrogation of sales tax on legal services and its replacement by other revenue sources. As a third alternative, the study urges for the adoption of a graduated sales tax schedule for different categories of legal services. For this purpose the indispensability of the legal service and its nexus to constitutional rights; the clients' ability to pay; and the governments' financial need ought to be considered in levying different sales tax rate on different categories of legal services.

Key Words: Legal Service, Sales Tax, Value Added Tax (VAT) and Turnover Tax (ToT)

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Examining the Overlapping Jurisdictions between the WTO and AfCFTA Dispute Settlement Mechanisms: Whose Jurisdiction Is It Anyway?

Yehualashet Tamiru Tegegn[♣]

Abstract

Under the World Trade Organization (hereinafter referred to as WTO) legal framework, at least in principle, there should not be discrimination between and among member states. This principle is further reinforced by the two core non-discriminatory provisions: national treatment and most-favored-nation treatment. This principle is not without exception, however. The different enabling clauses and specifically Article XXIV allows regional trade agreements to deviate from and provide preferential treatment. WTO system, however, lacks clarity and nowhere does it specify how to regulate the competency of the jurisdiction between the WTO and regional trade agreements dispute settlement mechanisms. This will in turn pose the greatest danger of assumption of jurisdiction by both forums and leads to forum shopping and irreconcilable decisions. Therefore, this piece of reflection tries to unpack one of the lingering questions of whether AfCFTA dispute settlement or the WTO dispute settlement body will have the competency to examine and provide valid judgement.

Keywords: AfCFTA, WTO, Dispute Settlement Body, Overlapping, Jurisdiction, Rule of Interpretation

Introduction

The mastermind behind the formation of WTO contemplates the pyramidal shape of international trade system which places multilateral agreement at the top, RTAs in the middle and national legal systems at the bottom. With

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the proliferation of RTAs, the jurisdictional conflict between the WTO and RTAs is ever increasing.[1]

In the era of GATT, only 123 RTAs were notified.[2] However, since the formation of the WTO, more than 300 additional RTAs notifications have been notified to the WTO Secretariat and as of 1 September 2019, 302 RTAs were enforced.[3] This in turn leads to double membership of a state in WTO and RTAs.[4] There are instances whereby both RTAs and WTO have the capability to entertain and pass a valid judgement over a dispute. As a result, there is a potential conflict of horizontal jurisdiction[5] between RTAs and the WTO dispute settlement mechanisms. Such type of jurisdictional overlap is well manifested in the Peru-Agriculture Product case[6], the Soft Drink case[7] and the Argentina-Poultry case.[8]

Sadly enough, under WTO system there is no forum choice clause and RTAs usually provide a forum clause to resolve the dispute.[9] In this piece, overlapping of jurisdiction can be defined as "situations where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems."[10] The very existence of overlap of jurisdiction can lead to duplication of cost, possibility

[1] Rafael Leal-Arcal, Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism? Queen Mary University of London Legal Studies Research Paper No. 78/2011, (2011), p. 597.

[2] Ibid.

[3] See Regional Trade Agreements available at: https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts last accessed on 19 November 2019.

[4] This is what Professor Jagdish Bhagwati called spaghetti bowl see Jagdish Bhagwati, Preferential Trade Agreements: the Wrong Road, *Law and Policy International Business*, Vol. 27, (1996), p. 866.

[5] Jurisdiction can be either horizontal or vertical. Horizontal jurisdiction is the allocation of jurisdiction between and among states and international organization. On the other hand, vertical jurisdiction means the allocation of jurisdiction between states and international organization see K Kwak and G Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, The Canadian Yearbook of International Law, (2003), pp. 83-84.

[6] For more detailed discussion please see G Shaffer and L Winters, FTA Law in WTO Dispute Settlement: Peru-Additional Duty and the Fragmentation of Trade Law, *World Trade Review*, Vol. 16, No. 2., (2016).

[7] For more detailed discussion on this point please see J. Davey, The Soft Drinks Case: The WTO and Regional Agreement, *World Trade Review*, Vol. 8, Issue 1, (2009).

[8] For more discussion on this point please see R Howse and J Langile, Spheres of Commerce: The WTO Legal System and Regional Trading Blocs- A Reconsideration, *Georgia Journal of International and Comparative Law*, Vol, 46, (2018), pp. 680-683.

[9] See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (1994). [hereinafter Understanding on Rules and Procedures Governing the Settlement of Disputes].

[10] R. Howse and J Langile, *supra* note 8, p. 86.

of res judicata,[11] irreconcilable decisions[12] and more importantly, uncertainty of international trade. Therefore, this reflection discusses the allocation of jurisdiction between these two competing and conflicting jurisdictions of the WTO DSM and AfCFTA Dispute Settlement Mechanism (hereinafter referred to as AfCFTA DSM).

1. Dispute Settlement under the WTO and the AfCFTA Regimes: Searching the nexus

Before examining the relationship between dispute settlement mechanisms under the WTO and Regional Trade Agreements (hereinafter RTAs), it is imperative to deal with how RTAs are dealt within WTO in general.

As developing countries constitute 75% of the WTO membership, the big concern from the very start was how to reconcile the interests of the developed and developing countries in one legal system.[13] One of the core touchstones of the WTO's system is the principle of non-discrimination which is enforced by two tools: national treatment[14] and most-favoured nation standard of treatment.[1516] Article 1 of the GATT states "… any advantage, favour, privilege or immunity granted by any Contracting Party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.''[17] This being the principle, there are exceptions for every established norm. Likewise, the GATT/WTO comes up with exceptions for this rule by way of an enabling clause[18] and RTAs.[19]

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[11] For more discussion on this please see S Sternberg, Res Judicata and Forum Non-Convenience in International Litigation, *Cornell International Law Journal*, Vol. 46, (2013).

[12] G. Kaufumann-Kohler, How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-suit Injunctions, *Dispute Resolution International*, Vol. 2, No. 1, (2008), p.110.

[13] L Stamberger, The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause, *Chicago Journal of International Law*, Vol. 4, No.2 (2003), p. 607.

[14] General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (1994) [hereinafter GATT/WTO], Article 3.

[15] Article 1 of the GATT/WTO.

[16] For more enlightened discussion on this point please see K Bagwell and W Staiger, *Reciprocity, Non-discrimination and Preferential Agreement in the Multilateral Trade System*, Working Paper No. 5932, National Bureau of Economic Research, (1997).

[17] Article 1 of the GATT/WTO.

[18] WTO/GATT Differential and More Favoured Treatment, Reciprocity and Full Participation of Developing Countries, (1979), Article 1

Enabling clauses can be applied for both between developing countries and between developing and developed countries.[20] Paragraph two of the enabling clause allows developed countries to provide special and differential treatment for least developing countries. Under Paragraph 2(a) of the enabling clause, the presence of two blocks of the countries is contemplated: preference-granting countries, i.e. developed countries and preference-receiving countries, i.e. developing countries.[21] Generally, the type of preference given by developed countries to the developing world under enabling clauses should be generalized, non-reciprocal and non-discriminatory in nature.[22] Whereas, under Paragraph 2(c) it is indicated that "Regional[23] or global arrangements[24] entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs, and in accordance with criteria or conditions which may be prescribed by the Contracting Parties." Moreover, Paragraph 2(d) provided for "[s]pecial treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.''

The other exception is Article XXIV of GATT/WTO that also has become the single most controversial provision for which all negative adjectives has been employed: extremely elastic, unusually complex, full of holes, full of ambiguity, vague absurdity, contradictory even mysterious.[25] GATT tolerates formation of customs union and free-trade areas in spite of MFN principles.[26]

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[19] Article 24 of the GATT/WTO

[20] WTO/GATT Differential and More Favoured Treatment, Reciprocity and Full Participation of Developing Countries, WTO 28 November 1979, Paragraph two

[21] E Patterson, Rethinking the Enabling Clause, *Journal of World Investment and Trade*, Vol. 6, No. 5, (2005), p.739.

[22] This came from the 1971 waiver decision see K Moss, The Consequences of the WTO Appellate Body Decision in EC-Tariff preference, for the African Growth Opportunity Act and Sub-Saharan Africa, *New York University Journal of International Law and Politics*, Vol. 38, No. 3, (2006), p.688.

[23] This means those RTAs formed between member countries of the same geographical location as AfCFTA.

[24] This means those RTAs formed between member countries of different geographical region like EU-China.

[25] K Chase, Multilateralism Compromised: the Mysterious Origins of GATT Article XXIV, *World Trade Review*, Vol. 5, No. 1, (2006), p. 1.

[26] Y Devuyst and A Serdarvic, The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap, *Duke Journal of Comparative and International Law*, Vol. 18, (2007), p. 17.

The close reading of Article XXIV of GATT reveals that RTAs can be customs union, free trade areas and interim agreement. Customs union is when two or more independent countries adopt a common external tariff to third parties and substantially reduce the tariff between and among themselves.[27] Free trade areas, on the other hand, emerge when two or more countries come together and substantially reduce the tariff between and among themselves with the view to facilitate trade; however, each country is allowed to retain their tariff rate to third parties.[28] These two arrangements assume that after the conclusion of the agreement they will enter into force immediately.[29] However, under Article XXIV, members of GATT envisage the possibility of a gap between the conclusion of the agreement and entry into force of the same agreement and this is called interim agreement.[30]

WTO, the youngest but the most influential economic globalization institution,[31] is the largest multilateral arrangement which encompasses 164 countries as member states[32] with complicated rules and regulations where the possibility of dispute as to the interpretation and application of the rules is inevitable. Recognizing this fact, from the very inception there was dispute settlement body intended to clarify the provisions of GATT/WTO. This has been an evidently well proven assumption since 1995 more than 300 disputes are brought before WTO.[33]

If not all, most RTAs which were established either under the enabling clause or Article XXIV exception have dispute settlement mechanisms that

[27] Article XXIV 8(a)(i) and (ii) of the GATT/WTO. For more detailed and enlighten discussion please see P Steve, Living in Sin: Legal Integration under the EC-Turkey Customs Union, *European Journal of International Law*, Vol. 7, No. 3, (1996).

[28] Article XXIV 8(b) of GATT/WTO. For more detail discussion please see P Hilpold, *Regional Integration According to Article XXIV GATT-between Law and Politics*, Max Planck Yearbook of United Nations Law, (2003).

[29] Z Hafez, Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs, *North Dakoto Law Review*, Vol. 79, (2003), p. 886.

[30] Article XXIV 8 of GATT/WTO..

[31] D Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, (2005), p.78.

[32] World Trade Organization, Members and Observers, (29 July, 2016), available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm last accessed on 19 August 2019.

[33] World Trade Organization, Dispute Settlement System Training Module, Preface, (November 2003), available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/intro1_e.htm, last accessed on 19 August 2019.

resolve any dispute arising between and among the signatory members.[34] This leads to the potential conflict of interest between the WTO dispute settlement body (hereinafter referred as WTO DSM) and Regional Trade Agreements dispute settlement mechanisms(hereinafter referred as RTAs DSM).[35]

With the view to avoid jurisdictional overlap between the WTO and RTAs DSM, many RTAs stipulate dispute settlement clause.[36] The general assessment of comparative analysis exhibits that three types of modality are employed to resolve the issue of overlapping jurisdiction between the WTO and RTAs DSM.

In some types of RTAs, the dispute settlement mechanism is provided, however, without mentioning anything about the possibility of resorting to the WTO or other international dispute settlement mechanisms. For instance, under Central European Free Trade Agreement (CEFTA) any dispute arising out of interpretation and application of the treaty should be resolved through consultation and exchange of information.[37] If the dispute is not resolved through this mechanism, then it is possible to refer to the Joint Committee.[38] In this RTA, nothing is mentioned about the possibility of resorting to the WTO DSM.[39] The same method is adopted under the EU and Andora RAT. The compliant before resorting to arbitration should refer the matter to the Joint Committee.[40] However, there is nothing said about the possibility of resorting to the WTO DSM.

Other RTAs provides discretion of choice of forum to the compliant. NAFTA in Chapter 20 provides a mechanism to resolve dispute arising

[34] C Chase and others, Mapping of Dispute Settlement Mechanism in Regional Trade Agreements-Innovative or Variations on a theme?, Staff Working Paper ERSD as quoted in R Acharya, Regional Trade Agreements and the Multilateral Trading System, Cambridge University Press, (2016), p. 608.

[35] Ibid.

[36] S Yang, The Settlement of Jurisdictional Conflicts between the WTO and RTAs: The Forum Non-Convenience Principle, *Willamette Journal of International Law and Dispute Resolution*, Vol. 23, No. 1, (2015), p. 235.

[37] Central European Free Trade Agreement (1992) [hereinafter CEFTA], Article 34(3) available at https://wits.worldbank.org/GPTAD/PDF/archive/CEFTA.pdf last accessed on 25 November 2019.

[38] Article 34(4) of the CEFTA.

[39] For more discussion please see L Biukovic, The New Face of CEFTA and Its Dispute Resolution Mechanism, *Review of Central and East European Law*, Vol. 33, (2008).

[40] Agreement on Free Trade between the European Economic Community and the Principality of Andorra, (1990), Article 18. Available at https://wits.worldbank.org/GPTAD/PDF/archive/EC-Andorra.pdf last accessed on 25 November 25, 2019.

between member states over the application and interpretation of NAFTA's provisions. The jurisdiction of NAFTA is provided under Article 2004 of the NAFTA and it is indicated that:[41]

> Except for the matter covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Measures) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance of settlement of all disputes between the Parties regarding the interpretation of application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

This chapter states that the disputing states should strive to resolve disputes through conciliation. In this process, the negotiating parties should exert maximum effort to reach mutually aggregable result[42] before resorting to Free Trade Commission arbitration, and ultimately before implementing the award.[43]

Under NAFTA dispute settlement mechanisms, the complaining party may choose the appropriate forum to resolve the dispute either by the forum established by agreement or by the WTO DSM. This choice of forum clause is provided which otherwise is not available for other WTO member states.[44] However, this approach in some cases leads to parallel proceedings in the NAFTA and the WTO DSMs.[45]

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[41] See The North American Free Trade Agreement (1994), Article 2004

[42] See The North American Free Trade Agreement(1994), Article 2006

[43] Available at https://idatd.cepal.org/Normativas/TLCAN/Ingles/North_American_Free_Trade_Agreement-NAFTA.pdf last accessed on 20 November 2019.

[44] The close reading of Article 23 and Article 3.8 of the WTO DSM reveals that it has compulsory and exclusive jurisdiction. See A Gantz, Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties, *America University Law Review,* Vol. 14, (1999), p. 1027.

[45] This happened in the case of *Mexico-Anti-Dumping Investigation of High- Fructose Corn Syrup (HFCS) from United State, DS132* (22 October 2001). For more information on this see Ibid.

The same type of method of choice of forum is adopted under the MERCOSUR dispute settlement. Article 1(2) of the Protocol of Olivos for dispute settlement in MERCOSUR states that:[46]

> [d]isputes within the scope of application of this Protocol that may also be subject to the dispute settlement system of the World Organization of Trade or other preferential trading schemes that are part of the individual member states of MERCOSUR may be subject to one or other jurisdiction, the choice of the complainant...

Therefore, it will be completely the discretion of the complainant by mutual agreement[47] to choose the right and appropriate forum.[48] In Argentina-Poultry case, the WTO panel confirmed that it was completely up to the discretion of the complainant to choose the forum. In this case, Argentina argued that Brazil had to be stopped from bringing the action under the WTO DSM before resorting to MERCOSUR dispute settlement.[49] However, the WTO panel rejected the objection by saying:[50]

> In particular, the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean Brazil, implicitly waived its rights under DSU. This is especially because the Protocol of Brasillia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. We note Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet

[46] The full version of this protocol is available at https://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf last accessed on 20 November 2019.

[47] Article 1(2) of the Protocol Olivos for dispute settlement in MERCOSUR.

[48] For more enlighten discussion please see A O'keefe, Dispute Resolution in MERRCOSUR, *World Investment*, Vol. 3, (2002).

[49] A. Appeletion, Forum Selection in Trade Litigation, ICTSD Programme on International Trade Law, Issue Paper No. 12 (2013), p. 31.

[50] Argentina- Definitive Anti- Dumping Duties on Poultry from Brazil, WTO, DS241(19 May 2003) Para. 7. 38. available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds241_e.htm last accessed on 22 November 2019.

> entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR saw the need to introduce the Protocol of Olivos (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect to the same measure.

Finally, there are few RTAs which provide exclusive dispute settlement mechanisms. For instance, under the EU-Mexico RTA, the contracting parties to the extent possible should resolve the dispute arising out of interpretation and application of the treaty in consultation and cooperation to arrive mutually agreed solution.[51] If they failed to resolve the dispute through conciliation, they might seek the assistance of the Joint Committee before resorting to arbitration.[52] Under the treaty, it is indicated that if the party instituted a dispute settlement proceeding or the WTO dispute settlement, it shall not institute proceedings in the same matter in another forum.[53] The same method is provided under the US-Israel RTA. Although the treaty failed to invoke the WTO DSM directly, it indicates that once the dispute is brought before the panel under this agreement or any other international dispute settlement mechanisms are invoked, that forum shall have exclusive jurisdiction over the issue in exclusion to other forums. The same holds true for European Economic Area (EEA).[54]

The treaty establishing AfCFTA under Article 20(1) declares that "[a] Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties." Therefore, any disputes arising out of member states of AfCFTA are resolved by the AfCFTA dispute settlement mechanism. This overlapping jurisdiction over a given dispute between AfCFTA DSM and the WTO DSB will potentially lead to parallel proceedings which involve the same parties and the same issue. This in turn produces forum shopping and contradictory decision on the same exact matter and makes the whole international legal framework become

[51] Decision No. 2/2000 of the EC-Mexico Joint Council, Article 42. The full version is available at http://www.sice.oas.org/Trade/mex_eu/english/Decisions_Council/2_2000_e.asp last accessed on 25 November 2019.

[52] Ibid. p. 101.

[53] For more discussion on this point see K Kawk and G Marceau, *supra* note 5, p. 89.

[54] For detailed discussion please see L Sevon, The EEA Judicial System and the Supreme Courts of the EFTA States, *European Journal of International Law*, Vol.3, (1992).

unpredictable and volatile. This problem is well noted by the then president of ICJ when he said:[55]

> …proliferation of judicial bodies was a response to the need to subject expanding inter-state relations and cross-frontier transactions to the rule of law. Among the unfortunate consequences from the proliferation, though, where the risk of overlapping jurisdictions, which could lead to forum shopping, the rendering of conflicting judgements and inconsistency in case law.

Therefore, the next necessary question will be, who should assume jurisdiction to resolve disputes arising between member states of both WTO and AfCFTA?

2. Why AfCFTA DSM is the Right Forum to Resolve the Dispute

For the following basic reasons, the writer of this reflection believes that the WTO DSB doesn't stand any chance to examine the case arising out of AfCFTA rather it is only AfCFTA DSM that has the competency to examine the disputes.

