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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 9. 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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The Ethiopian Law on the Right to Confrontation

Alemu Meheretu[*] *& Awol Alemayehu*[**]

Abstract

This article examines the Ethiopian law on the protection of the accused person's right to confront prosecution witnesses. The accused is entitled to confront adverse witnesses so that not only the criminal justice process and its outcome become fair and reliable but also the accused enjoys a meaningful participation in the process. Yet, the right is not unbridled with the nature and scope of the restriction varying across jurisdictions depending on the interests and values pursued most. The most common restrictions are triggered by protection of vulnerable witnesses, the use of depositions of absent witnesses, trial in absentia and use of anonymous witnesses. This article argues that the administration of restrictions under the Ethiopian law suffers two general limitations. First, it raises issues of compatibility with the constitution. Second, the restrictions fall short of adequately counterbalancing the interests involved: that of the accused, the public, victims, and witnesses. Allowing witness statements made before the police and depositions of preliminary inquiry to be put in evidence at trial in the situation where the accused is not represented by legal counsel and is not entitled to cross-examine witnesses; allowing trial in absentia in broad range of crimes without adequate guarantees put in place; and use of hearsay evidence in the circumstances where it is not regulated, all threaten the right to confrontation.

Key terms: *The Right to Confrontation. Cross-examination. The right to be tried in person. Trial in absentia. Ethiopia.*

Introduction

The nature and scope of the right to confrontation has been subject to debate with some treating it narrowly while others conceiving it broadly. However, there seems a general consensus that the right to confrontation is part of the right to a fair trial and is not a single right as such; rather it comprises of "a bundle of

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related but separate rights."[1] Albeit with variations among the list of such underlying rights, the right to confrontation is generally believed to have the following three main components:[2] (a) the accused right to be tried in person, (b) the accused right to require witnesses testifying against him to appear in person while giving their testimony, and (c) the accused right to cross-examine adverse witnesses. In this sense, although many use them interchangeably, the right to confrontation is broader than the right to cross examine adverse witnesses.[3]

The basic principle that underlies the right to confrontation is that the testimony of prosecution witness may not be used against an accused unless it is given under oath or affirmation, in the presence of the accused and is cross-examined by the latter.[4] This right, further, requires prosecution witnesses to give their testimony at trial, or if necessary, at a pre-trial proceeding, where the accused is entitled to confront them[5] and the reliability of their testimony is checked through cross-examination.[6] This guarantees the accused the right to defend himself by facing prosecution witnesses and cross-examining them to test their veracity. Besides, it provides the judge with an opportunity to observe the demeanor and body languages of witnesses, which in turn helps him evaluate their credibility.[7] As such, it protects the accused against the risk of conviction based on untested evidence.

The European Court of Human Rights captures important aspects of the right in *Kostovski v. The Netherlands*[8]*:*

> *If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the*

[1] Ian Dennis, The Right to Confront Witnesses: Meanings, Myth and Human Rights, *Criminal Law Review*, Issue 4, (2010) p.270; Christine Holst, The Confrontation Clause and pretrial hearings: A due process solution, *University of Illinois Law Review*,Vol.2010(2010),p.1601;Christine C. Goodman, Confrontation's Convolutions*, Loyola University Chicago Law Journal,Vol.47 (2016), p.819..*

[2] *Ibid* (Ian Dennis) (Adding, among others the right to public trial and the right to know ones accuser to the list of the rights); *Ibid* (Christine C. Goodman).

[3] Ian Dennis, *Supra* note 1, p.260.

[4] *Friedman, Richard D.* `Face to Face': Rediscovering the Right to Confront Prosecution Witnesses. *Int'l J. Evidence & Proof, Vol.8 No.1, (2004), p.4.*

[5] Ibid.

[6] Christine C. Goodman, supra note 1.

[7] *Ibid*, Natalie.Kijurna, The Confrontation Clause and Hearsay, *DePaul Law Review*, Vol.50, (2001), p.1133.

[8] *Kostovski v The Netherlands*, European Court of Human Rights, Series A, Vol.166, Judgment of 20 November 1989, App No 11454/85, 12 EHHR 434.

> *defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.*

The foregoing rationale reflects the instrumentalist conception of the right, which emphasizes on its value as a means to yield a reliable outcome by enabling the defense and the court to test evidence reliability. Jurisdictions that cherish this rationale most tolerate incursions into the right to confrontation as long as a piece of evidence is considered reliable even though it is not tested in cross-examination. This is true in some continental jurisdictions[9] as well in the USA prior to 2004 where in the latter case, the Supreme Court in *Crawford v. Washington* abrogated the mere instrumentalist conception of the right to confrontation, holding that: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[10]

The right to confrontation is also viewed from a procedural perspective, serving process values of defense participation of its own right. Thus, the right is vindicated not because it serves some ends in testing the reliability of evidence but simply because it promotes defense participation.[11] As such, the right to confrontation promotes two fundamental values: procedural values expressed in terms of ensuring defense participation in the criminal process;[12] and substantive value of ensuring outcome reliability.[13] Further, the accused right to confrontation in criminal litigation is acknowledged as one of the fair trial rights meant to ensure equality of arms.[14] As such, it has found a place in many international and regional human rights instruments and Statutes of international criminal tribunals.

Finally, it is important to note that although the right to confrontation forms one of the fundamental fair trial rights of the accused, it is not absolute. In some exceptional circumstances, it can be limited to promote overriding interests; the

[9] See John D. Jackson and Sarah J. Summers, Internationalization *of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, New York, 2012), pp.332-34.
[10] *Id.,* p.330; U.S. Reports: Crawford v. Washington, 124 US Supreme Court 1354 (2004) available at:https://www.loc.gov, accessed on 23 Sep 2019.
[11] Massaro, The Dignity Value of Face-to face Confrontations, *Fla.L.Rev.*, Vol.40, (1989) p.863; Ian Dennis, *Supra* note 1, p.266.
[12] *Ibid.*
[13] Pamela R. Metzger, Confrontation as a Rule of Production, *William and Mary Bill of Rights Journal*, Vol.24, (2014), p.104.
[14] Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, (Oxford: Hart Publishing, 2007).

most common incursions into the right being trial in absentia, hearsay evidence and witness protection measures.

In Ethiopia, the FDRE Constitution (herein after the Constitution)[15]and the 1961 Criminal Procedure Code (herein after CPC)[16] recognize elements of the right to confrontation. On the other hand, the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation [herein after Witnesses protection proclamation] limits the right to confrontation.[17] The extent to which the above legal frameworks protect the accused right to confrontation in criminal litigation remains unexplored. The FDRE constitution unconditionally entitles the accused to have access to evidence produced against him and to cross-examine adverse witnesses. Nonetheless, the Witness Protection Proclamation limits the right by extending several protection measures to witnesses, including withholding their identity.[18] Although this approach may be justified for practical considerations, its constitutionality is open to challenge, as the constitution accommodates no exception to the right.

It is also reported that the government of Ethiopia often denies criminal defendants from having access to evidence under its possession.[19] There are extensive grounds of trial in *absentia* prescribed under the CPC[20], albeit, no such clause exists under the constitution. Apparently, pursuant to the CPC, the prosecution is entitled to produce hearsay witnesses against the accused.[21] Nonetheless there are no specific provisions that prescribe when hearsay evidence shall be admissible and warrant conviction. Moreover, the 2011 Criminal Justice Policy of Ethiopia (herein after Criminal Justice Policy) has introduced broad exceptions in which the prosecution evidence shall not be disclosed to the accused.[22] The policy also demands the upcoming criminal procedure code, the draft of which is underway for many years, to emulate this.

What do all these mean to the right to confrontation? This article investigates the legal protection afforded to the right to confrontation and its challenges in

[15] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, (1995), Art.20(4), (Herein after the FDRE Constitution).
[16] Criminal Procedure Code of Ethiopia, Negarit Gazeta, Extraordinary Issue No.1 of 1961, (1961), Articles 127 (1), 124(1), 125, and 137. (Herein after CPC).
[17] Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010, Federal Negarit Gazeta, (2010), Article 4 (Herein after Witnesses Protection Proclamation).
[18] Witness Protection Proclamation, supra note 17, Article 4, para.1 (h)-(k).
[19] United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2014, Ethiopia Human Rights Report, (2014), p.8.
[20] CPC, *Supra* note 16, Article 161 (2).
[21] *Id.,* Article 137(1).
[22] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ. (ከዚህ በኋላ የወንጀልፍትህ ፖሊሲ. ይባላል) 2011ዓ/ም አንቀጽ 4(5) (2-3)::

Ethiopia having regard to the FDRE constitution and relevant international standards pledged by Ethiopia. The article, particularly, focuses on how the Ethiopian law fares on the three components of the right to confrontation: the accused right to be tried in person; the accused right to require witnesses testifying against him to appear in person; and the accused right to cross-examine adverse witnesses. To this end, it analyzes laws, international standards, and relevant literature on the subject matter. The article is organized as follows. The introduction part sets out the scene. The first section briefly outlines international standards on the right to confrontation. The second section critically examines the Ethiopian laws governing the right to confrontation and the accompanying challenges. This is followed by concluding remarks.

1. International Standards on the Accused Right to Confrontation

As discussed above, in criminal litigation, the accused right to confrontation encompasses the right of the accused to be tried in person; the right to compel prosecution witnesses to appear in person while giving testimony; and the right to cross-examine prosecution witnesses. This section attempts to outline the extent to which these components of the right to confrontation are acknowledged under international standards focusing on ICCPR and ACHPR.

1.1 The Accused Right to be tried in Person

The accused right to be tried in person is an important component of the right to a fair trial in general and the accused right to confrontation in particular. It enables the accused to have a meaningful participation in the trial by producing his own evidence and challenging adverse evidence — to face witnesses testifying against him, and defend himself through cross-examining them. As such, the accused right to be tried in person is recognized under several international instruments including the ICCPR.

The ICCPR guarantees the accused the right to be tried in his/her presence in the determination of any criminal charge[23] For the sake of clarity it is worth highlighting the scope of the right. Although some jurisdictions guarantee the

[23] International Covenant on Civil and Political Rights (adopted by UNGA Res 2200A (XXI) (16 December 1966), entered into force 23 March1976) 999 UNTS. (Herein after ICCPR), Art.14[3(d)]. It declares, "In the determination of any criminal charge against him, everyone shall be entitled, in full equality, to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing…"

right to be present in all stages of criminal proceedings,[24] international monitoring bodies such as the UNHRC and ECHR adopt a flexible approach. For instance, the UNHRC in *Gordon vs. Jamaica*[25] makes it clear that the hearing of an appeal in the absence of an appellant who is represented by a legal counsel does not constitute a violation of article 14(3) (d) of the ICCPR. Although the covenant does not prescribe an exception to this right, in its jurisprudence, the UNHRC acknowledged trial in absentia, noting that in the absence of due notice, trial *in absentia* violates the accused right to be tried in person and his right to cross-examine prosecution witnesses.[26] The Committee, particularly, observed[27]: "Judgment in absentia requires that all due notification has been made to inform [the accused] of the date and place of his trial and to request his attendance."

On the other hand, the accused right to be tried in person is not clearly acknowledged under the ACHPR. However, this instrument prescribes that the accused has the right to defense, including the right to be defended by counsel of his choice.[28] Here, it is logical to claim that the right to defense implies the right to be tried in person. Interestingly, the African Commission on Human and Peoples' Rights settles the dust by issuing Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (herein after PGRFTLA). The PGRFTLA not only prescribes that the accused has the right to defend himself in person or through legal assistance of his own choice[29] but also entitles him the right to be tried in his presence; and the right to appear in person before the judicial body.[30] The PGRFTLA, further, provides that the accused may not be tried in *absentia* in principle,[31] but he may "voluntarily waive the right to appear at a hearing, preferably in writing".[32] It also entitles the accused, who is tried in *absentia*, the right to petition for a reopening of the proceedings upon showing that the notice was not personally served on him, or he failed to

[24] Such is the case with the USA and Australia for example. In the USA, Rule 43(a) of the Federal Rules of procedure requires that the defendant shall be present from arraignment all the way to the imposition of sentence; albeit he may voluntarily waive it.

[25] Gordon vsJamaica, Communication No.237/1987, UNHRC, UN. Doc.CCPR/C/46/D/237/1987 (1992).

[26] *Mbenge vs. Zaire, UN HRC, Communication No. 16/1977, UNHRC, U.N. Doc. CCPR/C/OP/2 (1990) para.76. (Noting that without due notification, judgments in absentia violate Article 14(3) (e)); see also Antonaccio vs. Uruguay, Communication No. R.14/63, P.20, UNHRC, U.N. Doc. Supp. No. 40 (A/ 37/40) para 114 (1982).*

[27] *Ibid.*

[28] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU DocCAB/LEG/67/3 Rev. 5., Article7, Para. 1 (c) (herein after ACHPR).

[29] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa [herein after PGRFTLA].DOC/OS (XXX), para N [22(a)].

[30] *Id.,* Para. N [6(c)].

[31] *Ibid.*

[32] *Ibid.*

appear for "exigent reasons beyond his/her control".[33] Consequently, "if such petition is granted, the accused is entitled to a fresh determination of the merits of the charge".[34]

In sum, the PGRFTLA guarantees the accused right to be present while witnesses give their testimony and limits the right only in the following exceptional circumstances: "when a witness reasonably fears reprisal by the defendant; or when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons after having been duly notified".[35] Further, where the accused is removed or if his presence cannot be ensured, he has the right to be represented by a legal counsel so that his right to cross-examine witnesses is preserved.[36]In so doing, the African Human Rights Commission has tried its best to fill in the gaps in the ACHPR through adopting the principles and guidelines discussed above (PGRFTLA). It also urges States parties to the ACHPR to incorporate and apply the principles.

1.2 The Accused Right to Demand Prosecution Witnesses to Appear in Person

The accused right to confrontation depends on the prosecution's duty of producing witnesses before trial. Implicit in the right thus lies the prosecution's obligation to discharge its burden of producing witnesses before trial, which is vital in the accurate determination of facts. Describing this component of the right as 'confrontation's rule of production', one writer cogently sees it as a guarantee of the defendant's right to confrontation.[37] This writer observes[38]:

> *Confrontation is ... a procedural rule that regulates the prosecution's presentation of evidence by requiring it to place its witnesses before a defendant and ... [the court].In turn, this mandate of production reinforces two important due process concepts: first, at a criminal trial, the prosecution bears the burdens of production and persuasion; second, a criminal defendant has the right to rely on the prosecution's failure of proof. Confrontation's production imperative is the threshold procedural demand of the Confrontation Clause. Confrontation's mandate*

[33] *Ibid.*
[34] *Ibid.*
[35] *Id.*, para N [6(f)].
[36] ACHPR, *Supra* note 28, Article7, para 1 (c).
[37] Pamela R. Metzger, *Supra* note 13.
[38] *Ibid.*

> *incorporates several underlying rules of production: the prosecution must produce its witnesses at a public trial and elicit their accusations under oath and in the presence of the defendant and the… [the court]. Each aspect of this production imperative advances the due process command that the prosecution bear the burden of production and persuasion and restrains the government from abuses of power and process.*

Under the ICCPR, the accused is entitled to demand the personal attendance of the prosecution witnesses before court.[39] This embraces the principle of immediacy and orality that are designed to furnish a fact finder with firsthand information. Although ICCPR prescribes no exception to this right, it does not mean that the right remains unlimited in scope. The accused right to demand the prosecution witnesses to appear in person and the security right of the witnesses may conflict. Thus, the interest of justice requires reconciling these interests.

The experience of international tribunals and ICC provides us with evidence on efforts of reconciling those interests by recognizing limitations to the right. For instance, the Rules of Procedure and Evidence of the ICTY acknowledges the use of remote testimony when the interest of justice demands.[40] Similarly, Rule 90(A) of the ICTR's Rules of Procedure and Evidence[41]acknowledges use of remote video-conferencing technology (VCT) where it is necessary to safeguard the witness's security or in the interest of justice.

In determining whether VCT witness testimony is in the interests of justice, the ICTR considers the following[42]: (1) "the importance of the witness's testimony," (2) "the witness's inability or unwillingness to attend," and (3) "whether a good reason has been adduced for that inability or unwillingness". Likewise, the Statute of ICC, while demanding prosecution witnesses to give their testimony at trial in person[43], provides exceptional circumstances where they may testify *viva voce* (oral) or their recorded testimony by means of video

[39] ICCPR, *Supra* note 23, Article 14, para 3 (e).
[40] Rules of Procedure and Evidence, U.N. Doc. IT/32 (Feb. 11, 1994) [hereinafter ICTY RPE], reprinted in 33 I.L.M. 484 (1994); see Rule 81that provides proceedings may be conducted by videoconference link if consistent with the interests of justice). Rule 81was adopted to replace Rule 71 on July 12, 2007, to allow for greater use of testimony by VCT.
[41] See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 90(A), U.N. Doc. ITR/3/REV.1 (June 29, 1995). It states that "witnesses shall, in principle, be heard directly by Chambers."
[42] Yvonne M. Dutton, Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing Technology in Maritime Piracy Trials, *Vanderbilt Journal of Transnational Law*, Vol. 45, (2012), p.1296.
[43] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force on 1 July 2002) 2187 UNTS (Hereinafter Rome Statute of the ICC), Article 67, Para.1 (e).

or audio technology or documents or written transcripts produced for the purpose of protecting them.[44] These experiences indicate that the exception to the rule that " the prosecution witness should testify in person at the trial" shall be construed very strictly. Therefore, the prosecution witnesses shall appear in person except when the interest of justice or the purpose of safeguarding witnesses' right to security require otherwise.

Under the ACHPR, there is no specific provision demanding the prosecution witnesses to appear in person. However, the PGRFTLA requires the prosecution to furnish to the defense the names of witnesses it intends to call at trial and entitles the latter to attend the hearing of witnesses.[45] It also provides that the testimony of anonymous witnesses can only be admitted under exceptional circumstances having regard to the nature of the offence, the security of witnesses and the interests of justice.[46]

1.3 The Accused Right to Cross-examine Witnesses

Witnesses are often considered as the eyes and ears of justice.[47] Yet, they could be problematic and distort outcome accuracy unless their presentation is duly regulated. One of such regulation is done through examination of witnesses in general and cross-examination, in particular. Indeed, albeit with exaggerations, cross-examination has been characterized as "the greatest legal engine ever invented for the discovery of the truth."[48]

The right to cross-examine prosecution witnesses forms fundamental fair trial rights of the accused and as such receives recognition in international human rights systems as well as national procedural systems. Under the ICCPR, the accused is entitled to examine witnesses against him.[49] On several occasions, the UNHRC has interpreted the right to cross examination. The Committee noted that Article14 (3)(e) of the ICCPR guarantees the accused the same legal right to compel the attendance of adverse witnesses and cross-examine any witnesses as are available to the prosecution. Also, it entitles this same party the right to be given a proper opportunity to question and challenge witnesses against them at some stage of the

[44] *Id.,* Article 68, para 2.
[45] PGRFTLA, *Supra note* 29, para N [6(f)].
[46] *Ibid.*
[47] P. Wall, *Eye-Witness Identification in Criminal Cases* (Springfield: Charles C. Thomas, 1965).
[48] John H. Wigmore, Evidence § 1367, p.32.
[49] ICCPR, *Supra* note 23, Art. 14. It states that "In the determination of any criminal charge against him, everyone shall be entitled to, in full equality, to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

proceedings.[50] Here, the phrase 'at some stage of the proceeding' refers to both the pre-trial stage, including preliminary inquiry, and the trial stage. Indeed, the Committee explicitly mentions that this right encompasses preliminary proceedings at which witness testimony is received when the witness is subsequently unavailable at trial.[51] The Committee further noted that the accused or his defense counsel shall be given the opportunity to interrogate the prosecution witnesses.[52] It, specifically, observed that to safeguard the rights enshrined under Article14 (3)(e) of the ICCPR, criminal proceedings must provide the accused the right to an oral hearing, at which he may appear in person or be represented by counsel, and may bring evidence and examine the witnesses against him.[53] The committee went further to require the participation of the defense counsel in the taking of depositions, suggesting that[54] "a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer."

It is important to note that the accused right to examine witnesses against him is also acknowledged under the statute of the ICTY,[55] ICTR[56] and ICC.[57] These statutes uphold the accused right to cross-examine any of those witnesses testifying against him. On the other hand, the accused right to cross-examine prosecution witnesses is not specifically recognized under the ACHPR. Yet, the PGRFTLA entitles the accused to examine adverse witnesses. It states that the accused shall examine only those witnesses "whose testimony is relevant and likely to assist in ascertaining the truth."[58] Nonetheless, what will be the parameter to determine those witnesses whose testimony is relevant, and the authority competent to determine them are open to dispute and uneven interpretation.

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[50] UNHRC, General Comment No. 32 on Right to equality before courts and tribunals and to a fair trial recognized under Article 14 of ICCPR, Ninetieth session, Geneva, 9 to 27 July 2007, see para 39. A similar approach has been adopted by the European Court of Human Rights. See Lucav. *Italy*, para. 40: "If the defendant has been given an adequate and proper opportunity to challenge the depositions either when they are made or at a later stage, their admission in evidence will not in itself contravene Article 6(1) and 6(3 of European Convention on Human Rights)."

[51] *Compass v. Jamaica, Communication No. 375/1989, P.10.3, UNHRC, U.N. Doc. CCPR/C/49/D/375/1989 (1993).*

[52] *Semey v. Spain, Communication No. 986/2001, 8.7, UNHRC, U.N. Doc. CCPR/C/78/D/986/2001 (2003).*

[53] *Rodriguez Orejuela v. Colombia, Communication No. 848/1999, P.7.3, UNHRC, U.N. Doc. Supp. 40 (A/57/40) para 172 (2002).*

[54] *Simpson* v. *Jamaica, Supra* note 51, para 7.3.

[55] Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (herein after Statute of ICTY), Article 21, para 4 (d).

[56] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, (Herein after Statute of ICTR), Article 20, para 4 (e).

[57] Rome Statute of ICC, *Supra* note 43, Article 67, para 1 (e).

[58] PGRFTLA, *Supra* note 29.

The PGRFTLA further provides that where national laws of member states to the ACHPR do not recognize the accused's right to examine witnesses during pre-trial investigations,[59] "the defendant shall have the opportunity, personally or through his/her counsel, to cross-examine those witness at trial."[60] Yet this does not in any way displace the right to cross-examine those witnesses at trial for the reason that he has examined them during pretrial investigation. Indeed, those jurisdictions, which permit pretrial examination of witnesses, do also allow rehearing of them during the trial stage.[61]

To recap, the right to confrontation is not without qualifications. Although the extent of restrictions vary across procedural systems, the following represent the most common restrictions on the right[62]: (1) Where witnesses are not available at trial due to valid grounds; (2) with a view to protect witnesses, including protection of anonymity and; (3) with a view to protect vulnerable victims and witness from re-traumazation. Such limitations are grounded on the value of protecting legitimate interests. For instance, if we consider the last restriction, it is established that cross examination of vulnerable witnesses and victims such as child or mentally handicapped witnesses may mislead or confuse them to yield in undesirable results.[63] This calls for measures tailored to their needs,[64] such as protection of anonymity, regulating the nature of questions put to them, and questioning through intermediaries.

2. Ethiopian Legal Framework on the Right to Confrontation

2.1 The Right to be Tried in Person

The accused right to be tried in his presence is not specifically recognized under the FDRE constitution that guarantees fair trials rights of the accused.[65] However, generally the right to confrontation implies the right to be present at

[59] This considers structural differences between procedural systems where some adversarial systems consider the trial stage as the primary forum for examination of witnesses; in many inquisitorial traditions examination of witnesses normally takes place at the preliminary proceedings. See also John D. Jackson and Sarah J. Summers, *Supra note 9*, p.343.

[60] *Ibid*.

[61] *Id.*, p.326.

[62] See Stefan Trechsel, *Human Rights in Criminal Proceedings*, (Oxford: Oxford University Press, 2005), p.312.

[63] Phoebe Powden *et al*, Balancing Fairness to Victims, Society and Defendants in the Cross examination of Vulnerable Witnesses: An impossible Triangulation?", *Melbourne University Law Review*,Vol.37, (2014),p.539 ; Adrian Keane, Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re Professionalism *International Journal of Evidence and Proof Vol.16*, (2012), p.176–80; Schwikkard, "The Abused Child: A few Rules of Evidence Considered" *Acta Juridica* (1996), p.155.

[64] See for example UN *Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime*, ESC
Res 2005/20 (22 July 2005) [30]–[31], [40]–[42].

[65] FDRE Constitution, *Supra* note 15, Article 20.

trial. Interestingly, the CPC, as opposed to making it a right, requires the accused to appear personally at the trial to be informed of the charge and to defend himself.[66] This not only imposes on the court the duty to make sure that the accused attends the trial but also in principle precludes the accused from waving the right. On the contrary, in *Federal prosecutor vs. Dubai Auto-gallery and World International Free Zone Company*, [67] the Federal Supreme Court Cassation Division (herein after FSCCD) limits the requirement of personal attendance only to *accused natural persons,* thereby excluding legal persons, albeit with no explanation/reasoning available in the relevant volume. This amounts to amendment of the law, which is beyond the province of the court.

The CPC, under articles 127(1) and 123, also proclaims that trial shall be carried out in the presence of the accused so that not only he presents his own case but also exercises his right to confrontation, i.e., observes any adverse witness and challenges the adversary, which is essential to determine the reliability and accuracy of any evidence presented before the trial. To this end, the trial court is empowered to issue bench warrant[68] or arrest warrant where an accused person who has been dully summoned fails to appear[69] so that he is brought before court.

It is interesting to see whether the right to presence covers pretrial or post trial proceedings. Apparently, the language used in the CPC, which mentions "trial", seems to exclude pretrial proceedings. Nonetheless, it stands to reason that preliminary proceedings which involve the hearing or presentation of evidence trigger the right to presence and hence the right to confrontation. As such, the CPC seems to acknowledge the accused right to attend the preliminary inquiry when it requires the court to allow the prosecution open his case and call witnesses upon the appearance of the accused.[70]

On the other hand, the applicability of the right to post trial proceedings is controversial. The apparent reading of the law suggests that post trial proceedings such as appeal may not trigger the right to presence for the following reasons: (1) The CPC allows appeal to continue in the absence of the defendant where he is a respondent and the striking out of appeal where he is an

[66] CPC, *Supra* note 16, Article 127 (1).
[67] *ፌዴራል ዐቃቤሕግ vs. ዱባይ አዉቶጋሪ ኤልኤልሲ እና ወርልድ ኢንተርናሽናል ፍሪዞን ካምፓኒ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ*:19 ሰ/መ/ቁ/120762 የካቲት 25 2008ዓ/ም ገጽ. 279::
[68] CPC, *Supra* note 16, Article 125.
[69] *Id*., Article 160 (2).
[70] *Id*., Article 84.

appellant[71]; (2) the appellant or respondent is no more an accused person within the meaning of the CPC, thus a condition for the invocation of the right is not met; (3) the right seems to attach to the trial stage and not post trial proceedings. However, such an approach has adverse implications on the right of the defense, especially where the prosecution challenges an acquittal or punishment.

That said the requirement to be present at trial is not absolute. The CPC prescribes exceptional circumstances where trial in the absence of the accused is permissible. It is only when either the bench warrant or arrest warrant cannot be executed that the court may consider trial in the absence of the accused.[72] This is permissible on condition that the alleged offence entails rigorous imprisonment not less than 12 years or it relates to crimes against the fiscal and economic interests of the state entailing rigorous imprisonment or fine exceeding five thousand dollars.[73] The nature of offences eligible for trial in absentia —the meaning of offences that attract "not less than 12 years of rigorous imprisonment" — is open to diverse interpretations. Apparently, it can be understood to refer to the minimum punishment or simply as falling within the range of a specific rigorous punishment prescribed under the law. While the first interpretation is difficult to apply since virtually no crime has 12 years as its lower range of punishment; the second interpretation risks shirking of the right to be present before trial to the extent that trial in absentia becomes the rule. The FSCCD is yet to rule on this. Still we suggest for the amendment of this provision so that trial in absentia is unequivocally reserved only to exceptionally serious crimes.

Where the court establishes that grounds to conduct trial in *absentia* are satisfied, it orders the publication of summons to the accused with a warning that failure to appear triggers in absentia trial.[74] Although the English version is not clear regarding the manner of such publication, the Amharic version makes it clear that summons should be published in a newspaper or in other more effective methods so that it is duly served. The FSCCD echoes this in one case,[75] observing that posting a notice in a fleeing accused residence and kebele administration does not comply with the law since it is not more accessible and effective than publication in a newspaper. The court suggests that the minimum modality of summons is publication in a newspaper, the effectiveness of which

[71] *Id.*, Article 193.
[72] *Id.*, Article 160(3).
[73] *Id.,* Article 161 (2) and Articles 343 through 354 of the criminal code.
[74] *Id.*, Article 162.
[75] አቶ ዘውዱ ተስፋይ እና የትግራይ ክልል ፍትህ ቢሮ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰ/መ/ቁ. 93577 ህዳር 22 ቀን 2007 ዓ.ም. ገጽ. 198።

is contested in Ethiopia context. Where it is established that summons is duly served and the accused fails to appear thereafter, the hearing continues as in ordinary cases.[76] The court will conduct the hearing of prosecution witness and may call additional witnesses if it thinks fit to dispose of the case.

The CPC guarantees the accused the right to seek setting aside of a judgment rendered in his absence within 30 days from the date on which he became aware of such judgment[77] by establishing that he has not received a summons or he was prevented by *force majeure* from appearing in person or by an advocate.[78] After hearing both sides, the court may order either the retrial or dismissal of his petition. If the court dismisses such petition, the decision is final and non-appealable.[79] However, the accused is entitled to appeal against the sentence within 15 days from the date of the decision that dismisses the petition.[80]

Here, one may question the fairness of denying appeal against dismissal of application of retrial. This would in effect leave the absent defendant in dilemma whether to simply challenge the judgment via direct appeal instead of losing his right to appeal on convictions following unsuccessful attempt for retrial. At any rate, he can still avail himself of cassation review upon establishing fundamental error of law.

The CPC is silent on whether and how trial should proceed where the accused fails to appear after the trial begins. Although the effect depends on the stage at which the defendant fails to appear and the grounds of absence, anecdotal evidence shows that the approach of Ethiopian courts is uneven. Some courts allow trial in absentia only where the defendant fails to appear before the hearing of his defense provided that the offence qualifies for trial in absentia. Thus, if the accused absented himself after the hearing of his defense, the trial continues like ordinary trials, denying the defense the right to seek the setting aside of the judgment. The FSCCD takes this further to make it applicable to any offence horizontally, regardless of whether it can be tried in absentia. The Court sanctions this in *W/ro Fetia Awol vs Federal public prosecutor* by rejecting the appellant's motion to cancel a judgment and sentence imposed in her absence — absence apparently supported by good cause.[81] The court held

[76] CPC, *Supra* note 16, Article 163.
[77] *Id.*, Articles 164 and 197-198.
[78] *Id.,* Articles 198 -199.
[79] *Id.*, Article 202(3).
[80] *Ibid.*
[81] ወ/ሮ ፊት.ያ አወል *Vs* ፌዴራል ዐቃቤሕግ, የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 13 ሰ/መ/ቁ/76909 ግንቦት 10 ቀን 2004ዓ/ም ገጽ. 305::

that where an accused person, who has already examined prosecution witnesses and presented his own defense, failed to appear on the day fixed to pronounce a final judgment, the proceedings cannot be taken as default hearing/judgment and hence no retrial is warranted.[82]

This wholesale approach of the court undermines the right to confrontation and the fairness of the trial in many senses. First, the court erroneously limits the scope of the right simply to the stage of hearing of prosecution and defense witnesses. Yet, the right covers the entire trial proceeding including sentencing hearing. This denies the accused his opportunity to present favorable sentencing facts and challenge unfavorable ones. Second, it overlooks the distinction between total in absentia (absence from the outset) and partial in absentia (absence at some stages of the trial). Although not apparent from the law, the court refuses to recognize the latter version of absence and takes the entire trial as though it was held in the presence of the accused thereby blocking any chance of rehearing of the sentencing part. Third, the court seems reluctant to appreciate the necessary counterbalancing measures to the detriment of the accused right to confrontation. This could be done for instance by determining, based on the appellant's claim, whether the defendant was prevented from attending the latter stages of the trial owing to a good cause. Rather than pronouncing judgment and imposing a sentence in absentia, it would have been fair if the court ordered the bail bond to be *forfeited,* issued bench warrant and adjourned the case since the accused might have been hindered by conditions beyond her control as she claims. Further, her own lawyer whom she claimed to have been prevented while she was absent could have represented the appellant. From the available records, it is not clear whether these measures have been exhausted.

Similarly, the FSCCD in *Andualem Genanaw vs Amhara Regional State public prosecutor*[83] reversed a decision by a lower court, which, on grounds of offence illegibility, rejected the prosecution's motion for trial in absentia involving a defendant who failed to appear on a date fixed to hear his defense. Thus, trial in absentia (in this case offence eligibility) may not be invoked where a defendant who utilized his right to challenge prosecution witnesses and was allowed to call his defense, becomes absent. In effect, the court seems to cancel the requirement of the law, which limits the scope of trial in absentia to offences punishable with not less than 12 years of imprisonment. This approach undermines the right of the accused to be present by subjecting any offence to trial in absentia so long as

[82] *Ibid.*

[83] *አንዱአለም ጉናናው vs አማራ ክልል ዐቃቤሕግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 22 ሰ/መ/ቁ/127313 22/01/2010 ዓ/ም::*

similar factual circumstances unfold. It also refuses to recognize partial in absentia trials to which the facts of the case under consideration squarely fit in.

Furthermore, the CPC does not regulate whether a trial should continue or a retrial should be conducted and whether an accused should be allowed to join the trial when he has shown up amid a trial pending in his absence. Nor is there any jurisprudence established by the FSCCD on the matter. The way each court handles such legal gaps might adversely implicate the right of the defense in general and the right to confrontation, in particular. So long as it doesn't prejudice the defendant's right, in principle, he should be allowed to join in; otherwise a retrial can be considered.

Before winding up this part, it is intriguing to note that grounds of trial in absentia are not limited to waivers by the accused. The most commonly acknowledged grounds also include absence due to health problems and removal of a disruptive defendant. In many jurisdictions, courts are mandated to limit the right to presence and thus the right to confrontation by removing a defendant from a trial for his disruptive conduct.[84] However, in Ethiopia there is no procedure that permits the court to remove a disruptive defendant. Absent such procedure means courts simply adjourn a trial after holding a disruptive defendant in contempt. Likewise, the absence of a defendant due to health problems may not trigger trial in absentia; nor is there any deferral mechanism under the law thereby leaving the court simply to rely on adjournments until the accused recovers.

To sum up, the CPC acknowledges the accused right to be tried in person in principle and prescribes exceptional circumstances where trial in *absentia* can be conducted. However, apart from the elusiveness of offences eligible to trial in absentia, such specific guarantees /counterbalancing measures are missing: mandatory legal representation during trial in *absentia;* and the state's duty to establish that the accused is effectively served with advance notice and warning.

2.2 The Accused Right to Demand Prosecution Witnesses to Appear in Person

The Constitution guarantees the accused the right to a public trial, the right to have full access to any evidence presented against him, and the right to examine witnesses testifying against him.[85] The effective exercise of these rights depends

[84] See generally Sarah Podmaniczy, Order in the court: Decorum, Rambunctious Defendants and the Right to be Present at Trial, *Journal of constitutional law*, Vol.14, No.5 (2012), p.1283.
[85] FDRE Constitution, *Supra* note 15, Articles 20(1) and (4).

on the appearance of witnesses before a court. The CPC acknowledges this by providing for stringent rules designed to ensure the appearance of prosecution witnesses before trial. Among such rules, one finds the rules governing trial and preliminary inquiry. The CPC demands all witnesses who have given their testimony against the accused during preliminary inquiry to execute bonds binding themselves to appear before the trial court.[86] Albeit its propriety is assailable, it also empowers the court to put them in custody until the trial or they execute the required bail bond.[87] It is only where it is impossible to bring such witnesses for justified grounds that their depositions taken at preliminary inquiry may be read and put in evidence in trial.[88]

Once the date for trial is determined, the CPC requires the prosecution to furnish the register with a list of its witnesses to be summoned by the latter.[89] The trial court is empowered to issue bench warrant to arrest prosecution witnesses if they failed to appear before the court after they have been duly summoned and there is proof of service of such summons.[90] However, no other remedy is provided under the CPC where it is impossible to execute such bench warrant. The practice, which appears to have been endorsed by the FSCCD [91], indicates that if all or sufficient number of the prosecution witnesses failed to appear after dully summoned, and the police failed to execute the bench warrant after giving some adjournments, the court, by its own motion, orders to terminate the proceedings with the prosecution retaining the power to activate it. Whether such order temporarily suspends the period of limitation from running[92] or interrupts the period of limitation[93] remains controversial. From the foregoing, one can conclude that the prosecution witnesses are necessarily required to appear in person while giving their testimony at trial.

Even though the Constitution unconditionally entitles the accused the right to have full access to any evidence produced against him, there are several instances where the testimony of an unavailable witness may be put in evidence under the law, thereby prompting intrusion into the right to confrontation. The problem has two dimensions. First, the constitution accommodates no exception

[86] CPC, *Supra* note 16, Article 90 (1).
[87] *Id.*, Article 90(2).
[88] *Id.*, Article 144.
[89] *Id.*, Article 124 (1).
[90] *Id.*, Article 125.
[91] ወ/ሮ *ዘነበች ሽብሩ vs ፌደራል ዐቃቤሕግ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 10 ሰ/መ/ቁ/45572* የካቲት 26 ቀን 2002 ዓ.ም ገጽ.195::
[92] Criminal Code of Federal Democratic Republic of Ethiopia, Proclamation 414/2004, Federal Negarit Gazeta (2004) Article 220 (1).
[93] *Id.*, Article 221 (1).

to the right. Thus, any qualification to the right *per se* gives rise to constitutionality issues. Second, even accepting the qualification is vindicated as a matter of practicability, the balance between competing interests appears to have not properly configured. Below are some of the manifestations of these problems.

i) Hearsay

The CPC allows a prosecution witness to give testimony with regard to facts he has direct or an indirect knowledge.[94] The phrase "indirect knowledge" can be construed to refer to hearsay, albeit some understood it to connote simply circumstantial evidence as opposed to hearsay. Practice supports both lines of interpretation with some courts rejecting hearsay evidence altogether, while others simply endorsing it.[95] The FSCCD seems to uphold hearsay in a couple of cases.[96] For instance, in *Feyisa Mamo vs. Federal Prosecutor,* the court admitted the testimony of two hearsay witnesses. The first witness claimed to have confirmed from a mute victim who later died as a result of an attack that the defendant had attacked him, and the second witness testified to have learned this very fact from the first witness. The court held that although the testimony of the witness, which is hearsay, is admissible pursuant to article 137(1), it failed short of establishing the guilt of the appellant to the required degree.[97]

The practice of using hearsay evidence in criminal cases exhibits two limitations. First, the hearsay declarant who cannot appear in person before trial court while giving his statement is not subject to cross-examination. This compromises the accused's constitutional right to confront adverse witnesses, which is recognized unconditionally. Further, in relying on hearsay, neither lower courts nor the FSCCD articulated detailed admissibility standards, apparently suggesting unqualified use of hearsay. There are no legal rules under the CPC to regulate hearsay evidence particularly on its admissibility and weight requirements. Nor are justified grounds of unavailability of the declarant, other admissibility and weight requirements regulated. Therefore, uneven and unregulated reliance on hearsay evidence to warrant conviction seriously undermines the accused right to confrontation. Interestingly, the draft criminal

[94] CPC, *Supra* note 16, Article 137 (1). Accordingly, the prosecution witnesses may testify against the accused facts which he/she has indirect knowledge.

[95] See Tesfaye Abate, "Yesemi semi masreja (Hearsay Evidence)", *Mizan Law Review*, Vol.6, No.1, (2012), p.116.

[96] ፈይሳማሞ vs ፌደራል ዐቃቤሕግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 19 ሰ/መ/ቁ/109441 ጥሪ 17 2008 ዓ.ም ገጽ. 250:: ዘሪሁን ታደሰ vs ኦሮሚያ ዐቃቤሕግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 7 ሰ/መ/ቁ/31731 የካቲት 2000ዓ.ም ገጽ.279::

[97] ፈይሳማሞ vs ፌደራል ዐቃቤሕግ ቅጽ 19 ገጽ.256-57 (Id.)

procedure code puts this problem straight by requiring a witness to testify only on matters he possesses direct knowledge.[98]

ii) Depositions

As shown elsewhere, the prosecution assumes the responsibility to ensure that witnesses attend the trial so that the defense exercises its right to cross-examination. It is only under exceptional circumstances that are beyond its control that the prosecution may be dispensed with this obligation. Under Ethiopian law, the depositions of a prosecution witness[99] taken at preliminary inquiry may be read and put in evidence by the trial court where such witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absence from the country.[100] This qualification to the right to confrontation raises several legal and practical questions. In what follows we will address the prominent ones.

To start with, there are issues on whether the list of grounds of unavailability is exhaustive. Apparently, it seems exhaustive. Yet, this leaves out some instances of practical necessity and thus giving rise to problems in balancing competing interests. For instance, witnesses may not be available to testify on grounds of self incrimination or privileged communications or for any other valid reasons. It is not clear whether such grounds justify the admission of out-of-court statement of such witnesses without hearing them at trial, thereby limiting the right to confrontation. This could be the case for example with incriminating statements made at the police station against a spouse but later recanted at trial on grounds of spousal privilege, albeit not clearly recognized by law for now. [101]

Secondly, some of the grounds of unavailability that warrant incursion into the right are vague. For example, it is not clear how much effort is needed to secure the witness's presence at trial before he is declared "cannot be found". As it stands now, the law does not require any standard to determine this. Perhaps it would be up to the court to distill the matter, which is not the case so far. Here, experience from other jurisdictions could be illuminating. While the US experience suggests, among others, the standard of good faith requirement, i.e., the prosecution [police] must make a good-faith effort to produce at trial

[98] See article 239(1) the draft criminal procedure code as was valid in November 2019.
[99] The procedure of preliminary inquiry works to preserve the prosecution evidence only; the defense lacking similar advantage. This is in clear contrast with the principle of equality of arms.
[100] CPC, *Supra* note 16, Article 144.
[101] It is important to note that this problem would arise once the draft criminal procedure code which recognizes spousal privilege comes into force.

witnesses against the defendant;[102] UK law demands steps reasonably practicable to be taken to find the witness.[103] Thus, it is not enough to simply make phone calls or issue summons. Rather, a series of effort including visits of the witness's residence are required.[104]

The same can be said of the ground: "absent from the country". Apparently, establishing a mere absence of a witness within the Ethiopian territory is enough to undercut the right to conformation and admit depositions given at the preliminary inquiry. Indeed, in practice, it is suffice to produce evidence of the witnesses' departure to a foreign jurisdiction regardless of any effort to bring them back. Apart from establishing absence, some reasonable effort to secure the presence of a witness should be required so that a right balance is struck between the interests of the defense and that of the public.

Thirdly, it is not clearly articulated whether such disposition should be subject to an oath and cross examination. An affirmative conclusion can only be made through an implied reading of articles 88 and 147 of the code which regulate the recording of evidence to include the fact that witnesses have sworn in and that their testimony is divided into evidence-in-chief, cross-examination and re-examination.[105]

Fourthly and most profoundly, although both the constitution and the ICCPR entitle the accused the right to be represented by legal counsel of his choice, he is often unrepresented during preliminary inquiry. The CPC does not explicitly require legal representation during preliminary inquiry, either. Nor is there free legal service available to the accused at the pretrial stage, preliminary inquiry included.[106] This is inconsistent with the FDRE Constitution and the requirements of ICCPR, as held by the UNHRC in *Simpson v Jamaica*.[107]In the circumstances, no meaningful participation of the accused and effective cross-

[102] Brian J. Hurley, Confrontation and the Unavailable Witness: Searching for a Standard, *Valparaiso University Law Review*, Vol.18, No.1, (1983), p. 207.

[103] John D. Jackson and Sarah J. Summers, *supra note 9, p.*329.

[104] Ibid.

[105] CPC, *Supra* note 16, Article 147(1) reads "the evidence of every witness shall start with his name, address, occupation and age and an indication that he has been sworn or affirmed." Article 147(3) reads: "the evidence shall be divided into evidence-in-chief, cross-examination and re-examination with a note as to where the cross-examination and re-examination begin and end.".

[106] Federal Democratic Republic of Ethiopia, Five Years National Human Rights Action Plan (2013 – 2015), p.37. Available at www.absinialaw.com. Accessed on 6 March, 2019.

[107] *Simpson* v. *Jamaica*, *Supra* note 51, para 7.3 (noting that: "a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer").

examination can be imagined thereby leaving the reliability of witnesses go unchecked which in turn impinges on the fairness and accuracy of the trial.

Finally, it is interesting to see whether such depositions alone can be sufficient grounds for a conviction. In general, absence of clear requirement of corroboration under Ethiopian law means depositions alone can sustain a valid conviction. However, concerns on the reliability of such convictions may abound unless at least the defense is afforded with sufficient opportunities to test such evidence, pretrial or at the trial stage.

In conclusion, the writers hold that considering the depositions of prosecution witnesses taken at preliminary inquiry as evidence would threaten the right to confrontation unless: (i) witnesses are unavailable due to justified grounds (ii) the accused is guaranteed with the chance to cross examine witnesses either at or prior to the trial; and (iii) the accused is represented by legal counsel. The right to confrontation may not be effectively exercised in the circumstances where defendants are not represented by legal counsel; a phenomenon common to Ethiopia.

iii) Witness Statements made at police stations

Article 145 of the CPC allows the testimony of witnesses taken during police investigation to be put in evidence. Albeit variations on the interpretation of this provision – For example, some limiting its use only to impeaching the credit of witness's statements tendered at trial for perjury purposes — there is broad leeway for courts to render a judgment based on such evidence both directly or indirectly. Indeed, practice also supports this.[108] Nonetheless, the law does not entitle the suspect to appear in person and to be represented by legal counsel of his choice particularly when the investigative police officer takes the testimony of adverse witnesses. There is also no legal requirement for such witnesses to be examined by the suspect during police investigation. Reliance on such statements to ground a conviction, when witnesses are unavailable, contradicts and undermines the right to confrontation, and hence the fairness of the trial.

iv) Witnesses protection measures

The rights of witnesses and that of the accused person are linked so inextricably that a complete understanding of one of these rights is impossible without a close examination of stipulations regulating the other. The Witness and Whistle-

[108] Yosef Fenta, *The Admissibility of Absent Witnesses in the Criminal Proceedings of Ethiopia: Examination of the practice in Bahirdar and surrounding High court,* LLM thesis, (2019), p.32. (Unpublished).

blowers Protection Proclamation lays down several protective measures for witnesses. Among others, the following protection measures may be employed separately or in combination, as the case may be: (a) withholding the identity of a witness until the trial process begins and the witness testifies; (b) hearing testimony in camera; (c) hearing testimony behind screen or by disguising identity; (d) producing evidence by electronic devices or any other method.[109] These measures of protections are available to protected persons on three cumulative conditions[110]:

1) When the alleged offence is punishable with rigorous imprisonment for ten or more years or death;
2) Where the offence may not be revealed or established by another means otherwise than by the testimony of the witness; and
(3) Where it is believed that a threat of serious danger exists to the life, physical security, freedom or property of the witness or a family member of the witness.

The above approach on witness protection raises at least two concerns. In the first place, the limitations to the right to cross examination may not fall within the bounds of the constitution which unconditionally guarantees the accused's right to examine adverse witnesses; thus calling for harmonization of the law with the constitution or amendment of the latter. An aspect of this limitation was tested in a terrorism case, though unsuccessfully. In one case before the Council of Constitutional Inquiry,[111]defendants challenged the constitutionality of a provision of the anti-terrorism proclamation, which permits the use of anonymous witnesses. However, the Council rejected the motion reasoning that Art 20(4) of the Constitution doesn't recognize the right to have the identity of witnesses disclosed, nor does it impose a duty on the prosecution to disclose same.[112] The Council held that the relevant provisions of the Anti-terrorism and Witnesses Protection proclamations, which permit the use of anonymous witnesses, are constitutional.[113] The Council's decision is controvertible at least on two fronts. First it unduly restricts the right to cross-examination by overlooking the right to know one's accuser — a well-established dimension of

[109] Witness Protection Proclamation, supra note 17, Article 4, para.1 (h)-(k).
[110] *Id.*, Article 3.
[111] Mahdi, Alyi and others, File no 2356/2009, Council of Constitutional Inquiry, (2009 EC), as cited in Taddese Melaku, The Right to Cross-examination and Witness Protection in Ethiopia: Comparative Overview, *Mizan law Review,* Vol.12, No.2, (2018), pp.322-23.
[112] *Ibid.*
[113] *Ibid.*

the right to confrontation.[114] Second, it involves a misconception of the duty/right of disclosure and its scope under the constitution where the defense is unequivocally entitled to have "*full access* to any evidence presented against it", witnesses and their identity included so that the defense mounts its defense and examines adverse witnesses effectively.[115] Practice also supports this where accused persons receive a copy of the charge with a list of evidence including the name of witnesses.

However, this is not to suggest that the right to confrontation should remain unbridled. Leaving the constitutionality issue aside, one may still justify the above limitations on the right to confrontation on grounds of necessity triggered by the desire to make a balance between the rights of the defense and that of victims and witnesses.

Yet, one challenge remains unresolved which takes us to the second concern: the configuration of those interests made by the Ethiopian lawmaker lacks systematization and cogency. Two illustrations seem suffice here. First, the second test on the value of the testimony which implies that witnesses with decisive testimony may qualify for protection, including protection of anonymity, gives rise to questions of fairness. While it is essential to ensure that limitations to the right to confrontation notably through witness protection measures are strictly necessary, this does not in any way imply that convictions grounded solely on untested/anonymous evidence are justified. Thus, the second precondition for witness protection, which could possibly lead one to the conclusion that untested evidence alone, can sustain a valid conviction needs attention. Second, the power to determine the applicable witness protection measures including the use of anonymous witnesses is reserved to the Attorney General, a party to the proceedings and whose decision is not subject to judicial review;[116] thereby missing out important counterbalancing judicial safeguards for the accused's right to confrontation.

On the other hand, it is intriguing to see that in clear contrast to many jurisdictions, competent child witnesses and other vulnerable witnesses such as witnesses with intellectual disability and victims of sexual offences are not "protected persons" *per se* under the definition of the witness protection proclamation. Such witnesses can only receive protections upon fulfilling the

[114] Ian Dennis,*Supra* note 1, p.255-56. (Noting that the right to know the identity ones accuses forms part of the right to confrontation). For more critics on the council`s decision see Taddese Melaku, *Supra* note 111.

[115] FDRE Constitution, *Supra* note 15, See Article 20(4).