1. As provided under Article 23.1 of the understanding on dispute settlement, the WTO dispute settlement body has exclusive jurisdiction to entertain any claim related to "... a violation of obligations or other nullification or impairment of benefits under the covered agreement..."[56] The notion of 'covered agreement' is well clarified under Article 1.1 of the same document which is understood to encompass the WTO establishment agreement and other agreements under its umbrella.[57] To it put differently, the WTO DSB shall not have any jurisdiction to entertain a case emanating from non-WTO agreement. In support of this Professor Trachtman argues that the WTO DSB is priori precluded from being applied outside WTO agreement.[58]

[55] UN Press Release, President of world court warns of 'overlapping jurisdictions' in proliferation of international judicial bodies, (2000) available at https://www.un.org/press/en/2000/20001027.gal3157.doc.html last accessed on 19 August 2019.

[56] Please see Understanding on Rules and Procedure Governing the Settlement of Dispute, GATT/WTO (1994)

[57] Ibid.

[58] J Trachtmann, Recent Books on International Law, *America Journal of International Law*, Vol. 98, No. 4, (2004), p. 855. The reviewing work was J Pauwlyn, Conflict of Norms in Public International Law: How WTO Law Related to other Rules of International Law.

The appellate body in searching for the true meaning of 'covered agreement,' in the case of United States-Standards for Reformulated and Conventional Gasoline, mentioned that "… direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.''[59] It is true, as per Article 31(3) (c) of VCLT, WTO agreement should be interpreted in line with the rule of customary international rule of interpretation.[60] However, this in any way doesn't mean that member states will invoke non-WTO agreements before the WTO DSB. In clarifying this issue Joust Pauwelyn made it clear that "WTO members cannot base a claim before a WTO Panel on the violation of the rights and obligations set out in a non-WTO agreement."[61]

Furthermore, as stated under Article 3(2) of dispute settlement understanding, the panel and the appellate body while rendering their decision shouldn't extend or narrow the rights and obligations of the member states. If the WTO DSB assume jurisdiction for the conflict arising out of AfCFTA, there is a high possibility the rights or obligations of members might be either outspread or diminished since the terms and conditions of AfCFTA rules are not one and the same with the WTO rules. Moreover, as per the principle of privity which is reflected under Article 4 of VCLT[62] a treaty binds only contracting parties and hence the WTO members are only bound by WTO agreements nothing else, which makes it a self-contained treaty.[63] Therefore, it will be the violation of Article 1 of the WTO dispute settlement understanding if the WTO DSB extends jurisdiction based on other agreements. Although AfCFTA is formed in compliance with the WTO requirements, establishing agreement of AfCFTA is quite different from WTO agreements, and, hence, it is a non-WTO agreement. The AfCFTA is not a 'common

[59] United States-Standards for Reformulate and Conventional Gasoline, WTO, WT/DS2/9, (29 April 1996)

[60] T Graewert, Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO, *Contemporary Asia Arbitration Journal*, Vol. 1, (2008), p. 294.

[61] D Bossche, *supra* note 31, p. 59.

[62] Please see Vienna Convention on the Law of Treaty (VCLT), United Nations, Treaty Series, Vol. 1155.

[63] J Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go?, *The American Journal of International Law*, Vol. 95, (2001), p.535.

intention'[64] which is accepted by all member states of the WTO and enables the WTO DSB to assume jurisdiction.[65] Therefore, the WTO DSB shall not have the jurisdiction to resolve disputes arising out of AfCFTA even if the dispute is between member states of the WTO.

2. One of the cardinal rules of interpretation is that when two laws contradict each other, the special law prevails over the general law.[66] The applicability of this principle to international law is well supported by scholars.[67] Under WTO arrangements too, this general rule of interpretation is well recognized which states: [68]

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization … the provision of the other agreement shall prevail to the extent of the conflict.

This relationship between GATT and other Annex 1A agreements is well reflected in the appellate panel decision which states: "Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures.''[69] WTO is an arrangement which governs the issue of trade in goods, in services, agriculture, intellectual property and other plurilateral

[64] Such possibility can be imagined only in environmental and human rights since this two are global issues. However, for RTAs it is downright impossible.

[65] Professor Pauwelyn argue that if the non-WTO agreement reflect a common intent all member states of WTO, then Dispute Settlement Body can extend apply the interpretation to the dispute brought before it. For more enlightened counterargument on this point please see J Meltzer, Interpreting the WTO Agreements- A Commentary on Professor Pauwelyn's Approach, *Michigan Journal of International Law*, Vol. 25, Vol. 4, (2004).

[66] W Brugger, Concretization of Law and Statutory Interpretation, *Tulane European and Civil Law Forum*, Vol. 11, (1996), p.247.

[67] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press (2003) p. 385.

[68] World Trade Organization, Multilateral Agreements on Trade in Goods: General Interpretative Note to Annex 1A available at https://www.wto.org/english/docs_e/legal_e/05-anx1a_e.htmlast accessed on 16 July 2019.

[69] *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WTO, WT/DS27/AR/R(8 November 2012) Para.204 available at http://www.sice.oas.org/DISPUTE/wto/banab6.asp last accessed on 16 July 2019.

agreements[70] including 164 countries[71] as member states. Even some scholars have characterized this organization as Cosmopolites.[72] Whereas, RTAs like AfCFTA is region specific, catered for some specific situations on top of being detailed and precise.[73] Unlike WTO objective of bringing trade liberalization, the main objective of AfCFTA is to integrate African markets.[74] Moreover, unlike WTO, which focuses on globalization of economy and law, AfCFTA is characterized as a regional agreement, regionalization of economy, and regionalization of law.[75] Thus, the DSM embodied in the AfCFTA is *lex specialis* that prevails and overrides the WTO DSB embodied under WTO.

3. One of the most accepted rules of interpretation is '*lex posterior derogate legi priori,'* which means the latter treaty prevails over the former. The basic policy justification behind this is that member states by coming up with a new rule which contradicts the pre-existing norm implicitly shows their intent to repeal the former law.[76] The date of conclusion of the treaty serves as the benchmark in identifying the intention of the contracting states.[77]This is well reflected under Article 30(2) of the VCLT which states: "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[78] Article 30(1) made it clear that the two conflicting treaties should deal with the same subject matter. In comparison to the AfCFTA DSM which comes into force on May 30, 2019, prevails over the WTO/GATT-DSM coming into existence in 1948/1995. Moreover, both of these treaties deal with the same subject

[70] Unlike single undertaking whereby by being the member state of WTO, the country agrees to be bind by the whole full gamut of agreement, plurilateral agreements are optional in a sense a member state of WTO have full right and liberty to ratify or not.

[71] This information is accessed from the official website of WTO which is available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm last accessed on 16 July 2019.

[72] See S Chamoritz, WTO cosmpolitics, *Journal of International Law and Politics*, Vol. 34, (2002).

[73] S Yang, The Solution for Jurisdictional Conflicts between the WTO and RTAs: the Forum Choice Clause, *Michigan State International Law Review*, Vol. 23, (2014), p.137.

[74] African Continental Free Trade Area, African Union, (2018). The full version of this document is available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf last accessed on 16 July 2019.

[75] For more detailed discussion please see L Xue, Differentiation and Analysis on the RTAs, the WTO and other relevant concepts-the relationship between the RTAs and the WTOUS, *China Law Review*, Vol. 3, No. 6, (2006).

[76] T Abate, Introduction to Law and the Ethiopia Legal System: Teaching material, (unpublished), p. 102.

[77] J Pauwelyn, *supra* note 67, p. 371.

[78] Please see Vienna Convention on the Law of Treaty (VCLT), United Nations, Treaty Series, Vol. 1155.

matter within the meaning of Article 30(1) of the VCLT. Then, it naturally follows that AfCFTA, which came into existence under Article XXIV or the enabling clause is getting the go-ahead from either the Committee on Trade and Development (CTD)[79] or the Committee on Regional Trade Agreement (CRTA),[80] then it can be considered as an approval of its content including the dispute settlement clause. This is well-noted by an authoritative writer in this field when he said "… the RTAs (the likes of AfCFTA) including their forum choice clauses, have priority over the WTO legal texts according to the *lex posterior* principle.''[81]

4. One of the arguments forwarded to give the WTO DSB jurisdiction for disputes emanating from RTAs is that the effect on RTAs DSM will have spill over effects and negatively affect the whole set up of WTO. One may speculate, for instance, the RTAs DSM might contradict, in the course interpretation, the principles of WTO such as the principles of most favoured nations and national treatments. However, such a possibility is unrealistic to arise because provision of RTAs like AfCFTA, which come into existence either through enabling clauses or Article XXIV exceptions, will be examined for their compliance by CRTA or CTD. Therefore, the possibility that AfCFTA DSM will come up with a decision which contradicts the WTO provisions is next to zero.

5. One of the cardinal rules of interpretation is the *efficace*[82] principle, which states that a term of the treaty should be interpreted in a manner that gives an effect rather than rendering it ineffective and meaningless.[83] In support of this the titan judge states that:[84]

[79] This is the committee which oversee the compliance for those RTAs notified under enabling clause

[80] This is the committee which oversee the compliance of those RTAs notified under Article XXIV exception.

[81] S Yang, *supra* note 73, p.133.

[82] This is a French word which means effective. Maria Dictionary available at https://www.merriam-webster.com/dictionary/efficacy last accessed on 29 February 2020.

[83] This rule of interpretation is coined by WTO appellate body when it said:' one of the corollaries of the general rule of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty.' See *United States-Standard for Reformulated and Convention Gasoline*, WTO, WT/DS2/AR/R (25 September 1996), Para. 23. The full version of this decision is available at https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf last accessed on 25 July 2019.

[84] Justice A.K Srivastera, Interpretation of Statutes, *Institute's Journal*, (1995), p. 4.

> Where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the statute and to make the whole of it effective and operative.

As per Article 20 of the agreement establishing AfCFTA dispute settlement bodies are formed to entertain any conflict arising thereof. If we give jurisdiction to the WTO DSM for disputes arising out of AfCFTA, we are making the dispute settlement clause under AfCFTA meaningless and ineffective.

6. From a pragmatic point of view, it is not visible for the WTO DSB to entertain disputes arising out of RTAs like AfCFTA. With the creation of WTO in 1995 a pyramidal proposal in which the multilateralism at the top of the pyramid, then RTAs in the middle and finally domestic trade law and policy at the bottom was formed.[85] Today RTAs account for half of the international trade.[86] In almost all instances there is a dispute settlement clause.[87] Diametrically opposite to GATT, which entertains only 200 cases, the WTO DSB in its first three years of establishment entertained 118 cases and the number of cases brought before the WTO DSB is ever increasing.[88] Thus, if we extend the jurisdiction of RTAs disputes, including AfCFTA, to the WTO DSB, it will be overwhelmed by cases, and it will not be able to decide each case in a very efficient, constructive and speedy manner. Therefore, AfCFTA DSM should assume jurisdiction for any dispute arising out of AfCFTA.

7. Even if by overextended interpretation, we confer jurisdiction upon the WTO DSB, it should decline its jurisdiction in favour of the AfCFTA DSM because of forum non-convenience. Forum non-convenience allows the court which otherwise has jurisdiction to entertain the case, decline its competency "whenever it appears that the case before it may be more

[85] R Leal-Arcal, Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?, *Chicago Journal of International Law*, Vol. 11, No. 2 (2011), p. 598.

[86] OECD Regional Trade Agreements available at http://www.oecd.org/trade/topics/regional-trade-agreements/last accessed on 17 July 2019.

[87] S Yang, The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs, *Chinese Journal of International Law*, Vol. 11, (2012), p. 284.

[88] The International Economic Study, Chapter Two: The Dispute Resolution Mechanism (September 04,1998), available at http://internationalecon.com/wto/ch2.php last accessed on 17 July 2019.

appropriately tried elsewhere."[89] The tribunal in AfCFTA is more familiar within its own region in a sense it has easy access to sources of evidence and proof.[90] Regional interests in having regional controversy should be addressed by home tribunal. The evidence may lose its intrinsic value in transportation and it doesn't take more than common sense that bringing evidence to the nearby place, Africa, is less dangerous than other parts of the continent, i.e. Geneva, Switzerland. Moreover, in terms of forum convenience for witnesses because of cultural similarity, language, similar of way of life and other factors, African witnesses prefer African set-ups. In comparison to an African forum, the WTO DSB has huge cost implications for both claimant and respondent. Therefore, the WTO DSB should decline jurisdiction if the AfCFTA exercises its jurisdiction based on principle of forum non-convenience. However, if AfCFTA DSM declines to exercise its jurisdiction to determine and settle the matter then the WTO DSB will have the right to reopen the case.[91] As one author perfectly noted, "this will not only keep the efficiency of dispute settlement proceedings, but also avoid circumstances where there are no appropriate tribunals to deal with a particular dispute."[92]

Concluding remarks

As a rule of thumb, under WTO legal system, making discrimination is prohibited and each member should treat other members in the same way. Any preference given to third parties will immediately and unconditionally be extended to all other member states. With a view to enhancing economic development of developing countries and encouraging regional integration, the WTO rule permits formation of RTAs by way of enabling clauses or Article XXIV exceptions. As a result of this, there is a proliferation of RTAs across the globe and this, incidentally, leads to proliferation of RTA DSM. By the same token, the AfCFTA has envisaged the possibility of dispute between and among member countries and provide a mechanism to handle

[89] J Gaddard, The Doctrine of Forum Non-Convenience in Illinois, *University of IIlinois Law Journal*, (1964), p. 646

[90] S Yang, The Settlement of Jurisdictional Conflict between the WTO and RTAs: the Forum Non-Convenience Principle, *Willamette Journal of International Law and Dispute Resolution*, Vol. 23, (2015), p. 251.

[91] S Sternberg, Res Judicata and Forum Non-Conveniences in International Litigation*, Cornell International Law Journal*, Vol. 46, No. 1, (2013), p.197.

[92] Ibid. p. 253.

disputes. On the other hand, the same organization, i.e. WTO, which permits the formation of RTAs like that of AfCFTA, has also detailed provisions concerning disputes arising out of WTO agreement. Although this leads to the possible overlapping of jurisdictions between RTAs DSM and the WTO DSM, for multiple reasons the RTA DSM in general and AfCFTA DSB in particular is the appropriate and right forum to assume and render a valid decision.

የወል የሥራ ክርክር ጉዳዮችን በሰበር የማየትና የመወሰን ስልጣን የፌደራል ወይስ የክልል? የፍርድ ትችት

ተገኝ ዘርጋው[*]

አህጽሮተ ጥናት

የወል የአሰሪና ሰራተኛ ክርክር የፌደራል ፍርድ ቤቶች በተለይም የፌደራል ከፍተኛ ፍርድ ቤት ስልጣን ሲሆን የክልል ፍርድ ቤቶች እንደዚህ አይነት ጉዳዮችን በተመለከተ ያላቸዉ የዉክልና ስልጣን ብቻ ነዉ። የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎ በተለያዩ ዉሳኔዎቹ የክልል ጠቅላይ ፍርድ ቤት በይግባኝ ስልጣኑ ተመልክቶ የመጨረሻ ዉሳኔ የሰጠበትን የወል የስራ ክርክር በክልል ሰበር ሰሚ ችሎቶች እስክልታዩ ድረስ የፌደራል ሰበር ሰሚ ችሎቱ የማየት ስልጣን እንደሌለዉ ወስኗል። ከዚህ የፌደራል ሰበር ሰሚ ችሎት ዉሳኔ በኋላ የክልል ጠቅላይ ፍርድ ቤት በዉክልና ስልጣኑ በይግባኝ ተመልክቶ ዉሳኔ የሰጠበትን ማንኛዉንም የወል የአሰሪና ሰራተኛ ጉዳይ በክልል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ታይቶ ዉሳኔ እስክልተሰጠበት ድረስ በፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቀርቦ ለመታየት ብቁ አይደለም የሚለዉ ሃሳብ ሰፊ ተቀባይነት ያለዉ መርሕ ሆኗል። በመሆኑም የዚህ የፍርድ ትችት ዓላማ ይህ የፌደራል ሰበር ሰሚ ችሎቱ አቋም ከሕገ መንግስቱና ከሌሎች አግባብነት ካላቸዉ ህጎች ጋር አብሮ የሚሄድ ነዉ ወይስ አይደለም የሚለዉን መመርመር ነዉ። ይህንን ዓላማ ለማሳካት የፌደራል ሰበር ሰሚ ችሎቱ በጉዳዩ ላይ ዉሳኔ የሰጠባቸዉን ሁለት ዉሳኔዎች እና ሌሎች አግባብነት ያላቸዉን የአገሪቱን ሕጎች በጥልቀት ተመርምረዋል። የዚህ ጥናት ግኝት እንደሚያሳየዉ የፌደራል ሰበር ሰሚ ችሎት ሁለት ዉሳኔዎች ከኢፌዴሪ ሕገ መንግስት እና ሌሎች አግባብነት ካላቸዉ የአገሪቱ ሕጎች ጋር አብሮ የማይሄድ መሆኑ ነዉ። የወል የስራ ክርክሮች በፌደራል ፍርድ ቤቶች ብቸኛ ስልጣን ስር የሚወድቅ ሲሆን ክልሎች ይህንን አይነት ጉዳይ መመልከት የሚችሉት በዉክልና ስልጣናቸዉ ብቻ ነዉ። በሕገ መንግስቱ በተቀመጠዉ የፍርድ ቤቶች የስልጣን ዉክልና አወቃቀር መሰረት የክልል ጠቅላይ ፍርድ ቤቶች የፌደራል ጉዳዮችን በሰበር የማየት ስልጣን የላቸዉም። ስለሆነም የክልል ጠቅላይ ፍርድ ቤቶች በዉክልና ስልጣናቸዉ የወል አሰሪና ሰራተኛ ጉዳይን ተመልክተዉ የመጨረሻ ዉሳኔ ከሰጡ በኋላ ይሕንን ጉዳይ በሰበር የማየት ብቸኛ ስልጣን ያለዉ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ብቻ ነዉ።

ቁልፍ ቃላት፦ የወል የሥራ ክርክር፣ በይግባኝ የማየት ስልጣን፣በሰበር የማየት ስልጣን፣ የውክልና ስልጣን፣ የፌደራል ጠቅላይ ፍርድቤት፣የክልል ጠቅላይ ፍርድቤት።

1. የክልል እና የፌደራል ፍርድቤቶች አወቃቀር እና የዳኝነት ስልጣን ክፍፍል

በሕገ-መንግስቱ በግልጽ እንደተደነገገው የፌደራል መንግስቱ የራሱ ጠቅላይ፣ ከፍተኛ እና የመጀመሪያ ደረጃ ፍርድቤት የሚኖረው ሲሆን ክልሎችም በተመሳሳይ ሁኔታ የራሳቸው ጠቅላይ፣ ከፍተኛና የመጀመሪያ ደረጃ ፍርድቤት እንደሚኖራቸው ተደርጓል።[1] የፌደራል ጠቅላይ ፍርድቤት የፌደራል መንግስቱ ከፍተኛ የዳኝነት አካል ሲሆን ከስረ-ነገርና ከይግባኝ ስልጣኑ በተጨማሪ መሰረታዊ የሕግ ስህተት ያለበትን ማናቸውንም የመጨረሻ ውሳኔ በሰበር የማየት ስልጣን ተሰጥቶታል።[2] የፌደራል ጠቅላይ ፍርድቤት በሕገ-መንግስቱ የተቋቋመ ሲሆን የፌደራል ከፍተኛና የመጀመሪያ ደረጃ ፍርድ ቤትን በተመለከተ ግን

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[1] የኢፌዲሪ ሕገመንግስት ፌደራል አዋጅ ቁጥር1/1987 ነጋሪት ጋዜጣ ቁጥር1 በ1987 ዓ.ም፣ አንቀጽ 78 እና አንቀጽ 80

[2] ዝኒ ከማሁ፣ አንቀጽ 80(1) እ 80(3)(ሀ)

የህዝብ ተወካች ምክር ቤት አስፈላጊ ሆኖ ሲያገኘው በሀገሪቱ በሙሉ ወይም በከፊል እዲያደራጅ ስልጣን ተሰጥቶታል።[3] ሆኖም ግን ምክር ቤቱ በመላ ሀገሪቱ የከፍተኛ ፍርድቤትና የመጀመሪያ ደረጃ ፍርድቤት እስከሚያቋቁም ድረስ ግን የእነዚህ ፍርድቤቶች ስልጣን በሕገ-መንግስቱ ለክልሎች በውክልና ተሰጥቷል።[4] ምንም እንኳን መጀመሪያ ላይ የፌደራል ከፍተኛና የመጀመሪያ ደረጃ ፍርድቤቶች በአዲስ አበባና በድሬዳዋ ከተማ አስተዳደሮች ብቻ ተቋቁመው የነበሩ ቢሆንም ከ1995 ዓ.ም ጀምሮ በአምስት ክልሎች የፌደራል ከፍተኛ ፍርድቤቶች እንዲቋቋሙ ተደርጓል።[5] በመሆኑም የፌደራል ፍርድቤቶች ባልተቋቋመባቸው ክልሎች የክልል ጠቅላይና የክልል ከፍተኛ ፍርድቤት እንደየቅደምተከተላቸው ለራሳቸው ከተሰጣቸው መደበኛ ስልጣን በተጨማሪ በውክልና የፌደራል ከፍተኛና የመጀመሪያ ደረጃ ፍርድቤት ስልጣን እንዲመለከቱ ተደርጓል።[6] ከዚህ አንፃር የክልል ጠቅላይ ፍርድቤት በውክልና የሚያየውን የፌደራል ጉዳይ አስመልክቶ የሚሰጠው ውሳኔ የፌደራል ጠቅላይ ፍርድቤት በይግባኝ የማየት ስልጣን ያለው ሲሆን የክልል ከፍተኛ ፍርድቤት በውክል አይቶ ውሳኔ በሚሰጥበት የፌደራል ጉዳይ ላይ ደግሞ የክልሉ ጠቅላይ ፍርድቤት በይግባኝ እንዲመለከተው ስልጣን ተሰጥቶታል።[7] የክልሎችን የፍርድቤቶች አወቃቀር በምንመለከትበት ጊዜ ደግሞ የክልል ጠቅላይ፣ ከፍተኛና የመጀመሪያ ደረጃ ፍርድቤት አንደሚቋቋም በሕግ መንግስቱ በግልጽ የተደነገገ ሲሆን[8] የክልል ሕገ መንግስቶችም እነዚህን ሶስት ፍርድቤቶች አቋቁመዋል።[9] የክልል ጠቅላይ ፍርድቤት በክልሉ ጉዳይ ላይ የበላይና የመጨረሻ የዳኝነት ስልጣን ያለው ሲሆን በውክልና ካገኘው፣ ስረ ነገር ከስረ ነገርና ከይግባኝ ስልጣኑ በተጨማሪ መሰረታዊ የሕግ ስህተት ያለበትን በክልል ጉዳዮች ላይ የተሰጠ የመጨረሻ ውሳኔ በሰበር የማየት ስልጣን ተሰጥቶታል።[10] ክልሎች የፍርድ ቤቶችን አደረጃጀትና ዝርዝር ስልጣን የሚደነግጉ ህጎችን በማውጣት የፍርድ ቤቶቹን የስረ ነገር፣ የይግባኝና የሰበር ስልጣን በዝርዝር ደንግገዋል።[11] የፌደራል ፍርድ ቤቶችን በተመለከተ የፌደራል ፍርድ ቤቶችን ለማቋቋም የወጣው አዋጅ ቁጥር 25/1988 የፌደራል ፍርድ ቤቶችን ስልጣን የደነገገ ሲሆን የፍርድ ቤቶቹን የስረ ነገር፣ የይግባኝ እና የሰበር ስልጣንን በዝርዝር አስቀምጧል። በዚህ አዋጅ መሰረት የፌደራል ፍርድቤቶች በጠቅላላው ሕገ-መንግስቱን፣ የፌደራል መንግስቱን ሕጎች፣ አለም አቀፍ ስምምነቶችን መሰረት በማድረግ የሚነሱ ጉዳዮችን፤ በሕገ-መንግስቱ የፌደራል ተብለው ከተገለፀው ቦታዎች የሚመነጩ ጉዳዮችን እና በፌደራል መንግስቱ ሕግ ተገልፀው በተወሰኑ ጉዳዮች ላይ የዳኝነት ስልጣን እንዳላቸው ተደንግጓል።[12]

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[3] ዝኒ ከማሁ፣ አንቀጽ 78(2)

[4] ዝኒ ከማሁ፣ 78(2) እና 80(2፣4፣5)

[5] የፌደራል ከፍተኛ ፍርድቤት ማደራጃ አዋጅ ቁጥር 322/1995፣ *ነጋሪት ጋዜጣ*፣ (1995)፣ በአንቀጽ 2 መሰረት በቤንሻንጉል ጉሙዝ፣ በደቡብ፣ በጋምቤላ፣በአፋር እና በሶማሌ ክልሎች የፌደራል ከፍተኛ ፍርድቤት ተቋቁሟል

[6] የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታወሻ 2 እንደተገለፀው፣ አንቀጽ 78(2) እና 80(2፣4፣5)

[7] ዝኒ ከማሁ፣ አንቀጽ 80(5-6)

[8] ዝኒ ከማሁ አንቀጽ 78(3)

[9] የተሻሻለው የአማራ ብሔራዊ ክልል ሕገ መንግስት ማጽደቂያ አዋጅ ቁጥር 59/1994፣ *ዝክረ ሕግ*፣ (1994) ፣ አንቀጽ 46ና 47፤ እና የተሻሻለው የ1994 ዓ.ም የኦሮሚያ ክልል ሕገ መንግስት ማጽደቂያ አዋጅ ቁጥር 46/1994 አንቀጽ 64

[10] የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታወሻ 2 እንደተገለፀው፣ አንቀጽ 80(2) እ 80(3)(ለ)

[11] የአማራ ብሔራዊ ክልላዊ መንግስት ፍርድቤቶችን ለማቋቋም የወጣው አዋጅ ቁጥር 11/1988 (እንደተሻሻለው)

[12] የፌደራል ፍርድቤቶች አዋጅ ቁጥር 25/1988፣ *ነጋሪት ጋዜጣ* (1988) 13፣ 1988 አንቀጽ 3 እና ከአንቀጽ 4-15

ከዚህ አንፃር የዚህ ጥናት አላማ ለፌደራል ፍርድቤቶች የተሰጠውን አጠቃላይ የዳኝነት ስልጣንን ማብራራት እና መተንተን ባለመሆኑ ጥናቱ ትኩረቱን የሚያደርገው ትንሽ ግራ በሚያጋባውና አከራካሪ በሆነው ከፌደራል ሕጎች የሚመነጩ ጉዳዮች የመመልከት ስልጣን የማን ነው? በሚለው ጉዳይ ላይ ነው። በዚህ ጉዳይ ላይ ሁለት አቋሞች የሚንፀባረቁ ሲሆን የመጀመሪያው አቋም ከፌደራል ሕጎች የሚመነጩ ማለትም በሕገ መንግስቱ በአንቀጽ 55 መሰረት የህዝብ ተወካዮች እንዲያወጣቸው ተለይተው ከተሰጡ ሕጎች የሚመነጩ ወይም እነዚህን ሕጎች መሰረት ያደረጉ ጉዳዮች የፈደራል ፍርድቤቶች ብቸኛ ስልጣን ናቸው የሚል ነው።[13] እንደዚህ አቋም አራማጆች አባባል ከፌደራል ሕግ የሚመነጩ ወይም ይህንኑ መሰረት ያደረጉ የትኛዎቹም ጉዳዮች የፌደራል ጉዳዮች በመሆኑናቸው ለፌደራል ፍርድቤቶች የተሰጡ ብቸኛ ስልጣኖች ሲሆኑ ከዚህ ውጭ ያሉት ጉዳዮች በሙሉ የክልሎች ስልጣን ይሆናሉ ማለት ነው። በመሆኑም የወንጀል ሕግ፣ የአሠሪና ሠራተኛ ሕግና የንግድ ሕግ የፌደራል ሕጎች በመሆናቸው እነዚህን ሕጎች መሰረት ያደረጉ ጉዳዮች የፌደራል ጉዳዮች በመሆኑቸው እነዚህን በተመለከተ የክልል ፍርድቤቶች የውክልና ስልጣን ካልሆነ በስተቀር ጉዳዮቹን በብቸኝነት የማየትም ሆነ የጣምራ ስልጣን የላቸውም።[14] ሁለተኛው አቋም ደግሞ ምንም እንኳን የፌደራል ፍርድቤቶች ማደረጃ አዋጅ የፌደራል ሕጎችን መሰረት አድርገው የሚነሱ ጉዳዮች የፌደራል ጉዳዮች ናቸው ቢልም የፌደራል ጠቅላይ፣ ከፍተኛንና የመጀመሪያ ደረጃ ፍርድቤቶች የፍትሐብሔርና የወንጀል የስረነገርና የይግባኝ ስልጣንን በሚዘረዝርበት ጊዜ የፌደራል ሕጎችን መሰረት አድርገው የሚነሱ ሁሉንም ጉዳዮች በዝርዝሩ ውስጥ ያላካተተ ሲሆን ከፌደራል ሕጎች ውስጥ የተወሰኑ ጉዳዮችን ብቻ መርጦ ነው በዝርዝሩ ያካተተው።[15] በመሆኑም አዋጁ ከፌደራል ሕጎች ከሚመነጩ ጉዳዮች መካከል የተወሰኑ ጉዳዮችን ብቻ ለይቶ ለፌደራል ፍርድቤቶች የሰጠ በመሆኑ የፌደራል ፍርድቤቶች ስልጣን በአዋጁ በግልጽ ተለይተው በተሰጡት በእነዚህ ጉዳዮች ብቻ የተወሰነ እንጅ በሁሉም ከፌደራል ሕግ በሚመነጩ ጉዳዮች ላይ አይደለም በማለት ይከራከራሉ። በመሆኑም አዋጁ ከፌደራል ሕጎች የሚመነጩ ሁሉንም ጉዳዮች ለፌደራል ፍርድቤቶች በሙሉ ዘርዝሮ ባለመስጠቱ ለፌደራል ፍርድቤቶች ተለይተው ባልተሰጡ ሆኖም ግን ከፌደራል ሕግ በሚመነጩ ጉዳዮች የክልል ፍርድቤቶች ጉዳዩን የማየት ስልጣን ያላቸው መሆኑን ይናገራሉ።[16]

ሆኖም ግን ይህንን አቋም በሚያራምዱ ሰዎች መካከል ሁለት የተለያዩ አመለካከቶች የሚንፀባረቁ ሲሆን የመጀመሪያው አመለካከት በአዋጅ ቁጥር 25/1988 በዝርዝር ለፌደራል ፍርድቤቶችየተሰጡ ጉዳዮች ለፌደራል ፍርድቤቶች በብቸኝነት የተሰጡ ስልጣኖች በመሆናቸው በአዋጁ በግልጽ ተዘርዝረው ለፌደራል ፍርድቤቶች ባልተሰጡ ሆኖም ግን የፌደራል ሕጎችን መሰረት አድርገው በሚነሱ ጉዳዮች ላይ የክልል ፍርድቤቶችብቸኛ ስልጣን አላቸው የሚል ነው።[17] ሁለተኛው አመለካከት ደግሞ በፌደራል ፍርድቤቶች ማቋቋሚያ አዋጅ በግልጽ ተለይተው እና ተዘርዝረው ለፌደራል ፍርድቤቶች ባልተሰጡ ጉዳዮች የክልል

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[13] Abebe Mulatu, The Court System and Questions of Jurisdiction under the FDRE Constitution and Proclamation 25/26 "in Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, Vol. I, 2000,* P.129-130

[14] የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታወሻ ቁጥር 2 እንደተገለፀው፣ አንቀጽ 55(3-5)

[15] የፌደራል ፍርደ ቤቶች አዋጅ በግርጌ ማስታዎሻ ቁጥር 13 እንደተገለፀው ፣ አንቀጽ 4-15

[16] Asefa Feseha, Federalism Teahing Material, Justice and legal system research Institute, 2009, p.460,available at https://ethiopianlaw.weebly.com/uploads/5/5/7/6/5576668/federalism.pdfLast accessed on 16-02-2019)

[17] አበበ ሙላቱ በግርጌ ማስታዎሻ ቁጥር 14 እንደተገለፀው ፣ ገጽ 130

ፍርድቤቶች ያላቸው ስልጣን የራሳቸው ብቸኛ ስልጣን ሳይሆን የጣምራ ስልጣን ነው የሚል ነው። ለዚህም የሚቀርበው ምክንያት የመጀሪያውን አመለካከት ብንከተል የፌደራል ፍርድቤቶች ከፌደራል ሕጎች በሚመነጩ ጉዳዮች ምንም አይነት ስልጣን እንዳይኖራቸው የሚያደርግ ሲሆን ይህ ደግሞ የፌደራል ፍርድቤቶችን ተፈጥሯዊ ስልጣን ሙሉ በሙሉ እንደመንጠቅ ይቆጠራል። በመሆኑም የፌደራል ፍርድቤቶች የራሳቸውን ተፈጥሮአዊ ጉዳዮች እንዳይመለከቱ ማደረግ ፈጽሞ የማይታሰብ በመሆኑ እነዚህን ጉዳዮች የክልል ፍርድቤቶችም ሆነ የፌደራል ፍርድቤቶች ጉዳዩ የሚነሳበትን ቦታ መሰረት አድርገው በጣምራነት የመመልከት ስልጣን አላቸው በማለት ይከራከራሉ።[18] እነዚህን ሁለት አቋሞች በምንመረምርበት ጊዜ የሁለተኛው አቋም የተሻለ ይመስላል። ምክንያቱም እነዚህን ጉዳዮች የማየት ስልጣን የክልል ፍርድቤቶች ብቸኛ ስልጣን ከሆነ በፌደራል ሕጎች ላይ የፌደራል ፍርድቤቱ ምንም አይነት ሚና እንዳይኖራቸው ያደርጋል። በመሆኑ አንድ ከፌደራል ሕግ የሚመነጭ ጉዳይ[19] ለፌደራል ፍርድቤቶች በብቸኝነት እስካልተሰጠ ድረስ የፌደራል መንግስቱ በሚያስተዳድራቸው አካባቢዎች የፌደራል ፍርድቤቶች እንዲሁም በክልል በሚነሱ ጉዳዮች የክልል ፍርድቤቶች ጉዳዩን የመመልከት ስልጣን አላቸው።

2. ለክልሎች በጣምራነትና በውክልና የተሰጠ የፌደራል ጉዳይን በሰበር የማየት ስልጣን

የክልል ጠቅላይ ፍርድቤቶች በውክልና የሚያዩትን የፌደራል ጉዳይ በይግባኝ የማየት ስልጣን የፌደራል ፍርድቤቶች ስልጣን እንደሆነ በሕገ-መንግስቱ በግልጽ ተቀምጧል።[20] ይህንንም መነሻ በማድረግ የክልል ፍርድቤቶች በውክልና የተመለከቱትን የፌደራል ጉዳይ በሰበር የማየት ስልጣን የፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ነው የሚል አቋም መያዝ ተገቢነት አለው። ሆኖም ግን አከራካሪው እና ሕጋዊ ትንታኔ የሚጠይቀው ጉዳይ የክልል ፍርድቤቶች በጣምራ ስልጣን የሚመለከቷቸውን የፌደራል ጉዳዮች በይግባኝና በሰበር የማየት ስልጣን የማን ነው? የሚለው ጥያቄ ነው። የፌደራል ጠቅላይ ፍርድቤት በፌደራል ጉዳዮች ላይ ከፍተኛና የመጨረሻ የዳኝነት ስልጣን ያለው አካል በመሆኑ ክልሎች በውክልና የሚያዩትን የፌደራል ጉዳይ ብቻ ሳይሆን በጣምራ ስልጣንነት በስረነገር የሚመለከቷቸውንም የፌደራል ጉዳዮች በይግባኝ የማየት ስልጣን አለው ብለው የሚከራከሩ ሰዎች አሉ። ይህንን አቋም የሚደግፉ ሰዎች እንደሚሉት ለክልል በጣምራነት በተሰጡ የፌደራል ጉዳዮች ላይ የፌደራል ጠቅላይ ፍርድቤት ጉዳዮችን በይግባኝም ሆነ በሰበር የመመልከት ስልጣን አንዳለው ከሕገ መንግስቱ እና ከፍርድቤቶች ማቋቋሚያ አዋጅ የጣምራ ንባብ መረዳት እንደሚቻል ይጠቁማሉ።[21] ሁለተኛው አቋምና ይህ አጥኚ የሚደግፈው አቋም ደግሞ በእነዚህ ጉዳዮች ላይ የፌደራል ጠቅላይ ፍርድቤት በሰበር የማየት እንጅ በይግባኝ የማየት ስልጣን ሊኖረው አይገባም የሚል ነው። ምክንያቱም የሕገ መንግስቱን አንቀጽ 80ና የፌደራል ፍርድ ቤቶችን ማቋቋሚያ አዋጅ ቁጥር 25/88 በምንመለከትበት ጊዜ የፌደራል ፍርድቤቶች የይግባኝ ስልጣን የክልል ፍርድቤቶች በውክልና በሚያዩት የፌደራል ጉዳይ ላይ የተገደበ እንጅ የክልል ፍርድቤቶች በጣምራ ስልጣን በስረ ነገር ደረጃ የሚመለከቱትን የፌደራል ጉዳይ እንደሚጨምር የሚያመላክት ነገር የለም። አንዳንድ የህግ

[18] አሰፋ ፍስሃ (ዶ/ር) በግርጌ ማስታወሻ ቁጥር 17 እንደተገለጸው፣ ገጽ 461

[19] የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታወሻ 2 እንደተገለፀው፣ አንቀጽ 55(3))