[116] See the Witness Protection Proclamation, *Supra* note 17, Article 25.

above three cumulative conditions. Thus, a child witness or sexual offence victim witness in crimes that attract less than ten years of rigorous imprisonment may be subject to rigorous cross examination by the defense without any limit. Apart from leaving them in distress and anxiety, such unregulated cross examination would compromise the reliability and fairness of the trial, fundamental values pursued by the right to confrontation itself.[117] That is why many jurisdictions limit the right to confrontation by extending such witnesses various protections measures including protection of anonymity, regulating the nature of questions, and questioning through intermediaries.[118] Indeed in Ethiopia, it would be unfair not to mention the commendable practice of establishing child friendly benches in some quarters, which could address some of the concerns raised above. Still, the interests of child and other vulnerable witnesses need to be protected by law having regard to other competing interests.

v) Expert Opinion Reports

Where the prosecution or the court relies on expert evidence, the defense has a constitutional right to challenge it, including by countering it with own expert witnesses. The CPC recognizes the party's right to call and examine witnesses, including experts; leaving the manner of presentation of expert opinion largely unregulated.[119] Partly due to laxity of the law particularly on whether preparation of a report is needed[120] and mainly due to the aberration of the practice, many expert opinion reports are considered as documentary evidence,[121] thereby dispensing the prosecution with the production of experts who prepared them to testify before trial. In principle, this severely limits the rights of the defense to cross examine such experts.

2.3 The Accused Right to Cross-examine Witnesses

The constitution, under Article 20(4), states that accused persons have the right to examine witnesses testifying against them[122], but without prescribing any

[117] Adrian Keane, *Supra* note 63.

[118] *Ibid.*; Schwikkard,, *Supra* note 63; Bala, Child witnesses in the Canadian Criminal Courts, *Psychology, Public Policy and Law,Vol.5 (1999),* p.323. This is the case for example in several jurisdictions as diverse as South Africa, Norway, USA, UK, Canada, and Australia.

[119] CPC, *Supra* note 16, Article 136(2-3).

[120] See Semeneh Kiros and Chernet Hordofa, When the expert turns into a witch: Use of expert Opinion evidence in the Ethiopian Justice System, *Journal of Ethiopian Law*, Vol.27, No.1, (2015), pp.120 and 121 (suggesting contents of a standard expert opinion report).

[121] *Id*, p.103.

[122] The full text of Article 20(4) of the FDRE constitution reads: "Accused persons have the right to have full access to any evidence presented against them, *to examine witnesses testifying against them*, to

exception to this right. The phrases: "right to examine" and "witnesses testifying against them" are crucial elements of the right. Broadly speaking, the right to "examine" is a general term and includes the right to cross-examine prosecution witness. And specifically, the distinct use of the phrases "…examine witnesses testifying against them" and "…examination of witnesses on their behalf" under the constitution makes it clear that the former refers to cross-examination.

Nonetheless, the expression "witnesses testifying against" the accused within the meaning of the constitution is vague and requires interpretation. The scope of the right to confrontation depends on how broad or narrow the term "witness" is construed. Some limit witnesses only to those who provide testimonial statements,[123] thereby rendering the right to confrontation inapplicable to non-testimonial statements.[124] Others understood the word liberally to include any person with personal knowledge of something relevant to a case.[125]The European Court of Human Rights has rejected the narrower conception of witnesses and observed that the term needs to be conceived autonomously to include not only those who testify at trial but those who give pre-trial statements that are used in evidence at the trial.[126] In our case, the term "witness" has not been defined in the context of the right to confrontation thereby leaving those who qualify as "witnesses testifying against the accused" indeterminate. [127] The literal dictionary meaning of the term reflects its liberal conception. If one relies on this definition, the following out-of-court statements may fall under the category of witnesses testifying against the accused: (a) a medical doctor who gives a report about the seriousness or extent of the injury of the crime victim; (b) a traffic police reporting about whether the driver has committed professional fault or not before and during an accident; and (c) an expert witness testing DNA and blood-alcohol content of the accused. Nonetheless, in practice,

adduce or to have evidence produced in their own defense, and to obtain the attendance of and *examination of witnesses on their behalf* before the court."

[123] Obviously, there is some fuzziness in the term 'testimonial', but a practical definition is that if a reasonable person in the position of the maker of the statement would realize that the statement would likely be used in a criminal prosecution against the accused then the statement is testimonial. Here, the intention of the maker of the statement and the purpose of it should be taken into account to judge whether the statement is testimonial or not. In any case under this conception, a statement that is 'testimonial' in nature may not be used against an accused unless he/she has had an adequate opportunity to examine the maker of the statement. See Richard D. Friedman, *Supra* note 4, p.5.

[124] See Jeffery Bellin, The Incredible Shrinking Confrontation Clause, *Boston University Law Review*, Vol.92 (2012), p. 1882.

[125] *Id.*, p.1886.

[126] *Kostovski v. Netherlands* (1990) 12 E.H.R.R. 434 cited in William O'Brian, The Right to confrontation: European and US Perspectives, LQR Vol.121(2005), p.481-510.

[127] The term is defined for witness protection purposes as "a person who has acted or agrees to act as a witness in the investigation or trial of an offence against the accused". See Witness Protection Proclamation, *Supra* note 17, Article 2(1).

all expert opinion evidence is treated as documentary evidence dispensing the expert from appearing before court for testimony[128], thus seriously undermining the accused's constitutional right to confrontation.

Besides, the CPC under Articles 87 and 143 empowers the court to call additional witnesses on its own motion at the preliminary inquiry and trial stages respectively. However, whether and when additional witnesses called by court can be considered, as "witnesses testifying against the accused" is unclear, consequently leaving uncertain the right of the accused to confront such witnesses. No jurisprudence is established to crystallize this, either. Indeed, as much as one argues that the accused retains his right to cross examine adverse witnesses, regardless of who calls such witnesses; there are also counter arguments that witnesses called by the court are not witnesses of the parties as such and hence are not subject to structured examination by the parties. This needs to settle with clear statement of the law or jurisprudence.

On the other hand, the constitution does not entitle the suspect to cross-examine witnesses giving testimony against him during police investigation. There is no legal requirement that the suspect appears in person before the police during the taking of the testimony of witnesses against the former. Yet, pursuant to the CPC, the statements of the witnesses made before police in the course of investigation may be put in evidence during trial.[129] To the extent this provision is construed to refer to evidence used against the accused, using the testimony of such witness — without giving the accused an opportunity to cross examine it — infringes his right to confrontation.

The provisions of the CPC dealing with preliminary inquiry do not unequivocally guarantee the accused the right to cross-examine prosecution witness[130]while allowing the depositions of a witness taken at preliminary inquiry to be read and put in evidence.[131] One can only arrive at a conclusion through inference: the cumulative reading of Article 88 and 147(3) of the CPC suggests that the accused is entitled to cross-examine prosecution witness during preliminary inquiry.

The accused has the right to cross-examine those witnesses and experts produced by the prosecution before trial court. Pursuant to the CPC, the main purpose of questions put in cross-examination is to show to the court what is

[128] Semeneh Kiros and Chernet Hordofa, *Supra* note 120, p.103.
[129] CPC, *Supra* note 16, Article 145(1).
[130] *Id.*, Articles 80-93.
[131] *Id.,* Article 144.

erroneous, doubtful or untrue in the testimony of witness during examination in chief.[132]Yet, the CPC is silent on whether the accused is entitled to cross-examine additional wittiness called by court during both the preliminary inquiry and trial stages.[133] If additional witnesses called by court are considered as witness testifying against the accused according to the constitution, then one can arguably claim that the accused shall be entitled to cross-examine them.

Article 137(1) of the CPC authorizes prosecution witnesses to give testimony concerning facts of which they have an indirect knowledge. Here, the phrase "indirect knowledge" can be interpreted to mean the prosecution can produce hearsay witnesses. Indeed as shown above the Federal Cassation Bench has already endorsed such interpretation. Yet, neither the law nor the court prescribes how hearsay evidence should be administered in general, what types of hearsay evidences shall be produced and to what extent hearsay witnesses warrant conviction of an accused. This creates a broad leeway to resort to hearsay evidence without significant restraint to the detriment of the accused right to confrontation and thus the fairness and reliability of the trial.

Conclusion

Ethiopia has ratified both the ICCPR and UDHR and acceded to the ACHPR. However, neither of them is translated to the national working language, and published in official Federal *Negarit Gazeta*. This hinders their enhanced domestic implementation. PGRFTLA in Africa, adopted by the African Commission on Human and Peoples' Rights pursuant to the power vested to it under Article 45(c) of the ACHPR, has acknowledged the accused right to confrontation. The African Commission on Human and Peoples' Rights urges State parties to the ACHPR to adopt the PGRFTLA or to reform their national legislations in order to incorporate its principles. Ethiopia has not heeded to this call either by adopting the PGRFTLA or modifying national legislations to incorporate its principles.

As shown elsewhere, the accused right to cross-examine an adverse witness has received constitutional protection in Ethiopia. However, the language used in the constitution poses one challenge. The constitution leaves the right unqualified; thereby putting in question the propriety of restrictions made by other laws. Although not clearly mandated by the constitution, some laws put restrictions to

[132] *Id.,* Article 137(3).

[133] Under the Criminal Procedure Code of Ethiopia, Courts are empowered to call additional witnesses upon their discretion. Such witnesses are sometimes known as "court witnesses".

the right with a view to protect other overriding interests. Such laws exhibit several blemishes in terms of counterbalancing the interests involved in the criminal process, notably the rights of the accused on the one hand; and that of victims and witnesses, on the other. While allowing incursions into the right of the accused to cross examine prosecution witnesses, the protections extended to him are by and large precarious. To a certain extent this also applies to witnesses and victims. Some of the manifestations of these defects include the following: -

First, although the constitution is silent regarding trial in the absence of the accused, the CPC allows trial in *absentia* in crimes entailing not less than 12 years of rigorous imprisonment, albeit without providing for adequate safeguards for the accused.[134] Some of such inadequacies relate to the fact that: given the broad range of criminal punishment under Ethiopia law, it could cover a wide range of crimes; that the accused is not entitled to a mandatory legal representation; that the prosecution does not assume the burden of establishing the fact that effective notice and warning has been served to the absent accused.

Second, the suspect is not entitled to question witnesses during police investigation, nor is this unequivocally guaranteed in the preliminary inquiry. Furthermore, no law demands the testimony of the witness to be taken in the presence of the suspect during police investigation, nor is the accused entitled to a mandatory legal representation during the preliminary inquiry. Irrespective of these realities underlying the law the CPC allows the testimony of a witness taken during police investigation and preliminary inquiry be put in evidence at trial to the detriment of the accused right to confrontation.

Third, the CPC indirectly allows the prosecution to produce hearsay witnesses, which is also sanctioned by the Cassation bench. However, there are no rules on hearsay evidence governing the types and conditions under which it can be admitted and the weight attached to it; arguably warranting an unqualified use of hearsay. This is against the accused right to confrontation in particular and principles of fair trial in general.

Fourth, although the constitution unconditionally guarantees the accused the right to cross examines adverse witnesses, the Witness Protection Proclamation prescribes circumstances under which witnesses can give their testimony anonymously in which case such protection measures may apply: hearing testimony behind screen or by disguising the identity of the prosecution witnesses or producing evidence by electronic devices or any other methods.

[134] CPC, *Supra* note 16, Article 161(2) (a).

Yet, it is difficult to align such protection measures with the constitution, as it accommodates no exceptions for anonymous witnesses. Even accepting the restrictions justified as a matter of necessity, the conditions to invoke the protections fall short of striking a proper balance between the rights of the defense and that of victims and witnesses. This is so in two senses: there is no adequate protection for the defendant as a counterbalancing measure; and some overriding interests and values, which can be captured in terms of shielding vulnerable victims and witnesses such as child witnesses and victims of sexual offenses, are left unprotected.

Conceptualizing Peasants' Property Rights over Land under the FDRE Constitution

Gizachew Silesh Chane[♣]

Abstract

The question of who can use what resources of the land remained one of the most contentious subjects in policy debates and constitutional design. The FDRE Constitution has put in place a property regime acknowledging, inter alia, the State, the peoples of Ethiopia, peasants and pastoralists as having recognized interests/rights over land. Yet the reaches and limits of entitlements of these various stakeholders have not been resolved with a degree of certainty. This article examined the entitlements of peasants pertaining to land, based on doctrinal research method where the contents of Constitutional rules are exposed in light of general principles and concepts in property law. From this examination, it is concluded that while the letters of subsidiary laws and general rhetoric espouse the view that all potential powers and/or rights are put in the bucket of ownership and exclusively vested to the state, a closer look into the Constitutional provisions demonstrates that the state remained with a vacuum title in relation to land allocated to peasants and pastoralists individually or communally.

Key words: peasants, property, property rights, land, ownership, landholding rights

Introduction

Land continues to be one of the essential, perhaps the most essential, economic resources across communities in the globe. Reflecting this fact, land tenure[1], the

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[1] Samantha Hepburn, Principles of Property Law, (2nd ed., Cavendish Publishing Pty, Sydney, Australia), (2001), p.41.

system that "determines who can use what resources of the land for how long, and under what conditions,"[2] takes the center stage in policy debates.

A cursory review of Ethiopian land tenure system over the century shows that, it has been a major policy issue with the system changing with changing ideologies.[3] Leaving aside the remote past, the constitutional norms[4] during the Imperial time purported to uphold private ownership of land until they were superseded by declaration of public ownership of land[5] during the Derg regime.[6] Public ownership of land was upheld and continued during the transitional period.[7]

The 1995 FDRE Constitution[8] came up with its own design on the question of 'who can use what resources of the land'. The Constitution lists the State, *the peoples of Ethiopia*,[9] peasants, pastoralists, and investors as having vested interest in land though the bounds of their entitlement with respect to land

[2] FAO, Access to Rural Land and Land Administration after Violent Conflicts, Land Tenure Studies 8, Rome (2005), p.19.

[3] See generally Daniel Weldegebriel, Land Rights in Ethiopia: Ownership, Equity, and Liberty in Land Use Rights, Peer Reviewed Working paper, 2012.

[4] Constitution of Ethiopia, (1931), Article 27; The Revised Constitution of Ethiopia, (1955), Article 44.

[5] See Proclamation to Provide for the Public Ownership of Rural Lands, Proclamation No. 31/1975, *Negarit Gazetta*, (1975) (hereinafter, Proc. No. 31/1975); see also Government Ownership of Urban Lands and Extra House Proclamation, Proclamation No. 47 of 1975, *Negarit Gazetta,* (1975) (hereinafter Proc. No. 47/1975).

[6] On September 12, 1974, military leaders of Ethiopia's creeping coup d'etat placed Emperor Haile Selassie I under arrest and quickly formed a provisional military government. In March 1975, the Provisional Military Administrative Council (PMAC) officially terminated the ruling monarchy and began to promulgate a series of radical socialist measures. John M. Cohen& Peter H. Koehn, Rural and Urban Land Reform in Ethiopia, *African Law Studies*, No.14, (1977), p. 3.

[7] The period between the eviction of Derg from power in 1991 and the adoption FDRE Constitution in 1995. The then economic policy (issued in December 1991) of Transitional Government that declared land would remain under state ownership.

[8] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazetta*, (1995) (hereinafter FDRE Const.), Article 40.

[9] Id., Article 40(3), second sentence. The Nations, Nationalities and Peoples of Ethiopia are also mentioned as owners of land rights. We will not delve into the bewildering issue of defining who they are, and perhaps that no one precisely understands. The design of the provision suggests the term Ethiopian peoples sums up the triple designations.

remained uncertain and controversial. Article 40, on the Right to Property, provides:[10]

1. *Every Ethiopian citizen has the right to the ownership of 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.*
2. *"Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.*
3. *The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.*
4. *Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law.*
5. *Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by*
6 *Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.*
7. *Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.*

[10] The provision is reproduced here, for each of the sub-provisions are inter-related, so as to provide the glimpse of the whole design.

> 8. *Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.*

The interplay of this Constitutional precept and a number of federal and regional legislations subsequently enacted, in their own sphere,[11] determines property rights on land. Both the federal and regional governments produced a number of legislations[12] owing to the Constitutional proviso allowing the particulars to be specified by law.[13] The laws change from time to time,[14] from region to region,[15] and so do the rights of peasants.[16] Thus, the rights remain volatile in conceptualization, actual enforcement, and exercise.

Perhaps, nothing has been more controversial, in relation to entitlements in land, than the issue of expropriation and compensation of peasants' landholding rights. The government's growing demand for expropriation of land to develop infrastructure and to attract foreign investment[17] resulted in the displacement of

[11] See FDRE Const., *supra* note 8, Article 51(5) cum Article 52(2). Federal Government is vested with the power to "… enact laws for the utilization and conservation of land…. while states' domain is to "administer land" in accordance with Federal laws. See Article 51(5) cum Article 52(2).

[12] See generally Rural Land Administration and Land Use Proclamation of Federal Democratic Republic of Ethiopia, Proclamation No. 456/2005, *Federal Negarit Gazetta*, (2005) (hereinafter Proc. No. 456/2005), Article 2(2); Expropriation of land Holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation, Proclamation No.1161/2019, *Federal Negarit Gazetta*, (2019) (hereinafter Proc. No.1161/2019). The Regional States as well enacted their legislation on land. See for instance, Amhara National Regional State Revised Rural Land Administration and Use Proclamation, Proclamation No. 252/2017 (hereafter Amhara State Rural Land Proc. No. 252/2017).

[13] See FDRE Const., *supra* note 8, Article 40(4) & (5).

[14] Land Administration and Use Proclamation No. 87/1997, *Federal Negarit Gazetta*, (1997). It was later replaced by Proc. No. 456/2005; Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Proclamation No. 455/2005, *Federal Negarit Gazetta*, (2005) (hereinafter Proc. No.455/2005), which in turn is replaced by Proc. No.1161/2019).

[15] Montgomery Wray Witten, The Protection of Land Rights in Ethiopia, *Afrika Focus*, Vol. 20, Nr. 1-2, (2007), p. 156.

[16] Compare, for instance, Proc. No. 455/2005, *supra* note 14, Article 8(1) *vis-a-vis* Proc. No.1161/2019, *supra* note 12, Article 13. On displacement compensation, while the former provided for displacement compensation of a value equivalent to 10 years annual produce, the latter increased it to 15 years.

[17] Muradu Abdo, Reforming Ethiopia's Expropriation Law, *Mizan Law Review*, Vol. 9, No.2 (December 2015), pp.301, 328.

thousands of peasant households, leaving them without meaningful livelihood. While the debate at international level concerns how far expropriation accompanied by adequate compensation itself should be constrained, sadly, the political and legal discourse in Ethiopia has been whether the government owes legal obligation to pay compensation for peasant landholdings. The state officials, legal scholars and judges seem to have succumbed to the idea of, legally speaking, non-compensability of peasant's landholding during expropriation.[18] While considerable research has been made in articulating and restatement of the subsequent legislations regarding peasants' land rights, not much has been expended in tracing the rights and their protections in their very foundation - in the Constitution. It appears that, scholars have given up and perceived that not much could be fetched from the Constitution to crystallize the content of peasants' right in relation to land, to which this author begs to differ.

Relying on doctrinal research method, with an in-depth analysis of the constitutional provisions, this research attempted to address three basic questions: what relationship exists between the state and the people of Ethiopia with respect to land, given that land ownership is "exclusively vested in the State and in the peoples of Ethiopia"? Second, what is the relationship between the state and/or the people of Ethiopia *vis-a-vis* peasants and pastoralists with respect to land? Third, is landholding rights of peasants rendered legally non-compensable under the current legal setting? Moreover, wordings like 'property', property right, and 'ownership', though apparently vernaculars of property law, need closer examination and contextualized understanding.

Finally, the author would like to note that this research principally aims at examining the peasants' right in relation to land but it also makes mention of pastoralists' right in land scarcely. However, since peasants and pastoralists are treated more or less similarly in the Constitution,[19] the discussion and conclusion as regards peasants by and large applies to pastoralists.

The article is organized under six sections. Section one offers an account of the concept/conceptions of property. Particularly, it presents a general framework within which the provisions of Ethiopian Constitution on property could be analyzed and contextualized. The second section is dedicated to examining the conception of property under the FDRE Constitution. The third section

[18] Id., pp,303, 312, 319.

[19] FDRE Const., Article 40(4) & (5). Peasants and pastoralists are treated similarly in the Constitution. Of course, there might be technical differences in the actual implementation of the rights.

explicates the nature of relationship between the state and people of Ethiopia in relation to land by inquiring into the implication of their designation in the Constitution as owners of land. The question over the nature of peasants' rights in relation to land, in particular the apportionment of interests in land between the state and the peasants, has taken significant portion of the work and constituted section four in the overall structure of the research. Section five assesses the various arguments pertaining to the compensability or otherwise of peasant land holdings, upon expropriation, under the prevailing legal set up. Through the critical examination of the arguments, an attempt is made to clarify misgivings on the subject and reasons thereto. Finally, a brief concluding remark is provided.

1. Brief Account of the Concept/conception of Property

Providing a universally working definition of the term *property* is not an easy task. According to Hart, triple problems underlie the difficulty of dealing with property: "the problem of its definition, the problem of its justification, and the problem of its distribution".[20] As a way to deal with the difficulty of definition, some scholars seem to take the relative nature of the term. Jeremy Waldron, following this approach, holds that "[t]he concept of property is the concept of a system of rules governing access to and control of material resources."[21] As such conceptions of property differ as long as there are different legal systems.

Adriano Zambon concedes the troubling nature of defining the term property. Yet he calls for a distinction between the concept of property and conceptions of property,[22] the former one being universal while the latter is a relative one. For Zambon, the concept of property is "more precisely, the minimal sense of the term property"[23] that serves as minimum common denominator for all theorists and legal system alike whereas conception of property is a declension of the concept of property. According to Zambon, in its proper legal parlance, the concept of property is "a set of one or more deontic modalities that regulate the relations between persons in connection with one or more goods."[24] Similarly,

[20] Adriano Zambon, « Property: A conceptual analysis », Revus [Online], 38 | 2019, Online since 23 September 2019, connection on 04 February 2020. URL: http://journals.openedition.org/revus/5208; DOI: 10.4000/revus.5208, p.55.
[21] J. Waldron, What is Private Property? *Oxford Journal of Legal Studies*, Vol.5, No. 3, (1985), cited in Id., p. 61.
[22] Zambon, *Supra* note 20, p.56.
[23] Id.
[24] Id., p. 62.

Hohfeld holds that "property does not consist of things, but rather fundamental legal relations between people…sets of claims and entitlements in tension with each other, held by people against one another."[25] In simple terms, in its minimal sense and as a universal concept, property is a set of legal relation between persons with respect to things.

Zambon further notes the prevalence of two improper uses of the term property. The first one is concerning the use of the term property as designator of a thing, which is common in the ordinary course of communication. [26] He expresses his discontent with the reference to things as the meaning of the term property stating that it "makes us immediately think of a thing, and it thereby makes it easier for us to think of property as a single right over a thing" as opposed to a set of rights or norms in relation to a thing.[27] Thus, he emphasizes that the description of the term property as designator of things should not be used in the legal lexicon. Second, while property is a set of legal relation between persons with respect to things, there is this inappropriate characterization of property as a relation between a person and a thing which is deeply rooted in the Roman conception of property.

Legal systems and legal theorists may develop their own conception of property based on that minimal sense - the *concept* of the term property. [28] Indeed, there are accounts of property, by legal philosophers, that identify property with just one right[29] and characterizations of "property" as aggregate of rights.[30] And yet,

[25] Denise R. Johnson, Reflections on the Bundle of Rights, *Vermont Law Review,* (2007), Vol. 32 (2007), p.251.
[26] Id., p.65.
[27]Id.
[28] Zambon, *supra* note 20, p. 56.
[29] Id., P.62. According to James E. Penner, "property is the right to determine how particular things will be used", and "exclusion is […] the formal essence of the right." Penner's definition of property as the right of exclusive use gives the impression that it is permitted only to someone to determine how particular things will be used.
[30] Munzer, S. R., Property and Disagreement, in J. Penner & H. E. Smith (eds.), *Philosophical Foundations of Property Law*, (2013), Oxford University Press. Cited in, Id., p. 61. Stephen R. Munzer stated that:
The idea of property […] involves a constellation of Hohfeldian elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalog of "things" (tangible and intangible) that are the subjects of these incidents. Hohfeld's conceptions are normative modalities. In the more specific form of Honoré's incidents, these are

beyond the minimal sense, general categorization and comparison of the *conception* of property is still necessary and possible.

It is worthwhile to cite Pierre's remark that "an understanding of a different approach to the similar problem faced by a society governed by the rules of another tradition, therefore, has the distinct advantage of avoiding narrow-mindedness in the search for possible solutions."[31] The insights to make this categorization and comparison are drawn from established legal traditions which crystallize the conceptions. To this end, the customary Common law-Civil law division of legal systems is employed here for comparison. In the common law, especially in the United States, the conventional view takes "property" "as a bundle of rights" -collection of various rights with respect to a resource, metaphorically called "bundle of sticks".[32] The sticks could be owned by different persons. This conception of property is characterized by fragmentation of title where one is not regarded as owning the thing itself but a right pertaining to the thing which is enforceable against all persons.[33] Emphasizing this conception in the common law tradition, Johnson explains that "[t]he bundle of rights metaphor was intended to signify that property is a set of legal relationships among people and is not merely ownership of 'things' or the relationships between owners and things."[34]

In contrast, in the civil law legal systems such as France, the concept of property is constructed on the Roman idea of total dominion over a thing whereby all the uses of a thing are united in the single concept of ownership and vested in the same person. Under this conception, ownership comprises the union of three attributes: *usus, fructus* and *abusus.*[35] From this characterization of property rights, one can observe that scholars in the civil law tradition confine the conception of the rights to ownership. Chang and Smith remarked that "when civil law property scholars define property rights, they think of only

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the relations that constitute property. Metaphorically, they are the "sticks" in the bundle called property.

[31] B. Pierre, Classification of Property and Conceptions of Ownership in Civil and Common Law, *Revue Générale De Droit,* Vol. 28, No. 2, (1997), p.238, available at https://doi.org/10.7202/1035639ar.

[32] Yun-chien Chang & Henry E. Smith, An Economic Analysis of Civil versus Common Law Property, *Notre Dame L. Rev.*, Vol. 88, No. 1, (2012), p.5, available at http://scholarship.law.nd.edu/ndlr/vol88/iss1/1.

[33] Pierre, *supra* note 31, p. 251.

[34] Johnson, *supra* note 27, p, 249.

[35] Pierre, *supra* note 31, p.249

ownership."[36] Unlike the common law system, where entitlements in a thing are treated as separate object of ownership, thereby recognizing plurality of owners in relation to the thing, the civilian notion of ownership is anchored in the conception that there can be "only one "owner" in respect of each thing."[37]

Of course, this does not mean that only a single person can have rights in a thing in the civil law legal systems. There could be cases whereby the "owner" may split and give parts of what is in his exclusive control thereby creating rights such as usufruct and servitudes. And yet each right created thereto is *"a right in the land (thing) owned by another*".[38]

Adriano Zambon made a passing remark that the concept of property right is a subset of the concept of property. We use the wording "property right" when we do not want to signal that the holder of the right has a legal position that is not an advantageous position while property embraces both advantageous and disadvantageous relationships. [39]

2. Conceptualizing Property Rights over Land under the FDRE Constitution

Constitutional level framing of property rights is so fundamental that it shapes the entire conceptualization of this right across spheres of peoples' lives. The FDRE Constitution takes such a stature requiring critical examination. The pertinent provisions on property rights in the constitution are always points of scholarly preoccupation raising such questions as: how is the term property conceived in the Constitution? Is it similar to the common law conception of property or that of civil law legal system? What things could be the object of property? Is the conception of property in the Constitution in congruity with the pre-existing legal framework as envisaged in Civil Code of Ethiopia?

In this section of the article, an attempt has been made to explicate these issues as a way to demonstrate the prevailing conception of property in land in the context of the Constitution. The Constitutional provision on property right opens its first sentence by stating "[e]very Ethiopian citizen has *the right to the ownership* of private property", and *ownership* is described as inclusive of the

[36] Chang and Smith, *supra* note, p.32.
[37] Pierre, *supra* note 31, p.256.
[38] Id., p.257.
[39] Zambon, *supra* note 20, p.66

triple elements of *usus, fructus,* and *abusus*.[40] The notion of property is just attached to the concept of ownership in the constitution - as it is simply stated that "[e]very Ethiopian citizen has *the right to the ownership* of private property." Yet this begs such questions as: how about the right to other property rights lesser than ownership? Does it mean only ownership right is recognized? Or does it mean other rights are not private property rights? What is private property in the first place? In an attempt to define "private property," Article 40 (2) of the Constitution stipulates:

> *Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common*.

A closer look into this definition shows that, it fails to articulate the notion of property in itself while it purports to define "private property." It is simply a description of just one of the property regimes well recognized in legal jurisprudence. According to Honoré and Harris,[41] "every legal system no matter its politico-economic genesis,"[42] recognized four property regimes: (i) private

[40] *Usus, fructus, abusus* are the three constituent elements of ownership as conventionally recognized in civil law legal tradition. The FDRE Constitution also states that the 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." The usufruct element is not apparent from the letters of the Constitutions but it is logical to conclude it is there; the Constitution recognized the right to dispose and as such, for stronger reason lesser rights such as usufruct are recognized. See FDRE Const., Article 40 (2).

[41] Paul T Babie, John V Orth, and Charlie Xiao-chuan Weng, The Honoré-Waldron Thesis, A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese and Australian Land Law, *TUL. L. REV.*, Vol. 91, (2016-2017), p.2. Private property includes those held by individuals, or jointly by more than one individual or group, or by a corporation..

[42] Babie *et al, supra* note 41, pp.6-7. It claimed every legal system contains each of the four categories "no matter its politico-economic genesis," and differences between systems is not related presence or absence of any one or more of them rather but of the degree of those types of property in each system.

property;[43] (ii) public/state property;[44] (iii) communitarian property;[45] and (iv) common property /non-property.[46]

The FDRE Constitution has acknowledged three of these property regimes: private property,[47] communitarian/communal property[48], and state/public

[43] Barrie Needham, *Planning, Law and Economics: An Investigation of the Rules We Make for Using Land* (Routledge, 2006), p.42. Individual owners have the right to undertake socially acceptable uses, and have the duty to refrain from socially unacceptable uses. Others (non-owners) have the duty to refrain from preventing socially acceptable uses and have the right to expect that only socially acceptable uses will occur.

[44] See also D.W. Bromley, Environment and Economy: Property Rights and Public Policy, Cambridge MA: Blackwell, (1991), as cited in Needham, Id., p.42. Individuals have duty to observe use and access rules determined by the controlling or managing state agency. The agency has the right to determine the use and access rules.

[45] Needham, *supra* note 43, p.42. The management group (the owners) has the right to exclude non-members, and non-members have the duty to abide by the exclusion. Individual members of the management group (the co-owners) have both rights and duties with respect to use rates and maintenance of the thing owned.

[46] Babie *et al*, *supra* note 41, p.6; Needham, *supra* note 41, p.42. No defined group of users of owners and the benefit stream is available to anyone. Individuals have both privilege and no rights with respect to use rates and maintenance of the asset. The asset is an open-access resource. A public park is an example. The concepts of privilege and no rights (a non-property regime) refer to the idea that someone has presumptive rights. There is a difference in the use of terminology in the Honere-Hariris classification on the one hand and Bromley's terminology on the other hand. Common property in the first classification corresponds to non-property regime in the second while the term communitarian in the first corresponds to common property in the second case.

[47] FDRE Const., *supra* note 8, Article 40(2). The notion of "Private Property," hinges on what does property mean by "private" on the one hand, and what does property mean on the other hand. The term 'private', according to Harris, signifies a case where property rights are held by individuals, or jointly by more than one individual or group, or by a corporation. See Babieet al, *supra* note 39, p.6. The Constitution's description of "private" more or less corresponds to this conventional characterization except that the Constitution subsumed the phrase 'communities specifically empowered by law to own property in common' with in the category of persons privately entitled to private property.

[48] Id., Article 40(2). The notion of 'communities specifically empowered by law to own property in common' in the FDRE Constitution best fits communitarian property regime within the general legal literature. [48] Needham, *supra* note 43, p.42. However, the Constitution subsumed the phrase 'communities specifically empowered by law to own property in common' with in the category of persons

property regimes[49] but the fourth one, common/non-property regime, did not find its way into the FDRE Constitution. Of course, scholars have also branded it non-property regime, and thus it makes little sense to incorporate a non-property regime in the limited space of the constitution dealing with property.

Even though the above cited definition failed to articulate the notion of property in itself, some important elements surrounding the conception of property are still discernible from this definition. The first one pertains to the nature of things that can be the subject of property to which the definitions responds by referring to any tangible or intangible product having some value. Second, the definition makes a clear mention of as to who can have the right to private property. To this end, individual citizens, juridical persons, and "communities specifically empowered by law to own property in common" are the category of persons entitled to private property. Third, the definition attempts to address the issue of what justifies entitlement to private property. As such, entitlement to private property draws its justification in so far as the tangible or intangible things are the produce of the labour, creativity, enterprise or capital of the person. Moreover, it surfaces that the term property is employed in the Constitution to designate a thing— *tangible or intangible*, which is the use of the term in ordinary language as opposed to the peculiar use of the term in legal parlance. Of course, the Civil Code also suffers from such limitation.[50]

Finally, the notion of "private property" in Article 40(2) does not encompass all other property rights that can be privately enjoyed but lesser than ownership. The list and description in the definition is rather confined to ownership, just one of the possible property rights. For instance, the definition can hardly cover property rights in other sub-provisions of Article 40, such as recognition of peasants' right to obtain land, the investors' right over land after acquisition against payment, etc.

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privately entitled to private property. Yet this does not change the fact that the Constitution recognized communitarian property regime. In other words, though Constitution seemingly reduced the recognized property regimes in to private property and state property, communitarian property regime is also acknowledged as it is included within the description of private property.

[49] The Constitution endorsed public/state property regime in that Article 40(3) declared "the right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia". See FDRE Const., *supra* note 8, Article 40(3).

[50] Civil Code Proclamation, 1960 (hereinafter Civil Code). See generally Book III that begins with goods in general, and specifically see the description of ownership in Arts 1204 and 1205.

Yet it is important to note that, this does not mean that the Constitution denies recognition for the other property rights lesser than ownership; they are recognized as property rights in the Constitution itself because they are subsumed under the caption "the right to property" under Article40. In addition, since the Constitution has recognized ownership —the widest property right— for stronger reason, other property rights lesser than ownership are recognized. Thus, it only means that other entitlements in land that are lesser than ownership still constitute property rights but they are not *private property* due to the fact that the Constitution equated *private property* with full ownership over a thing, which is similar to civilian conception of property.

Generally, the definition in the FDRE Constitution is by far deficient. For instance, Chinese law[51] appears to employ the term "property" to refer to things, which is simply a use in the ordinary sense of the term. But that deficiency is complemented by making distinction between "property" and "property rights," and Chinese law described property rights as inclusive of *ownership, usufructuary and security right* in property rights." Thus, Chinese law is far better explicit in recognizing property rights other than ownership as opposed to Ethiopian Constitution. Nonetheless, in the Ethiopian case, the Constitution could be and should be complemented by the Civil Code and other relevant legislations to get the real picture of the laws on property.

3. The Nature of Relationship between the State and the Peoples of Ethiopia with Respect to Land

The Constitution excludes land from the domain of private ownership, and rather it states the right to ownership of land is "exclusively vested in the State and in the peoples of Ethiopia."[52] So, what is the relationship between the state and the people of Ethiopia with respect to land? Are they joint owners? This article argues that "state ownership "and "public ownership" of land are alternatives instead of distinct category of property regimes inviting the conjunction "and". On the other hand, some scholars interpret that

[51] The Property Rights Law of the People's Republic of China, (2007), National People's Congress of the People's Republic of China, LLX Translation (Unofficial Translation) (hereinafter Chinese Property Rights Law of 2007), Article 2. Article 2 provided that the word "property". .. includes movable and real property. Where there are *laws stipulating rights as the objects of property rights,* they shall be observed." And it then stated "[t]he phrase "property rights" as a term used in this Law refers to the exclusive right enjoyed by the obligee to directly control specific properties including *ownership, usufructuary and security right* in property rights."

[52] FDRE Const., *supra* note 8, Article 40(3).

Constitutional clause as one depicting a kind of joint ownership, and they also build more arguments based on that description.

Daniel made a good account of state ownership of land within the framework of generally recognized property regimes, and concluded that "[p]ractically, there are no real differences between the dichotomy of the "state or government" (ownership), on the one hand, and the "collective or public" ownership of land on the other."[53] He maintained that this conception holds true for Ethiopia as well in that, under the FDRE Constitution, the "state" and the "people" are considered as two joint owners of land but the state is the representative of the people to administer the resource.[54] Yet, Daniel failed to take his argument to its logical end and to apply this conception in the actual interpretation and application of the constitutional provisions; he made a couple of assertions recounting joint ownership of land by the state and the people, portraying state and the people as two distinct entities establishing a kind of co-ownership.[55] Muradu Abdo also made a passing remark arguing the Constitution's stipulation that vests ownership of land in the state and the people signifies shared interests in land,[56] which implies a kind of co-ownership. These references to joint

[53] Daniel Weldegebriel Ambaye, Land Rights and Expropriation in Ethiopia, Doctoral Thesis, Royal Institute of Technology, (KTH), Stockholm, (2013), pp32-38.

[54] Id., p.38.

[55] Id. On page 230, Daniel held that "fallacy is created because of the conflicting sub-articles of Article 40 of the FDRE Constitution. The constitution on the one hand creates the joint ownership of land by the people and the state, but on the other it denies the holder a market-based compensation for the land in the event of expropriation." Also at page 255, he stated "...the first problem (in relation to compensation for loss of land) stems from the constitutional right to the land itself.... land belongs to the joint ownership of the state and the people. To ensure this right, the constitution and the rural land proclamations provide equal access to rural land and the protection against arbitrary eviction. Farmers are recognized as collective owners of the land and entrusted with holding right which is not limited in time and which provides all land rights except sale... When land is taken for public purposes, the damage that is caused to the holders is not equally compensated by the average value of ten years´ production.

[56] Muradu, *supra* note 17, pp.311-312. Muradu stated this: "The Constitution says land is the joint property of the state and the people. If land is really a joint property, it means your right as a landholder is short of ownership including the right to reap the economic value of your land use rights. But the expropriation law does not permit you to capture enhanced value of land. Yet, the individual shall be allowed to share the enhanced value of the land instead of being diverted to state treasury as a whole."

ownership and arguments based thereon could result in misconceptions giving the sense of co-ownership, which is a mode of private ownership,[57] and hardly conceivable between the state and the people collectively.

According to the general classification of property regimes (briefly discussed under section 2 above), public/state property is one of four typical categories of property regimes.[58] The feature of public/state property (also sometimes called collective property) is that the people collectively own the resource; and they are represented by the state regarding the utilization of the resources.[59] It must be noted that the state acts in differing capacity depending on the resource in use.[60] There are resources in which the state may hold title to the resource and uses it in similar manner as a private property owner, with the proviso that no self-seeking exploitation is allowed but resource must be deployed for social function. On the other hand, there are resources open to use for the whole collective but under state administration on behalf of the collective. Roads, streets, canals, railways, seashores are some of the examples that fit into this category. These are resources that the Civil Code of Ethiopia referred to as "public domain."[61]

Therefore, interpretations depicting joint ownership between the state and the people are misleading; there is no practically conceivable and legally sensible joint ownership of land between the state and the people. It is practically inconceivable because the whole people cannot act in concert to exercise their joint ownership with the state, and that is why state stepped in as agent. It is not legally sensible because the state is the representative (agent) and the people are the principals, and they cannot be depicted as two distinct entities regarding legal engagements but only the principal. That is why Art 40(3) of the Constitution itself dropped the word "state" in the second sentence and simply declared "land is a common property of the Nations, Nationalities and Peoples of Ethiopia...," that collectively constitute the reference to peoples of Ethiopia in the first sentence. Moreover, Article 89(5) of the Constitution unequivocally asserts the principal-agent relationship between the people and the state declaring that "[g]overnment has the duty to hold, *on behalf of the People,* land and other natural resources and to deploy them for their common benefit and development." This is not unique to Ethiopia. Chinese law similarly

[57] Babie et al, *supra* note 41, p.4.
[58] Id., p.2.
[59] Id., p.7.
[60] See generally Id.
[61] See Civil Code, *supra* note 50, arts. 1444-1459.

acknowledges state ownership, collective ownership (a kind of communal ownership), and private ownership. And then it confirmed that property owned by the state is property owned by the whole people. [62] Thus, there is no joint ownership but just only public (or state)[63] ownership of land.

Nevertheless, as a matter of principle of legal interpretation, if a meaning must be ascribed to the phrase "the right to ownership of... land... is... vested in the State and in the peoples of Ethiopia" so that the seemingly "joint ownership" description is not totally without meaning in the Constitution, the author would say that it must have been the product of a mind-set that takes into account the dual role of state in exercising its capacity as an agent of the people: cases where it acts in similar fashion to private proprietor, and a case where it is a passive guardian of public resources (public domain). The terms public ownership and state ownership are, thus, alternatives and the nature of relationship between the state and the peoples of Ethiopia with respect to land is that of agent-principal relationship.

4. On the Question of the Nature and Scope of Property Rights of Peasants Regarding Land

Given the constitutional stipulations on property rights in general and the contending arguments over the underlying meaning thereof, it is compelling to further raise more questions such as what is the relationship between the state and/or the people of Ethiopia *vis-a- vis* peasants /pastoralists? On the one hand, the state owns land (on behalf of the whole public), as we concluded above. On the other hand, the Constitution acknowledged the rights of peasants and pastoralists with respect land. Peasants and pastoralists are subset of the peoples of Ethiopia that collectively own land. Yet, they are given special status and privilege in relation to land owing to the fact that their livelihood is indispensably attached to land more than other categories of the Ethiopian

[62] Chinese Property Rights Law of 2007, *supra* note 51. See generally Arts. 45-69. Article 45 provided that "[w]ith regard to the properties belong to the State according to law, they are owned by the State, that is, by the whole people. The State Council shall, on behalf of the State, exercise the ownership with respect to the State properties; if there are provisions otherwise provided, they shall be observed.

[63] Of the alternatives, public ownership or state ownership, I prefer to use state ownership, a preference to name the agent instead of the principal. This is because property implies relations between persons regarding things, and it is the agent (the state) that actively engages in these relations. That would provide vivid picture of actors in the legal relation and ease comprehending discourse on property.

people such as urban dwellers and investors. Hence, the question of who gets what resources of the land would be between the state (on behalf the general public) *vis-a-vis* peasants and pastoralists.

The Constitution, after acknowledging the rights of peasants and pastoralists with respect to land, left the implementations to be detailed by subsequent legislation.[64] Efforts to that effect have been made both at federal and regional level. The laws termed the right of peasants and pastoralist regarding land as "holding right"[65] and defines it as:

> *The right of any peasant farmer or semi-pastoralist and pastoralist shall have to use rural land for purpose of agriculture and natural resource development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.*

So far, content analysis of peasants' right regarding land is mostly focused on articulation of the laws enacted subsequent to the Constitution. We noted above that, the laws have been changing a couple of times and there are also variations across regional legislation, giving rise to differing rights and treatments of peasants across time and place. And practically, the peasants' entitlement on land has continued diminishing from time to time due to population pressure, absence of redistribution for the new generation, and expanding demand for expropriation without adequate compensation. Moreover, even though the state has recognized landholding right of peasants, the right remained malleable-such as where compensation amount varying in time horizon as legislation changes.[66] All these conflate to render the rights of peasants in land unstable and unpredictable.

However, pretty obvious as it is, the scope and content of rights of peasants should not merely depend on what the subordinate legislation ascribed to it. The very nature of the right as endorsed in the Constitution deserves adequate attention and exposition so that the minimum threshold of the right would be recognized as constitutionally well founded, be stable and predictable.

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[64] See FDRE Const., *supra* note 8, Article 40(4) & (5).
[65] Proc. No. 456/2005, *supra* note 12, Article 2 (4).
[66] Cf. Proc. No. 455/2005, *supra* note 14, Article 8(1) and Proc. No.1161/2019, *supra* note 12, Article 13. Displacement compensation was 10 years annual produce, latter increased to 15 years.

We have concluded that the FDRE Constitution's conception of property is oriented by the civilian notion of property that equates private property with that of full ownership over a thing. As such there might be a temptation to conclude all rights and powers in land, under the FDRE Constitution goes to the state (on behalf of the people) since land is under public ownership. Moreover, the Constitution uses the term property to designate a thing, so tempting to "think of property as a single right over a thing",[67] thereby gravitating that single right on land toward the state. In addition, Ethiopia is a civil law country, at least in relation to the Civil Code, and the civilian notion of property might be deeply rooted. Thus, the ramifications of the Roman conception of property as absolute dominion over a thing, that there can be "only one 'owner' in respect of each thing,"[68] could have permeated into the way we think of property. The Ethiopian trained legal professionals might have a mind-set unperceptive of property rights other than ownership. Maybe, the remark that "when civil law property scholars define property rights, they think of only ownership"[69] applies to them. Scholars also point out such dangers of over simplifying property by confining it to narrow conceptualizations. To this end, Barrie Needham noted that "discussion about property rights often limit themselves to one of the many possible rights, namely the right of ownership. This simplification then causes a simplification in the discussion about the practical implications of property rights."[70] All these factors stand against concretizing the constitutional rights of peasants.

And yet, even though the state is owner of the land pursuant to the Constitution, the same Constitution affirms Ethiopian peasants' right to obtain land and the right is guaranteed against eviction. Can we make good sense of these provisions and concretize the rights? This author responds affirmatively, and argues for that.

As Needham explained, there can be a variety of property rights over land even though the list of all possible property rights that could be established at a particular time depends on what is recognized and protected by particular legal system. We noted that common law conception of property depicts it as the bundle of rights acknowledging the possibility of many different and non-competing ways of using the same thing. Besides, the civil law legal system is not alien to the prospect of accommodating several persons with respect to a

[67] Zambon, *supra* note 20, p.65.
[68] Pierre, *supra* note 31, p.256.
[69] Chang and Smith, *supra* note 31, p.31.
[70] Needham, *supra* note 43, p.35.

thing that there can be dismemberments of ownership.[71] This holds true in the Ethiopian property law as well, as endorsed in the 1960 Civil Code which adopted the civilian notion of ownership.[72] Usufruct constitutes typical example of such legally recognized dismemberment of ownership in the Civil Code,[73] and other dismemberments of that widest right are permitted subject to statutory blessing.

In the same vein, although the Constitution vested ownership of land to the peoples of Ethiopia collectively, that right of ownership is short of full ownership and charged with special rights of peasants and pastoralists—certain property rights are ripped off and vested to peasants and pastoralists by the operation of the law, the Constitution itself.[74]

Then, the remaining issue would be: what is the scope of rights dismembered from ownership and granted to the peasants and pastoralists? In other words, of the triple elements of ownership, i.e. *usus*, *fructus*, and *abusus*, which of them goes to peasants and what remains with the owner - the peoples of Ethiopia collectively? The Constitution has guarantees peasants free access to land and protection against eviction from their possession.[75] Consequently, the rural land laws confirmed that peasants have the right to use rural land for purposes of agriculture and natural resource development, lease (for limited period) and bequeath same to limited category of persons.[76] Added to that, landholding right of peasants is stated to be without time limit.[77] Therefore, it appears that, of the

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[71] Pierre, *supra* note 31, p.257.

[72] Civil Code, *supra* note 50, Article 1204(2). It states that ownership "may *neither be divided* or restricted *except in accordance with the law*." The term *neither be divided* but only if permitted by law indicates the possibility of dismemberments. As per the Civil Code, the triple element (usus, fructus, and abusus) are vested to the owner. Also, Article 1204(1) reads that "Ownership is the widest right that may be had on a corporeal thing. It is to be noted that the Code mention corporeal things only as if intangibles cannot be owned. But this is the influence of Roman law that attached ownership to things with material existence and capable of physical possession. This is one of the most criticized conception of property in Roman law tradition. See for instance, Johnson, *supra* p.250; Pierre, Classification of Property, *supra* note 43, p. 252.

[73] See Id., arts.1309 ff.

[74] It is also possible to say that the dismemberment is also by contract because a constitution is a pact between the people and the government.

[75] FDRE Const., *supra* note 8, Article 40(3).

[76] See Proc. No. 456/2005, *supra* note 12, arts. 2(4).

[77] See Id. Article 7(1). It reads as "the rural land use right of peasant farmers, semi-pastoralists and pastoralists shall have no time limit."

constituent elements, according to the Roman law conception of ownership, the state is left with *abusus* while *usus* and *fructus* go to the peasants. In deeded, as Needham opined, a person worth taking the name owner must have the right to capital,[78] which corresponds to the *abuses* elements of *dominium* according to the Roman law conception of ownership. Yet, according to the FDRE Constitution, the owner does not have *abusus* right from the beginning; the Constitution affirmed land "shall not be subject to sale or to other means of exchange."[79] This results in a straight forward but untenable conclusion that the state has no any recognizable interest in land, and that 'no one owns land in Ethiopia'. We arrived at this indefensible conclusion due to extended application of private ownership conception to public ownership. Otherwise, restriction on alienation of publicly held land is not uncommon. [80]

The characterization of ownership as consisting of just three general elements (*usus, fructus* and *abusus)* has failed us; it is unable to explain what interests remain with the state. Perhaps, the elements of full ownership in Honere's list could be of help. In his influential essay on ownership, written in the early 1960s, Honore' listed what he calls incidents of full ownership that have come to be known as the bundle of rights.[81] He made an inventory of eleven incidents[82] that consists of the right to possess, the right to use, the right to

[78] Needham, *supra* note 43, p.39.
[79] FDRE Const., *supra* note 8, Article 40(3).
[80] Babie et al, *supra* note 41, p.12.
[81] Johnson, *supra* note 27, p. 253. Honore alleged that his list of incidents of full ownership were "common to all 'mature' legal systems."
[82] Id., p.253. The list of the incidents consists of the following:

1. *The right to possess*—the right to "exclusive physical control of the thing owned.
2. *The right to use*—the right "to personal enjoyment and use of the thing as distinct from" the right to manage and the right to the income.
3. *The right to manage*—the right "to decide how and by whom a thing shall be used."
4. *The right to the income*—the right "to the benefits derived from foregoing personal use of a thing and allowing others to use it."
5. *The right to capital*— "the power to alienate the thing," meaning to sell or give it away, "and to consume, waste, modify, or destroy it."
6. *The right to security*— "immunity from expropriation," that is, the land cannot be taken from the right-holder.
7. *The power of transmissibility*— "the power to devise or bequeath the thing," meaning to give it to somebody else after your death.

manage, the right to the income, the right to capital, the right to security, the power of transmissibility, the absence of term, the prohibition of harmful use, liability to execution, and rights of residuary character.

Honere's eleven incidents are further decomposition of the triple elements of ownership and in aggregate they constitute full ownership. Putting the ownership right of the state, on the one hand, and the land holders' right one the other end of the continuum, it is possible to determine which of the rights are dismembered and vested to peasants.

Peasants in Ethiopia do have incident of the right to possession and the right to use since the Constitution guarantees them access to land and protection against eviction from their possession. With respect to 'the right to manage—the right "to decide how and by whom a thing shall be used"— it is vital to look at this issue in two layers. The whole stock of land is under the control of the state to hold it in trust for the general public. The state retains decisive power, due to generality of the Constitution, in determining who should be eligible in the allocation of land to peasants depending on the realities on the ground. The constitutional proviso allowing the implementation to be specified by law signifies that. But once a peasant has got his fair share, it is logical to conclude that he has control over that plot, can decide how and by whom it shall be used subject to the regulatory control aiming at preservation of capital. Consequently, the subsequent legislations have guaranteed peasants not only the right to use but also the right to income —rights to lease. They can decide how and who can use. Therefore, peasants have the right to income and shared right as regards the right to manage.