[20] ዝኒ ከማሁ አንቀጽ 80(6)

[21] Sileshi Zeyohannes, Constitutional Law II, Teaching material, Prepared under the sponsorship of Justice and Legal System Research Institut,2009, p. 203

ምሁራን እንደሚሉት የፌደራል ሕጎች ተጠቅሰው የሚመሰረቱ ክሶች ምንም እንኳን ጉዳዮቹ የፌደራል ጉዳዮች ቢሆኑም በተግባር ጉዳዮቹ በክልል ፍርድቤቶች በስረ ነገርና በይግባኝ መታየታቸው የማይነቀፍ መሆኑን አምነው እነዚህን ጉዳዮች ግን የክልል ሰበር ሰሚ ችሎቱ በሰበር መመልከቱ የሚነቀፍና ተግቢ ያልሆነ ተግባር እንደሆነ ይገልፃሉ።[22]

ሁለተኛው መሰረታዊ ጉዳይ ደግሞ ክልሎች በጣምራነት በሚያዩዋቸው የፌደራል ሕጎችን መሰረት አድርገው የሚቀርቡ ጉዳዮችን በሰበር የማየት ስልጣን የማን ነው? የሚለው ነው። በዚህ ጥያቄ ላይ ሁለት አመለካከቶች ያሉ ሲሆን የመጀመሪያው አመለካከት የፌደራል ሕጎች መሰረት ተደርገው በሚመሰረቱ የትኞቹም ክሶች ጉዳዩ ከክልል ፍርድ ቤትም ይነሳ ከፌደራል ፍርድቤት ጉዳዩን በሰበር የማየት ስልጣን ያለው የፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ነው የሚል ነው። መሃሪ ረዳኢ(ዶ/ር) እንደሚሉት ከፌደራል ሕጎች በሚመነጩ ጉዳዮች ላይ የሚቀርብን ክስ ወደክልል ሰበር ሰሚ ችሎት ማቅረብ በፌደራል ሕግ ላይ የመጨረሻና አስገዳጅ ትርጉም መስጠት ያለበት የፌደራል ጠቅላይ ፍርድቤት ነው የሚለውን የሕገ መንግስቱን ግልጽ ድንጋጌ የሚጋፋ ነው። በመሆኑም የፌደራሉ ሰበር ሰሚ ችሎት እነዚህን የመሳሰሉ ጉዳዮችን የማስተናገድ መብትም ሆነ ሃላፊነት ያለው ሲሆን የክልሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት የፌደራል ሕግ መሰረት ተደርጎ የተወሰኑ ጉዳዮችን በሰበር ማስተናገድ የለበትም። ስለዚህ የአሠሪና ሠራተኛና መሰል የፌደራል ሕጎች መሰረት ተደርጎ በክልል ፍርድቤቶች ውሳኔ የተሰጠባቸው ጉዳዮች ላይ ጥቅም ላይ የዋለው ሕግ የፌደራል ሕግ ስለሆነ ይህ ሕግ በአግባቡ ጥቅም ላይ መዋሉን ማረጋገጥና መተርጎም የፌደራሉ ሰበር ሰሚ ችሎት ስልጣን በመሆኑ የክልል ሰበር ሰሚ ችሎት እነዚህን የመሳሰሉ ጉዳዮች ሊያስተናግዱ አይገባም በማለት ይከራከራሉ። በመሆኑም በፌደራል ሕግ የሚዳኙ ጉዳዮችን የክልል ሰበር ሰሚ ችሎቶች እንዳያዩ በማድረግ በዚህ ረገድ የሚከሰተው የሰበር ሰበር ሊቀር የሚገባው ሲሆን[23] እነዚህን ጉዳዮች የክልል ፍርድቤቶች በሰበር ማየታቸው ተቀባይነት የለውም የሚል አመለካከት አላቸው።[24] በአጠቃላይ ማንኛውም የአሠሪና ሠራተኛ ጉዳይ የፌደራል ሕግ ከሆነው የአሠሪና ሠራተኛ ሕግ የሚመነጭ በመሆኑ ጉዳዩ ለክልል ፍርድቤቶች የተሰጠው በጣምራነት ይሁን በውክልና ይህንን ጉዳይ የክልል ተዋረዱን ጠብቆ ከመጣ በኋላ በሰበር የማየት ብቸኛ ስልጣን ያለው የፌደራል ጠቅላይ ፍርድቤት ነው። ከዚህ በተቃራኒ ያለው አመለካከት ደግሞ የፌደራል ፍርድቤቶች በይግባኝም ሆነ በሰበር የማየት ስልጣን ለክልል ፍርድቤቶች በውክልና በተሰጠ ጉዳይ ላይ የተገደበ በመሆኑ ከፌደራል ሕጎች የሚመነጩ ሆነው ለክልሎች በጣምራነት በተሰጡ ጉዳዮች የፌደራል ጠቅላይ ፍርድቤት ጉዳዩን በይግባኝም ሆነ በሰበር የማየት ስልጣን የለውም የሚል ነው።[25] ይህ አጥኚ የመጀመሪያው አቋም የተሻለ ነው የሚል እምነት አለው። ምክንያቱም በሕገ መንግስቱ ለክልል ፍርድቤቶች በውክልና የተሰጠን የፌደራል ጉዳይ በይግባኝ የማየትና

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[22] መሃሪ ረዳኢ፣ የሰበር ሰበርና ተግዳሮቶቹ በኢትዮጵያ፣ *ሚዛን ሎው ሪቪው* ፣ ቅጽ 9 ቁጥር 1፣ 2007 ዓ.ም፣ ገጽ 193 Avilable at https://www.ajol.info/index.php/mlr/article/view/124829/114342 Accsesd on 4/12/2017

[23] ዝኒ ከማሁ፣ ገጽ 193

[24] ዝኒ ከማሁ፣ ገጽ 194

[25] Abdisa Dashura, Implication of Cassation Over Cassation In The Ethiopian Federal Context: With Special Reference To the Principle of Self-Determination, a Thesis Submitted to Addis Ababa University, College of Law and Governance, unpublished, 2014 p.97 avilable at http://etd.aau.edu.et/bitstream/handle/1234567 accsessed on 1/3/2019

ማንኛውንም የመጨረሻ ፍርድ በሰበር የማረም ስልጣን የተሰጠው ለፌደራል ጠቅላይ ፍርድቤት በመሆኑ ነው።[26]

3. የአሠሪና ሠራተኛ ጉዳይን በስረ ነገር፣ በይግባኝና በሰበር የማየት ስልጣን

ሀ. የስረ ነገር እና የይግባኝ ስልጣን

ስለአሠሪና ሠራተኛ ጉዳይ የወጣውን አዋጅ ቁጥር 377/2003[27] በምንመለከትበት ጊዜ የአሠሪና ሠራተኛ ጉዳይን የወልና የግለሰብ የስራ ክርክር በማለት የከፈላቸው ሲሆን ጉዳዩ የግል የስራ ክርክር ከሆነ መደበኛ ፍ/ቤቶች እንዲሁም ጉዳዩ የወል የስራ ክርክር ከሆነ ደግሞ የአሠሪና ሠራተኛ ወሳኝ ቦርዶች እንዲመለከቷቸው ስልጣን ተሰጥቷቸዋል።[28] በዚህም መሰረት የክልል ወረዳ ፍርድቤቶች በጥቅሉ የግል የስራ ክርክሮችን እንዲመለከቱ ስልጣን የተሰጣቸው ሲሆን የደሞዝና ሌሎች ጥቅማ ጥቅሞችን፣ ስንብትንና የዲሲፕሊን እርምጃዎችን፣ የስራ ውል መቋረጥ/መሰረዝን፣ የስራ ሰዓትን፣ የተከፋይ ሂሳብን፣ ፈቃድንና ዕረፍትን፣ የቅጥርና የስንብት ማስረጃ ሰርተፍኬት መስጠትንና የጉዳት ካሳን የሚመለከቱ ክሶችን የመዳኘት ስልጣን ተሰጥቷቸዋል።[29] ከአሠሪና ሠራተኛ ጉዳይ ጋር በተያያዘ በሚቀርቡ ጉዳዮች ላይ የክልል ከፍተኛ ፍርድቤት የይግባኝ ስልጣን ብቻ ያለው ሲሆን የወረዳ ፍ/ቤት የሰጠውን ውሳኔ የስራ ክርክር ስልጣንን፣ የማህበር ምዝገባ(ስረዛን) በተመለከተ ሚንስቴሩ የሚሰጠውን ውሳኔ፣ የስራ ሁኔታ ተቆጣጣሪ የሚሰጠውን ትዕዛዝ፣ እና በአንቀጽ 20(3) መሰረት መብትና ግዴታዎችን ለጊዜው ማገድን ተከትሎ ሚንስቴሩ (በክልል ደረጃ ደግሞ የሰራተኛና ማህበራዊ ጉዳይ ቢሮ) የሚሰጠውን ውሳኔ በመቃወም የሚቀርቡ ይግባኞችን የማየት ስልጣን አለው።[30] ከዚህ ላይ የአሠሪና ሠራተኛ ጉዳዮችን በውክልና ሳይሆን በጣምራ ስልጣንነት ለክልል ፍርድቤቶች መሰጠቱን በጽኑ የሚቃወሙ ሰዎች መኖራቸው መታወቅ ያለበት ሲሆን ሕጉ ግን በዚህ መልኩ የክልል ፍርድቤቶች በግለሰብ የስራ ክርክር ላይ የስረ ነገርና የይግባኝ ስልጣን እንዳላቸው በግልጽ አስቀምጧል።[31] አዋጁ የወል የስራ ክርክሮችን በተመለከተ እነዚህን ጉዳዮች የመዳኘት ስልጣን ከክልል መደበኛ ፍርድቤቶች ይልቅ ለጊዚያዊና ቋሚ የአሠሪና ሠራተኛ ጉዳይ ወሳኝ ቦርድ የሰጠ ሲሆን የቦርዶቹን ስልጣን በዝርዝር አስቀምጧል።[32] ከዚህ ላይ መረሳት

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[26] የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታወሻ 2 እንደተገለፀው ፣ አንቀጽ 80(3)(ለ) እና አንቀጽ 80(5)

[27] ይህ አዋጅ በአሰሪና ሰራተኛ አዋጅ አዋጅ ቁጥር ቁጥር 1156/2011 የተተካ ሲሆን ይህ አዋጅም ቢሆን የአሰሪና ሰራተኛ ጉዳይን የወልና የግል የስራ ክርክር በማለት በመክፈል የወል የስራ ክርክሮችን በአሰሪና ሰራተኛ ወሳኝ ቦርድና የግል የስራ ክርክርን ደግሞ በመደበኛ ፍርድቤቶችእንዲታዩ አድርጓል

[28] የአሠሪና ሠራተኛ ጉዳይ አዋጅ ቁጥር 377/1996፣ የፌደራል ነጋሪት ጋዜጣ፣ 10ኛ ዓመት ቁጥር 12፣ 1996፣ አንቀጽ 138 እና 142

[29] ዝኒ ከማሁ፣ አንቀጽ 139

[30] ዝኒ ከማሁ፣ አንቀጽ 139(2)

[31] ሕሩይ ውቤ እንደሚለው የክልል ፍርድቤቶች ሁሉንም የፌደራል ጉዳዮች ያለምንም ገደብ የማየት ስልጣን ያልተሰጣቸው በመሆኑ የፌደራል ፍርድ ቤት ስልጣን የሆኑትን ጉዳዮች የሚያዩበት ስልጣን የሚመነጨው በሕገ መንግስቱ በተሰጣቸው የውክልና ስልጣን ብቻ ነው። በዚህ ውክልና መሰረት በክልሎች የሚነሱ የአሠሪና ሠራተኛ ጉዳዮችን በትክክለኛው መንገድ በውክልና መመልከት የሚችሉት የክልል ጠቅላይ ፍርድቤትና ከፍተኛ ፍርድቤቶች ብቻ ናቸው ። በመሆኑም የክልል የወረዳ ፍርድቤቶች ከፌደራል ሕግ የሚመነጨ የአሰሪና ሰራተኛ ጉዳዮችን ለመዳኘት የሚያስችል ሕገ መንግስታዊ መሰረት የላቸውም። ይሁን እንጅ አዋጁ ከዚህ በተለዩ ሁኔታ ክርክሮች ከክልል የወረዳ ፍርድ ቤቶች ጀምሮ በቀጥታ እንዲታዩ አድርጓል። Hiruy Wubie, The Settlement of Individual and Collective Labour Disputes under Ethiopian Labour Law, *E-Journal of International and Comparative Labour Studies*, Volume 2, No. 1, 2013, p.21

[32] በዚህም መሰረት የጊዜያዊ የአሠሪና ሠራተኛ ወሳኝ ቦርድ የአየር መንገድ አገልግሎት፣ የኤሌክትሪክ/መብራት ሀይል አገልግሎት፣ የውሃና የከተማ ጽዳት አገልግሎት፣ የከተማ አውቶብስ አገልግሎት፣ ሆስፒታሎች፣ ክሊኒኮች፣ የመድሀኒት ማከፋፈያ ድርጅቶችና የመድሀኒት መሸጫ ቤቶች፣ የእሳት አደጋ አገልግሎትና የቴሌ ኮሙኒኬሽን

የሌለበት ነገር ቢኖር በቋሚም ይሁን በጊዜያዊ ቦርዱ በክርክር ሂደት የተረጋገጡ ፍሬ ነገሮች ሁሉ የመጨረሻ በመሆናቸው በይግባኝ ችሎቱ ክርክር አይነሳባቸውም።[33] የፌደራሉ ከፍተኛ ፍርድቤት በቦርድ በተሰጠ ውሳኔ ላይ የህግ ነጥብን መሰረት አድርጎ የሚቀርብ ይግባኝን የማየት ስልጣን በብቸኝነት የተሰጠው ሲሆን በዚህ አግባብ በይግባኝ የሚሰጥ ውሳኔም የመጨረሻ እንደሆነ በግልጽ ተመልክቷል።[34]

ለ. የአሠሪና ሠራተኛ ጉዳይን በሰበር የማየት ስልጣን

ከዚህ በላይ በዝርዝር እንደቀረበው የአሠሪና ሰራተኛ ጉዳይን በሰበር የማየት ስልጣንን በተመለከተ ሁለት አቋሞች ያሉ ሲሆን፣ የመጀመሪያው አቋም የአሠሪና ሠራተኛ ሕግን ጨምሮ ማንኛውንም የፌዴራል ሕግ መሰረት አድርገው የሚመሰረቱ ክሶች ምንም እንኳን ጉዳዩ በክልል ፍርድቤቶች ታይቶ የመጣ ቢሆንም ጉዳዩን በሰበር አይቶ የመወሰን ስልጣን የክልል ፍርድቤቶች ሳይሆን የፌዴራል ሰበር ሰሚ ችሎት ነው የሚል ነው። ይህንን አቋም የሚያራምዱ ሰዎች እንደሚሉት ከሕገ መንግስቱ አኳያ ሲታይ የፌዴራል ሕግ በሆነው የአሠሪና ሠራተኛ ሕግ ላይ የመጨረሻና አስገዳጅ ትርጉም መስጠት ያለበት የፌዴራል ጠቅላይ ፍርድቤት በመሆኑ ምንም እንኳን ጉዳዮ በስረ ነገር ደረጃ በክልሎች ታይቶ የመጣ ቢሆንም የፌዴራሉ ሰበር ሰሚ ችሎት የፌዴራል ሕጎች ተጠቅሰው የሚመሰረቱ ጉዳዮችን የማስተናገድ መብትም ሆነ ሃላፊነት አለው። እንደእነዚህ ሰዎች አባባል ሰበር በባህርይው በሕጉ ላይ የመጨረሻ ትርጉም የመስጠት ሃላፊነት እንደመሆኑና የክልል ፍርድ ቤቶችም የፌዴራል ሕግን መሰረት ያደረገ ጉዳዩን በሰበር ተመልክተው ውሳኔ መስጠት የማይቻላቸው በመሆኑ እነዚህን ጉዳዮችን የክልል ሰበር ሰሚ ችሎት በሰበር የማስተናገድ ምንም አይነት ህጋዊ ስልጣን የለውም። በመሆኑም የአሠሪና ሠራተኛና መሰል የፌዴራል ሕጎች መሰረት ተደርጎ በክልል ፍርድቤቶች ውሳኔ የተሰጠባቸው ጉዳዮች ቢኖሩ ጥቅም ላይ የዋለው ሕግ የፌዴራል ሕግ እስከሆነ ድረስ ይህ ሕግ በአግባቡ ጥቅም ላይ መዋሉንና መተርጎሙን ማረጋገጥ ያለበት የፌዴራሉ ሰበር ሰሚ ችሎት በመሆኑ የክልል ሰበር ሰሚ ችሎት እነዚህን የመሰሰሉ ጉዳዮች ሊመለከቱ አይገባም በማለት ያስረዳሉ።[35] አሰፋ ፍስሃ(ዶ/ር) ይህንን ተመሳሳይ አቋም የሚደግፍ ሲሆን እንዲያውም ለክልሎች በጣምራኑት በተሰጡ የፌዴራል ጉዳዮች የፌዴራል ሰበር ሰሚ ችሎት በተግባር እንደሚያደርገው ጉዳዩን በሰበር የማየት ስልጣን ብቻ ሳይሆን ያለው ጉዳዩን በይግባኝ የማየት ስልጣን አለው በማለት ይከራከራል።[36] በሁለተኛ ደረጃ የሚንፀባረቀው አቋም ደግሞ ምንም እንኳን ጉዳዮቹ ከፌዴራል ሕግ የሚመነጩ ቢሆኑም በአዋጅ ቁጥር 25/1988 ወይም በሌላ አግባብነት ባለው ሕግ ለፌዴራል ፍርድቤቶችተለይተው ባልተሰጡ ጉዳዮች የክልል ፍርድቤቶች የጣምራነት ስልጣን ያላቸው

አገልግሎት የሚሰጡ ድርጅቶችን በተመለከተ የሚነሱ የደመወዝና ሌሎች ጥቅማ ጥቅሞች ጋር የተያያዙ ጉዳዮችን የማየት ስልጣን ተሰጥቶታል። ቋሚ የአሠሪና ሠራተኛ ጉዳዮች ወሳኝ ቦርድ በበኩሉ ጉዳዮች በቅድሚያ በአስማሚው አካል ታይተው ካልተፈቱ በአንቀጽ 136 የተመለከቱትን (ህዝባዊ አገልግሎት የሚሰጡ) ድርጅቶች ጨምሮ አዲስ የስራ ሁኔታዎችን መመስረት፣ የህብረት ስምምነትን የተመለከቱ አለመግባባቶች፣ የሠራተኞች አቀጣጠርና ዕድገት አሰጣጥ፣ አጠቃላይ የሰራተኞችንና የድርጅቱን ህልውና የሚነኩ ጉዳዮች፣ ዕድገትን፣ ዝውውርንና ስልጠናን በተመለከተ አሰሪው የሚወስዳቸውን ዕርምጃዎች፣ የሰራተኞችን ቅነሳ እንዲሁም በአንቀጽ 160 ላይ የተመለከቱትን ህገ-ወጥ ተግባራት በተመለከተ የሚቀርቡ ጉዳዮችን የማየት የስራ-ነገር ስልጣን ተሰጥቶታል።በግርጌ ማስታዎሻ ቁጥር 28 እንደተገለጸው፣ አንቀጽ 136፣ 142(3)፣ 147(2)፣ እና የአሠሪና ሠራተኛ አዋጅን ለማሻሻል የወጣ አዋጅ ቁጥር 466/1997 ዓ.ም ፌደራል ነጋሪት ጋዜጣ(1997) ዓ.ም፣ አንቀጽ 2(1) እና (2))

[33] የአሠሪና ሠራተኛ አዋጅ አዋጅ ቁጥር ቁጥር 1156/2011፣ *የፌደራል ነጋሪት ጋዜጣ* (2011)፣ አንቀጽ 142(1)፣ አንቀጽ 147(1) እና አንቀጽ 153

[34] ዝኒ ከማሁ አንቀጽ 140(1) እና አንቀጽ 154 እና አንቀጽ 140(2)

[35] መሐሪ ረዳኢ በግርጌ ማስተዎሻ ቁጥር 23 እንደተገለፀው ፣ገጽ 193

[36] አሰፋ ፍስሃ (ዶ/ር) በግርጌ ማስታዎሻ ቁጥር 17 እንደተገለጸው ፣ ገጽ 463-464

በመሆኑ የፌደራል ጠቅላይ ፍርድቤት በሰበር ስልጣኑ ማየት የሚችለው ለክልል ፍርድቤቶች በውክልና የተሰጡ ጉዳዮችን እንጅ በጣምራነት የሚያዩዋቸውን የፌደራል ጉዳዮች አይደለም በማለት ይከራከራሉ። ከዚህ አንፃር ለክልል ፍርድቤቶች በውክልና በተሰጡ ጉዳዮች የክልል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ጉዳዩን በሰበር የማየት ስልጣን የሌለው ሲሆን በጣምራነት በተሰጠው የፌደራል ጉዳዮች ግን ጉዳዩን በሰበር የመመልከት ስልጣን አለው በማለት ይከራከራሉ።[37]

ሁለቱን አቋሞች በምንመለከትበት ጊዜ የፌደራል ጠቅላይ ፍርድቤት በሰበር ስልጣኑ ማየት የሚችለው ለክልል ፍርድቤቶች በውክልና የተሰጡ የፌደራል ጉዳዮችን እንጅ በጣምራነት የሚሰተናግዷቸውን የፌደራል ጉዳዮች አይደለም የሚለው አቋም የተሻለ ተቀባይነት አለው። ሆኖም ግን ለክልሎች በጣምራነት በተሰጡ የፌደራል ጉዳዮች የመጨረሻ የሰበር ውሳኔ የሚሰጠው የክልል ጠቅላይ ፍርድቤት ብቻ እንደሆነ አድርጎ መቁጠሩ ግን ሕገ መንግስቱን ያገናዘበ አይደለም። ለክልል ፍርድቤቶች በጣምራነት የተሰጡ የፌደራል ጉዳዮች ወደክልሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት መቅረብ የሚኖርባቸው ቢሆንም በዚህ የሰበር ችሎት የሚሰጠው ውሳኔ የመጨረሻ ሳይሆን የፌደራል ጠቅላይ ፍርድ ቤቱም ጉዳዩን በሰበር የማየት ስልጣን አለው። ምክንያቱም በሕገ መንግስቱ አንቀጽ 80(3)(ሀ) መሰረት የፌደራሉ ጠቅላይ ፍርድቤት ማንኛውንም የመጨረሻ ውሳኔን ተመልክቶ በሰበር የማረም ስልጣን ያለው በመሆኑ ነው። የፌደራል ሕጎች በሀገሪቱ ወጥ የሆነ አተረጓጎምና አፈፃፀም እንዲኖራቸው የማድረግ ሃላፊነት የተጣለበት በፌደራል ጠቅላይ ፍርድቤት ላይ በመሆኑ ጉዳዮቹ በክልል ሰበር ሰሚ ችሎት ታይተው ክልል ላይ ይቋጨ ከተባለ ጠቅላይ ፍርድቤቱ ይህንን ሚናውን በተገቢው ሁኔታ መወጣት እንዳይችል ያደርገዋል። በመሆኑም የአሠሪና ሠራተኛ ሕጉ አንድ የፖለቲካና የኢኮኖሚ ማህበረሰብ ለመፍጠር ከሚያስችሉ ህጎች መካከል አንዱና ዋነኛው በመሆኑ ይህንን ህግ በተመለከተ በሀገሪቱ ወጥ የሆነ አተረጓጎምና አፈፃፀም እንዲኖር ለማድረግ የፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት እነዚህን ጉዳዮች በሰበር የማዬታ መመልከት ይኖርበታል፤ የመመልከት ስልጣንም ተሰጥቶታል።

ወደአሠሪና ሠራተኛ ጉዳይ በምንመጣበት ጊዜ እንደዚህ አጥኝ እምነት በአዋጁ በግልጽ ለክልል የወረዳ፣ የከፍተኛና ጠቅላይ ፍርድቤቶች በጣምራነት በተሰጡ የፌደራል ጉዳዮችን በሰበር የማየት ስልጣን ያለው የክልል ጠቅላይ ፍርድቤት ነው። ምክንያቱም በአሠሪና ሠራተኛ አዋጁ የተወሰኑ ጉዳዮችን አይቶ የመዳኘት የስረ ነገር ስልጣን በጣምራነት ለክልል ፍርድቤቶች በግልጽ የሰጠ በመሆኑና እነዚህ ጉዳዮች ደግሞ በአዋጅ ቁጥር 25/1988 መሰረት ለፌደራል ፍርድቤቶች በግልጽ ተለይተው የተሰጡ ጉዳዮች ባለመሆናቸው ለክልል ፍርድቤቶች እንደተሰጡ ጉዳዮች ተደርገው መቆጠር አለባቸው። ስለዚህ ከላይ የቀረበውን የመጀመሪያውን አቋም በመደገፍ እነዚህን ጉዳዮች በክልልና በፌደራል ፍርድቤቶች የጣምራነት ስልጣን የሚወድቁ በመሆናቸው ጉዳዩን በሰበር የማየት ስልጣን ሊኖረው የሚገባው የክልል ፍርድቤት ነው። ሆኖም ግን ምንም እንኳን ጉዳዮቹ በጣምራነት ለክልል ፍርድቤቶች የተሰጡ ቢሆንም የፌደራል ሕግ ከሆነው የአሠሪና ሠራተኛ ሕግ የመነጩ ጉዳዮች በመሆናቸው የክልል ጠቅላይ ፍርድቤት በሰበር የሰጠው ውሳኔ በጉዳዩ ላይ የመጨረሻ መሆን የለበትም። ከዚህ አንፃር በዚህ ጉዳይ ላይ የክልል ሰበር ችሎቱ የሰጠውን የመጨረሻ ውሳኔ የፌደራል ጠቅላይ ፍርድቤት በሰበር ሊመለከተው እንደሚገባ ከሕገ መንግስቱ ንባብ በቀላሉ መረዳት ይቻላል። በዚህ ላይ አሁን የፌደራል ጠቅላይ ፍርድቤት

[37] አብዲሳ ዳሹራ በግርጌ ማስታዎሻ ቁጥር 28 እንደተጠቀሰ፣ ገጽ 97

እየተከተለው ያለው አሰራር ትክክለኛነት ያለውና ሕጉን ያገናዘበ ነው፡፡ የፌደራሉ ሰበር ሰሚ ችሎት በሰበር መዝገብ ቁጥር 94106 ላይ በክልሉ ውስጥ የሰበር ሰሚ ችሎት ካለ በክልል ወረዳ ፍርድቤት የተጀመረ አንድ ጉዳይ በዚያው ክልል በሰበር ሳይመረመር ወደ ፌደራል ሰበር ሰሚ ችሎት ሊቀርብና ሊስተናገድ አይገባውም የሚል ውሳኔ በ2006 ዓ.ም ሰጥቷል፡፡ ጉዳዩ የአሠሪና ሠራተኛ ጉዳይን መሰረት አድርጎ የቀረበ ሲሆን በክልሉ የወረዳ ፍርድቤት ተጀምሮ በዞን ከፍተኛ ፍርድቤት በይግባኝ ቀርቦ የስር ፍርድቤት ውሳኔ ከፀና በኋላ አመልካቹ ጉዳዩን በቀጥታ ለፌደራል ጠቅላይ ፍርድቤት ሲያቀርብ ሰበር ሰሚ ችሎቱ መጀመሪያ ወደ ክልል ሰበር ሰሚ ችሎት ሳይቀርብ ወደዚህ ችሎት መቅረብ አልነበረበትም ብሎ ክሱን ውድቅ አድርጎታል፡፡[38] ምንም እንኳን ጉዳዩ መሰረት ያደረገው ለክልሎች በጣምራነት በተሰጠ የአሰሪና ሰራተኛ ጉዳይ በመሆኑ የፍርድ ቤቱ ውሳኔ ተገቢና የሚነቀፍ ባይሆንም አንዳንድ የሕግ ምሁራን ይህንን ውሳኔ በመቃወም በጽኑ ተችተውታል፡፡[39] እንደ አጥኚዉ እምነት ጉዳዩ ለክልሎች በጣምራነት የተሰጠ የአሰሪና ሰራተኛ ጉዳይ በመሆኑ ፍርድ ቤቱ የደረሰበት ድምዳሜ የሚነቀፍ አይደለም፡፡

አሁን ለተያዘው ጉዳይ ጠቃሚ የሚሆነው ለአሰሪና ሰራተኛ ቦርዶች በስረ ነገርና ለከፍተኛ ፍርድቤት በይግባኝ በተሰጡ የወል የስራ ክርክሮች የአሠሪና ሠራተኛ አዋጁ በግልጽ የተለየ አካሄድ የተከተለ በመሆኑ እነዚህን ጉዳዮች አስመልክቶ ቦርዶች የወሰናቸውን ውሳኔዎች በሰበር የማየት ስልጣን የማን ነው የሚለውን በጥልቀት መመርመር ያስፈልጋል፡፡ የአሠሪና ሠራተኛ አዋጁ ለክልል ወረዳ ፍ/ቤቶች በግል የአሠሪና ሠራተኛ ጉዳዮች የስረ-ነገር ስልጣን ከሰጠና እነዚህንም ጉዳዮች የክልሉ ከፍተኛ ፍርድቤቶች በይግባኝ የሚያዩበትን አሰራር ካስቀመጠ በኃላ በልዩ ሁኔታ የወል የአሰሪና ሰራተኛ ክርክሮችን በስረ ነገርና በይግባኝ የማየት ብቸኛ ስልጣን እንደየቅደምተከተላቸው ለአሰሪና ሰራተኛ ወሳኝ ቦርዶችና ለፌደራል ከፍተኛ ፍርድቤት ሰጥቷል፡፡[40] በሌላ አነጋገር የአሠሪና ሠራተኛ አዋጁ የግል የስራ ክርክሮችን ከክልል የወረዳ ፍ/ቤቶች ጀምሮ በቀጥታ በክልል ፍርድቤቶች በስረነገርና በይግባኝ እንዲታዩ ያደረገ ቢሆንም ከዚህ አካሄድ በተለየ ሁኔታ በየክልሎቹ የተቋቋሙት ጊዜያዊና ቋሚ ቦርዶች የሚሰጧቸውን ውሳኔዎች በይግባኝ የማየት ስልጣን ግን ለክልል ፍርድቤቶች ሳይሆን በቀጥታ ለፌደራሉ ከፍተኛ ፍርድቤት ብቻ ሰጥቷል፡፡ የተወሰኑ ጉዳዮችን ለክልል ወረዳ ፍርድቤቶች ከሰጠና ጉዳዮቹም በክልል ፍርድቤቶች በይግባኝ እንዲታዩ በግልጽ ካስቀመጠ በኃላ የቦርዱን ውሳኔዎች በይግባኝ የማየት ስልጣን ለፌደራል ከፍተኛ ፍ/ቤት እንዲሆን ያደረገበት ምክንያት ይህ ጉዳይ የክልል ፍርድቤቶች ጣምራ ስልጣን እንዳይሆንና በዚህ ጉዳይ ላይ የፌደራል ፍርድቤቶች ብቸኛ ስልጣን እንዲኖራቸውና ክልሎች ጉዳዩን በውክልና ስልጣናቸው ብቻ እንዲመለከቱት በመፈለጉ ነው ብሎ መረዳት ይቻላል፡፡ በመሆኑን ከሕገ መንግስቱ፣ ከአሠሪና ሠራተኛ አዋጁ ብሎም ከፌደራል ፍርድቤቶች ማቋቋሚያ አዋጅ ጣምራ ንባብ መረዳት የምንችለው በአሠሪና ሠራተኛ ወሳኝ ቦርዶች የሚወሰኑ ጉዳዮች የፌደራል ፍርድ ቤቶች የስረ ነገር ስልጣኖች መሆናቸውን ነው፡፡ በዚህም ምክንያት የክልል ጠቅላይ ፍርድቤቶች በቦርዶቹ የሚሰጡ ውሳኔዎችን በይግባኝ ማየት የሚችሉት በአሠሪና ሠራተኛ አዋጁ በቀጥታ በተሰጣቸው የጣምራ ስልጣን ሳይሆን በሕገ መንግስቱ በተቀመጠው የውክልና ስልጣን መሆኑን በቀላሉ መገንዘብ ይቻላል፡፡ የክልል ፍርድቤቶች በነዚህ ጉዳዮች ላይ የተሰጣቸው በይግባኝ የማየት ስልጣን የጣምራ ስልጣን

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[38] ኢትዮ-ቴሌኮም ደቡብ ምዕራብና ጋምቤላ ሪጅንና ወ/ሮ ሳባ መንገሻ፣የሰበር መዝገብ ቁጥር 94106፣ ቅጽ 16

[39] መሐሪ ረዳኢ በግርጌ ማስተዎሻ ቁጥር 23 እንደተገለፀው ፣ገጽ 187-188

[40] የአሠሪና ሠራተኛ አዋጅ በግርጌ ማስታዎሻ ቁጥር 28 እንደተገለጸው ፣ አንቀጽ 14

ቢሆን ኑሮ አዋጁ የተወሰኑ የአሠሪና ሠራተኛ ጉዳዮችን ከወረዳ ጀምሮ እስከ ክልል ጠቅላይ ፍርድቤቶች ድረስ በስረ ነገርና በይግባኝ የሚታዩበትን አግባብ ካስቀመጠ በኋላ በቦርዶቹ የሚወሰኑ ጉዳዮችን በይግባኝ የማየት ስልጣን በልዩ ሁኔታ ለፌደራል ከፍተኛ ፍርድ ቤት ብቻ አይሰጥም ነበር። በመሆኑም አዋጁ ይህንን ያደረገው በእነዚህ ጉዳዮች ላይ የክልል ፍርድቤቶች የውክልና ስልጣን እንጅ የጣምራ ስልጣን እንዳይኖራቸው ለማድረግና እነዚህ ጉዳዮች የፌደራል ፍርድቤቶች ብቸኛ ስልጣን እንዲሆኑ በማሰብ ነው ብሎ መደምደም ይቻላል።

እነዚህ ጉዳዮች ከላይ በቀረበው አግባብ የፌደራል ጉዳዮች መሆናቸውን ካየን በቀጣይ በጥልቀት መታየት ያለበት ነገር እነዚህን ጉዳዮች በሰበር የማየት ስልጣን የፌደራል ፍርድቤት ነው ወይስ የክልል ፍርድቤቶች የሚለውን ጥያቄ ነው። ከዚህ በላይ በነበረው ገለፃ የፌደራል ፍርድቤቶች በብቸኝነት በተሰጣቸው ስልጣንና ክልሎች በሕገ መንግስቱ በተሰጣቸው ውክልና መሰረት የሚመለከቱት ማንኛውም የፌደራል ጉዳይን በይግባኝ የማየት ስልጣን የፌደራል ሰበር ሰሚ ችሎት እንጅ የክልል ጠቅላይ ፍርድቤቶች እንዳልሆነ ተመልክተናል። ምክንያቱም በሕገ መንግስቱ አንቀጽ 80(3)(ለ) መሰረት ለክልል ጠቅላይ ፍርድቤት ጉዳዮችን በሰበር የማረም ስልጣን የተሰጣቸው መሰረታዊ የሆነ የሕግ ስህተት ባለባቸው <u>የክልል ጉዳዮች</u> (ሰረዝ የተጨመረ) ብቻ እንደሆነ በግልጽ ተመልክቷል። የአሠሪና ሠራተኛ ቦርድ የሚወስነው ማንኛውም ውሳኔ በይግባኝ የሚቀርበው ለፌደራል ከፍተኛ ፍርድቤት እንደሆነ በአሠሪና ሠራተኛ አዋጅ አንቀጽ 140ና 154 በግልጽ ተመላክቷል። እነዚህ ጉዳዮች የፌደራል ጉዳዮች በመሆናቸው የክልል ፍርድቤቶች በውክልና የሚመለከቷቸው ሲሆን በአሰሪና ሰራተኛ ቦርዱ የሚወሰኑ የወል የስራ ክርክሮች የክልል ፍርድቤቶች በስረ ነገር ደረጃ ሳይሆን ጉዳዩን በውክልና በይግባኝ የማየት ስልጣን ብቻ እንደተሰጣቸው ግልጽ ነው። ምክንያቱም አዋጁ የግል የስራ ክርክሮች በክልል የመጀመሪያ ደረጃ ፍርድቤት ከታዩ በኋላ ጉዳዩን በይግባኝ የማየት ስልጣን በግልጽ የክልል ይግባኝ ሰሚ ፍርድቤቶች እንደሆነ በአንቀጽ 139 ካስቀመጠ በኋላ ከዚያው አንቀጽ ቀጥሎ ባለው አንቀጽ 140 በቦርዱ የሚወሰኑ የወል አሰሪና ሰራተኛ ክርክሮችን የማየት ስልጣ የክልል ይግባኝ ሰሚ ፍርድቤት ሳይሆን በግልጽ የፌደራል ከፍተኛ ፍርድቤት ስልጣን መሆኑን ያስቀመጠ በመሆኑ ነው። አዋጁ እነዚህ ጉዳዮች በክልል የመደበኛ ይግባኝ ሰሚ ፍርድቤቶች በጣምራነት እንዲታዩ ቢፈልግ ኖሮ በአንቀጽ 139 ከተመለከተው አቋም በተለየ ሁኔታ ጉዳዮቹን በይግባኝ የማየትን ስልጣን ለፌደራል ከፍተኛ ፍርድቤት አይሰጥም ነበር፤ ወይም የክልል ይግባኝ ሰሚ ችሎቶች ጉዳዩን በይግባኝ እንደሚመለከቱት በግልጽ ያስቀምጥ ነበር። ከዚህ ላይ አሁን የወጣውን አዋጅ በምንመለከትበት ጊዜ ከአሁን ቀደም የነበረው አዋጅ በአሰሪና ሰራተኛ ወሳኝ ቦርድ የሚሰጡ ውሳኔዎችን በይግባኝ የማየት ስልጣን ለፌደራል ከፍተኛ ፍርድቤት እና በውክልና ደግሞ ለክልል ጠቅላይ ፍርድቤት መሰጠቱ ተገቢ አለመሆኑን በመገንዘብ ጉዳዩን በፌደራልም ሆነ በክልል ደረጃ ያሉ ከፍተኛ ፍርድቤቶች በስረ ነገር ስልጣን እንዲመለከቱት አድርጓል። በመሆኑም ከአሁን በፊት ይህንን ጉዳይ የክልል ጠቅላይ ፍርድቤቶች የሚመለከቱት በሕገ መንግስቱ በተቀመጠው ውክልና መሰረት ሲሆን ከአሁን በኋላ ግን የክልል ከፍተኛ ፍርድቤቶች በቦርዱ ውሳኔ የተሰጠበትን የወል የስራ ክርክር በጣምራ ስልጣን በስረ ነገር ደረጃ በይግባኝ የማየት ስልጣን ተሰጥቷቸዋል።[41] ከዚህ በተጨማሪ ሕገ-መንግስቱን በምናይበት ጊዜ የክልል ፍርድቤቶች በሰበር የማየት ስልጣን የተሰጣቸው በክልል ጉዳይ ላይ በተሰጠ የመጨረሻ ውሳኔ ላይ እንጅ በግልጽ ለፌደራል