In relation to 'the right to security'—immunity from expropriation— it is maintained that there is no absolute immunity from expropriation but the government's power to expropriate must be limited to certain class of thing and only for limited purposes, even if it is against compensation. Otherwise, a

8. *The absence of term*— "the indeterminate length of one's ownership rights," that is, that ownership is not for a term of years, but forever.
9. *The prohibition of harmful use*—a person's duty to refrain "from using the thing in certain ways harmful to others."
10. *Liability to execution*—liability for having "the thing taken away for repayment of a debt."
11. *Residuary character*— "the existence of rules governing the reversion of lapsed ownership rights"; for example, who is entitled to the property if the taxes are not paid, or if some other obligation of ownership is not exercised.

general power to expropriate against compensation would render ownership of material objects (rights in *rem*) into monetary claims. Peasants' right in land being a right in *rem*, they deserve the right to security.[83]

As regards duration (term), the Constitutions talks of peasants at individual level, and access to land is contingent on someone being a peasant[84] and continuing to maintain that status. Hence, in terms of duration the Constitution assured at least lifetime enjoyment starting from the time one is eligible as a peasant, normally from the age of 18 years,[85] until death or one cease to be a peasant. That is the minimum security the constitution guarantees. This also implies that peasants lack 'power of transmissibility'— "the power to devise or bequeath the thing," meaning to give it to somebody else after death. However, subsequent legislation confirmed use right without term (indefinite time use right) and permitted some degree of power of transmissibility as a matter of policy to ensure tenure security.

The Constitution entitles neither the state nor the peasants with the right to capital— "the power to alienate the land." We noted that such a restriction is common in resources held in trust for the general public. Yet normally the people are sovereign and can decide on their fate; they can decide to make land saleable or otherwise exchangeable. In fact, this is not possible under the existing constitutional pact, and if they wish so, they must amend the Constitution. A related incident is 'liability to execution'—liability for having "the thing taken away for repayment of a debt." Again, neither the state nor the landholders could avail land for this purpose owing to the fact that this right presupposes the right to capital.

Still the other important incident of ownership pertains to what Honere' termed as 'residuary character'— consists in the reversion of lapsed ownership rights. It is exemplified as reclaiming the thing where certain obligations such as default on payment of tax or failure to exercise ownership. This is typically the right reserved to the state. The federal rural land laws stipulated several grounds

[83] A.M. Honere', The Nature of Property and the Value of Justice, available at http://fs2.american.edu/dfagel/www/OwnershipSmaller.pdf, accessed on 5 May 2020, p.373.

[84] See Proc. No. 456/2005, *supra* note 12, Article 2 (7) reads that "peasant" means a member of a rural community who has been given a rural landholding right and, the livelihood of his family and himself is based on the income from the land.

[85] Id. Article 5 (1)(b).

where by a landholder would lose entitlement thereto and the land reverts to the state.[86]

Based on the above analysis, it seems that, of the eleven elements of full ownership according to Honere's list,, the peasants have constitutionally secured several of them, and the state remained only with the residuary character incident of ownership and a shared right to manage.[87] It is conceivable, therefore, to hold that such a right of the state generally exist even in the absence of state ownership. The power to regulate and impose restrictions on property right (the power to tax, to expropriate or other restrictions in the public interest) are inherently inbuilt in the idea of *imperium* as it is called in the civil law legal system or eminent domain and police power as used in the common law legal system.[88] Consequently, the analysis revealed that the usual assertion labelling the state as exclusive owner of land is more of a rhetoric than a reality.

At this point, it is also important to note that not all land in the Ethiopian territory is allocated to peasants and pastoralists; there would be a bulk of it in urban areas and in rural areas as well. This corresponds to what the rural land laws referred to as "state holding" and defined it as "rural land demarcated and

[86] See Id., Article 10(1); see also Daniel, 2013, *supra* note 57, p. 82. He reviewed the Federal as well as Regional rural land laws and summarized the reasons for the loss or termination of rural land rights that includes:
- Permanent employment of the farmer that brings him an average salary determined by government
- Engagement in professions other than agriculture and for which tax is paid
- Absence of a farmer from the locality without the knowledge of his whereabouts and without renting the land for more than 5 years
- Fallowing the land for three consecutive years without sufficient reasons
- Failure to protect land from flood erosion
- Forfeiting land right upon written notification
- Voluntary transfer of land through gift
- Land distribution (the loss will be partial).
- Expropriation of land without replacement of another land

[87] Peasants have the right to possession of land allocated, to make use of it, decide how to use in so far as its normal use of land and by whom, and there by derive income. They have right to security during their tenure and they owe the duty to abstain from harmful use. The power of transmissibility and absence of term beyond life time are not strictly speaking constitutional rights of peasants but in effect the state is discharging is duty to allocate land to every new generation of peasants. The right to capital and the ability to use the thing for execution of liability belongs neither to the peasants nor the state. An important right that remained with the owner is the residuary character incident of ownership

[88] Needham, *supra* note 43, p.46.

those 'lands' 'to 'be demarcated in the future as federal or regional states holding; and includes forestlands, wildlife protected areas, state farms, mining lands, lakes, rivers and other rural lands."[89] Thus, on state holdings, both in urban and rural areas, the state exercises every possible use as that of a private land holder or as passive guardian of resources in open use (public domain). Yet the state remains with a vacuum title of 'residuary character' in relation to land assigned to individual peasants or communal holders.[90]

It is also worthwhile to contrast the land tenure system under the FDRE Constitution against tenure systems elsewhere. As regards rural land, the current land tenure system of Ethiopia closely resembles what is known as free estates in common law countries.[91] In these countries, the individual tenant is given from the Crown a freehold estate in the land. The absolute ownership remain with the Crown and as such "an estate held by a tenant is not the land itself or the dominium, but a conceptual, abstract portion of ownership, the scope of which depends on the particular form it assumes and the length of time for which it is to exist."[92] For instance, in Australia, the freehold estate takes three forms: fee simple, fee tail and life estate.[93] A fee simple will exist absolutely and indefinitely, and the holder of fee simple has the power to deal with the estate as he thinks fit signifying the highest form of ownership that an individual can have subject to the nominal title of the Crown. In fee tail, on the other hand, inheritance of the freehold estate is restricted to particular lineages of the holder. Where that specified lineage is absent, the right shall be extinguished, unlike fee simple where heirs who could inherit the estate were unrestricted. The life estate is freehold estate that will exist for a duration of a life, and therefore, not capable of inheritance by an heir.

Of these alternatives, the rural land tenure system in Ethiopia is closer to the fee tail system in Australia mainly in that inheritance and donation are permitted only to certain category of people and subject to conditions in Ethiopia. Of course, such a deduction needs to be taken with caution. To begin with, the holder in Ethiopia lacks the power to alienate. Again though the right is purportedly indefinite and guaranteed against eviction, a holder in Ethiopia is

[89] Proc. No. 456/2005, *supra* note 12, Article 2(13).
[90] Id. Article 2(12). It reads as: "communal holding" means rural land which is given by the government to local 'residents for common grazing, forestry and other social services."
[91] Hepburn, *supra* note 1, p.52.
[92] Id.
[93] Id., pp.52-54.

less secured for there might be redistribution of land while the nominal owner (the Crown in common law) lacks this authority.

We noted, from the close examination and juxtaposition made, that most of the Ethiopian state's interests in ownership title are dismembered and constitutionally assigned to peasants/pastoralists individually or communally. One may wonder whether the prevailing landholding right depicted in the Constitution fit into any of the dismemberments of ownership rights already known to us via the Civil Code or whether the Constitution has come up with a *sui generis* right to peasants. Usufruct is the potential nominee for comparison here.

Article 1309 of the Civil Code defines usufruct as "the right of using and enjoying things or rights subject to the duty of preserving their substance." Juxtaposing this definition of *usufruct* with peasants' entitlement to land in the Constitution and expounded in the definition of landholding rights by subsequent legislation, one can observe that these property concepts share basic attributes: they are both rights in *rem*, as opposed to rights in *personam*; and the beneficiary of the right in both cases is vested with the right of *usus* and *fructus*, subject to the duty of preserving the substance. These are the essences of both rights. In spite of potential differences in the details[94], peasants' right with respect to land as stipulated in the Constitution is in essence similar to usufruct as depicted in the Civil Code. Therefore, this similarity would allow us to build the jurisprudence of land holding rights in the current land tenure system of Ethiopia in light of the well-developed philosophy of usufruct. The rules on

[94] Usufruct is conceived in Roman law as personal servitude in that it is attached to the person to whom it is established and ends with his death or expiry of fixed period. Usufruct is time bounded while landholding right is characterized by its indefiniteness and transferable to a certain extent in the subsequent laws. But we noted that the Constitution talks about peasants at individual level and peasants' minimum assurance is lifetime enjoyment starting from the time one is eligible as peasant. The characterization of landholding right as indefinite entitlement and vesting power of transmissibility in subordinate legislation are not strictly speaking in the text of the constitution. Rather they are pragmatic designs of the state to discharge its responsibility of recollecting land from old generation (applying reversion right-residuary character) and allocating to the new generation of peasants. Also, specific attributes of landholding include issues of possibility of land redistribution, restrictions such as lease duration limit and collateral limits on landholding right as cap on the right to income. Cf. generally Civil Code, *supra* note 50, arts.1309-1358 and Proc. No.456/2005, *supra* note 12, arts. 5-14; See also Girma Kassa Kumsa, Issues of Expropriation: The Law and the Practice in Oromia, LLM Thesis, Addis Ababa University, (November, 2011), pp.33-37..

acquisition, transfer, extinction of the right and the rights and duties of the *usufructuary* and the grantor/bare owner as enshrined in the Civil Code[95] would be of immense help where the specific land legislation left us in predicament.

5. Peasants' Rural Landholding Rights and Expropriation: Compensable or Otherwise of Loss of Landholding Rights

The expropriation of landholding rights of peasants constitutes one of the sensitive issues that have commanded the attention of researchers in the field of land tenure system in Ethiopia. Several researchers documented the expansive expropriation ventures of the governments, and this is likely to continue due to mounting pressure for infrastructure development and for attracting foreign investment.[96] These apparently beneficent development initiatives of the government resulted in the displacement of thousands of peasant households, leaving them without meaningful livelihood.[97] As Muradu summed up, while the impact of maladministration in the implementation of expropriation could not be neglected, the real problems are rooted in the legal setting itself: unduly broad definition of 'public purpose' as a justification for expropriation; lack of judicial scrutiny; narrow conception of compensable interests that rendered peasants' land holding right non-compensable. [98]

The scholars called for a narrower definition of public purpose element of expropriation. True that this demand must be on the stage, this author contends, not just only in our cases where expropriation becomes regular act of government against nominal compensation but also in legal systems with strong hold on private property over land whereby expropriation is constrained by adequate compensation and more stringent due process rules. Others proposed redefining land rights of small land holders as human right, specifically the right to life.[99] Given land is basic livelihood for small land holders, the argument goes on, deprivation of land to these category of peasants amounts to little less than deprivation of right to life. While this argument is compellingly sound, inculcating this jurisprudence is so evolutionary that redefining and developing it can barely be an antidote to chronic and fatal plights of peasants.

[95] Civil Code, *supra* note 50, arts. 1309-1358.
[96] Muradu, *supra* note 17, pp.301, 328.
[97] Belachew Yirsaw Alemu, Expropriation, Valuation and Compensation in Ethiopia, Royal Institute of Technology, (KTH), Stockholm, (2013), pp.128-139,180; Muradu, *supra* note 17, pp.309-323.
[98] Muradu, *supra* note 17, p. 311.
[99] Id., pp. 333-334.

Scholars exposed the limitations of the compensation scheme as presented in the expropriation law and put forward available alternative methods of compensation potentially resulting in higher compensation. The endeavours on this topic expended less on compensability of loss of landholding due to expropriation. As noted above, the scholars in academia, the judges in court and state officials alike seem to have conceded to the narrative that peasant landholding is non-compensable during expropriation, and they perceive that is so in the law itself. Given that, no matter how novel the compensation approach designed is, it can hardly redress the plights of expropriated peasants in so far as compensability of landholding remains dubious, to say the least.

This is more of a misconception than a defect in the legal setting, the author firmly argues here. While most scholars have articulated the subordinate laws on rural land, they seem to have perceived that not much could be fetched from the Constitution to obtain concrete shape and content of peasants' right in relation to land, to which the author begs to differ. This section examines the issues pertaining to whether peasants' landholding is compensable, under the existing legal setting. For instance, Muradu maintained that "the current expropriation laws are inadequate to protect small landholders because...the Ethiopian *state is not legally obliged* during expropriation to pay compensation for land use rights nor is it obligated (or at times not feasible) to give a substitute land."[100] He explained that both the Constitution and the Expropriation Proclamation[101] rebuffed compensability of loss of landholding itself but property on the land. Daniel also claimed that Article 40 of the FDRE Constitution consists of conflicting sub-provisions that, on the one hand, create the joint ownership of land by the people and the state while, on the other hand, a landholder is denied a market-based compensation for the land in the event of expropriation.[102]

Turning to the arguments on the exclusion of land from the set of compensable interests, we observe that they mainly rely on the silence (with respect to land) of the constitutional provisions dealing with expropriation. Daniel rightly pointed out that the Constitution says nothing about expropriation of land but construed the silence as denial of compensation for peasant landholders.[103] The

[100] Muradu, *supra* note 17, p. 303

[101] Proc. No.455/2005, *supra* note, 14. It is replaced by Proc.No.1161/2019, *supra* note 12, but the content remained similar as regards the issue in discussion.

[102] Daniel, 2013, *supra* note 53, p.230

[103] Daniel, 2013, *supra* note 53, pp.237-238. Daniel maintained that "the Ethiopian..Constitution doesn't say anything about the loss of land. In other words, government is not supposed to pay commensurate compensation for loss

author contends that such interpretation is unwarranted. The Constitution doesn't deal with land expropriation, at least explicitly, and as such it is not expected to deal with compensation thereto.[104]

Muradu sought support from the definition of private property and tempted to conclude that the adoption of the labor theory[105]that recognizes only produces of labor as private property (object of property in the proper legal context)—signifies the exclusion of land from the compensable categories of interests, given that rights in land can barely fit into this theorization. Though Lockean theory of labor is manifestly observable from that provision of the Constitution, it does not seem to be complete explanation of theories espoused by the Constitution.[106] For instance, labor theory can hardly explain acquisition of property via capital endorsed in the same sentence in Article 40 (1). Moreover, property rights in other sub-provisions of Article 40 such as recognition of peasants' right to obtain land cannot be explained based on labor theory. Rather it would be the utilitarian view —property rights are a matter of legal recognition in specific jurisdiction[107]— that can explain these rights. Thus, the argument advanced based on the lens of Lokean labor jurisprudence to exclude

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of land." It is postulated that the silence of the Constitution might have been due to state ownership of land for it would be inconceivable to expropriate oneself. But we uncovered in the forgoing analysis that the state remains with vacuum title in respect of plots allocated to peasants or communally held land.

[104] FDRE Const., *supra* note 8, Article 40 (8) reads as "[w]ithout prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property". This provision raises neither the expropriation of landholdings, and consequently, nor its compensability.

[105] Muradu, *supra* note 17, p. 311; According to Muradu, private property as defined in FDRE Const., Article 40 (2), is linked to the produce of labor or capital or enterprise and compensation is limited to value added via labor or capital on lawfully possessed land.

[106] Indeed, the definition of "private property" in Article 40(2) of the Constitution is not definition of property *per se*, it is rather definition of private ownership, as explicated in section 3. The definition does not encompass all other property rights lesser than ownership but still recognized as property rights as they are subsumed under the caption "the right to property" in Article 40.

[107] Sukhninder Panesar, Theories of Private Property in Modern Property Law, *The Denning Law Journal,* Vol. 15 No. 1 (*2012)*, available at http://bjll.org/index.php/dlj/issue/view/36, accessed on 5 May 2020, P.132. "The utilitarian theory of property regards property as a positive right created instrumentally by law to achieve wider social and economic objectives. Property is said to be a positive right as opposed to a natural right."

landholding rights from the compensable categories of interests is oversimplification.

There are also attempts to establish a ground of justification for land expropriation on account of Article. 40(7) of the Constitution which partly reads: "[e]very Ethiopian shall have the full right to... property.... This right shall include the right to alienate, to bequeath, and, *where the right of use expires*, ... claim compensation for it." This does not apply to peasants given that their right is protected against eviction, and we cannot use termination or expiration without apparently contravening the rules guaranteeing protection against eviction. Perhaps this could be applicable for investors and urban dwellers since their use right is time bounded. But if the right expires, there remains no land use right to be expropriated and compensated. Unfortunately, there are arguments that incorrectly[108] interpret this provision to imply expropriation of land without compensation, including peasants' landholdings. The provision deals with "private property" rights in things other than land on which the owner has *usus, fructus* and *abusus*.[109] As such there is no issue of expropriation of land to be inferred from this provision but the right to recollect assets on land on expiry of land use right.[110]

Generally, the misconception that peasants' landholding is not compensable under the Constitution stems principally from the silence of the constitution on expropriation of land. However, land rights in Ethiopia could not be so unique to impede expropriation. First, we cannot totally ignore the classic jurisprudence

[108] Daniel for instance, in explaining Article 40 (8) of FDRE Constitution, maintained that "the Ethiopian Constitution recognizes any property on the land as private property but not the land itself. Owners of property on the land are guaranteed with commensurate compensation to the loss of their private property in the event of expropriation. The Constitution doesn't say anything about the loss of land. In other words, government is not supposed to pay commensurate compensation for loss of land." Daniel, 2013, *supra* note 53, pp.237-238. But Article 40 (8) of the Constitution raises neither the expropriation of landholdings, and consequently, not its compensability.

[109] The provision dealing with expropriation repeats the elements of ownership (*usus, fructus, abusus*) in the definition of private property. As such expropriation in art 40(8) does not concern itself with rights less than full ownership (private property); thus did not have in view expropriation and compensation of land use rights that are obviously less than full ownership

[110] If at all this provision implies termination due to expropriation, and if we apply it to investors and urban dwellers, it is absurd to claim that an investor who paid for land use right, say for 50 years but used just 25, would be forced to leave without a penny for land use right but for property on land.

asserting a simply presumed power of eminent domain even in the absence of authorizing constitution or subsidiary statutes,[111] and in Ethiopia, we have at least statutes empowering the state on expropriation. Also, Brightman justified the legitimacy of such state power tracing Constitutional provisions here and there, that he believes empowers the state to expropriate land, both urban and rural land.[112] One among the arguments he advanced is that the Constitution provided for expropriation of private property (private ownership) and, for stronger reason, property rights less than ownership are subject to the state's power of eminent domain.[113] Apart from the argumentative inferences, if at all there exists explicit constitutionally founded basis for expropriation of rural land holding, it is Article 44(2) of the FDRE Constitution which declares "[a]ll persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance."[114] From the reading of this provision, most important of all, it must be underscored that compensation is concomitant with power of expropriation.

Brightman explained that Article 44(2) can be invoked to establish power of expropriation in relation to land rights of peasants and pastoralists, particularly from the clause "persons whose livelihood is affected by the state programmes." He added, the phrase "…who have been displaced…" could be appealed to in search of constitutional power for expropriation of residential land in urban centres.[115] The author concurs to these deductions. Brightman further argued that constitutional foundation for the power of land expropriation as regards investors could be established based on Article40(8) of the FDRE Constitution that provides for expropriation of private property. He claimed that the investors' rights on land normally emanate from acquisition by capital (due to acquisition by payment), and as such rights so acquired would qualify as intangible private property within the definition of Article 40(2). He added, the investors have "ownership right over their property rights to land".[116]

[111] Brightman Gebremichael Ganta, The Power of Land Expropriation in the Federation of Ethiopia: The Approach, Manner, Source and Implications, *Bahir Dar University Journal of Law,* Vol.7, No.1, (December 2016), p.7.
[112] Id., pp. 15-20.
[113] Id., p. 17.
[114] FDRE Const., *supra* note 8, Article 44(2). For details, see Id., p.19.
[115] Brightman, *supra* note 111, p.19.
[116] Id.

However, the author differs as regards this argument striving to establish the basis of land expropriation in relation to investors. First, according to the Constitution, intangibility refers to a certain thing onto which a property right is attached, not the rights themselves for they are always intangible. In the case at hand, the object is land itself which is tangible. His second assertion— ownership right over their property rights to land— would have been sensible in the context of a constitution that endorses bundle of rights notion of property[117] but not under a constitution such as the FDRE Constitution that espouses the civilian notion of one thing — one owner line of thinking, and in which the state is already the recognized owner. In other words, the Constitution recognizes ownership of a thing, not ownership of a right that inheres in a thing already owned, as discussed in section 3 above.

Therefore, Article 40 (8) of the FDRE Constitution doesn't in any case provide a basis for land expropriation, be it for inventors, urban dwellers or peasants. Thus, the constitutional basis of expropriation of land as regards investors is still not clearly established. Either the presumed power of eminent domain theory[118] should be invoked; or one needs to rely on the *argumentum a fortiori*—that if ownership (the widest property rights) is subject to expropriation, for stronger reason, lesser property rights must be; or else other provisions of the Constitution such as those on economic and social policy objectives must be called into, as some argued.[119]

In any case, it must be capitalized, where the Constitution deals with expropriation of land, it also recognized compensation. The Constitution did not render expropriation of peasant landholdings non-compensable: either it doesn't deal with land expropriation, at least explicitly, and as such it is not expected to deal with compensation thereto; [120] or where it does, such as in Article 44(2) of the FDRE Constitution, compensation is concomitant with power of expropriation. The Constitution grantees peasants' access to land in the very provisions dealing with the right to property signifying they are property rights in things that must be of some economic value. Thus, it is inconceivable to hold

[117] The claim that they have ownership of rights with respect to land would have been sensible had it not been that constitution defined private property as a kind of full ownership where the usus, fructus and abusus of a certain thing fully vested to one owner

[118] See Brightman, *supra* note 111, p.7

[119] Id., p.18.

[120] See FDRE Cons., *supra* note 8, Article 40 (8). This provision of the Constitution deals with neither the expropriation of landholdings nor its compensability.

that peasant landholdings are property rights in things of economic value (land), but its taking away entails no cost. Moreover, we concluded that the jurisprudence of usufruct can be employed to peasants' landholding right under the current legal set up. To this end, Article 1319. (2) of the Civil Code affirms that "[t]he usufruct shall extend to the equivalent value of the thing in case of its expropriation or requisition."

Well, the Constitution is safe, so to speak; either doesn't deal with land expropriation and compensation, at least explicitly, and where it does, compensation is concomitant with power of expropriation. How about the subordinate laws? Both the recent Proclamation No.1161/2019 as well as its predecessor, proclamation no.455/2005, addressed issues of expropriation and compensation. Proclamation No.455/2005 had subtly evaded the compensability or otherwise of landholding expropriation; it failed to include loss of landholding in the very definition of compensation that determines for interests compensation is to be paid but the subsequent provisions have provided for a nominal compensation of 10 years annual produce (based on preceding five years average value).[121]

On the other hand, the new legislation, Proclamation No.1161/2019, admits that it is not anymore possible to evade compensability of loss of landholding. As such, it avoids a restrictive definition of compensation and included landholding right within the six categories of compensable interests.[122] It raised the quantum of compensation from 10 to 15 years' produce (based on the highest annual income in the preceding three years),[123] provided there is no substitute land. In any case, both laws recognized displacement compensation as compensation to

[121] Proc.No.455/2005, *supra* note 13 Article 2(1) had provided that "compensation" means, payment to be made in cash or in kind or in both to a person for his property situated on his expropriated landholding. However, Art 8 recognized compensation for land-displacement compensation. It provided that "[a] rural landholder whose landholding has been permanently expropriate shall, in addition to the compensation payable under Article 7(compensation for his property situated on land, permanent improvement on land and costs) of this Proclamation, be paid displacement compensation which shall be equivalent to ten times the average annual income he secured during the five years preceding the expropriation of the land.

[122] Proc. No.1161/2019, *supra* note 11, Article 2 (3). This provision talks of 'displacement compensation' which is defined as "payment to be made to a landholder for the loss of his use right on the land as a result of expropriation."

[123] Id. Article 13.

loss of land due to expropriation though inadequate and without clear basis for setting the quantum.

Over all, the drafters of the Constitution on property rights were preoccupied with private property in the sense of full ownership, from the beginning to the end, excepting instances such as the provisions on peasants' entitlement in relation to land. Yet who said ownership is the only property right worth recognition, protection, and articulation? True that, as Stephen R. Munzer writes, "the idea of property... involves..... ownership *and other related but less powerful interests*...." Less powerful interests don't in anyway mean undeserving of attention. The drafters recognized the interests lesser than ownership in article 40(3), (4) & (5) but forgot them in the expropriation part; and they forgot them not only in relation to their compensability but unfortunately as regards their expropriatability, so to speak.

Then, where did all that misconception in the academia conceiving the legal setting as denying compensability of peasant landholdings stem from? Why should the silence of the Constitution on adverse action (expropriation) be interpreted as implying expropriation without compensation? Is it not inattention to interpret silence on adverse action (expropriation) as signifying confirmation of that adverse action accompanied by a more debilitating action (denial of compensation)? Is that not a common problem of Civil law lawyers to be inattentive of rights lesser than ownership? Those tempted to question the compensability of these rights lesser than full ownership, merely relying on a provision totally dedicated to expropriation and compensation of private property (full ownership), need to reconsider their view in this regard.

Pretty obvious that the subordinate laws provided insufficient quantum of compensation and the standard is unverifiable. Why it was 10 and now raised to 15 years of annual produce value? Why not more or even less? The genesis of this value determination, based on random numbers such as 10 or 15, could be traced in Chinese practice[124]but hardly in economics science. The Chinese law recognized communal (collective) ownership of land along with public ownership (state ownership), and it purported to have recognized full

[124] Land Administration Law of the People's Republic of China, (1999), Article 47, sec. 2 cited in Zhang Xian, Seeking Just Compensation for Collective-owned Land Expropriation in China, Short Academic Paper, PKU, STL, (----) (hereinafter Land Administration Law of the People's Republic of China, (1999)), p.6.

compensation in case of expropriation of collective ownership.[125] However, the amount of compensation for loss of land ownership by the collective ranges from 6 to 10 times of the average output value of the preceding three years,[126] excluding compensation for other property on the land.

Yet the Chinese system is better than the Ethiopian in some respects. First, the Chinese law clearly recognized ownership of land by the collective (communal ownership) and compensability of such land as opposed to the exclusively public ownership of land in the Constitution of Ethiopia and the hesitant subsidiary laws about compensability of peasants' landholding rights. Second, individual peasants in China does not have indefinite period use right expectation but only a contractual right for limited period (30years) and the law seems to assure fair compensation to the specific individual contractor in case of expropriation before lapse of his contractual term.[127] Third, where land owned by the collective is expropriated, the burden is usually shared within members of the collective,[128]not just the individual peasant shoulders misfortune of low compensation as opposed to the case of Ethiopia where peasants take the burden individually owing to increasing shortage of substitute land and absence of readjustment/redistribution.

Then, back to the quantum of compensation under Ethiopian law, we are still far way in making the peasants' right predictable and in proffering the state an optimal standard for compensation. What can be done with arbitrary numbers like 15 years of annual produce value?

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[125] Chinese Property Rights Law of 2007, *supra* note 51, arts.42, 58, 132.

[126] Land Administration Law of the People's Republic of China, (1999), *supra* note 124, Article 47, sec. 2 cited in Xian, *supra* note 124, p.6.

[127] Chinese Property Rights Law of 2007, *supra* note 51, Article132. It reads "[t]he contractor of the right to land contractual management shall, pursuant to the provisions of the 2nd paragraph of Article 42 of this Law, obtain the relevant compensations in the event of expropriation of its contracted land."

[128] Xiuqing Zou and Arie J. Oskam, New Compensation Standard for Land Expropriation in China, China &World Economy, Vol. 15, No. 5, (2007), p. 112. It is stated that "although the amount of compensation paid to collective owners has increased substantially over time, peasants continue to receive extremely low levels of compensation, and in many cases no cash compensation at all, in return for their land rights. Usually, the collective retains all of the cash compensation on the pretext of developing the collective economy, and shares *the burden of the land loss among all village peasants by conducting a large readjustment*. Therefore, those peasants who initially lose all or much of their land receive a somewhat lower compensation at the expense of the land allocations for everybody else. This process has increasingly led to complaints by peasants."

Scholars are often engaged in articulation and exposition of deficiency of subsidiary laws in setting the nominal compensation while such subsidiary laws should have been challenged in light of the Constitution. Of course, some scholars who view the Constitution deficient in recognizing compensability of loss of landholdings argue that the peasants deserve compensation based on the clause that land is jointly owned by the people and the state.[129] Yet, this line of argument can hardly be defensible. In the first place, the prescription of joint ownership is proved unsound. Second, not only peasants but every Ethiopian including urban dwellers and investors belong to the generic reference of "the peoples of Ethiopia". This would put everyone at par as regards acquisition and loss of rights related to land, which is not the case as the Constitution has already differentiated among them. To succumb to this view renders Constitutional provisions specifically devoted to peasants and pastoralist entitlements in land pointless.

At times scholars do appeal to equity/justice[130] that peasants are being unfairly treated. Nevertheless, the state being often in budgetary deficit, it can hardly head appeals to equity. Rather, this author contends, the state must be informed and compelled to learn that it is constitutionally encumbered with the duty to compensate adequately. How and what is that adequate amount? It could be traced in the very conceptualization of the nature of peasants' property rights in land: it is a right in *rem* entailing the 'right to security' according to Honere's description; it is virtually similar to usufruct and that it is compensable in case of expropriation.

We noted from this analysis that the Constitution talks of peasants at individual level and peasants' minimum assurance is lifetime enjoyment starting from the time one is eligible as a peasant. During this period, the state retains vacuum title of residuary character, bereft of the use right. We recount that the state has only reversion right after such period and during such period, all use values goes to the landholder. Therefore, the minimum amount of compensation to peasants would be equivalent to one's life expectancy, based on national standard, subject to adjustments like deduction of production cost etc. This offers a verifiable and predictable standard instead of random numbers such as 10 and 15.

Well, based on life span formula, young expropriatees will fetch higher value. What if one is close or already over the national standard of life expectancy? And in the absence of redistribution, how fair would it be depriving value to

[129] Id., pp 311-312; Daniel, 2013, *supra* note 53, p. 230.
[130] Muradu, *supra* note 17, p. 309, 311.

potential heirs on the mere fact of shorter life expectancy of landholder? Several arrangements could be of help: single equation of compensation to everyone which is equivalent to duration of between 18 years to life expectancy (more than about forty years) of annual produce or the fair market value of use right for such period. Fair market value for the use right of peasants is government's land transferring fees to developers/investors as determined in land auction (for the period we fixed- based on life expectancy).[131]

Compensation based on life span use right might lead to huge budgetary demand on the state. But not necessarily insurmountable! Every landholder must share the burden of expropriation in so far as expropriation is for public benefit. There could be a surcharge to be levied together with land use fee, and deposited in separate fund, we can call it expropriation compensation fund (ECF). The government must plan its annual land demand and estimate the cost of expropriation, levy surcharge, pay expropriatees from the ECF. We can employ the analogy of insurance fund as envisaged in Proclamation No.799/2013[132] and similar arrangements like pension fund. These thoughts require further development and refinement but time and space constraint halted the journey, forced us to park here.

Conclusion

The Ethiopian land tenure system has not been stable for several decades of years or so mainly due to changing ideologies. The FDRE Constitution declared right to ownership of land is exclusively vested in the State and in the peoples of Ethiopia. On the other hand, the Constitution confirmed the right of peasants and pastoralists to obtain land without payments and guaranteed protection against eviction. This has given rise to perplexing issues of the relation between the State and the peoples of Ethiopia as well their relation with respect to

[131] This uniform standard, for the young and aged ones alike, means the potential heirs/donees of expropriated old ones who are expecting land via heirship will get a value of compensation transferred via succession. Or else, a different approach could be adopted by differentiating compensation based on remaining expected duration of life. This requires continuation of redistribution for the next generation; that every one fetches only what is due for his remaining part of life if expropriated; there should be arrangement to support those alive after the speculated span of life; government should recollect land after the death of landholder or where one ceases to be a peasant; every new generation expects land allocation, and other details.

[132] Vehicle Insurance against Third Part Risks Proclamation, Proclamation No.799/2013, *Federal Negarit Gazetta*, (2013), Arts.19-24.

peasants/pastoralists. The research found out that there is only one owner- the public (peoples of Ethiopia collectively). This is also conventionally referred to as state ownership but practically state is just an agent instead of a distinct entity entitled to co-ownership. The analysis in this work revealed that state's interests in ownership title are dismembered and constitutionally assigned to peasants/pastoralists so much so that the usual assertion labelling the state as exclusive owner of land is more of a rhetoric than reality; the state remains with a vacuum title of 'residuary character' in relation to land assigned to individual peasants/pastoralists or communal holders. However, not all land in the Ethiopian territory is allocated/ granted to the peasants and pastoralists; there would be a bulk of unallocated land in urban areas and in rural areas as well- "state holding-"on which the state exercises every possible use as that of a private land holder or as a passive guardian of open access resources on behalf of the general public.

Due to poor conceptualization, there prevailed dubious status of whether landholding rights of peasants are compensable at times of expropriation. This research disclosed that peasants' landholding rights, as envisaged in the FDRE Constitution, are property rights: rights in *rem*; worth of the right to security; fits into the jurisprudence of *usufruct*. Thus, not only that peasants' landholding rights entail payment of commensurate compensation during expropriation but also that the constraints on expropriation as applicable to ownership similarly applies to them. The author has concluded, in fixing amount of compensation for loss of landholding right, that peasants as usufractuary deserve a minimum of life time use value (minus cost of production) instead of random numbers such as 15 years of annual produce.

The author further observed scholars suggesting alternatives that would improve quantum of compensation; some appeal to equity, others call for narrower definition of public purpose as a justification for expropriation, still others recommend redefining small landholders' right as human rights. While all these could contribute to that intended goal, the author proposes and advises the scholars in the field that it is better to defend from one's own fortress; properly conceptualize the nature of the existing property rights over land as established in the Constitution, and thereby dismantle the rhetoric on exclusive control/ownership of state over land; liberate judges, the pubic officials, and others who succumbed to that ill-conception; then it would be alright, the subsidiary laws would be updated to address the concerns.

Shared Automated Teller Machine (ATM) Network in Ethiopia: Appraisal of the Competition Concerns

*Tajebe Getaneh Enyew**

Abstract

Traditionally, banking transactions have been carried out manually with the help of bank tellers. Nowadays, however, financial businesses are employing advanced technologies to deliver their services efficiently. Among these technologies, ATM is a noticeable one. Using ATM, customers can make a withdrawal, balance inquiry, fund transfer, and cash deposit. Until recent times, customers have been using their bank's proprietary ATM network only. Currently, banks interconnecting their ATM network and allow customers to access their account using the ATM terminal of any bank. The Ethiopian commercial banks have also integrated their proprietary network and allow their customers to access their account using the ATM of any member bank. Though the introduction of a shared ATM payment system in the country makes it convenient for the e-banking users, so far, there is no clarity on its impact on the market competition. The objective of this article is, therefore, to analyze the major competition concerns of shared ATM network in light of the Ethiopian general competition law and the NBE's directive on licensing and authorization of the payment system operators. In addressing this issue, the writer employed a qualitative research approach and typically doctrinal research type. After due analysis of the issue, the writer concludes that the act of creating market monopolization in the Ethiopian national switch system, the unconditional and mandatory access to new entrants, unrestricted membership in more than one network, and the collective determination of network fees at the switch level are anticompetitive acts evolving in the Ethiopian shared ATM network market. Finally, the writer remarks that the NBE should revise its directive on licensing and authorization of the payment system operators to balance cooperation and competition in the payment network market.

Keywords: Automated Teller Machine (ATM), Shared ATM Network, Market Competition Concerns

Introduction

Conventionally, banking transactions have been carried out manually with the help of human agents. When a person needs to deposit, withdraw, or transfer

funds, he can do that only by communicating his intention to the teller through writing bank vouchers. Today, because of the introduction of advanced technologies in the financial sector, banks are rendering their services to customers using technologies. Among such technologies, the automated teller machine (ATM) is the most popular one.[1] Recently, Commercial Banks in Ethiopia have augmented their service delivery by installing ATMs across different parts of the country. They are making their service accessible to their customers. Consequently, customers can make cash withdrawals, balance inquiries, loan payment, fund transfer, cash deposit, and bill payment via ATMs.[2]

Until a few years ago, customers of a bank could use only the ATMs of their bank since there were no shared network systems in Ethiopia.[3] Recently, however, two major shared ATM networks were established in the country. In 2009, three private commercial banks, namely Nib International Bank S.C, Awash International Bank S.C., and United Bank S.C established a consortium known as Premiere Switch Solutions Share Company (PSS).[4] Following, additional three private commercial banks, namely Addis International Bank, Birhan International Bank, and Cooperative Bank of Oromia joined this consortium, and the members of the platform surge to six. The primary goal of this consortium is to allow customers of member banks to use ATMs of all the member banks with a single plastic ATM card.[5] Besides, in 2011, another national ATMs shared network, Ethswitch, has been launched by all Ethiopian private commercial banks, the Ethiopian Banker's Association, and the National

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[1] Heli Snellman, Automated Teller Machine Network Market Structure and Cash Usage, Scientific Monographs, Bank of Finland, (2006), p.9 available at https://helda.helsinki.fi/bof/bitstream/handle/123456789/9346/128493.pdf?sequence=1&isAllowed=y , last accessed on 22 January 2020.

2 Ellen S. Goldberg, Shared Electronic Funds Transfer Systems: Some Legal Implications, *Banking Law Journal*, Vol. 98, No. 8, (1981), Pp. 715-746, p.716 available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/blj98&div=59&start_page=715&collection=journals&set_as_cursor=2&men_tab=srchresults , last accessed on 22 January 2020.

3 Habte Ashenafi, Effect of ATM Service Quality on Customers Satisfaction in Banking Industry in Ethiopia: The Case of Oromia International Bank in Addis Ababa, MSc Thesis, Addis Ababa University, (2019), p.3 available at http://etd.aau.edu.et/bitstream/handle/123456789/18645/Habte%20Ashenafi.pdf?sequence=1&isAllowed=y, last accessed on 23 January 2020.

[4] *Id*., p.3.

[5] Premiere Switch Solutions Share Company (PSS), official website, available at https://psseth.com/, last accessed on 23 January 2020.

Bank of Ethiopia (NBE).[6] Through this national payment network, the ATM networks of all banks in Ethiopia are connected, and customers are getting ATM service from any bank's ATM terminal.

The business of a shared ATM network is recognized in the national payment proclamation of Ethiopia.[7] The national payment proclamation permits financial institutions to adopt an electronic fund transfer in a shared system including a shared ATM network. It gives the power to set the terms and conditions of the shared payment system to member banks of the shared network, i.e. it shall be decided through multilateral or bilateral agreements of members to the system.[8] Nonetheless, the NBE is empowered to enact a directive on a shared system and to provide major guidelines to be incorporated into the members' agreement.[9] Accordingly, in August 2020, the NBE enacted a directive on licensing and authorization of the payment system operators.[10]

The purpose of creating a shared payment network is to empower clients to each bank to use all ATMs in the country with a single bank ATM card.[11] Because of the shared ATM network between commercial banks of the country, these days, cardholders are using any ATM of member banks of the switch. One can obtain cash by visiting the nearby ATM even if he doesn't have an account in the bank that deploys the ATM. This lets consumers get banking services in their vicinity easily. Even if the shared network eases the life of consumers, there is a suspicion that it may go against the principles of market competition in the ATM network industry. Especially, the issue of market concentration in the ATM network market, access to existing ATM network, the manner of fixing the network fees involved in the shared ATM network, and the rules on dual membership are the concerns that are susceptible to be anticompetitive in the shared ATM network market.[12] The purpose of this article is, therefore, to evaluate these competition concerns of shared ATM network from the

[6] BPC Banking Technologies, Ethiopia Switches on Unified Payment System with BPC, (2016) available at https://www.finextra.com/pressarticle/64428/ethiopa-switches-on-unified-payment-system-with-bpc, last accessed on 23 January 2020.
[7] The National Payment System Proclamation, Proclamation No.718/2011, *Federal Negarit Gazetta*, (2011), Art. 22.
[8] *Id*., Art.22/2.
[9] *Id*., Art. 22/2.
[10] Directive on Licensing and Authorization of the Payment System Operators, National Bank of Ethiopia, (2020) (hereinafter, Directive on Licensing and Authorization of the Payment System Operators)
[11] BPC Banking Technologies, Supera note 6.
[12] Robert D. Anderson and Brian Rivard, Antitrust Policy towards Eft Networks: The Canadian Experience in the Interac Case, *Antitrust Law Journal*, Vol. 67, No. 2, (1999), Pp. 389-451, P.391 available at https://www.jstor.org/stable/40843438, last accessed on 24 January 2020.

perspective of licensing and authorization of the payment system operators directive of the NBE and general competition law of the country.

The article has three sections of which the first section deals with the general conceptual framework of ATM. In this section, the author explores the conceptual underpinning of ATM in general and shared ATM Network in particular. This section helps to give some insights to readers about the general understanding of ATM and the shared ATM network before they appreciate the competition concerns thereof. Section two tries to show the practices of banking transactions using proprietary ATM networks in Ethiopia and shared ATM networks. In the third section, an attempt is made to show major competition concerns in the shared ATM networks in Ethiopia. Particularly, in this section, the author attempts to show major competition concerns in the shared ATM networks in Ethiopia in light of general competition law, and NBE's directive on licensing and authorization of the payment system operators.

1. Conceptual Understanding of ATM and Shared ATM Network

The term ATM may be described using different terminologies including automated bank machine, cash machine, 24-hour teller, and others.[13] Conceptually, ATM means a terminal that a bank supplies so that customers can withdraw money, inquire about balance, transfer funds, deposit funds, or pay bills electronically.[14] It can also be defined as "a computerized telecommunications device that provides the clients of a bank with access to financial transactions in a public space without the need for a cashier, human clerk, or bank teller."[15] ATM lets customers of a bank access their account electronically, without visiting the bank teller.[16] The ATM connects "a computer terminal, database system and cash vault in one unit" and enables the customer to access his account by inserting the plastic card given to him by his bank and his Personal Identification Number (PIN).[17]

[13] Getachew Tadesse, Challenges and Opportunities of ethiopay ATM Service, MSC Thesis, Addis Ababa University, (2018), p.9 available at http://etd.aau.edu.et/bitstream/handle/123456789/12583/Getachew%20Tadesse.pdf?sequence=1&isAllowed=y, last accessed on 25 January 2020.
[14] Habte, *supra* note 3, p.12.
[15] Getachew, *supra* note 13, p.9.
[16] Steven C. Salop, Deregulating Self-Regulated ATM Shared Networks, *Economics of Innovation and New Technology*, Vol. 1, No. 1, (1990), Pp.85-96, p.85 available at https://www.researchgate.net/publication/233212909_Deregulating_Self-Regulated_Shared_ATM_Networks, last accessed on 23 January 2020.
[17] Habte, *supra* note 3, p.13.

Historically, the beginning of ATM in the banking business is traced back to the late 1960s.[18] A Barclay Bank in England installed the first ATM in 1967.[19] Initially, the ATM service faced strong resistance from users, as they didn't trust the machine.[20] However, as time went by, users started to accept this technology and enjoyed the service.[21] In the beginning, the ATM lacks a magnetic-stripe card; customers use the ATM by feeding a paper voucher.[22] While the customer fed the paper voucher, the machine holds it and, instead, gives cash to the customer.[23] Through time, the technology of ATM continued to advance. In 1968, Don Wetzel invented an ATM that can use a magnetic-stripe card.[24] Passing different revolutions of technology, the ATM banking business reached its development, as we know it today.

At present, ATM is the common machinery that many banks use to deliver their banking service to their customers without the help of a teller.[25] The use of electronic payment systems, including ATM and point of sale (POS) has increased drastically across the world.[26] We are noticing that, banks are installing their ATM not only in the compound of their branches, but also at the premises of schools, hotels, groceries, hospitals, offices, and other public spaces. By deploying their ATMs at such places, banks are providing their service for 24 hours a day. This brings some benefits for both customers and banks. For customers, it allows them to access their account in the nearest place and fitting time.[27] Banks also render their service expeditiously, with reduced cost and without working hour limits.[28]

For a long period, banks have been providing an ATM service to their clients only through the proprietary system.[29] Here the proprietary system refers to when customers can use only their bank's ATM to access their account.[30] In this

[18] Fumiko Hayashi *et al, A guide to the ATM and Debit Card Industry*, Federal Reserve Bank of Kansas City, (2003), p.12 available at https://econpapers.repec.org/RePEc:fip:fedkmo:2006agttaadci2, last accessed on 25 January 2020.
[19] *Id*.
[20] Habte, *supra* note 3, p.12.
[21] *Id.*
[22] Hayashi *et al, supra* note 18, p.12.
[23] *Id*.
[24] *Id.*
[25] Snellman, *supra* note 1, p.9.
[26] *Id.*
[27] James J. Mcandrews, Automated Teller Machine Network Pricing – A Review of the Literature, *Review of Network Economics*, Vol.2, No. 2, (2003), pp. 146-156, p.146 available at https://www.rnejournal.com/articles/mcandrews_june03.pdf, last accessed 26 January 2020.
[28] *Id.*
[29] James J. Mcandrews, Retail pricing of ATM network services, Working Paper No. 96-12, Federal Reserve Bank of Philadelphia, (1995), p.3.
[30] *Id*.

system, banks utilize their ATMs only to reach their customers; and the users of the ATM need to be a client of the ATM owner bank and shall hold that bank card. This system creates some inconvenience for users of ATM by imposing an obligation on them to look for the ATM of their bank only. It makes customers walk far for accessing their account. Since the machine is very expensive, banks also faced difficulty in expanding individually their ATMs in different locations. Due to this, banks are compelled to seek cooperation among them. They started to interconnect their proprietary network together through a central switch.[31] Today, banks in many jurisdictions integrated their ATM network and created one or more shared ATM networks.[32] Conceptually, Robert D. Anderson and Brian Rivard defined shared ATM network as:

> *[A] set of terminals and computer software connected by telecommunication links that are used to process transactions. In particular, a shared ATM "…" coordinates transactions between a customer and cardholder of one institution or "issuer") and a terminal operated by a different institution (the institution acquiring the transaction the "acquirer"). The network processes or coordinates, simultaneously, the transaction between the cardholder and the acquirer, the transaction between the cardholder and the issuer, and possibly the transaction between the acquirer and the issuer.*[33]

Through shared ATM network systems, the ATM networks of different banks are linked and the customers of such banks are using the ATMs of all members of the system without being required to be a customer and holding the plastic card of that specific bank.[34] It increases banking service accessibility for customers.[35] Since the shared ATM network allows customers of a bank to use the ATMs of other member banks, it has a significant role for the customer to access his account in his location.[36] Traditionally, banks deliver their ATM service to customers by deploying proprietary ATMs in different geographical locations, which is very costly, and difficult for banks to reach their customers

[31] Joy Ishii, Compatibility, Competition and Investment in Network Industries: ATM Networks in the Banking Industry, MSC Thesis, Stanford University, (2005), p.5 available at https://pdfs.semanticscholar.org/251f/a0b0639628a8158be6acc80f09f42e0aedfc.pdf, last accessed on 27 January 2020.

[32] *Id.*

[33] Anderson and Rivard, *supra* note 12, p.404.

[34] Congressional Budget Office of America, Competition in ATM Markets: Are ATMs Money Machines? Report Paper, (1998), p.1 available at https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/6xx/doc666/atmcomp.pdf, last accessed on 27 January 2020.

[35] James J. Mcandrews, the Evolution of Shared ATM Networks, *Business Review*, (1991), p.8.

[36] *Id.*, p.5.

in their convenience places. The shared ATM network, however, solves these problems by entitling customers to access their accounts from machines of any member bank. Besides, a shared ATM network is believed to be an incentive for banks to install their ATMs in different locations; i.e. in a location where there is no members' ATM.[37]

Structurally, shared ATMs networks may be owned by an entity established by member institutions, or it may be owned and operated by another independent company. In the first case, member institutions themselves create the network through a joint venture.[38] Members act as a member of the company. However, in the latter case, another third party payment network operator owns the network. In both cases, there is interconnection of members' ATM networks with a single, centralized network switch, namely shared ATM network.[39] Here, network switch refers to "[t]he electronic equipment that receives and transmit transaction between the bank that operates the ATM and the bank that holds the customer's account and issues the card used in the transaction."[40] It can be also understood as "a system of computer software and telecommunications facilities acts as a routing, coordinating, and communication agent to the network members."[41] Principally, the centralized ATM network switch serves as an intermediary that facilitates the clearance and settlement of transactions made between member banks.[42]

In terms of participation, in the shared ATM transaction, at least three persons are involved: namely card issuing bank (issuing bank), a bank that issues ATM cards for its customers; ATM owning bank (acquirer), a bank that installs an ATM; and Switch network, a network that integrated members' ATM into a centralized system.[43] In a shared ATM network, there are some fees involved in each transaction.[44] To mention a few, foreign fees, surcharge, interchange fees, and switch fees are the major fees involved in the integrated ATM network.[45] Surcharge means a fee that the cardholder pays to the ATM owners, acquiring bank, for receiving service from the machine other than his bank.[46]A foreign fee is a fee paid by the cardholder to his bank, the issuing bank and mostly, this fee

[37] *Id*., p. 8.
[38] Hayashi *et al, supra* note 18, p.26.
[39] Salop, *supra* note 16, p.85.
[40] Mcandrews, (1991), *supra* note 35, p. 5.
[41] Anderson and Rivard, *supra* note 12, P.4040.
[42] *Id*., P.4040-405.
[43] *Id*., p.407.
[44] Hayashi *et al*, *supra* note 18, P.5.
[45] Mcandrews, (1991), *supra* note 35, p.4-5.
[46] *Id*., p.4.

is set by the issuer bank.[47] The interchange fee is also a type of network fee in the shared ATM network that the issuing bank pays to the acquiring bank for the service that the latter provides to the customer of the former.[48] Lastly, the switch fee refers to a fee that member banks pay to the switch per each transaction for using the switch's service.[49] These network fees, especially the interchange fee and network switch fee, and other related terms and conditions are mostly set by the agreement of members of the network switch.[50]

2. Development of Shared ATM Network in Ethiopia

The banking business in Ethiopia has been operated starting from 1905 when the first bank called the Bank of Abyssinia was established.[51] Starting that time, the banking operation has been carried out manually using the paper system, using bank vouchers. Through time, banks in the country transform their service from manual systems to the electronic banking systems. They started to provide their services using ATM, inter alia. In 2001, the Commercial Bank of Ethiopia introduced, for the first time, the ATM service by deploying eight ATMs located in Addis Ababa.[52] Though the Commercial Bank of Ethiopia is the first to introduce ATMs in the country, it failed to be the leader in providing ATM services because of problems of infrastructure.[53] Rather, Dashin Bank, which is the first to introduce ATM in the country among private banks, becomes the leader in expanding the service in the country.[54] As of June 2009, Dashin Bank has been providing banking service for 24 hours of a day by employing 40 ATMs in different geographical locations.[55] Afterwards, ATM banking service becomes prominent in the country. Nowadays, almost all commercial banks provide their service by installing ATMs in different corners of the country.