[41] አዲሱ የአሰሪና ሰራተኛ አዋጅ አንቀጽ 155

መንግስቱ ተለይተው የተሰጡና የክልል ፍርድቤቶች በውክልና በሚመለከቷቸው የፌደራል ጉዳዮችን እንዳልሆነ በቀላሉ መረዳት ይቻላል።[42] በሕገ መንግስቱ አንቀጽ 80(6) እንደተቀመጠው የክልል ጠቅላይ ፍርድቤት በውክልና ስልጣኑ የሚያያቸውን ጉዳዮች በይግባኝ የማየት ስልጣኑ ተሻግሮ የሚሄደው ወደ ፌደራሉ ጠቅላይ ፍርድቤት በመሆኑ ይህ አይነት ጉዳይ በክልሉ ሆነ በፌደራሉ ጠቅላይ ፍርድቤት የመጨረሻ ውሳኔ ሲሰጥበት ጉዳዩን በሰበር የማየት ስልጣን ሊኖረው የሚገባው የፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት እንጅ የክልል ሰበር ሰሚ ችሎት አይደለም።

በአጠቃላይ ምንም እንኳን የፌደራል ፍርድቤቶች ማቋቋሚያ አዋጅ የአሠሪና ሠራተኛ ጉዳይን በግልጽ ለፌደራል ፍርድቤቶች በብቸኝነት ያልሰጠ ቢሆንም በኋላ የወጣው የአሠሪና ሠራተኛ አዋጅ አንዳንድ ጉዳዮችን በግልጽ ለይቶ ለክልል ፍርድቤቶች ከሰጠ በኋላ የወል የስራ ክርክሮችን ለአሰሪና ሰራተኛ ወሳኝ ቦርዱና ለፌደራል ከፍተኛ ፍርድቤት በመስጠት የፌደራል ፍርድቤቶች ጉዳይ እንዲሆንና በዚህ ዙሪያ ላይ የክልል መደበኛ ፍርድቤቶች ጉዳዩን በውክልና በይግባኝ የማየት ስልጣ ብቻ እንዲኖራቸው አድርጓል። ከዚህ ላይ ግልጽ ሊሆን የሚገባው ነገር አሁን በተግባር የአሰሪና ሰራተኛ ወሳኝ ቦርድ የወሰነውን ውሳኔ የክልል ጠቅላይ ፍርድቤቶች የሚመለከቱት በአሰሪና ሰራተኛ አዋጁ መሰረት ሳይሆን በሕገ መንግስቱ አንቀጽ 80(2) በተሰጣቸው የውክልና ስልጣን ነው። ከዚህ አንፃር የአሠሪና ሠራተኛ ሕጉ በአሠሪና ሠራተኛ ጉዳይ ላይ ልዩ ሕግና ከፌደራል ፍርድቤቶች ማቋቋሚያ አዋጅ በኋላ የወጣ ሕግ በመሆኑ የአሠሪና ሠራተኛ ጉዳይን በተመለከተ ያለውን የፍርድቤቶች የስልጣን ክፍፍል ለመወሰን የበላይነትና ቅድሚያ ሊሰጠው የሚገባው ሕግ ነው።

የፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት መ/ቁ 94839 እና የሰ/መ/ቁ 99426 የውሳኔ ይዘት

በመ/ቁ 94839[43] የተመለከተው ጉዳይ በመተሃራ ስኳር ፋብሪካና በ139 ሰራተኞች መካከል በተፈጠረ የስራ ክርክር ሲሆን ክርክር የተጀመረው ሠራተኞቹ በፋብሪካው ላይ በምስራቅ ኦሮሚያ አሠሪና ሠራተኛ ጉዳይ ወሳኝ ቦርድ በመሰረቱት ክስ ነው። የከሳሾችም የክስ ይዘት ባጭሩ ሲታይ ከተከሳሽ ጋር መስርተው የነበረውን የስራ ውል አዋጅ ቁጥር 714/2003 አንቀጽ 19(7)ን በሚቃረን ሁኔታ ከስራ የተቀነሱ መሆኑን ጠቅሰው እርምጃው ሕገ ወጥ ነው ተብሎ ወደ ስራ እንዲመለሱ ወይም ሕጋዊ ክፍያዎች እንዲከፈሏቸው ዳኝነት ጠይቀዋል። ተከሳሽ ለክሱ በሰጠው መልስ የግል የስራ ክርክር በመሆኑ በቦርዱ ሊታይ እንደማይገባ፣ ክሱም በይርጋ የታገደ መሆኑን በመጀመሪያ ደረጃ መቃወሚያነት ያነሳ ሲሆን በፍሬ ነገር ደረጃም ተገቢ ነው ያለውን የክርክር ነጥብ አንስቷል። ቦርዱም ጉዳዩን መርምሮ ጉዳዩን ለማየት ስልጣን እንዳለው ሆኖም ግን የአብዛኞቹ ሰራተኞች ክስ በይርጋ የታገደ መሆኑንና የ14 ሰራተኞች ደግሞ ምንም እንኳን ክሱ ጊዜውን ጠብቆ የቀረበ ቢሆንም ጥያቄው በክፍያ ላይ የተመሰረተ በመሆኑ በቦርዱ ስልጣን እንደማይወድቅና የወረዳ ፍርድቤት ስልጣን መሆኑን ጠቅሶ መዝገቡን ዘግቷል። ከሳሾቹ በዚህ ውሳኔ ቅር በመሰኘት ይግባኛቸውን ለኦሮሚያ ክልል ጠቅላይ ፍርድቤት አቅርበው ፍርድ ቤቱም ጉዳዩን ከመረመረ በኋላ በሰጠው ውሳኔ የከሳሾች ጥያቄ ከራሳቸው አልፎ የሌሎችን ሰራተኞች የሚነካ በመሆኑ ክርክሩ የወል የስራ ክርክር እንደሚሆንና ጉዳዩም በይርጋም አልታገደም በማለት

[42] የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታወሻ ቁጥር 2 እንደተገለፀው ፣ አንቀጽ 80(3)(ለ)

[43] መትሃራ ስኳር ፋብሪካና ጥበቡ እሸቱ (139 ሰዎች) የሰበር መዝገብ ቁጥር 94839፣ቅጽ 16

የቦርዱን ብይን ሽሮ ቦርዱ በፍሬ ነገር ግራ ቀኙን አከራክሮ ዳኝነት ሊሰጥበት ይገባል በማለት ጉዳዩን መልሶታል። ተከሻሹም ይህንን ውሳኔ በመቃወም ጉዳዩን ወደ ፌደራል ጠቅላይ ፍርድቤት አቅርቦታል። የሰበር ሰሚ ችሎቱም ይህ ጉዳይ በክልል ደረጃ የመጨረሻ ውሳኔ ተሰጥቶበት የቀረበ ጉዳይ ነው ወይ? የሚለውን በጭብጥነት ይዞ ከመረመረ በኋላ ጉዳዩ በክልሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ሳይታይ ወደ ፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ሊቀርብ አይገባም በማለት አቤቱታውን ውድቅ አድርጎታል። ፍርድ ቤቱ እንደሚለው አንድ የስራ ክርክር በፌደራል ጠቅላይ ፍርድቤት ሰበር ችሎት ለመስተናገድ እንዲችል ጉዳዩን ለመወሰን ስልጣን በተሰጣቸው አካላት በተዋረድ ታይቶ የመጨረሻ ውሳኔ የተሰጠበት መሆኑ መረጋገጥ እንደሚገባው ከኢፌዲሪ ሕገ መንግስት አንቀጽ 80(3)(ሐ)ና ከአዋጅ ቁጥር 25/88 አንቀጽ 10(3) ድንጋጌዎች ይዘት መገንዘብ ይቻላል። የሰበር ችሎቱ እንዳተተው ክርክሩ በምስራቃዊ ኦሮሚያ የአሠሪና ሠራተኛ ጉዳይ ወሳኝ ቦርድ የተጀመረና በኦሮሚያ ክልል ጠቅላይ ፍርድቤት ይግባኝ ሰሚ ችሎት ታይቶ የቦርዱ ውሳኔ ከመሻሩ ውጭ በኦሮሚያ ሕገ መንግስትና የክልሉ ፍርድቤቶች እንደገና ለማቋቋም በወጣው አዋጅ መሰረት ጉዳዩ ለክልሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ቀርቦ ውሳኔ የተሰጠበት ባለመሆኑ ጉዳዩ ለክልሉ ጠቅላይ ፍርድቤት ችሎት ቀርቦ ሊታይ የማይችልበት ሌላ ህጋዊ ምክንያት የለም። በአጠቃላይ ጉዳዩ በፌደራል ሰበር ሰሚ ችሎት ሊስተናገድ በሚችል ደረጃ የመጨረሻ ውሳኔ ያልተሰጠበ በመሆኑና የቀረበው የስራ ክርክር የሚመራው በአዋጅ ቁጥር 377/1996 መሰረት በመሆኑ በክልል ሰበር ሰሚ ችሎት ያልታየ ውሳኔን ችሎቱ የሚያስተናግድበት አግባብ የለም በማለት ወስኗል።[44]

ሁለተኛው የሰ/መ/ቁ 99426ን[45] በምንመለከትበት ጊዜ ደግሞ ጉዳዩ በአሽራፍ አግሪካልቸራልና ኢንዱስትሪያል ኃ/የተ/የግል ማህበርና በእነ አየለ አድማሱ 113 ሰዎች መካከል የነበረ የስራ ክርክር ሲሆን ጉዳዩ የተጀመረው በምእራብ አማራ የአሠሪና ሠራተኛ ጉዳይ ወሳኝ ቦርድ ነው። ከሳሾች ባቀረቡት ክስ ተከሻሽ የመዋቅር ለውጥ ባልተደረገበት ሁኔታ የመዋቅር ለውጥ በመስራት ላይ ስለሆንኩኝ የሰው ሃይል ለመቀነስ አስፈልጎኛል በማለት ሰራኞችን በሚጎዳ መልኩ የቀነሰን በመሆኑ ቅነሳው ህግ ወጥ ነው ተብሎ ያልተከፈልን ደመወዝ ተከፍሎን ወደ ስራ እንመለስ ሲሉ ጠይቀዋል። ቦርዱም አመልካች የፈጸመው የሰራተኞች ቅነሳ በአዋጅ 377/96 አንቀጽ 29-50 ያሉትን ተከትሎ ያልፈፀመው ስለሆነ አስፈላጊው ክፍያ ተከፍሎ ወደ ስራ እንዲመልሳቸው ወስኗል። ተከሳሽም በውሳኔው ቅር በመሰኘት ወደ ክልሉ ጠቅላይ ፍርድቤት ቅሬታውን በማቅረቡ ፍርድ ቤቱም የቦርዱን ውሳኔ አጽንቷል። ተከሳሹም በቦርዱና በክልሉ ጠቅላይ ፍርድቤት የተሰጠውን ውሳኔ ለማስቀየር ጉዳዩን ለፌደራል ሰበር ሰሚ ችሎት አቀርቧል። የሰበር ችሎቱም ጉዳዩ ከመታየቱ በፊት ምላሽ ሊያገኝ የሚገባው ነጥብ እንደዚህ አይነት የአሠሪና ሠራተኛ ክርክር በክልሉ የአሠሪና ሠራተኛ ወሳኝ ቦርድ ከተጀመረና በይግባኝ በክልል ፍርድቤት ከታየ በኋላ በክልሉ ሰበር ሰሚ ሳይታይ ወደ ፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት መቅረብ አለበት የሚለው በጭብጥነት ይዞ ጉዳዩን መርምሯል። ችሎቱም ከአሁን ቀደም በተመሳሳይ ጉዳይ ላይ በመዝገብ ቁጥር 95298፣ 98381፣ እና 94839 ትርጉም የሰጠበት መሆኑን በማስታዎስ አመልካች የክልሉ ጠቅላይ ፍርድቤት በይግባኝ የወሰነውን የመጨረሻ ውሳኔ ወደ ክልሉ ሰበር ማቅረብ ሲገባው ወደ ፌደራል ጠቅላይ ሰበር ሰሚ ችሎት ማቅረቡ

[44] ገዢ ከማሁ

[45] አሽራፍ አግሪካልቸራልና ኢንዱስትሪያል ኃ/የተ/የግልማህበርና አየለ አድማሱ(113 ሰዎች)፣ የሰበር መዝገብ ቁጥር 99426 (ያልታተመ)

መሰረታዊ የስነ ስርዓት ሕግ ስህተት ያለበት በመሆኑ ጉዳዩ ከክልል ሰበር ሰሚ ችሎት አቤቱታ በፊት ለፌደራል ሰበር ሰሚ ችሎት ቀርቦ የሚታይበት አግባብ እንደሌለ ወስኗል፡፡

በሁለቱ መዝገቦች ላይ የሰበር ችሎቱ የሰጠውን ውሳኔ በተመለከተ የቀረበ ትችት

በመጀመሪያ ደረጃ ችሎቱ ለአሠሪና ሠራተኛ ወሳኝ ቦርዶችና ለክልል መደበኛ ፍርድቤቶች የተሰጡ የአሠሪና ሠራተኛ ጉዳዮቹን አንድ አድርጎ በመቁጠር ማንኛውም ከአሠሪና ሠራተኛ አዋጁ የመነጨ ጉዳይ በተመሳሳይ ስነ ስርዓት መስተናገድ አለበት የሚል አቋም ይዞ ጉዳዮቹን መመርመሩ ተገቢ አልነበረም፡፡ በመሆኑም ችሎቱ ጉዳዩ ከክልሎች የመጣ መሆኑን እንጅ ክልሎች ይህንን ጉዳይ ያዩት በራሳቸው ብቸኛ ስልጣን የሚወድቅ በመሆኑ ነው? ወይስ ጉዳዩ የፌደራል ጉዳይ ሆኖ በጣምራነት ወይም በውክልና ያገኙት በመሆኑ ነው? የሚለውን በጭብጥነት ይዞ አልመረመረም፡፡ ከዚህ አንፃር ችሎቱ ጉዳዩን በሚመረምርበት ጊዜ የአሠሪና ሠራተኛ ጉዳዮች የወልና የግል ጉዳይ ተብለው እንደተከፋፈሉና እነዚህ ጉዳዮች በተለያዩ ስነ ስርዓቶች የሚስተናገዱ መሆኑን ከግምት ውስጥ አላስገባም፡፡ ከላይ በዝርዝር እንደተመለከትነው የወል የአሰሪና ሰራተኛ ጉዳዮች በአሠሪና ሠራተኛ ወሳኝ ቦርድ እንደሚታዩና ቦርዱ የሰጠው ውሳኔ በይግባኝ የማየት ስልጣን በብቸኝነት የተሰጠው ለፌደራል ከፍተኛ ፍርድቤቶች ሲሆን የክልል ፍርድቤቶች በቦርዱ የተሰጠውን ውሳኔ በይግባኝ ማየት የሚችሉት በሕገ መንግስቱ በተሰጣቸው የውክልና ስልጣን ብቻ ነው፡፡ በሕገ መንግስቱ የተሰጣቸው ስልጣን ባይኖር ኖሮ የክልል ፍርድቤቶች ይህንን ጉዳይ በይግባኝ የማየት ስልጣን አይኖራቸውም ነበር፡፡ ምክንያቱም የአሰሪና ሰራተኛ አዋጁ በግል የስራ ክርክር ጉዳዮች ላይ የክልል ይግባኝ ሰሚ ፍርድቤቶች ጉዳዩን እንደሚያዩት በግልጽ ካስቀመጠ በኋላ ቦርዱ ውሳኔ የሰጠበትን የወል የስራ ክርክር በይግባኝ የማየት ስልጣን ደግሞ ለፌደራል ከፍተኛ ፍርድቤት ለይቶ የሰጠ በመሆኑ ነው፡፡ ሆኖም ግን የሰበር ፍርድ ቤቱ ይህንን መሰረታዊ ጉዳይ አንድም ቦታ ላይ ሳይጠቅስ ሁሉንም የአሠሪና ሠራተኛ ጉዳዮች የመመልከት ስልጣን ሙሉ በሙሉ ለክልል ፍርድቤቶች እንደተሰጠ አድርጎ በመቁጠር ጉዳዩን መርመሩና የወል የስራ ክርክሮች በክልል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ሳይታዩ በቀጥታ ለፌደራል ሰበር መቅረብ አይችሉም ብሎ መወሰኑ ተቀባይነት የለውም፡፡ ሕገ መንግስቱ የክልል ጠቅላይ ፍርድቤት በውክልና የሚያያቸውን የፌደራል ጉዳዮች በይግባኝ የማየት ስልጣን የፌደራል ጠቅላይ ፍርድ ቤቱ እንደሆነ በግልጽ ያስቀመጠ ሲሆን ሕገ መንግስቱ የክልል ፍርድቤቶች በውክልና የተመለከቷቸውን የፌደራል ጉዳዮች ወደ ክልሉ ሰበር ሰሚ ችሎት ሳይቀርቡ ወደ ፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት መቅረብ የለባቸውም የሚል አቋም ቢኖረው ኖሮ ይህንን ድንጋጌ አያስቀምጥም ነበር፡፡ የፌደራል ከፍተኛ ፍርድቤት ባልተቋቋመባቸው ክልሎች የክልል ጠቅላይ ፍርድቤት የፌዴራል ከፍተኛ ፍርድ ቤትን ስልጣን በውክልና ስለሚያይ ራሱ በውክልና ያየውን ጉዳይ እንደገና በሰበር ይይ ቢባል ጉዳዩን ለፌዴራል ጠቅላይ ፍርድቤት በይግባኝ የማቅረብ መብትን የሚጋፋ ነው፡፡ ቦርዱ በወሰነው ውሳኔ ላይ የፌደራል ከፍተኛ ፍርድ ቤቱ ወይም የክልሉ ጠቅላይ ፍርድቤት በይግባኝ የሚሰጠው ውሳኔ የመጨረሻ ነው ተብሎ በግልጽ በአዋጁ ባይቀመጥ ኖሮ የስራ ክርክር ወሳኝ ቦርድና የክልል ጠቅላይ ፍርድቤት የተለያዩ ውሳኔዎች ቢሰጡ ይግባኝ ለፌዴራል ጠቅላይ ፍርድቤት የማቅረብ መብት ስለሚኖር የክልል ጠቅላይ ፍርድቤት ጉዳዩን በሰበር ይይ ቢባል ይህ የይግባኝ መብት ይቀራል ወይም የፌዴራል ጠቅላይ ፍርድቤት በይግባኝ ካያቸው በኋላ ለሰበር ወደ ክልል ጠቅላይ ፍርድቤት ይመለሳል ማለት ነው፡፡ ይህ ደግሞ ተቀባይነት ያለውና ህጉን የተከተለ አካሄድ አይደለም፡፡ በአጠቃላይ የሰበር ችሎቱ ከወረዳ ፍርድቤት ጀምሮ እስከ ጠቅላይ ፍርድ ቤቱ ድረስ

ተለይተው ለክልሎች በግልጽ የተሰጡ የግል የአሰሪና ሰራተኛ ጉዳዮች ለቦርዱ ከተሰጡ የወል የስራ ክርክሮች የተለዩ መሆናቸውን ቢገነዘብና የክልል ፍርድቤቶች እነዚህን ጉዳዮች በምን አግባብና ብቃት እንደሚያዩዋቸው ቢመረምር ኖሮ አሁን ከደረሰበት የተሳሳተ ድምዳሜ ላይ አይደርስም ነበር፡፡

ከዚህ ላይ ልብ ሊባል የሚገባው ነገር በአዋጅ ቁጥር 25/1988 አንቀጽ 3 መሰረት የፌደራል መንግስቱ ህጎችን መሰረት አድርጎ የሚነሳ ክርክር ለፌደራል ፍርድቤቶች የተሰጠ ስልጣን በመሆኑ የአሰሪና ሰራተኛ ጉዳይ በፌደራል መንግስቱ ሕግ የማውጣት ስልጣን ስር የሚወድቅ በመሆኑ ከዚህ ህግ የሚመነጭ ማንኛውም ጉዳይ በፌደራል ፍርድቤቶች ስልጣን ስር የሚወድቅ ነው፡፡ ሆኖም ግን የአሰሪና ሰራተኛ አዋጁ ከወል የስራ ክርክር በስተቀር የክልል ፍርድቤቶች የአሰሪና ሰራተኛ ጉዳይን እንዲመለከቱ ስልጣን ሰጥቷል፡፡ ይህ በሆነበት ሁኔታ የአሠሪና ሠራተኛ ቦርድ ባየው ጉዳይ ላይ የክልሉ ጠቅላይ ፍርድቤት በውክልና በይግባኝ ተመልክቶ የሚሰጠው ውሳኔ የመጨረሻ እንደሚሆን በግልጽ የተቀመጠ በመሆኑ ጉዳዩን የፌደራል ጠቅላይ ፍርድቤት በሰበር የሚመለከተው ከመሆኑ በቀር የክልል ጠቅላይ ፍርድቤት ጉዳዩን በሰበር የማየት ሕገ መንግስታዊ ስልጣን የለውም፡፡ ከዚህ አንፃር የፌደራል ጠቅላይ ፍርድቤት ይህንን መሰረታዊ ነጥብ ሳይመረምር የደረሰበት ድምዳሜ ከአሠሪና ሠራተኛ አወጁና ከሕገ መንግስቱ ጋር አብሮ የሚሄድ አይደለም፡፡

ሰበር ፍርድ ቤቱ በሁለቱም መዝገቦች ላይ በሰጠው ውሳኔ ላይ የሚስተዋለው ሁለተኛው ችግር ደግሞ ጉዳዩ ለጠቅላይ ፍርድ ቤቱ የቀረበበትን ምክንያት የተረዳበት አግባብና ይህንን መሰረት በማድረግ የደረሰበት ድምዳሜ ጉዳዩንና ሕጉን በደንብ ያላገናዘበ መሆኑ ነው፡፡ ጉዳዩ ለፌደራል ሰበር ሰሚ ችሎት ሊቀርብ የቻለው የክልሉ ጠቅላይ ፍርድቤት በይግባኝ ጉዳዩን የተመለከተው በሕገ መንግስቱ በተሰጠው ውክልና መሰረት በመሆኑ የሰበር አቤቱታ መቅረብ ያለበት ለፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ነው በሚል እምነት ነው፡፡[46] ከዚህ አንፃር የሰበር ችሎቱ በጭብጥነት ይዞ መመርመር የነበረበት የቀረበው ጉዳይ የወል ወይስ የግለሰብ የስራ ክርክር? የወል የስራ ክርክር ከሆነስ ጉዳዩን በስረ ነገር የመመልከት ስልጣን ያለው መደበኛ ፍርድቤት ወይስ የአሠሪና ሠራተኛ ቦርድ? ይህንን ጉዳይ በይግባኝ መመልከት የሚችለው የፌደራል ፍርድቤቶች ወይስ የክልል ፍርድ ቤቶች? በዚህ አግባብ የመጣን ጉዳይ በሰበር የማየት ስልጣንስ የማን ነው? ጉዳዩን ክልሎች የሚመለከቱት ከሆነስ በምን ብቃት ነው? የሚሉትን ጉዳዮች መሆን ሲገባው ይህንን አላደረገም፡፡ የሰበር ችሎቱ ጉዳዩ የወል የስራ ክርክር እንደሆነ፣ ጉዳዩን የማየት ስልጣን በስረ ነገር ደረጃ ለአሰሪና ሰራተኛ ወሳኝ ቦርድ ብሎም በይግባኝ ደረጃ ለፌደራል ከፍተኛ ፍርድቤት የተሰጠ መሆኑን፣ እና ይህንን ጉዳዩ የክልሎቹ ጠቅላይ ፍርድቤቶች የተመለከቱት በውክልና መሆኑን አንድም ቦታ ላይ አላነሳም፡፡ ከትክክለኛ ውሳኔ ላይ ለመድረስ ደግሞ የሰበር ችሎቱ በጭብጥነት ይዞ መፍታት የነበረበት ይህንን የጉዳዩን ዓይነትና አመጣጥ እንጅ የተከራካሪ ወገኖች ማንነት ባለመሆኑና ሁሉም የአሠሪና ሠራተኛ ጉዳዮች ለክልል ፍርድቤቶች በብቸኝነት እንደተሰጡ አድርጎ በመቁጠር ጉዳዩን የመረመረ በመሆኑ ከዚህ የተሳሳተ ድምዳሜ ላይ ሊደርስ ችሏል፡፡

[46] ለአብነትመ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት በቀን 04/02/07 ያለፈ ሰበር ይፈቀድልኝ በሚል በአሸራፍ አግሪካልቸራልና ኢንዱስትሪያል ኃ/የተ/የግል ማህበር የቀረበ አቤቱታ(አቤቱታው የቀረበው ጉዳዩን ወደ ፌደራል ሰበር ሰሚ በመሄዱ ምክንያትና የሰበር ችሎቱም ጉዳዩ በክልሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ሳይቀረብ ወደፌደራል ሰበር ሰሚ ችሎት መቅረብ አይችልም ብሎ ውሳኔ በመስጠቱ ለክልሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት የማቅረቢያ የጊዜ ገደቡ በማለፉ የሰበር አቤቱታው እንዲፈቀድለት ለመጠየቅ የቀረበ አቤቱታ ነው፡፡)

ከዚህ ላይ የሰበር ፍርድ ቤቱ ለትችት በቀረቡት ሁለት መዝገቦች ላይ የተመለከተውን ውሳኔ ለመስጠት ከአሁን በፊት ውሳኔ የሰጠበትን የሰበር መዝገብ ቁጥር 95298 መሰረት ማድረጉን በምናይበት ጊዜ ጠቅላይ ፍርድ ቤቱ ይህንን ስህተት ለምን እንደሰራ በቀላሉ መገንዘብ ይቻላል። ምክንያቱም በሰበር መዝገብ ቁጥር 95298 የቀረበው ጉዳይ በክልል የወረዳ ፍርድቤት ተጀምሮ በክልሉ ጠቅላይ ፍርድቤት በይግባኝ የተወሰነ የግል የስራ ክርክር አንጅ በውል የስራ ክርክር ጉዳይ ባለመሆኑ በእነዚህ ሁለት መዝገቦች ከቀረበው ጉዳይ ጋር ምንም አይነት ግንኙነት የለውም። በመዝገብ ቁጥር 95298 ላይ ጠቅላይ ፍርድ ቤቱ የሚከተለውን ትንታኔና ውሳኔ ሰጥቷል[47]፦

> *የአሠሪና ሠራተኛ ጉዳይን በተመለከተ በክልሎች ውስጥ የሚነሱ የግል የስራ ክርክር ጉዳዮችን ተቀብሎ የማየት የስረ ነገር ስልጣን የተሰጠው ለክልል የመጀመሪያ ፍርድቤት ለመሆኑ በአዋጅ ቁጥር 3771996 አንቀጽ 138(1) ተደንግጓል። ይህ ድንጋጌውም በአዋጅ ቁጥር 25/1988 የተደነገገውን ዓይነት የተከራካሪ አካላትን ማንነት ከግንዛቤ ውስጥ ካለማስገባቱም ሌላ ድንጋጌው የተካተተበት አዋጅ ቁጥር 377/1996 የወጣው ከአዋጅ ቁጥር 25/1988በኋላ ከመሆኑ አንፃር የአሠሪና ሠራተኛ ጉዳይ ክርክር የተለየ ባህርይ ከግምት ውስጥ በማስገባት ሕግ አውጭው ማናቸውም በክልሎች ውስጥ የሚነሳ የአሠሪና ሠራተኛ ጉዳይ የተከራካሪ ወገኖችን ማንነትን ከግምት ውስጥ ሳይገባ በክልል የመጀመሪያ ደረጃ ፍርድቤት እንዲታይ መደነግጉን፤ አንድ ጉዳይ የተነሳው በክልል የመጀመሪያ ፍርድቤት ከሆነ ደግሞ ጉዳዩ በተነሳበት ክልል የሰበር ችሎት የተደራጀ እስከሆነ ድረስ በክልሉ ሰበር ሰሚ ችሎት ሳይታይና ውሳኔው የመጨረሻ መሆኑ ሳይረጋገጥ በቀጥታ ለፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ቀርቦ ሊስተናገድ የሚችልበት ሀጋዊ ምክንያት አይኖርም* በማለት የቀረበውን አቤቱታ ውድቅ አድርጎታል።

ከዚህ የፍርድ ቤቱ ውሳኔ መረዳት የምንችለው የሰበር መዝገብ ቁጥር 95298 የግል የስራ ክርክርን የተመለከተ ሲሆን በመዝገብ ቁጥር 94839ና መዝገብ ቁጥር 99426 ደግሞ የወል የስራ ክርክርን የተመለከቱ በመሆናቸው በሰበር መዝገብ ቁጥር 95298 የተሰጠው ውሳኔ በእነዚህ ሁለት መዝገቦች ለተያዘው ጉዳይ ምንም አይነት አግባብነት ያልነበረው መሆኑን ነው። ከዚህ አንፃር ሰበር ሰሚ ችሎቱ በቦርዶቹ የሚታዩ የወል የስራ ክርክሮችንና በክልል ፍርድቤቶች የሚታዩ የግለሰብ የአሠሪና ሠራተኛ ጉዳዮችን አንድ አድርጎ በመቁጠር በክልል የወረዳ ፍርድቤት ለተጀመረ የግል የአሠሪና ሠራተኛ ክርክር የሰጠውን ውሳኔ በአሠሪና ሠራተኛ ቦርድ በታየ የወል የስራ ክርክር ላይ መጥቀስና በዛ መዝገብ ላይ የሰጠውን ትንታኔና ምክንያት መሰረት አድርጎ ውሳኔ መስጠቱ ተገቢ አልነበረም።[48]

የፌደራል ጠቅላይ ፍርድ ቤቱ ሰበር ሰሚ ችሎት የሰራው ሶስተኛው ስህተት ደግሞ በሕገ መንግስቱ አንቀጽ 80(3)(ለ) የተቀመጠውን ሃሳብ በደንብ ያልመረመረ መሆኑ ነው። በሕገ መንግስቱ በግልጽ እንደተደነገገው የክልል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት የሰበር ስልጣን የተሰጠው በክልል ጉዳዮች ብቻ እንጅ ለፌደራል ፍርድቤቶች በብቸኝነት በተሰጡ

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[47] የሰበር መዝገብ ቁጥር 94102 በሰበር መዝገብ ቁጥር 94102 ቅጽ 16 እንደተጠቀሰው

[48] የአሠሪና ሠራተኛ አዋጅ በግርጌ ማስረታዎሻ ቁጥር እንደተገለጸው አንቀጽ 137-139140፤147፣ 153ና የኢፌዲሪ ሕገ መንግስት በግርጌ ማስታዎሻ ቁጥር 2 እንደተገለጸው ፣ አንቀጽ 80

ጉዳዮች ጭምር እንዳልሆነ ግልጽ ነው። የክልል ጠቅላይ ፍርድቤት በውክልና ስልጣኑ በይግባኝ የሚመለከታቸውን ጉዳዮች የፌደራል ጠቅላይ ፍርድቤት በይግባኝ የማየት ስልጣን አለው። አሁን የተያዘው ጉዳይ ደግሞ በአሠሪና ሠራተኛ አዋጁ መሰረት በስረ ነገርና በይግባኝ የማየት ስልጣን የተሰጠው ለአሠሪና ሠራተኛ ቦርዱና ለፌደራል ከፍተኛ ፍርድቤት በመሆኑ የክልል ጠቅላይ ፍርድቤት በውክልና ስልጣኑ ተመልክቶ ውሳኔ የሰጠበትን የወል የስራ ክርክር የክልል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት በሰበር የማየት ሕገ መንግስታዊ ስልጣን የለውም። ምክንያቱም የክልል ጠቅላይ ፍርድቤት የአሰሪና ሰራተኛ ቦርድ ውሳኔ የሰጠበትን የወል የስራ ክርክር ለማየት ስልጣን ያገኘው በአሰሪና ሰራተኛ አዋጁ ሳይሆን በሕገ-መንግስቱ መሰረት የፌደራል ከፍተኛ ፍርድ ቤትን ስልጣን በውክልና የመመልከት ስልጣን ያለው በመሆኑ እንጅ ይህ ጉዳይ ለክልል ፍርድ ቤቱች የተሰጠ ጉዳይ ስለሆነ አይደለም። ስለሆነም በነዚህ ሁለት መዝገቦች የፌደራል ጠቅላይ ፍርድቤት ሰበር ችሎቱ በሕገ መንግስቱ የተሰጠውን ስልጣን አሳልፎ የሰጠ ከመሆኑም በላይ ሕጉን የተረጎመበት አግባብና የደረሰበት ድምዳሜ ምንም አይነት ህጋዊ ተቀባይነት የለውም።

በመጨረሻም የሰበር ፍርድቤት የደረሰበትን ድምዳሜ ተቀባይነቱን ጥያቄ ውስጥ የሚጥለው ፍርድ ቤቱ የያዘው አቋም የፌደራል ከፍተኛ ፍርድቤቶች በተቋቋሙባቸው ክልሎች ያለውን አንድምታ በምናይበት ጊዜ ነው። ከዚህ ላይ የሰበር ችሎቱ የፌደራል ከፍተኛ ፍርድቤቶች በተቋቋሙባቸው ክልሎች የሚገኙ ጠቅላይ ፍርድቤቶች በአሰሪና ሰራተኛ ወሳኝ ቦርድ የሚወሰኑ የወል የስራ ክርክሮችን በይግባኝ የማየት ስልጣን የሌላቸው መሆኑንና የይግባኝ ስልጣን የሚኖራቸው በክልሎቹ የተቋቋሙት የፌደራል ከፍተኛ ፍርድቤቶች መሆናቸውን ከግንዛቤ ውስጥ አላስገባም። ይህ ብቻ ሳይሆን ለወደፊቱ በሁሉም የሀገሪቱ ክፍሎች የፌደራል ከፍተኛ ፍርድቤቶች ሲቋቋሙ የአሠሪና ሠራተኛ ቦርዶች በስረ ነገር የወሰኗቸውን የወል የስራ ክርክሮች በእነዚህ ቦታዎች የሚገኙ የክልል ጠቅላይ ፍርድቤቶች ጉዳዮቹን በይግባኝ የማየት ስልጣን ሙሉ በሙሉ ቀሪ እንደሚሆን ግልጽ ነው። ምክንያቱም የክልል ፍርድቤቶች የፌደራል ጉዳዮችን በውክልና የሚያዩት በጊዚያዊነትና የፌደራል ፍርድቤቶች በክልሎቹ እስከሚቋቋሙ ድረስ እንደሆነ ከሕገ መንግስቱ መረዳት ይቻላል።[49] ሆኖም ግን ከላይ በቀረቡት ሁለት የሰበር መዝገቦች ከተሰጠው ውሳኔ መገንዘብ እንደምንችለው በክልሎች የሚነሱ የወል የአሰሪና ሰራተኛ ጉዳዮች ወሳኝ ቦርድ መታየት ያለባቸው ቢሆንም እነዚህ ውሳኔዎች በክልሉ ሰበር ሰሚ ችሎት ሳይቀርቡ ለፌደራል ሰበር ሰሚ ችሎት በቀጥታ መቅረብ እንደማይችሉ ነው። በዚህ ውሳኔ መሰረት የፌደራል ከፍተኛ ፍርድቤት በተቋቋመባቸው ክልሎች የአሠሪና ሠራተኛ ወሳኝ ቦርድ ውሳኔዎችን በይግባኝ ማየት የሚችለው የተቋቋመው የፌደራል ከፍተኛ ፍርድቤት ቢሆንም ጉዳዩን በቅድሚያ በሰበር የማየት ስልጣን ያለው የክልሉ ጠቅላይ ፍርድቤት ነው። ይህ ደግሞ በአሠሪና ሠራተኛ አዋጁና ከሕገ-መንግስቱ መንፈስና እሳቤ ውጭ የሆነ አረዳድ ነው። ምክንያቱም በፌደራል ፍርድቤቶች ታይተው የመጨረሻ ውሳኔ በተሰጠባቸው ጉዳዮች የክልል ጠቅላይ ፍርድ ቤትን ጉዳዮቹን በሰበር ለማየት የሚያስችል ምንም አይነት ሕገ-መንግስታዊ ስልጣን የላቸውም። በመሆኑም ጠቅላይ ፍርድ ቤቱ ይህንን ውሳኔ የወሰነው በተለያዩ ክልሎች የፌደራል ከፍተኛ ፍርድቤቶች ተቋቁመው ባሉበት ሁኔታና ይህ ውሳኔ በእነዚህ ፍርደ ቤቶች ላይ ሊያመጣው የሚችለውን አንድምታ ከግምት ውስጥ ሳያስገባ ነው።