For a decade, most banks in the country have been delivering their service using proprietary ATMs system. Under such system, customers of any bank in Ethiopia can use only the ATMs of their bank, as the proprietary network of each bank was not linked together. However, in February 2009, intending to

[47] Anderson and Rivard, *supra* note 12, p.408.
[48] Hayashi *et al, supra* note 18, p.6.
[49] Mcandrews, (1991), *supra* note 35, p.5.
[50] Mcandrews, (2003), *supra* note 27, p.125.
[51] Arnaldo Mauri, The Short Life of the Bank of Ethiopia, CONOMICA, (2014), p.104 available at https://www.researchgate.net/publication/228466309_The_Short_Life_of_the_Bank_of_Ethiopia, last accessed on 28 January 2020.
[52] Gardachew Worku, Electronic-Banking in Ethiopia- Practices, Opportunities and Challenges, *Journal of Internet Banking and Commerce*, Vol. 15, No. 2, (2010), P.4.
[53] *Id*.
[54] *Id*.
[55] *Id*.

facilitate the electronic payment system in the country, three banks, namely Nib International Bank S.C, Awash International Bank S.C, and United Bank S.C integrated their ATM networks into a single network called 'premier switch solution' for the first time.[56] Latter, another three banks, namely Birhan International Bank, Addis International Bank, and Cooperative Bank of Oromia joined to this network. Though the task of creating a shared system was started in 2009, the system was officially launched to operate on July 5, 2012, with 165 million Birr.[57] The major task of this centralized network is "engaging in the operation and management of ATM, engaging in point of sales (POS) card banking service, and providing platforms (hardware, switch software, database, etc.) to member banks."[58] After the commencement of this shared system, a customer of member bank can to use the ATMs of any member bank irrespective of whose bank customer he is.

Even though the premier switch solution is the first shared network in the country, latter, because of the national payment project implemented by the NBE, all commercial banks, the NBE, and the Ethiopian Bankers Association came together and created a single national shared ATMs network, called Ethswitch, in 2011.[59] Premier Switch Solution is also merged with this national payment system.[60] Nowadays, the ATMs of all commercial banks in the country are united and resulting in establishment of monopoly in the national payment switch. By 13 May 2016, "the system linked over 1500 ATMS, over 13,000 POS-terminals, and 2.5 million cardholders all over the country."[61]

3. Major Competition Concerns in the Shared ATM Networks in Ethiopia

3.1. Monopolization of the National Payment Switch

As discussed before, currently, there is a monopolization of the national payment switch in Ethiopia. Ethswitch is the only payment scheme that operates as a national payment switch in the country. The NBE'S directive on licensing and authorization of the payment system operators also recognizes this monopolization of the national switch.[62] It explicitly provides that Ethswitch is

[56] Habte, *supra* note 3, p.3.
[57] Premiere Switch Solutions Share Company (PSS), Official Website, available at https://psseth.com/, last accessed on 30 January 2020.
[58] Premier Switch Solution, 9th Annual Report, (2018/2019), p. 26 available at https://psseth.com/index.php/reports, last accessed on 30 January 2020.
[59] BPC Banking Technologies, *supra* note 6.
[60] Premier Switch Solution, *supra* note 58, p.8.
[61] BPC Banking Technologies, *supra* note 6.
[62] Directive on Licensing and Authorization of the Payment System Operators, Art. 9.1

the only national switch share company in the nation that provides interconnectivity, interoperability, and clearing all payment transactions in the state.[63] Because of a monopoly of the national switch, all commercial banks are obliged to join the Ethswitch joint venture. This creates market monopolization in the national ATM network market. The critical issue here is, should monopolization of the national payment system be tolerated? Usually, market monopoly is supposed to mess up the marketplace competition and causes to have lower productivity, higher cost, and lower product quality.[64] In the ATM network case, it results in a lower number of ATMs,[65] higher network fees, inefficient service, and lower ATM quality.[66]

Some scholars, however, attempt to justify the monopoly of market power in the ATM network industry by invoking two reasons. First, they try to justify market monopoly in the ATM network industry by showing its welfare impact on the consumers.[67] They argue that technical advancement is required to create a friendly environment in the ATM service to customers, and to bring this, the market players need to induce an economy of scale in the market.[68] The appropriate way of making economies of scale is, thus, by developing a concentrated/monopoly market.[69] In the short run, this justification may be sound. Because when banks integrate their proprietary ATM network in a single national web, customers can simply access the banking service by using the ATM terminals of member financial institutions in their convenient place and time. To accomplish this, the economy of scale is required, which can be acquired through market concentration or monopoly. In the long run, however, the advantage of market competition between ATM networks will override the advantages of network monopoly since competition brings innovation, efficiency, quality, and lower price, unlike monopoly. Second, proponents suggest that the ATM network is a natural monopoly for the reason that "a single network can serve ATMs at a lower monetary value than multiple competing networks."[70] Practically, there are countries that recognized more

[63] *Id*., Art. 9.4 (C).
[64] Snellman, *supra* note 1, p. 22.
[65] For instance, the practice in Finland shows that the number of ATM has decreased because of the monopolization of the shared ATM networks in the country (*Id*., p. 10).
[66] *Id*.
[67] Mcandrews, (1991), *supra* note 35, p.8.
[68] Robin A. Prager, ATM Network Mergers and the Creation of Market Power, *Antitrust Bulletin*, (1999), Vol. 44, No. 2, p. 349-364, p.354.
[69] *Id*.
[70] Oxera, Competition, and Innovation in Payments: An Analysis of Market Functioning and Innovation, Report prepared for vocalink, (2015), P.2 available at https://www.oxera.com/wp-

than one national switch network. For example, in the USA, there are more than one national switch networks, which compete with each other at the national level.[71] PLUS, Cirrus, and the Armed Force Financial Network are some of the National switches operating in the USA.[72] Even a study conducted in Europe showed that there is no concluding evidence affirming ATM network is a natural monopoly.[73]

In the case of Ethiopia, we may not find a direct rule under the general competition law that regulates the monopolization of the market. However, the general competition law, indirectly, prohibits market monopolization or concentration by prohibiting anticompetitive merger of businesses.[74] Of course, literally speaking, it is hardly possible to say that the joint venture in the payment system is merger. A merger is said to exist when "one company acquiring the assets and liabilities of another company, and causing that other company to cease to exist as an independent entity."[75] However, different scholars have concluded that even if there is no actual consolidation of entities in the case of ATM network joint ventures, it shall be treated similarly with the merger.[76] The tendency of treating joint ventures under the cartel has changed and rather, considered in the legal regime of a merger.[77] The creation of a joint venture is treated as a merger because its effect on creating market power is similar to that of merger.[78] For example, in the USA, in the case of *United States Vs. Penn-Olin Chemical Co*, the Federal Supreme Court applied the principles of merger to a joint venture antitrust case.[79] Likewise, the Ethiopian Competition Law treates the acts of pooling the whole or part of resources to conduct commercial activity as a merger,[80] which implicitly encompasses joint ventures such as shared ATM networks. Hence, though the Ethiopian competition law doesn't explicitly consider a joint venture as a merger, the

content/uploads/2018/07/15-11-27-Oxera-competition-and-innovation-public.pdf.pdf, last accessed on 1 February 2020.

[71] Congressional Budget Office of America, *supra* note 34 , p.21.

[72] *Id*.

[73] Oxera, *supra* note 70, P.2.

[74] The Trade Competition and Consumer Protection Proclamation No. 813/2013, *Federal Negarit Gazetta,* (2014), art. 9/1, (hereinafter, Trade Competition and Consumer Protection Proclamation No. 813/2013).

[75] Hussein Ahmed Tura, Regulation of Merger under The Ethiopian Competition Law, *Journal of Ethiopian Law* Vol. 26, No.1 (2014), p.13.

[76] Richard W. Pogue, Antitrust Considerations in Forming A Joint Venture, *Antitrust Law Journal*, Vol. 54, No. 3, (1985), Pp. 925-946, P.926.

[77] Donald l. Baker, Shared ATM networks-the Antitrust Dimension, Federal Reserve Bank of St. Louis, *Review,* 1995, p.7.

[78] *Id*.

[79] Goldberg, *supra* note 2, p.725.

[80] Trade Competition and Consumer Protection Proclamation No. 813/2013, Art. 9/3(a).

creation of payment system operators through a joint venture shall be treated through the principles of merger.

Once it is concluded that payment network joint ventures are subject to the regulations of a merger, the next question is whether the current act of monopolizing the national payment switch constitutes a prohibited merger. As a rule, the mere presence of a merger of ATM networks may not be problematic for a market competition, which means that the mere existence of a joint venture in the payment switch is not anticompetitive. Even the general competition law of Ethiopia allows the merger of competing entities if the merger is likely to result in technological efficiency or other pro-competitive gains that outweigh the adverse effect of the merger on the market competition.[81] Conversely, the general competition law of Ethiopia prohibits a merger if it "causes or likely to cause a significant adverse effect on the trade competition."[82] Looking into its impact along with the trade competition, monopolization of the national network entirely abolishes market competition between networks in terms of network costs and quality of product supply. A single market player exclusively controls the market, and this may even invite Ethswitch to abuse its market power. In fact, one may argue that since the NBE is a member of the Ethswitch, it can closely oversee the switch, for example, not to abuse its monopoly power in setting network prices. Even then, this monopoly switch may not be prompted to go for further investment and innovation in the network system since there is no competition in the ATM network market. The membership of NBE may not be a guarantee to bring efficiency and quality service through regulation. These can be done only through competition between national ATM payment system operators. Hence, though the monopolization of the national payment switch is justified, at least in the short run, by its economic optimality, in the long run, it is market competition that will bring more efficiency, technological creativity and ultimate welfare to the consumers.

On top of that, the interconnection of all commercial banks in the nation in a single national switch closes the chance for the conception of non-national network ventures in the state. By plugging in all banks in the country, Ethswitch enables the customer of all depository financial institutions in the state to find an ATM service from any bank's ATM. If then, banks will not be inspired to create a network venture other than the national payment network. Therefore, to reduce the anticompetitive effect of a monopoly of the national shared ATM network,

[81] *Id*., Art. 11/2.
[82] *Id*., Art. 9.

the directive should permit the possibility of more than one national switch in the country and the NBE ought to encourage banks, especially the emerging banks, to create a new competitive national ATM network. Though cooperation through joint ventures in the ATM industry is of paramount importance to the consumers' welfare, it should not be extended up to the creation of a market monopoly in the national payment network. The NBE should allow the creation of competing national switch in the payment system market in Ethiopia.

3.2. Access to Established Shared ATM Networks

The most argumentative competition concern in the shared ATM payment system is whether payment systems should be open for new entries or not. As the financial market flourishes, new financial institutions may emerge in a country where the payment market is already controlled by a big ATM network market. At this time, an issue may arise that should existing ATM networks give unrestricted access to new entrants to join or not. Logically, newly emerging markets may face the difficulty of creating a new payment system and compete in the market. This is called the network externality of payment networks.[83] To avoid the network externalities and enable emerging banks as competitive as the existing ones in the market, scholars argue that existing networks should open their networks for newly formed financial markets in the country.[84] Such scholars adopt the "traditional public utility model" which treats payment networks as a public good and enables any market players to access the system without restriction.[85] They argue that, since the payment network is a public good, it shall be open and accessible for any interested bank to be a member of the venture. Based on this argument, they propose mandatory sharing of payment platforms to any bank that desires to become a member.[86] The proposal for mandatory sharing of the ATM network is, however, met by a counter argument. It is criticized for making new entrants "free-rider" on the established networks and, consequently, undercuts the incentive of network owners for further investment.[87] It also discourages new entrants from establishing a new competing network.[88]

[83] Oxera, *supra* note 70, P.22.
[84] David A. Balte, Payment Systems, and Antitrust: Can the Opportunities for Network Competition Be Recognized?, *Federal Reserve Bank of St, Review*, (1995), p.19.
[85] Anderson and Rivard, *supra* note 12, p.435 & 436.
[86] Balte, *supra* note 84, p.19.
[87] Anderson and Rivard, *supra* note 12, p.435 and 436.
[88] *Id*.

Examining the practice regarding the issue of accessing the network by emerging markets, we couldn't find a consistent practice. For example, the National Commission on Electronic Fund Transfer (NCEFT), which was established in the U.S.A to entertain such concern, refused the mandatory sharing of ATM networks to newly emerging markets.[89] The commission justified its decision, alleging that the mandatory sharing of the network will weaken competition, which can be realized otherwise when members compete in different platforms.[90] In describing its concern, the commission puts the following statement:

> *"…"competition will be diminished if institutions form consortia or sharing arrangements that are overly inclusive in the sense that more competing institutions in a market will join an [electronic fund transfer] system than the economics of operation requires, thus lessening competition in the market.*[91]

On the contrary, in the *VISA Vs. Discover Card* Case where Dean Witter (the issuer of the Discover Card) sued VISA as the latter denied it to access its network,[92] the Trail and District Court recognized mandatory sharing of forums provided it fulfills the following screenings: "a market power screen, an economic sense screen, and an essential facility screen."[93] The first requirement that the court used to recognize mandatory sharing of the platform is when the forum has a dominant market power. According to this criterion, a network shall be required mandatorily to share its forum to emerging markets if it has tough market power or economies of scale.[94] This is to prevent big forums not to manipulate their market power by excluding newly emerging markets from becoming a member of the network. The second requirement is that to oblige a network to share its network, the purpose of its exclusionary rule must be to bring an economic benefit to its members (an economic screen).[95] The third condition, namely the essentiality facility screen, is met if the emerging bank is

[89] Balte, *supra* note 84, p.19.
[90] *Id*., p.19 & 20.
[91] Goldberg, *supra* note 2, p.725.
[92] David A. Blate, Access Demands, and Network Joint ventures, in David Gabel & David F.Weiman, (ed.), *Opening Networks to Competition: The Regulation and Pricing of Access*, 1st ed., Springer Science and Business Media LLC, (1998), p.184 available at https://books.google.com.et/books?id=ZNOxhls6gg0C&pg=PA107&dq=Opening+Networks+to+Competition:+the+Regulation+and+Pricing+of+Access&hl=en&sa=X&ved=0ahUKEwiynZXruMLpAhUFxYUKHThMCskQ6AEIJjAA, last accessed on 1 February 2020.
[93] *Id*., p.185.
[94] *Id*.
[95] *Id*.

not capable to compete unless it accesses the forums of the existing network.[96] After analyzing these three criteria, the court reached on the conclusion that though network forums can, in principle, set an exclusionary rule to newly emerging markets, it is mandatory to open for others provided the aforementioned elements are met. Yet, different writers opine that the new entrants should not be allowed to be free riders, and to that end, strict and transparent requirements must be put in place to protect the intellectual property right of the owner, "financial and operational risks."[97]

The Ethiopian competition law generally requires a market player that has a dominant market power to give access to competitors or potential competitors to essential facilities controlled by it.[98] The same law, however, allows dominant firms to deny access to competitors or potential competitors provided there is a justifiable economic reason.[99] From this, it can be understood that the mandatory sharing of a facility is not outright in the general competition law of the country. Rather, it is applied when the facility is essential to the entrants to compete in the market and there is no economic reason for the controlling entity to deny access.

The directive, nevertheless, requires the bylaws of payment system operators to "open network for the reciprocal exchange of transactions with a national switch or licensed financial institution."[100] The bylaw can't deny access to new entrants in any case. The term 'open network' shows that the sharing of the switch to emerging market players is unrestricted. It seems that no plausible justification exists to refuse access to the switch. What the switch can do is only to set fair criteria to access the system by new participants. The directive also mandatorily requires the national switch to permit open access to any participant.[101] Requiring payment switches to give unconditional access to new entrants is not, however, pro-competitive. Giving unrestricted access to any participant, ultimately, results in the concentration of the market in a single or a few firms. In fact, having a monopolized national payment switch in the country, it is naive to argue that there shall not exist mandatory sharing of the switch system. Unless we require the dominant national switch system to share its system to the

[96] Thanh Tu Nguyen, EU Antitrust Law in Payment Card Systems, LL.M Thesis, Lund University, (2003), p.26-27 available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1554679&fileOId=1563407%20, last accessed on 2 February 2020.
[97] *Id.*, p.26-35.
[98] Trade Competition and Consumer Protection Proclamation No. 813/2013, Art. 5/2(e).
[99] *Id.*, Art. 5/2(e).
[100] Directive on Licensing and Authorization of the Payment System Operators, Art. 10.1 (h).
[101] *Id.*, Art. 9.4 (C).

emerging markets, emerging markets may face difficulty to compete in the market. It is also clear that becoming a member of the Eathswitch is an essential facility for emerging banks to compete in the market; they can compete only by linking with the existing big market. Thus, until the country's number of national switches boom, it is fair to oblige an existing national switch to permit any newly emerging banks.

Presently, there are about eight banks, which are emerging in Ethiopia, namely; Gada Bank, Ahadu Bank, Ethiopia Diaspora Bank, Sheger Bank, Geez Bank, Jano Investment Bank, Kush Investment Bank, Amhara Bank, Zamzam Bank, Zad Bank,[102] and Goh Betoch Bank.[103] Requiring the existing networks to share their system mandatorily with this flourishing number of emerging banks at the same time will exacerbate the monopolization of the market in the national payment switch system. If mandatory sharing continues to be the principle, we will not have a chance to see the establishment of a new competing national network switch system in the country. The act of monopolizing this industry should be curtailed at a certain stage, and the right time is now. The NBE ought to enable these newly emerging banks to create new competing national ATMs networks. Thus, the principle of mandatory sharing of a network of the existing switches should not be permitted at this time since there is a chance to have another competitive national and non-national ATM network in the country. As explained before, mandatory access to existing network should be applied only if it is essential to the entrants to compete in the market. Hence, the outright mandatory sharing of payment networks prescribed by the directive needs to be reconsidered in light of the general competition law.

3.3. Exclusivity of Membership

Should financial institutions be allowed to be a member in more than one payment switch simultaneously is another pressing competition concern in a payment system.[104] In some jurisdictions, there are some trends in ATM switch networks to set anti-duality rules in their bylaws. For example, in Canada, membership in VISA and MasterCard is an exclusionary one.[105] Once a certain bank becomes a member of a certain switch network, it can't be a member of

[102] Tesfaye Getenet, Values Banking, (2019), available at https://www.capitalethiopia.com/interview/values-banking/, last accessed on 6 February 2020.
[103] Muluken Yewendwosen, Private Mortgage Bank Coming to Ethiopia, (2019), available at https://www.capitalethiopia.com/featured/private-mortgage-bank-coming-to-ethiopia/, last accessed on 6 February 2020.
[104] Mcandrews, (1991), *supra* note 35, p.13.
[105] Gabel & Weiman, *supra* note 82, p.183.

another switch simultaneously. The exclusionary rule is used as a means "to ensure the commitment of the members of a network to its success."[106]

In some, jurisdictions, on the other hand, like the U.S.A, members of a certain switch network can be simultaneously a member of another competing network in the country.[107] The concern here is whether the anti-duality rule of switches is anti-competitive or pro-competitive. To evaluate this issue, it is better to see the effects of simultaneous membership in more than one switch. Scholars criticized the act of having a dual membership at a time justifying that when there is a dual membership of member banks, there may be confilict of interest in each switch.[108] Since members have an interest in both switches, the likelihood of using the same or identical product and switch is high.[109] When there is dual membership, each network will prefer cooperation to competition.[110] For example, they may not be competitive in terms of network fee categories, qualities, and types of technologies used in the system, and efficiencies of their system. In other words, the duality rule may discourage ATM networks to innovate their system, to enhance efficiencies, and to bring network price reduction. The practice also favors this line of argument. For example, in the *MountainWest (SCFC)* case in the USA, the court of appeal and the Supreme Court decided in favor of the exclusionary membership rule.[111] Their justification was that the exclusionary membership rule of payment system is an important tool to regulate members not to be "free-riding and to bring competition in the market."[112] The actual practice in other jurisdictions also shows that competition between switches is higher in switches that adopt the exclusionary rule than switches, which allow dual membership. For example, the practice in Canada and the U.S.A show that competition is high in anti-duality follower switches than duality membership follower switches.[113]

Looking into the current reality of Ethiopia, membership duality may not be an issue since there is only one national payment switch system, namely Ethswitch,

[106] David A. Balto, Creating A Payment System Network: the Tie that Binds or an Honorable Peace?, *The Business Lawyer*, Vol. 55, No. 3, (2000), Pp. 1391-1408, p.1391 available at https://www.jstor.org/stable/40657075, last accessed on 29 February 2020.
[107] Gabel & Weiman, *supra* note 82, p.183.
[108] *Id.*
[109] *Id.*
[110] Daniel I. Prywes, ATM-Related Antitrust Developments, *The Business Lawyer*, Vol. 46, No. 3, (1991), Pp.1063-1068, p.1065 available at https://www.jstor.org/stable/40687230, last accessed on 8 February 2020.
[111] Nguyen, *supra* note 96, p.37.
[112] Balto David A., The Murky World of Network Mergers: Searching for the Opportunities for Network Competition, *Antitrust Bulletin*, Vol. 42, No. 4, (1997), Pp. 793-850, p.845.
[113] Gabel & Weiman, *supra* note 82, p.183.

and one switch other than the national switch, Premier League Solution switch. However, the issue of dual membership will become a concern for the Ethiopian competition law when there are more than one competing payment networks, be it national or other switches. Regarding membership duality, the Ethiopian general competition law is silent. Similarly, when we look at the directive, it is silent as to whether payment switches could forbid dual membership by their bylaws. Since the directive doesn't prohibit dual membership in the payment industry, a member of a certain payment switch can be also a member of another competitor payment switch if it wants. Payment switches may adopt dual membership or non-exclusivity membership rule.

This approach of membership is, however, open to hamper competition between or among payment switches. When a bank acquires a dual membership in different networks, the competition between those networks will be eliminated. For example, terms and conditions such as network fees of a network will be set by the decision of members. In such cases, a bank that has dual membership may not wish to set different network fees in each network to which it is a member. Rather, it will prefer to set similar terms and conditions in each network. It will result in the convergence of terms and conditions of ATM network in different payment switches. In the end, such an act will go against the objectives of free-market competition, i.e. lower price and higher quality products. Just to avoid such an overlap of interest between switches, the anti-duality membership rule is better than the dual membership approach. The exclusive membership approach is the right approach to enhance competition in the network market. If the dual membership is allowed, the trade secrets of a network will be disclosed to another competitor network. This will also affect the interests of consumers and competitors. Hence, the directive needs to be revised and should adopt the anti-dual approach of membership.

3.4. Network Fee Fixing

In a shared ATM network, there are different varieties of fees that can be paid by either card issuing bank, acquiring bank, or cardholder. The issuing bank pays an interchange fee to the acquiring bank for the cost that the latter incurs in installing the ATM and providing services to the customers of the issuing bank.[114] This fee is a means of compensating the acquiring bank for deploying the ATM.[115] In a shared ATM network, the customers of a bank with few ATMs

[114] Jocelyn Donez, and Isabelle Dubece, The Role of Interchange Fees in ATM networks, (2005), p. 2 available https://ideas.repec.org/p/wpa/wuwpio/0311002.html, last accessed on 14 February 2020.
[115] Salop, *supra* note 16, p.87.

are more exposed to use the ATMs of other banks that have a high number of ATMs. The effect is that a bank with few numbers of ATMs will pay higher interchange fee. Because of this, while banks with higher number of ATMs prefer to have higher interchange fee, banks with lower number of ATMs prefer to lower interchange fee.[116] A cardholder may also pay a foreign fee to the issuing bank, his bank, for using the card of the issuing bank in withdrawing money from the ATM of another bank.[117] Besides, the cardholder also pays a fee, surcharge, to the acquiring bank for using its ATM, though he is not the customer of that bank.[118] Similar to other countries' experiences, these fees are applied here in Ethiopia when banking transactions are made using a shared ATM network.

ATM network fees become the concern of competition law when we think of how these fees are fixed. Particularly, the fixing of network fees becomes an issue of competition law provided these fees are fixed by the collective agreement of member banks at the switch level. When we see the international experiences of fixing ATM network fees, in most countries, interchange fees are fixed collectively.[119] Interchange fees are fixed at the integrated network level by the board of the network.[120] Unlike interchange fees, foreign fees and surcharges are fixed by each bank independently.[121] Because of this, the primary concern of competition scholars, in the international arena, stick with interchange fees set by the shared ATMs network collectively.

Observing the Ethiopian case in fixing network fees in a shared ATM network, the directive does not expressly address the issue of determination of fees for the ATM network. It is silent as to the determination of network fees unless one argues that the determination of network fees is part of a system rule, which is required to be determined through collective agreements.[122] Looking into the practice, nowadays, there is a collective determination of fees in the system through multilateral agreements. Most network fees in the Ethswitch, for example, are fixed at the switch level through collective agreements. In particular, surcharges, interchange fees, and switch fees are determined collectively in the Ethswitch.[123] In the Ethswitch, the cardholder pays 0.50 cents

[116] Congressional Budget Office of America, *supra* note 34, p.24.
[117] Salop, *supra* note 16, p.87.
[118] *Id.*
[119] *Id.*
[120] *Id.*, p.89.
[121] Hayashi *et al, supra* note 18, p.30; Salop, *supra* note 16, p.89.
[122] Directive on Licensing and Authorization of the Payment System Operators, Art. 6.5.
[123] Etswitch S.C, Commencement of the Revised ATM Cash Withdrawal Fees, A Circular Letter Written to All Banks in Ethiopia, Ref: EtS/CEO-010/17, February 23, 2017.

per one hundred ETB withdrawals from the ATMs of a bank other than his bank.[124] This fee is a surcharge fee that a customer pays to the owner of the ATM for withdrawing cash using that ATM. Unlike other countries, the surcharge is set by the collective agreement of member banks of the switch in Ethiopia. It is determined collusively at the switch level. Besides, member banks of the Ethswitch set collectively the interchange fee of 0.25 cents per one hundred ETB cash withdrawal by customers of issuing bank from another member's ATM.[125] The sum becomes 0.75 cents per one hundred ETB cash withdrawal out of which, 0.45 cents is paid to the acquiring bank and 0.30 cents paid to the central switch Ethswitch. Not only this, but collective network fee determination is also made when a cardholder withdraws cash from his bank, provided the bank is a member of the Ethswitch. Accordingly, the fee that the cardholder should pay to his bank for withdrawing cash using the machine of his bank is 0.50 or less per one hundred ETB.[126] Of course, member banks are allowed to set their fees unless it exceeds the maximum cap set by the Ethswitch. Furthermore, the issuer bank pays ETB 0.05 per ETB 100 cash withdrawal by its customer using its ATM.[127] When a customer withdraws one hundred ETB from his bank's ATM, the total fee paid by both the bank and the customer is 0.55 ETB out of which, Ethswitch gets paid ETB 0.30 per one hundred ETB withdrawal the bank while issuing bank, gets paid ETB 0.25 or less depending on the decision of the bank.[128] Generally, the current practice in Ethiopia tells us that almost all fees in the shared ATM networks are fixed collectively at the switch level.

Considering this reality of the country, the next concern is whether the act of fixing the ATM network fees in the shared network collectively is anticompetitive or not, according to the Ethiopian competition law. Normally, some competition law scholars argue that setting the interchange (network) fee collectively goes against the market competition principle of competition law.[129] In market competition, the price of ATM networks shall be determined by the interaction of market players independently. If the fees involved in the shared ATM network are set by the negotiation of each member bank, then, there will be low network fees, high quality of service, and maximum convenience for the

[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Donez and Dubece, *supra* note 114, p. 2.

users.[130] Fixing the fees collectively avoids competition between ATM of banks, as the fee that a customer would pay is the same everywhere regardless of the cost and convenience.[131] The act of collective price fixing in shared ATMs is against the norms of a competitive market.

When we see the Ethiopian competition law, anti-competitive agreements made by market players are prohibited. [132] "An agreement, or concerted practices, between business persons or a decision by an association of business persons in a horizontal relationship is prohibited if [i]t involves, directly or indirectly, fixing a purchase or selling price or any other trading condition"…".[133] If we evaluate the current practice of the integrated ATMs in Ethiopia, almost all fees are determined by the boards of Ethswitch, which is an association of all banks in the country. This means the acts of the association is anti-competitive agreement. The fees are fixed by the decision of the association of banks in Ethiopia. This decision violated the competition rules of the country. It avoids competition among banks in terms of the price of the ATM network. This will affect the interests of consumers who would have been the ultimate beneficiary of reduced network fees, high quality product, and efficient service. Unless there is fierce competition in the ATM network industry, there will not exist any advancement in the ATM networks in the country. This problem exacerbates in Ethiopia because of the existence of a single, monopolized national ATM network in the country. In a nutshell, the collective determination of the network fees in the shared ATM network is anticompetitive according to the current competition law of the country.

Some writers, of course, try to justify and tolerate the act of fixing network fees collectively, though, literally, it is anti-competitive, arguing that the independent negotiation of banks to set the price of the network is costly and inconvenient.[134] Based on this argument, especially, the act of fixing network fees and interchange fees collectively is tolerable. Even court decisions in some countries are favoring the practice of collective network fee fixing on the ground that requiring independent network fee negotiation is cumbersome and inefficient. For example, in the U.S.A, the court permitted the collective setting of interchange fees by the Visa credit card network in the *NaBanco antitrust* case.[135] Partly, this justification is sound since it avoids redundant independent

[130] Salop, *supra* note 16, p. 89.
[131] Nguyen, *supra* note 96, p.23.
[132] Trade Competition and Consumer Protection Proclamation No. 813/2013, Art. 7.
[133] *Id.*, Art. 7/1 (b).
[134] Nguyen, *supra* note 96, p. 22.
[135] Salop, *supra* note 16, p.89.

negotiations among member banks. If network fees are set by the negotiation of each member, it will be very difficult even to reach consensus. The disagreement of members may affect the efficient running of the network. Not only this, since a switch is a software that helps to clear and settle the transactions made between each bank, but it will also be inconvenient to set different prices especially for interchange fees. Similarly, in the Visa International-Multilateral Interchange Fee case, the European Commission concluded that though the act of collective fixing of fees in a network is anticompetitive, it should be an exception to cartel rule in the competition law.[136] Unlike the *NaBanco anti-trust* case in the USA and Visa International-Multilateral Interchange Fee case in Europe, the competition tribunal of Canada prohibited the collective setting of network fees at the switch level in the interact case.[137] This tribunal explicitly orders member banks to determine their network fees in the system individually.[138] Generally, the international practice shows that there is no single accepted stance concerning setting the price involved in a payment network.

However, the Ethiopian case is different from other countries on two grounds. On the one hand, there is a high concentration of the national ATM network, monopolize by Ethswitch. There is only one national network switch called Ethswitch in the country that integrated all banks. Considering the inconveniences of independent negotiations, we may tolerate a collective network fee setting provided there are many switches in the country. If there is more than one national switch, competition may still be intact between those switches. The act of collective setting of network fees in one switch may not highly affect the interests of consumers since there is another competitive network. However, in a monopolized national switch, like the Ethiopian case, the collective setting of network fees will result in high network fees. This affects the consumers' welfare. Therefore, the practice in other countries where there is more than one network switch could not be used to justify the act of collective network fees setting in Ethiopia since the national payment system operator is monopolized and open to be manipulated. The author believes that in a monopolized market the network fees should be determined by the negotiation of each bank independently to bring intra-network competition. The cost of inconvenience could not be a justification to curtail the interests of the consumers that they would otherwise have received in a competitive market.

[136] Nguyen, *supra* note 96, p. 26-27.
[137] Anderson and Rivard, *supra* note 12, P. 439ff.
[138] *Id.*, p. 440.

What is more concerning in Ethiopia, unlike the case in other countries, is that even the surcharge that a cardholder pays to the owner of the ATM for using the service is determined collectively. The collective determination of the surcharge cannot be justified by any means. In our case, the surcharge of all ATMs is the same, i.e. 0.50 ETB per one hundred ETB withdrawal. This means once the cardholder decided to use the ATM of a bank other than his bank, there is no choice among other bank's ATM because of similar surcharge fees for all banks. To safeguard market competition, this fee should be set independently by the owner of the ATM. Furthermore, the act of setting network fees in Ethiopia extends even to set the maximum price that a cardholder pays to his bank using the ATM's of his bank. By the mere fact of membership to the switch, the maximum price that each bank shall impose on their customers for withdrawing cash from their ATM is determined to be ETB 0.50 or less. For a stronger reason, fixing collectively the maximum fees that each bank imposes on their customers is an anti-competitive agreement. Generally, the act of collusive fixing of ATM network fees by Ethiopian banks is violating the competition law of the country and deviates from the international experience. The anticompetitive agreements in determining network fees must not be treated exceptionally so long as it puts the consumers at disadvantage.

Conclusion

The shared ATM network enables customers to access their bank account using a single ATM card from any ATM of member banks. It also helps member banks to deliver their service through the ATM of another member bank. Beyond these, shared ATM network gives power to banks to introduce sophisticated technologies as it involves cooperation among member banks. Yet, shared ATM network has some competition concerns that call for careful regulation. Market concentration in the ATM network, access to existing ATM network, the manner of fixing the network fees involved in the network, and the anti/dual membership in the ATM network are key competition concerns, which require proper regulation.

Lookin into the case in Ethiopia, the directive explicitly allows the Etswitch to monopololize the national ATM network market. The act of venturing all commercial banks in a single national shared ATM network is, however, detrimental to the interests of consumers as it may lead to higher prices, lower product quality, and inefficient service. Though competition law promotes the well-being of consumers by discouraging market concentration, the current act

of monopolization of the national shared ATM network in Ethiopia is deviating from this principle.

Besides, the directive requires both the 'national' and 'other switches' to givet open access to all participants in the industry. It adopts the unconditional mandatory sharing of the ATM network. Automatic imposition of mandatory sharing of the existing network to emerging markets will, however, hamper market competition in the network market. The mandatory sharing of a network is sound only in some exceptional cases, namely when the existing shared ATM network has market dominance, and the emerging bank can't compete unless it accesses the existing network. Even, these conditions are not strong enough to apply a mandatory sharing approach as of today as there is a proliferating number of emerging banks in the country that can create a new competing payment network.

Moreover, the directive does not prohibit the adoption of the dual membership approach in the payment networks, i.e. a bank can be a member in more than one switch. The article, however, argued that dual membership of banks in more than one payment switch may impede competition in the network market. Since the dual membership is open for overlap of interest for a member in two switches, it discourages competition between such switches. It could expose those different networks to have similar markets such as similar fees.

Lastly, the article concludes that even if the directive is silent how the network fees should be decided, practically, the network fees, including interchange fees and surcharge are set by the collusive agreement of member banks. Nevertheless, the Ethiopian competition law forbids anticompetitive price agreements if it lessens competition. The act of collective setting of network fees, obviously, affects competition between networks in terms of network fees. To bring to market competition among banks in terms of network fees, network fees, especially, interchange fees and surcharge should be set through independent negotiation of each bank.

To make a balance in cooperation and competition in the shared ATM network, the NBE should revise its directive on licensing and authorization of the payment system operators. In doing so, the NBE needs to give due consideration to the tasks of de-monopolization of the national switch, setting conditions such as essential facility requirement to access existing ATM networks, adopting anti-duality of network membership, and prohibiting collective setting of network fees, particularly, interchange fees and surcharge.

በኢትዮጵያ የቤተሰብ ሕግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ (Adult Adoption) የመፍቀድ አስፈላጊነት፡- አንዳንድ ነጥቦች ከሌሎች አገራት ሕግጋት ተሞክሮ

*ነጋ እውነቱ መኮንን**

አጭጽሮተ ጥናት

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሮማዊያንን ሕግ ጨምሮ በጥንታዊ ሕግጋት ውስጥ ቦታ የነበረው ሲሆን ለአህጉረ አውሮፓና ለኢትዮጵያ የፍትሐ ብሔር ሕግ መሠረት በሆነው እ.አ.አ. በ1804 ዓ.ም በወጣው የፈረንሳዩ የናፖልዮን ሕግ እውቅና ተሰጥቶታል። እንዲሁም በሂደት በናፖልዮን ሕግ አማካይነት በዘመናዊው የፈረንሳይ፣ የእስፔን፣ የጣልያን፣ የጀርመንና በሌሎች የአውሮፓ አገራት ሕግጋት ውስጥ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የተፈቀደ ሲሆን፣ ከዚያም አልፎ በአሜሪካ ግዛቶችና በሌሎች የኮመን ሎው የሕግ ሥርዓት በሚከተሉ አገራት የቤተሰብ ሕግጋት ውስጥ በስፋት እየተሠራበት ይገኛል። በኢትዮጵያ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ታሪካዊ፣ ባህላዊ፣ ትውፊታዊና ማኅበራዊ መሠረት የነበረው ሲሆን፣ ምንጩን በዋናነት ከፈረንሳይ የፍትሐ ብሔር ሕግ ያደረገውና በ1952 ዓ.ም የወጣው የኢትዮጵያ የፍትሐ ብሔር ሕግ ለጉዳዩ እውቅና ከመንፈግ ባሻገር በወቅቱ ሥራ ላይ ከነበሩ ሌሎች ነባር የአገሪቱ የልማድ ሕግጋት ጋር አብሮ ሸሮታል፤ መሠረታቸውን የ1952 ዓ.ም የኢትዮጵያ የፍትሐ ብሔር ሕግ ያደረጉትና በቀጣይ ተሻሽለው የወጡት የፌዴራልም ሆነ የክልል የቤተሰብ ሕግጋት ተመሳሳይ መንገድ ተከትለዋል። በኢትዮጵያ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመፍቀድ የሚያስችሉ ታሪካዊ፣ ባህላዊ፣ ትውፊታዊ፣ ማኅበራዊና ሕጋዊ ምክንያቶች አሉ፤ በማለት ይህ አጥኝ ይከራከራል፤ እንዲሁም እነዚህን ምክንያቶች መሠረት በማድረግ አሁን በሥራ ላይ ያለው የቤተሰብ ሕግ እንዲሻሻል አጥኝው ይመክራል።

ቁልፍ ቃላት፦ *ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ፣ የእድሜ ልዩነት፣ ቀደምት ግንኙነት፣ ባህላዊ፣ ትውፊታዊና ታሪካዊ መሠረት፣ ቤተሰባዊ፣ ማኅበራዊና ሥነልቦናዊ ምክንያቶች፣ የቤተሰብ ሕይወት የመከበር መብት*

መግቢያ

ስለጉዲፈቻ ሲነሳ ወደ አእምሯችን የሚመጣው ሃሳብ የተለመደውና የታወቀው ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻ ነው። የኢትዮጵያን የቤተሰብ ሕግ ጨምሮ የሌሎች ብዙ አገራት የቤተሰብ ሕግጋት የህጻናት መብት ኮንቬንሽንም ጭምር የሚደነግጉት ይህንን

* በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት የሕግ ረዳት ፕሮፌሰር። ኤል ኤል ቢ(አዲስ አበባ ዩኒቨርሲቲ በ1996 ዓ.ም)፣ ኤል ኤል ኤም (ዩኒቨርሲቲ አፍ ግሮኒንገን፣ ዘኔዘርላንድስ በ2000 ዓ.ም)፣ ከፍተኛ ዲፕሎማ በማስተማር ሥነዘዴ (ባሕር ዳር ዩኒቨርሲቲ በ2007 ዓ.ም)፣ የፒ ኤች ዲ ተማሪ (ባሕር ዳር ዩኒቨርሲቲ)፤ ፀሀፊውን በኢ-ሜይል አድራሻው beleteeng@yahoo.com ማግኘት ይቻላል።

ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻን (child adoption) ነው።[1] የዚህ ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻ መሠረታዊ አላማም በተለያየ ምክንያት ከወላጆቻቸው ጋር ማደግ ላልቻሉ ልጆች ሰው ሰራሽ በሆነ ዘዴ ወላጅ እንዲያገኙ በማድረግ ልጆችን ተጠቃሚ እንዲሆኑ ማስቻል ነው። ተግባሩ ከጥንት ጀምሮ ሲሰራበት የቆየ ቢሆንም ከጊዜ ወደ ጊዜ እየተሻሻሉ የመጡት አገር አቀፍም ሆነ ዓለም ዓቀፍ ሕግጋት ጉዲፈቻው መደረግ ያለበት የልጁን/ጇን ጥቅም በሚጠብቅ መልኩ መሆን እንዳለበት ይደነግጋሉ።

ከላይ በተጠቀሱትና በሌሎች ተጨማሪ ምክንያቶች የጉዲፈቻ አላማ ከተፈጥሮ ወላጆቻቸው ጋር ማደግ ላልቻሉ ልጆች ሰው ሰራሽ በሆነ መልኩ ወላጅ ማስገኘት በመሆኑ ጉዲፈቻ በአብዛኛው የሚፈቀደው ለአካለ መጠን ያልደረሱ ልጆችን በተመለከተ ብቻ ሆኖ ቆይቷል። ከዚህ በታች በዝርዝር እንደምንመለከተው በአንጻሩ ጥንታዊና ታሪካዊ መሠረት ቢኖራቸውም ከቅርብ ጊዜ ወዲህ ይህንን የጉዲፈቻ ተደራጊውን/ዋን እድሜ መሠረት ያደረገውን ቅድመ-ሁኔታና አስተሳሰብ የለወጡ ሕግጋት ብቅ እያሉ ነው። የእነዚህ ሕግጋት ዋና ማጠንጠኛ ለአካለ መጠን ያልደረሱ ልጆችን ጉዲፈቻ ከምናደርግበት አላማ የተለየ ቢሆንም ለአካለ መጠን የደረሱ ሰዎችም ጉዲፈቻ እንዲደረጉ (adult adoption) መፍቀድ ነው።[2] እንደሚታወቀው እንደሌሎች ውስን አገራት የቤተሰብ ሕግጋት የኢትዮጵያ የቤተሰብ ሕግ[3] የሚፈቀደው ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻን ብቻ ነው።

የዚህ ጥናት ዋና አላማ የኢትዮጵያ የቤተሰብ ሕግ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ መደንገግና መፈቀድ እንደሚገባውና ከዚህም አኳያ በሥራ ላይ ያለው የቤተሰብ ሕግ መሻሻል እንዳለበት ከነምክንያቱ ማመላከት ነው። ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን በሕግ የመደንገግ አስፈላጊነትን ለማላየት የሌሎች አገራት የቤተሰብ ሕግጋት ተሞክሮዎች ይመረመራሉ። ከእነዚህ አገራት የቤተሰብ ሕግጋት ተሞክሮዎች የኢትዮጵያ የቤተሰብ ሕግ ምን ይማራል? እንደትስ ከኢትዮጵያ ተጨባጭ ሁኔታ ጋር አጣጥመን በቤተሰብ ሕጉ ውስጥ ለአካለ መጠን የደረሱ ሰዎችን ጉዲፈቻን ማካተት እንችላለን? የሚሉና ሌሎች ተያያዥ ጉዳዮችና ነጥቦች በጥናቱ ይቃኛሉ፤ ይተነተናሉ። ጥናቱ በዋናነት ለአካለ መጠን የደረሱ ሰዎችን ጉዲፈቻ በኢትዮጵያ የቤተሰብ ሕግ የመደንገግና የመፍቀድ አስፈላጊነትን ከባህላዊ፣ ታሪካዊ፣ ማኅበራዊ፣ ሥነ-ልቦናዊ፣ የሕግ ወይም ሰብአዊ መብት ምክንያቶች ጋር በማያያዝ ይከራከራል፤ ከዚህም አኳያ በሥራ ላይ ያለው የቤተሰብ ሕግ እንዲሻሻል ይመክራል።

ወደ ጥናቱ ይዘት ስንመጣ በመጀመሪያ ስለ ጉዲፈቻ ጠቅላላ ገለጻ የሚደረግ ሲሆን፣ የጉዲፈቻ ታሪካዊ አመጣጥ፣ የጉዲፈቻ አላማ፣ ለአካለ መጠን ስለደረሱ ሰዎች ጉዲፈቻ

[1] *Conventioin on the Rights of the Child, adopted* and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (entered into force 2 September 1990, in accordance with article 49), art. 21

[2] ለበለጠ መረጃ Mandi Rae Urban, The History of Adult Adoption in California, 11 J. CONTEMP. LEGAL Issues 612 (2000) ይመልከቱ።

[3] "የኢትዮጵያ የቤተሰብ ሕግ" የሚለው ሐረግ ለአዲስ አበባ እና ድሬዳዋ ከተማ አስተዳደሮች እንዲያገለግል በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ መንግሥት በሕዝብ ተወካዮች ምክርቤት የወጣውንና ሌሎች ክልሎች አጽድቀው ሥራ ላይ ያዋሏቸውን የቤተሰብ ሕግጋትን ጭምር ለማመላከት የገባ ነው። ይህንን ሐረግ አጥኝው የመረጠበት ምክንያት የብሔራዊ ክልሎች የቤተሰብ ሕግጋት በጉዲፈቻም ይሁን በሌሎች ጉዳዮች ላይ ተመሳሳይ ስለሆኑ እንጂ አንድ ብሔራዊ የቤተሰብ ሕግ በኢትዮጵያ በመኖሩ አለመሆኑን አጥኝው ለአንባቢያን ማስገንዘብ ይወዳል።

ታሪካዊ አመጣጥ፣ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ በሌሎች አገራት ሕግጋት ውስጥ ያለው ቦታ፣ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ አስፈላጊነትን በመደገፍና በመቃወም የሚነሱ ምክንያቶች፣ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ ለማድረግ መሟላት ያለባቸው ቅድመ-ሁኔታዎች፣ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ መለያ ባሕሪያት፣ እንዲሁም ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ አስፈላጊነትና ፋይዳ ከኢትዮጵያ ተጨባጭ ሁኔታ አኳያ፤ የሚሉ ዓበይት ነጥቦች በቅደም ተከተል ይቃኛሉ፤ይተነተናሉ። በመጨረሻም የማጠቃለያ ነጥቦችን በማንሳትና የመፍትሄ ሃሳቦችን በመጠቆም ጥናቱ ይቋጫል።

1. ስለጉዲፈቻ በጠቅላላው

በዚህ ክፍል ስለጉዲፈቻ ታሪካዊ አመጣጥና አላማ አጭር ቅኝት ይደረጋል።

1.1. የጉዲፈቻ ታሪካዊ አመጣጥና አላማ

ከጥንት ጊዜ ጀምሮ በሰው ልጅ ታሪክ ውስጥ ልጆችን ከተፈጥሮ ወላጆቻቸው ወደ ሌላ ቤተሰብ ለመመሥረት ለሚፈልጉ፣ የፖለቲካ ጎብረት ለመፍጠር ለሚያስቡ፣ ንብረትን በውርስ ለማዛወር ለሚሹ፣ በጋብቻ መተሳሰር ለሚፈልጉና በእድሜ ለገፉ ጧሪ ለሚፈልጉ አዛውንቶች በጉዲፈቻ ማዛወር የተለመደ ነበር።[4] ጉዲፈቻ ማድረግ በግሪክ ግዛቶች፣ በቱቶናዊያን (የጀርመን ነገዶች)፣ በስሎቫንያ ሩስያዊያንና በፖላንዶች ዘንድ የተለመደ ነበር።[5]

የጉዲፈቻ ታሪካዊ አመጣጥን በተመለከተ ሁለት ዋና ጥንታዊ ሕግጋትን ማንሳት ተገቢ ነው። እነሱም የሮማዊያን ሕግና የባቢሎናዊያን ወይም የሀሙራቢ ሕግ ናቸው። አሁን በሥራ ላይ ያሉት ዘመናዊ የጉዲፈቻ ሕግጋት በሙሉ ማለት ይቻላል፣ በቀጥታም ይሁን በተዘዋዋሪ ምንጫቸው የሮማዊያን ሕግ ነው።[6] እንደ ሮማዊያን ሕግ ከፍተኛ ዓለም አቀፍ ተጽእኖ ማሳደር ባይችሉም በተወሰነ መልኩ የፈርኦናዊያን ወይም የግብጽ፣ የግሪክ እንዲሁም የእብራይስጥ ሕግጋት ተጠቃሽ ጥንታዊ የጉዲፈቻ ሕግ ምንጮች ናቸው።[7] ክክርስቶስ ልደት በፊት እ.አ.አ. በ2285 ዓመተ ዓለም የተደነገገው የባቢሎናዊያን ወይም የሀሙራቢ ሕግ ከዘመናዊው የጉዲፈቻ ሕግጋት ጋር የሚቀራረብ ድንጋጌ ነበረው፤ "አንድ ሰው አንድን ልጅ ወስዶ እንደ ልጁ ካሳደገው ማንም ሰው ይህንን የመንከባከብና የማሳደግ መብቱን አይነጥቀውም።" በማለት ሕጉ ይደነግጋል።[8]

ወደ ሮማዊያን ሕግ ስንመጣ የጉዲፈቻ ጉዳይ ለጉዲፈቻ አድራጊውና ተደራጊው ብቻ የተተወ የግል ወይም የቤተሰብ ጉዳይ ብቻ ሳይሆን የመንግሥት ቀጥተኛ ጣልቃ ገብነት የሚታይበትና ጠንካራ መዋቅር የነበረው ነው።[9] በሞግዚት አስተዳደር ስር የነበሩ ልጆች

[4] Bisha Eugena, Adoptioin in Ancient Times, https://cyberleninka.ru/article/n/adoption-in-ancient-times/viewer

[5] Leo Albert Huard, The Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743 (1956).

[6] ለበለጠ መረጃ Jean-François Mignot, "Les adoptions en France et en Italie: une histoire compare du droit et des pratiques (xixe-xxie siècles)", Vol. 70), (2015/4) ይመለከቷል።

[7] Adoption in Virginia, 38 Va. L. Rev. 546 (1952).

[8] የሀሙራቢ ሕግ አንቀጽ 185፤ ይህ አንቀጽ በእንግሊዝኛው *If a man has taken a young child 'from his waters' to sonship and has reared him up no one has any claim against that nursling* በማለት ይደነግጋል።

[9] ከዚህ በላይ ማስታወሻ ቁጥር 7፣ ገጽ 545።

በጉዲፈቻ ሲተላለፉ በሕግ የተቀመጡ መሟላት ያለባቸው ቅድመ-ሁኔታዎች መሟላታቸው በፍርድ ቤት መረጋገጥ ሲኖርባቸው ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ ሲደረጉ በነገሥታቱ ፈቃድ ላይ የተመሠረተ ነበር።[10] ከዚህ በላይ እንደተጠቀሰው የሌሎች አገራት ጥንታዊ የጉዲፈቻ ሕግጋት ቢኖሩም ለአውሮፓውያን የጉዲፈቻ ሕግ መሠረት የሆነው ይህ በጀስትንያን የዳበረው የሮማ ሕግ ነው።[11] እንደ አብዛኞቹ ቀደምትና ጥንታዊ ሕግጋት የሮማዊያን ሕግ ሴቶችን በተመለከተ አድሎአዊ ስለነበር ጉዲፈቻ ማድረግ የሚፈቀድላቸው ወንዶች ብቻ ነበሩ።[12] ለዚህም ምክንያቱ በሮማዊያን ሕግ ቤተሰብን የመምራት መብት (*patria potestas)* የተሰጠው ለወንዶች ብቻ ስለነበረ ነው።[13] ይህ ሕግ በሂደት ተሻሽሎ ውስን የሆኑ ቅድመ-ሁኔታዎች ሲሟሉ (ለምሳሌ አንዲት እናት ሁሉንም ልጆቿን በሞት ካጣች) ሴቶች ጉዲፈቻ የሚያደርጉበት ሁኔታ እየተፈጠረ መጣ።[14]

የሮማዊያን ሕግ ለአህጉረ አውሮፓ የሲቪል ሎው የጉዲፈቻ ሕግ ላይ ተጽእኖ አሳድሯል። ይህ ተጽእኖ ካረፈባቸው አገራት መካከል የፈረንሳይ ሕግ በቀዳሚነት ይጠቀሳል።[15] በፈረንሳይ ሕግ በግልጽ የተቀመጡና በሂደት የዳበሩ ሁለት የጉዲፈቻ አይነቶች አሉ። የመጀመሪያው ሙሉ (full) ጉዲፈቻ የሚባለው ሲሆን፣ ይህ የጉዲፈቻ አይነት እውቅና የተሰጠው እ.አ.አ. በ1939 እና በ1966 ዓ.ም በወጡት ሕግጋት ነው።[16] በዚህ የጉዲፈቻ አይነት የሚካተቱት ለአካለ መጠን ያልደረሱ ወላጆቻቸውን በሞትና በተለያዩ ምክንያቶች ያጡ ልጆች ሲሆኑ፣ አሳማውም ልጆቹን ከተፈጥሮ ወላጆቻቸው ጋር ያላቸውን ዝምድናና የሕግ ግንኙነት ሙሉ በሙሉ የሚያቋርጥ ነው።[17] ሁለተኛው ቀላል (simple) የሚባለውና እ.አ.አ. በ1804 እና በ1966 ዓ.ም በወጡት ሕግጋት እውቅና የተሰጠው ነው። ከሙሉ ጉዲፈቻ በተለየ የዚህ ጉዲፈቻ አላማ፣ ጉዲፈቻ ለሚደረገው ከተፈጥሮ ወላጆቹና ዘመዶቹ ተጨማሪ የጉዲፈቻ ወላጅና ዘመድ እንዲያገኝ ማስቻል ነው። ሁለተኛው የቀላል ጉዲፈቻ ባሕርይ፣ ከሙሉ ጉዲፈቻ በተለየ ጉዲፈቻ የሚደረጉት ለአካለ መጠን የደረሱ ሰዎች ብቻ መሆናቸው ነው፤ አላማውም ሃብትንና ንብረትን በውርስ ማስተላለፍ ነው።[18]

የሮማ ሕግ እንደ ጉዲፈቻ የሕግ ምንጭ ያገለገለው ለአህጉረ አውሮፓ የሕግ ሥርዓት ብቻ ሳይሆን፣ በዋናነት አሜሪካና እንግሊዝ ለሚካተቱበት የኮመን ሎው የሕግ ሥርዓትም ጭምር ነው።[19] በኮመን ሎው የሕግ ሥርዓት ጉዲፈቻን በተመለከተ ቀደም ሲል ምንም አይነት ሕግ ባለመኖሩ፣ በአሜሪካና በእንግሊዝ ይህንን ጉዳይ የሚደነግጉ የሮማ ሕግ ተጽእኖ ያረፈባቸው ሕግጋት ወጥተው ሥራ ላይ ውለዋል።[20] እንግሊዝ ለመጀመሪያ ጊዜ የጉዲፈቻ ሕግ ያጸደቀችው እ.አ.አ. በ1926 ዓ.ም ሲሆን በአሜሪካ ደግሞ ማሳቹሴትስ

[10] ዝኒ ከማሁ።
[11] ዝኒ ከማሁ።
[12] Walter J. III Wadlington, Minimum Age Difference as a Requisite for Adoption, 1966 Duke L.J. 395 (1966).
[13] ዝኒ ከማሁ።
[14] ዝኒ ከማሁ፣ ገጽ 395-96።
[15] ለበለጠ መረጃ ሊዮ አልበርት ሁዋርድ፣ ከዚህ በላይ ማስታወሻ ቁጥር 5 ይመለከቷል።
[16] ለበለጠ መረጃ Frederique Dreifuss-Netter, Adoption and Medically Assisted Procreation under French Law, 1996 St. Louis-Warsaw Transatlantic L.J. 93 (1996) ይመለከቷል።
[17] ለበለጠ መረጃ Jean-François Mignot. Simple Adoption in France: Revival of an Old Institution (1804-2007), Revue française de sociologie, Centre National de la Recherche Scientifique, (2016) ይመለከቷል።
[18] ዝኒ ከማሁ፣ ገጽ 1።
[19] Jullian Bamberger, Adoption in Indiana, *Indiana Law Journal*, Vol. 17, Iss. 3, 225 (1941-42).
[20] ለበለጠ መረጃ ሊዮ አልበርት ሁዋርድ፣ ከዚህ በላይ ማስታወሻ ቁጥር 5 ይመለከቷል።

እ.አ.አ. በ1851 ዓ.ም የጉዲፈቻ ሕግ ደንግጋ ሥራ ላይ ያዋለች የመጀመሪያዋ ግዛት ናት። በመሆኑም የሮማ ሕግ በጥቅሉ እንዲሁም በ19ኛው መቶ ክፍለ ዘመን የዳበረው የናፖሊዮን ሕግ በተለይ ከአህጉረ አውሮፓ በተጨማሪ ለኮመን ሎው የሕግ ሥርዓት የጉዲፈቻ ሕግ ምንጭ ሆነው ከማገልገላቸውም በላይ ቀደምትነት የነበራቸውና ለረጅም ጊዜ ያገለገሉ ሕግጋት መሆናቸውን እንገነዘባለን።

እንደ ሮማዊያን ሁሉ በጥንታዊ ግሪክም ጉዲፈቻ ተገቢ ቦታ ነበረው። በአቴንስ የነበረውን የጉዲፈቻ ሕግ ስንመለከት በዚህ ዘመን እየተሰራበት ካለው ሕግ በተቃራኒው ጉዲፈቻ የሚደረጉት ልጆች ሳይሆኑ ለአካለ መጠን የደረሱ ሰዎች ነበሩ።[21] የዚህም ዋነኛ ምክንያት የጉዲፈቻ አላማና ጠቀሜታው ጉዲፈቻ የተደረገውን ሰው በቀጥታ ለመጥቀም ሳይሆን የጉዲፈቻ አድራጊውን ሃብትና ንብረት ወራሽ እንዲኖረው በማድረግና የዘር ሐረጉን በማስቀጠል ላይ ያተኮረ በመሆኑ ነበር።[22]

ጥንታዊያኑን የሮማና የግሪክ የጉዲፈቻ ሕግጋት ከሌሎች ሕግጋት የሚለያቸው ነገር ቢኖር ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን የደነገጉና የፈቀዱ መሆናቸው ነው።[23] ከዚህ በታች እንደምንመለከተው ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ አላማ ጉዲፈቻ አድራጊውን ለመጥቀም ቢሆንም በጥንታዊት ሮማ ለአካለ መጠን የደረሱ ነጻ ሰዎችን ጉዲፈቻ ማድረግ የተለመደ ነበር።[24]

ከዚህ በላይ በአጭሩ ለመግለጽ እንደተሞከረው ከጉዲፈቻ ታሪካዊ አመጣጥ ጀምሮ እንደምንገነዘበው ዋናው የጉዲፈቻ አላማ ጉዲፈቻ ተደራጊውን ሳይሆን የጉዲፈቻ አድራጊውን ጥቅም ለመጠበቅ ነበር። እንደ ሮማ ባሉ ጥንታዊ ስልጣኔዎች ጉዲፈቻ ከጉዲፈቻ አድራጊው ጥቅም በተጨማሪ ፖለቲካዊና አገራዊ ፋይዳ ጭምር ነበረው።[25] ለምሳሌ የሮማ ነገሥታት ቀጣይ የዙፋናቸው ወራሽ እንዲኖር ለማረጋገጥ ጉዲፈቻን እንደ አማራጭ ይጠቀሙበት ነበር።[26]

1.2. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ ታሪካዊ አመጣጥ በአጭሩ

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ መቼ ተጀመረ የሚለውን ጥያቄ ለመመለስ የሰነድ ማስረጃ ማቅረብ ቢያስቸግርም ከጥንት ጀምሮ የተፈጥሮ ልጅ የሌላቸው ሰዎች በእድሜ ለሚበልጡት ጓደኛ ሃብትንና ንብረትን በውርስ ለማስተላለፍ የሚጠቀሙበት አይነተኛ መሣሪያ ነበር።[27] ነገር ግን የጉዳዩን ታሪካዊ አመጣጥ በተመለከተ እርግጠኛ ሆኖ መናገር

[21] Nigel Wilson (ed.), Encyclopedia of Ancient Greece, 10 (2013)

[22] ዝኒ ከማሁ።

[23] Adult Adoption, 1972 Wash. U. L. Q. 254 (1972) በጥንታዊያኑን በግሪክና በሮማ የጉዲፈቻ ሕግጋት መካከል ያለውን ንጽጽር ይበልጥ ለመረዳት Hugh Lindsay, Adoption in Greek Law: Some Comparisons with the Roman World, *New Castle Law Review*, Vol. 3, No. 2, 1999 ይመለከቷል።

[24] Hugh Lindsay, Adoption in Greek Law: Some Comparisons with the Roman World, 3 Newcastle L. REV. 91 (1999).

[25] C. D. Spinellis and C. Shachor R-Landau, Reflections on the Law of Adoption in Greece and Israel in Light of the European Convention, *Revue Hell6nique de Droit International,* Vol. 25, 1972, p. 144

[26] ከዚህ በላይ ማስታወሻ ቁጥር 7፣ ገጽ 545።

[27] Russell E. Jr. Utter, The Benefits and Pitfalls of Adult Adoption in Estate Planning and Its Likely Future in Missouri, 80 UMKC L. Rev. 256 (2011).

የሚቻለው ለአካለመጠን የደረሰ ሰው ጉዲፈቻ በጥንታዊቷ ሮማ እንደተጀመረ ነው።[28] ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ማለት ከቃሉ መረዳት እንደሚቻለው ከመደበኛው ጉዲፈቻ ሥርዓት በተለየ በአንድ አገር የፍትሐ ብሔር ሕግ መሠረት አንድ ለአካለ መጠን የደረሰ ሰው ሌላ ለአካለ መጠን የደረሰን ሰው በጉዲፈቻ ተቀብሎ ልጁ የሚያደርግበት ሥርዓት ማለት ነው።[29]

ልክ እንደ መደበኛው ጉዲፈቻ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ መሠረቱና ታሪካዊ አመጣጡ በዋናነት የምዕራብ አገራት ባህልና ሕግ ነው።[30] ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ቀደምት የሕግ እውቅና ካገኙባቸው የሕግ ሥርዓቶች መካከል የሮማዊያን ሕግ በቀዳሚነት የሚጠቀስ ሲሆን ሕጉ መደበኛውን ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻና ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለያይቶ የሚደነግግ ነበር። መደበኛው ጉዲፈቻ በሞግዚት ስር ያሉ ልጆች በጉዲፈቻ የሚተላለፉበት አሠራርን ሲያመለክት፤ ለአካለመጠን የደረሰ ሰው ጉዲፈቻ ደግሞ ከሞግዚት ነጻ የነበሩ ሰዎች የጉዲፈቻ ቤተሰብ የሚያገኙበትን ሥርዓት የሚደነግግ ነው። ይህ በሮማዊያን ዘንድ ሲሠራበት የቆየው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ አላማን በሁለት ከፍሎ ማየት የሚቻል ሲሆን እነሱም ቤተሰባዊና ማኅበራዊ ግንኙነትን ለመመሥረትና ሃብትንና ንብረትን በውርስ የማስተላለፊያ መንገድ ሆኖ ማገልገሉ ናቸው።[31]

ይህ አሠራር ከጥንታዊያኑ የግሪክና የሮማዊያን ስልጣኔ ጀምሮ የአውሮፓ አገሮችን አካሎ የአትላንቲክ ውቅያኖስን ተሻግሮ እስከ ዘመናዊቷ አሜሪካ ድረስ የዘለቀ ነው። ጉዳዩን ከሌሎች የምእራብ አገራት ይልቅ በአሜሪካ ልዩ የሚያደርገው ይህ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ከመደበኛው ጉዲፈቻ ጋር በተቀራራቢ ጊዜ የሕግ እውቅና ማግኘቱ ነው።[32]

2. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ አስፈላጊነትን በመደገፍና በመቃወም የሚነሱ መከራከሪያዎች

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በሕግ ተፈቅዶ ሥራ ላይ በዋለባቸው አገራት ጥቅሙንና ጉዳቱን አስመልክቶ በፀሀፍት የተለያዩ ሃሳቦች ይሰነዘራሉ። በጥናቱ መግቢያ እንደተመለከተው የዚህ ምርምር ዋናው አላማ በኢትዮጵያ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ መፈቀድ አለበት የሚልና ለዚህም አሳማኝ ምክንያቶችን ማመላከት ቢሆንም አሁን ያለው የኢትዮጵያ የቤተሰብ ሕግ ተሻሽሎ ወደ ሥራ ቢገባ በሌሎች አጋራት ሕግጋት ያጋጠሙ ችግሮች ከኢትዮጵያ ተጨባጭ ሁኔታ አንጻር ችግር መሆን አለመሆናቸውን መመርመር እንዲሁም ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሚኖሩትን አንጻራዊ ጥቅሞችና ጉዳቶችን በአጭሩ መቃኘት አስፈላጊ ነው።

[28] ዝኒ ከማሁ።
[29] ለበለጠ መረጃ https://legaldictionary.net/adult-adoption/ ይመለከቷል።
[30] Robert Keefe, Sweet Child O' Mine: Adult Adoption & Same-Sex Marriage in the Post-Obergefell Era, 69 Fla. L. Rev. 1481(2017).
[31] ዝኒ ከማሁ።
[32] ዝኒ ከማሁ።

2.1. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ አስፈላጊነትን በመደገፍ የሚነሱ መከራከሪያዎች

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በመደገፍ የሚነሱ ክርክሮችና ምክንያቶች በአብዛኛው ጉዳዩ በሕግ ተፈቅዶ ሥራ ላይ ያዋሉ አገራትን ተሞክሮና የሕግ አውድ መሠረት ያደረጉ ናቸው። እነዚህን ክርክሮችና ምክንያቶች መመልከት በኢትዮጵያ የቤተሰብ ሕግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ቢፈቀድ ምን ምን ጠቀሜታዎች ይኖሩታል? የሚለውን ለመመዘንና ለመመርመር ያግዛል። ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በመደገፍ በብዙ ፀሀፍት የተለያዩ የመከራከሪያ ነጥቦች ይቀርባሉ። በጉዳዩ ላይ የጻፉ ምሁራን ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በመደገፍ የሚከተሉትን ክርክሮች ያነሳሉ፦

1) ጉዲፈቻ አድራጊው ጉዲፈቻ ማድረግ የፈለገው ሰው ለአካለ መጠን ያልደረሰ ሆኖ እያለ ጉዲፈቻ ማድረግ ፈልጎ ይህ ፍላጎቱ በተለያዩ ምክንያቶች ሳይሳካ ሲቀር፣

2) ልጅ የሌላቸው ባልና ሚስት ወይም ልጅ የሌለው ሰው የቤተሰብ ስሙን ማስቀጠል ሲፈልግ፣ ወይም አንደኛው የትዳር አጋር ቢሞት ረዳትና ደጋፊ ለማግኘት፣

3) ጉዲፈቻ አድራጊው ጉዲፈቻ ማድረግ የፈለገውን ሰው በሂደት መቀራረብና ቤተሰባዊ ወዳጅነት መፍጠር፣ አንዲሁም

4) አንድ ሰው ለአካለ መጠን የደረሰ የእንጀራ ልጁን ጉዲፈቻ ማድረግ ቢፈልግ የሚሉ ሲሆን፤[33] ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በዋናነት ቀድሞ የነበረን ቤተሰባዊ ግንኙነት ሕጋዊ ለማድረግ ጥቅም ላይ የሚውል ሲሆን በተለይ በአሜሪካ በእንጀራ አባት/እናት እና በእንጀራ ልጅ መካከል የነበረን ቀደምት ግንኙነት ወደ ልጅና ወላጅ ግንኙነት ለመለወጥ ጥቅም ላይ ሲውል ይስተዋላል።[34]

5) ሌላው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ጥቅም ጉዲፈቻ አድራጊው ወይም ተደራጊው ሲሞት ሃብት ንብረትን በውርስ ለማስተላለፍ ማስቻሉ ነው።[35] እዚህ ላይ ሊነሳ የሚችለው ነጥብ ከውርስ ውጪ ሀብት ንብረትን በሌሎች ሕጋዊ መንገዶች ማለትም በኑዛዜና ከሞት በኋላ በሚፈጸም ስጦታ ማስተላለፍ ስለሚቻል ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ አስፈላጊ አይደለም የሚል ሲሆን እነዚህ የሀብትና ንብረት ማስተላለፊያ መንገዶች ከሚቹ የሥጋ ዘመዶች በተለያየ መልኩ ጥያቄና ተቃውሞ ሊቀርብባቸው ስለሚችል ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ተመራጭ ያደርገዋል።[36]

እነዚህን የመከራከሪያ ነጥቦች ወይም ምክንያቶች በሁለት ከፍሎ ማየት የሚቻል ሲሆን እነሱም የልጅና የወላጅ ግንኙነት ያለበት እና የልጅና የወላጅ ግንኙነት የሌለበት ናቸው።[37] ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በመደገፍ የሚነሱ ምክንያቶች በጥቅሉ ሲታዩ በአንድ መሠረታዊ ነጥብ ላይ የተመሠረቱ ናቸው። ይኸውም በጉዲፈቻ አድራጊውና ተደራጊው መካከል ቀድሞ የነበረንና በተለያዩ ምክንያቶች የተመሠረተ ግንኙነትን ተጠናክሮ

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[33] Walter Wadlingtont, Adoptioin of Adults: A Family Law Anomality, 54 Cornell L. Rev. 578 (1968-1969)

[34] ሮበርት ኪራ፣ ከዚህ በላይ ማስታወሻ ቁጥር 30፣ ገጽ 1482::

[35] Gwendolyn L. Snodgrass, Creating Family without Marriage: The Advantages and Disadvantages of Adult Adoption among Gay and Lesbian Partners, 36 Brandeis J. FAM. L. 81 (1997).

[36] ገዛኒ ከማሁ፣ ገጽ 81-82።

[37] ዋልተር ዋድሊንተን፣ ከዚህ በላይ ማስታወሻ ቁጥር 33፣ ገጽ 578።

እንዲቀጥል (solidify) በማድረግ በመጨረሻ የጉዲፈቻ ልጁን ወራሽ እንዲሆን ማስቻል ነው።[38]

2.2. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ አስፈላጊነትን በመቃወም የሚነሱ መከራከሪያዎች

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሚነቀፍበት አንዱ ምክንያት ቀድሞ በሕግ ያልተፈቀደና ሕጋዊ ያልሆነን በጉዲፈቻ አድራጊውና ጉዲፈቻ ተደራጊው መካከል የነበረን ድብቅ ግንኙነት ወይም የጎንዮሽ ዓላማን በጉዲፈቻ ሽፋን ለማስቀጠል መሣሪያ ሆኖ ያገለግላል ወይም በእንግሊዝኛው collateral purpose ይኖረዋል የሚል ነው። ይህ መከራከሪያ በዋናነት የሚነሳው ከተመሳሳይ ጾታ ጾታዊ ግንኙነት ወይም ግብረ-ሰዶማዊያን ጋር ተያይዞ ነው።[39] እንደ አሜሪካ ባሉ አገራት የተመሳሳይ ጾታ ጋብቻ በሕግ ከመፈቀዱ በፊት ጾታዊ ግንኙነት የነበራቸው ሰዎች ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በማድረግ ግንኙነቱን ለማጎበረሰቡ የአባትና የልጅ ወይም የእናትና የልጅ አስመስሎ ማቅረብ የተለመደ ነበር።[40] ይህ በግብረ-ሰዶማዊያን የሚደረግ ጉዲፈቻ በሕግ ያልተፈቀደን የተመሳሳይ ጾታ ሃሳዊ ጋብቻ (pseudo-marriage) ሕጋዊ ሽፋን ለመስጠት ያገለግላል ማለት ነው። እነዚህ ሰዎች በማኅበረሰቡ ዘንድ ልጅና ወላጅ መስለው ከመታየት ባለፈም ጉዲፈቻን ሃብት ንብረታቸውን በውርስ ለማስተላለፍ አይነተኛ ዘዴ አድርገው ይጠቀሙበታል።[41]

የዚህ ክርክር መነሻ በዋናነት ለታችኞቹ የአሜሪካ ፍርድ ቤቶች ሲቀርቡ የነበሩ የተመሳሳይ ጾታ ግንኙነት ያላቸውን ሰዎች የጉዲፈቻ ጥያቄ ሲሆን በአሁኑ ወቅት የአሜሪካ ጠቅላይ ፍርድ ቤት በተመሳሳይ ጾታ ጋብቻ ሕጋዊነት ላይ እ.አ.አ. በ2015 ዓ.ም ህጋዊ ነው በሚል ከሰጠው ውሳኔ ጋር ተያይዞ ጉዳዩ ለአሜሪካ ሕግጋትና ፍርድ ቤቶች የሕግ ክርክር የሚያስነሳ አይደለም።[42] ጉዳዱን ይበልጥ ለማብራራት የተመሳሳይ ጾታ ጋብቻ ሕጋዊ ከመሆኑ በፊት ከተሰጡ የፍርድ ቤት ውሳኔዎች ውስጥ ለኒውዮርክ ከተማ ፍርድ ቤት የቤተሰብ ችሎት ቀርቦ የነበረን ጉዳይ በአጭሩ እንመልከት። የጉዲፈቻ ማመልከቻው ለፍርድ ቤቱ የቀረበው እ.አ.አ. በ1982 ዓ.ም ሲሆን፣ የ57 ዓመት እድሜ የነበረው ሰው ለ25 ዓመታት ጥብቅ የሥራና የግል ግንኙነት የነበረውን የ50 ዓመት ጎልማሳ ጉዲፈቻ ለማድረግ የቀረበ ማመልከቻ ነው። ፍርድ ቤቱ የጉዲፈቻ ማመልከቻውን ውድቅ ያደረገ ሲሆን ለውሳኔው በምክንያትነት የቀረበው አመልካቶች ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሚፈቅደውን ሕግ የተመሳሳይ ጾታ ሃሳዊ ጋብቻ ለመፈጸም በሽፋንነት ተጠቅመውበታል የሚል ነው።[43] ነገር ግን በአሜሪካ የታችኞች ፍርድ ቤቶች ዘንድ ተቀባይነት አግኝቶ ነበረው

[38] Thomas Adolph Pavano, Gay and Lesbian Rights: Adults Adopting Adults, 2 Conn. Prob. L.J. 261-262 (1987).

[39] Brynne E. McCabe, Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations, 22 Quinnipiac Prob. L.J. 301 (2009).

[40] ለበለጠ መረጃ Peter N. Fowler, Adult Adoption: A New Legal Tool for Lesbians and Gay Men, 14 Golden Gate U. L. Rev. (1984) ይመለከቷል።

[41] In re Robert P., 117 Misc. 2d 279, 458 N.Y.S.2d 178 (1983), aff'd mem. sub nom. In re Pavlik, N.Y.L.J., Nov. 17, 1983, at 6, col. 3 (N.Y. App. Div.) (court denied an adoption petition on the basis that the parties were attempting to create a pseudo-marriage through use of the adult adoption statute), ፒተር ኤን ፋውለር፣ ከዚህ በላይ ማስታወሻ ቁጥር 40፣ ገጽ 669 ይመለከቷል።

[42] Obergefell v. Hodges, 576 U. S. ____ (2015)

[43] ለበለጠ መረጃ ፒተር ኤን ፋውለር፣ ከዚህ በላይ ማስታወሻ ቁጥር 40 ይመለከቷል።

ይህ ምክንያት በይግባኝ ሰሚ ፍርድ ቤቶች በአብዛኛው ይሻር ነበር።[44] ምንም እንኳ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ጋር ተያይዞ የተመሳሳይ ጾታ ሃሳዊ ጋብቻ ክርክር ቢነሳም ጉዲፈቻው በማጭበርበር ወይም በአላስፈላጊ ተጽእኖ ካልተደረገ በስተቀር ሊሰረዝ ስለማይችል (irrevocable በመሆኑ) ጉዳዩ ለግብረ-ሰዶማዊያን አይነተኛ አማራጭ ሆኖ አያውቅም።[45] ድብቁ የተቃራኒ ጾታ ጾታዊ ግንኙነቱና መፈላለጉ በሂደት ሊቀር ቢችል በሕግ የሚታወቀው የጉዲፈቻው ግንኙነት ሊሰረዝ ስለማይችል በአብዛኛው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ለሃሳዊ ጋብቻ በሽፋንነት ጥቅም ላይ ሲውል አይታይም።[46]

ከተመሳሳይ ጾታ ጉዳይ ጋር የሚመሳሰለውና ሌላው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የመቃወሚያ ነጥብ በተቃራኒ ጾታ የፍቅር ግንኙነት ላይ የተመሠረተ ነው። ይህም ልክ እንደተመሳሳይ ጾታ ጾታዊ ግንኙነት ድብቅ የፍቅር ግንኙነት ያላቸው አንድ ወንድና ሴት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በማድረግ ግንኙነታቸውን የልጅና ወላጅ አድርጎ ለማቅረብ እንደ ሽፋን ይጠቀመብታል የሚል ነው።[47] ብዙውን ጊዜ ከዚህ የተቃራኒ ጾታ የፍቅር ግንኙነትና ጉዲፈቻ በስተጀርባ ያለው ምክንያት በዋናነት የፍቅር ግንኙነቱ እንዳይታወቅ መፍራት ሳይሆን ሃብትንና ንብረትን በውርስ ከማስተላለፍ ጋር የተያያዘ ነው። ይህ ጉዳይ በቀጥታ ሊያያዝ የሚችለው ከውርስ ሕግ ጋር ሲሆን ባል የሚስቱ፣ እንዲሁም ሚስት የባሏ ወራሽ ባልሆነችበት አገር (jurisdiction) ይህንን የሕግ ክልከላ የልጅና የወላጅ ግንኙነት ለመፍጠር የሚያስችለውን ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በሽፋንነት በመጠቀም ማምለጥ ይቻላል ማለት ነው። በመሆኑም ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ይህን የመሳሰሉ ኢሞራላዊና ግብረ-ገብነት የጎደላቸውን ግንኙነቶች ለመሸፈንና ለማስቀጠል መሣሪያ ሆኖ ያገለግላል፤ የሚለው አንዱ የሚነቀፍበት ምክንያት ነው።

3. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ በሌሎች አገራት ሕግጋት ውስጥ ያላቸው ቦታና ታሪካዊ መሠረት

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በኢትዮጵያ የቤተሰብ ሕግ ውስጥ መፈቀድ አለበት የሚለውን ጉዳይ ከመመልከታችን በፊት ጉዳዩ በሌሎች አገራት ሕግጋት ውስጥ ምን ቦታ አለው፤ የሚለውን ጉዳይ መቃኘቱ በጣም ጠቃሚ በመሆኑ በዚህ ክፍል ስር በአህጉረ አውሮፓ የሲቪል ሕግ ሥርዓትና በኮመን ሎው ሕግ ሥርዓት ውስጥ ያሉ አገራት በምን መልኩ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ እየሰሩበት ይገኛሉ የሚለውን እንቃኛለን።

ከአህጉረ አውሮፓ የሲቪል ሕግ ሥርዓት የፈረንሳይ፣ የጣልያንና የጀርመን ሕግጋቶችን የምንመለከት ሲሆን፤ የአሜሪካና እንግሊዝ ሕግጋት ደግሞ ከኮመን ሎው የሕግ ሥርዓት የሚዳሰሱ ይሆናሉ። እነዚህ አገራት የተመረጡበት ዋናው ምክንያት ለጉዳዩ የሰጡትን ትኩረት መነሻ በማድረግ ነው።

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[44] Gwendolyn L. Snodgrass, Creating Family without Marriage: The Advantages and Disadvantages of Adult Adoption among Gay and Lesbian Partners, 36 Brandeis J. FAM. L. 81 (1997).

[45] Mandi Rae Urban, The History of Adult Adoption in California, 11 J. CONTEMP. LEGAL Issues 615 (2000).

[46] ዝኒ ክማሁ።

[47] ብራን ኢ ማኬብ፣ ከዚህ በላይ ማስታወሻ ቁጥር 39፣ ገጽ 301።

3.1. የአህጉረ አውሮፓ የሲቪል ሕግ ሥርዓት

ከዚህ በላይ በጉዲፈቻ ታሪካዊ አመጣጥ ክፍል ስር እንደተጠቀሰው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ከመደበኛው ጉዲፈቻ ጎን ለጎን መነሻውን የሮማውያንን ሕግ አድርጎ ወደ ሌሎች የአውሮፓ አገራት እንደተስፋፋና ለኮመን ሎው የሕግ ሥርዓት የጉዲፈቻ መሠረት እንደሆነም አይተናል። በዚህ ክፍል ስር ጉዳዩ በአህጉረ አውሮፓ የሲቪል ሕግ ሥርዓት ምን ቦታ እንደነበረውና እንዳለው ዘርዘር አድርገን እንመለከታለን።

ፈረንሳይ ከ19ኛው መቶ ክፍለ ዘመን መጀመሪያ ጀምሮ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በሕግ ፈቅዳለች። በዚሁ መሠረት በዋናነት የሮማዊያን ሕግ ተጽእኖ ያረፈበት እ.አ.አ. በ1804 የወጣው የፈረንሳይ የፍትሐ ብሔር ሕግ ለአካለ መጠን ያልደረሱ ወይም እድሜያቸው ከሃያ አንድ ዓመት በታች የሆኑ ልጆች ጉዲፈቻ እንዳይደረጉ ይከለክላል።[48] ይህም የሆነው በዚህ ሕግ መሠረት አንድ ልጅ ለአካለ መጠን ደረሰ የሚባለው እድሜው ሃያ አንድ ዓመት ሲሞላው ነው።[49] ጉዲፈቻ ለማድረግ ከዚህ ቡተጨማሪ ሕጉ ሁለት ቅድመ-ሁኔታዎችን ያስቀምጣል። የመጀመሪያው ቅድመ-ሁኔታ ከጉዲፈቻ አድራጊዎች እድሜ ጋር የተያያዘ ሲሆን ለአካለ መጠን የደረሱ ሰዎችን ጉዲፈቻ ለማድረግ እድሜያቸው በትንሹ አምሳ ዓመት ሊሞላቸው ይገባል።[50] ሁለተኛው ቅድመ-ሁኔታ ጉዲፈቻ አድራጊዎቹ በጋብቻ ውስጥ የተወለደ ልጅ (legitimate child) የሌላቸው ሲሆኑ ይገባል።[51] ይህ ቅድመ-ሁኔታ በዋናነት ጉዲፈቻው በውርስ ላይ የሚኖረውን ውጤትና የጉዲፈቻ አድራጊዎቹን ልጆች ጥቅም ግምት ውስጥ ያስገባ ነው። ነገር ግን ይህ ሁለተኛው ቅድመ-ሁኔታ እ.አ.አ. በ1976 ዓ.ም በተሻሻለው ሕግ እንዲቀር ተደርጓል።[52]

ሁለተኛው ከፈረንሳይ የተቀዳው እ.አ.አ. በ1900 ዓ.ም የወጣው የጀርመን የፍትሐ ብሔር ሕግ ሲሆን ይህ ሕግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ፈቅዷል። ምንም እንኳ ይህ ሕግ ሁለቱንም አይነት ማለትም ለአካለ መጠን የደረሱ ሰዎችና ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻን ቢፈቅድም ሕጉ በወጣበት የመጀመሪያው አስር አመታት ከፍተኛ ቁጥር የያዘው ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ ነበር።[53] ይህም ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ በጀርመን ሕግ የተሰጠውን ቦታ ያሳያል።

የሮማዊያን ሕግና የፈረንሳይ የፍትሐ ብሔር ሕግ ተጽእኖ ያረፈበትና ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ የፈቀደው ሦስተኛው ሕግ እ.አ.አ. በ1865 ዓ.ም የወጣው የጣሊያን የፍትሐ

[48] የሕጉን አንቀጽ 346 እና 388 ከሚከተለው ድረገጽ ላይ ይመለከቷል፤ http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf

[49] ገዢ ከማሁ።

[50] የሕጉን አንቀጽ 343 ከሚከተለው ድረገጽ ላይ ይመለከቷል፤ http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf

[51] ገዢ ከማሁ።

[52] Jean-Francois Mignot, Child Adoption in Western Europe, 1900–2015, in Cliometrics of the Family, Springer, 5 (2019).

[53] ገዢ ከማሁ።

ብሔር ሕግ ነው።[54] በዚህ ሕግ መሠረት አስራ ስምንት ዓመት የሞላቸውና የወላጆቻቸውን ፈቃድ ያገኙ ሰዎች ጉዲፈቻ እንዲደረጉ ይፈቀድላቸዋል።[55]

የናፖሊዮንን የፍትሐ ብሔር ሕግ ውስን ማሻሻያ በማድረግ ጣልያንንና ጀርመንን ጨምሮ ኔዘርላንድ እ.አ.አ. በ1838 ዓ.ም፣ ሮማንያ እ.አ.አ በ1865 ዓ.ም፣ ፖርቱጋል እ.አ.አ በ1867 ዓ.ም፣ እስፔን እ.አ.አ በ1888 ዓ.ም፣ እንዲሁም ስዊዘርላንድ እ.አ.አ 1912 ዓ.ም ተቀብለው የየአገራቸው ሕግ አድርገውታል።[56] በዚህም ምክንያት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ጨምሮ የአብዛኛው የአህጉረ አውሮፓ የሲቪል ሕግ ሥርዓት ተከታይ የሆኑ አገራት ከዚህ በላይ ከተመለከትነው ከፈረንሳይ የፍትሐ ብሔር ሕግ ጋር ተመሳሳይ መሆናቸውን መገንዘብ እንችላለን። እነዚህ የተለያዩ አገራት ሕግጋት ከናፖሊዮን የፍትሐ ብሔር እንደመቀዳታቸው በወቅቱ ሲጸድቁ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመፍቀድ በዋናነት እንደምክንያት ተመልክቶ የነበረው ጉዲፈቻ አድራጊው የተፈጥሮ ልጅ የሌለው መሆኑ ነው።[57]

3.2. የኮመን ሎው ሕግ ሥርዓት

የአህጉረ አውሮፓ የሲቪል ሕግ ሥርዓት ከጥንታዊ የሮማና የግሪክ ሕግጋት ጀምሮ በጁስትንያን ከዚያም በ19ኛው መቶ ክፍለ ዘመን በዳበረው የናፖሊዮን ሕግ አማካይነት ከሁለት ሺ አመታት በላይ የቆየ የጉዲፈቻ ሕግ እንዳለው ተመልክተናል። ወደ ኮመን ሎው የሕግ ሥርዓት ስንመጣ ግን የጉዲፈቻ ጉዳይ ከሌሎች ሕግጋት በተለየ በሕግ ሥርዓቱ ውስጥ ትኩረትና ቦታ ባለማግኘቱ በኮመን ሎው የዳበረ አልነበረም።[58] በመሆኑም ቀደም ሲል እንደተጠቀሰው የማሳቹሴትስ ግዛት እ.ኤ.አ. በ1851 ዓ.ም የጉዲፈቻ ሕግ ደንግጎ ሥራ ላይ እስኪያውል ድረስ በኮመን ሎው የሕግ ሥርዓት በአሜሪካም ይሁን በእንግሊዝ እንዲሁም የሕግ ሥርዓቱ ተከታይ በሆኑ ሌሎች አገሮች ምንም አይነት የጉዲፈቻ ሕግ አልነበረም።[59] ይህ ሕግ የሮማውያን ሕግ ተጽዕኖ ያረፈበት መሆኑን ተመልክተናል። ምንም እንኳ የኮመን ሎው የጉዲፈቻ ሕግ መሠረቱ የሮማውያን ሕግ ቢሆንም ከዚህ በታች እንደምንመለከተው ሕጉን በመተርጎምና በመተንተን ፍርድ ቤቶች ለሕጉ መዳበር ከፍተኛ አስተዋጾ አድርገዋል። በዚህ ክፍል ስር በኮመን ሎው የሕግ ሥርዓት ከሚጠቀሱት አገራት ዋና ዋናዎቹ ማለትም አሜሪካ እና እንግሊዝ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሰጡትን ቦታ እንቃኛለን።

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[54] ለበለጠ መረጃ ዝርን ፈራንኽይስ ሚንት፣ ከዚህ በላይ ማስታወሻ ቁጥር 6፣ ገጽ 761 ይመለከቷል።

[55] ዝኒ ከማሁ። በዚህ የፍትሐ ብሔር ሕግ መሠረት አንድ ሰው ለአካለ መጠን እንደደረሰ የሚቆጠረው እድሜው ሃያ አንድ ዓመት ሲሞላው መሆኑን ልብ ይሏል። ዝኒ ከማሁ።

[56] ለበለጠ መረጃ Seldag Gunes Peschke, Legal Status of Turkish Women: Past and Present under the Turkish Civil ode, 7 Ankara B. Rev. 27 (2014) ይመለከቷል።

[57] ለበለጠ መረጃ Child Adoption: Trends and Policies, Department of Economic and Social Affairs Population Division, United Natioins, New York, 2009 ይመለከቷል።

[58] Hope C. Blain, I Now Pronounce You Husband and Son: Confronting the Need to Amend Adult Adoption Codes to Facilitate Same-Sex Marriage, 22 Chap. L. Rev. 411 (2019).

[59] Elizabeth J. Samuels, The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records, 53 Rutgers L. Rev. 368 (2001).

3.2.1. አሜሪካ

ከዚህ በላይ እንደተመለከትነው በአሜሪካ ግዛቶች ታሪክ የመጀመሪያዋ መደበኛውን ጉዲፈቻ በሕግ የፈቀደችው ግዛት ማሳቹሴትስ ስትሆን መደበኛው ጉዲፈቻ የሕግ እውቅና ካገኘ ከሃያ ዓመታት በኋላ የመጀመሪያውን ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ግዛቷ ፈቅዳለች። በዚህ ጉዳይ ላይ ፈር ቀዳጅ እርምጃ ከወሰዱ የአሜሪካ ግዛቶች ሁለተኛዋ ግዛት ኢንዲያና ናት። ምንም እንኳ የኢንዲያና የጉዲፈቻ ሕግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በግልጽ ባይፈቅድም የግዛቷ ጠቅላይ ፍርድ ቤት እ.አ.አ. በ1892 ዓ.ም ጉዳዩ ቀርቦለት "ልጅ" የሚለው ቃል ለአካለ መጠን ያልደረሱትን ብቻ ለማመላከት የሚያገለግል ቃል ሳይሆን የአንድ ሰው ልጅነት ለአካለ መጠን ሲደርስ የማይቀርና ከዚያ በኋላም የሚቀጥል በመሆኑ የጉዲፈቻ ሕጉ ለሁሉም ለአካለ መጠን ላልደረሱ ልጆችና ለአካለ መጠን ለደረሱ ሰዎች እኩል ተፈጻሚ የማይሆንበት ምንም ምክንያት የለም የሚል ትንተና በሕጉ ላይ ሰንዝሯል።[60] እ.አ.አ. በ19ኛው መቶ ክፍለ ዘመን መጨረሻ ተመሳሳይ ጉዳይ የቀረበለት የሚዙሪ ጠቅላይ ፍርድ ቤት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመፍቀድ ተመሳሳይ ትንታኔና ፍርድ ሰጥቷል።[61] ልክ እንደ ኢንዲያና የጉዲፈቻ ሕግ የሚዙሪ ሕግ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን በተመለከተ ግልጽ ድንጋጌ ያልነበረው በመሆኑ ፍርድ ቤቱ "ልጅ" የሚለው ቃል በሕጉ ምን ለማመላከት እንደገባ ትርጉም መስጠት አስፈላጊ ሆኖ አግኝቶታል።

እንደ ኢትዮጵያ ሁሉ በአሜሪካም የቤተሰብ ሕግ የመደንገግ ሥልጣን የግዛቶች ስልጣን ቢሆንም ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ጨምሮ ስለ ጉዲፈቻ የአሜሪካ ወጥ ሕግ ኮሚሽን (U.S. Unifrorm Law Commission) እ.አ.አ. በ1994 ዓ.ም ለሁሉም ግዛቶች በሞዴልነት የሚያገለግል የጉዲፈቻ ሕግ (The Uniform Adoption Act) አውጥቷል።[62] በዚህ ሞዴል ሕግ መሠረት አንድ ለአካለ መጠን የደረሰ ሰው ሌላ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ማድረግ እንደሚችል ፈቅዷል።[63] ይህ ሞዴል የጉዲፈቻ ሕግ አስገዳጅ ባለመሆኑ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ጨምሮ ሌሎች የሕጉን ክፍል ሙሉ በሙሉ የተቀበሉ እንደ ቬርሞንት ያሉ ግዛቶች ቢኖሩም ሊሎቹ ነባሩን የጉዲፈቻ ሕጋቸውን በተወሰነ መልኩ ክፍተት ለመሙላት ተጠቅመውበታል።[64]

ወደ ግዛቶች ሕግጋት ስንመጣ በአሁኑ ወቅት ሁሉም የአሜሪካ ግዛቶች ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ፈቅደዋል።[65] ምንም እንኳ ሁሉም የአሜሪካ ግዛቶች ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ቢፈቅዱም የሕግጋቱ አተገባበርና የሚያስቀምጡትን ቅድመ-ሁኔታ ግን በሁለት ከፍለን ልናየው እንችላለን። የመጀመሪያው መንገድ የግዛቶቹ የቤተሰብ

[60] የጠቅላይ ፍርድ ቤቱ አመክንዮ በእንግሊዝኛ የሚከተለው ነው "It is also true that the word "child," as commonly used, carries with it the idea of tender years and of minority. It is, however, also true that one's child does not cease to be his child when it attains its majority... We see no reason why [the adoption statute] may not apply to adults equally with infants." ለበለጠ መረጃ ራስል ኢ አተር፣ ከዚህ በላይ ማስታወሻ ቁጥር 27፣ ገጽ 257 ይመለከቷል።

[61] ገጪ ከማሁ።

[62] ይህ ኮሚሽን በጉዲፈቻ ጉዳይ ላይ ብቻ ሳይሆን በሌሎች ጉዳዮች ላይም አስገዳጅ ያልሆኑ ሞዴል ሕግጋትን ያወጣል፣ እነዚህን ሞዴል ሕግጋትን በሕጋቸው ውስጥ ማካተት የግዛቶቹ ምርጫና ስልጣን ነው።

[63] UNIF. ADOPTION ACT § 5-101

[64] ብራን ኢ ማኬብ፣ ከዚህ በላይ ማስታወሻ ቁጥር 39፣ ገጽ 304።

[65] ለበለጠ መረጃ የሚከተለውን ድረገጽ ይመለከቷል፣ https://adoptingback.com/adopting-back/united-states-adult adoption-law/

ሕግጋት ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን በግልጽ የሚፈቅዱበት ሲሆን ሁለተኛው ደግሞ ጉዳዩ በዝምታ ሲታለፍ የሕግ አውጪው ፍላጎት ምን እንደሆነ ፍርድ ቤቶች የሚሰጡት ትርጉም ነው።[66] የመጀመሪያውን መንገድ ከተከተሉ የአሜሪካ ግዛቶች ውስጥ አላባማ፣ አላስካ፣ አሪዞና፣ አርካንሳስ፣ ካሊፎርንያ፣ ኮሎራዶ፣ የኮሎምቢያ ዲስትሪክት፣ ፍሎሪዳ፣ ጆርጂያ፣ ሃዋይ፣ ኢሊኖይስ፣ ካንሳስ፣ ኬንታኪ፣ ሉዚያና፣ ሜሪላንድ፣ ማሳቹሴትስ፣ ሚቺጋን፣ ሚኖሶታ፣ ሚሲሲፒ፣ ሚዙሪ፣ ሞንታና፣ ኔብራስካ፣ ኔቫዳ፣ ኒው ጀርሲ፣ ኒው ሜክሲኮ፣ ኒው ዮርክ፣ ኖርዝ ካሮላይና፣ ኖርዝ ዳኮታ፣ ኦሀዮ፣ ኦክላሆማ፣ ኦሪጎን፣ ፔኒሲሊቫኒያ፣ ሮዴ አይላንድ፣ ሳውዝ ካሮላይና፣ ሳውዝ ዳኮታ፣ቴኔሴ፣ ቴክሳስ፣ ዩታህ፣ ቬርሞንት፣ ቨርጂኒያ፣ ዋሽንግተን፣ ዌስት ቨርጂኒያ፣ ዊስኮንሲን እና ዋዮሚንግ ይጠቀሳሉ።[67]

እነዚህ ግዛቶች ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በተመለከተ አብዛኞቹ ቅድመ-ሁኔታዎችን አስቀምጠዋል። ቅድመ-ሁኔታዎቹ እንደግዛቶቹ የቤተሰብ ሕግጋት የተለያዩ ሲሆኑ ለአብነት የሚከተሉትን መጥቀስ ይቻላል፤ ጉዲፈቻ የሚደረገው ሰው ከጉዲፈቻ አድራጊው ጋር ለአካለ መጠን ከመድረሱ በፊት አብሮ መኖሩ፣[68] ጉዲፈቻ የሚደረገው ሰው ሙሉ በሙሉ የአካል ጉዳተኛ መሆን ወይም የአእምሮ እድገት ውስንነት ያለበት መሆኑ፣[69] ጉዲፈቻ የሚደረገው ሰው ከጉዲፈቻ አድራጊው ጋር ቢያንስ አስር አመት የእድሜ ልዩነት ሊኖር የሚገባው መሆኑ፣[70] ጉዲፈቻ በሚደረገው ሰውና በጉዲፈቻ አድራጊው መካከል የጋብቻ ወይም የስጋ ዝምድና አስፈላጊነት (የእንጀራ ልጅ፣ የእህት ልጅ፣ የወንድም ልጅ፣ እና የመሳሰሉት ዝምድና መኖር)[71] በሕግጋቱ ውስጥ እንደ ቅድመ-ሁኔታ ተጠቅሰው ይገኛሉ።

ምንም እንኳ የአሜሪካ ግዛቶች ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን የሚደነግጉበት ሕግና መሟላት ያለባቸው ቅድመ-ሁኔታዎች በመጠኑ የተለያዩ ቢሆኑም በአሁኑ ወቅት ሁሉም ግዛቶች ከመደበኛው ጉዲፈቻ ምንም አይነት ልዩነት ሳያደርጉ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በሕግ ፈቅደዋል።[72]

3.2.2. እንግሊዝ

ከአህጉረ አውሮፓ የሕግ ሥርዓት በተለየ እንደ ሌሎች የኮመን ሎው አገራት በእንግሊዝም መደበኛው ጉዲፈቻ የሕግ እውቅና ያገኘው በአንጻሩ በቅርቡ መሆኑን ተመልክተናል። እንዲሁም ከአሜሪካ በተለየ የእንግሊዝ ሕግ ለአካለ መጠን ለደረሰ ሰው ጉዲፈቻ የሰጠው ቦታ በጣም ውስን ነው።[73] ለዚህ በዋናነት እንደ ምክንያት የሚጠቀሰው በእንግሊዝ

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[66] ዝኒ ከማሁ። እንዲሁም ቶማስ አዶልፍ ፓቫኖ፣ ክዚህ በላይ የግርጌ ማስታወሻ ቁጥር 38፣ ገጽ 264-66 ይመለከቷል።

[67] ስበስጠ መረጃ የሚከተለውን ድረገጽ ይመልከቱ https://adoptingback.com/adopting-back/united-states-adult-adoption-law/

[68] ቨርጂኒያ

[69] አህዮ፣ አላባማ

[70] ኒው ጀርሲ

[71] አሪዞና

[72] ሮበርት ኪፊ፣ ክዚህ በላይ የግርጌ ማስታወሻ ቁጥር 30፣ ገጽ 1482።

[73] Kent Blore, A Gap in the Adoption Act 2009 (QLD): The Case for Allowing Adult Adoption, 10 Queensland U. Tech. L. & Just. J. 77 (2010).

በፊውዳሊዝም ላይ ተመሥርቶ የነበረው ማኅበረሰባዊ ስሪት ነው።[74] በዚህ ማኅበረሰባዊ ስሪትና አስተሳሰብ መሠረት እንግሊዛዊያን መሬታቸው በደም ከሚዛመዷቸው ሰዎች በስተቀር ለሌላ ሰው በውርስ እንዲተላለፍ አይፈልጉም ነበር።[75] ይህ በእንዲህ እንዳለ ጉዳዩን በተመለከተ እ.አ.አ. በ2002 ዓ.ም በወጣው ሕግ መሠረት አንድ ሰው ጉዲፈቻ ሊደረግ የሚችለው ለአካለ መጠን ከደረሰ በኋላ እስከ አንድ አመት ድረስ ማለትም አስራ ዘጠኝ አመት እስኪሞላው ድረስ ብቻ ነው።[76] በተመሳሳይ መልኩ የስኮትላንድ ሕግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሚደረገው የጉዲፈቻ ማመልከቻው አስራ ስምንት አመት ከመሙላቱ በፊት የቀረበ እንደሆነ ይደነግጋል።[77] እነዚህን የእንግሊዝና የስኮትላንድ ሕግጋት ስንመለከት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ክክልከላ ብዙም ፈቀቀ ያላለ መሆኑን እንገነዘባለን።

4. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ መለያ ባሕርያት

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በባሕርይው ከመደበኛው ጉዲፈቻ የተለየ ነው። ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ከመደበኛው ጉዲፈቻ የሚለይበት ሁለት መሠረታዊ ባሕርያት አሉ። እነሱም፦ ከጉዲፈቻው በስተጀርባ ያለው ምክንያትና የጉዲፈቻው ሂደት ሲሆኑ እንደሚከተለው ዘርዘር አድርገን እንመለከታቸዋለን።

4.1. ከጉዲፈቻው በስተጀርባ ያለው ምክንያት (Motive)

ከዚህ በላይ በተለይም ከሮማዊያን ጉዲፈቻ ሕግ ጋር አያይዘን እንደተመለከትነው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ለማድረግ ያለው መነሻ ምክንያት በባሕርይው ከመደበኛው ጉዲፈቻ የተለየ ነው። ምንም እንኳ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ለማድረግ ያለው መነሻ ምክንያት ከመደበኛው ጉዲፈቻ የተለየ ቢሆንም እንደ ጉዲፈቻ አድራጊው ሰው ጥቅምና ፍላጎት መነሻ በማድረግ የተለያዩ ምክንያቶችን ማንሳት ይቻላል። ከእነዚህ ምክንያቶች ውስጥ አንዱ ቀደምት የአሳዳጊነት ወይም የእንጀራ እናት/አባት ግንኙነትን ወደ ሕጋዊ የወላጅና የልጅ ግንኙነት ከፍ ለማደረግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ እንደ ምክንያት ሊጠቀስ ይችላል።[78] ከዚህ በተጨማሪ ዋናው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ምክንያት ተደርጎ ሊጠቀስ የሚችለው ከገንዘብ ወይም ከውርስ ጋር የተያያዘው ምክንያት ነው። ይህም ጉዲፈቻ አድራጊው ሲሞት የጉዲፈቻ ልጁ ወራሽ ሆኖ የሚቀርብበትን መንገድ ለመፍጠር ያገለግላል።[79] ከዚህ በላይ እንደተገለጸው ባል የሚስቱ እንዲሁም ሚስት የባሏ የሕግ ወራሽ ሆነው በማይቀርቡበት የሕግ ሥርዓት ባላቸው አገራት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ባል የሚስቱ፣ ሚስት የባሏ የሕግ ወራሽ ለማድረግ ሲሰራበት ቆይቷል።[80] ከዚህ በተጨማሪም በቅርብ ዘመዳሞች መካከል ለምሳሌ፣ በልጅና በወላጅ መካከል ሃብት ንብረት በውርስ ሲተላለፍ የሚከፈል ዝቅተኛ ታክስ ተጠቃሚ ለመሆን ለአካለ መጠን

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[74] ቶማስ አዶልፍ ፓቫኖ፣ ከዚህ በላይ የግርጌ ማስታወሻ ቁጥር 38፣ ገጽ 254።

[75] ገዚ ከማሁ።

[76] የሕጉን አንቀጽ 47 ከሚከተለው ድረገጽ ላይ ይመለከቷል፤ https://www.legislation.gov.uk/ukpga/2002/38/data.pdf

[77] ኪንት ብሎር፣ ከዚህ በላይ ማስታወሻ ቁጥር 73፣ ገጽ 77።

[78] ከዚህ በላይ ማስታወሻ ቁጥር 23፣ ገጽ 255::

[79] ገዚ ከማሁ፣ ገጽ 256።

[80] ገዚ ከማሁ። ይህ በባልና ሚስት መካከል የሚደረግ ጉዲፈቻ የልጅና የወላጅ ግንኙነት ይፈጥራል፤ ውጤቱም በቤተዘመዳሞች መካከል የሚደርግ የግብረ ሥጋ ግኙኙነት የሚከለክል መሆኑን አንባቢ ልብ ሊለው ይገባል። ምንም እንኳ ሁሉም ግዛቶች ባያጸድቁትም እ.አ.አ. በ1994 ዓም የወጣው የአሜሪካ ሞዴል የጉዲፈቻ ሕግ በባልና ሚስት መካከል የሚደረግ ጉዲፈቻን የሚከለክል መሆኑን መገንዘብ ይገባል።

የደረሰ ሰው ጉዲፈቻን እንደመሣሪያ የሚጠቀሙም አሉ።[81] ምንም እንኳ ይህ ምክንያት ከሕግ አውጪው ፍላጎት ያፈነገጠ ቢመስልም በተቃራኒው የፍርድ ቤት ይሁንታን ያገኘበት አጋጣሚ አለ፤ ለምሳሌ፣ ጉዳዩ የቀረበለት የደልዋር ግዛት ጠቅላይ ፍርድ ቤት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ አንዱ ምክንያት የተፈጥሮ ልጆችን ተጠቃሚ የሚያደርገው ሃብት ንብረት በውርስ ሲተላለፍ የሚከፈል ዝቅተኛ ታክስ የጉዲፈቻ ልጆችንም ተጠቃሚ ያደርጋል በማለት ለዚህ ጥቅም እውቅና ሰጥቷል።[82] በመሆኑም ይህ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በስተጀርባ ያለው ምክንያት ጉዲፈቻ አድራጊውና ተደራጊው ቀድሞ በጉዲፈቻ ሽፋን አስበው ለማሳካት የፈለጉት ጉዳይ ይሁንም አይሁንም የሕግና የፍርድ ቤት ይሁንታ እያገኘ የመጣ መሆኑን እንገነዘባለን።

4.2. የጉዲፈቻው ሂደት

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ከፈቀዱ አገራት ሕግጋት እንደምንረዳው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ሂደት ከመደበኛው ጉዲፈቻ የተለየ ነው። በመደበኛው ወይም ለአካለ መጠን ባልደረሱ ልጆች ጉዲፈቻ ሂደት ውስጥ ትልቁና ዋናው ጉዳይ ጉዲፈቻው ለልጁ ጥቅም የተደረገ መሆኑን ማረጋገጥ ነው። ይህ አሠራር የልጁ ጥቅም መሠረታዊ መርኅን መሠረት ያደረገ ነው። ወደ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ስንመጣ ይህንን መርኅ ማለትም ጉዲፈቻው ለጉዲፈቻ ልጁ ጥቅም መደረግ አለመደረጉን መመርመር አስፈላጊ ቢሆንም ለመርኑ የሚሰጠው ቦታና ትርጉም ግን መደበኛው ጉዲፈቻ ከሚሰጠው ቦታና ትርጉም ያነሰና የጠበበ ነው።[83]

ከጉዲፈቻ ሂደት ጋር በተለይም ከልጁ ጥቅም መሠረታዊ መርኅ ጋር ተያይዞ የሚነሳው ነጥብ ከጉዲፈቻው በስተጀርባ ያለው ምክንያት ምን እንደሆነ መመርመር ነው። ምንም እንኳ ኢኮኖሚያዊ ጥቅም ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ለማድረግ በብዛት እንደ ምክንያት ቢወሰድም ከዚህ በላይ እንደተመለከትነው ሌሎች ለአገራዊ ፖሊሲና ለሞራል ተቃርኒ የሆኑ ምክንያቶችም ይስተዋላሉ። ለለአካለ መጠን ከደረሰ ሰው ጉዲፈቻ በስተጀርባ እነዚህ ምክንያቶች መኖር አለመኖራቸውን መመርመር ጉዳዩን በፈቀዱ አገራት በተለይም በአሜሪካ ፍርድ ቤቶች ዘንድ የተለመደ ነው። ፍርድ ቤቶች ከሚመረምሯቸው ጉዳዮች ውስጥ በሰዎቹ መካከል ያለን የግብረ ሥጋ ወይም ጾታዊ ግንኙነት ለማስቀጠል (የተቃራኒም ይሁን የተመሳሳይ ጾታ) ጉዲፈቻን በሽፋንነት ለመጠቀም መሆን አለመሆኑን እንዲሁም ሌሎች ለአገራዊ ፖሊሲ ተቃራኒ የሆኑ ጉዳዮች መኖር አለመኖራቸውን ይመረምራሉ።[84]

በጉዲፈቻ ሂደቱ ጉዲፈቻው ለጉዲፈቻ ልጁ ጥቅም መደረግ አለመደረጉን መመርመር አስፈላጊ መሥፈርት ባይሆንም ሌሎች በመደበኛው ጉዲፈቻ መሟላት ያለባቸው መሥፈርቶች ግን ለአካለ መጠን በደረሰ ሰው ጉዲፈቻም መሟላት ይኖርባቸዋል። በመደበኛው ጉዲፈቻ መሟላት ካለባቸው መሥፈርቶች ውስጥ አንዱ ነጻ ፈቃድ ሲሆን ይህ መሥፈርት ለአካለ መጠን በደረሰ ሰው ጉዲፈቻ በፈቀዱ አገራት ሕግጋት ውስጥ ዋነኛው

[81] ዝኒ ከማሁ።
[82] In re Adoption of Swanson, 623 A.2d 1095, 1096 (Del. 1993).
[83] ብራን ኢ ማኬብ፣ ከዚህ በላይ ማስታወሻ ቁጥር 39፣ ገጽ 304።
[84] ዝኒ ከማሁ፣ ገጽ 305-6።

መሟላት ካለባቸው መሥፈርቶች ውስጥ አንዱ ሆኖ እናገኘዋለን፡፡ በመሆኑም ጉዲፈቻ አድራጊውና ተደራጊው በጉዲፈቻ ስምምነቱ ላይ ነጻ ፈቃዳቸውን ሊሰጡ ይገባል፡፡

ነጻ ፈቃድን በተመለከተ ሊነሳ የሚችለው ሌላው ተያያዥ ነጥብ ጉዳዩ የሚመለከታቸው ሰዎች ለምሳሌ የጉዲፈቻ አድራጊውና ተደራጊው ባል ወይም ሚስት እንዲሁም ወላጆች ጉዳይ ነው፡፡ የእነዚህ የተለያዩ ሰዎች ይሁንታ ወይም ነጻ ፈቃድ አስፈላጊነት በቀጥታም ይሁን በተዘዋዋሪ ከጉዲፈቻው ውጤትና ከሰዎቹ የወደፊት ጥቅም ጋር የተያያዘ ነው፡፡ ጉዲፈቻ ውል በመሆኑ የጉዲፈቻ አድራጊውና ተደራጊው ነጻ ፈቃድና ስምምነት አስፈላጊ ቢሆንም የጉዲፈቻ ልጁ የተፈጥሮ ወላጆች ፈቃድ እንደ ቅድመ-ሁኔታ የሚያስቀምጡና የማያስቀምጡ የቤተሰብ ሕግጋት አሉ፡፡[85]

5. ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻ ለማድረግ መሟላት ያለባቸው ቅድመ-ሁኔታዎች

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በፈቀዱ አገራት ከመደበኛው ጉዲፈቻ በተለየ ለተለያዩ ውስብስብ ችግሮችና ተግዳሮቶች ሲጋለጥ ይስተዋላል፡፡ በተለይ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ከመፈቀዱ በፊት በሁለት ሰዎች መካከል የነበረ ግንኙነትን ወደ ሕጋዊ የጉዲፈቻ ግንኙነት በሚመጣበት ጊዜ እንዲሁም ይህ የጉዲፈቻ ግንኙነት ከተፈጠረ በኋላ የሌሎች አዳዲስ ያልነበሩ ሕግጋት መውጣት ጉዳዩን ይበልጥ ውስብስብ ሲያደርጉት ይስተዋላል፡፡ እነዚህን በተግባርና በሕግ የሚስተዋሉ ችግሮች ለመቅረፍ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ምን ምን ቅድመ-ሁኔታዎችን ማሟላት አለበት? የሚለውን ጉዳይ በዚህ ክፍል እንቃኛለን፡፡ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻና "የልጅ መሠረታዊ ጥቅም መርሃ" ፣ የእድሜ ልዩነት፣ እንዲሁም የቀደመ ግንኙነት መኖር አለመኖር ስለሚኖረው አንድምታ እና ፋይዳ ላይ ቅኝት ይደረጋል፡፡

5.1. የእድሜ ልዩነት

ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻን በተመለከተ የኢትዮጵያን ሕግ ጨምሮ በሌሎች አገራት ሕግጋት በጉዲፈቻ አድራጊውና ጉዲፈቻ በሚደረገው ልጅ መካከል የእድሜ ልዩነት መኖር እንዳለበት በግልጽ ተደንግጎ እናገኘዋለን፡፡ ለምሳሌ፣ በተሻሻለው የኢትዮጵያ የቤተሰብ ሕግ መሠረት የጉዲፈቻ አድራጊው እድሜ ቢያንስ ከሃያ አምስት አመት ማነስ የለበትም፤ እንዲሁም የጉዲፈቻ ተደራጊው እድሜ ቢበዛ ከአስራ ስምንት አመት መብለጥ የለበትም፡፡[86] በመሆኑም በጉዲፈቻ አድራጊውና በጉዲፈቻ ተደራጊው መካከል ያለው የእድሜ ልዩነት በትንሹ የሰባት አመት ይሆናል ማለት ነው፡፡ ሕጉ ይህ የእድሜ ልዩነት እንዲኖር የፈለገበት ምክንያት በተፈጥሮ ልጆችና ወላጆች መካከል ሊኖር የሚችለውን የእድሜ ልዩነት በጉዲፈቻ ልጆችና ወላጆች መካከልም እንዲኖር በመፈለጉ ነው፡፡ በተፈጥሮ ልጆች በእድሜ ከወላጆቻቸው እንደሚያንሱ ሁሉ የጉዲፈቻ ልጆችም ከጉዲፈቻ አድራጊው በእድሜ ማነስ ይኖርባቸዋል፡፡ በተፈጥሮ ልጆችና ወላጆች መካከልም የሚኖረው የእድሜ ልዩነት በጉዲፈቻ

[85] ለበለጠ መረጃ Angela Chaput Foy, Adult Adoption and the Elder Population, 8 span (2006) ይመለከቷል፡፡

[86] የተሻሻለው የቤተሰብ ሕግ፣ አዋጅ ቁጥር 213/1992፣ ፌደራል ነጋሪት ጋዜጣ፣ 6ኛ አመት፣ ልዩ እትም ቁጥር 1፣ አንቀጽ 184ና 185። በአንቀጽ 184 (2) መሠረት ጉዲፈቻ አድራጊዎቹ ባልና ሚስት ከሆኑ ከሁለቱ አንዳቸው 25 አመት ከሞላቸው በቂ መሆኑን እንገነዘባለን።

ልጆችና ወላጆች መካከል ከሌለ የልጅ እና የወላጅ ግንኙነትና ስሜት ሊፈጠር አይችልም ማለት ነው።

ይህ የእድሜ ልዩነት ጉዳይ በተለይ ለአህጉረ አውሮፓ የሕግ ሥርዓት መነሻ በሆነው የሮማውያን ሕግ ተገቢ ቦታ ያገኘ ጉዳይ ነበር። የሮማዊያን ቋንቋ በነበረው በላቲኑ *adoptio naturam imitator* በአማርኛ ትርጉሙ "ጉዲፈቻ ተፈጥሮን ይመስላል" የሚለው መርኅ የእድሜ ልዩነትን ጨምሮ በጉዲፈቻ ልጅና ወላጅ መካከል ሊኖር የሚገባው ግንኙነት በተፈጥሮ ልጆችና ወላጆች መካከል ካለው ግንኙነት ጋር ተመሳሳይ መሆን እንዳለበት የሚያመላክትና በውስጡ ብዙ ነጥቦችን አካቶ የያዘ መርኅ ነው።[87] ይህን መርኅ አካቶ የያዘው የሮማዊያን ሕግ *"Minorem natu non posse maiorem adoptare placet: adoptio enim naturam imitatur et pro monstro est, ut major sit filius quam pater....."* በእንግሊዝኛው "It is settled that a man cannot adopt another person older than himself, for adoption imitates nature, and it would be unnatural for a son to be older than his father." የሚል ሲሆን በአማርኛ "በተፈጥሮ ልጅ ከአባቱ በእድሜ እንደማይበልጠው ሁሉ ጉዲፈቻም ከዚህ ተፈጥሮ ጋር ይመሳሰላል፤ በመሆኑም አንድ ሰው በእድሜ የሚበልጠውን ሰው ጉዲፈቻ ማድረግ አይችልም፤"[88] የሚል ተዛማጅ ትርጉም አለው። ይህ እድሜን የተመለከተው የሮማዊያን የጉዲፈቻ ሕግ በሂደት እያደገና እየዳበረ መጥቶ በጀስትንያን ሕግ በጉዲፈቻ አድራጊውና ጉዲፈቻ ተደራጊው መካከል መኖር ያለበት የእድሜ ልዩነት በትንሹ አስራ ስምንት አመት መሆን እንዳለበት ተደንግጎ እናገኘዋለን።[89] ይህ የአስራ ስምንት አመት የእድሜ ልዩነት በዋናነት ግምት ውስጥ ያስገባው ወንዶች ለአቅመ-አዳም ደርሰው አባት ይሆኑበታል ተብሎ የታመነውና ሥነ-ሕይዎታዊ መሠረት ያለው እድሜ ነው።[90] ቀደምሲል እንደተመለከትነው በሮማዊያን ሕግ በሂደት ሴቶች ጉዲፈቻ እንዲያደርጉ የተፈቀደላቸው ሲሆን ሴቶች በተፈጥሮ ከወንዶቹ ቀድመው ለአቅመ-ሄዋን ስለሚደርሱ ይህ የአስራ ስምንት አመት የእድሜ ልዩነት ሴቶችን አይመለከትም ነበር።

እንደ መደበኛው ለአካለ መጠን እንዳልደረሱ ልጆች ጉዲፈቻ በተመሳሳይ መልኩ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን በፈቀዱ አገራት ጉዲፈቻ በሚደረገውና በጉዲፈቻ አድራጊው መካከል የእድሜ ልዩነት መኖር እንዳለበት ይደነግጋሉ። የዚህ ምክንያትም ልክ ለአካለ መጠን እንዳልደረሱ ልጆች ጉዲፈቻ በልጆችና በወላጆች መካከል በተፈጥሮ ሊኖር የሚገባውን የእድሜ ልዩነት ለማምጣት ታስቦ ነው። ምንም እንኳ የእድሜ ልዩነት መኖር እንዳለበት ሕግጋቱ ቢደነግጉም ልዩነቱ ስንት አመት መሆን አለበት በሚለው ጉዳይ ላይ ግን ልዩነቶች አሉ። ለምሳሌ፣ የተለያዩ የአሜሪካ ግዛቶችን ብንወስድ በሕግጋቱ መካከል ያለውን ይህንን ልዩነት በግልጽ እንረዳለን። የኒው ጀርሲን ሕግ ብንመለከት የእድሜ ልዩነቱ አስር አመት መሆን እንዳለበት ይደነግጋል።[91] ከዚህ በተለየ የማሳቹሴትስና የኔቫዳ ሕግጋት ጉዲፈቻ የሚደረገው ሰው ከጉዲፈቻ አድራጊው በእድሜ እስካነሰ ድረስ ጉዲፈቻ ማድረግ

[87] ጉዲፈቻና የእድሜ ልዩነትን በተመለከተ የበለጠ መረጃ ለማግኘት ዋልተር ጀ ዋድሊንግተን፣ ከዚህ በላይ ማስታወሻ ቁጥር 12 ገጽ 392 ይመለከቷል።

[88] ዝኒ ከማሁ።

[89] ዝኒ ከማሁ፣ ገጽ 395።

[90] ዝኒ ከማሁ፣ ገጽ 396።

[91] Sarah Ratliff, Adult Adoption: Intestate Succession and Class Gifts under the Uniform Probate Code, 105 Nw. U. L. Rev. 1788 (2011).

እንደሚቻል ይፈቅዳሉ።[92] እነዚህ ሕግጋት ጉዲፈቻ የሚደረገው ሰው ከጉዲፈቻ አድራጊው በወራትም ቢሆን በእድሜ እስካነሰ ድረስ ጉዲፈቻ ማድረግን እንደማይከለክሉ እንገነዘባለን። ይህ ሁኔታ ግን ቀደም ሲል የተገለጸውን ጉዲፈቻን በተፈጥሮ በልጅና በወላጅ መካከል ከሚኖረው የእድሜ ልዩነት ጋር ለማመሳሰል የሚደረገውን ጥረትና የሚኖረውን አወንታዊ ውጤት የሚጋፋ ይመስላል። ምንም እንኳ ጉዲፈቻ የሚደረገው ሰው ከጉዲፈቻ አድራጊው በወራትና በጥቂት አመታት ማነሱ በቁጥር ደረጃ "የእድሜ ልዩነት" መኖሩ ግልጽ ቢሆንም በሁለቱ መካከል ሊኖር የሚገባው የወላጅና የልጅ ግንኙነት፣ የሥነ-ልቦና ቁርኝትና ስሜት ይኖራል ብሎ ማሰብ ግን አስቸጋሪ ነው።

5.2. የቀደመ የወላጅና የልጅ ግንኙነት መኖር

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የፈቀዱ አገራት በተለይም የአሜሪካ ግዛቶች የቀደመ ግንኙነትን ከመደበኛው ጉዲፈቻ በተለየ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ላይ እንደ ቅድመ-ሁኔታ ሲያስቀምጡት ይስተዋላል። በተለይም ጉዳዩ የሚቀርብላቸው የአሜሪካ ግዛት ጠቅላይ ፍርድ ቤቶች ሕግ አውጪው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ሲፈቅድ በዋናነት ቀደምት የልጅና የወላጅ ግንኙነትን ለማስቀጠል ታሳቢ በማድረግ እንደሆነ ይጠቅሳሉ።[93] እዚህ ላይ ቀደምት የልጅና የወላጅ ግንኙነት ቅድመ-ሁኔታ በሕግ በግልጽ የተቀመጠ ሳይሆን እንደ የደለዋር ግዛት ጠቅላይ ፍርድ ቤት ሌሎች ጉዳዩ የቀረበላቸው ፍርድ ቤቶች የሚሰጡት ትርጉም መሆኑን መገንዘብ ይገባል። ይህ ቅድመ-ሁኔታ በዋናነት አግባብና ተፈጻሚ የሚሆነው ለማደጎና ለእንጀራ ልጆች ነው። እነዚህ የማደጎና የእንጀራ ልጆች ለአካለ መጠን ከመድረሳቸው በፊት ከጉዲፈቻ አድራጊው ጋር አብረው መኖራቸው እንደ ቅድመ-ሁኔታ ተወስዶ ጉዲፈቻው ይህንን ቀደምት ግንኙነት ወደ ልጅና ወላጅ ግንኙነት ከፍ ለማድረግና ለማስቀጠል ያገለግላል ማለት ነው። ይህ በፍርድ ቤቶች ትርጉም የተቀመጠው ቅድመ-ሁኔታ የተመሳሳይ ጾታ ግንኙነት ያላቸው ሰዎች ቀደምት የልጅና ወላጅ ግንኙነት መኖሩን ማስረዳት አስቸጋሪ ስለሚሆንባቸው ግንኙነታቸውን ለአካለ መጠን በደረሰ ሰው ጉዲፈቻ ሽፋን እንዳያስቀጥሉ ያደርጋቸዋል።[94]

ከዚህ በላይ እንደተመለከትነው ጉዲፈቻን የፈቀዱ ሕግጋት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመፍቀድ በዋናነት ቀደምት የልጅና የወላጅ ግንኙነት መኖሩን እንደ መሥፈርት ይወስዳሉ። ይህ የልጅና የወላጅ ግንኙነት በተለያየ መልኩ የሚገለጽ ሲሆን ጉዲፈቻውን ለመፍቀድ እርሾ ሆኖ ያገለግላል። ነገር ግን ይህን ቀደምት የልጅና የወላጅ ግንኙነት ግምት ውስጥ ሳያስገቡ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን የሚፈቅዱ ሕግጋት አሉ።[95] ይህ

[92] ገቢ ከማሁ።

[93] ለምሳሌ በዚህ ጉዳይ ላይ የደለዋር ግዛት ጠቅላይ ፍርድ ቤት እ.አ.አ. በ1993 ዓም የሚከተለውን ትንታኔ አስቀምጧል፤ *[i]ndisputably, the legislature, by providing for adoption of minors, intended to allow for the creation and formalization of parent-child relationships between nonrelated adults and children.... It is reasonable to infer that the legislature, by providing for adult adoptions, intended to allow for the formalization of the parent-child relationship where there is an existing parent-child relationship between nonrelated individuals.* ለበለጠ መረጃ ብራን ኢ. ማኬብ፣ ከዚህ በላይ ማስታወሻ ቁጥር 39 ይመለከቷል።

[94] ብራን ኢ. ማኬብ፣ ከዚህ በላይ የግርጌ ማስታወሻ ቁጥር 39፣ ገጽ 303።

[95] Richard C. Ausness Planned Parenthood: Adult Adoption and the Right of Adoptees to Inherit, University of Kitchenery Law Faculty Scholarly Articles, 266 (2016).

ቀደምት የልጅና የወላጅ ግንኙነት የሌለበት ጉዲፈቻ ዋና አላማው ሃብትና ንብረትን በጉዲፈቻ ሰበብ በውርስ ማስተላለፍ ነው።

5.3. ነጻ ፈቃድ

ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ላይ ነጻ ፈቃድ ወይም ይሁንታ መስጠት ያለበት ማን ነው? የሚለውን ጉዳይ ይበልጥ ለመረዳት ከመደበኛው የልጆች ጉዲፈቻ ጋር ማነጻጸር ጠቃሚ ነው። ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በፈቀዱ አገራት በተለይም በአሜሪካ በመደበኛው የልጆች ጉዲፈቻ የልጁ የተፈጥሮ ወላጆች ወይም የሞግዚቶች ይሁንታና ነጻ ፈቃድ ለጉዲፈቻው አንዱ ቅድመ-ሁኔታ ሲሆን ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በተመለከተ ግን በአብዛኞቹ የአሜሪካ ግዛቶች ጉዲፈቻ የሚደረገው ሰው ይሁንታና ነጻ ፈቃድ በቂ ነው።[96] ከዚህ በተለየ ጉዲፈቻ የሚደረገው ሰው የተፈጥሮ ወላጆችን ፈቃድ ወይም ይሁንታ እንደ ቅድመ-ሁኔታ የሚያስቀምጡ ግዛቶች አሉ። ለምሳሌ፣ ጉዳዩ የቀረበላቸው የፍሎሪዳ የመጀመሪያ ደረጃ ፍርድ ቤትና ይግባኝ ሰሚው ፍርድ ቤት የጉዲፈቻ ጥያቄው ጉዲፈቻ የሚደረገው ሰው የተፈጥሮ ወላጆችን ፈቃድ ወይም ይሁንታ አላካተተም፤ በሚል ጉዲፈቻውን ሳያጸድቁ ውድቅ አድርገውታል።[97] በሕግጋቱ መካከል ላለው ለዚህ መሠረታዊ ልዩነት እንደ ምክንያት ሊጠቀስ የሚችለው ለተፈጥሮ ወላጆች ጥቅምና ስሜት የሚሰጠው ቦታ በአንድ ወገን፣ እንዲሁም ጉዲፈቻ የሚደረገው ሰው ለአካለ መጠን የደረሰ ስለሆነ በራሱ ጉዳይ ላይ እራሱ መወሰን ይችላል፤ የሚለው በሌላ ወገን ግምት ውስጥ የገቡና በእነዚህ መካከል ሚዛን ለማስጠበቅ የሚደረግ ጥረት ነው።

6. ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ አስፈላጊነትና ፋይዳ በኢትዮጵያ ተጨባጭ ሁኔታ

ሕግ እንደ ሰው ልጅ የማኅበራዊ ባሕርይ መቆጣጠሪያ መሣሪያነቱ በጠቅላላው የጉዲፈቻ ሕግ ደግሞ በተለይ አንዱ ተደንግጎ የማይሻሻልና የማይቀየር ለዘላለም የሚኖር መድብል አለመሆኑ ግልጽ ነው። አንድ ሕግ ሲደነገግ የሚገለገልበት ማኅበረሰብ ያለበትን የፖለቲካ፣ ማኅበራዊ፣ ኢኮኖሚያዊና ባህላዊ እውነታዎችን ግምት ውስጥ ያስገባል። ሕጉ ወጥቶ ሥራ ላይ ሲውል የነበሩት እውነታዎች በጊዜ ሂደት ሲለወጡ ሕጉ አብሮ መለወጡና መሻሻሉ የግድና አይቀሬ ነው። አንዳንዱ ደግሞ በተቃራኒው ተደንግገው ሥራ ላይ የዋሉ ሕግጋት በሆነ መልኩ ከሌሎች አገራት የተቀዱ ወይም እንዲለ የተወሰዱ ከማኅበረሰቡ ፖለቲካዊ፣ ማኅበራዊ፣ ኢኮኖሚያዊና ባህላዊ እውነታዎችና አውድ የራቁና አብረው የማይሄዱ ሲሆኑ ይስተዋላል። ወደ ጉዲፈቻ ሕግ ስንመጣም ጉዳዩ ተመሳሳይ ነው። በሌሎች አገራት እንደታየው መደበኛው የጉዲፈቻ ታሪክ ከሥነ-ሕዝብ መለኪያዎች መለዋወጥ ጋር በተለይም አሳዳጊ ከሌላቸውና ወላጅ አልባ ከሆኑ ልጆች ብዛት አኳያ፣ እንዲሁም የአገራትን የሕግና የባህል ከባቢ ሁኔታን መሠረት በማድረግ የሚታይና የሚሻሻል ነው።[98] በተመሳሳይ ከዚህ በላይ ባሉት ክፍሎች ሥር እንደተመለከትነው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን የፈቀዱ አገራት እነዚህን ሁኔታዎች በተለያየ መልኩ ግምት ውስጥ አስገብተዋል።

[96] ገዢ ከማሁ፣ ገጽ 258።
[97] ገዢ ከማሁ።
[98] ገርን ፍራንክይስ ሚንት፣ ከዚህ በላይ ማስታወሻ ቁጥር 6፣ ገጽ 759።

አሁን በሥራ ላይ ያለው የኢትዮጵያ የቤተሰብ ሕግ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ባይፈቅድም ሕጉ ሲወጣ ግምት ውስጥ ያላስገባቸውና የሕጉን መሻሻል የግድ የሚሉ ታሪካዊ፣ ባህላዊ፣ ትውፊታዊ፣ ሥነ-ልቦናዊና የሕግ ምክንያቶች አሉ። እነዚህ ለቤተሰብ ሕጉ መሻሻል መነሻ የሚሆኑ የተለያዩ ተጨባጭ ምክንያቶች በዚህ ክፍል ስር ይቃኛሉ፤ ይተነተናሉ።

6.1. ባህላዊና ታሪካዊ መሠረት

በኢትዮጵያ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመደንገግ እንደ ዋና አሳማኝ ምክንያት ከሚጠቀሱት ውስጥ ቀደም ሲል ጉዳዩ በአገሪቱ ውስጥ ባህላዊና ታሪካዊ መሠረት ያለው መሆኑ ነው። ለዚህም ጉዳዩ በስፋት ትኩረት ተሰጥቶባቸው የነበሩትን የኦሮሞንና የአማራ ባህሎችን መመልከት በቂ ነው።

6.1.1. አካለ መጠን የደረሰ ሰው ጉዲፈቻ በኦሮሞ ባህል ውስጥ

በኦሮሞ ባህል ውስጥ ጉዲፈቻ ወይም ሞጋሳ በአጠቃላይ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ደግሞ በተለይ ልዩ ቦታ ተሰጥቶት እናገኘዋለን። ምንም እንኳ ጉዳዩ በተለያዩ የኦሮሚያ አካባቢዎች የተለያየ ባህላዊና ታሪካዊ ገጽታዎች እንዲሁም ትውፊቶች ያሉት ቢሆኑም በጦርነት የተማረኩ ወይም ሰላማዊ የሆኑ ሰዎችን ማለትም ልጆችንና ለአካለ መጠን የደረሱ ሰዎችን ጉዲፈቻ ወይም ሞጋሳ ማድረግ በተለይ በሜጫ ኦሮሞዎች ዘንድ የተለመደ፣ የነበረና አሁንም በተወሰነ መልኩ እየተሠራበት ያለ የገዳ ሥርዓቱ አካል ነው።[99]

በኦሮሞ ባህል ውስጥ በስፋት ጥቅም ላይ የሚውለው ቃል "ጉዲፈቻ" የሚለው ቢሆንም ለአካለ መጠን የደረሱ ሰዎችን በተመለከተ ተገቢነት ያለው ቃል ሞጋሳ የሚለው ነው።[100] "ጉዲፈቻ" የሚለው ቃል ጥቅም ላይ የሚውለው ለአካለ መጠን ላልደረሱ ልጆች ሲሆን፣ "ሞጋሳ" ደግሞ ለአካለ መጠን የደረሱ ሰዎችን ልጅ አድርጎ ለመቀበል በተለይም በሜጫና[101] በቱለማ ኦሮሞዎች ዘንድ የሚፈጸመውን ባህላዊ ሥርዓት የሚያመላክት ቃል ነው።[102] ይህም ልክ ጥንታዊ ሮማዊያን ያደርጉት እንደነበረው በኦሮሞ ባህል ለአካለ መጠን ያልደረሱና ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን ለይቶ የሚያስተዳድር ባህላዊ አሠራር እንዳላቸው እንዲሁም እነዚህን ሁለት የተለየዩ ሥርዓቶች ለማመላከት ጥቅም ላይ የሚውሉ ሁለት ቃላት ጥቅም ላይ መዋላቸውን የሚያመላክት ነው።[103] ለአካለ መጠን

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[99] ከተባባሪ ፕሮፌሰር ፍሴ ጃለታ፣ በወለጋ ዩኒቨርሲቲ የቋንቋና ጋዜጠኝነት ተቋም መምህር ጋር የተደረገ ቃለ-መጠይቅ።

[100] ምንም እንኳ ሁሉቱ ቃላት የተለያየ ትርጉም ያላቸው ቢሆንም በዚህ ጽሁፍ ውስጥ ጉዲፈቻ የሚለው ቃል ለአካለ መጠን ያልደረሱና ለአካለ መጠን የደረሱ ሰዎች ከተፈጥሮ ወላጆቻቸው ውጪ ያሉ ሰዎች ልጅ አድርገው የሚቀበሉበትን ባህላዊ ሥርዓት ለማመላከት የገባ ቃል ነው።

[101] ከተባባሪ ፕሮፌሰር ፍሴ ጃለታ ጋር የተደረገ ቃለ-መጠይቅ፣ ከዚህ በላይ ማስታወሻ ቁጥር 99።

[102] Dessalegn Negeri, GUDDIFACHAA PRACTICE AS CHILD PROBLEM INTERVENTION IN OROMO SOCIETY: THE CASE OF ADA'A LIBAN DISTRICT, A Thesis Submitted to the Research and Graduate Programs of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Social Work (MSW)፤ Addis Ababa University, 28 (2006)

[103] በጥንታዊ ሮማዊያን ዘንድ ሁለት የጉዲፈቻ አይነቶች የነበሩ ሲሆን *adoptio* የሚለው ቃል ለአካለ መጠን ያልደረሱ ልጆች ጉዲፈቻን ለማመላከት ጥቅም ላይ ይውል የነበረ ቃል ሲሆን *adrogatio* የሚለው ቃል ደግሞ ለአካለ መጠን የደረሱ ሰዎች ጉዲፈቻን ለማመላከት ይጠቀመብት የነበረ ቃል ነው። ለበለጠ መረጃ ሀግ ሊንድሳይ፣ ከዚህ በላይ ማስታወሻ ቁጥር 23 ይመለከቷል።

የደረሱ ሰዎች ጉዲፈቻ በስፋት ያከናውኑ ከነበሩ የኦሮሚያ አካባቢዎች የባሌና የጉጂ ኦሮሞዎች ይጠቀሳሉ። የባሌና የጉጂ ኦሮሞዎች በጦርነት የተማረከ ሰው ከማረከው ሰው ወይም ከማረከው ሰው ጎሳ ጋር እንዲኖር ይፈቀድለታል።[104]

ሞጋሳ በሁለት አይነት መንገድ የሚፈጸም ሲሆን የመጀመሪያው መንገድ ኦሮሞ ያልሆነ ሰው በገዳ ሥርዓት መሠረት የሚቀበለው ጎሳ አባል ከዚያም አልፎ የአንድ ቤተሰብ ልጅ ለመሆን በራሱ ነጻ ፈቃድ በሚያቀርበው ጥያቄ ተመስርቶ የሚፈጸም ነው።[105] ሁለተኛው መንገድ ከመጀመሪያው መንገድ የተለየና ኦሮሞ ያልሆነ/ኑ የጦር ምርኮኞችን ኦሮሞነት በማላበስ ከኦሮሞ ማኅበረሰብ ጋር ለማዋሃድ የሚያገለግል ነው።[106] በኦሮሞ ባህል ሁለተኛው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የሚደረግበት መንገድ ሞጋሳ ከሚፈጸመበት የመጀመሪያው መንገድ ጋር ተመሳሳይ የሆነው ማለትም በጦርነት ከተገኘ ምርኮ የተለየና የጉዲፈቻ አድራጊውንና የጉዲፈቻ ተደራጊውን ሰላማዊ ግንኙነት መሠረት ያደረገው *harmahodhaa* ወይም የጡት ማጥባት ሥርዓት ነበር። ይህ ባህላዊ ሥርዓት ይፈጸምባቸው ከነበሩ የኦሮሚያ አካባቢዎች ከዚህ በላይ የተጠቀሰው የባሌ አካባቢ አንዱ ነው።[107] በዚህ ሥርዓት ጉዲፈቻ አድራጊው አውራ ጣቱን በማርና በውተት በመንከር ጉዲፈቻ የሚደረገው ሰው እንዲጠባው ይደረጋል።[108] ይህም ተፈጥሯዊ የሆነውና ጡት በማጥባት የሚጀመረው የእናትና የልጅ ግንኙነት ምሳሌ ተደርጎ ይወሰዳል።

6.1.2. ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በአማራ ባህል ውስጥ

በኢትዮጵያ ባህል ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ከሚፈጸምባቸው አካባቢዎች አንዱ የአማራ ክልል ነው። በዚህ ክልል ለአካለ መጠን ያልደረሱ ልጆችን ብቻ ሳይሆን ለአካለ መጠን የደረሱ ሰዎችን ጭምር ባህላዊ በሆነ መንገድ ልጅ አድርጎ የመቀበል ትውፊታዊ አሠራር ለረጅም ጊዜ ሲሠራበት ቆይቷል። ይህ ትውፊት በተለያዩ አካባቢዎች በተለያዩ ስሞች የሚታወቅ ሲሆን በዋናነት ጥቅም ላይ ሲውሉ የሚታዩት የማር ልጅ እና የጡት ልጅ የሚሉት መጠሪያዎች ናቸው።[109] እነዚህ መጠሪያዎች የሚያመላክቱት የሥርዓቱን አፈጻጸም ሂደትና ይዘት ነው። ቀደም ሲል በኦሮሞ ባህል የጉዲፈቻ ሥርዓት ምን እንደሚመስል እንደተመለከትነው በአማራ ባህልም ሂደቱና ሥርዓቱ ተመሳሳይ ነው።[110]

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[104] Ayalew Duressa, Guddifachaa: Adoptioin Practice in Oromo Society with PARTICULAR Refeence to the Boranan Oromo, A Thesis Submitted in Partial Fulfilmet of the Master of Art, Addis Ababa University, 82 (2002)

[105] ከተባባሪ ፕሮፌሰር ፍሉ ጃለታ ጋር የተደረገ ቃለ-መጠይቅ፣ ከዚህ በላይ ማስታወሻ ቁጥር 99።

[106] ዝኒ ከማሁ።

[107] ለበለጠ መረጃ Abebayehu Tsegaye Aredo and Dejene Gemechu Chala, *Harmahodhaa*: A Traditional Child Fostering and Fictive Kinship Formation Among the Oromo, Ethiopia, Ethiop.j.soc. lang. stud., Vol.6. No.2, (2019) ይመለከቷል።

[108] ዝኒ ከማሁ፣ ገጽ 36-37::

[109] ለበለጠ መረጃ Birhanu Bitew, Inter-ethnic Relations Among Amhara and Kemant Ethnic Groups in North-Western Ethiopia, Int. J. Polit. Sci. Develop., (2019) እንዲሁም Solomon Addis Getahun, A History of Ethiopia's Newest Immigrants to the United States: Orphans, *Journal des africanistes*, (2011) ይመለከቷል።

[110] ዝኒ ከማሁ::

ይህ ሥርዓት በአማራ ክልል በዋናነት በሰሜን ጎንደርና ምዕራብ ጎጃም አስተዳደር ዞኖች የተለመደ ነው።[111] ከሌላ አካባቢ በተለያዩ ምክንያቶች ወደ አዲስ የመኖሪያ ቦት የሚመጡ ሰዎች ዘመድና ወላጅ የሚሆናቸው ሰው መፈለግ፣ ልጅ አድርገው የሚቀበሉ ሰዎችም የተፈጥሮ ልጅ ቢኖራቸውም ባይኖራቸውም ተጨማሪ ጉልበት፣ ኃይልና መከታ የሚሆናቸው ሰው መፈለግ በእነዚህ አካባቢዎች ለአካለ መጠን የደረሱ ሰዎችን ልጅ አድርጎ ከመቀበል በስተጀርባ ካሉት ምክንያቶች ውስጥ የሚጠቀሱ ናቸው።[112] ለአከለ መጠን የደረሱ ሰዎችን ልጅ አድርጎ የመቀበል ተግባር በተለይ በምዕራብ ጎጃም አስተዳደር ዞን ሰከላ፣ ደጋ ዳሞትና ወንበርማ ወረዳዎች አሁን ድረስ በሰፊው ጥቅም ላይ ይውላል።[113] ለምሳሌ፣ በወንበርማ ወረዳ የሚፈጸመው ጉት የማጥባት ትውፊታዊ ሥነ-ሥርዓት በአጭሩ የሚከተለውን ይመስላል፦[114] ሥነ-ሥርዓቱ የሚፈጸመው ልጅ አድርጎ የሚቀበለው ሰው የነፍስ አባትና ሎሌዎች የአካባቢው ኗሪዎችና ዘመድ ወዳጆች በሚገኙበት ሲሆን ለዚህ የሚሆን ግብዣ ይዘጋጃል። በሥነ-ሥርዓቱ ላይ ልጅ የሚሆነው ሰው ልጅ አድርጎ የሚቀበለውን ሰው ጡት የሚጠባ ሲሆን ልጅ አድርጎ የሚቀበለው ሰው እንደ ልጁ ለመቁጠር፣ የእርሻ መሬትና ሃብት ንብረት ለመስጠት፣ በማንኛውም ጉዳይ እንደ ልጁ ለመንከባከብ እንዲሁም ሲሞት ወራሽ ሊያደርገው በነፍስ አባቱ ፊት ቃል ይገባል። ለዚህ ተግባር ግብዣ መዘጋጀቱ፣ አንዲሁም በሥነ-ሥርዓቱ ላይ የነፍስ አባትና ዘመድ ወዳጅ መገኘቱ ለጉዳዩ የሚሰጠውን ክብደት ከማሳየቱም በላይ አዲስ የሚፈጠረውን የልጅና የወላጅ ግንኙነት በይፋ መጀመሩን ለማብሰር ጭምር ያገለግላል።

6.2. ቀደምት የልጅና የአሳዳጊነት ግንኙነት እና የእንጀራ ልጅነት ግንኙነት እንዲሁም ተያያዥ ሥነ-ልቦዊ ምክንያቶች

6.2.1. የልጅና አሳዳጊነት ግንኙነት (Foster Care)

በኢትዮጵያ ከ2010 ዓ.ም ጀምሮ የውጪ አገር ዜጋ ጉዲፈቻ እንዳያደርግ መከልከሉን[115] ተከትሎ ኢትዮጵያዊያን ቤተሰቦች ልጆችን ተቀብሎ እንደ ልጅ ለማሳደግ ከፍተኛ ፍላጎትና መነሳሳት እያሳዩ ይገኛሉ።[116] ወላጅ አልባ ልጆችን የመንከባከብና የማሳደግ ኃላፊነት የምዕራባዊያንና መንግሥታዊ ያልሆኑ ድርጅቶች ነው፤ የሚለው ከዚህ በፊት በማኅበረሰቡ ዘንድ የነበረው አመለካከት እየተቀየረ መጥቷል።[117] ምንም እንኳ በኢትዮጵያውያን ቤተሰቦች ልጆችን ተቀብሎ እንደ ልጅ የማሳደጉ ጉዳይ የውጪ አገር ጉዲፈቻ መከልከልን ተከትሎ ምን ያህል አድጓል፤ የሚለውን ለመመርመር ሕጉ ከወጣ አጭር ጊዜ በመሆኑ እንዲሁም ጉዳዩ ራሱን የቻለ በስታስቲክሳዊ መረጃ ላይ የተመሠረተ ጥናት መፈለጉ፣ በጉዳዩ ላይ ሳይንሳዊ ድምዳሜ ላይ ለመድረስ ባያስችልም ልጆችን ተቀብሎ ማሳደግ በብዙ ኢትዮጵያዊያን ቤተሰቦች ዘንድ የተለመደና ለረጅም ጊዜ የቆየ አሠራር ነው።

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[111] ከአቶ ደርበው ጥላሁን፣ በአማራ ብሔራዊ ክልላዊ መንግሥት ባሕልና ቱሪዝም ቢሮ የባሕል እሴቶች ልማት ባለሙያ ጋር የተደረገ ቃለ-መጠይቅ።

[112] ዝኒ ከማሁ።

[113] ዝኒ ከማሁ።

[114] ዝኒ ከማሁ።

[115] የተሻሻለው የቤተሰብ ሕግ ማሻሻያ፣ አዋጅ ቁጥር 1070/2010፣ ፌደራል ነጋሪት ጋዜጣ፣ 24ኛ አመት፣ ቁጥር 26 ይመለከታል።

[116] ለበለጠ መረጃ Lindsay Steele, Expanding Foster Care Changing Ethiopian Communities, 2019 , https://www.mnnonline.org/news/expanding-foster-care-changing-ethiopian-communities/ ይመለከታል።

[117] ዝኒ ከማሁ።

እንደሚታወቀው የልጅና የአሳዳጊነት ግንኙነት ከጉዲፈቻ ግንኙነት የተለየ ነው።[118] ይህ በአሳዳጊነትና በልጅነት የተጀመረው ግንኙነት በጊዜ ሂደት ልጁ ለአካለ መጠን ከደረሰ በኋላም የሚቀጥል ነው። ምንም እንኳ ግንኙነቱ ለረጅም ጊዜ የቀጠለ ቢሆንም በአሳዳጊውና ለአካለ መጠን በደረሰው ሰው መካከል ምንም አይነት የሕግ እውቅናና ውጤት የለውም።[119] ይህንን ለረጅም ጊዜ የቆየ፣ በሰዎች ልብ ውስጥ የልጅና የወላጅ ግንኙነት ስሜት፣ መቀራረብ፣ መረዳዳትና ፍቅር የፈጠረ ግንኙነት ካለ ምንም ሕጋዊ ውጤት መበተን ከሰዎች ብሎም ከማኅበረሰቡ ስሜትና ፍላጎት ያፈነገጠ ይሆናል። ሕግ ለዚህና ይህንን ለመሳሰሉት ማኅበራዊና ቤተሰባዊ ችግሮች የመፍትሄ መሣሪያ በመሆኑ በአሳዳጊውና ለአካለ መጠን በደረሰ ሰው መካከል ያለን ግንኙነት የሕግ ውጤት ወዳለው የልጅና የወላጅ ግንኙነት ከፍ ማድረግ የሚቻለው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን በመፍቀድ ነው።

እዚህ ላይ ሊነሳ የሚችለው ነጥብ አሳዳጊው ልጁ ለአካለ መጠን ከመድረሱ በፊት ጉዲፈቻ ማድረግ ይችል ነበር የሚል ሲሆን በተለያዩ ምክንያቶች ይህ ሳይፈጸም ሊቀር ይችላል። ለዚህ በምክንያነት ከሚጠቀሱት ውስጥ አንዱ የአሳዳጊው ፍላጎት ሲሆን ምንም እንኳ በሂደት የልጅና የወላጅ ስሜትና ትስስር ቢፈጠርም አሳዳጊው በወቅቱ ከአሳዳጊነት ያለፈ ሚና እንዲኖረው ላይፈልግ ይችላል። ሌላው ምክንያት ከልጁ የተፈጥሮ ወላጆች ፍላጎት ጋር የተያያዘ ሲሆን ልጁ የጉዲፈቻ ልጅ እንዲሆን የተፈጥሮ ወላጆች ፈቃዳቸውን ላይሰጡ ይችላሉ።[120] በተሻሻው የቤተሰብ ሕግ በግልጽ እንደተመለከተው የልጁ አባትና እናት ልጁ የጉዲፈቻ ልጅ እንዲሆን ፈቃዳቸውን እንዲሰጡ ያስፈልጋል።[121] ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በፈቀዱ አገራት ሕግጋት ከመደበኛው የልጆች ጉዲፈቻ በተለየ ለአካለ መጠን የደረሰው ሰው ወላጆች ፈቃድ እንደ ቅድመ-ሁኔታ አይቀመጥም። በመሆኑም በእነዚህና በሌሎች ምክንያቶች አሳዳጊው ልጁ ለአካለ መጠን ከመድረሱ በፊት ጉዲፈቻ ሳያደርገው ከቀረ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የመጨረሻው አማራጭ ይሆናል ማለት ነው።

6.2.2. የፍቺ መበራከትና የአዲስ ጋብቻዎች መፈጠር (Divorce and the Rise of Step-Families)

ከዚህ በላይ እንደተመለከትነው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን የፈቀዱ አገራት በብዛት እንደ-ቅድመ ሁኔታ የሚወስዱት ቀደምት የወላጅና የልጅ መሰል ግንኙነት መኖሩን ሲሆን ይህ ግንኙነት ከሚገለጽባቸው መንገዶች ውስጥ ዋናው የእንጀራ አባት/እናትና የእንጀራ ልጅ ግንኙነት ነው። በኢትዮጵያ ፍቺን፣ በተለያዩ ምክንያቶች የጋብቻ መፍረስን፣ የቤተሰብ መለያየትንና ይህንን ተከትሎ የሚመሠረት አዲስ ጋብቻን፣ በጋብቻው ለአካለ መጠን ደርሰው ከእንጀራ አባት/እናት ጋር የሚኖሩ ሰዎችን፣ ለአካለ መጠን የደረሱ የማደጎ ልጆችን እና ይህንን የመሳሰሉ መረጃዎች የሚያዙበት፣ የሚጠናቀሩበት፣ የሚተነተኑበትና ይፋ የሚደረገብት እንዲሁም መረጃዎቹ ለተለያዩ ጉዳዮች ጥቅም ላይ የሚውሉበት አሠራር

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[118] በአሳዳጊነትና በጉዲፈቻ መካከል ያለውን መሠረታዊ ልዩነት እንዲሁም የሕግ ውጤት ለመረዳት Anarida Delaj, Anna Schamberg, Nathalia Sosa & Camille Mendoza Soto, Adoption and Foster Care, 19 Geo. J. Gender & L. (2018). ይመለከቷል።

[119] ልጁ ለአካለ መጠን ከመድረሱ በፊት አሳዳጊው ጉዲፈቻ ለማድረግ አድሱ ቢኖረውም በተለያዩ ምክንያቶች ይህ ሳይፈጸም ሊቀር ይችላል።

[120] Sarah Ratliff, Adult Adoption: Intestate Succession and Class Gifts under the Uniform Probate Code, 105 NW. U. L. REV. 1780 (2011).

[121] የተሻሻለው የቤተሰብ ሕግ፣ ከዚህ በላይ ማስታወሻ ቁጥር 86፣ አንቀጽ 191።

ባለመኖሩ በጉዳዩ ላይ የተጠናቀረ መረጃ ማቅረብ አይቻልም።[122] ነገር ግን እነዚህን ግንኙነቶች ማለትም ለአካለ መጠን ደርሰው ከእንጀራ አባት/እናት ጋር የሚኖሩ ሰዎችን መመልከት የተለመደ፣ የነበረና ወደፊትም የሚቀጥል ማኅበራዊና ቤተሰባዊ እውነታ መሆኑ ለሁሉም ግልጽ ነው። በጉዳዩ ላይ የተሠሩ ውስን አካዳሚዊ ጥናቶችም ይህንን ያረጋግጣሉ።[123]

እንደ መደበኛው ጉዲፈቻ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ቀደምት የቤተሰብ ግንኙነትን ወደ ወላጅና ልጅ ግንኙነት ከፍ ለማደረግ ጥቅም ላይ ማዋል ይቻላል።[124] ይህም በተለይ ካለምንም ሕጋዊ ግንኙነት በአንድ ልጅና በአንድ ሰው መካከል የአሳዳጊነት ግንኙነት ከነበረ፣ እንዲሁም የእንጀራ ልጅና የእንጀራ አባት፣ የእንጀራ ልጅና የእንጀራ እናት ግንኙነት ካለ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ይህንን ቀደምት ግንኙነት ወደ ወላጅና ልጅ ሕጋዊ ግንኙነት ከፍ ለማድረግ አይነተኛ መሣሪያ ነው።[125] ከዚህ ላይ አንባቢ ልብ ሊለው የሚገባው ነጥብ በእነዚህ ግንኙነቶች ውስጥ ልጁ እድሜው ከአስራ ስምንት አመት በታች ከሆነ በመደበኛው ጉዲፈቻ አማካይነት ልጅ የሚሆንበት የሕግ መሠረት ክፍት መሆኑን ነው። ነገር ግን ከዚህ በላይ እንደተመለከትነው በተለያዩ ምክንያቶች መደበኛውን የጉዲፈቻ አመሠራረት ሥርዓት በመጠቀም ጉዲፈቻ ሳይደረግ ቀርቶ እድሜው ከአስራ ስምንት አመት በላይ ከሆነ ይህ የሕግ አሠራር ስለማይኖር አንድ ሰው ሲያሳድገው የኖረውንና እንደ ልጁ የሚያየውን የእንጀራ ልጅ ልጁ የሚያደርግበት እድል አይኖረውም ማለት ነው። ይህ አሠራር ሕግ ከሰዎች ስሜትና ፍላጎት ውጪ የሚሆንበት፣ በሰዎች ልብ ውስጥ ያለውን የልጅና የወላጅ ስሜት፣ ትስስር፣ ግንኙነትና ፍቅር በሕግ ጣልቃ ገብነት ምክንያት ዳር ሳይደርስና ሕጋዊ መሠረት ሳይኖረው የሚቀርበትን አጋጣሚን ይፈጥራል ማለት ነው።

በኢትዮጵያ ባለው ተጨባጭ ሁኔታ ይህንን የመሰለ ግንኙነት በእንጀራ እናቶች/አባቶችና ለአካለ መጠን በደረሱ ሰዎች መካከል መመልከት የተለመደ የቀን ተቀን የቤተሰብ ሕይወት ነው። በዚህ ግንኙነት ተመሥርቶ የአሳዳጊዎችንና የእንጀራ አባቶችን ስም እንደ አባት ሥም ወስዶ መጠቀምም እንዲሁ የተለመደና በብዛት የሚስተዋል እውነታ ነው።[126] ከዚህም አልፎ ይህንን ሁኔታ በመመልከት የአካባቢው ማኅበረሰብ እውነታውን ማለትም

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[122] እነዚህን መረጃዎችን መሰብሰብ፣ ማጠናቀር፣ መተንተንና ይፋ ማድረግ በሌሎች አገራት በተለይም በአውሮፓና አሜሪካ የተለመደ ነው። መረጃዎቹ በጉዳዩ ላይ አዲስ ፖሊሲ ለማመንጨት፣ ሕግጋትን ለመከለስና ለማሻሻል ጠቃሚ ግብአቶች ሆነው ያገለግላሉ። በኢትዮጵያ ውሳኝ ኩነቶችን ማለትም ሞት፣ልደት፣ጋብቻና ፍቺን ከአሐሴ 2008 ዓ.ም ጀምሮ መመዝገብ የተጀመረ ቢሆንም የዚህ ምርምር ዕሁፍ ትኩረት የሆነውን ማለትም በተለያዩ ምክንያቶች የጋብቻ መፍረስን ተከትሎ ከእንጀራ እናት ወይም አእንጀራ አባት ጋር የሚኖሩ ለአካለ መጠን የደረሱ ሰዎችን የተመለከተ የተጠናቀረ ስታስቲክሳዊ መረጃ ማግኘት አይቻልም።

[123] ለምሳሌ Kasahun Amare, Phychological and Social Adjustment of Adolesenet Students Among Different Family Types, The case of Addis Ketema Senior Secondary School, A Thesis Submitted to the Graduate School of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts, (2005); Serkalem Bekle, Divorce: Its Cause and Impact on the Lives of Divorces Women and Children, A Comparative Study Between Divorced And Intact Families, A Thesis Submitted to the Graduate School of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Social Work, (2006) እንዲሁም Muleye Tarekegn, An Exploratory Research on Stepchildren's Experiences in the Stepparent Households: The Case of Kolfe Keranyo Sub-city, Addis Ababa, A Thesis Submitted to the Graduate School of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Social Work, (2011) ይመለከቷል።

[124] ሮበርት ኪ.፣ ከዚህ በላይ የግርጌ ማስታወሻ ቁጥር 30፣ ገጽ 1482።

[125] ዝኒ ከማሁ።

[126] ይህ ፀሀፊ ተወልዶ ባደገበት እንዲሁም አሁን በሚኖርበት አካባቢ ተመሳሳይ ሁኔታዎች መኖራቸውን ተመልክቷል።

የአሳዳጊነትና የእንጀራ እናት/አባት ግንኙነት ሳይሆን ግንኙነቱ የአባት/እናትና የልጅ ግንኙነት ነው፤ ብሎ የሚቀበልበትና የሚያምንበት አጋጣሚም ብዙ ነው። ይህ ጉዳይ ግንኙነቱ በሕግ የልጅና የወላጅ እውቅና ባይሰጠውም በስዎቹ መካከል ያለው ትስስር ምን ያህል ሥር እንደሰደደና የማኅበረሰቡን እምነትና አሳቤ እንዴት እንደቀየረ አመላካች ነው።[127] ይህ ማኅበራዊና ቤተሰባዊ ምክንያትን መሠረት ያደረገ መከራከሪያ የሕግ ድጋፍ እንዳለው ከዚህ በታች ባለው ንዑስ ክፍል ስር እንመለከታለን።

6.3. የቤተሰብ ሕይወት የመከበር መብት

ከዚህ በላይ ከተመለከትናቸው ታሪካዊ፣ ባህላዊ፣ማኅበራዊ፣ ቤተሰባዊና ተያያዥ ሥነ-ልቦናዊ ምክንያቶች በተጨማሪ በኢትዮጵያ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመፍቀድ የሚያስችል የሕግ ወይም የሰብአዊ መብት መሠረት ማንሳት ይቻላል። ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ያልፈቀዱ አገራት መንግሥታት ጉዳዩን በሕጋቸው ለመፍቀድ ሰብአዊ መብትን መሠረት ያደረገ ግዴታ አለባቸው። ይህንን አስመልክቶ ኬንት ብሎር የተባሉ ፀሀፊ መንግሥት በቤተሰብ ሕይወትና ጉዳዮች ውስጥ አላግባብ ጣልቃ እንዳይገባ የሚከለክለውንና በተለያዩ የዓለም አቀፍ የሰብአዊ መብት ድንጋጌዎች ውስጥ እውቅና የተሰጠውን መብት መሠረት በማድረግ እንደሚከተለው ይከራከራሉ "It is submitted that the prohibition on adult adoption interferes with the human right not to be subject to arbitrary interference in family matters."[128] ይህ ክርክር በዋናነት መሠረት ያደረገው ዓለም አቀፍ የሲቪልና የፖለቲካ መብቶች ቃልኪዳንና[129] ዓለም አቀፍ የሰብአዊ መብቶች መግለጫ ላይ ነው። በእነዚህ የሰብአዊ መብት ሰነዶች መሠረት ማንኛውም ሰው የግል ሕይወቱ፣ ቤተሰቡ፣ መኖሪያ ቤቱ፣ የሚጽፋቸውና የሚጻጻፋቸው መልእክቶቹ አላግባብና ከሕግ ውጭ አይደፈሩም፤ ጣልቃ አይገባባቸውም።[130]

ከእነዚህ ከተዘረዘሩትና ጥበቃ ከተሰጣቸው ጉዳዮች ውስጥ ለያዝነው ነጥብ አግባብነት ያለው ጉዳይ ለቤተሰብ ሕይወት የተሰጠው ጥበቃ ነው። ለቤተሰብ የተሰጠውን ይህንን ጥበቃ ለመረዳት በመጀመሪያ "ቤተሰብ" ምንድን ነው የሚለውን የቤተሰብ ትርጉም መመርመር ይገባል። ከዚህ ጉዳይ ጋር በተያያዘና የቤተሰብን ትርጉም በተመለከተ ነጻ የባለሙያዎች

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[127] በሁለት ሰዎች መካከል የሚፈጠር የስሜትና የሥነ-ልቦና ቁርኝት በተግባር ወደ ልጅና ወላጅ ግንኙነት የማደግ እድል አለው፤ እነዚህ ሰዎች ይህንን ግንኙነት ወደ ሕጋዊ ግንኙነት ከፍ ለማድረግ ፍላጎቱ ይኖራቸዋል በማለት ፒተር ኤን ፋውስር የተባሉ ፀሀፊ ይከራከራሉ። ለበለጠ መረጃ ፒተር ኤን ፋውስር፣ ከዚህ በላይ ማስታወሻ ቁጥር 40 ይመለከቷል።

[128] ኬንት ብሎር፣ ከዚህ በላይ ማስታወሻ ቁጥር 73፣ ገጽ 63።

[129] ኢትዮጵያ የዓለም አቀፉ የሲቪልና የፖለቲካ መብቶች ቃልኪዳንን እ.አ.አ. ከ1993 ዓም ጀምሮ የተቀበለች ሲሆን ቃልኪዳኑ በኢትዮጵያ ፌደራዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ-መንግሥት አንቀጽ 9(4) መሠረት የአገሪቱ ሕግ አካል ነው። ከዓለም አቀፉ የሲቪልና የፖለቲካ መብቶች ቃልኪዳን አንቀጽ 17 የተወሰደው የግል ሕይወት የመከበር መብት በኢትዮጵያ ፌደራዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ-መንግሥት አንቀጽ 26 ስር እውቅና የተሰጠውና ዘርዝር ብሎ የተቀመጠ ቢሆንም ይህ የሕገ-መንግሥቱ አንቀጽ የቤተሰብ ሕይወትን በተመለከተ የሚለው ምንም ነገር የለም። በሕገ-መንግሥቱ አንቀጽ 34 ለቤተሰብ ጥበቃ የተደረገ ቢሆንም የዚህን ድንጋጌ አርእስቱንና ዝርዝሩን ስንመለከት ጋብቻን መሠረት ያደረገ ቤተሰብንና ከዚያ የሚወለዱ ልጆችን ብቻ ታሳቢ ያደረገ ይመስላል። ከዓለም አቀፉ የሲቪልና የፖለቲካ መብቶች ቃልኪዳን በተጨማሪ የዓለም አቀፉ የሰብአዊ መብቶች መግለጫ በሂደት ዓለም አቀፍ የልማድ ሕግ እየሆነ መጥቷል የሚል ክርክር ስላለ በኢትዮጵያም እንደቃልኪዳኑ አስገዳጅ የዓለም አቀፍ የሕግ ምንጭ አድርገን ልንቆጥረው እንችላለን። የዓለም አቀፉን ፍርድ ቤት ዝርዝር ስልጣንና ተግባር በሚወስነው ሕግ አንቀጽ 38 መሠረት የዓለም አቀፍ ሕግ የሕግ ምንጮች ዓለም አቀፍ ስምምነቶች፣ዓለም አቀፍ የልማድ ሕግ፣ ጠቅላላ የሕግ መርኖች እንዲሁም የፍርድ ቤት ውሳኔዎች፣ የሊቃውንት አስተምህሮዎችና ዕሁፎች መኖናቸውን ያስታውሷል።

[130] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, Art. 17 (entered into force 23 March 1976); *Universal Declaration of Human Rights,* opened for signature 10 December 1948, GA Res 217A, Art. 12.

ቡድን የሆነውና የዓለም አቀፍ የሲቪልና የፖለቲካ መብቶች ቃል-ኪዳንን አተገባባር የሚቆጣጠረው የሰብአዊ መብቶች ኮሚቴ በጠቅላላ ማብራሪያው ቁጥር 16 ጉዳዩን ተመልክቶታል። በዓለም አቀፉ የሲቪልና የፖለቲካ መብቶች ቃል-ኪዳን አንቀጽ 17 መሠረት "ቤተሰብ" ምንድን ነው? ለሚለው የትርጉም ጥያቄ ኮሚቴው የሚከተለውን ማብራሪያ ሰጥቷል "Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned."[131] በዚህ ማብራሪያ መሠረት ቤተሰብ ምንድን ነው? በቤተሰብ ውስጥ ማን ይኖራል? የሚሉትና መሰል የትርጉም ጥያቄዎች የሚመለሱት ጉዳዩን ማኅበረሰቡ እንዴት ይረዳዋል? የሚለውን በመመርመር ሲሆን፣ ትርጓሜውም ሰፊና ብዙ ጉዳዮችን ያካተተ መሆን ይገባዋል። በመሆኑም የቤተሰብ ትርጉም ለማኅበረሰቡ ከተተወ ዋናው ጥያቄ በኢትዮጵያ ማኅበረሰባዊ አውድ ዘንድ ለቤተሰብ ምን ትርጉም ይሰጠዋል? የሚለውን ጉዳይ መመልከት ጠቃሚ ነው።

በኢትዮጵያ በተለምዶ "ቤተሰብ" የሚለው ቃል በአንድ ቤት ውስጥ በቋሚነት የሚኖሩ የሰዎች ስብስብን ለማመላከት ጥቅም ላይ ይውላል። ይህ የሰዎች ስብስብ ወላጆችን፣ ልጆችን፣ የእንጀራ ልጆችንና ሌሎች የቅርብ የስጋ ዝምድና ያላቸው ሰዎችን ይጨምራል። ከዚህ በመነሳት ሦስት የቤተሰብ አይነቶችን መዘርዘር እንችላለን። እነሱም፦ እናት ወይም አባት ብቻ ከልጆቻቸው ጋር የሚኖሩበት፣ እናትና አባት ከልጆቻቸው ጋር አብረው የሚኖሩበት እንዲሁም የእንጀራ እናት ወይም አባት ከባለቤቶቻቸውና እነሱ ከሚወለዱ የእንጀራ ልጆቻቸው ጋር አብረው የሚኖሩበት ቤተሰብ ናቸው።[132] በመሆኑም በሌሎች አገሮች እንደተለመደው በኢትዮጵያም ከእንጀራ አባታቸው ወይም ከእንጀራ እናታቸው ጋር የሚኖሩ ልጆችና ለአካለ መጠን የደረሱ ሰዎች በአንድ ቤተሰብ ስር ይጠቃለላሉ ማለት ነው። የቤተሰብ ትርጉም ይህንን ካካተተ ወደ ተነሳንበት የሕግ ጭብጥ ስንመለስ በኢትዮጵያ ለአካለ መጠን ደርሰው ከእንጀራ አባታቸው ወይም ከእንጀራ እናታቸው ጋር የሚኖሩ ሰዎችን የእንጀራ አባታቸው ወይም የእንጀራ እናታቸው ጉዲፈቻ እንዳያደርጉ መከልከል በአንድ ቤተሰብ ሕይወት ላይ የሚደረግ አላግባብና ሕጋዊ ያልሆነ ጣልቃ ገብነት ነው። አንድ ሰው አብሮት የኖረውንና ያሳደገውን ለአካለ መጠን የደረሰ የእንጀራ ልጁን እንደልጄ ስለማየው ጉዲፈቻ አድርጌ ግንኙነታችን የወላጅና የልጅ ይሁን፤ ብሎ ቢከራከርና በሥራ ላይ ያለው ሕግ እድሜን መሠረት በማድረግ ብቻ ይህንን ማድረግ አትችልም ቢለው በብሎር አገላለጽ ይህ የሰብአዊ መብትን የጣሰና በቤተሰብ ሕይወት ላይ የተደረገ አላግባብ የመንግሥት ጣልቃ ገብነት ሲሆን ከዚያም አልፎ ቤተሰባዊ ሕይወትን እንደመበጥበጥ ሊቆጠር እንደሚችል ይህ አጥኝ ያምናል።

[131] UNHRC, *General Comment No. 16, Para.5: Art.17*(The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*)*, 32nd Sess, adopted 8 April 1988, UN Doc HRI/GEN/1/Rev.9 (Vol 1).

[132] እዝህ ቤተሰቦች በእንግሊዝኛው single-parent family, intact family, step-parent family ይባላሉ። ለበለጠ መረጃ Kasahun Amare, Phychological and Social Adjustment of Adolesenet Students Among Different Family Types, the case of Addis Ketema Senior Secondary School, A Thesis Submitted to the Graduate School of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts, 21(2005) ይመለከታል።

ብሎር ከዚህ ለቤተሰባዊ ሕይወት ከተሰጠ የሰብአዊ መብት ጥበቃ በመነሳት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ለምን እንደማይፈቅድ የማስረዳት ሸክሙ በሕግ በከለከለው መንግሥት ትከሻ ላይ ይወድቃል፤ በማለት በአጽንኦት ይሞግታሉ።[133] አሁን በኢትዮጵያ ባለው ተጨባጭ ሁኔታ፣ ከማኅበራዊና ቤተሰባዊ እውነታዎች አኳያ፣ እንዲሁም ከዚህ በላይ እንደተጠቀሰው ከዓለም አቀፍ የሰብአዊ መብት ሰነዶች የሚመነጭ የሕግ ግዴታ ባለበት ሁኔታ፣ ከጉዳዩ ጋር የሚቃረን ተጨባጭ አገራዊ ፖሊሲና ጥቅም በሌለበት ሁኔታ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የማይፈቀድበት ምንም ምክንያት የለም፤ መንግሥትም[134] ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለምን እንደማይፈቅድ ማስረዳትና የማስረዳት ሸክሙንም መወጣት እንደማይችል የዚህ ጥናት ባለቤት ያምናል።

ለአከለ መጠን የደረሰ ሰው ጉዲፈቻ ውስጥ መንግሥት አላግባብ ጣልቃ መግባት የለበትም በማለት የሚቀርበው ሌላው ተያያዥ መከራከሪያ ከግል ሕይወት የመከበርና የመጠበቅ ሕገ-መንግሥታዊ መብት ጋር የተያያዘ ነው። ይህ ክርክር በዋናነት የሚያጠነጥነው ለአከለ መጠን የደረሰ ሰው ጉዲፈቻን ከመደበኛውን የልጆች ጉዲፈቻ ጋር በማነጻጸር ነው።[135] ክርክሩ በመደበኛውን የልጆች ጉዲፈቻ ላይ መንግሥት የልጆችን ጥቅም ከማስጠበቅ አኳያ ጉዳዩ በቀጥታ የሚመለከተው ሲሆን ለአከለ መጠን የደረሰ ሰው ጉዲፈቻን በተመለከተ ግን ይህ መብት ሊኖረው አይገባም፤ ከዚያም አልፎ በጉዳዩ ጣልቃ መግባት የግል ሕይወት የመከበርና የመጠበቅ ሕገ- መንግሥታዊ መብት ጥያቄ ያስነሳል፤ ሁለት ለአካለ መጠን የደረሱና ችሎታ ያላቸው ሰዎች የልጅና የወላጅ ግንኙነት ለመፍጠር መወሰን ይችላሉ፤ የሚል ነው።[136] በመሆኑም በዚህ ክርክር መሠረት በኢትዮጵያ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ አለመፈቀዱ በኢትዮጵያ ፌዴራዊ ዲሞክራሲያዊ ሪፐፐሊክ ሕገ-መንግሥት አንቀጽ 26 ሥር የተደነገገውን የግል ሕይወት የመከበርና የመጠበቅ መብትን የጣሰ ነው ብሎ መሞገት ይቻላል።[137]

8. የማጠቃለያ ነጥቦችና የመፍትሄ ሃሳቦች

ከጥንታዊው የሮማ ሕግ ጀምሮ ጉዲፈቻን የፈቀዱ አገራትን የጉዲፈቻ ታሪክ ስንመረምር አንድ አንኳር ነጥብ እንገነዘባለን። ይኸውም እነዚህ አገራት በጉዲፈቻ ሕጋቸው በቅድሚያ እውቅና የሰጡት ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ መሆኑን ነው። እነዚህ አገራት በሂደት ለአካለ መጠን ላልደረሱ ሰዎች ጉዲፈቻም ተገቢ የሆነና በዋናነት የልጆች ጥቅምን መሠረት ያደረጉ ሕግጋት አውጥተዋል። በኢትዮጵያም ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ጽንሰ-ሃሳብ ከመደበኛው ጉዲፈቻ ጎን ለጎን ባህላዊ በሆነ መንገድ ሲሠራበት የኖረ ነው። ይህንን ባህላዊና ትውፊታዊ አሠራር ከሌሎች ነባር የአገሪቱ የልማድ ሕግጋት ጋር ወደ ጎን በመተው ለመደበኛው የልጆች ጉዲፈቻ ብቻ እውቅና የሰጠው መሠረቱን በዋናነት ከፈረንሳይ የፍትሐ ብሔር ሕግ ያደረገው በ1952 ዓ.ም የወጣው የኢትዮጵያ ንጉሠ ነገሥት

[133] ኪንት ብሎር፣ ከዚህ በላይ ማስታወሻ ቁጥር 73፣ ገጽ 63።

[134] "መንግሥት" የሚለው ቃል በኢትዮጵያ ፌዴራዊ ዲሞክራሲያዊ ሪፐፐሊክ ሕገ-መንግሥት አንቀጽ 50ና በሌሎች አግባብነት ባላቸው ድንጋጌዎችና ሕግጋት መሠረት የፌዴራል መንግሥቱንና የክልል መንግሥታትን ለመግለጽ ተመራማሪው የተጠቀመባት ቃል ነው።

[135] ፒተር ኤን ፋውለር፣ ከዚህ በላይ ማስታወሻ ቁጥር 40፣ ገጽ 673::

[136] ዝኒ ከማሁ፣ ገጽ 673-74።

[137] የኢትዮጵያ ፌዴራዊ ዲሞክራሲያዊ ሪፐፐሊክ ሕገ-መንግሥት አንቀጽ 26፣ አዋጅ ቁጥር 1/1987፣ ፌዴራል ነጋሪት ጋዜጣ።

መንግሥት የፍትሐ ብሔር ሕግ ነው፤[138] በሂደት ይህንን የፍትሐ ብሔር ሕግ ያሻሻሉ የፌደራልና የክልል የቤተሰብ ሕግጋትም የፍትሐ ብሔር ሕጉን ፈለግ ተከትለዋል። ምንም እንኳ ይህ ሕግ መሠረቱን ከፈረንሳይ ቢያደርግም ሁሉቱንም ማለትም ነባሩን የኢትዮጵያ ባህልና ትውፊት እንዲሁም የፈረንሳይ ሕግ ለጉዳዩ የሰጡትን ትኩረት ወደጎን በመተው የልጆች ጉዲፈቻን ብቻ ፈቅዷል። ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ በፍትሐ ብሔር ሕጉ ውስጥ ሳይካተት የቀረበት ምክንያት የሕጉ አርቃቂ የነበሩት ፕሮፌሰር ሬኔ ዳቪድ የውጪ አገር ዜጋ በመሆናቸው፣ በወቅቱ ሥራ ላይ የነበረውን ባህላዊ ጉዲፈቻ በሚገባ ለመረዳት ክፍተት መኖሩ ሊሆን ይችላል። ምንም እንኳ ፕሮፌሰር ዳቪድን ጨምሮ ለአርቃቂ ኮሚሽኑ አባላት የኢትዮጵያ ጥንታዊ ፍርዶች መጽሐፍ በአማርኛ ቋንቋ ተዘጋጅቶ ቀርቦላቸው የነበረ ቢሆንም፣ መጽሐፉ ወደ ፈረሳይኛ ቋንቋ ባለመተርጎሙ አርቃቂው ለጉዳዩ ጥልቅ ግንዛቤ ሳይኖራቸው የቀረ ይመስላል።[139]

ከዚህ በላይ እንደተመለከትነው በኢትዮጵያ አሁን ባለው ተጨባጭ ሁኔታ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን ለመፍቀድ የሚያስችሉ ታሪካዊ፣ ባህላዊ፣ ሥነ-ልቦናዊና የሕግ ወይም የሰብአዊ መብት ምክንያቶች አሉ። በመሆኑም እነዚህንና ሌሎች በጊዜ ሂደት ሊከሰቱ የሚችሉ ምክንያቶችን ግምት ውስጥ በማስገባት አሁን በሥራ ላይ ያለው የቤተሰብ ሕግ መሻሻል አለበት።[140] ተሻሽሎ ለአካለ መጠን የደረሰ ሰው ጉዲፈቻን የሚፈቅደው የቤተሰብ ሕግ ዝርዝር ምን መሆን አለበት? የሚለው ጥያቄ ዘርፈ-ብዙ ምሁራንን በተለይም የሕግና የባህል ሊቃውንትን ያካተተ ሰፊ ጥናት ተካሂዶ በሂደት የሚመለስ ሆኖ በዋናነት ግን የጉዲፈቻ ሂደቱና ውጤቱ የአገርንና የህዝብን ጥቅም (public interest) የማይነካ፣ ከመልካም ጸባይ (morality) የማይቃረን፣ እንዲሁም የሰዎችን ድብቅ የጎንዮሽ ዓላማን ለማስፈጸም (collateral purpose) በመሣሪያነት የማያገለግል መሆን ይኖርበታል። የሚሻሻለው የጉዲፈቻ ሕግ ከዚህ በላይ በዝርዝር እንደተመለከተው በዋናነት ቀደምት ግንኙነትን መሠረት ያደረገና ይህንን ግንኙነት ወደ ወላጅና ልጅ ግንኙነት ከፍ አድርጎ ማስቀጠል የሚያስችል ሊሆን ይገባል። ብሎር "[…] adult adoptions can be permitted without opening the floodgates to adoptions of convenience"[141] በማለት በጉዳዩ ላይ እንዴት ሚዛን መጠበቅ እንደሚገባ እንደገለጹት ለአካለ መጠን ከደረሰ ሰው ጉዲፈቻ ጋር

[138] የኢትዮጵያ ንጉሠ ነገሥት መንግሥት የፍትሐ ብሔር ሕግ፣አዋጅ ቁጥር 1/1952፣ ነጋሪት ጋዜጣ፣ በተለይ የወጣ። ይህ የፍትሐ ብሔር ሕግ አንቀጽ 3347(1) ግልጽ የሆነ ተቃራኒ ድንጋጌ ከሌለ በቀር በዚህ በፍትሐ ብሔር ሕግ ውስጥ ለተመለከቱት ጉዳዮች ከዚህ በፊት በልማድ ወይም ተጽፈው ይሠራባቸው የነበሩ ደንቦች ሁሉ ይህ የፍትሐ ብሔር ሕግ ስለተተካ ተሽረዋል በማለት ይደነግጋል። ይህ ድንጋጌ ምንም እንኳ በተግባር እየተሠራበት ቢሆንም ባህላዊና ትውፊታዊ መሠረት ያለውን ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ የማድረግ ልማዳዊ አሠራርን ሽሯል ማለት ነው። ነገር ግን ይህ በተግባር የሚከናወነው ባህልንና ትውፊትን መሠረት ያደረገ አሠራር ምንም አይነት የሕግ ውጤት የማያስከትል መሆኑን መገንዘብ ያስፈልጋል። ለምሳሌ፣ በዚህ ባህላዊ አሠራር ጉዲፈቻ የተደረገ ለአካለ መጠን የደረሰ ሰው እንደልጅ ስለማይቆጠር ጉዲፈቻ አድራጊው ቢሞት አያወርስም፤ እሱ ቢሞትም ጉዲፈቻ አድራጊው አያወርስም። ከዚህ በተጨማሪም ቀስብ የመስጠትና የመጠየቅ ሌሎች በወላጆችና በተወላጆች መካከል የሚኖሩ በሕግ የተደነገጉ መብቶችና ግዴታዎች አይኖሩም።

[139] ለበለጠ መረጃ John H. Beckstrom, Adoption in Ethiopia Ten Years after the Civil Code, 16 J. Afr. L. 149 (1972) ይመለከቷል።

[140] በኢትዮጵያ እነዚህን የመሰሉ አሳማኝ ምክንያቶች ሲገኙ የቤተሰብ ሕጉን በተለይም ጉዲፈቻን የተመለከቱ ድንጋጌዎችን ማሻሻል አዲስ ነገር አይደለም። ከዚህ በላይ እንደተመለከትነው የተሻሻለውን የቤተሰብ ሕግ ከብሔራዊ የህጻናት ፖሊሲ ጋር ማጣጣም አስፈላጊ ሆኖ በመገኘቱ በተሻሻለው የቤተሰብ ሕግ ማሻሻያ አዋጅ ቁጥር 1070/2010 አንቀጽ 2 መሠረት የውጭ አገር ዜጋ ጉዲፈቻ አድራጊን በተመለከተ የሚደነግጉት የቤተሰብ ሕጉ አንቀጽ 193 ተሽሮና የአዋጁ አንቀጽ 194 (3)(መ) ተሰርዞ፤ ነባሩ ፊደል ተራ (ሠ) ፊደል ተራ(መ) ሆኖ ተሸጋሽጓል። በሌላ አነጋገር ይህ የተሻሻለው የቤተሰብ ሕግ የማሻሻያ አዋጅ የውጭ አገር ዜግነት ባላቸው ሰዎች የሚደረግ ጉዲፈቻን ክልክሏል።

[141] ኬንት ብሎር፣ ከዚህ በላይ ማስታወሻ ቁጥር 73፣ ገጽ 85።

ተያይዘው ሊመጡ የሚችሉ የጎንዮሽ ችግሮችን ግምት ውስጥ በማስገባትና ለእነዚህ ችግሮች በር በማይከፍት መልኩ አሁን በሥራ ላይ ያለውን ለአዲስ አበባና ድሬዳዋ የከተማ አስተዳደሮች የሚያገለግለው የተሻሻለው የቤተሰብ ሕግ በተለይ አንቀጽ 185 እንዲሁም የዚህ አንቀጽ የካርቦን ቅጂ የሆኑትን የክልል የቤተሰብ ሕግጋት (በተለይም ከዚህ በላይ እንደተመለከተው ለአካለ መጠን የደረሰ ሰው ጉዲፈቻ ባህላዊ፣ታሪካዊና ትውፊታዊ መሠረት ያለባቸው የአማራና የኦሮሚያ ብሔራዊ ክልሎች የቤተሰብ ሕግጋት) ማሻሻል ይገባል።

The Importance of Introducing Adult Adoption in the Family Law of Ethiopia: Some Points from the Experience of Other Jurisdictions

Nega Ewunetie Mekonnen[♣]

Abstract

Adult adoption had a place in ancient laws, including Roman law. It was also recognized by the French Napoleonic Law of 1804, which was used as a source for the European continental legal system and the 1960 Civil Code of Ethiopia. The concept of adult adoption in Napoleon's law was transplanted in the modern laws of France, Spain, Italy, Germany, and other European countries; it used widely used in the family laws of the United States and other Common law legal systems. Even though adult adoption in Ethiopia had a historical, cultural, traditional, and social basis, the 1960 Civil Code of Ethiopia did not only fail to recognize it but also repealed it with other existing customary laws of the country. The federal and regional state family laws, based on the 1960 Civil Code of Ethiopia, follow a similar pattern. This researcher argues that there are historical, cultural, traditional, social, and legal reasons for allowing adult adoption in Ethiopia. Based on these reasons, the researcher recommends the amendment of the existing family law and the introduction of adult adoption in the Ethiopian legal system.

Keywords: Adult adoption, age difference, prior family relationship; cultural, traditional and historical basis; familial, social and psychological reasons; the right to respect for family life

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Overview of Some Gaps Regarding the Regulation of Construction Insurance in Ethiopia: A Note

Mamenie Endale Messelu[*]

Abstract

Construction is a risky business. However, such risk can be managed, minimized, shared, or transferred trough insurance. In the developed world, it is difficult to practice construction business in the absence of sufficient cover of insurance. Adequate insurance policy could satisfy the interest of the general public, client, construction workers, and other concerned parties. In Ethiopia, though construction insurance is evolving, it is not given proper attention by concerned stakeholders such as law makers and legal professionals. Accordingly, this note explores the legal lacunas observed in the regulation of different types of insurance policies that are apt to manage risks on construction projects in Ethiopia. To discover the gaps and scrutinize the contesting legal issues, the writer employed a doctrinal research method. In the investigation, it is found out that variables such as rigid standard insurance policies, complex insurance policy language, absence of mandatory insurance for license renewal — mainly for contractors and consultants, excessively expensive premium, and lack of coordination between parties of the insurance policies are major sources of legal gap in this regime of law. As a result, the writer suggests areas of improvement to rectify these gaps. Particularly, it is imperative for the legislature synchronize the insurance policy laws in the country, eliminating conflicts, make insurance mandatory for license renewal, set fair insurance policy premium, and use concise language in drafting the policies.

Keywords: Client, Contractor, Consultant, FIDIC, Insurer, MoWUED, Sub-contractor.

Introduction

Risk is an inherent part of any construction project.[1] Usually, the inherent risk is exacerbated by the interdependence among the project participants; if one participant runs into financial difficulty, it is likely to impact the entire project.[2]

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[1] Gail S. Kelley, Construction Law, An Introduction for Engineers, Architects, and Contractors, John Wiley & Sons, Inc., (2013), p.197. [here in after Gail S. Kelley].

[2] Ibid.

Further, construction industry is highly risk prone with complex and dynamic project environments which create an atmosphere of high uncertainty. The industry is vulnerable to various technical, socio-political and business risks. It is sensitive to an extremely large matrix of hazards and thus to risks.[3] This sensitivity is, in turn, due to some of the inherent characteristics of construction projects such as long period, complicated processes, hostile environment, financial intensity, dynamic organizational structures, and diverse interests of project stakeholders.[4]

It is, therefore, extremely relevant for the construction industry and those involved in it to understand the concept of risk and to equip themselves with knowledge and skills to manage the risk matrix generated when a construction project is initiated.[5] Managing risks in construction projects has been recognized as an important process to achieve project objectives in terms of time, cost, quality, safety, and environmental sustainability.[6] Moreover, the need for suitable insurance policy is unquestionable to satisfy the interest of the client, to achieve the required quality and standard, to safeguard the safety of workers and the general public during and after construction, and for proper utilization of public resources.[7]

Yet, in Ethiopia, despite the boom in the construction industry, construction firms, their clients, law makers, legal professionals, and the society in general fail to appreciate such roles of insurance policies.[8] These problems, the author supposes, can be traced to failure in institutional accountability and deficiency in professional training. For example, concerning legal professionals, the main reason for their lack of proper understanding may be the failures of the existing scholarship on teaching construction law in general and construction insurance in particular. The law schools in Ethiopia offer construction law as an eclectic course rather than a mandatory one in their LLB programs. While the current educational law school programs overlook this discipline, no sign of attempt has been made to comprehensively map the offering of the course in the future. In

[3] Nael G.Buni, Risk and Insurance in Construction, Second Edition, Spon Press, Taylor and Francis Group, (2003), pp. 30-32 [here in after Bunni].
[4] Ibid.
[5] Ibid.
[6] Patrick, Guomin, and Jiayuan, Understanding the Key Risks in Construction Projects in China, International Journal of Project Management, Vol. 25, No.6, (2007), p.612.
[7] Abebe Dinku, Insurance Requirements and Practices of Ethiopia's Construction Sector, Journal of EAEA, Vol.17, (2000), p. 35 [hereinafter Abebe Dinku]. Though this article is published 20 years ago, its finding on the benefit of insurance for construction industry and the then problems in the Ethiopian construction industry are intact today.
[8] Ibid.

addition, an improvement is mandatory on those laws regulating the establishment and operation of the construction insurance policy, and on those laws determining the rights and duties of the stakeholders such as clients, contractors, and consultants. This note explores these loopholes and their sources at greater depth in the regulation of construction insurance in Ethiopia. Further, it suggests remedies to redress the gaps identified. The note employed doctrinal research method which is based on the identification, synthesis and analysis of the law regulating construction and construction insurances.

The themes in the note are organized in six sections. Following this introductory section, in the first section, terminology of risk, construction, insurance, and construction insurance are explained. In section two, the writer evaluates the major rationale behind construction insurance. Section four identifies the major types of insurance policy in construction industry. In section five, the note shows some loopholes in the regulation of construction insurance in Ethiopia. Finally, it concludes by suggesting areas of improvement in the formulation of laws, enforcement, professional training, and public education pertaining to construction insurance policy.

1. The Definition and Forms of Construction Insurance

Different scholars define construction insurance with a slightly different phrasing, but closely similar essence. For example, Bunni, defines it *as* "… contracts of indemnity within the activities of the Construction industry where insurance is chosen as the medium through which liabilities are shifted.[9] Akbiyikli defines this concept as "… a practice of exchanging a contingent claim for a fixed payment to protect the interests of parties involved in a construction project and it is a major method of managing risks in the construction industry .[10]

From the definitions given by the two scholars, one could see that construction insurance is a contract whereby the insurance company seeks to provide coverage and indemnify the construction contractor or the client against a potential peril, loss, damage, or liability that arises from the performance of the construction work. In the practical operation of the contract, insurance allocates the risks to which the project is exposed, between the parties while risk forms the basis of insurability and premium calculation.[11] As such, construction

[9] Buni, *supra* Note 3, p. 181.
[10] Akbiyikli, Dikmen, and Eaton, Insurance Issues and Design and Build Construction Contracts, *Journal of New World Sciences Academy*, Vol. 7, No. 1, (2012), pp. 203-214.
[11] Buni, *supra* Note 3, p. 181.

insurance is expressed in the form of bond or guarantee. It is to note that the main forms of bond and guarantee transacted within the construction industry take different forms such as performance bond, bid bond, advance payment bond, retention money bond, maintenance bond or defects liability bond. The next sections take each of these forms bond for further explanations.

1.1. Tender Bond or Bid Bond

The tender bond is an amount of money deposited in the form of a bank guarantee bond to compensate the damage the public body may sustain as a result of the successful bidder refusing to sign the contract. Bid bonds are intended to assure the beneficiary that the bid or tender is a serious one and that, if it is accepted, the tenderer will proceed and effect the form of contract including whatever subsequent bonding arrangements he is required to provide.[12]

The bid bonds deposit could be made either in cash, letter of credit, insurance bond or a bank guarantee.[13] The amount of bid security shall be sufficient to discourage irresponsible bidders.[14] In fixing the amount of bid security, the public body shall take into account the following points:(1) the volatility of the price of the required object of procurement, (2) the availability of adequate number of candidates to participate in the bid, (3) that the bid security required of candidates doesn't discourage them from participating in the bid, (4) that the bid security urges the successful bidder to sign the contract, (5) that the bid security is sufficient to compensate the damage the public body may sustain as a result of the successful bidder refusing to sign the contract.[15] Any tenderer who fails to fulfill the conditions of tender bond will be disqualified or rejected.[16]

[12] Bunni, *supra* note 3, p. 199.
[13] Federal Public Procurement Directive, MOFEC, June 2010, Articles 16.16.4 & 16.16.5. [here in after Public Procurement Directive].
[13] Bunni, *supra* note 3, p. 200.
[14] Federal Government Procurement and Property Administration Proclamation, Proc. No. 649/2009, 15th Year, No. 60, Art. 40(1). [here in after Federal Procurement Proclamation]. The Public Procurement Directive as per Article 16.16.2 provided that the amount of bid security shall be between 0.5-2 % of the total estimated contract price and the maximum amount of bid security shall not be exceed 500, 000.00 (Five Hundred Thousand) Birr. See Public Procurement Directive, *supra* note 13, Article 16.16.2.
[15] See Public Procurement Directive, *supra* note 13, Article 16.16.3.
[16] Article 16.21 of the Public Procurement Directive puts the condition of rejection of Bid Bond such as committing corruption, violation of the procurement proclamation and directive, breach of obligation in previous contract and the like. See Public Procurement Directive, *supra* note 13, Article 16.21.

The forms to be used for submission of tender bond shall be included in the tender documents.[17]

1.2. Performance Security or Bond

Performance bond is issued for the completion of the contract or given as a guarantee for the performance of the contractual obligation.[18] According to Bunni, unless it is specifically provided, the bond is issued for the completion of the contract and not for its proper implementation.[19] Bunni argued that keeping the bond beyond the contract period is of no value to the owner unless the usual format of the bond is changed to include the word 'proper' or similar terminology to incorporate the standard of performance into the bond.[20]

In Ethiopia, for every contract, a public body shall receive performance security, an amount equal to 10% of contract price, within 15 days from the conclusion of the contract.[21] It will be used to compensate damages suffered by the public body due to failure by contractors to perform the contract.[22]

1.3. Advance Payment Bond

Advance payment bond is issued to assure the beneficiary that any sums of money advanced will not be lost through default or poor performance by the party in receipt of the advance.[23] It is submitted in cheque /unconditional bank guarantee from a bank, equal in amount to the advance payment.[24] However, under the Ethiopian laws, domestic contractors may submit unconditional, irrevocable and payable on demand advance payment security and conditional advance payment security issued by a bank.[25] The client and contractors may conclude an agreement on the use of the advance payment. Finally, advance

[17] Federal Procurement Proclamation, *supra* note 14, Article 40; Public Procurement Directive, *supra* note 19, Article 16.16.
[18] The FIDIC: Federation Internals des Ingenieurs Conseils: International Federation of Consulting Engineers, Clause 10. [here in after FIDIC]; Federal Procurement Proclamation, *supra* note 14, Article 47; Public Procurement Directive, *supra* note 13, Article 16.25.
[19] See Bunni, *supra* note 3, p. 200.
[20] Ibid.
[21] Public Procurement Directive, *supra* note 13, Article. 16.25.2. The tender should include the period of validity of the bond, the procedures to be followed if the bond is said to be forfeited and arrangements for its release.
[22] Public Procurement Directive, *supra* note 13, Article. 16.25; see also Federal Procurement Proclamation, *supra* note 14, Article 47.
[23] See Bunni, *supra* note 3, p.200.
[24] Federal Procurement Proclamation, *supra* note 14, Article 48; Public Procurement Directive, *supra* note 13, Article 16.26. 2.
[25] Public Procurement Directive, *supra* note 13, Article 16.26 (3 -9).

payment shall not exceed 30% of the contract price and to be stated in the contract price.[26]

1.4. Retention Money Bond

According to Bunni, retention money bond is "issued to allow the release of retention money usually held by the beneficiary".[27] The employer may retain certain amount of money from each payment due to the contractor until the completion of the whole of the works. In Ethiopia, Five percent of the certificate amount shall be retained from payment indicated in each payment certificate (PC).[28] Half of the total retained is released upon completion of works and issuance of provisional acceptance certificate while the remaining 50% shall continue to be retained for one-year period of warranty. However, such sum may be released on condition that the contractor submits unconditional guarantee valid for 12 months.[29]

2. Types of Insurance Policy in Construction Industry

Construction insurance policies must be specially designed to respond to the circumstances.[30]It means an insurance policy needs to be specially designed according to the nature of the project, the types of procurement, and construction contract.[31] Under the Construction Works Contract, a contractor is expected to produce five different insurance policies. Contractor's all risk policy, contractor's comprehensive commercial vehicles policy, third party's liability policy, workmen's compensation policy, and decennial or inherent defect policy. These insurance policies cover distinct forms of risks. The following sections elaborate their contents and differences.

2.1. Contractor's All Risk Policy

In principle, the meaning of *Contractor's All Risks* is all the risks attributed to construction Works. It covers loss or damage from whatever cause to the contract works or materials on the contract site(s) and in use in connection with the contract during the performance of the contract and the period of

[26] Id, Article 16.26(1).
[27] See Bunni, *supra* note 3, p.200.
[28] Public Procurement Directive, *supra* note 13, Art. 28.5(b).; see also General Condition of Contract-Public Procurement Agency, 2006, Clause 48 & 49.
[29] Public Procurement Directive, *supra* note 19, Article 28(5) (c).
[30] Bunni, *supra* note 3.
[31]Junying, Bingguang, and Jiong, Insurance and construction project risks: a review and research agenda, InProc 12th Annu PBFEA Conf, (2004), p13.

maintenance.[32] Yet it is important to note that not all risks affecting the construction works are insurable. Particularly, the exception to the principle, stipulates that risk must be unforeseeable or unintended by a prudent contractor. Even if the risk is unforeseeable, the damage that may entail may be extremely high which is beyond the capacity of insurers hence is uninsurable.[33] For example, risks arising from war, ionizing radiation, or contamination; pressure waves caused by aircraft or aerial devices, act of foreign enemies etc. Such types of risks are generally excluded by the insurance market, hence are uninsurable risks.[34] Apart from these risks, insurers also restrict certain risks or limit their coverage. Sometimes the contractors also may accept certain deductions just to minimize the premiums. The FIDIC conditions of contract require the contractor to take out such a policy in the joint name of the client and the contractor.[35]

2.2. Contractor's Comprehensive Commercial Vehicles Policy

The Contractor is responsible to insure the works, plants, materials and equipment for incorporation into the works. However, damages to third parties caused by commercial vehicles of the Contractor are not usually covered by the third-party insurance policy. They are excluded risks since self-propelled vehicles licensed for road use are not covered under plant and equipment insurance of the Contractor's All Risk Policy.[36] As a principle under insurance laws, insurable risks are departmentalized and vehicle insurance is a separate department from construction insurance and requires a separate policy. Accordingly, a construction Contractor is required to produce a comprehensive commercial vehicle and private vehicle policy for these vehicles utilized in the construction.[37] Moreover, if the contract states that the Contractor is responsible to provide vehicle to the Consultant, that vehicle should have commercial vehicle insurance policy coverage. Thus, this insurance policy alerts contractors and third-party clients to the separate cover given to vehicles in construction businesses.[38]

[32] Abebe Dinku, *supra* note 7, p.30.
[33] Debebe Moges, Check Lists for construction Insurance Policies, Legal Service Department, Ethiopian Road Authority, p.5. Unpublished, this is available on the writer library. [here in after called Debe Moges].
[34] FIDIC, *supra* note 18, Clause 20**.**
[35] Id.Clause 20 and 21.
[36] Debebe Moges, *supra* note 33, p.5.
[37] Ibid.
[38] Id, p.4.

2.3. Third Party's Liability Policy

A third-party liability insurance policy covers loss or damage to third party persons or property arising out of the construction or maintenance of the works. To put it in other words, it means anyone who is not directly a party to the insurance contract may sustain damage due to accidents connected to the operation of the construction business. The FIDIC conditions of contract require the contractor to buy this policy covering the such damages.[39] At this point it is important to note that third party liability policy does not cover the contractor's employees or that of the employer's employees in the project as these risks are to be insured under separate insurance policy. The policy is mainly against liabilities for death or injury to any person or loss by or damage to any property arising out of the execution of the contract other than the exceptions stated in the contract. The contractor shall produce this policy in the joint name of the Contractor and the Employer.[40]

2.4. Workers' Compensation Policy

Worker's compensation insurance is designed to cover workers who are injured in the course of employment.[41] The contractor is contractually responsible to insure his employees working in the construction project.[42] The Contractor's workers are excluded from the third party liability insurance policy coverage since damage resulting from the process of construction works in the case of employees fall under separate sector of insurance. Therefore, workers compensation policy covers damages in respect of injuries to employees in their employment, or employment of any sub-contractor.[43]

2.5. Inherent Defect Policy

The inherent defect policy is usually required for constructions of buildings or structures. It is transacted to cover the liability of those involved in construction for latent defects in the stability of the structure and for major defects in the weather shield for ten years.[44] In most jurisdictions including Ethiopia the period of limitation for inherent defect insurance policy is ten years from the

[39] FIDIC, *supra* note 18, Clause 22 & 23.
[40] Debebe Moges, *supra* note 33, p.6.
[41] Gail S. Kelley, *supra* note 1, p.201. According to Gail's workers are entitled to compensation without regard to fault and without having resort to litigation. In exchange for guaranteed compensation, workers give up their right to sue their employer for employment-related injuries.
[42] Abebe Dinku, *supra* note 7, p. 31.
[43] Id, p. 31.
[44] See Bunni, *supra* note 3, p.200.

final taking over certificate of the project.[45] Article 3282 of the Civil Code of Ethiopia adopted this ten years guarantee or warranty in respect of defects of construction.[46] Where there is a problem in structures, there will be difficulty in identifying the causes of problems as to whether it is due to design, defects in materials or due to problems in workmanship. So, this policy is intended to cover such inherent defects that may arise from design, workmanship or defect in materials in buildings or structures within ten years from its completion.

3. Gaps in the Regulation of Construction Insurance in Ethiopia

While an attempt has been made by legislators to distinctively departmentalize insurance policies and explicitly stipulate the rules of the respective purposes, there are still gaps in the regulation and working environment of construction insurance in Ethiopia. In this section, the writer tries to examine these gaps in the real operation of the construction business and the interaction of parties in the processes thereof. These gaps take on different forms. Some of them are related to professional indemnity insurance and lack of coordination between concerned parties while others are concerned with rigid and complex insurance policy language use and formality requirement of construction insurance. Still others are about lack of professional measurement of premium and compensations and deficiency on the coverage of construction insurance. Each of these gaps are elaborated at greater depth in the next sub sections.

3.1. Gaps Related to Professional Indemnity Insurance

Professional indemnity insurance insures against liability arising from professional negligence. Reasonable care and diligence is required from architects, engineers, quantity surveyors, professional consultants and a building contractor.[47] Each will have their own insurance policy to indemnify them

[45] Ibid, Bunni cited the French Civil code, Articles 2270 & 2820; Italian Civil code, Law No.1086 of Nov 1971, the Spanish Civil Code, art. 1591, Belgian covil code, art.1792, the Dutch Civil Code, art 1645). Art 1792 of the French civil code of 1979 provided that "any architect, contractor, technician, or other person bound to the owner of the structures by a work contract is legally responsible to the owner or those deriving title from him for any damage which jeopardize the integrity of the structure or which by affecting one of its component element or one of the equipment elements renders the structure unfit for its intended purposes.

[46] Civil Code of Ethiopia, the Federal Negarit Gazeta, Year No.2, Proc. No. 165/1960, Article 3282. [here in after Civil Code).

[47] Standard professional indemnity policies cover the insured against liability for professional negligence, but there are considerable doubts as to whether they extend to other forms of liability. Thus, if the architect is held to have guaranteed the suitability of a design, rather than merely undertaking that reasonable skill and care has been used, any resulting liability might well not be covered. Policies could specifically exclude liabilities that the professional voluntarily assumes by way of such guarantees. See

against liability for professional negligence.[48] The policy is taken as a cover against their liability for acting negligently. For example, in case where a structure collapses during construction because of faulty design, the client would be compensated for the loss arising out of designer's negligence and all resulting cost of damage thereof.

In Ethiopia, professional indemnity insurance policy is one of the rare elements in the operation of construction businesses. According to Abebe, there are different reasons for the rarity. First, the government and/or clients in Ethiopia do not demand for it and the policy has never been exercised by insurance companies; or if they exercise it at all, it is too expensive.[49] The other problem of this policy is that it may be valid and adequate within construction period, yet it may be discontinued after the construction is completed.[50]This means that a latent design fault discovered after completion of the construction is not covered by professional insurance.

Research evidence on such problems uncover the gap in the regulation of construction insurance policy in this country. For example, Getachew revealed that though consultants of construction firms are required to provide the professional indemnity insurance equivalent to the contract amount and valid for the period of the service contract, a majority of the design and supervision consultants involved in the road projects do not have effective professional indemnity insurance for the service they deliver.[51] One could guess the damage the employer (the government or the public in this case) would sustain upon the occurrence of professional negligence in the design or supervision of road constructions which consumes huge public budget. Given the magnitude of public interest visible in such situations, this author argues, it is imperative to include professional indemnity insurance as a mandatory element of contractual obligations.

3.2. Lack of Coordination Between Concerned Parties

In the operation of a construction work, it is presumed that the client, consultant, insurance companies and the contractor cooperate to the effect of identifying

Will Hughes, et.al., Construction Contracts, Law and management, Routledge, Taylor & Francis Group, 5th eds., 2015, p. 271.

[48] Id, p. 270.

[49] Abebe Dinku, *Supra* note 7, pp.1-35. Abebe mentioned an instance as this policy is not a criterion for license renewal for contractor and consultant.

[50] Id, p. 30.

[51] Getachew Yilma, The Practice of Construction Risks Management through Insurance in the Ethiopian Federal Road Projects, Msc Study, *Addis Ababa University, 2014,* p.97.[here in after Getachew Yilma].

and allocating risks to the party who is supposed to better control and manage it. As such, the reasoned risk allocation strategy in construction industry is a *win-win* proposition for all project participants. Such a strategy tries to allocate specific risks based on an analysis of which party is best able to evaluate, control, manage, and assume the risk.[52]

However, the problem is that the contracting parties mainly provide insurance coverage to meet the demand of the client rather than to avoid possible risks. The client mainly uses the opinion of external consultants (design and supervision consultants) as a primary means of risk identification. Contractors, on the other hand, conduct risk analysis at the time of tendering. Due to complex characteristics of construction projects, a construction project insurer's opportunity lies in the drafting, negotiating, and concluding of a bearable long-term insurance agreement, it is therefore, necessary for construction insurers to get involved in the risk identification, allocation, drafting and negotiation of insurance policies before and during construction. Nevertheless, in practice most of the insurance companies provide insurance coverage without normally visiting sites such as road construction projects.[53]

According to the evidences reported by Getachew, most of the contractor groups just add a percentage to budget/cost to cope with uncertainties rather than implementing mathematical risk analysis tools to quantify risks.[54] He discovered that the insurance premium is fixed mainly based on the location of the project and the contract amount of the project.[55] He further added that most of the contractual agreements between client and consultant, client and contractor, contractor and sub-contractor do not require adequate insurance cover.[56] Moreover, the research evidences showed that the cooperation and coordination among the contracting groups in the identification and management of risks with insurance companies is insignificant.[57]

Therefore, this author takes the view that drafting a common contract involving all concerned parties would be one means of increasing cooperation and proper risk allocation among interested parties. Though it is not common in Ethiopia and abroad in content, it is commendable to reconsider of the existing contractual relations and to develop a single and comprehensive construction

[52] Bunni, *Supra* note 3, p.43.
[53] Getachew Yilma, *supra* note 51, pp.96-99
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.

insurance contract that involves all concerned parties namely the client, the contractor, and insurance companies.

3.3. Rigid and Complex Insurance Policy Language Use

One of major source of problems in the operation insurance policy in the Ethiopian construction industry is the adhesion nature of construction contract. That is, insurance companies follow a universal standard in drafting insurance policies. As such, policy clauses provided under the general and special conditions of contract are copied verbatim from FIDIC and it is difficult to understand due to its technical and complex language use. So, it is this writer's view that drafting the insurance policy in plain language and updating it from time to time. Besides, as stated earlier it would be proper to design an insurance policy according to the nature of projects, the types of procurement and construction contract as well as its limitation and coverage than adopting standard policy words that are forwarded by the insurance companies.

Secondly, there are tendencies of using warranties[58] and conditions[59] interchangeably while the two have different legal effects. In his examination of the meanings carried by these terms, Zekarias indicates that conditions and pre-conditions are in many respects similar to what are known as warranties and it is invariably difficult to distinguish between the two in the way they are expressed in insurance policies currently in use.[60] Zekarias further argues that the non-observance of warranty clauses always exonerates the insurer from liability while this is not always true in the case of conditions precedent.[61] This lack of clarity in the wordings and the meanings construed therein may cause uncertainties in the interpretation and enforcement of the law. Thus, it should be considered as a point of improvement through subordinate laws such as directives or amendment of the existing legislation.

[58] Warranties are essentially promises made by the insured relating to facts or things which he undertakes to do, or not to do, as the case may be. They will invariably affect the risks to which the insurer is subject. See John Birds and Norma J. Hird; Modern Insurance Law, Sweet and Maxwell Limited, London, (2001), p.138.

[59] Usually a notification and cooperation and supply supporting information concerning the claim are a condition precedent to the insurer's liability under the policy. For instance, if a notification clause provides that notice of a claim is to be given with in a particular period of time, but in the event notice of the claim is given late, the insurer's liability will not have been triggered, and the insurer will be entitled to reject the claim. See Julian Bailey, Construction Law, Routledge, Taylor and Francis Group, Vol. I, II & III, 2nd eds., 2011, p.1208.

[60] Zekarias Kenea, Issues of Controversy around Some of the Provisions of Ethiopian Insurance Laws and Contracts, Ethiopian Bar Review, p.20. [here in after Zekarias Kenea].

[61] Ibid.

3.4. Issues on the Formality Requirement of Construction Insurance

Form is the outward appearance of contract, and so the way the will of the parties becomes apparent. It is mainly about whether a contract must be written, or it suffices to be agreed orally. Article 1719 of the Civil Code provides that no special form is required of parties when they conclude a contract. Yet there are specific cases where the law imposes a formality requirement. Thus, failure to comply with the exceptionally imposed formality requirements would render a contract null and void. Concerning the formality of an insurance contract it is required to be made in written form[62]; signed by the parties[63]; and attested by the witness[64] The non-observance of any one of the requirements makes an insurance contract a mere draft[65] and to be invalidated.[66]

In Ethiopia construction insurance contract is concluded in the form of an insurance policy and an insurance policy is defined under Art 654 of the Commercial Code of Ethiopia as "a contract whereby a person, called the insurer, undertakes, against payment of one or more premiums, to pay to a person, called the beneficiary, a sum of money where a specified risk materializes".[67] Here, the terms and conditions of an insurance policy is drafted and signed only by an insurer ,i.e., there is no signature of an insured (contractor) and there is no mechanism of attestation by witnesses. The FIDIC, MoWUD, and the Insurance Proclamation[68] are consistent with the commercial code. Now, the issues of controversy are that how can we resolve the inconsistency between the civil code provisions with other laws including the commercial code. For example, in Ethiopian *Insurance Corporation Vs. Fetan Construction Contractors*, the Federal First Instance Court ruled that the insurance contract is invalidated by the mere fact that it is not signed by the contractors and attested by witnesses.[69] Yet the writer would dissent in the ruling of the court following the rules of interpretation based on hierarchy of special and general laws. As such the insurance proclamation, the special law in the present context, which is also in line with the commercial code, MoWUD and FIDIC, shall prevail over the general law, the provisions of the civil code.

[62] Civil Code, *supra* note 46, Art. 1725 (2).
[63] Id, Art.1727(1)
[64] Id, Art. 1727 (2)
[65] Id, Art. 1720.
[66] Id, Art. 1808
[67] The Commercial Code of Ethiopia, Proclamation No. 166/1996, *Federal Negarit Gazzeta*, (1960), Art. 654. [here in after the Commercial Code].
[68] For example, see FDRE Insurance Business Proclamation, Proc No. 746/2012, Federal Negarit Gazetee, 18th year No. 17, 22nd August 2012.
[69] Ethiopian Insurance Corporation vs. Fetan Construction Contractors, Federal First Instance Court, F. No. 39988, Cited by Zekarias Kenea, *supra* note 60, pp. 1-35.

So, in the present context attestation by witness, this writer holds, is not a mandatory requirement for the conclusion of insurance contract and the civil code provisions shall be amended accordingly.

3.5. Lack of Professional Measurement of Premium and Compensations

In Ethiopia, there is lack of professional experts to weight risks and insurance largely resulting in significantly expensive premium.[70] The main problem here is that the insurance premium is fixed mainly based on the location and the contract amount of the project. Concerning the cost of premium, Article 678 of the commercial code states that compensation shall not exceed the value of the object insured.[71] This rule can only apply if the real value of the object insured is equivalent to the sum insured. Thus, if the sum insured is less or more than the real value of the object, its application would be at odds either with the rules expressed in Article 665(2) — which provides that the insurer's liability shall not exceed the sum insured or — with the principle that compensation shall not exceed actual damages.[72] Another point worth noting in this respect is that construction insurance policy does not cover loss of use or consequential loss resulting from damage to the object insured. This stipulation in insurance policies has been the subject of frequent and intense disputes and some argued that the insurer must, at least, be made liable for consequential loss resulting from his failure to exercise his obligation within a reasonable period.[73] Thus, these hosts of contesting meanings and the absence of professionally crafted standards of premium in the policies can be potential sources of threat to the ends of insurance law in the construction industry.

3.6. Deficiency on the Coverage of Construction Insurance

In Ethiopia, there is lack of capacity of the insurance companies and absence of re-insurance scheme. Mostly, insurance companies are not efficient in responding to clients' claim and they do not give immediate attention and assistance to contractors.[74] The arrangement of insurance by contractors and consultants might be revisited to implement effective insurance policies by shifting the responsibility of purchasing of insurance to the client.[75] However, in Ethiopia, there is no insurance scheme for employers' risk. The law simply

[70] Abebe Dinku, *Supra* note 7, p.35.
[71] Commercial Code, *supra* note 67, Article 678.
[72] Id, Art. 665 (2).
[73] See for example, Zekarias Kenea, *supra* note 69, pp.1-35.
[74] Abebe Dinku, *Supra* note 7, p.35.
[75] Getachew Yilma, *supra* note 51, p.98.

requires the ,the contractor to provide (in joint names of the employer and the contractor) insurance cover from the start date to the end of the defects liability period, in the amounts and deductibles stated in the special conditions of contract (SCC) for the contractor's risks such as loss of or damage to the works, plant, and materials; loss of or damage to equipment; loss of or damage to property, and personal injury or death.[76]

A closer look into this stipulation shows exclusion of the employer's risks. Yet, who insures for such risks? While there is a possibility for such risks to occur, it is less common for contractors to require security from an owner. Further, it is believed that contractors know the need to require an owner to provide evidence of finance or capacity to pay the entire contract sum. Yet they expediently restrain themselves from doing so. Moreover, there is no sufficient insurance coverage which is limited to buildings and to some extent to road projects. There is no as such insurance coverage for other construction projects such as dams, water related structures, water storage reservoirs.

4. Concluding Remarks

The hosts of analysis and investigations presented across the different sections of this note lead us to the conclusion that there are several legal lacunas clearly visible in the regulation and working environment of construction insurance in Ethiopia. Specific instances of the gap include: rigid standard of the insurance policies; complex insurance policy language; failure to make insurance as a criterion for license renewal mainly for contractor and consultant; very expensive premium; and lack of coordination between parties of the insurance policies.

Therefore, this writer holds, the relationship between clients and consultants; clients and contractors; consultants and contractors; contractors and sub-contractors should be clearly stipulated in the pertinent insurance laws. Also, the insurance policy should be crafted in simple and plain language. Further, insurance should be made a mandatory requirement for license renewal for those get involved in risky construction projects. Finally, insurance premium and compensation should be assessed by professional experts and the assessment should take into consideration the relevant risk factors of the construction projects. Particularly, as part of risk identification, insurance companies are recommended to visit project sites at the early stage of the construction

[76] FIDIC, *supra* note18, Clause 22 & 23.

processes and throughout the construction period rather than only when problems arise.

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ተ ጠ ሪ ..... ብታመ ዓለማየሁ
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ፍርድ

ከመዝገብ ምርመራው እንደተረዳነው አመልካቾች የሥር ከሳሾች ተጠሪዎች ደግሞ ተከሳሾች በመሆን ተከራክረዋል። የክሱ ይዘት ወላጅ አባታችን አቶ ዓለማየሁ ቢተው በጂጋ ከተማ መኖሪያ ቤት ሠርቶ ሲኖር ከዚህ ዓለም በሞት ተለይቷል። አንደኛ ተጠሪ ከእኛ ጋር የአባታችን ወራሽ ሆኖ አንድ ድርሻ እያለው፤ ሁለተኛ ተጠሪም የሚች አባታችን ሚስት ሳትሆን እንደሚስት ተቆጥራ ለአራተኛ ተጠሪ በባለዕዳነት ተፈርዶባቸው ከአባታችን በውርስ ያገኘነው ቤት በአፈፃፀም ሂደት በጨረታ ለሦሥተኛ

ተጠሪ ተሸጦለታል። ስለሆነም ቤቱ የወራሾች ሃብት በመሆኑ ስለአንደኛ እና ሁለተኛ ተጠሪ ዕዳ የጋራ ሃብት የሆነው ቤት ሊሸጥብን ስለማይገባ የተደረገው ሽያጭ ፈርሶ ቤቱ እንዲመለስ ይደረግልን በማለት ጠይቀዋል።

አንደኛ እና ሁለተኛ ተጠሪዎች የውርስ ሃብት የሆነው ቤት ስለአራተኛ ተጠሪ ዕዳ መሸጡ አግባብ አልነበረም ሲሉ ሦሥተኛ ተጠሪ በበኩሉ ቤቱ የተሸጠው በአንደኛ እና ሁለተኛ ተጠሪዎች ዕዳ ምክንያት ብቻ ሳይሆን ቤቱን ለአመልካቾች ባወረሷቸው አቶ ዓለማየሁ ቢተው ዕዳ ምክንያት ጭምር ነው፤ በዚህ የተነሳ አፈፃፀም ቀጥሎ በፍርድ ቤቱ ትዕዛዝ በተደረገ የጨረታ ሂደት ተሳትፌ ቤቱን የገዛሁ እና የባለቤትነት የምስክር ወረቀት ያገኘሁበትም በመሆኑ ቤቱን እንድመልስ ሊደረግ አይገባም በማለት ተከራክሯል።

ፍርድ ቤቱም የግራ ቀኙን ክርክር እና ማስረጃ ከመረመረ በኋላ አመልካቾች ለክሱ ምክንያት ያደረጉት የውርስ ቤት የተሸጠው እነርሱ እንደሚሉት በአንደኛ እና በሁለተኛ ተጠሪዎች ዕዳ

ብቻ ሳይሆን በአመልካቾች አውራሽ አቶ ዓለማየሁ ቢተው ዕዳ ጭምር ነው። ይህንንም ጨረታ ከወጣበት የጋዜጣ ማስታወቂያ ላይ መረዳት ይቻላል፤ ነገሩ እንዲህ ከሆነ አመልካቾች በአባታቸው ዕዳ ምክንያት የተሸጠው ቤት እንዲመለስላቸው የሚጠይቁበት አግባብ የለም በማለት አቤቱታቸውን ባለመቀበል ወስኗል።

አመልካቾች በዚህ ውሳኔ ቅር በመሰኘት ለክልሉ ጠቅላይ ፍርድ ቤት መደበኛ ችሎት ቅሬታቸውን ያቀረቡ ቢሆንም ፍርድ ቤቱ በሃራጅ የተደረገውን ሽያጭ ተገቢ ነበር ካለ በኋላ አንደኛ እና ሁለተኛ ተጠሪዎች ግን የነርሱ ብቻ ያልሆነውን ቤት ማሸጣቸው አመልካቾችን የሚጎዳ በመሆኑ ቤቱ የተሸጠበትን ብር 15,700 (አሥራ አምስት ሺህ ሰባት መቶ ብር) ባልተነጣጠለ አላፊነት ለአመልካቾች ሊከፍሉ ይገባል በማለት የሥር ፍርዱን በማሻሻል ወስኗል።

ይህ የሰበር አቤቱታ የቀረበው ይህን ውሳኔ ለማስቀየር ሲሆን አመልካቾች

- አውራሻችን አቶ ዓለማየሁ የተፈረደባቸው ፍርድ ሳይኖር እንደተፈረደባቸው ሆኖ በጋዜጣ ማስታወቂያ ስለወጣ ብቻ ሽያጩ ተገቢ እንደሆነ መታሰቡ ተገቢ አልነበረም፤
- ሦሥተኛ ተጠሪም ቤቱ የአውራሻችን መሆኑን አብሮ ኗሪ በመሆኑ እያወቀ ከቅን ልቡና ውጪ መግዛቱ ዕውቅና ሊሰጠው አይገባም ነበር፤
- በፍርድ ባለዕዳ እና በፍርድ ባለመብት መካከል የተንኮል ግንኙነት እንደነበር የሚያስረዱ ምስክሮች አሉን እያልን ማስረጃዎቻችን ሳይሰሙ ፍርድ ቤቱ ወደውሳኔ ማምራቱ ሥህተት ነበር፤
- ጠቅላይ ፍርድ ቤቱ ባልተጠየቀ ዳኝነት ግንኙነታችንን መሠረት ያላደረገ ውሳኔ መስጠቱ ተገቢ አልነበረም በማለት የሥር ፍርዱ እንዲሻርላቸው ጠይቀዋል።

አንደኛ ተጠሪ ከዚህ ዓለም በሞት በመለየቱ እና ወራሽ የሚሆኑ ሰዎች ባለመቅረባቸው በርሱ ላይ የቀረበው ክስ ተቋርጧል። ሁለተኛ እና አራተኛ ተጠሪ ጥሪ ተደርጎላቸው ያልቀረቡ በመሆኑ ጉዳዩ በሌሉበት እንዲታይ ተወስኗል። ሦሥተኛ ተጠሪ ለቀረበው አቤቱታ በሰጠው መልስ የሥር ፍርዱ መሠረታዊ የሆነ የህግ ሥህተት የለበትም በማለት እንዲጸናለት ጠይቋል። ክርክሩም በዚሁ ተጠናቋል።

እኛም መዝገቡን መርምረናል። እንደመረመርነውም ለክሱ ምክንያት የሆነው ቤት በአቶ ዓለማየሁ ቢተው ስም የተመዘገበ መሆኑ አላከራከረም። የሚያከራክረው ቤቱ የተሸጠው ስለአንደኛ እና ሁለተኛ ተጠሪዎች ዕዳ ነው? ወይስ ስለሟች ዓለማየሁ ቢተው ዕዳ ጭምር? ቤቱ የተሸጠው የአቶ ዓለማየሁ ወራሾች በሆኑት አንደኛ እና ሁለተኛ ተጠሪዎች ዕዳ ብቻ ከሆነ በፍርድ ቤት ትዕዛዝ የተደረገው ጨረታ የሚፈርስበት የህግ ምክንያት አለ ወይስ የለም? የሚለው በመሆኑ እንደሚከተለው በየተራ እናያቸዋለን።

ከመጀመሪያው ነጥብ ስንነሳ ለክርክሩ ምክንያት የሆነው በአቶ ዓለማየሁ ቢተው ስም የተመዘገበው ቤት የተሸጠው በፍርድ አፈፃፀም ሂደት ነው። ለአፈፃፀም ክርክሩ መነሻ የሆነው በምዕራብ ጎጃም መስተዳድር ዞን ከፍተኛ ፍርድ ቤት በመ.ቁ. 13930 የተሰጠው ፍርድ ነው። ይህ ፍርድ በተሰጠበት መዝገብ ላይ ከሳሽ ተሾመ ጥሩነህ ተከሳሾች ደግሞ አንደኛ ተጠሪ ሃብታሙ ዓለማየሁ እና ሁለተኛ ተጠሪ ቀረብሽ አዳሙ ናቸው። አቶ ዓለማየሁ ቢተው

ተከራካሪ ሆነው አልተፈረደባቸውም። ስለሆነም ለክርክሩ ምክንያት የሆነው ቤት የተሸጠው በሚች አቶ ዓለማየሁ ቢተው ዕዳ ምክንያት ሳይሆን በአንደኛ እና በሁለተኛ ተጠሪዎች ዕዳ ምክንያት መሆኑን መረዳት ይቻላል። በዚህ ረገድ ዕዳውን ለማስከፈል የአቶ ዓለማየሁ መኖሪያ ቤት በጨረታ እንዲሸጥ በተወሰነ እና በጋዜጣ ጥሪ እንዲደረግ በታዘዘ ጊዜ አቶ ዓለማየሁ ባለዕዳ እንደሆኑ ተደርጎ የጨረታ ማስታወቂያ መውጣቱ ሥህተት ነበር። ይህ መሆኑ ብቻውን ግን ቤቱ ስለአቶ ዓለማየሁ ዕዳ የተሸጠ ነው ለማለት አያስችልም። ስለሆነም ቤቱ በአመልካቾች

ወላጅ አባት አቶ ዓለማየሁ ዕዳ ምክንያት የተሸጠ አይደለም ብለናል። ነገሩ እንዲህ ከሆነ ይህን ተከትሎ የሚመጣው ሌላው ጥያቄ አመልካቾች በውርስ ያገኙት ቤት ስለሁለተኛ ተጠሪ ዕዳ ሊሸጥ የሚችልበት የህግ ምክንያት አለ ወይስ የለም? የሚለው ነጥብ ነው። አመልካቾችና ሁለተኛ ተጠሪ የወላጅ አባታችን ሚስት ሳትሆን እና በቤቱ ላይ አንዳች መብት ሳይኖራት ስለርሷ ዕዳ ቤቱ መሸጡ ተገቢ አልነበረም ሲሉ ሁለተኛ ተጠሪ ለክሱ በሰጠችው መልስ ሚስት ነኝ፣ በቤቱም ላይ መብት አለኝ አትልም። የአንደኛ ተጠሪ እናት ከመሆኗ በቀር የሚች አቶ ዓለማየሁ ቢተው ሚስት አለመሆኗን ዕዳውንም ቢሆን በራሷ መንገድ ከምትከፍል በቀር ስለእርሷ ዕዳ ቤቱ መሸጡ ሥህተት እንደነበር ትገልፃለች። ነገሩ እንዲህ ከሆነ ደግሞ ከርሷ አንፃር ሲታይ ቤቱ ስለርሷ ዕዳ በሃራጅ እንዲሸጥ መደረጉ ስህተት ነበር ማለት ነው።

አንደኛ ተጠሪን በተመለከተ ግን አሁን ክርክር ለቀረበበት ቤት ወራሽ ነው። የቤቱ ወራሽ እርሱ ብቻ ሳይሆን አመልካቾችም ጭምር ናቸው። አልተከፋፈሉትም። ወራሾች ያልተከፋፈሉት ሃብት በመካከላቸው ሳይነጣጠል የሚቆይ በመሆኑ ስለጋራ ሃብት በህጉ ላይ የተደነገገው ተፈፃሚ ይሆንባቸዋል (የፍ.ብ.ህ.ቁ. 1060)። በአንደኛ ተጠሪ ዕዳ ምክንያት ቤቱ በድርሻው መጠን ለዕዳ ማስፈጸሚያ ሊውል ይችላል ማለት ነው። ስለአንደኛ ተጠሪ እዳ ቤቱ ሊሸጥ የሚችል ከሆነም ሽያጩ የሚፈርስበት ሁኔታ የለም። ሽያጩ ባይፈርስም ግን የቤቱ የተፈጥሮ ጠባይ በከፊል ሊሸጥ የሚችል ባለመሆኑ ስለአንደኛው ተጠሪ ዕዳ ቤቱ በሚሸጥበት ጊዜ የጋራ ባለሃብት የሆኑት አመልካቾች የቀዳሚነት መብት ይኖራቸዋል [የፍ.ብ.ህ.ቁ.1272፣ 1388 እና 1394(1)]። የቀዳሚነት መብታቸውን ለመጠቀም ንብረቱ ለሦስተኛ ተጠሪ መተላለፉን ካወቁበት ጊዜ ጀምሮ በመብታቸው ሊገለገሉበት የፈለጉ መሆናቸውን ለአዲሱ ባለሃብት ማስታወቅ ይገባቸዋል [የፍ.ብ.ህ.ቁ.1401 (1) እና 1402]። ቤቱ በሦስተኛ ተጠሪ ስም እንዲዛወር ፍርድ ቤቱ ትዕዛዝ ያስተላለፈው ሰኔ 27 ቀን 2000 ዓ.ም ነው። አመልካቾች አቤቱታ ያቀረቡት ደግሞ በአስራ ሁለተኛው ቀን ሐምሌ 09 ቀን 2000 ዓ.ም ነው። የቤቱ ስመ-ሃብትነት በገዢ ስም እንዲዛወር ለአመልካቾች የተነገረው መቼ እንደሆነ የቀረበ ማስረጃ የሌለ በመሆኑ ክስ ካቀረቡበት ቀን አንድ ቀን ቀድሞ ባለው ጊዜ እንደተነገራቸው ይታሰባል። ከዚህ ጊዜ ጀምሮ ባለው የሁለት ወር ውስጥ የስመ-ሃብትነቱ ዝውውር በገዢ ስም እንዲዛወር ለአመልካቾች የተነገረበት ቀን እንደሆነ መውሰድ ይቻላል። ከዚህ ጊዜ ጀምሮ ባለው ሁለት ወር ውስጥ አመልካቾች በፍርድ ቤት የተደረገው የሃራጅ ሽያጭ እንዲፈርስ በክስ መጠየቃቸው በቀዳሚነት መብታቸው በመገልገል ቤቱን ማስቀረት ስለመፈለጋቸው ለአዲሱ ገዢ (ለሦስተኛ ተጠሪ) የማስታወቅ ውጤት ያለው ነው [የፍ.ብ.ህ.ቁ.1400]። ስለሆነም ገዢው (ሦስተኛ ተጠሪ) የገዛውን ቤት ለአመልካቾች ለማስተላለፍ ይገደዳል

[የፍ.ብ.ህ.ቁ.1405]፡፡ በዚህ የተነሳ ሦሥተኛ ተጠሪ በሃራጅ የገዛውን እና አሁን ክርክር የቀረበበትን ቤት ለአመልካቾች የማስተላለፍ ኃላፊነት አለበት፡፡ ይህ ግዴታውን የሚወጣው ግን ቤቱን የገዛበት ዋጋ ብር 15, 700 (አሥራ አምስት ሺህ ሰባት መቶ ብር) እና የቤቱን ስመ-ሃብትነት ለማዛወር በደረሰኝ ቁጥር 91735 ያወጣው ብር 185 (አንድ መቶ ሰማኒያ አምስት ብር) የቤቱን ዋጋ ከከፈለበት ከሰኔ 27 ቀን 2000 ዓ.ም ጀምሮ ገንዘቡ ተጠቃሎ እስኪከፈለው ድረስ ከሚታሰበው 9% ወለድ ጋር ታስቦ ሲከፈለው ነው [የፍ.ብ.ህ.ቁ.1406 እና 1408]፡፡ ይህ ቢሆንም ግን በሚለቀው ንብረት ላይ ያወጣውን ገንዘብ በተመለከተ ያለአግባብ በመበልጸግ ህግ ሊጠይቅ የሚችልበት መብት የሚቀርበት አይሆንም [የፍ.ብ.ህ.ቁ.1409]፡፡

ቤቱ ስለአንደኛው ተጠሪ ዕዳ ሊሸጥ የሚችል በመሆኑ ከፍ ሲል እንደተገለጸው ሽያጩ የሚፈርስበት አግባብ የለም፡፡ የገገርው ሦሥተኛ ተጠሪ ግዴታ የገዛበት ዋጋ ተመልሶለት ቤቱን ቀዳሚ መብት ላላቸው አመልካቾች ማስረከብ ነው፡፡ ይህ ሲሆን ቀዳሚ መብት ያላቸው አመልካቾች ገገርው ቤቱን ለመግዛት ያወጣውን ብር 15,700 (አሥራ አምስት ሺህ ሰባት መቶ ብር) እና ለስም ማዛወሪያ የከፈለውን ብር 185 (አንድ መቶ ሰማኒያ አምስት ብር) ክፍያውን ከፈጸመበት ከሰኔ 27 ቀን 2000 ዓ.ም ጀምሮ ገንዘቡ ተከፍሎ አለቀ ድረስ ከሚታሰብ ህጋዊ ወለድ ጋር ባልተነጣጠለ ኃላፊነት የመክፈል ግዴታ አለባቸው፡፡

ከፍ ሲል በተጠቀሱት ምክንያቶች የክልሉ ጠቅላይ ፍርድ ቤት መደበኛ ችሎት በፍርድ ቤት የተደረገውን ሽያጭ ማጽናቱ ተገቢ ቢሆንም አመልካቾች በማይንቀሳቀሰው ሃብት ላይ ያላቸውን ልዩ ጥቅም፣ እና በህግ የተጠበቀላቸውን የቀዳሚነት መብት በሚጎዳ ሁኔታ የሸያጩን ገንዘብ ብር 15,700 (አሥራ አምስት ሺህ ሰባት መቶ ብር) እንዲያገኙ መወሰኑ ሥህተት ነበር፡፡ ስለሆነም የሚከተለውን ውሳኔ ሰጥተናል፡፡

ውሳኔ

ስለአንደኛ ተጠሪ ዕዳ ለክርክር ምክንያት የሆነውን ቤት ሊሸጥ የሚችል በመሆኑ በሃራጅ የተደረገው ሽያጭ የሚፈርስበት አግባብ የለም፡፡ ይሁንና የአመልካቾች ጥያቄ ቤቱን ከገገርው ላይ የማስቀረት ቁርጥ ሃሳብ ያላቸው መሆኑ የጋራ ባለሃብት የሆኑበትን ቤት በቀዳሚነት የማስመለስ ፍላጎት ያላቸው መሆኑን የሚያሳይ በመሆኑ ከገገርው ላይ የተሸጠውን ቤት የማስመለስ መብት አላቸው፡፡ ስለሆነም ሦሥተኛ ፈቃዱ ጋሻዬ ቤቱን የገዛበትን ዋጋ ብር 15,700 (አሥራ አምስት ሺህ ሰባት መቶ ብር) እና ለስም ማዛወሪያ የከፈለውን ብር 185 (አንድ መቶ ሰማኒያ አምስት ብር) ክፍያውን ከፈጸመበት ከሰኔ

27 ቀን 2000 ዓ.ም ጀምሮ ገንዘቡ ተከፍሎ አለቀ ድረስ ከሚታሰብ 9% ወለድ ጋር ሲከፈለው በጂጋ ከተማ 01 ቀበሌ የሚገኘውን ቀደም ሲል በአቶ ዓለማየሁ ቢተው ስም የተመዘገበውን እና አሁን ግን በእርሱ (በሦሥተኛ ተጠሪ ፈቃዱ ጋሻዬ) ስም የተመዘገበውን

በምስራቅ: መንገድ	በሰሜን: ባዶ ቦታ
በምዕራብ: ባዶ ቦታ	በደቡብ: አቶ አታላይ ጥሩነህ

የሚያዋስኑትን ቤት ለአመልካቾች እንዲያስረክብ እና ስመ-ሃብትነቱንም በአመልካቾች ስም ለማዛወር በሚያስችል ደረጃ የሚያስፈልገውን ማስረጃ ሁሉ ለአመልካቾች እንዲያስረክብ ወስነናል፡፡ ቤቱ የተገዛበት ዋጋ ብር 15,700 (አሥራ አምስት ሺህ ሰባት መቶ ብር) እና

ለስም ማዛወሪያ የተከፈለው ብር 185 (አንድ መቶ ሰማኒያ አምስት ብር) ክፍያው ከተፈጸመበት ከሰኔ 27 ቀን 2000 ዓ.ም ጀምሮ ገንዘቡ ተከፍሎ አለቀ ድረስ ከሚታሰብ 9% ወለድ ጋር ለገዢው እንዲከፈል የተወሰነው ገንዘብ የመክፈል ያልተነጣጠለ ኃላፊነት ያለባቸው የቀዳሚነት መብታቸውን የተገለገሉበት አመልካቾች ናቸው ብለናል፡፡

ሦሥተኛ ተጠሪ ፈቃዱ ጋሻዬ በሚለቀው ንብረት ላይ ያወጣው ገንዘብ ካለ በፍ.ብ.ሀ.ቁ.1409 እንደተደነገገው ያለአግባብ በመበልጸግ ህግ የመጠየቅ መብቱ የተጠበቀ ነው፡፡

ኪሣራና ወጪ ይቻቻሉ፡፡

ትዕዛዝ

የውሳኔውን ይዘት እንዲያውቁት ግልባጩ ለሥር ፍርድ ቤቶች ይተላለፍላቸው፡፡ ይፃፍ፡፡

ቀደም ሲል በትዕዛዝ የመጣውና ቁጥሩ 19595 የሆነው የምዕራብ ጎጃም መስተዳር ዞን ከፍተኛ ፍርድ ቤት መዝገቡን ለላከው ፍርድ ቤት ይመለስ፡፡

የተሰጠ ዕግድ ካለ ተነስቷል፡፡ ይፃፍ፡፡
መዝገቡ ተዘግቷል፡፡ ወደመዝገብ ቤት ይመለስ፡፡

የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የሰ.መ.ቁ. 80459
ሐምሌ 22 ቀን 2011 ዓ.ም.

ዳኞች፦ ፀጋዬ ወርቅአየሁ
ኃ/የሱስ ተ/ማርያም
አብዬ ካሣሁን
ታንተይገኝ የማነ
አራጌ ዘለቀ

አመልካች .....ደርብ ግዛቸው

ተጠሪ .....ዓቃቤ ህግ

<u>ፍርድ</u>

ከመዝገብ ምርመራው እንደተረዳነው ዓቃቤ ህግ ጥቅምት 06 ቀን 2011 ዓ.ም በተሻሻለና በተሻሻለ አቤቱታ በሥር ፍርድ ቤት አንደኛ ተከሳሽ የነበረችው ጎጃም አዘነ እና የአሁን አመልካች የወ.ህ.ቁ. 32 (1) (ሀ) እና 539 (1) (ሀ) ላይ የተመለከተውን በመተላለፍ ጎጃም አዘነ ባለቤቱ ሟች ህብስት ደነቀው ሌላ ሴት አፍቅርብኛል በሚል ቅናት ተነሳስታ፤ የአሁን አመልካች ደግሞ ሌላ ሴት ይዞብሽል በሚል አንደኛ ተከሳሽን በውሽምነት ለመያዝ በማሰብ ሐምሌ 18 ቀን 2009 ዓ.ም ከሌሊቱ በግምት 5፡00 ሲሆን ህብስት ደነቀው ከቤቱ በተኛበት ጎጃም አዘነ እና አመልካች በዱላ ጭንቅላቱን ደጋግመው ሲመቱት ህይወቱ ሊያልፍ ባለመቻሉ ጎጃም አዘነ በምሣር (መጥረቢያ) ጭንቅላቱን ስትመታው አመልካች በጩቤ ጎኑን እና ደረቱን ደጋግሞ በመውጋት ከገደሉት በኋላ አስከሬኑን ከውጭ አውጥተው በመጣል ከባድ የግፍ አገዳደል ፈጽመዋል የሚል ክስ አቅርቦባቸዋል፡፡

የሥር ፍርድ ቤት አንደኛ ተከሳሽ ጎጃም እና አመልካች እንዲቀርቡ ተድርጎ እና ክሱን እንዲረዱትም ከተነበበላቸው በኋላ የተከሰሰንበትን የወንጀል ድርጊት አልፈጸምንም፤ ጥፋተኞች አይደለንም በማለት ክደው ተከራክረዋል፡፡

ዓቃቤ ህግ አመልካቾች የተከሰሱበትን የወንጀል ድርጊት ስለመፈጸማቸው የሳዱ ቢሆንም እንደክሱ የሚያስረዱ ምስክሮች አሉኝ በማለት ስድስት ምስክሮችን አቅርቦ አስደምጧል፡፡ ፍርድ ቤቱም የቀረቡትን ምስክሮች ቃል ከሰማ በኋላ ዓቃቤ ህግ ከምስክሮቹ ውስጥ አንዲ የሟች እና በሥር ፍርድ ቤት የአንደኛ ተከሳሽ ጎጃም አዘነ ልጅ በፖሊስ ጣቢያ እና በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት የሰጠችውን ምስክርነት በመቀየር ለፍርድ ቤት ብትመሰክርም በቀዳሚ ምርመራው አድራጊ ፍርድ ቤት እና በፖሊስ ጣቢያ የሰጠችውን ቃል እንዳቀርብ ይፈቀድልኝ ብሎ ተፈቅዶለት አቅርቧል፡፡ ከዚህ በኋላም ፍርድ ቤቱ የቀረቡትን ማስረጃዎች በጥቅሉ መዝኖ አመልካች እና የሥር ፍርድ ቤት አንደኛ ተከሰሽ ክሱን እንዲከላከሉ ብይን ሰጥቷል፡፡

አመልካች በጊዜው ሚች ከሞተ በኋላ ተጠርቶ መሄዱን እንጂ በተከሰሰበት የወንጅል ድርጊት ላይ ተሳታፊ እንዳልነበር ያረጋግጡልኛል ያላቸውን ሁለት የመከላከያ ምሥክሮች አቅርቦ አስደምጧል።

ፍርድ ቤቱም የቀረበው ክርክር እና ማስረጃ ከመረመረ በኋላ አመልካች ያቀረባቸው የመከላከያ ምስክሮች ክሱን ማስተባበል አልቻሉም፤ ይልቁንም የዓቃቤ ህግ የሰውና የጽሁፍ ማስረጃዎች አመልካች የተከሰሰበትን የወንጀል ድርጊት መፈጸሙን የሚያረጋግጡ በመሆኑ አመልካች በተከሰሰበት ድንጋጌ መሠረት ጥፋተኛ ነው በማለት በአሥራ ሥድስት ዓመት ጽኑ ዕሥራት እንዲቀጣ ወስኗል።

አመልካች በዚህ ውሳኔ ቅር በመሰኘት ቅሬታውን ለክልሉ ጠቅላይ ፍርድ ቤት መደበኛ ችሎት ያቀረበ ቢሆንም ፍርድ ቤቱ አቤቱታውን ሳይቀበለው ቀርቷል።

ይህ የሰበር አቤቱታ የቀረበው ይህን ውሳኔ ለማስለወጥ ሲሆን አመልካች በቅሬታው ላይ ብቸኛዋ የዓይን ምስክር ተብላ የቀረበችው የሚች ልጅ እኛ ወንጀሉን ስለመፈጸማችን አለማየቷን አስረድታለች፤ በፖሊስ ጣቢያ እና በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት የሰጠችውን የምስክርነት ቃል በተመለከተ በከፍተኛ ተጽዕኖ ሥር ሆና የሰጠችው ቃል እንደሆነ አስረድታለች። ይህ እንዳለ ሆኖ ምስክሯ በአካል ቀርባ መስክራ እያለ በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት እና በፖሊስ የሰጠችውን ቃል መቀበል እና በማስረጃነት መያዝ ተገቢ አልነበረም፤ አባቷን እኔ ገድዬባት ቢሆን ኖሮ በእኔ ላይ ለመመስከር የማትፈልበት ምክንያት አልነበረም በማለት የሥር ፍርዱ እንዲታረምለት ጠይቋል።

ዓቃቤ ህግ በቀረበው ቅሬታ ላይ መልስ እንዲያቀርብ ታዝዞ ባቀረበው መልስ የአመልካች ቅሬታ ያስቀርባል የተባለበት ጭብጥ የፍሬ ነገር ጉዳይ በመሆኑ በዚህ ሰበር ችሎት ሊመረመር አይገባም፤ ምስክሯ በመጀመሪያ የሰጠችውን ምስክርነት የለወጠችው ውላ አድራ ነገሩን በማመዛዘን በወላጅ እናቷ ላይ ለመመስከር አለመፈለጓን ከሚያሳይ በቀር ዕውነተኛው ቃሏ በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት የሰጠችው መሆኑ ተረጋግጦ መወሰኑ ተገቢ ነበር፤ የአንደኛ ዓቃቤ ህግ ምስክር ወንድም በወላጅ እናትዋ ላይ እንዳትመሰክር በማስፈራራቱ ተከሶ ተከላከል መባሉ ሲታይ እና በኤግዚቢትነት የተገኘው ማስረጃ ተደማምረው ሲታዩ አመልካች የተከሰሰበትን የወንጅል ድርጊት ስለመፈጸሙ የሚያሳይ በመሆኑ የሥር ፍርዱ ሊጸና ይገባል በማለት ተከራክሯል። ክርክሩም በዚሁ ተጠናቋል።

እኛም መዝገቡን መርምረናል። እንደመረመርነውም ውሳኔ የሚሹት ጭብጦች በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት የተሰጠው የአንደኛ ዓቃቤ ህግ ምስክር ቃል ለፍርድ ቤቱ መቅረብ ይችላል ወይስ አይችልም? ሊቀርብ የሚችል ከሆነ የሚቀርበው በምን ሁኔታ ነው? ውጤቱስ ምን ይሆናል? ዓቃቤ ህግ ከዚህ ማስረጃ ውጪ አመልካች የተከሰሰበትን የወንጀል ድርጊት ስለመፈጸሙ የሚያረጋግጥ ማስረጃ አለው ወይስ የለውም የሚሉት ነጥቦች በመሆናቸው እንደሚከተለው በየተራ እንመለከታቸዋለን።

የመጀመሪያውን ጭብጥ በተመለከተ በሁለት መንገድ ማየት ያስፈልጋል። የመጀመሪያው በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት የተሰጠ የምስክርነት ቃል ለከፍተኛው ፍርድ ቤት እንደሚቀርብ በወ.መ.ሥ.ሥ.ህ.ቁ. 144 ላይ ተደንግጓል። ስለሆነም በዚህ ድንጋጌ መሠረት ምስክርነቱ በማስረጃነት ቀርቦ ሊመዘን የሚችል መሆኑ አያከራክርም። በማስረጃነት

የሚቀርብበትን ሁኔታ በተመለከተ ግን በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት ምስክርነቱን የሰጠው ምስክር የሞተ፣ የአዕምሮ ጉድለት ያገኘው፣ ማግኘት ያልተቻለ እንደሆነ፣ በህመም ምክንያት ሊቀርብ የማይችል ወይም በኢትዮጵያ ግዛት ውስጥ ባለመኖሩ ሊቀርብ የማይችል በሆነ ጊዜ ነው። የድንጋጌው ዓላማ ከፍ ሲል በተገለጹት ሁኔታዎች ምስክሮቹን ማግኘት ወይም ምስክርነታቸውን መቀበል በማይቻልበት ሁኔታ አጥፊ ናቸው ተብለው በክብድ ወንጀል የሚከሰሱ ሰዎች ሳይጠየቁ የሚቀሩበት ሁኔታ ተፈጥሮ የህዝብ ጥቅም እንዳይጎዳ ምስክርነታቸው ሳይባክን ጠብቆ ማቆየት[1] ነው።

እነኚህ ሁኔታዎች በሌሉበት ሁኔታ ምስክሩ ጉዳዩ በሚቀርብበት ሥልጣን ባለው ፍርድ ቤት ላይ ቀርቦ ምስክርነቱን መሥጠት አለበት። ምስክሩ ቀርቦ ከተደመጠ በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት የተሰጠው የምስክርነት ቃል አይቀርብም። የሚቀርብበት ምክንያትም የለም። ማስረጃን የምንጠብቀው ምስክርነቱ አስፈላጊ ነው የተባለው ሰው በማይኖርበት ጊዜ የሰጠውን ምስክርነት ፍርድ ቤቱ በማስረጃነት እንዲመዘነው ለማድረግ ነው። ምስክሩ በቀረበ ጊዜ ግን ራሱ ቀርቦ ምስክርነቱ እየተፈተነ መመስከር አለበት፤ እንጂ ራሱ ቀርቦ የሰጠውን ምስክርነት ዓቃቤ ህግ ባልተስማማው ጊዜ በዚህ ፋንታ

በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት የተሰጠው ምስክርነት በአካል ቀርቦ የተሰጠውን ምስክርነት እንዲተካለት ሊጠይቅ አይችልም። የህጉ ድንጋጌ በዚህ ዓላማ ላይ የተመሠረተ አይደለም። ስለሆነም ተፈላጊው ምስክር ቀርቦ ምስክርነቱን በሰጠበት ሁኔታ የሥር ፍርድ ቤት ይኸው ምስክር በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት የሰጠውን ምስክርነት ተቀብሎ በችሎት የሰጠውን ቃል እንዲተካው አድርጎ ማስረጃውን መዝኖ መወሰኑ ስህተት ነበር። በሌላ አባባል በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት ላይ አመልካች የተከሰሰበትን የወንጀል ድርጊት ስለመፈጸሙ ለማሳየት ዓላማ በማስረጃነት ሊቀርብ አይገባም ነበር ብለናል። በዚህ ረገድ ስህተት ተፈጽሟል።

በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት የተሰጠ ምስክርነት ሊቀርብ የሚችልበት ሁለተኛው መንገድ የምሥክሩን ተዓማኒነት ጥያቄ ውስጥ ለመጣል ዓላማ ነው። ይህ በህጉ ላይ በግልጽ አልተመለከተም። ይሁንና በወ.መ.ሥ.ሥ.ህ.ቁ. 145 (2) ላይ እንደተመለከተው በፖሊስ ምርመራ ጊዜ የተሰጠ ምስክርነት በአካል በፍርድ ቤት ቀርቦ የመሰከረውን ሰው ተዓማኒነት ጥያቄ ውስጥ ለመጣል[2] (for the purpose of impeachment) የምንገለግልበት ከሆነ በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት የተሰጠን ምስክርነት ለተመሳሳይ ዓላማ (for stronger reasons) የማንገለገልበት ምክንያት የለም። ልንገለገልበት እንችላለን። ይህ ምስክርነቱን በማስረጃነት ከመቀበል የተለየ ነው። በማስረጃነት ስንቀበለው ክስ የቀረበበትን ወንጀል የሚያረጋግጥ መሆን አለመሆኑን እንመረምራለን። የምስክሩን ተዓማኒነት ጥያቄ ውስጥ ለመጣል ዓላማ ስንጠቀምበት ግን ምስክርነቱ ከግምት ውስጥ ሳይገባ እንዳለ ውድቅ እንዲሆን እናደርጋለን። ዛሬ አንዱን ነገ ሌላውን የሚናገር ሰው ቃሉ ዕምነት የሚጣልበት

[1] በኢትዮጵያ የወንጀለኛ መቅጫ ሥነ-ሥርዓት ውስጥ የቀዳሚ ምርምራ ማድረግ ዋና ዓላማ ማስረጃን ጠብቆ ማየት ነው። የድንጋጌው ይዘት የሚያሳየው ይህንን ነው። በሌሎች አገሮች ግን ዋና ዓላማው የዓቃቤ ህግ ማስረጃ ለክስ የሚያበቃ ምክንያት ያለው መሆን አለመሆኑን ለመመርመር (for the purpose of screening) ነው። ለዚህ ዓላማ ምስክርነትን ተቀብሎ መመርመር ማስረጃን ዕማረ-መንገድ (incidentally) ጠብቆ የማየት ሚና ሊጫወት የሚችል ቢሆንም ዋናው ዓላማ ግን የዓቃቤ ህግ ያልተገባ ተግባር ለመቆጣጠር መሆኑን ማሰብ ያስፈልጋል።

[2] የድንጋጌው ሌላ ዓላማ በወ.መ.ሥ.ሥ.ህ.ቁ. 145 (1) ላይ እንደተገለጸው ምስክርነቱ በማስረጃነት ከሌሎች ማስረጃዎች ጋር ተገናዝቦ እንዲታይ ማድረግ ነው።

ባለመሆኑ ለምስክርነት የማይበቃ ነውና (unworthy to testify) የርሱን ቃል ከሌላው ምስክር ቃል ጋር እያመሳከርን አስረጂነቱን አንመዝንም ማለት ነው። ስለሆነም የዓቃቤ ህግን ጥያቄ ከዚህ አንፃር ማየት የሚገባ ይሆናል። ነገሩን በዚህ መንገድ ስናየው ምስክሯ በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት አመልካች የተከሰሰበትን የወንጀል ድርጊት እንዴት እንደፈጸመ ብታስረዳም በከፍተኛው ፍርድ ቤት ቀርባ ወንጀሉን አለመፈጸሙን ያስረዳች በመሆኑ ምስክርነቷ ዕምነት የሚጣልበት አይደለም። ስለሆነም ምስክሯ በከፍተኛ ፍርድ ቤትም ሆነ በቀዳሚ ምርመራ አድራጊው ፍርድ ቤት የሰጠችውን ምስክርነት በሙሉ የሚታመን ባለመሆኑ[3] ከፍ ሲል በተጠቀሱት ምክንያቶች ውድቅ አድርገነዋል።

ነገሩ እንዲህ ከሆነ ዓቃቤ ህግ በአመልካች ላይ ክሱን ለማስረዳት ያቀረበውን ሌላ ማስረጃ ማየት ያስፈልጋል። አንዱ የሟች ልጅ አንደኛ የዓቃቤ ህግ ምስክር በእናታቸው ላይ እንዳትመሰክር አስፈራርቷታል በሚል ተከሶ እንዲከላከል ብይን የተሰጠ መሆኑን ያሳያል የተባለው ማስረጃ ነው። ማስፈራራቱ ተረጋግጦ እንዲከላከል ብይን መሰጠቱ ዕውነት ነው። ነገር ግን አመልካች የቀረበበትን ክስ ተከላክሎ በነፃ እንዲሰናበት የተወሰነ በመሆኑ ማስረጃው አመልካች የተከሰሰበትን ወንጀል ስለመፈጸሙ የሚያረጋግጥ ነው ማለት አይቻልም። ተወስኖበት ቢሆን እንኳ ከፍ ሲል በተጠቀሱት ምክንያቶች አመልካች የተከሰሰበትን የወንጀል ድርጊት የፈጸመ ስለመሆኑ የሚያረጋግጥ አይሆንም።

ሌላው በአመልካች ላይ የቀረበው ማስረጃ በሥር ፍርድ ቤት አንደኛ ተከሳሽ የነበረችው ጎጃም አዘነ በወ.መ.ሥ.ሥ.ህ.ቁ 35 መሠረት የሰጠችው የዕምነት ቃል ነው። በዚህ የዕምነት ቃል ላይ አመልካች በክስ የቀረበበትን የወንጀል ድርጊት ስለመፈጸሙ ይገልጻል። ይህ የዕምነት ቃል ጎጃም አዘነ በራሷ ላይ ለቀረበባት ክስ አስረጂ ሊሆን ከሚችል በቀር በአመልካች ላይ አስረጂ ሆኖ ሊቀርብ የሚችል አይደለም። ሌላ ማስረጃ ደግሞ አልቀረበም። ስለሆነም አመልካች የቀረበበትን ክስ የፈጸመ ስለመሆኑ የሚያሳይ በቂ ማስረጃ ዓቃቤ ህግ አቅርቧል ማለት አይቻልም። ስለሆነም አመልካች በሥር ፍርድ ቤት በተከሰሰበት የወንጀል ድርጊት ጥፋተኛ ሊባል አይገባም ነበር። ክሱ በነፃ ሊሰናበት ይገባል። ስለሆነም የሚከተለውን ውሳኔ ሰጥተናል።

ውሳኔ

የምሥራቅ ጎጃም መስተዳድር ዞን ከፍተኛ ፍርድ ቤት በመ.ቁ. 0219053 ግንቦት 22 ቀን 2010 ዓ.ም በዋለው ችሎት የሰጠው የጥፋተኝነት ውሳኔ እና ግንቦት 23 ቀን 2010 ዓ.ም በዋለው ችሎት የሰጠው የቅጣት ውሳኔ መሠረተዊ የሆነ የህግ ስህተት የተፈጸመበት ስለሆነ ሽረነዋል።

ዓቃቤ ህግ በአመልካች ላይ ያቀረበው ማስረጃ አመልካች የተከሰሰበትን የወንጀል ድርጊት ስለመፈጸሙ በበቂ ማስረጃ ማረጋገጥ ያልቻለ በመሆኑ አመልካች ከቀረበበት ክስ በነፃ ሊሰናበት ይገባል ብለናል።

[3] አንዱን ወይም ሌላውን ምክንያት በማንሳት አንዱን መጣል እና ሌላውን መቀበል በወ.መ.ሥ.ሥ.ህ.ቁ. 144 ላይ ምስክርነቱ የሚቀርብበትን ውስን ሁኔታ መጣስ ይሆናል።

ትዕዛዝ

የክፍሉ ማረሚያ ቤት አመልካች ከቀረበበት ክስ በነጻ እንዲሰናበት የተወሰነ መሆኑን ተረድቶ የታሠረበት ሌላ ምክንያት ከሌለ በቀር በዛሬው ዕለት ከዕሥር እንዲለቀው የመፍቻ ትዕዛዝ ይፃፍ።

መዝገቡ ተዘግቷል። ወደ መዝገብ ቤት ይመለስ።
ያስቻሉት ዳኞች ፊርማ አለበት።