[49] የኢፌዲሪ ሕገ መንግስቱ በግርጌ ማስታወሻ ቁጥር 2 እንደተገለጸው ፣ አንቀጽ 78 (2)

ማጠቃለያ

ከሁለቱ መዝገቦች መረዳት የምንችለው ጉዳዮቹ ከክልል የአሰሪና ሰራተኛ ቦርድ የተጀመሩና ቦርዱ የሰጠውን ውሳኔ በመቃወም ለክልሎቹ ጠቅላይ ፍርድቤት በይግባኝ ከቀረቡ በኋላ ፍርድ ቤቶቹ ጉዳዩን ተመልክተው የመጨረሻ ውሳኔ የሰጡት በሕገ መንግስቱ የተሰጣቸውን ውክልና መሰረት አድርገው በመሆኑ የሰበር አቤቱታ ለፌደራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ቀርቧል፡፡ የፌደራል ሰበር ሰሚ ችሎትም ወደጉዳዩ ፍሬ ነገር ከመግባቱ በፊት ጉዳዮቹ ለሰበር ፍርድ ቤቱ ለመቅረብ የሚያስችል የመጨረሻ ውሳኔ የተሰጠባቸው ጉዳዮች ናቸው ወይ? የሚለውን በጭብጥነት በመያዝ ጉዳዩን መርምሮ ውሳኔ ሰጥቷል፡፡ የሰበር ሰሚ ችሎቱም ይህ ጉዳይ በክልል ጠቅላይ ፍርድቤቶች የታየ በመሆኑ እና በየክልሎቹ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ሳይታዩ መምጣታቸው የመጨረሻ ውሳኔ ተሰጥቶባቸዋል ለማለት ስለማያስችል በአሰሪና ሰራተኛ አዋጁ መሰረት ተደርገው የሚቀርቡ የስራ ክርክሮች በክልል ሰበር ሰሚ ችሎት ያልታየ ውሳኔን ችሎቱ የሚያስተናግድበት አግባብ የለም በማለት ውሳኔ ሰጥቷል፡፡ የሰበር ሰሚ ችሎቱ ጉዳዩን የተገነዘበበት፣ ጭብጥ የያዘበት ብሎም ጉዳዩን እና ህጎቹን የመረመረበት አግባበት ትክክለኛውን አካሄድ የተከተለ አልነበረም፡፡ በተለይም ጉዳዩ ከአሰሪና ሰራተኛ አዋጁ የመነጨ መሆኑን ከመጥቀስ በስተቀር በአዋጁ መሰረት ቦርዱ ውሳኔ የሰጠበትንጉዳይ በይግባኝ የማየት ስልጣን በመሰረታዊነት የማን ነው? የክልሉ ጠቅላይ ፍርድቤት የአሰሪና ሰራተኛ ቦርድ የሚወስናቸውን የወል የስራ ክርክሮች በይግባኝ የመመልከት መብት ያገኘው በአሰሪና ሰራተኛ አዋጁ መሰረት ነው ወይስ በሕገ-መንግስቱ በተሰጠው ውክልና? የክልል ጠቅላይ ፍርድቤት በውክልና ስልጣኑ ተመልክቶ የመጨረሻ ውሳኔ የሰጠባቸውን ጉዳዮች በሰበር የመመልከት ስልጣን የማን ነው? የሚሉትን ጉዳዮች በጭብጥነት ይዞ አልመረመረም፡፡ በመሆኑን እነዚህን ጭብጦች ሳይመረምር ማንኛውም የአሰሪና ሰራተኛ ጉዳይ የጉዳዩ መነሻ ምንም ይሁን ምን በክልል ሰበር ሰሚ ችሎት ሳይታይ እና የመጨረሻ ውሳኔ ሳይሰጥበት ወደ ፌደራል ሰበር ሰሚ ችሎት መቅረብ የለበትም በማለት የደረሰበት ድምዳሜና የሰጠው ውሳኔ ትክክል ካለመሆኑም በላይ ሕገ-መንግስቱንና አግባብነት ያላቸውን ሕጎች ከግምት ውስጥ ያስገባ አይደልም፡፡

Cassation Review Power over Collective Labor Dispute: Whose Jurisdiction is it; the Federal or Regional Supreme Courts? A Case Comment.

Tegegne Zergaw[*]

Abstract

Collective labor disputes normally fall under the original jurisdiction of the Federal Courts, to be specific the Federal High Court, and that regional courts have only delegated power. In its different decisions, the Federal Supreme Court cassation division ruled that it lacks jurisdiction to entertain collective labor disputes decided by the Regional Supreme Courts in their appellate jurisdiction unless the Cassation remedy at Regional Supreme Courts is also exhausted. After such decision of the Federal Supreme Court, it becomes the norm that any collective labor dispute that was finally decided by the Regional Supreme Courts, at appellate level and through delegated power, is not eligible to be entertained by the Federal Cassation division before it is finally settled by the Regional Supreme Courts cassation bench. Therefore, this case comment aims at examining whether or not this position of the Federal Supreme Court is in line with the Constitution and other relevant laws of the country. In order to achieve these objectives, two relevant decisions of the Federal Cassation bench and relevant laws of the country are examined thoroughly. The findings of the study revealed that the decision of the Federal Cassation division is not in line with the Constitution and other relevant laws of the country. Collective labor dispute falls under the exclusive jurisdiction of the federal courts, and the regional Supreme Court entertain such matters only through delegated power. Acccording to the constitutional arrangement on delegation of power, the Regional Supreme Courts lack delegated power to entertain Federal Matters through cassation.Hence, once the Regional Supreme Courts passed a final decision over collective labor dispute through appeal, it is only the the federal Supreme Court that is entitled to entertain the case through cassation.

Keywords: Collective labor dispute, Appellate Jurisdiction, Cassation Jurisdiction, Delegated power, Federal Supreme Court, Regional supreme Courts.

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ዳኞች፡- አልማው ወሌ
ዓሊ መሐመድ
ሡልጣን አባተማም
መስጠፉ አህመድ
ተክሊት ይመሰል

አመልካች፡ ወ/ሮ ሀቢባ መካ -ከጠበቃ ዘውዱ ተሾመ ጋር ቀረቡ

ተጠሪዎች፡- 1. አቶ ደሊል ሁሴን - ቀረቡ

2. ኢትዮ የአሽከርካሪዎች እና መካኒኮች ማሰልጠኛ ማዕከል ኃ. የተወሰነ የግል ማህበር- ጠበቃ ስንታየሁ ብርሃኑ

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ጉዳዩ የፍቺ ውሳኔን ተከትሎ በጋብቻ ውስጥ የተፈራ የአክሲዮን ድርሻ በተጋቢዎቹ መካከል የሚከፋፈልበትን ስርዓት አስመልክቶ የተነሳ የአፈጻጸም ክርክርን የሚመለከት ነው፡፡

የጉዳዩን አመጣጥ በተመለከተ የፍቺ ውሳኔን ተከትሎ በአመልካች እና በ1ኛ ተጠሪ መካከል በነበረው የንብረት ክፍፍል ክርክር በ2ኛ ተጠሪ ማህበር ውስጥ በ1ኛ ተጠሪ ስም ተመዝግቦ የሚገኘው 162 የአክሲዮን ድርሻ በጋብቻ ውስጥ የተፈራ የጋራ ንብረት መሆኑ ተረጋግጦ እኩል እንዲካፈሉ በስረ ነገሩ ውሳኔ የተሰጠ መሆኑን፣ይህንኑ ውሳኔ ለማስፈጸም አመልካች ባቀረቡት የአፈጻጸም ክስ ላይ የአሁኑ 2ኛ ተጠሪ የፍትሐብሔር ስነ ስርዓት ሕግ ቁጥር 418 ድንጋጌን ጠቅሶ መቃወሚያ አቅርቦ የነበረ መሆኑን፣ፍርድ ቤቱም መቃወሚያው ወደፊት የሚታይ ነው በማለት የጋራ ናቸው የተባሉትን ሌሎች ንብረቶች በተመለከተ አፈጻጸሙን መቀጠሉን፣ ከዚህ በኃላ የአክሲዮን ድርሻውን በተመለከተ እንደ ፍርዱ እንዲፈጸምላቸው አመልካች አቤቱታ ማቅረባቸውን፣ፍርድ ቤቱም የአክሲዮን ድርሻው የሚገኝበት ማህበር ኃላፊነቱ የተወሰነ የግል ማህበር መሆኑን ታሳቢ በማድረግ ለአፈጻጸሙ ያመች ዘንድ በአፈጻጸም ጥያቄው ላይ ማህበሩ አስተያየት እንዲሰጥ ትዕዛዝ መስጠቱን ተከትሎ ከቀድሞ ተጋቢዎች መካከል አንዳቸው ለሌላኛው ድርሻውን ለቆ አንደኛው ወገን በማህበሩ አባልነት መቀጠል የሚችል ከመሆኑ ውጪ ሁለቱን ወገኖች በአንድነት በማህበሩ ውስጥ የማይፈልጋቸው መሆኑን ገልጾ አስተያየት ማቅረቡን፣ግራ ቀኙ የዋጋ ግምቱን ተቀብለው አንዳቸው ለሌላኛው ድርሻውን ለመልቀቅ መስማማት ያልቻሉ መሆኑን እና የማህበሩ አባላት ባልተስማሙበት ሁኔታ ደግሞ ፍርድ ቤቱ ሌላ ሰው በማህበሩ ውስጥ አባል እንዲሆን መወሰን የማይችል መሆኑን ገልጾ የአክሲዮን ድርሻው ተሸጦ ገንዘቡን አመልካች እና 1ኛ ተጠሪ እኩል እንዲከፋፈሉ ትዕዛዝ መስጠቱን የመዝገቡ ግልባጭ ያመለክታል፡፡

አመልካች አቤቱታውን ለዚህ ችሎት ያቀረቡት የፌዴራል ከፍተኛ ፍርድ ቤት ይግባኙን ዘግቶ በማሰናበቱ ሲሆን የሰበር አቤቱታው ተመርምሮ ለክርክሩ መነሻ የሆኑት አክሲዮኖች

በዓይነት መካፈል የሚችሉ ሆነው የ2ኛ ተጠሪ መተዳደሪያ ደንብም ሳይከለክል አክሲዮኖቹ በሐራጅ ተሸጠው ክፍፍሉ እንዲፈጸም የመወሰኑን አግባብነት ተጠሪዎቹ ባሉበት ለማጣራት ይቻል ዘንድ ጉዳዩ ለሰበር ክርክር እንዲቀርብ በመደረጉ ግራ ቀኙ የጽሁፍ ክርክር ተለዋውጠዋል፡፡የጉዳዩ አመጣጥ እና የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን እኛም አቤቱታ የቀረበበት የስር ፍርድ ቤቶች የአፈጻጸም ትዕዛዝ መሰረታዊ የሕግ ስህተት የተፈጸመበት መሆን አለመሆኑን ለክርክሩ ከተያዘው ጭብጥ አንጻር መርምረናል፡፡

በዚህም መሰረት በ2ኛ ተጠሪ ማህበር ውስጥ በ1ኛ ተጠሪ ስም ተመዝግቦ የሚገኘው 162 የአክሲዮን ድርሻ በጋብቻ ውስጥ የተፈራ የአመልካች እና የ1ኛ ተጠሪ የጋራ ንብረት መሆኑ በስረ ነገሩ ፍርድ ተረጋግጧል፡፡ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው ፍርድ ቤት የአክሲዮን ድርሻው በሐራጅ ተሸጦ ክፍፍሉ በገንዘብ እንዲደረግ ውሳኔ ሊሰጥ የቻለው ከቀድሞ ተጋቢዎች መካከል አንዳቸው ለሌላኛው ድርሻውን ለቆ አንደኛው ወገን በማህበሩ አባልነት መቀጠል የሚችል ከመሆኑ ውጪ ሁለቱን ወገኖች በአንድነት በማህበሩ ውስጥ የማይፈልጋቸው መሆኑን ገልጾ 2ኛ ተጠሪ ማህበር አስተያየት አቅርቦአል በማለት ነው፡፡አመልካች ከስር ጀምረው የሚከራከሩት ደግሞ አክሲዮኖቹ በዓይነት ሊካፋሉ የሚችሉ በመሆኑ ሕጻናት ልጆቻቸውን ለማሳደግ ጭምር እንዲረዳቸው የአክሲዮኖቹ ክፍፍል በዓይነት እንዲደረግ በመጠየቅ ነው፡፡በመሰረቱ የጋብቻ መፍረስን ተከትሎ የጋራ ሀብት እንዲከፋፈል የሚደረገው እያንዳንዱ ተጋቢ ከጋራ ሀብቱ የተወሰነ ንብረት እንዲደርሰው በማድረግ ስለመሆኑ እና ክፍፍሉ በሽያጭ ሊደረግ የሚችለው ንብረቱ ለክፍፍል የማያመች ወይም ለማከፋፈል የማይቻል ሆኖ ንብረቱ ከሁለት ለአንዳቸው እንዲሰጥ ባልና ሚስቱ ሳይስማሙ በቀሩ ጊዜ ስለመሆኑ በተሻሻለው የቤተሰብ ሕግ በአንቀጽ 91 እና 92 ስር በዝርዝር ተደንግጎ ይገኛል፡፡

በተያዘው ጉዳይ 2ኛ ተጠሪ ማህበር ከአመልካች እና ከ1ኛ ተጠሪ መካከል አንዳቸውን እንጂ ሁለቱን በማህበሩ ውስጥ አልፈልጋቸውም ከማለት በቀር አመልካች እና 1ኛ ተጠሪ አክሲዮኖቹን በየድርሻቸው በዓይነት በመከፋፈልየማህበሩ አባላት መሆን የማይችሉበት ሕጋዊ ምክንያት ስለመኖሩ በስር ፍርድ ቤት ያቀረበው ክርክር እና ማስረጃ የለም፡፡በሰበር ደረጃም ቢሆን አመልካች እና 1ኛ ተጠሪ አክሲዮኖቹን በዓይነት ተከፋፍለው በአባልነት ይቀጥሉ መባሉ በማህበሩ ውስጥ ብርቱ ጭቅጭቅን እና አለመግባባትን የሚያስከትል ነው ከማለት ውጪ የዚህ ዓይነት ሁኔታ ሊከሰት ስለሚችልበት ምክንያት ያቀረበው አሳማኝ መከራከሪያ የለም፡፡ የአክሲዮኖቹ በዓይነት የመከፋፈል ጉዳይ የሚመለከተው በመሰረቱ አመልካችን እና 1ኛ ተጠሪን እንጂ 2ኛ ተጠሪን ባለመሆኑ አክሲዮኖቹ ሊከፋፈሉ የሚገባቸው በሽያጭ ነው በማለት 2ኛ ተጠሪ መቃወሚያ አቅርቦ ለመከራከር የሚያስችል መብት እና ጥቅም አለው ለማለትም የሚቻል አይደለም፡፡

ሲጠቃለል በ2ኛ ተጠሪ ማህበር ውስጥ በ1ኛ ተጠሪ ስም ተመዝግቦ የሚገኘው 162 የአክሲዮን ድርሻ በጋብቻ ውስጥ የተፈራ የአመልካች እና የ1ኛ ተጠሪ የጋራ ንብረት መሆኑ እስከተረጋገጠ ድረስ የአክሲዮን ድርሻውን አመልካች እና 1ኛ ተጠሪ በዓይነት እንዲከፋፈሉ ለመወሰን የሚከለክል ሕጋዊ ምክንያት ባልቀረበበት ሁኔታ 2ኛ ተጠሪ ማህበር የሰጠውን አስተያየት ብቻ መሰረት በማድረግ የአክሲዮን ድርሻው ክፍፍል በሽያጭ አማካይነት እንዲፈጸም በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ተሰጥቶ በይግባኝ ሰሚው ፌዴራል ከፍተኛ ፍርድ ቤት በትዕዛዝ የጸናው የአፈጻጸም ትዕዛዝ የተሻሻለውን የቤተሰብ ሕግ በአንቀጽ 91 እና 92 ድንጋጌዎች መሰረት ያላደረገ እና መሰረታዊ የሕግ ስህተት የተፈጸመበት ሆኖ በመገኘቱ የሚከተለው ውሳኔ ተሰጥቷል፡፡

ው ሳ ኔ

1. በ2ኛ ተጠሪ ማህበር ውስጥ በ1ኛ ተጠሪ ስም ተመዝግበው የሚገኙት 162 የአክሲዮኖች ለአመልካች እና ለ1ኛ ተጠሪ ሊከፋፈል የሚገባው በሐራጅ ሽያጭ ነው በሚል በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በመዝገብ ቁጥር 206322 በ25/07/2006 ዓ.ም. ተሰጥቶ በፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 150907 በ30/08/2006 ዓ.ም. በትዕዛዝ የጸናው የአፈጻጸም ትዕዛዝ በፍትሐብሔር ስነ ስርዓት ሕግ ቁጥር 348(1) መሰረት ተሽሯል፡፡
2. በ2ኛ ተጠሪ ማህበር ውስጥ በ1ኛ ተጠሪ ስም ተመዝግበው የሚገኙት 162 አክሲዮኖች በዓይነት ሊከፋፈሉ የማይችሉበት ሕጋዊ ምክንያት ባለመኖሩ እነዚህን አክሲዮኖች አመልካች እና 1ኛ ተጠሪ በተሻሻለው የቤተሰብ ሕግ በአንቀጽ 91(1) ድንጋጌ መሰረት እያንዳንዳቸው 81 አክሲዮኖችን በዓይነት ሊከፋፈሉ ይገባል በማለት ወስነናል፡፡
3. የዚህ ውሳኔ ግልባጭ በውሳኔው መሰረት እንዲያስፈጽም ለፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት፣ እንዲያውቀው ደግሞ ለፌዴራል ከፍተኛ ፍርድ ቤት ይላክ፡፡
4. የሰበር ክርክሩ ያስከተለውን ወጪና ኪሳራ ግራ ቀኙ የየራሳቸውን ይቻሉ፡፡
5. ውሳኔ ያገኘ ስለሆነ መዝገቡ ተዘግቷል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት::